TITLE OF THESIS

ENVIRONMENTAL PROTECTION UNDER NATIONAL LEGISLATION AND AGREEMENTS BETWEEN OIL AND GAS MULTINATIONAL CORPORATIONS AND HOST COMMUNITIES

Fidelis Adedipe Esq

Canterbury Christ Church University Kent

Thesis submitted
for the degree of Doctor of Philosophy

ABSTRACT

The exploration, production and shipment of crude oil and gas by multinational corporations (MNCs), involved in bilateral treaties in Nigeria has perpetrated environmental disasters upon host communities. This has been as a result of oil and gas leaks from MNCs facility into the air, land, water, marine habitat, and cultural life of host communities are heavily polluted.

International law has attempted to regulate the activities of MNCs particularly in the protection of the environment in which they operate through four main treaties: Universal Declaration of Human Rights,[1] International Covenant on Economic, Social and Cultural Rights (ICESCR),[2] Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)[3] and Declaration of the United Nations on Environment and Development (Rio Declaration)[4]. In addition, the demand for environmental protection is foregrounded under the right to life recognized in article 6 of the International Covenant on Civil and Political Rights (ICCPR),[5] However, a major criticism of international law is its inapplicability to non-State actors such as corporations. This creates a lacuna in the legal framework of protections which has been exploited by opportunistic MNC's.

International soft law such as the Global Compact,[6] Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises[7] and United Nations Guiding Principles (UNGPs) on Business and Human Rights[8] encourages corporations to respect environmental rights and creates substantive standards for States to hold corporations accountable for environmental and human rights violations. The challenge remains that these international laws having soft law status are not binding on corporations. Also, a further problem

[1] Universal Declaration of Human Rights: Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948 Text: UN Document A/810, p. 71 (1948)

[2] International Covenant on Economic, Social and Cultural Rights. Adopted on 16th December 1966 by the United Nation General Assembly, GA. Resolution 2200A (XXI), came in force from 3 January 1976.

[3] Declaration of the United Nations Conference on Human Environment adopted 16th June 1972.

[4] Rio Declaration on Environment and Development which took place 3-14 June 1992, adopted 12th August 1992, A/CONF.151/26 (Vol. I)

[5] International Covenant on Civil and Political Rights. Adopted 16th December 1966 by the United Nation General Assembly, GA. Resolution 2200A (XXI), came in force 23rd March 1976.

[6] United Nations Global Compact. Adopted 26th July 2000

[7] Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct. Adopted 25th May 2011. Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed: 2/2/2021

[8] United Nations Guiding Principles on Business and Human Rights. Adopted 16th June 2011 by United Nations General Assembly

is that several developing state governments may be complicit in the environmental abuses perpetrated by MNCs for the purpose of boosting economic development.

Therefore, this research proposes the regulation of MNCs under national legislation and bilateral investment treaties. It recommends certain preventive and mitigation measures against the adverse environmental effect of their activities in the exploration of natural resources, waste disposal and other connected operations in developing communities in Nigeria. Some of these preventive measures include environmental impact assessment (EIA), mandatory reporting and disclosures, community stakeholder participation, environmental management and safety practices, with activity, temporal and spatial management as mitigation measures. Also, clean-up and compensation by MNCs are effective remedies for environmental abuses. Furthermore, fines, blacklisting, withdrawal of license and criminal charges are recommended for the enforcement of environmental protection of host communities.

CERTIFICATION OF THESIS

I certify that the work presented in this dissertation is entirely my own effort, except where otherwise acknowledged. This thesis represents my own original work and has not previously been submitted for a degree in any other university.

Fidelis Adedipe Esq

FA 31/12/2021

Name and Signature of Candidate Date

DEDICATION

I dedicate this thesis to myself for the willingness, doggedness, and persistent hunger for success, against all odds. Furthermore, I dedicate this PhD to my beloved daughter Alvina Adedipe, and my parents, for believing in me from my cradle days. Finally, this PhD is also dedicated to people all over the world who are in any way affected by the menace and exploitation by multinational corporation. Including the good people of Ogoni in Rivers state in Nigeria

ACKNOWLEDGEMENTS

First, I want to give God all the glory for decorating my life with the most prestigious academic qualification. The journey has not been easy however, it has been worth the while. Furthermore, I want to acknowledge my father chief Ifedayo Adams Adedipe (SAN) for believing in me, against all odds, to making this wild dream a reality. To my mother, Mrs Maria Anna Otto, mummy you have been my rock all these years, and your prayers have brought me this far of which I am thankful. To my brothers and sisters, family and friends who have in one way or the other supported this dream, I say a very big thank you. I also want to Acknowledge the former

first lady of the federal republic of Nigeria Dame Patience Jonathan, who has been supportive in my pursuit of knowledge. Also, I want to acknowledge my supervisor Dr Narissa Ramsundar for her support and persistence guidance, this thesis will not be complete without your guidance, and I say a very big thank you for helping me, achieve this goal.

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LIST OF ABBREVIATIONS

ANAN - Association of National Accountants of Nigeria

AR - Annual Reports

CERES - Coalition for Environmentally Responsible Economies

CEO - Chief Executive Officer

CSR - Corporate Social Responsibility

EDI - Environmental Disclosure Index

EPI - Environmental Performance Indicators

GRI - Global Reporting Initiative

FRCN - Financial Reporting Council of Nigeria

HCs - Host Communities

HREC - Human Ethics Research Committee

ICAN - Institute of Chartered Accountants of Nigeria

IHL – International Human Rights Law

ISEA - Institute of Social and Ethical Accountability

ILO - International Labour Organisation

ISO - International Organisation for Standardisation

MNCs - Multinational Corporations

NAOC - Nigerian Agip Oil Company Ltd

NNPC - Nigerian National Petroleum Corporation

NGOs - Non-governmental Organisations

PET - Political Economy Theory

SPDC - Shell Petroleum Development Company

SDI - Social Disclosure Index

SED - Social and Environmental Disclosures

SEDI - Social and Environmental Disclosure Index

SPI - Social Performance Indicators

R&D - Research & Development

UNEP - United Nations Environment Program

CHAPTER 1

1.1 Introduction

Environmental concerns across the globe can be traced to the United Nations Conference on the Human Environment in 1972. Although there were some earlier attempts to raise concerns[9], the 1972 conference marked a turning point in the recognition of these important concerns. Prior to 1972, there was heavy global environmental pollution as a result of industrial revolution, technological advancement and chemical productions.[10] The Industrial Revolution which began in 1760 introduced engines that could convert biomass energy of fossil fuels into mechanical power. The main energy resources are biomass, coal, and oil. However, this energy source came with some environment adverse effects as biomass burning and fossil fuels combustion generates pollution. For example, the production of automobiles using fossil fuels contributed to air

[9] *Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, October 12, 1940, United Nations Treaty Series, Vol. 161, p. 193 (No. 485); London Convention relative to the Preservation of Fauna and Flora in their Natural State, November 8, 1933, League of Nations Treaty Series, Vol. 172, p. 241; ; Tokyo International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, United Nations Treaty Series, Vol. 205, p. 65 (No. 2770); International Convention for the Prevention of Pollution of the Sea by Oil, May 12, 1954, United Nations Treaty Series, Vol. 327, p. 3, (No. 4714); Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution, January 7, 1969, International Legal Materials, Vol. 8 (1969), p. 497; Bonn Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil, June 9, 1969, United Nations Treaty Series, Vol. 704, p. 3 (No. 10099); Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, United Nations Treaty Series, Vol. 1063, p. 265 (No. 16197). African Convention on the Conservation of Nature and Natural Resources, September 15, 1968, United Nations Treaty Series, Vol. 1001, p. 3 (No. 14689); Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, February 2, 1971.*

[10] *Simeonov V. Environmental history of the Twentieth Century. Chair of Analytical Chemistry, Faculty of Chemistry, University of Sofia "St. Kl. Okhridski", 1164 Sofia, J. Bourchier Blvd. 1, Bulgaria*

pollution.[11] Fertilizers became water pollutants when they are not distilled carefully. The impact of chemical fertilizers did not stop with chemistry but deeply influenced the choice of crops post-1950.[12]

The 1972 Stockholm conference focused on stimulating and providing guidelines for actions by municipal governments and international organizations facing environmental challenges.[13] First, it established a link between environmental protection with sustainable development.[14] Secondly, noted that factors which harm the environment include developing economies, increasing population, and technological and industrial advancements.[15] Thirdly, it comprised of 26(twenty-six) principles to guide national governments, businesses and individuals on the protection of their environment.[16] It acknowledged the right of every human to a healthy environment and called for an end to the dumping of toxic waste in the environment.[17] These ideas were further developed a decade later in 1982 United Nations Convention on the Law of the Sea which gives sovereign rights to States in the exploitation of their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.[18] Further scope for environmental protection were later made in the Rio Declaration on Environment and Development 1992, United Nation Framework Convention on Climate Change 1992 and its accompanying Kyoto protocol.[19]

Environmental pollution is one of the numerous challenges facing the globe today, particularly in developing countries.[20] Environmental pollution is defined as man-made pollution to the

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[11] *ibid*
[12] *ibid*
[13] *Sohn L.B., (1973) Stockholm Declaration on the Human Environment. Harvard International Law Journal. pp.423-515.*
[14] *Sullivan E.T (1972) The Stockholm Conference: A Step toward Global Environmental Cooperation and Involvement. 6 Indiana Law Review. pp. 267-282*
[15] *Ibid, p.272*
[16] *Ibid, p.279*
[17] *Ibid, p.279*
[18] *Article 193 of the United Nations Convention on the Law of the Sea 1982. Adopted 10th December 1982; came into force 16th November 1994.*
[19] *United Nation Framework Convention on Climate Change. Adopted 3-14 June 1992; came into force on 21 March 1994. Kyoto Protocol. Adopted 11th December 1997; came into force on 16th February 2002.*
[20] *Omosu, O. (23rd September 2014) Environmental Pollution is Inevitable in Developing Countries. Available at: <https://breakingenergy.com/2014/09/23/environmental-pollution-is-inevitable-in-developing-countries/> accessed: 23/08/2019*

atmosphere, water, land, elements of the environment and the ecosystem.[21] The United Kingdom Royal Commission on Environmental Pollution and the UK Environmental Protection Act further describes pollution as the disposal of substances causing harm to man or human health.[22] It is alleged that multinational enterprises (MNEs) are the major perpetrators environmental hazards. Developing countries in Africa, lacking the technical skills and capital rely on the expertise of foreign investors to facilitate the development of their natural resources. Consequently, the activities of corporations culminate into air and water pollution, causing destruction to live, property and biodiversity of a range of flora and fauna, including indigenous species[23]

The need for multilateral laws, to regulate corporate entities arose as a result of the myriad of abuses and damages, caused by corporate negligent to environmental and human rights.[24] Some of these abuses include oil spillages,[25] gas flaring,[26] burning of fossil fuels in the rivers of local communities,[27] thereby causing pollution to community fishponds,[28] water resources[29] and farmlands.[30]

There are many international codes of conducts and standards, that have attempted to regulate the activities of multinational corporations, some of these multilateral provisions include the United Nations Global Compact, Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,[31] and United Nations Guiding Principles on Business and Human Rights: Protect, Respect and Remedy Framework. These core provisions

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[21] Appannagari, R.R. (2017) Environmental Pollution causes and consequences: A study. North Asian International Research Journal of Social Sciences and Humanities.

[22] United Kingdom (UK) Royal Commission on Environmental Pollution, 3rd report: Pollution in some British Estuaries and Coastal Waters (1972); However, the Commission was dissolved in 2011 due to UK spending cuts. Section 1(3) of the U.K. Environment Protection Act, 1990

[23] Zabbey, N. and Hart, A. I. (2011) Preliminary checklist of macrozoobenthos of Bodo Creek in the Niger Delta, Nigeria, Nigerian Journal of Fisheries, 8 (2), 271–283.

[24] Jelly M. & Moreno-Ocampo L. (2016) The Corporation as a subject of international law. In eds. Jelly M., Prosecuting Corporation for Genocide (OUP, 2016)

[25] Adeuti, B.R. (2020) Analysis of Environmental Pollution in Developing Countries. American Scientific Research Journal for Engineering, Technology, and Sciences. 65(1) pp. 39-48

[26] ibid

[27] ibid

[28] Ejiba I., Onya S., and Adams O. (2016) Impact of Oil Pollution on Livelihood: Evidence from the Niger Delta Region of Nigeria. Journal of Scientific Research and Reports.

[29] ibid

[30] ibid

[31] Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (2011 Update). Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed: 2/2/2021

are critically analyzed in the latter part of this work Others regulations include; ILO Tripartite Declaration of the Principles Concerning Multinational Corporation and Social Policy, United Nations Commission Draft Code of Conduct for Multinational Corporations,[32] UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights for Business, civil regulation, CSR principles, self- regulation by MNC's and the Voluntary Principle on Security and Human Right (VPSHR). Most of these guidelines share similar provisions in encouraging businesses to respect human rights and to support precautionary approach to environmental undertaking by presenting identifiable risk assessment. However, the lack of a thorough scientific certainty should not be a reason for failing to prevent an environmental disaster. A precautionary approach would also require that MNCs exercise due diligence in their exploration and production activities.

The nascent debate revolving against multilateral legal approach towards regulating corporate activities is that its provisions are not binding and unenforceable.[33] Considering the grave abuses that corporations have done to humans and the environment in a bid to accomplish its business interest, a regulation that can compel corporate compliance is required. Presently, all the laws applicable to multinationals, are mere soft l*aw* having no binding force as they are only referred to as guidelines, standards or codes of conduct, which has resulted in corporations, creating human and environmental hazards, rather than compliant towards stakeholder's protection Therefore, a binding regulation through the creation of treaty is essential.

To emphasize the need for provisions of corporate social responsibility in bilateral investment treaties (BITs), African countries have played an active role over the decade in pursuit of international investment regime. The new generation investment treaties tend to differ from the conventional bilateral investment treaty. The Morocco-Nigeria BIT 2016 is an example of how important CSR is to the development of developing countries.[34] The treaty includes innovative

[32] United Nations Commission Draft Code of Conduct for Multinational Corporations. Adopted by the Economic and Social Council on 10th June 1987. Available at: <https://digitallibrary.un.org/record/156251?ln=en> accessed: 12/2/2021

[33] Wettstein, F. (2015) Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment. Journal of Human Rights. pp. 162-182

[34] Nyombi C., (2018) The Morocco-Nigeria Bit: Towards a New Generation of Intra-African Bits. International Company and Commercial Law Review, Vol 29(2), pp.69-80.

investor's obligation to host state, as well as protection against environmental and human right abuses.[35] The treaty adopts an approach of human rights protection in the sustainability of foreign direct investment. In the reverse, the preamble to the treaty acknowledges the importance of investment in the protection of human rights. Article 15(5) creates an obligation for States to establish laws and regulations protecting human rights considering the economic and social circumstances of each party. Article 15(6) require State parties to implement laws consistent with international human rights treaties. Also, article 17(1) require parties to adopts measures in prevention of corrupt practices. The treaty imposes an obligation on foreign investors to comply with human rights laws in the host state[36] and this includes respecting international human rights law in which either the host or home state is a party. The call on foreign investors to respect human rights in their investment dealings and the use of hard language such as "shall" under the Morocco-BIT investment treaty is an effective approach which other BITs should imitate in the prevention and accountability of human and environmental rights abuses by MNCs.

Furthermore, the need for technological advancement has given rise to the continuous exploration of the earth and its resources since the first industrial revolution. The first industrial revolution which was between 1760-1840[37] witnessed the introduction of processes and tools in the production and refining of crude oil such as cable tool drilling which was developed in China.[38] OML29, an oil and gas field in Nigeria is the described as the largest producing onshore oil field in the Joint Venture (JV) between Shell Petroleum Development Corporation (SPDC) and Nigerian National Petroleum Company (NNPC).[39] In 2014, the JV produced an average of 43,000 barrels per day.[40] In March 2017, it was reported that production levels at OML 29 increased to 90,000 barrels per day.[41] Sadly, the requirements for these resources, has resulted in

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[35] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco–Nigeria BIT) (adopted on 3 December 2016). Available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409> accessed: 15/2/2021

[36] Ibid, Article 24.

[37] Hart, P. (1968) The New industrial Revolution. Washington and Lee Law Review, 25 (2) 187-192

[38] Temple, Robert; Joseph Needham (1986). The Genius of China: 3000 years of science, discovery and invention. New York: Simon and Schuster. pp. 52–54

[39] Wood Mackenzie, (5th May 2020) Asset report: OML 29. Available at: <https://www.woodmac.com/reports/upstream-oil-and-gas-oml-29-12385691

[40] Ibid

[41] World Oil, (10th March, 2017) Nigeria's Aiteo Group achieves 90,000-bopd output rate in one year. Available at: <https://www.worldoil.com/news/2017/3/10/nigeria-s-aiteo-group-achieves-90-000-bopd-output-rate-in-one-year> accessed: 12/2/2021

the tremendous abuse of human rights and the environment by the actors and explorers, ranging from multinational corporations, to the government of the day. Therefore, this work is going to research on the possibility of incorporating corporate social responsibility (CSR) in bilateral investment treaties to enable us control, to some extend the activities of multinationals to discourage, and deter them from the gross abuse of human right and the environment.

1.2 Research Background

The growth of multinational corporations (MNCs) over the decades has been of important global concern whereby, actors, stakeholders and crusaders of corporate social responsibility have been looking for ways to regulate MNCs negative impacts on environmental and human rights, especially as these MNCs stretch across national boundaries and beyond national control mechanisms.[42]

However, this seemed to have failed as industrialized and individual corporate codes as well as multilateral initiatives such as the global compact[43] deals with obligations that involves human rights, labour and environmental law which are necessary to regulate the activities of multinational corporations. However, these multinationals, to the dismay of activists have rapidly increased their codes of conduct as well as networks to help them boost their public image and reputation while any effective means of genuine international regulations is always swept off the agenda. States and international organizations failed to direct adequate attention to transnational corporation and other business enterprises which constitute the most powerful nonstate actors across the globe, affecting both human and environment rights.[44] This led to the emergence of the United Nations Norms of Transnational Corporations and other Business Enterprises (Norms)[45]

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[42] Jelly M. & Moreno-Ocampo L. (2016) The Corporation as a subject of international law. In eds. Jelly M., Prosecuting Corporation for Genocide (OUP, 2016)

[43] United Nations Global Compact 2000. Available at: <http://www.unglobalcompact.org> accessed: 15/2/2021.

[44] Weissbrodt D., (2003) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Scholarly Repository, The American Journal of International Law. pp. 901-922

[45] United Nations, United Nations Norms of Transnational Corporations and other Business Enterprises (Norms) Doc E CN 4/Sub 2/2003/12/Rev 2 (2003) Available at: <http://www1.umn.edu/humanrts/links/ norms-Aug2003.html> (Norms) accessed: 2/3/2021

One of the problems of multinational corporations is best captured with the word "greenwashing." Here a corporation would increase its sales or boost its brand image through environmental rhetoric, and at the same time, pollute the environment or decline to spend money on worker's welfare.[46] For example, Royal Dutch Shell environmental policy states that the company operates in a way respects nature and protects the ecosystem.[47] Meanwhile, this multinational corporation have been involved in series of oil spills causing damage to the environment in Nigeria.[48] Since 1958, the multinational corporation have caused severe environmental damage in Ogoniland with the support of the Nigerian government.[49] The Ogoni human rights activist, Ken Saro Wiwa who persistently confronted the RDS and Nigerian government against such environmental disasters was executed following a summary trial before a special military tribunal[50]

The Nigerian government alleged that the Ken Saro Wiwa participated in the killing of four political rivals. In 1996, the family of the human rights activist instituted a claim before the Southern District in New York claiming that the company and its subsidiary have for several decades polluted the community with their oil exploration activities and colluded with the Nigerian government to bring about the arrest and execution of the human rights activist and 8 others. The company entered settlement with the families of all deceased in paying a compensation sum of $15.5 billion dollars. However, CSR's detractors from all corners and those clamoring that business should be meant for profit making purposes and that is ineffective, would not amount to any reasonable long term social change[51]. Critics of CSR, however, agree

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[46] Tom Wright, (30th January 2008) False "Green" Ads Draw Global Scrutiny, Wall Street Journal, at B4;Lisa M. Fairfax, (2007) Easier Said Than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric, 59 FLA. Law Reviw. 771, 795-96

[47] Respecting Nature. Available at: <https://www.shell.com/sustainability/environment/respecting-nature.html#iframe=L3dlYmFwcHMvUG93ZXJpbmdQcm9ncmVzc19FbnZpcm9ubWVudEZyYW1ld29yay8> accessed: 3/2/2021

[48] Hennchen, E. (2015) Royal Dutch Shell in Nigeria: Where Do Responsibilities End? Journal of Business Ethics. 125, pp. 1-25

[49] Center for Constitutional Rights (CCR), Wiwa et al v. Royal Dutch Petroleum et alAvailable at: <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed: 12/4/2021

[50] Ibid

[51] Kellye Y. Testy, (2002) Linking Progressive Corporate Law with Progressive Social Movements, 76 Tulane Law Review. 1227, 1229-30

that greenwashing is a big problem for consumers, investors and stakeholders and there are currently no available measures put in place to monitor the claims.[52]

The British Petroleum (BP) oil spill off the Gulf of Mexico further shows the level of failure perpetrated by the government agencies in collaboration with multinational corporation overseeing deep water drilling,[53] corporate governance as well as corporate social responsibility, are factors that led to the fatal disasters. This goes to show how poorly managed as well as how they tend to present their corporate image and the goals they represent.

The tragic incident was just a clear indication that BP had consistently neglected workers and environmental safety standards. Through their records, it was uncovered that BP had over the years incurred accidents, which could have easily been avoided had the company been more serious with worker's safety rather than the poorly maintained safety facilities[54]. However, the company had advertised itself to the public, portraying itself as a socially responsible corporation, that is environmentally friendly[55]. Their strategy worked well as the company was seen by the general public as morally upright which saw them retain the top ten most profitable multinational corporation in the world position. Ironically, part of the criteria used for the ranking, is the treatment of employees and corporate social responsibility which BP greatly faulted.[56]

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[52] *Douglas M. Branson, (2001) Corporate Governance "Reform" and the New Corporate Social Responsibility, 62 University of Pittsburgh. Law Review. 605; Richard Marens, (2008) The Hollowing Out of Corporate Social Responsibility: Abandoning a Tradition in an Age of Declining Hegemony, 39 McGeorge Law Review. 851 ; Joe W. (Chip) Pitts III, (2009) Corporate Social Responsibility: Current Status and Future Evolution, 6 Rutgers Journal of Law and Public Policy 334 ; Judd F. Sneirson, (2007) Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decision-making, 3 Corporate. Governance Law Review. 438, 444-450 ; C.A. Harwell Wells, (2002) The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century, 51 Kansas Law Review. 77*

[53] *Karla Urdaneta, (2010) Transboundary Petroleum Reservoirs: A Recommended Approach for the United States and Mexico in the Deepwaters of the Gulf of Mexico, 32 Houston Journal of International Law. 333, 346; Rachael E. Salcido, (2008) Offshore Federalism and Ocean Industrialization, 82 Tulane Law Review. 1355.*

[54] *See infra Part II.B*

[55] *Helene Cooper & John M. Broder, (26th May 2010) BP's Ties to Agency Are Long and Complex, New York Times, at A14; Joe Stephens, (24th May 2010) Oil Spill Threatens To Stain Alliances; Environmental Nonprofits Face Potential Backlash as Supporters Learn of Ties to BP, Washington Post, at A1.*

[56] *According to the Wall Street Journal : BP . . . is now watching the halo created by a decade of smart advertising vanish as a mammoth oil slick makes its way across the Gulf of Mexico. BP's 'Beyond Petroleum' campaign had positioned the company on the green side of energy development. But its sunken drilling platform—and the resulting environmental catastrophe—has sent it firmly back into dirty carbon company territory.*

Peter D. Hart & Dan McGinn, (27th May 2010) Advice for BP's Reputation Crisis, Wall Street Journal., at A19. BP has indeed fallen from grace as a result of the oil spill, garnering a "devastating 4-to-1 negative-to-positive ratio on

There has been an outcry from the general public and stakeholders, for the need by multinationals to be more socially responsible.[57] This has been due to the incessant environmental and human rights abuses caused by corporate negligent activities. These includes oil spills, gas flaring, burning of fossil fuels as well as lack of conducive working environment,[58] thereby, causing pollution to the locals in host countries and gross abuse of their rights which sometimes, may results in permanent deformity or death.[59] For example, the oil and gas operations of Royal Dutch Shell has caused environmental damage in Nigerian communities. Over the span of 15 years, between 1976-1991, the corporation contributed to nearly 3,000 oil spills in Ogoniland – a small community in the Niger Delta region of Nigeria.[60] In 2008 and 2009, the multinational corporation spilled over 280,000 barrels of oil in Ogoniland.[61] Consequently, this resulted in the devastation of the mangrove forests, destruction of planktonic organisms (small plants species) and about 91 per cent of fauna species including fishes were polluted.[62] The air, water and sea creatures including fish and crabs were polluted with crude oil. In addition, there is evidence to support the notion that in some cases multinationals exploit the corrupt practices in mostly third world host countries to perpetrate these heinous act as evidenced in the case of oil spill in Ogoni land in Nigeria by Royal Dutch Shell. Since the beginning of the 21st century, several government officials including oil corporations have been indicted in both local and international courts for corruption relating to oil revenues.[63] In 2017, two oil and gas

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feelings about the company." Id.; Ron Lieber, Driving Past the BP Station, and Tilting at Windmills, New York. Times, June 12, 2010, at B1 (noting consumer boycotts of BP gas stations).

[57] Osemeke L., Adegbite A., and Adegbite E., (2016) Corporate Social Responsibility Initiative in Nigeria. In eds. Samuel Idowu, Key Initiative in Corporate Social Responsibility. (Springer International Publishing, Switzerland; 2016)

[58] Rebecca Ratcliffe, (6th December 2019) This place used to be green': the brutal impact of oil in the Niger Delta. Available at: <https://www.theguardian.com/global-development/2019/dec/06/this-place-used-to-be-green-the-brutal-impact-of-oil-in-the-niger-delta> accessed: 12/2/2021

[59] Ibid

[60] Friends of the Earth International, (17th May 2019) A journey through the oil spills of Ogoniland, Available at: <https://www.foei.org/news/oil-spills-ogoniland-nigeria-shell> accessed: 5/2/2021

[61] John Vidal, (3rd August 2011) Shell oil spills in the Niger delta: Nowhere and no one has escaped. The Guardian. Available at: <https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> accessed: 4/2/2021

[62] Zabbey, N. and Malaquias, M. A. E. (2013) Epifauna diversity and ecology on intertidal flats in the tropical Niger Delta with remarks on the gastropod species Haminoea orbignyana, Journal of the Marine Biological Association of the United Kingdom, 93 (1), 249–257.

[63] Ibekwe, C., "Corruption in Oil Revenue Distribution and Conflict in Bayelsa State, Nigeria" (2014). Doctor of International Conflict Management Dissertations. 1.
Available at: <https://digitalcommons.kennesaw.edu/incmdoc_etd/1> accessed: 12/2/2021

giants, Eni and Shell were charged to court for alleged claims on bribing Nigerian government officials for the purchase of an oil block in 2011.[64] Although they were acquitted of the charges, the case however, exemplifies the degree of environmental pollution and degradation that is perpetrated by multinational oil companies. As such, community dwellers in oil and gas regions, still believe that MNCs and host governments can nevertheless commit environmentally hazardous practices and remain unaccountable. This further creates a level of scepticism towards the empty promises of MNCs to prevent oil and gas spills when an environmental damage occurs. It is for this reason that victims of environmental hazards from oil spills are reluctant to institute claims in third world courts because the oil corporation may bribe the host government and its judiciary. This was demonstrated in the massacre of Ogoniland residents (a rural community in the Niger Delta region of Nigeria) by the combined effort of both the Nigerian government and Royal Dutch Shell as depicted in the facts present by the plaintiffs in the case of *Kiobel v Royal Dutch Shell*.[65]

At the time of writing Nigeria was recorded the largest oil producing country in Africa, producing at least 2,500 barrels of oil per day.[66] Also, the country has discovered over thirty solid minerals in its region.[67] In 1905, Nigeria began to engage in commercial mining pioneered by the Royal Niger Company.[68] Due to lack of environmental regulation, there was wide degradation of land in the country, erosion of the soil and loss of productive agricultural land.[69] Mining activities resulted in environmental pollution of agricultural products, thereby causing poverty in rural communities who are heavily reliant on agriculture.[70] Even after the creation of

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[64] BBC News (17th March 2021) Eni and Shell: Italian court acquits oil giants in Nigeria corruption case. Available at: <https://www.bbc.com/news/world-europe-56434890#:~:text=An%20Italian%20court%20has%20cleared,bribe%20Nigerian%20politicians%20and%20officials> accessed: 25/3/2021

[65] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)

[66] Abosede Babatunde, Oil Exploitation and Local Economy in the Oil-Bearing Areas of Niger Delta, Nigeria. APSA Africa 2012 Workshop Paper. Available at: <https://ssrn.com/abstract=2205439> accessed: 2/3/2021

[67] Supra (n8) Aldinger, P.E.

[68] Okechukwu C., Arowosaiye J., (2020) Reforms in the Mining Sector of Nigeria. Available at: <https://extractiveshub.org/servefile/getFile/id/7590> accessed: 10/3/2021

[69] Adegboye M., (2012) Effect of Mining on Farming in Jos South Local Government Area of Plateau State, 3(4) Journal of Soil Science and environmental management 77

[70] Aldinger, P.E., (2014) Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda and Ghana. 26 Geology International Environmental Law Review. 345

the Mining Act in 1946,[71] the pollution persists because of lack of enforcement mechanisms by the government. At all stages of petroleum exploration and production, there is the likelihood of environmental impact.[72]

The relationship between foreign trade agreements and need for environmental protection clauses began in the 1990s as a result of debates over the creation of the North American Free Trade Agreement (NAFTA).[73] Environmentalist opposed NAFTA due to likely risk of harm to natural resources in Mexico.[74] Another factor was the World Trade Organization ruling concerning United States ban on the importation of Mexican tuna because the fishing mode adopted by Mexico caused harm to the dolphins.[75] Thus, the introduction of free trade seemed to have precipitated neglect for the environment. Pre- 1985 investment treaties did not have clauses on the protection of the environment. Therefore, it has become common trade practice for international or foreign investment agreements to contain provisions relating to environmental protection. Contemporary trade practices incorporate environmental safeguards in Bilateral Investment Treaties (BIT) and Free Trade Agreements (FTA).

[71] *Omotehinse A, & Ako B., (2019) The environmental implications of the exploration and exploitation of solid minerals in Nigeria with a special focus on Tin in Jos and Coal in Enugu. Journal of Sustainable Mining. 18(1) 18-24.*

[72] *Sandra Kloff and Clive Wicks, Environmental Management of Offshore Oil Development and Maritime Oil Transport: A Background Document for Stakeholders of the West African Marine Eco Region (IUCN Commission on Environmental and Social Policy, October 2004) 25-28*

[73] *Condon M., (2015) The Integration of Environmental law into the international Investment Treaties and Trade Agreements: Negotiation Process and the legalization of Commitments. Virginia Environmental Law Journal. 33(1) 102-152.*

[74] *Judith Adler Hellman, Mexican Perceptions of Free Trade Support and Opposition to NAFTA in the Political Economy o North American Free Trade (Ricardo Grinspun & Maxwell A. Camerons eds, 1993)*

[75] *Panel Report, United States - Restrictions on the Imports of Tuna, DS21/R-39S/155 (Sept. 3 1991)*

1.3 Research aim, objectives and rationale

Aim

Consequent upon the above conceptual underpinning, this research aims to:

- Advance a proposal for the regulation of multinational corporations under national legislations and bilateral investment treaties for the protection of the environment and communities.

Objectives

Ancillary to the aim of this research are broader objectives that it aims to investigate. These includes:

1. To determine the effectiveness of existing legal frameworks on environmental protection against oil and gas pollution in Nigeria (Chapter two)
2. To conduct an overview of the laws establishing obligations for corporate responsibility for environmental protection during foreign investment (Chapter three)
3. To examine limitations to existing legal framework on environmental regulations of oil and gas MNCs in Nigeria (Chapter four)
4. To investigate best practices towards the prevention and mitigation of environmental abuses by MNCs (Chapter five)
5. To advance potential remedial measures that can be incorporated in national legislations and bilateral investment treaties, towards improving the efficacy of legal frameworks in holding MNCs accountable for oil and gas pollution in Nigeria (Chapter six).

Rationale

The rationale for this research is varied. First, this work aims to provide a practical way through which environmental obligations can be identified and articulated in an enforceable manner, ie through the BITS themselves. Secondly, this work aims to show in detail how developing states have allowed environmental and human rights abuses by multinationals corporations as seen for

instance in the cases of Ogoni oil spills. The spill which occurred in 2008 leaked about 120,000 barrels of oil per day for 3 months.[76] It contaminated the water, farmlands, air of 69,000 residents living in the community.[77] This is because there are no multilateral laws or guidelines to adequately checkmate their activities. Sadly, this is because, they are not legally obligated to international humanitarian responsibility and in most cases, they tend to get away with it furthermore, due to the level of corruption in most developing third world countries, the government that is supposed to protect its citizens, often neglect them in most cases because, of their quest for foreign direct investment which in most cases can be detrimental to its citizens. This work undertakes an examination of state complicity with MNCs on environmental degradation and thus aims to find solutions that can address enforcing both MNC and MNC/state obligations towards environmental protection.

There has been a global meteoric attention given to corporate social responsibility (CSR)[78] A notable mechanism that have attempted to mitigate the menace of multinational corporations allowing individuals, communities, or their representatives to bring complain against multinationals through the National Contact Point established under the Guidelines promulgated by the organization for economic cooperation and development, (OECD).[79] The Global Compact and UN Guiding Principles are equally reliable instruments.[80]. The Global Compact established ten principles for sustainable business development which largely focus on the responsibility of corporations to respect environmental and human rights.[81]

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[76] John Vidal, Supra (n45); Kelechukwu Iruoma and Ruth Olorounbi (29th April 2020) Silent killer: The deadly price of oil. Africa Report. Available at: <https://www.theafricareport.com/26235/nigerias-silent-killer-welcome-to-ogoniland/> accessed: 12/4/2021

[77] Ibid

[78] Barnea, A. & Rubin A. Corporate social responsibility as a conflict between shareholders. (Working Paper No. 2006-2). Simon Frasier University, The CIBC Centre for Corporate Governance and Risk Management. Available at: <http://business.sfu.ca/files/PDF/cibc-centre/ccgrm-barnearubin.pdf> accessed: 3/3/2021

[79] Supra (n6); Supra (n7)

[80] Julia Moshkin, (1st May 2021) Why the UN Global Compact is CSR commitment that works. Available at: <https://www.reutersevents.com/sustainability/why-un-global-compact-csr-commitment-works> accessed: 10/5/2021; Backer, L. C. (2011). From institutional misalignment to socially sustainable governance: The guiding principles for the implementation of the United Nation's 'Protect, Respect and Remedy' and the construction of inter-systemic global governance. Pacific McGeorge Global Business & Development Law Journal.

[81] United Nations Global Compact. Adopted 26th July 2000

The Global Compact adopts a toolbox known as the Global Report Initiative (GRI) which communicates to corporations the impact of their activities on the environment and society. Also, the responsibility to protect human rights and avoid corruption enable corporations to be aware of their sustainable risk, improve their financial performance, promote a respectable brand name and moral standards. Overall, corporations who have implemented these principles in its policy are experiencing better sustainable development.[82] The Guiding Principles equally encourages corporations to respect human and environmental rights. A significant feature of the GPs is that creating a binding obligation for member States but serves as a guiding policy for businesses. However, it expects States to implement these provisions in the creation of binding obligations for businesses relating to respect for environmental and human rights. Notwithstanding, maximum compliance with both the Global Compact and UNGPs regulations is yet to be achieved.[83]

Another fundamental question is why do most of these environmental and human rights abuses occur in developing countries? It has been observed that businesses often affect human rights and the environments in adverse ways if their activities are not regulated and guided. Sometimes, multinational corporations deliberately disregard human rights and environmental norms, which sometimes, often results in lack of potable drinking water for the occupants of the host communities because of environmental pollution, as well as serious injuries and death to stakeholders and employees. Corporations have been implicated in crimes committed by the governments towards its citizens as seen in the deprivation of the Ogoni people of their land and unlawful execution of Ken Saro-Wiwa by the former Nigerian military government. Corporations such as Royal Dutch Shell take advantage of the corrupt practices of the government of the day through oil and gas operations causing environmental hazards in host communities.[84]

This work shows the inconsistency of multinational corporations portrayed to the public, and the truth behind the public domain. It is fascinating to note that the public image of the company and

[82] *Julia Moshkin, Supra (n60)*
[83] *Tom Wright, Supra (n31)*
[84] *Wiwa v. Royal Dutch petroleum co, 96 Civ. 8386 (KMV)(HBP) March 18, 2009; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)*

profit making for shareholders was more important than its environmental and safety record. This goes to further strengthen the argument of Adam Smith in "Wealth of Nations" when he argued that self-interest comes first, and businesses are primarily involved for profit making. The researcher shall explore ways in which corporate law doctrine will serve corporations to be more socially responsible. To achieve this objective, this research supports the public agitations requesting for high standards of corporate social responsibility[85].

The aims and objectives of this research will be to find a sustainable mechanism in the prevention or mitigation of environmental and human rights abuses by multinationals including the demand of a greater and more effective accountability from those involved. Therefore, the research calls for a harmonization of binding treaties and national legislation that links business and human rights obligations with guiding soft law rules to inform the activities of MNCs. This work argues that to a great extent the weaknesses of the current environmental legal framework can be addressed to a large extent through mandatory negotiation and enforcement of key protection clauses in BITs.

1.4 Chapter outline

After this introductory chapter, the researcher shall also discuss the methodology adopted in this research ranging from positivist critic to a policy-oriented jurisprudence. It examines the existence of legal positivism and its application to corporate accountability. Furthermore, the researcher used some case analysis, to further show the defects in the current legal framework. This work continues to Chapter 2, whereby literatures of the non-applicability of international law to MNCs is discussed. This means that MNCs holds no rights and duties under international law because States are unwilling to give it to them. However, it recognizes the legal personality of MNCs under traditional international law which recognizes corporate rights but not corporate obligations.[86] It examines the implication of a direct regulation of corporations under international law. While international soft law advises corporations to respect environmental and

[85] *ee Janet E. Kerr, The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens, 81 TEMP. L. REV. 831 (2008); Michael R. Siebecker, (2006) Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment, 48 William & Mary Law Review. 613; Cynthia A. Williams, (1999)The Securities and Exchange Commission and Corporate Social Transparency, 112 Harvard Law Review. 1199, 1293- 1306*

[86] *Menno T. Kamminga, Multinational Corporations in International Law (Oxford University Press, 2010)*

human rights, they remain non-binding. Thus, this chapter discusses the opinion of authors on the adoption of national law and BITs as an effective instrument in the regulation of MNCs particularly towards the protection of the environment. Although, they are remedies for environmental damage, measures towards the prevention of such abuses should be enforced. This chapter considers the different aspects of my research question. Therefore, I examined authors who have probed the weakness of the current legal framework, authors who have offered solutions, authors who have suggested use of the BIT framework. I also develop several approaches and clauses towards the reliability of BITs in preventing or mitigating environmental disasters by MNCs in host states.

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Chapter 3 carries the work forward, by presenting the current legal framework. Before an analysis into the problematic aspects of the work can be undertaken, it is necessary to review what the legal framework is. This chapter discusses several international environment laws which may be relied upon by host state and victims of environmental abuses. They include the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) and Declaration of the United Nations on Environment and Development (Rio Declaration). The host states are expected to implement these laws in the domestic legislations. It however examines the setback of the non-binding nature of international law on corporations. On the other hand, this work analyses the various attempts to regulate corporations under international soft laws such as the Global Compact, OECD Guidelines, and UN Guiding Principles.

Chapter 4 then drills into the weaknesses of this legal framework by looking at the problems with this framework through selected case studies. This chapter analyses two case studies relating to the activities of oil and gas MNCs and their impact on host communities in Nigeria. The focus here is on Royal Dutch Shell (RDS) oil spills in Ogoni Land in 2008 and 2009 respectively. The Chapter begins with a historic perspective of oil and gas exploration by MNC, including the controversial death penalty of former human rights activist, Ken Saro Wiwa. It further examines the responsibility of the Nigerian government to protect the lives and properties

of citizens as enshrined in the Nigerian constitution[87], which includes host community dwellers. The 2008 and 2009 Ogoni oil spill reveals the causes of the spills and the delay by RDS in organizing an immediate clean-up. It points out how MNCs and host government have extremely sluggish towards cleaning up the environment which they have polluted. The case study shows the perceived compromise and unreliability of the Nigerian judicial system, which results in environmental pollution claims, often instituted before English courts.

The second case study examined is *Kiobel v RDS.*[88] The case study reveals how MNCs collaborates with host government in the perpetration of environmental hazards and other human rights abuses. This case study discusses the decision of the United States Supreme Court on whether a corporation can be held accountable for breach of customary international law in a foreign court as per the Alien Tort Claims Act.[89] These case studies set the stage for chapter 6 by exploring the legal lacuna for environmental protection before moving to look at solutions.

Chapter 5 critically discusses solutions through presenting several measures in the prevention or mitigation of environmental abuses. This includes environmental impact assessment (EIA), public disclosure, community stakeholder participation, and precautionary measures under the MARPOL Convention.[90] There are number of international laws on EIA such as the World Charter of Nature,[91] United Nations Convention on the Law of the Sea,[92] Rio Declaration[93] etc. The MARPOL Convention deals with the prevention of pollution from shipping vessels which is a common form of oil spills by oil and gas corporations. This work examines the jurisdiction of flag states and the host states in the enforcement of the MARPOL Convention.

This chapter also draws attention to the contribution made by the International Court of Justice on EIA. The research emphasizes on the importance of States implementing these preventive

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[87] *Constitution of the Federal Republic of Nigeria, 1999' as amended.*
[88] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)*
[89] *Alien Tort Statute (28 U.S.C. § 1350)*
[90] *International Convention for the Prevention of Pollution from Ships, 1973 modified by the Protocol of 1978(2) (MARPOL 73/78) adopted 17th February 1973, came into force on the 2nd of October 1983.*
[91] *World Charter for Nature. United Nations General Assembly adopted October 28, 1982*
[92] *United Nations Convention on the Law of the Sea. Adopted 10th December 1982 and came into force 16th November 1994.*
[93] *Supra (n4)*

measures under national law. Although Nigerian has taken steps to enact the Environmental Impact Assessment (EIA) Act,[94] certain amendments to the Act are necessary for the prevention and mitigation of environmental hazards. It specifically explores and critically analyses three mitigation and environmental management strategies namely: activity management, temporal management and spatial management.

Chapter 6 of this work then draws the thesis to its conclusion. This chapter presents the recommendation that host states incorporate environment protection clauses in their national legislations, and investment agreements with oil and gas MNCs. It also discusses enforcement measures such as the imposition of fines, withdrawal of license and indictment of perpetrators of environmental abuses. Furthermore, it examines the application of remedial measures such as clean-up and compensation in the event of oil spills.

METHODOLOGY

Introduction

The researcher discusses, the methods and methodology adopted to address the weaknesses of existing legal framework in failing to hold MNCs accountable for human and environmental rights violations, solutions on these regulatory gaps and how MNCs can be held accountable under BITs. There is a difference between research methods and research methodology. Research methods are the processes or techniques adopted by the researcher in addressing a subject matter.[95] This includes research strategy, data collection and data analysis. On the other hand, research methodology focuses on how "how" and "why" the author apply a particular research method.[96] Given the doctrinal nature of this research, it examines international laws, domestic statutes and case laws on human rights accountability for MNCs. Thus, the research strategies adopted in this writing are positivist critique, policy developments and case analysis.

[94] *Environmental Impact Assessment Act (Cap E12 LFN 2004).*
[95] *McGregor S.L and Murname, J.A. (2010) Paradigm, methodology and method: Intellectual integrity in consumer scholarship. International Journal of Consumer Studies, 34(4), p.421*
[96] *Ibid*

This Chapter adopts a mixed method approach. In other words, it combines elements of a descriptive, analytical and qualitative research. It describes the causes and situation of environmental abuses in Nigerian communities. It analyses the impacts of these abuses on the sustainability of the affected Nigerian regions. All of these put together form the qualitative research in this writing. Also, this writing discusses the form of data collection used in the writing. There are two main ways of collecting data: primary data collection and secondary data collection. Primary data is collected from interviews, questionnaires, field observations or experiments. On the other hand, secondary data is sourced from statutes, journals, textbooks, and government and corporate reports. This research adopts secondary form of data collection. Finally, it discusses the use of different data analysis such as grounded theory, content analysis and comparative analysis.

Positivist research approach

This writing takes on a positivist mode of analysis. It critically analyzes the *lex lata* – law as it is or law in force developed by Hans Kelsen.[97] Therefore, it analyzes international regulations on the obligation of States to protect human and environmental rights. I examine the limitations of existing legal framework and discuss the development of an effective *lege leferenda* – future law or law as it ought to be.[98] Thus, i discuss municipal and international regulations which creates a moral responsibility to hold MNCs accountable for human rights abuses such as the UN Global Compact,[99] Guiding Principles (GPs)[100] and OECD Guidelines[101]

Legal positivism claims that laws are established in written form by a legislative body as opposed to religious injunctions, social pressure or natural legal theory.[102] It views citizens as subjects of the law and the police as law enforcement agents.[103] In relation to international

[97] *Himma, Kenneth Einar. "Legal Positivism." In Internet Encyclopedia of Philosophy. Edited by James Fieser and Bradley Dowden. 2005.*
[98] *Himma, Kenneth Einar, Supra (n1)*
[99] *United Nations Global Compact. Adopted 26th July 2000*
[100] *United Nations Guiding Principles on Business and Human Rights. Adopted 16th June 2011 by United Nations General Assembly*
[101] *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct. Adopted 25th May 2011. Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed: 2/2/2021*
[102] *Hart H.L.A, The Concept of Law 6-8 (1961); Unger, R.M. (1976) Law in Modern Society.*
[103] *ibid*

human and environmental rights and responsibilities, such laws include UNDHR,[104] ICESCR,[105] Rio declaration,[106] Stockholm Declaration[107] etc. These laws do not directly address MNCs and are not binding on corporations. Therefore, a major limitation is that there is less corporate compliance under *lex lata*[108] which leads to my discussion on the development of new laws (*lege ferenda*) as stated above.

This writing undertakes a positivist examination of the current problem which mainly is not corporate-centric and does not tilt towards natural legal theory hinged on morality. Existing legal framework in respect of the regulation of MNCs focuses on natural legal theories or policies on moral responsibility.[109] Such policies have been developed under international regulations such as the UN Global Compact,[110] Guiding Principles (GPs)[111] and OECD Guidelines[112]. Therefore, I adopt the lege leferenda research approach to recommend a solution in holding MNCs accountable for human and environmental abuses.

Policy-oriented jurisprudence

This research takes on a policy-oriented approach which develops solutions to address current problems. A theory of policy intervention in social problems is needed to enhance our understanding of the processes of change when instigated by social engineers. Such an undertaking should start with a description of the social setting, the relationship in which policy is to be initiated, and the larger society within which these operate as well as ongoing social processes.

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[104] *Universal Declaration of Human Rights: Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948 Text: UN Document A/810, p. 71 (1948)*

[105] *International Covenant on Economic, Social and Cultural Rights. Adopted on 16th December 1966 by the United Nation General Assembly, GA. Resolution 2200A (XXI), came in force from 3 January 1976.*

[106] *Declaration of the United Nations Conference on Human Environment adopted 16th June 1972.*

[107] *Rio Declaration on Environment and Development which took place 3-14 June 1992, adopted 12th August 1992, A/CONF.151/26 (Vol. I)*

[108] *Hart, H.L.A (1958) Positivism and the Separation of Law and Morals, 71 Harvard Law Review. 593.*

[109] *Crowe, Jonathan, 2019, Natural Law and the Nature of Law, Cambridge & New York, Cambridge University Press.*

[110] *United Nations Global Compact. Adopted 26th July 2000*

[111] *United Nations Guiding Principles on Business and Human Rights. Adopted 16th June 2011 by United Nations General Assembly*

[112] *Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct. Adopted 25th May 2011. Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed: 2/2/2021*

The policymaker is required to map the sociological territory designed for policy intervention. In this study, the sociological territory in need of policy intervention are oil and gas communities or regions. The essence of sociological mapping is to respond to the interest of all persons affected by the proposed policy even though it is impossible to satisfy the interest of all concerned.[113] The creation of policies involves a communication process between policy makers and stakeholders which is likely to result in multiple dissimilar interest among the stakeholders. Thus, it is common for a group of stakeholders to antagonize or protest the development of a policy that does not favor their interest. In reflecting the contribution or participation of stakeholders, the policies are drawn from how these stakeholders determine their commitments or the factors affecting their choice. It is important to assess the issues which involves the stakeholders, their activities and social process. It is important that a policy is evaluated to ensure that its objectives are achieved and does not pose any unforeseeable adverse consequences. The stakeholders referred in this study are MNCs, residents in host communities, governmental agencies and NGOs.

This study discusses extant policies which have been established by intergovernmental organizations, researchers and corporate organization in ensuring a sustainable and responsible corporate behavior. Some of these policies are embedded in international laws such as UN Global Compact, UN Guiding Principles and the OECD Guidelines. For every social problem there exists a government policy that will solve it and with proper government policies, human behavior can be changed, and the human condition improved. For many years, corporations have determined their own foreign policy.[114] The increase in global economy demands corporations to develop policies that addresses social concerns. These policies of corporations are derived from financial objectives, operational necessity, business reputation and CSR. It is only since the beginning of the 21st century that intergovernmental organizations such as the United Nations, OECD and ILO began to establish standards on corporate social responsibility. For example, in 2005, Prof. John Ruggie received the UN mandate to develop Guiding Principles on Business and Human Rights: Protect, Respect and Remedy Framework. The Guiding Principles reflects policies for sustainable and socially responsible business conduct. Some of the policies in Ruggie's framework addressed issues such as environmental protection, corporate responsibility

[113] Rittel & Webber, (1973) Dilemmas in a general theory of planning. *Policy Sciences.* pp. 155-169
[114] Matthew Wallin, (2018) Corporate Foreign Policy and Social Responsibility. *American Security Project*

to respect human rights, remediation of adverse human rights impact, due diligence and stakeholders' consultation. The research problem giving rise to policy developments were sourced from media reports, company annual reports, textbooks and articles. However, there are factors which affects the validity and reliability of data collection contained in a policy.[115] A typical example is subjective accounts of the problem presented by authors or where a story does not cover the central issue.

One of the weaknesses of policy development is that compliance is usually of a voluntary nature. This implies that some subjects may be unwilling to comply with a given policy. Accordingly, policies are designed in furtherance of binding law or to gain legislative approval.[116] Notwithstanding, voluntary programs can play a useful role in a comprehensive environmental strategy but only if they are carefully designed to fit with and complement the other elements of a nation's environmental policy system. It can create capacity, transparency, and flexibility; facilitate the development of long-term agendas; provide opportunities and incentives for firms to assume leadership in environmental protection; and provide avenues for greater community and NGO participation. This study examines three strategies which can be adopted for effective implementation of CSR policies. First is the reliance on 'incentives external to the programs' which is where a policy provides incentives or imperatives to action. Secondly is the establishment of different approaches for leaders and laggards. This is where a policy is most effective in a dynamic system of regulation, in which the level of regulation is established by best practices at leading firms, and laggards are then brought forward by regulatory requirements. Thirdly is the 'fundamental legislative reform' in which new policies are synergized with existing policies to produce a greater compliance effect.

[115] *Weiss C.H., (1978) The Interface between Evaluation and Public Policy. Sage Journals.*
[116] *Wiseman W., (1979) Toward a Theory of Policy Intervention in Social Problems. Social Problems. pp.3-18*

Case Analysis

Case analysis method was also deployed in the conduction of this research. I deployed this method because of its usefulness to the aim and objectives of this thesis. According to Kohlbacher,[117] case analysis is an aspect of qualitative research methodology that is used to analyze specific cases and issues to derive evidence to support the findings and conclusions of a research. In the context of a socio-legal research, case analysis comprises the study of case laws and pronouncement of the courts on specific issues, so that its findings can be deployed to ascertain precedents of a legal subject.[118]

In contrast to documentary analysis, case analysis method is not used to review documents and legislations but deployed to examine judgement of the courts. However, the two methods align in their objective; the achievement of evidence to corroborate or rebut hypothesis of a qualitative study.[119] But, both methods are remarkably different from case study methodology because, they are not used in research to generalise its findings.[120] Instead, case analysis is used to determine patterns of judicial decisions towards using its findings to 'make a case' or proffer recommendations considering identified paradigm of judicial pronouncements. In effect, whilst case study is the actual study of events that have occurred, using statistical data to measure patterns and ratio of occurrences, case analysis focuses on the exploration of judgements of courts. Thus, the sphere of divergence of both methods, it can be argued, is contextualised within the prism that while the former examines actual events; the latter is used to explore the legal connotations of such real-life occurrences.[121] Hence, Yin explained that case study is 'an

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[117] Kohlbacher, F. (2006). The use of qualitative content analysis in case study research. In Forum Qualitative Sozialforschung/Forum: Qualitative Social Research (Vol. 7, No. 1, pp. 1-30). Institut für Qualitative Forschung., Lund, C. (2014). Of what is this a case?: Analytical movements in qualitative social science research. Human organization, 73(3), 224-234.

[118] Webley, L. (2010). Qualitative approaches to empirical legal research. The Oxford handbook of empirical legal research, 927, 927.

[119] Webley, L. (2016) Stumbling Blocks in Empirical Legal Research: Case Study Research. Law and Method, 10.

[120] See Flyvbjerg, B. (2006.) Five Misunderstandings about Case-Study Research, Qualitative Inquiry 12(2), 219-245, Argyrou, A. (2017) Making the Case for Case Studies in Empirical Legal Research. Utrecht Law Review, Vol.13(3), pp.95-113 – On the import of case study methodology in qualitative research

[121] See Simons, H. (2014) Case Study Research: In-Depth Understanding in Context. In P. Leavy (Ed.), The Oxford Handbook of Qualitative Research, Oxford University Press.

empirical study that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between the phenomenon and context are not clearly evident'.[122]

As such, I used case analysis in this research because of its relevance to the study, and analysis of decided cases on environmental protection and activities of MNCs by Nigerian courts. Within this endevour, I examined the four cases of [*Bodo Community v. Shell Petroleum Development Corporation of Nigeria Limited,*[123] *His Royal Highness Okpabi v. Royal Dutch Shell,*[124] *Harrison Jalla and Others v. Shell International Trading and Shipping Company & Shell Nigeria Exploration and Production Company Limited,*[125] and *Kiobel v Royal Dutch Shell*.[126] The outcomes of these cases evidences the severe human and environmental rights abuses perpetrated by MNCs in the form of oil and gas spills in Nigerian communities. In addition, and more importantly perhaps, these cases show the state of Nigerian jurisprudence and regulatory framework on multinational business undertaking, and its effectiveness in holding MNCs accountable for the negative impact of their activities on the environment and human rights.

Quantitative method sometimes does not accurately measure the impact of these issues, partly because of inconsistent statistical data from different sources or the inability to quantify certain impacts.[127] Therefore, I applied case analysis research method because of its qualitative approach and ingredients that it accords to research. For example, it is impracticable for an environmental analyst to measure the number of fishes in the sea affected by an oil or gas pollution. Thus, under a case analysis research method and within the context that it was applied in this thesis, I was able to draw a correlation between the judicial pronouncements of Nigerian courts and the activities of oil and gas corporations. The objective of this endevour was to determine the devolvement and effectiveness of legal regulatory frameworks against environmental and human rights abuses, to enable the deployment of the judicial outcomes to advance relevant recommendations for the better regulation of the negative impact of multinational corporate

[122] *Yin, R. K. (1994). Case Study Research Design and Methods (2nd edn.) Thousand Oaks, London, New Delhi: Sage Publications, Yin, R. K. (2009). Case study research: Design and methods (4th Ed.). Thousand Oaks, CA: Sage.*
[123] *Bodo Community v. Shell Petroleum Development Corporation of Nigeria Limited, 20 June 2014, [2014], EWHC 1973*
[124] *His Royal Highness Okpabi v. Royal Dutch Shell EWCA Civ 191*
[125] *Harrison Jalla and Others v. Shell International Trading and Shipping Company & Shell Nigeria Exploration and Production Company Limited [2021] EWCA Civ 63*
[126] *Kiobel v Royal Dutch Petroleum Co. [2013] 133 S. Ct. 1659*
[127] *Queirós, A., Faria, D., & Almeida, F. (2017). Strengths and limitations of qualitative and quantitative research methods. European journal of education studies.*

activities on the environment and human rights through International Investment Agreements. This adventure is necessary in this thesis because it is a condition precedent and excellent practice for an investigation into the efficiency or ineffectiveness of the current legal regulatory frameworks against environmental and human rights abuses by MNCs.

Despite drawing vital conclusions and evidence from the analysis of the cases however, its findings were not deployed in a generalised form. This is important for two reasons. First and foremost, case analysis is different from case study research, because, whilst the former is only deployed to draw theoretical opinion in support of a hypothesis, the latter may sometimes be used to draw generalised evidence.[128] Second, there is the danger of generalisation when applying case analysis research because, it is not every oil and gas corporations that is guilty of environmental and human rights abuses. In using case analysis in this thesis therefore, it is the theory and not the specific population that is generalized. For example, this research does not focus on Corporate Social Responsibility (CSR) towards developing regions but on those MNCs that perpetrate human rights and environmental abuses globally.

Although other methodologies such as law and society, economic analysis of law and case study were not adopted for this research, but it is imperative to clearly differentiate case study research from case analysis due their close similarity. Usually, a case study selects a geographical area, event or a small number of individuals as the subject matter for analysis. The study moves to generalize any outcome it derives from its selection. In contrast however, case analysis aims to examine court judgements, with the information and evidence deployed as a yardstick to comment on the position of the law on a specific subject.[129]

Within this context, the information from the analysed cases were used to draw some conclusions on the state of the legal framework about the regulation of the activities of MNCs on environmental and human rights in Nigeria. Since the nuance of the analysis is about legal regulation through case laws, the findings of the case analysis can be taken as an objective conclusion of the state of the law. This is clearly different from case study research method where general conclusions would have been drawn from the findings of the study. The

[128] *Gerring, J. (2004) What Is a Case Study and What Is It Good for? American Political Science Review 98(2), 341-354*

[129] *Lund, C. (2014). Of what is this a case? Analytical movements in qualitative social science research. Human organization, 73(3), 224-234.*

deployment of the case analysis method in this thesis, therefore, helps in 'making a case' for the incorporation of obligations on MNCs in IIAs.

Data collection

This research adopts both qualitative and quantitative data otherwise referred to as a mixed method data research. A mixed method research is the use of both qualitative and quantitative data to develop our understanding of accountability and its practices within a specified region.[130] It is necessary where a theory or phenomenon is unclear.[131] Qualitative research is defined as, 'the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made'.[132] This writing undertakes a qualitative approach to establish four objectives: describe the hazardous activities of oil and gas corporations in Nigeria, to explain the impact of oil and gas operations on human lives and their environment, discuss the weaknesses of existing legal framework in the creation of corporate human rights responsibilities, critically examine the development of solutions and alternatives towards the creation of corporate human rights obligations. Finally, my contribution to this research takes on a qualitative approach as it discusses a human rights approach in the bilateral investment treaty between host States and foreign investors which are usually MNCs. The writing does not adopt quantitative data analysis as the research question does not focus on the number of environmental hazards by MNCs in Nigeria or the statistics on the impact of their violations, e.g., number of lives or land affected. These results are not needed to create a legal framework that holds MNCs accountable for human rights violations. Besides, numbers in quantitative research analysis may not be exact and can be misleading.[133]

The data used in this research were largely collected from legal sources such as statutes and case laws. However, data was also collected from secondary sources such as textbooks, journals,

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[130] Berry, A. J., & Otley, D. T. (2004) Case-based research in accounting. In: Christopher, H., & Bill, L. (eds.) The real life guide to accounting research: a behind the scenes view of using qualitative research methods. Amsterdam: Elsevier/CIMA Publishing.

[131] Creswell, J. W. & Plano Clark, V. L. (2011) Designing and conducting mixed methods research, 2nd ed. Thousand Oaks: Sage Publications, Inc.

[132] Ian Parker, 'Qualitative Research' in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds), Qualitative Methods in Psychology: A Research Guide (OU 1994) 2

[133] Lutabingwa J. & Auriacombe C.J., (2007) Data Analysis in Quantitative Research, Journal of Public Administration. p.534

annual reports and websites. These sources were adopted to address weakness of existing international legal framework in holding MNCs accountable for human and environmental rights abuses. The secondary sources were relevant in providing the case studies on how MNCs pollute the environment of developing countries such as Nigeria. These sources also emphasize on the weaknesses of existing international legal framework and the possible solutions to enforcing corporate social responsibility.

I begin with discussing general international human rights statutes such as UNDHR, ICESCR, and Rio Declaration and Stockholm Declaration. While these laws create human rights obligations for States, that are not directly applicable MNCs. However, international laws such as the UN Global Compact, Guiding Principles and the OECD Guidelines directly address corporate practices and encourages them to be CSR compliant.

Data analysis

Grounded theory

The qualitative data in this research encompasses different forms of analysis which are descriptive, evaluative, explanatory, predictive, and grounded theory. This research develops several grounded theories which addresses the questions in this research. The development of theories enabled me to identify areas of the law which requires development. For examples, the theory of corporate social responsibility promotes corporate respect for human and environmental rights. Also, the theory of human rights approach to BITs emphasizes on the enforceability of corporate accountability. Grounded theory comprises of three elements namely, theoretical sampling, theoretical coding, and theoretical writing.[134] In a theoretical sampling, the research must show that the sample can be interpreted in a theoretical form.[135] Theoretical coding is the process of building theories from data.[136] In order words, the data is broken into concepts. At the theory writing stage, the theory is developed from the data.

Content analysis

[134] *Flick, U. (1998) An introduction to qualitative research (London, Sage Publications).*
[135] *Mason, J. (2002) Qualitative Researching (London, Sage).*
[136] *Strauss, A. L. & Corbin, J. (1990) Basics of qualitative research. (London, Sage).*

Content analysis is the most common method of analyzing CSR voluntary disclosures as contained in corporation's reports and web pages.[137] Corporate websites are used to communicate economic, environmental, and social programs to stakeholders, attract investors, and promote the firm's reputation. It is used to defend negative information or ethical misconduct alleged by the public.[138] Although some corporate websites contain less harmful information, other corporations incur liability by virtue of having a website which discloses excessive irrelevant information.[139] While some of the information on corporate websites represent its implemented policies and practices, other information are merely aspirational.[140] Annual reports, advertisement, mission statement and press release are some of the materials published on the corporate websites.[141] Annual reports published on a corporation websites reflects its actual performance.[142] Examination of corporate website reveals the evolution of CSR programs and its sustainability.[143]

Qualitative and interpretive content analysis is considered most effective for social accountability. Thus, there is the need to *move away from the 'safety' of quantitative based content analysis toward the more unfamiliar territory of interpretive and qualitative methodologies (e.g., narrative, rhetorical, visual and discursive methods)*[144]. Content analysis explores how organizational communication or reporting is constructed and its probable consequences, the content of the various form of corporate communication or reports and the reason for their production and disclosure.[145]

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[137] *Tregidga, H. Milne, M. & Lehman, G. (2012) 'Analyzing the quality, meaning and accountability of organizational reporting and communication: Directions for future research'. Accounting Forum, 36(3): 223-230.*
[138] *Campbell, D., and Beck, A.C. (2004). Answering Allegations: The use of the corporate Website for Restorative Ethical and Social Disclosure. Business Ethics, 13(2), 100-116.*
[139] *Prentice, R. A., V. J. Richardson and S. Scholz. (1999). Corporate Web-site Disclosure and Rule 10-5. American Business Law Journal, 3(4), 531-578.*
[140] *Perrini, F. (2005). Building a European Portrait of Corporate Social Responsibility Reporting. European Management Journal, 23(6), 611-627.*
[141] *Williams, C.C. (2008). Toward a Taxonomy of Corporate Reporting Strategies. Journal of Business Communication, 45(7), 232-264.*
[142] *Jose A., & Lee S., (2007) Environmental Reporting of Global Corporations: A Content Analysis based on Website Disclosures*
[143] *Shetty J., Murthy H., & Yadapadithaya P., (2013) Corporate Social Responsibility: Content analysis of corporate web pages. Journal of Business Ethics.*
[144] *Ibid*
[145] *Ibid*

Content analysis is used to describe objectively, systematically and quantitatively the disclosed content of communication.[146] It is an analytical method for the scientific and generalizable analysis of communication content.[147\] It is used to determine whether or not an information is included and can be used for analyzing all forms of CSR information disclosures.[148] However, it is difficult to measure the extent of information disclosed.[149] The content analysis used in this study comprises of four main stages as follows: identifying the sampling unit, identifying the CSR themes, measurement of the themes, assessing data validity and reliability.

Identifying the sampling units means selecting the documents to be analyzed in order to avoid the use of two documents providing inconsistent data. Also, document selection is necessary to ensure that all relevant information from CSR communication channels is collated.[150] These communication channels include advertising and promotional, leaflets, press releases, company websites, interim reports, and discussions.[151] However, this study largely selects company annual reports, interim reports and websites for its analysis based on the following reasons. Annual report is a very vital document to gain insight into a corporation's social and environmental practices. Secondly, it is highly credible and [152] thirdly, it is commonly used by many stakeholders due to the vital information it contains on environment, investment etc.[153] This study analyzes the annual reports of Royal Dutch Shell corporation ranging from 2008-2021 which represents the period of series of environmental degradation by MNCs and their legal outcomes as discussed in this study.

The next step is selection of categories or themes which is a key element in research design.[154] The selected themes are used describe and analyze the social responsibility of corporations or the content of their communication channels. On the other hand, categories or themes are selected

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[146] Berelson, B (1952), Content Analysis in Communications Research, Illinois: The Free Press, Glencoe.
[147] Kassarjian (1977)
[148] Haniffa, RM & Cooke, TE (2005), 'The impact of culture and governance on corporate social reporting', Journal of Accounting and Public Policy, vol. 24, no. 5, pp. 391-430.
[149] Zeghal, D & Ahmed, SA (1990), 'Comparison of social responsibility information disclosure media used by Canadian firms', Accounting, Auditing & Accountability Journal, vol. 3, no. 1, pp. 38-53.
[150] Ibid
[151] Gao, SS, Heravi, S & Xiao, JZ 2005, 'Determinants of corporate social and environmental reporting in Hong Kong: a research note', Accounting Fourm, vol. 29, no.2, pp. 233-42.
[152] Tilt, CA (1994), 'The influence of external pressure groups on corporate social disclosure some empirical evidence', Accounting, Auditing &# 38; Accountability Journal, vol. 7, no. 4, pp. 47-72.
[153] (Deegan & Rankin 1996)
[154] Gutherie & Matthews 1985

from the content analysis of communication channels. Different studies adopt different categories, and a single study may use multiple categories ranging from anti-corruption, community participation, environment, and fair business practices. CSR categories may further be divided into subcategories. For example, Environment is divided into environmental management, systems and environmental audit, environmental-product and process, environmental policy, environmental sustainability and energy. Also, community participation category is divided into education, public health, and infrastructure. The themes adopted in this research are measured by the number of words, sentences, lines, paragraphs, pages, or page proportion with the aim of addressing corporate social responsibility.

Comparative analysis

The writing adopts an exploratory study on four case studies. It explores the judicial approaches towards holding corporations accountable for human rights violations. For example, the duty of care approach acknowledged by the Supreme Court in *Okpabi v Royal Dutch Shell [2021] UKSC 3.* The case studies are also used to explore the causes of environmental violations in oil and gas operations – whether human or mechanical error, the attitude of corporations towards settlement of disputes on human or environmental rights violations, what remedies are agreed by parties and how long it takes to practically settle human and environmental rights violation disputes. In order words, how long does it take the corporation to fully pay a compensation sum or organize a total clean-up of the environment.

This writing also adopts doctrinal concepts and comparative analysis. For example, it is opined that existing legal framework on corporate human rights behavior would develop to become a binding treaty. Another doctrine maintains that existing legal frameworks must work together to bind corporations. Some authors still hold that home States and host States have the capacity to create domestic legislations on human and environmental rights obligations that would be binding on MNCs. There is also the doctrine which posits that the home State or host State Courts can hold corporations criminally liable for human and environment rights abuses. Therefore, this writing undertakes a comparative analysis of doctrinal concepts and case studies adopted. A comparative analysis of the case studies explains the different approaches of the Court in determining corporate liability for human rights violations.

This writing adopts a comparative analysis to demonstrate the strengths and weaknesses among existing international legal framework on CSR. It also highlights on the similarities and differences between two or more legal systems.[155] Thus, this thesis drew a comparison between the UN Global Compact, OECD Guidelines and the UN Guiding Principles. The comparative approach used in this thesis was necessary to determine the legal instrument that is most effective in holding MNCs accountable for human and environmental rights abuses. This approach would enable stakeholders know an effective law to rely on for the protection of their human and environmental rights. Through this approach, this thesis can identify areas of legal development in relation to corporate social responsibility. Therefore, a comparative approach helps to find the better solution to a legal problem.[156]

Conclusion

Methods and Methodologies play a crucial role in research as it determines the approach to addressing the research questions. This research adopts both a doctrinal and case analysis approach. It emphasizes on the type and sources of data. It employs both qualitative and quantitative data sourced from annual reports, journals and textbooks. It adopts grounded theory, content and comparative approach in the analysis of data collected. The use of theories guided the analysis of documentary data. The methods of analysis reveal the concepts and practice of corporate accountability.

[155] *Konrad Zweigert and Hein Kotz, An Introduction to Comparative Law (Tony Weir tr, 3rd edn, OUP 1998) 34*
[156] *Hugh Collins, (1991) 'Methods and Aims of Comparative Contract Law' 11(3) OJLS 396.*

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

This chapter identifies, discusses and systematizes the literature so far on the research questions asked in this work. Importantly, it also identifies the original contribution this work makes to the existing literature by discussing the ways in which this work integrates into the literature and fills existing gaps in the literature surrounding corporate responsibility towards environmental protections for host communities in Nigeria. While there has been a developing body of literature on CSR in Nigeria, particularly in the context of obligations in BIT'S,[157] this work specifically examines the role of mandatory obligations towards host communities as corrective to current problems in the legal framework.[158] This chapter examines the existing literature that is relevant to this work by firstly looking at the research questions and then examining the literature that is relevant to those questions. Thus, it examines the literature that has discussed the problems associated with lack of accountability for MNC's in international law because these entities are not seen as subjects of international law and thus cases cannot be brought against them in international courts. The literature has also examined solutions to these problems, and these are discussed in this chapter. The literature has been discussed thematically so that different themes that have been identified in the existing literature are analyzed.

This chapter is divided into four main parts: literature on the problems of Corporate Social Responsibility in Nigeria; literature that adopts a right based analysis of the problems with foreign investment relationships ; literature on solutions to the weaknesses of the existing legal framework and finally the original contribution to this research through the creation of scholarly discussion on the adoption of a human rights approach to foreign direct investment under bilateral investment treaties as an effective means, to creates binding human rights obligations for corporate entities.

2.2 Corporate Social Responsibility (CSR) in Nigeria

[157] *Ibid.*
[158] *More discussion on the problems with the current framework of environmental protections appears in chapter 5 of this thesis.*

The imposition of CSR on oil corporations in the Niger-Delta region of Nigeria began in the 1960s.[159] At the time, compensation for the exploration of the region by oil corporations was a peaceful pas-as-you-go system.[160] The corporations provided the needs of the communities to secure the support of the local chiefs[161]. However, with the introduction of the Land Use Act in 1979 which vested all rights to land in the Governor of a State, local dwellers began to engage in peaceful protest of the exploration of their environment by oil corporations.[162] Also, the Nigerian constitution gave federal government the power to grant license for the exploration of mineral resources in region across the country.[163] In addition, local community chiefs mismanaged funds donated by corporations. The Nigerian government neglected the agitations of the local communities because it believed that their small-sized population would not adversely impact the development and stability of the economy.[164] During the 1980 and 1990s, oil corporations accommodated CSR initiatives and Community Development (CD) model.[165] However, local communities were not involved in the decision-making and implementation process of the model.[166] Thus, the infrastructural facilities provided did not prioritize the needs of the community and some argued that host communities did not feel a sense of ownership of these resources.[167] More disturbingly, the corporations failed to pay attention to the environmental hazards caused by their oil exploration in the region. For instance, the oil pollution in Bodo Community[168]. So far, oil corporations have made no contributions but have rather caused inter and intra community conflicts[169]. While there are arguments that oil corporations have

[159] *Idemudia and Osayande,.N 2018.Accessing the Effect of Corporate Social Responsibility on Community Development in the Niger Delta. A Corporate Perspective. Community Development Journal 53(1) p.5*
[160] *Ibid*
[161] *Wirba, A.V. Corporate Social Responsibility (CSR): The Role of Government in promoting CSR. J Knowl Econ (2023). https://doi.org/10.1007/s13132-023-01185-0*

[162] *Ibid*
[163] *Section 44(3) of the 1999 Constitution.*
[164] *Idemudia et al, (1999) p.8*
[165] *Ibid, p.12*
[166] *Ibid*
[167] *ibid*
[168] [168] *Bodo Community v. Shell Petroleum Development Corporation of Nigeria Limited, 20 June 2014, [2014], EWHC 1973*

[169] *ibid*

contributed water, electricity, and shelter[170] there is no contribution to human development.[171] In some cases of material development, there is a decline in relational capabilities, i.e., a gap between the rich and poor, elites and uneducated, or leaders and their subjects.[172] Therefore, social issues related to CSR are difficult to measure. The political economy also contributes to this imbalance that makes it difficult to assess CRS impact on community development.

In recent years, some MNC's have attempted to improve CSR implementation in host state communities. Shell for example, has executed GMoUs (General Memorandum of Understanding) with host communities in a bid to implement CSR.[173] These agreements provide for a period of funding for the planning of implementation of projects decided by host communities[174]. Shell has developed a systematic methodology of measuring its GMoU in host communities called Shell Community Transformation and Development Index (SCOTDI)[175]. However, this index focuses on management systems rather than quality and performance. Hence, the corporation may be reluctant to accommodate accountability talks with stakeholders.

Given that corporations have the power to influence society, they should be held accountable and socially responsible.[176] This power-responsibility argument has led to debates on whether corporations should in addition to profit maximization be responsible for the society and multi-stakeholders. While the primary obligations of MNCs is to act in the best interest of shareholders, CSR claims that MNCs owe a duty to the society.[177] In the exercise of CSR, the corporation begins with obtaining a social license to operate (SLO) from the government but with the consent of local stakeholders within the prospective area of operation. However, such consent from local stakeholders have always not led to transparency and accountability of MNCs for environmental infractions. The importance of CSR in the Nigerian petroleum industry is

[170] *Ibid*
[171] *Ibid*
[172] *Ibid, p.14*
[173] *Ibid*
[174] *ibid*
[175] *ibid*
[176] *Egbon O, Idemudia U, Amaeshi K. (2018) Shell Nigeria's Global Memorandum of Understanding and corporate-community accountability relations: A critical appraisal. Accounting, Auditing & Accountability Journal. 31 (1). pp. 51-74*
[177] *Ekhator, E.O. and Iyiola-Omisore, I., 2021. Corporate Social Responsibility in the Oil and Gas Industry in Nigeria: The Case for a Legalised Framework. In Sovereign Wealth Funds, Local Content Policies and CSR. p.43*

attributed to the fact that oil production remains its major source of revenue.[178]Corporations enter a Memorandum of Understanding (MoU) to manage their relationship with host communities and address the impact of their operation on the community.[179] Therefore, the GMoU reflects the participation of both the corporation and host community. However, due to the diverse interest of community members, reflecting the interest of the community under the GMoU is challenging. In some cases, the government may formulate policies which are rather favorable to corporations such as relinquishing the rights and responsibilities of the people to a particular land without their consent.[180] The environmental pollution from the activities of oil and gas corporations and the inability of these corporation to implement community development initiatives and participation of host communities has resulted in a shift from CSR to corporate accountability.[181]

In addressing the conflict between oil and gas corporations and the community, it is important to examine various CSR processes such as accountability, transparency, and balance of power.
For example, when oil and gas corporations protect the environment from degradation, enrich the community and engage in peaceful corporate-community relations, they are protected from reputational damage.[182] Also, these are non-market strategies necessary for public trust in the continuation of their exploration activities. However, the ultimate objective for these corporation is not to secure an SLO but for community development. The failure of the government to undertake the responsibility of community development has led the host communities to call for CSR. Nevertheless, it is argued that host communities demand for CSR because these corporations work with the Nigerian government and will abandon a site once the oil well becomes dry. CSR has not shifted social responsibility from the government to corporations but is used as a parameter where stakeholders identify the negative impacts for community development such as environmental degradation and community division.[183] As a result, oil, and gas MNCs have been both targets and beneficiaries of government's abdication of community development responsibilities.

[178] *Egbon O, Idemudia U, Amaeshi K. (2018) p.55*
[179] *Ibid*
[180] *Ibid*
[181] *Ibid*
[182] *Ibid*
[183] *Ibid*

The negative impact of CSR on community development are caused by lack of social, economic and political integration as well as corruption.[184] For example, the Shell Petroleum Corporation delayed in cleaning up the oil spills at a Nigerian community (called Rukpokwu in Rivers State) due to contest on who should be awarded the environmental remediation contract. The delay resulted in prolonged environmental degradation and economic loss such as contamination of waters, and sea animals which the community rely upon for food and trade. Therefore, the GMoU adopts the corporate-community model of CSR which recognizes the participation of host community is necessary for the promotion of social cohesion and transfer of funds to the community. However, there is still the issue of power imbalance between Shell corporations and host communities in Nigeria. The GMoU favors Shell Corporation because they are viewed as legitimate entity holding an SLO.[185] Also, the GMoU lacks an enforcement mechanism.[186]

Generally, CSR is a voluntary and non-binding initiatives which corporations adopt to for the development of the society.[187] The aim of CSR is to hold corporations responsible for the negative impacts of their activities on society. It is also necessary for the sustainability of corporations Some of the adverse impacts of corporate activities relate to human rights, labour rights, bribery and corruption and so forth.[188]. The society in CSR context includes employees, suppliers, customers, environment, and communities. This is referred to as the stakeholder approach to CSR. On the other hand, CSR is viewed as corporate policies for profit maximization of the business.[189] This is referred to as the business case approach to CSR. The business case has been criticized for ignoring the impact of corporate activities on stakeholders.[190] However, the business case model argues that CSR is about being responsible for what the company believes is right rather than what society thinks is right.[191] The government

[184] *Ibid*
[185] *Ibid*
[186] *Ibid*
[187] *p.440*
[188] *p.440*
[189] *Jonker & Marberg (2007) p.274*
[190] *Waddock (2004)*
[191] *Jonker & Marberg (2007)*

has a responsibility to create laws which makes CSR mandatory for MNCs.[192] However, the creation of legal rules for the promotion of CSR should not substitute but complement the voluntary nature of CSR. For example, the Nigerian government has enacted legislations which seeks to ensure that oil and gas MNCs comply with CSR rules.[193] This is believed to promote transparency, accountability, and secure public trust in the government approval of SLO for the benefit of both host communities and the nation. If binding laws are not created, MNCs will inflict severe harm to stakeholders without remedy. For example, Shell exploration activities in Ogoniland, Nigeria caused severe pollution to human life and their environment.[194] Till date, the environment remains polluted, and the people have been denied a larger part of their livelihood.[195] However, there are concerns that MNCs may violate binding CSR laws. In Nigeria, an example of a CSR provision binding on oil and gas MNCs is incorporated in the Minerals and Mining Act 2007.[196] Section 116(1) of the Act requires mining lease holders to enter a Community Development Agreement with members of the community in which they plan to operate. Community Development Agreement (CDAs) are similar to GMoU and MoU.

Uwuigbe also explains that the impact of environmental operations on mankind and ecology has led to an increased corporate environmental disclosure (CED).[197] However, he notes that disclosure requirement remains voluntary in some developing countries such as Nigeria.[198] The application of CSR in Nigeria is beneficial to both public and private interest.[199] However, they argue that the level of compliance monitoring is below minimum standard as can be observed from the negative environmental impact of industry operations in key sectors of the economy such as oil and gas, telecommunication and banking and finance. The authors further blame the regulatory institutions for failing to mitigate the environmental adverse impact.[200] Thus, there is

[192] *Ekhator, E.O. and Iyiola-Omisore, I., 2021. Corporate Social Responsibility in the Oil and Gas Industry in Nigeria: The Case for a Legalised Framework. In Sovereign Wealth Funds, Local Content Policies and CSR p. 439*
[193] *Ibid*
[194] *Ibid*
[195] *Ibid*
[196] *Ibid*
[197] *Uwuigbe, U and Jimoh J., (2012) Corporate Environmental Disclosures in the Nigerian Manufacturing Industry: A Study of Selected Firms. African Research Review. 6(3) p.71*
[198] *Ibid*
[199] *Oyewunmi, Adebukola and Oyewunmi, Olabode (2017) Corporate Social Responsibility in Nigeria: Realities, Modalities and Possibilities, Journal of Advanced Research in Law and Economics, Volume VIII, Winter, 8(30): p.2514*
[200] *ibid*

the need for regulatory bodies to undertake a practical and proactive approach to achieve a positive outcome.[201]

The perspective of CSR in Nigeria is anchored from socio-cultural approach in which corporations exhibit the traditional values of sharing and consensus building.[202] The authors note that the failure of corporations to balance the delivery on community projects with environmental protection is one of the challenges of CSR in Nigeria. Alabi & Ntukekpo suggest that it is crucial for corporations to engage with community stakeholders in the delivery of any designated project.[203] Oyewunmi & Oyewunmi identifies the outcome of a broken CSR, noting that the failure of corporations to fulfil their social responsibility results in insecurity, restiveness and tension in Nigerian communities which eventually hampers business planning and operations. Uwuigbe & Egbide opines that CED is used to measure compliance level in respect of the execution of community projects.[204] Oyewunmi & Oyewunmi highlights some of the factors adversely affecting CSR in Nigeria: poor regulatory framework, low capital utilization, and institutional deficits.

Amodu argues that objective of the Corporate Social Responsibility Bill introduced by the Nigerian legislature in 2007 is to provide adequate relief for communities who are victims of environment hazards by corporate entities.[205] The Bill required corporations to allocate 3.5% of its generated revenue to the community where it operates.[206] This allocation was to be used in the development of community projects.[207] Amao noted that the Bill never came into law because it was criticized for attempting to introduce a corporate tax system or viewing CSR as charity concept.[208]

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[201] *ibid*
[202] *Ibid*
[203] *Alabi, O.F., and Ntukekpo, S.S. (2012) Oil companies and corporate social responsibility in Nigeria: An empirical assessment of Chevron's community development projects in the Niger Delta. British Journal of Arts and Social Sciences, 4(2): p.366*
[204] *Uwuigbe, U., and Egbide, B.C. (2012) Corporate social responsibility disclosures in Nigeria: A study of listed financial and non-financial firms. Journal of Management and Sustainability, 2(1), 160-169.*
[205] *Amodu, N., (2017) Regulation and Enforcement of Corporate Social Responsibility in Corporate Nigeria. Journal of African Law, 61(1) p. 105*
[206] *Corporate Social Responsibility Commission (Establishment, etc.) 2007 No. C 1239 Enacted by the National Assembly of the Federal Republic of Nigeria*
[207] *ibid*
[208] *Amao .O.(2008) "Mandating corporate social responsibility: Emerging trends in Nigeria" 6(1) Journal of Commonwealth Law and Legal Education 75 at 83-85.*

In corporate governance, the one of the main effects of cost eternalization requires, corporate executives to ensure that shareholders obtain profits, whereby stakeholders bear the corporate cost[209].

It was recorded that in the late 2009, shell decided to increase dividend value for its shareholders, thereby axing about 5,000 jobs. Furthermore, this practice is not uncommon to the African continent, and it can be said to be largely driven by the shareholder primacy of corporate law[210]. This practice over the years has led to environmental neglect, that has affected stakeholders, across the board, ranging from high unemployment rate as well as crumbling infrastructures, which results in abject poverty in these regions[211].

Having established the fact that there is a lacuna in this approach, what measures have African states adopted, towards cost internalization through corporate legislation in the last decade?

The Nigerian approach towards corporate governance, is similar to the Enlighted shareholders Value (ESV) adopted by the United Kingdom[212] In 2020, the Nigerian government enacted the Companies and Allied Matters Act 2020. With the enactment of this act, the previous 1990 act, is impliedly repealed.

Historically, under the corporate purpose section 279 of the 1990 CAMA, directors were enjoined to act in the best interests of the company, ensuring that the interests of the company's employees are also safeguarded which seemingly insulated employee interests against cost externalization. However, the efficacy of that provision is weakened by the requirement that, even in clear cases of socio-economic and environmental cost externalization to the employee constituent, remedy is only available for the 'company[213]'.

Under the previous 1990 Act, directors were required under section 279 to Act in the best interest of the company, ensuring that the interest of employees was also catered for, which insinuated employees' interest against cost. However, the efficacy of that provision is weakened by the requirement that, that even in clear cases of socio-economic and environmental cost externalization to the employee constituent, remedy is only available for the 'company'.

The traditional approach is that a company, is assumed to refer to shareholders. Furthermore, the best interest of the company, is interpreted by the court in the case of Hutton v West Cork

[209] *https://www.jus.uio.no/english/research/areas/companies/blog/companies-markets-and-sustainability/2021/cost-internalization--amodu-iyiola-omisore.htmla. acessed october 28 2022*
[210] *ibid*
[211] *ibid*
[212] *ibid*
[213] *ibid*

Railway[214] to mean what is beneficial, to the economic interest of the shareholders. Therefore, under the 1990 Act, shareholders interest, overrides others.

The 2020 CAMA Section (305 (3)) appears to improve the situation with environmental protection as it requires the directors to work in the best interest of the company, and in so doing, have regard to the effect of the company's operations on the environment. However, it can be argued that the word 'have regard to' does not impose a duty on the directors of the company which suggests that a lot still needs to be done to protect the environment at both national and multilateral level.

2.3 Weaknesses of Existing International Legal Framework of Multinational Corporations

The problems associated with non-recognition of the legal personality of MNCs under IHL have been addressed by leading scholars. Vogelaar opines that international law has been unable to regulate the activities of MNCs and the latter are equally not subjects of domestic law in their home state or host state.[215] This has resulted in MNCs enjoying a great degree of freedom than domestic businesses in their cross-border distribution of production, financing, research, costs and profits, management and know-how.[216] Therefore, MNCs benefit from jurisdiction gaps as they select a suitable legal regime for the protection of their investment.[217]

Vogelaar believes that corporations do not have international legal personality and therefore cannot be considered subjects of international law which includes international human rights laws.[218] This point has been also noted by Karavias. He sees the issues as serious. To Karavias, what this means is that MNCs have no obligation under international law irrespective of their global positive and negative influence such as human and environmental rights abuses.[219] Tombs and Whyte identifies three factors that motivates such criminal abuses. Firstly, is the separation of shareholders from managerial functions.[220] The managers would only engage shareholders in profit sharing and maximation without involving them in the protection of human rights.

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[214] 1883)23 ch D 654
[215] Vogelaar, Th (2009) Asser Institute Lectures on International Law: Multinational Corporations and International Law. Cambridge University Press. p.72
[216] Ibid
[217] Ibid
[218] Ibid
[219] Simon Baughen, Human Rights and Corporate Wrongs: Closing the Governance Gap. Corporations, Globalisation and the Law. (Cheltenham: Edward Elgar, 2015), p.271
[220] Steve Tombs and David Whyte,, The Corporate Criminal: Why Corporations Must Be Abolished. (Oxford: Routledge, 2015).

Secondly, MNCs operating through their subsidiaries enjoy substantial level of limited liability. Thirdly, the courts do not view corporations as possessing the *mens* rea or intention to perpetrate harm.[221]

Vogelaar points out that international law and international legal bodies such as the United Nations largely focuses on economic, social, and political relationship among States. United Nations member states would not recognize the UN as having authoritative force over corporations. Accordingly, he maintains that international human rights law (IHL) recognizes the State as the only entity that bears the responsibility to ensure human rights is respected. IHL lacks the power to impose sanctions or attribute liability to corporations for non-compliance. He further emphasizes that early international human rights law such as the Universal Declaration on Human Rights (UDHR) created rights and responsibilities only for individuals and State actors. Blitt comments that due to the non-binding nature of the Declaration, States have no legal obligation to enforce corporate social responsibility under international law.[222] This increases the perpetration of human rights abuses by corporate entities without been held accountable for such harm.

However, Brownlie opines that the UDHR is part of customary international law which is binding on States.[223] On the other hand, Dodge argues that this has no effect as customary international law is not binding on corporations. He cites the case of *Kiobel v. Royal Dutch Petroleum*[224] in which the United States Second Circuit held that corporate liability is not a rule of customary international law. The court further noted that corporate liability in customary international law is not accepted as a specific, obligatory and universal norm. Dodge supports the position of the court in stating that international law does not contain norms of general liability applicable to certain category of actors.

However, this argument, though effective on a normative basis may not have the ability to influence sates. For example, Kravias argues that States are unwilling to create obligations regulating the activities of corporations. According to the author, host States must know that they

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[221] *Ibid*
[222] *Blitt, R. C. (2012). Beyond ruggie's guiding principles on business and human rights: Charting an embracive approach to corporate human rights compliance. Texas International Law Journal, 48(1), p.56.*
[223] *Ian Brownlie, Principles of Public International Law 559 (7th edition, 2008)*
[224] *William Dodge, (2012) Corporate Liability Under Customary International Law. UC Hastings Scholarship Repository. p.1046*

stand to benefit from human rights development respected by corporations. He noted that an international legal status for corporation would reduce the obligations of States and the latter should not be anxious of such development because they will be the entity that decides how much obligation to be directed to corporations. However, Amodu argues that this state-centric medium defeats the view of progressive scholars to have an international legal system directly binding on corporations[225].

While Wettstein acknowledges an international legal system directly binding on corporations, it notes that the international obligations are soft law only.[226] Shephard defines soft law as norms which may possess many legal features but fail to have the features that are necessary to create obligations that constrain the behavior of its subjects.[227] In order words, soft law fails to specify obligations or reiterates existing obligation. Weil argues that soft law is in fact not law at all.[228] In addition, Barelli posits that the non-binding nature of soft law is an indication that the legal importance and potential to influence State behavior should be treated with levity.[229] Nevertheless, Davidov posits that soft law is a popular mode of regulation because it is cheaper to draft and easy to adopt.[230]

To mount pressure on MNCs to be accountable for human rights abuses, the United Nations through Professor John Ruggie, Special Representative to the former Secretary-General, Kofi Annan developed the Guiding Principles on Business and Human Rights.[231] Blitt views the GPs as the most internationally authoritative statement in addressing the relationship between business and human rights. Yet, scholars such as Wettstein opines that the GPs does not create any legal obligation for MNCs and did not plan to do so[232]. He opines that the GPs rather elaborates on the implications of extant standards and practices for States and businesses

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[225] *ibid*
[226] *Wettstein, F. (2015) Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment. Journal of Human Rights.*
[227] *Sheppard, B. (2014). Norm supercompliance and the status of soft law. Buffalo Law Review, 62(4), p.790.*
[228] *Prosper Weil, Towards Relative Normativity in International Law?, (1983) 77 Amsterdam Journal of International Law. p.414-15*
[229] *Barelli, M. (2009). The role of soft law in the international legal system: The case of the United Nations declaration on the rights of indigenous peoples. International and Comparative Law Quarterly, 58(4), 957*
[230] *Guy Davidov, (2005) Enforcement Problems in "Informal" Labor Markets: A View from Israel, 27 Comparative Labor Law and Policy Journal 3, p.26*
[231] *Wettstein, F. (2015) Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment. Journal of Human Rights.*
[232] *ibid*

integrated within a single, logical, coherent and comprehensive framework, including the identification of the shortcomings of the current regime and ways of redress.[233]

Buhmann for example takes this forward, He opines that the State's duty to protect human rights under the GPs addresses the governance gap between States and MNCs.[234] However, this duty which presents a positive obligation is inadequate because in some cases States provides support to businesses in the abuse of human rights. By implication, States should carry both a positive and negative obligation to protect and respect human rights respectively.[235] Penelope Simons and Audrey Macklin argue that home states have a larger responsibility to deter corporations domiciled in its territory from complicity in human right abuses.[236] They further propose that home states establish a regulation requiring such corporations to comply with domestic law. However, these authors do not specify the jurisdiction, i.e., whether compliance with domestic law of the home state or host states. Nevertheless, the authors believe that mandatory domestic regulations would complement extant voluntary initiatives in effectively coercing corporate compliance towards the protection of human rights. On the other hand, Karavias identifies issues of under-regulation and under-enforcement with States discharging their international human rights obligation via municipal laws as recommended by UN Guiding Principles[237].

Wettstein identifies the GPs use of the term 'responsibility' as indicating no intention to establish any obligation for MNCs under international law[238]. Thus, it is observed that Guiding Principles 12 emphasize on the responsibility of business enterprises to respect human rights which are non-binding human rights instruments such as the Universal Declaration of Human Rights[239] and the ILO Declaration on Fundamental Principles and Rights at Work.[240] Although the view of the

[233] *Blitt, R. C. (2012).*
[234] *Buhmann K, (2015) Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions. Transnational Legal Theory 6(2) p.429*
[235] *Ibid, p.246*
[236] *Penelope Simons & Audrey Macklin, The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage (New York: Routledge, 2014)*
[237] *ibid*
[238] *ibid*
[239] *Universal Declaration of Human Rights, Adopted by General Assembly Resolution 217 A(III) of 10 December 1948.*
[240] *International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work, June 1988, Adopted at it 86th Session, Geneva, June 1998.*

term ‘responsibility’ may be discretionary, Wettstein argues that this is not in relation to whether or not such responsibility would be discharged but how it will be discharged[241]. Wettstein further argues that while ethical standards are usually considered in the establishment of global regulations, they cannot change the logic of doing business in a fundamental way[242].

According to Wettstein, the responsibility of corporations to merely respect human rights as one of three main pillars under the GPs is not unique and does not define their status as a specialized economic organ.[243] He explains that this an inalienable duty which applies to any agent capable of violating human rights. He criticizes, John Ruggie’s perception of corporate human rights responsibility as not far reaching. He notes that the SRSG fails to address the central issue, i.e., what agent-related human rights responsibilities are derived from the corporation’s specialized function in the society?[244] In addition, the responsibility of corporations to respect human rights is a negative duty which is inadequate. Corporations should be required to protect human rights, i.e., taking steps to ensure that stakeholders directly benefit from their operations and are protected from the misconduct of others.

Wettstein notes that Prof. John Ruggie while drafting the GPs believed that a treaty approach to establishing corporate human rights obligations would deviate from the main objective of the GPs and cause delays[245]. However, he noted that Ruggie applied a mixture of both voluntary and mandatory policy with hopes that it was result in binding legal framework in future. This was nevertheless perceived as ineffective because the mandatory policies were directed to the states such that the enforcement of the GPs were made the obligations of municipal governments who will be unwilling to comply. Wettstein further opines that national governments are reluctant to implement or enforce domestic human rights measures against corporation because the government is focused on protecting foreign direct investment within its territorial market[246].

Simons and Macklin conclude the GPs failed to cover the governance gaps between the government and corporations. In addition, Wettstein points out other lapses with the GPs such as: no enforcement mechanisms which holds MNCs accountable for human rights abuses, the right

[241] *ibid*
[242] *ibid*
[243] *Ibid*
[244] *ibid*
[245] *ibid*
[246] *ibid*

of stakeholders to effective remedy is not recognized under the Guiding Principles and does not provide for measures which home states could adopt in the prevention of human rights abuses by their corporations operating overseas. He explains that the GPs does not offer any corporate accountability but shift this obligation to the State to implement at the domestic level. The attribution of a binding duty to national governments does not explore accountability at the global level in which MNCs operate. Besides, the GPs was liberal in promoting a binding obligation at the domestic level. However, he expresses optimism that although soft laws are not legally enforceable, they could still achieve some level of binding force. In addition, he believes that international human rights laws could in theory establish human rights obligations for MNCs.[247]

Nevertheless, Wettstein argues from a contextual or theoretical perspective, noting that the GPs limits the responsibility of corporations where it provides an approach to the prevention of human rights abuses directly linked to a corporation's activities, products, or services in connection with a different entity[248]. This is a subjective standard of establishing corporate human rights responsibility. The corporation can take advantage of this standard by evading liability on the grounds that it has no relationship with such other entity who may be the principal party or agent that perpetrated the harm. The lack of objective standard and wide discretion created in favor of corporations defeats the establishment of corporate human rights obligations.

While there has been some success achieved by the current accountability framework, there is however evidence and data that the efficacy is far from satisfactory.[249] A 2013 study by Aaronson and Higham provides evidence of little effect of the current existing legal framework, including the Guiding Principle on corporate practices[250]. One of the main challenges of regulating the activities of multinationals and holding them accountable for human right abuse and environmental damage, is that there is no binding international law, which multinationals are

[247] *Wettstein (2015) Supra (n25)*
[248] *Ibid*
[249] *Owusu E.S. (2021) Environmental Degradation and Human Rights Violation: A cursory overview of the potential existing frameworks to Hold Multinational corporations accountable. Groningen Journal of International Law. 28; 9(1) p.143*
[250] *Aaronson and Higham (n 67)*

regulated. Furthermore, multinationals when incorporated, often obtain legal existence in various countries[251]. This can further be strengthened by the European Union's failure, to agree on the legal basis for European companies[252]. Therefore, the current international human right laws, as noted by Augenstein, generally do not impose an obligation on environmental and Human Rights protection[253]. This is because, it is difficult, in ascribing international legal personality to MNC's[254].

Currently, corporations and their subsidiaries are formed by the operation of domestic law, and therefore the company acquires the nationality of the host state, where the company is incorporated[255]. However, one of the major defects, as expressed by Hu is the corporate personality status of companies[256]. This sometimes poses a problem as parent companies, are not automatically held liable on behalf of their subsidiary's wrongdoings. The principle of limited liability applies to any shareholder, whether it is a private individual, or a parent company, which makes it very likely that corporations can hide under the guise of corporate personality and limited liability, to avoid liability, for the wrongdoings, of its subsidiaries, which it owns and controls[257]

The Bhobal disaster supports the arguments of Hu whereby between the 1986 to 2016, victims of the disaster and their families, who felt that justice had not been served, brought a class action against UCC, in US courts under the Alien Tort Statute, arguing that it held 50.9 percent shares in UCIL[258] the claimants were able to demonstrate that UCC built the plant and was involved in every aspect of the building installation, including the waste disposal system that caused the pollution[259]. The claimants further argued that UCC were partly if not full liable for the effect of

[251] *Hu (n 14).*

[252] *ibid 115; See also Zerk (n 80)*

[253] *Augenstein and others (n 9); See also Antonio Cassese, International Law in a Divided World (OUP 1986)*

[254] *Silverman and Orsatti (n 9); Wouters and Chané (n 10)*

[255]*Hu (n14): Muchlinski (n 82).*

[256] *Salomon v salomon (1897)*
[257] *Hu (n 14) 115.107Covell (n 84).*
[258] *Covell (n 84).*
[259] *ibid*

the water pollution, caused by the chemical plant in the community[260]. However, UCC argued that it had no role in the operation of the plant at the time of the disaster because, the factory was owned and operated by a different legal entity UCIL[261] These claims were dismissed and, in some cases, referred to the Indian courts arguing that UCIL was a separate legal entity in India while UCC is not liable for the disaster. The US Court of Appeals in 2016, further upheld this position in the case of Sahu et al v UCC[262]

Despites the fact that right and duties, are two sides of the coin,[263] they do not seem to have binding obligations, at the national level[264]. This has made it very difficult to hold them accountable for human rights and environmental abuses[265]. Over the last 2 decades, over 370 bilateral and multilateral trade agreements have been signed, with more than 1,500 BITs concluded, involving most of the world's leading multinationals[266]. Under the European convention of Human Rights, (ECHR) corporations enjoy rights to a fair hearing by an independent and impartial tribunal or court to adjudicate over the suit, as well as a reasonable length to prepare etc. sadly and quite unfortunately, as argued by Silverman and Orsatti, these confer supra national rights on multinationals however, there do not confer the same rights on the victims of those who have been adversely affected by the negative effect, of their activities[267].

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[260] 108Narayan Lakshman, 'U.S. court rules in favour of Union Carbide' The Hindu (Chennai, 31 July 2014) <https://www.thehindu.com/news/international/U.S.-court-rules-in-favour-of-Union-Carbide/article11181105.ece> accessed 20 July 2020

[261] 109The Associated Press, 'Company Defends Chief in Bhopal Disaster', The New York Times (New York, 2 August 2009) <https://www.nytimes.com/2009/08/03/business/global/03bhopal.html?r=1&html> accessed 20 July 2020; Prasenjit Bhattacharya, 'Court Rules Union Carbide Not Liable in Bhopal Case' The Wall Street Journal(New York, 28 June 2012)

[262] Jagarnath Sahu et al v UCC and Madhya Pradesh StateNo. 07 Civ. 2156 (JFK), (30 July 2014)

[263] Nick Mabey, 'Defending the Legacy of Rio: The Civil Society Campaign against the MAI' in Sol Picciotto and Ruth Mayne (eds) Regulating International Business: Beyond Liberalization(Macmillan 1999) 60

[264] See Cassese (n 103); José E Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 Santa Clara Journal of International Law 1; Muchlinski (n 7).

[265] Lori F Damrosch, Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, International Law: Cases and Materials(West Academic Publishing 2001); see also Silverman and Orsatti (n)

[266] Rudolph Adlung and Martin Molinuevo, Bilateralism in Services Trade: Is There Fire Behind the (BIT) Smoke?(World Trade Organization 2008); see also Silverman and Orsatti (n 9).

[267] Silverman and Orsatti (n 9)

2.4 Solutions to Repair Weaknesses of Existing Legal Framework

Blitt views hope for the GPs, noting that the Guidelines could find mysterious ways of developing into enforceable international norms that may embody severe consequences for abusive corporations[268]. Barelli explains when contemporary international laws are examined, it is observed that the latter originates from a mixture of different instruments including soft laws[269].

Blitt suggests that the GPs adopts a more rigorous approach in addressing human rights responsibility of corporations. According to Abbott, this includes the provision of a mechanism to monitor how the government apply the GPs. Baughen suggests that soft law would also be complied with where CSR is made a compulsory requirement for listing on the stock exchange. Buhmann emphasize on the implementation of the GPs as human rights governance model in specific sectors. This means the GPs can be incorporated into policy of oil and gas corporations. Tombs and Whyte suggest that empowering those adversely affected by the human rights abuses of corporations such as activist group, local communities, labour force would limit corporate abusive decision power. However, the authors do not specify the kind of empowerment effective for the above stakeholders. Nevertheless, they do not really believe in the regulation of corporations to mitigate human rights abuses noting that regulation is for boosting corporate economy.

According to the Tombs & Whyte regulation gives room for negotiation and non-compliance and rather advises that corporate criminals be abolished. They refer to the event of Occupy Wall Street in the United States which called for the removal of corporate protection from the American constitution. In its final chapter, the authors suggest an alternative which the to reduce the burden of corporations as per its cost of doing business. They believe that such burden puts excess pressure on corporations to engage in human rights abusive practices.

Abbot believes that some Intergovernmental Organizations (IGOs) have the power to hold MNCs accountable by adopting the UN Guiding Principles.[270] However, this may result in fragmentation and hinder a uniformity of corporate norms necessary for large-scale compliance.

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[268] *ibid*
[269] *ibid*
[270] *Abbot, L. (2014) Integrating the Ruggie Guiding Principles into the International Economic Community*

Corporations will be stunned by the large number of corporate codes and the cost of compliance involved. On the contrary, Buhmann believes that there is homogenization of transnational corporate governance instruments which can be found with the OECD Guidelines, IFC Performance Standards of the World Bank, UN Global Compact, ISO 26000, and the 2011 European Union CSR Communication.[271] Buhmann explains that due diligence standards may be drawn from the above instruments and incorporated into a binding corporate legal framework. In addition, he cites the OECD's adoption of the human right due diligence concept under the GPs. Abbott maintains that IGOs including the World Trade Organization (WTO) should work with the UN Special Representative of the Secretary-General (SRSG) on Human Rights in incentivizing businesses to fulfil their human rights responsibilities.[272] To an extent, this corroborates the perception of Buhmann that in practice, the GPs are implemented through other transnational business governance instruments such as the National Contact Point(NCPs) – a quasi-judicial mechanism under the OECD Guidelines because the GPs has no enforcement mechanisms of its own.[273] Thus, the SRSG made reference to the OECD, ILO, ICC[274] and World Bank's interaction with MNCs when drafting the Framework which led to the endorsement of the UN Guiding Principles on Business and Human Rights.[275]

In Abbot's view, the UN should urge the World Bank through the International Finance Corporation (IFC) not to provide finance to human rights abusive project of corporations. This means that by virtue of the IFC Performance Standards, the World Bank would be required to critically assess human rights risk of all proposed companies' projects. On the other hand, he believes that the provision of incentives by these IGOs could motivate large scale corporate compliance with human rights under the GPs. However, incentives or rewards would only achieve temporary compliance compared to sanctions which produces a longer positive change in human behavior. This is because once rewards can no longer be offered as a result of regime change or economic regressions, corporations are very likely to return to their old behaviors. Thus, Simons and Macklin opine that existing corporate governance initiatives are ineffective because they have no independent monitoring and enforcement mechanisms, thereby resulting in

[271] *Buhmann K, (2015) Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions. Transnational Legal Theory 6(2) p.429*
[272] *Ibid*
[273] *Ibid p.426*
[274] *International Criminal Court*
[275] *Abbott (Supra n34) p.14*

corporate green washing, inconsistence practices and weak incentives.[276] They further hold that the reputational cost for non-compliance under the UN Global Compact is inadequate to prevent corporate human rights abuses and provide accountability in the event of such violations.

Ratner has suggested in his work that the World Trade Organization (WTO) can enforce corporate accountability through prescription of hard law.[277] The WTO which welcomes a global membership has the capacity to create a regime with enforcement mechanisms.[278] Kinley & Tadaki are of the view that the International Monetary Fund (IMF), International Labour Organization (ILO), UN human rights organization and World Bank are capable of enforcing human rights responsibility of MNCs.[279] However, one single body cannot achieve this enforcement objective alone but the collective efforts of as many IGOs as technical expertise and contributing their resources would result in an wide enforcement outcome.[280]

On the other hand, Deva opines that IGOs may enter partnership with the United Nations in order to realize resilient enforcement mechanisms of tackling human rights violations.[281] For example, Abbott cites the Organization of Economic Corporation and Development (OECD) as improving the global economy and enhancing foreign investment, and its policies have strong influence on MNCs particularly as its member-states constitute the vast majority of MNCs home states. He further points out that while the OECD encourage business to adopt judicial and non-judicial remediation processes, it established the National Contact Point (NCP) as an effective quasi-judicial remediation process.

Abbott refers to the NCPs established in member states as providing conciliation and mediation to individuals, civil societies and corporations on disputes concerning the implementation of the Guidelines. He notes the NCP as one of the ways in which the OECD promotes the Guiding Principles. Abbot examines relationship between the NCP, Business and Industry Advisory Committee (BIAC) and the Directorate of Financial and Enterprise Affairs and the OECD's as having a direct positive influence on the activities of MNCs. However, Abbot criticized the NCP

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[276] David Kinley & Junko Tadaki, (2004) 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' 44 Virginia Journal of International Law p.952
[277] Ratner, S. Supra (n9)
[278] Ibid
[279] Kinley D. & Tadaki, J. (2004) Supra (n36). p.995
[280] Ibid, p.1019
[281] Deva, S. (2003) Human Rights Violations by Multinational Corporations and International Law: Where from Here?, 19 Connecticut Journal of International Law p.2

as unbalanced and ineffective noting that it fails to provide other alternative dispute settlement mechanisms if conciliation and mediation becomes unreliable. On the other hand, he identifies the National Contact Point (NCP) under the OECD Guidelines as an enforcement mechanism which may publish information of non-compliant corporations. However, he criticizes the submission of complaints to the government who aims to promote international trade and investment rather than respect human rights. Other criticisms of the NCP identified by Abbott are delays in the dispute settlement process and interpretation of the Guidelines in a restrictive way.

Celia Wells in her book discusses the effectiveness of criminal liability for negligent corporations under both domestic and international law.[282] However, she considers the unwillingness and challenge faced by States to impose sanctions on corporations responsible for human and environmental rights abuses. This is due to conceptual and political reasons including in her argument that criminal law is only attractive when applied to individuals. Nevertheless, she cites the Corporate Manslaughter Bill first recommended by the England and Wales Law Commission in 1966. England has long-recognized corporate criminal responsibility through hold corporation accountable for non-compliance with health and safety or impact assessment standards. The standard of proof is strict liability, and it is immaterial whether a violation caused death. The United Kingdom and South Africa also recognizes corporate criminal responsibility.

Meanwhile, Simons & Macklin identify the failure of home state courts to enforce corporate accountability under domestic legislation as was observed with the decision of the U.S Supreme Court in its interpretation of the Alien Tort Claims Act in the case of *Kiobel v Royal Dutch Shell*[283] and in a number of Canadian cases seeking to enforce an Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, which was established in 2009.[284] They argue that a litigation approach takes a very long time and there is no certainty of remedy for victims of human rights abuses. In addition, Tombs and Whyte noted that corporate criminals in the criminal justice system are treated with clemency because judges and administrators are "*either subject to the material ideological influence of business-people, or*

[282] *Celia Wells, Corporations and Criminal Responsibility, (2nd edition OUP, 2001) p. 63*
[283] *Kiobel v Royal Dutch Petroleum Co, 133 SCt 1659 at 1664 (2013)*
[284] *Bill C-300, "An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries. Adopted by the Committee: October 8th, 2009.*

share their ideological and/or cultural world views."[285] Baughen opines that soft law or voluntary norms can only have an impact on corporations when the courts decided to recognize that MNCs hold a duty of care in respect of activities by their subsidiaries in host states.

2.5 Original contribution to research

My contribution to this research is the adoption of a human rights approach to the sustainability of foreign direct investment (FDI) under a Bilateral Investment Treaty as an effective means of creating direct human rights obligations for MNCs. This is underscored by the fact that BITs are binding agreements between a national or company of a foreign country and the host state. Therefore, it is my view that BITs incorporate domestic human rights into its contractual framework and corporation entering contracts with host state would be bound by such domestic laws. This way, corporations may equally become subjects of international human rights law incorporated under the BIT. Investment treaties which implement human rights obligations would promote socially responsible BITs, thereby resulting in the development of host states. Also, the implementation of human rights obligations under a BIT is a way of striking a balance between investment sustainability and safeguarding the State's legitimate public policy of human rights protection.

Specifically, I recommend that human rights obligations under BIT should exceptionally reflect the provision of the two fundamental human rights namely, (i) right to adequate standard of living; and (ii) right to adequate physical and mental health. In so far as, corporate obligations in relation to environmental protection is concerned, all other human rights fall under the above two fundamental rights. In order words, human rights obligation under BIT should be streamlined. This is because corporations tend to be overwhelmed by the numerous human rights obligations contained in various international and hard law provisions. Such fragmentation does not guarantee corporate compliance but rather creates room for conflicting legal provisions.

Another recommendation is for BIT to create a "direct obligation" for the investor corporation to respect the two fundamental human rights mentioned above. The means that the obligation to

[285] *Steve Tombs and David Whyte, The Corporate Criminal: Why Corporations Must Be Abolished. (Oxford: Routledge, 2015).*

respect human rights should be imposed on both the State party and investor corporation. This form of parallel obligation prevents the investor corporation from using the State as an instrument to perpetrate human rights violations. Direct obligation also means that the state is not responsible for creating human rights duties for corporations. This approach is an effective way of controlling investor advantage under a BIT which adversely impacts on human rights in host states. Direct human rights must begin from the preamble to the treaty. The preamble is a significant part in a treaty such that its guides the interpretation of the treaty. Investment arbitral tribunals may refer to the preamble to determine the treaty standard or reach a decision. Also, direct human rights obligation clauses should be void of limitations.

Furthermore, BIT should be drafted in hard law language with the use of terms such as “shall”, or “must” and avoiding words as “encourage” or “recommend”. The use of such words connotes the creation of binding obligations for MNCs. These words attract the feelings of corporations to compulsorily rather than voluntary undertake their activities in a socially responsible manner. Most corporations are non-compliant not because international soft law does not address corporations, but the wording of such legal text does not make them feel obliged to respect human rights. Corporations would not just respect human rights because a legal provision emphasize on the need to do so. Thus, in order attract the feeling of corporations, it is equally important to State why corporations must respect human rights which is absent in most international soft law provisions. In the case of oil and gas corporations, it should be stated that oil and gas spills result in large scale human and biological deaths which is morally wrong. Stating the reasons for compliance introduces a moral approach to the BIT which when embedded under soft law attract low level compliance.

Finally, I recommend that a human rights recognition under a BIT should take more of a “preventive approach” than a remedial approach as the popular cliché, “it is better to be save than be sorry”. Unlike a remedial approach, a preventive approach does not seek to pay compensation, organize environmental clean-up or sanction corporations. This is because most oil and gas corporations are rather reckless than negligent and therefore prepared for an unending punishment for environment abuse except a withdrawal of their license to operate in each country. A preventive human rights approach is effective under a contractual instead of a

statutory legal framework because former relates to a specific activity by the corporation. In this case, the corporation concerned will develop the feeling such approach specifically address its operations. When a preventive approach is under an international framework, most corporation are evasive because they assume that such provisions speak to other corporate subjects or speaks to some of its operations. Nevertheless, this writing suggests a neutral form of remedy for environmental abuses known as "victims' autonomy". This means victims should be given the autonomy to determine their choice of remedy upon the violation of their human or environmental rights without the interference of the municipal government. This is because not every victim wants a compensation for damage caused to their environment. Some victims may prefer that the corporation is precluded from operating within their environment for the purpose of sustainability and environmental preservation.

Conclusion

In conclusion, the thesis is different from existing scholarly material in the sense that much of what has been written has been largely unenforceable. Many authors opine that the major weakness with international law in relation to business and human rights is its failure to establish human rights obligations directly binding on businesses or corporations. While some authors suggest mandatory domestic regulation to ensure corporate human rights accountability, other authors argue that the courts may be reluctant to hold MNCs accountable under a domestic legal framework. International human rights law remains non-applicable to corporations and the emergence of other legal framework which addresses corporate behavior are non-binding. Authors such as Simons, Macklin and Karavias have examined the international human rights obligations of corporations from a State-centric approach. In order words, States should establish human rights regulations binding on corporations operating in its region. Home States may establish such regulation which shall have an extraterritorial application on corporations domiciled within its territory. Unlike existing legal frameworks, this thesis with reference to BITs introduces a contractual approach between MNCs and the host state in establishing corporate human rights obligations. Chapter 3 discusses an overview of the laws establishing obligations for corporate responsibility for environmental protection during foreign investment.

CHAPTER 3

AN OVERVIEW OF THE LAWS ESTABLISHING OBLIGATIONS FOR CORPORATE RESPONSIBILITY FOR ENVIRONEMTNAL PROTECTION DURING THE COURSE OF FOREIGN INVESTMENT.

3.1 *Introduction*

This chapter takes the work forward from chapter two by presenting an overview of current international and domestic legal framework establishing obligations for corporate responsibility for environmental protection during foreign investment. It critically analyses international human rights laws relating to a safe, healthy and sustainable environment. It particularly examines several public international laws such as the International Economic, Social and Cultural Rights (ICESCR),[286] the Stockholm Declaration,[287] Rio Declaration,[288] United Nations Declaration on the Rights of Indigenous People,[289] Articles on the Responsibility of States for Internationally Wrongful Acts,[290] the United Nations Guiding Principles on Business and Human Rights, and the 2011 Revised OECD Guidelines on Multinational Enterprises.

It highlights the weaknesses of the above international regulations as they relate to environmental protection including their failure to create binding rules on corporate accountability. Thus, it argues that there is the need to hold corporate entities accountable for environmental violations by establishing binding legal rules on corporations. It discusses several legislative requirements that must be considered towards the development of a treaty on environmental protection that will be binding on corporations during their extraterritorial investment operations. It discusses the notion and scope of Corporate Social Responsibility (CSR) in which corporations are encouraged to incorporate into its internal policy.

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[286] *UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3*
[287] *UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994*
[288] *UN Commission on Human Rights, Human rights and the environment., 24 February 1995, E/CN.4/RES/1995/14*
[289] *UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html> accessed: 23/9/2021*
[290] *The 2001 Articles on Responsibility of States for Internationally Wrongful Acts 53 UN GAOR Supp (No 10) at 43; UN Doc A/56/83/2001*

The chapter moves to discuss extant Nigerian legislations on corporate responsibility for environment protection such as the Oil Pipeline Act,[291] Petroleum (Drilling and Production) Regulations,[292] Environmental Impact Assessment Act,[293] National Environmental Standard Regulation and Enforcement Authority (NESREA)[294] and the National Oil Spill Detection Response Agency Act (NOSDRA).[295] Finally, it critically examines the criminal and civil jurisdiction of the Nigerian courts in holding corporations accountable for environmental hazards. In addition, there are legislations in Nigeria that impose criminal and civil liability on corporations for environmental violations, and specifically state the degree of criminal penalty or conviction to be imposed on persons found liable.[296] Accordingly, the courts have ruled that the director or alter ego of the corporation shall be held accountable for environmental violations and bear criminal liability perpetrated through the company.[297] On the other hand, the Nigerian legislations and courts view environmental violations by corporations as a civil wrong in which it declares punitive measures such as fines and compensation against negligent corporations.[298]

3.2 Public International Law on environmental protection

3.2.1 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR does not explicitly stipulate individual's right to a healthy environment. However, it creates a binding obligation for States to protect their environment under the following legal provisions:[299] right of self-determination and to freely dispose of natural wealth and resources (Article 1), right to decent, safe and healthy occupational life (Art. 7), recognition of the right of every person to adequate standard of living such as adequate food, clothes and housing (Art.11),

[291] *Oil Pipelines Act (Laws of the Federation of Nigeria. No. 24 of 1965)*
[292] *Petroleum (Drilling and Production) Regulations. (Laws of the Federation of Nigeria. No. 69 of 1969)*
[293] *Environmental Impact Assessment Act (Cap E12 Laws of the Federation of Nigeria 2004)*
[294] *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, (Laws of the Federation of Nigeria. No. 25 of 2007).*
[295] *National Oil Spill Detection and Response Agency Act, 2006 (Laws of the Federal Republic of Nigeria. No. 15 of 2006).*
[296] *Fagbemi, S.A Ph.D. & Akpanke A.R., (2019) Environmental Litigation in Nigeria: Role of the Judiciary. African Journal Online. p.27*

[297] *Such as the The Companies and Allied Matters Act 2020, which prescribes methods of operations for companies and their subsidiaries in Nigeria.*
[298] *Ibid. 291 above*
[299] *Fung, M. (2006) The Right to a healthy environment: Core obligations under the international covenant of Economic, Social and Cultural Rights. Williamette Journal of International Law and Dispute Resolutions. p.98*

recognition of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health including all aspects of environmental and industrial hygiene (Art.12).

However, the Committee on Economic, Social and Cultural Rights (CESCR) which is the implementing body of the ICESCR explains the relationship between the right to health under Article 12 and the provision of a healthy environment. It noted that the right to health is not exclusive to the provision timely and appropriate health care but also factors affecting human health such as; clean and portable water, thorough sanitation, food security, housing, healthy environmental conditions, access to health education, including sexual and reproductive health.[300] Therefore, the ICESCR promotes the right to a healthy environment.

The right to health depends on a sustainable healthy environment. For example, contaminated water, polluted air, exposure to toxic waste are environmental issues which inflicts diseases on human health.[301] States hesitate to enforce human right to health when it is linked to environmental rights because it establishes an affirmative duty on the State to provide environmental protection.[302] The CESCR in adopted General Comment No. 14 has identified the right to a healthy environment as panacea to the enjoyment of right to health. Also, a Special Rapporteur was appointed by the United Nations Commission on Human Rights to study the relationship between health and environment.[303] The Special Rapporteur agreed with the CESCR that the right to health includes the right to environmental protections such clean water and proper sanitation. Therefore, although the right to a healthy environment is not listed as one of the human rights under the ICESCR, its inclusion is implied from the findings of the CESCR and Special Rapporteur.

The obligation of the State to recognize and enforce the right to a healthy environment under the ICESCR was emphasized by the African Commission on Human and People's Right in the case between *SERAC v. Nigeria.*[304] In this case, toxic waste from oil exploration spillage into

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[300] *CESCR General Comment No. 14 (2000); General Audrey R. Chapman & Sage Russell, Core Obligations: Building a framework for Economic, Social and Cultural Rights (Audrey Chapman & Sage Russell eds, 2002).*
[301] *Herman Koren, Handbook of Environmental Health and Safety: Principles and Practices,*
[302] *Ibid, p.104*
[303] *Ibid, p.98*
[304] *SERAC v. Nigeria, Case No. ACHPR/COMM/A0441/1 (African Commission on Human and People's Rights. May 27, 2002).*

communities in Ogoniland – a region in the Southern part of Nigeria. The air, water, and soil were contaminated causing severe health problems including cancer, skin infections, respiratory ailments, and reproductive disorder. The Commission noted that Article 12 of the ICESCR requires States to take steps as shall be necessary for environmental and industrial hygiene.

The Covenant fails to define the scope or extent of the individual's right to a healthy environment. It however provides for "progressive realization" which is emphasized under Article 2(1) as the obligation of States to "only take steps, individually, and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". The Covenant does not provide any guidance for the determination of State's "maximum available resource". The ICESCR envisaged that sometimes States are assumed to have sufficient resources when they do not. However, the danger is that a State may claim that it has limited resources to enforce citizen's right to a healthy environment.[305] Therefore, the rights under the ICESCR are limited by the principle of progressive realization. Thus, the way forward is to identify the minimum core obligations of States.[306] The minimum core obligations of States in enforcing the people's right to health is to address environmental issues affecting human health. These may be categorized into three core State obligations namely, *Respect, Protect, and Fulfil.*

Obligation to respect, protect and fulfil

Under obligation to respect, States are required to refrain from the direct or indirect interference with the people's right to health. An obligation to protect means that the State is expected to adopt measures that prevents third parties from interfering with the enjoyment of the right to human health guaranteed under Article 12 of the ICESCR. Finally, the obligation to fulfil requires the State to take legislative, judicial, administrative, and budgetary steps towards the full

[305] *Raj Kumar C., (2004) International Human Rights Perspectives on the Fundamental Right to Education – Integration of Human Rights and Human Development in the Indian Constitution 12 Tulane Journal of International and Comparative Law. p.240*

[306] *Melissa Fung, (2006) The Right to a healthy environment: Core obligation under International Covenant of Economic, Social and Cultural Rights. Williamette Journal of International Law and Dispute and Resolution. 14(1) p.97.*

realization of the right to health. Unlike the progressive realization principle which targets future actualization, these core obligations are immediate minimum requirements.

State's obligation to respect posits a negative duty[307] that requires State to refrain from interfering with the rights of the people to freely dispose of their ''natural wealth and resources" as encapsulated in Article 1(2) of the Covenant. The obligation to respect is cost-free as the States is not obliged to use its resources to satisfy the environmental needs of an individual or the people referred under Article 1(2).[308] This obligation prohibits the State from interference with individual or community resources through the execution, sponsorship or approval of practices, policies, or any other legal steps. For example, a State is prohibited from evicting people from their homes; prohibited from encouraging activities that may result in environmental pollution, prohibited from repealing a legislation that guarantees access to safe and adequate water or enacting legislations that restricts access to water. In other words, a State would be in violation of its obligation to respect where introduce legislation that deprives individuals of their right to health or a healthy environment.[309] A State may be compelled to remove any restrictions that prevent individual from enjoying their right to a healthy environment.[310] Although, this is not part of a negative obligations under the ICESCR, it is nevertheless constitutes a cost-free domestic obligation of the State to respect the people's right to a healthy environment.

State's obligation to protect indicates a positive duty to prevent third parties such as individuals, corporation or other stakeholders from interfering with the rights of individuals to a healthy environment. The interference of third parties may be for political, social or economic purposes. For example, exploration activities by oil and gas industries which results in air and water pollution in urban or rural communities. Therefore, some of the positive duty required of States includes adopting legislations binding on corporations that guarantees individual's right to health, building infrastructures, and creating cooperate and social awareness on health-related

[307] *Coomans F,. (2003) The Ogoni Case Before the African Commission and Peoples' Rights. 52 International and Comparative Quarterly Law. p.752.*
[308] *Ida Elizabeth Koch, (2005) Dichotomies, Trichotomies or Waves of Duties? 5 Human Rights Law Review, p.81*
[309] *Alicia Ely Yamin, (2003) Not Just a Tragedy: Access to Medications as Right under International Law. 2 Boston University International Law Journal. p.353*
[310] *Nsongurua J. Udombana, (2004) Between Promise and Performance: Revisiting States obligation under the African Human Rights Charter, 40 Standford Journal of international Law, p.105*

matters.[311] The State is equally expected to monitor the activities of third parties in ensuring a healthy environmental for individuals and communities. In other words, a State would be in violation of its duty where if fails to regulate the activities of corporations and other non-State actors towards the protection of the environment. Therefore, the State obligation protect is not always cost-free except where it declares illegal a domestic law violating the enjoyment of the right to health.

State's obligation to fulfil is closely related to the obligation to protect but requires the State to adopt positive measures toward the enjoyment of a right to healthy environment. This involves long-term plans which shows progress towards the full realization of such rights. States are responsible for the cost of implementing measures towards the attainment of the rights. The States' obligation to fulfil is divided into three responsibilities namely, facilitate, promote and provide. An example of responsibility to facilitate would mean adopting positive measures to enable individuals and community access to water.[312] Responsibility to promote mean ensuring education on use of water in a hygienic manner, protection of water sources and minimize its wastage. The obligation to provide would for example require the State to adopt legislation such as water policy to protect the right to adequate water supply. The obligation to fulfil is supported under Article 2 of the ICESCR which requires State to take steps "by all appropriate means, including particularly the adoption of legislative measures". It is argued that implementation of the obligations to protect and fulfil should not require States to spend money as they are considered core minimum obligations.

Another major criticism with the ICESCR is that not every State has signed the Covenant. For example, the United States which is one of the best economies in the globe and has large amounts of subsidiary corporations across many countries. This implies that the United States does not respect or protect human rights at home and would be unwilling to hold accountable its subsidiary corporations domiciled in other countries.[313]

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[311] Zenon Stavrindes, (1999) Human Rights Obligations Under the United Nations Charter, 3 International Law Journal of Human Rights, p.43

[312] Michael Dennis & David Stewart, (2004) Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health? Amsterdam Journal of International Law. p.98

[313] Aaronson, S.; and Higham, I. (2013). Re-righting business: John ruggie and the struggle to develop international human rights standards for transnational firms. Human Rights Quarterly, 35(2), p.333.

3.2.2 The 1972 Stockholm Declaration

The Stockholm Declaration is also referred to as the Declaration of the United Nations on the Human Environment. It was the first major attempt at addressing global impact of human activities on the environment[314]. The Declaration comprises of a comprehensive environmental policy than normative goals. The Conference which witnessed the participation of 113 countries[315] was considered a significant progress particularly as it led to the establishment of several environmental conventions on water pollution, ocean dumping, international trading of flora and fauna and the United Nations on Environmental Programme (UNEP).

The Conference and the Declaration has been beneficial to both developing and developed countries. The Declaration identifies under-development as the cause of environmental damage in developing countries.[316] Therefore, it encourages governments of developing countries to promote development in the provision adequate food, shelter, clothing, education and health care. However, not every environmental problem in developing countries is linked to under-development. Some environmental issues are products of industrialization and technological development. For example, most corporation oil spills in Nigeria is associated with the negligent extraction process of the corporation concerned.

The Convention encapsulate both positive and negative obligation. Most provision under the Declaration evince position obligations. However, Principle 11 which creates a negative obligation provides that States should not develop environmental policies that would pose risk to the present and future development of developing countries. Nevertheless, a major weakness with the Declaration is its non-binding effect on States. This presents the document as a set of norms having no means of enforcement. Also, the Declaration appear as black letter as it does not provide practical solution on how the State and other relevant stakeholders can undertake the positive and negative obligations under the Declaration.

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[314] *Manulak, M. W. (2015). Multilateral solutions to bilateral problems: The 1972 stockholm conference and canadian foreign environmental policy. International Journal: Canada's Journal of Global Policy Analysis, 70(1), p.15*

[315] *Ibid.*

[316] *Paragraph 4 of the Proclamation to the Declaration of the United Nations Conference on the Human Environment.*

3.2.3 The 1992 Rio Declaration

The aftermath of the Stockholm Declaration accompanied disruptive protest from various stakeholder groups.[317] However, the protest adopted an approach of bearing witness to a global regime necessary for environmental protection and development. Therefore, to strengthen the international field of environmental protection, the Rio Declaration was introduced as the second most crucial step in the field of environmental protection. It is also referred to as the Declaration of the United Nations Conference on Environment and Development.[318] A distinctive feature with the Declaration was the adoption of environmental protection measures towards economic and social development otherwise referred to as "a compromise between ecocentric and anthropocentric approaches to nature conservation".[319]

Prior to the 1992 Declaration, developing countries challenged developed countries by protesting, against the establishment of environmental laws which were unconnected to economic growth.[320] They were committed to fighting poverty and as much as ensuring environmental sustainability. They viewed an exclusive environmental law as a form of green imperialism. As former Indian Prime Minister Indira Gandhi argued, poverty is the worst form of pollution.[321] In the Tuna-Dolphin case adjudicated by the General Agreement on Tariffs and Trade (GATT) Panel, Mexico instituted a complaint against the United States for restricting the import of Mexican Tuna which violation of the underlying objective of free trade under the Agreement.[322] United States' argued that the import restrictions were necessary to prevent the use of unsafe fishing methods by Mexican fleets which killed dolphins during their operation thereby violating the U.S environmental law.[323] The Panel faulted the argument of the United States and upheld the ultimate objective of free trade promoted under the GATT. According to the Panel, GATT rules did not permit unilateral trade action for the purpose of trying to enforce its own

[317] *Death, C. (2015). Disrupting global governance: Protest at environmental conferences from 1972 to 2012. Global Governance, 21(4), p.584*
[318] *Rio Declaration on Environment and Development (A/CONF.151/26, vol. I) and Agenda 21 (A/CONF.151/26, vol. II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.*
[319] *Francioni, F. (2016). From Rio to Paris: What Is Left of the 1992 Declaration on Environment and Development. Intercultural Human Rights Law Review, p.17.*
[320] *Ibid, p.17*
[321] *Death, C. (2015). p.583*
[322] *U.S. Restrictions on Imports of Tuna, 30 ILM (1991) 1594.*
[323] *Mexico etc versus US: 'tuna-dolphin' Not adopted, circulated on 3 September 1991. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm> accessed: 21/3/2020*

national laws in another country even where it is aimed at protecting fauna or natural resources.[324] The decision of the Panel was widely criticized for giving no consideration to conservation policies such as protecting the dolphins. However, developing countries appraised the Panel's decision.[325] This was not because developing countries were satisfied with environmental hazardous process or endangering natural species, but they viewed U.S environmental law as a form of green imperialism.[326]

Principle 1 of the Declaration states that "Human beings are at the center of concerns for sustainable development and are entitled to a healthy and productive life in harmony with nature".[327] This provision establishes a relationship between human beings and their environment. It explains that preservation of the environment is the pathway for human beings to achieve sustainability which includes quality health and productivity. This indicates a balance between the anthropocentric and ecocentric approach. Principle 4 made this more explicit by stating environmental protection is an integral part of development process. This means that protecting the environment is not development but a process. The results of such process such as quality air, water, land, aquatic and terrestrial inhabitants constitute the development envisaged under the Declaration. It is my view that environmental protection as a process of development is not undertaken solely for human satisfaction. It is also essential for development and preservation of nature.

Principle 7 provides for the concept of common but differentiated responsibilities which states thus: *"In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."* This means that the responsibilities of States in achieving the common goal of environmental protection is different. The difference in responsibilities is due to the different capabilities of individual States. For example, developed countries would implore advanced technologies and funds towards global sustainable development. This is

[324] *Ibid*
[325] *Francioni, F. (2016).p.17.*
[326] *Ibid*
[327] *Supra (n20)*

contrary to the polluter pays principle provided under Principle 16 particularly where it was not the developed country that perpetrated the harm. Also, it is my view that the differentiated responsibilities is as a result of the various forms of environmental degradation in the State concerned. For example, Canada and Nigeria have greater responsibility in eradicating marine pollution as opposed to refuge dumping which is peculiar to Ivory Coast. However, a major criticism is that it shifts liability and responsibility from the perpetrator to the victims which may be considered unfair. Nevertheless, the concept aims to set environmental standards applicable to State parties or between developed and developing countries in a way that complements each other.[328]

This principle has been manifested in existing environmental regulations such as the 1997 Kyoto Protocol on climate change. It separates the environmental responsibility between developed and developing countries but in an unconventional manner. It noted that developed countries have the responsibility of reducing the emission of greenhouse gases resulting from exploration and high consumption of non-renewable energy.[329] Developing countries only need to report greenhouse gas emissions.[330] Although, the Protocol is based in the principle of common but differentiated responsibilities, its approach is different from that envisaged under the Rio Declaration which determines responsibility on the basis of a country having adequate funds and technology. The Kyoto Protocol does not justify the basis of imposing the responsibility of reducing emission on developed countries, but I would argue this is as a result of the historical involvement of developed countries in high level of greenhouse gas emission.

Principle 11 encourages States to promulgate environmental laws. These laws are expected to set standards that does not impose arbitrary economic and social cost on other countries. A similar provision is reflected under Principle 12 which prohibits States from establishing trade policies for environmental protection but likely to pose unfair discrimination or restrict international trade. This reflects a potential conflict between domestic and international law. For example, the United States restriction on the importation of Tuna from Mexico because its production process

[328] *Policy brief and proposals: common but differentiated responsibilities. Available at: file:///C:/Users/HP/Downloads/1111_920_cbdr%20paper%20for%20OWG%20112113.pdf> accessed: 22/3/2020*
[329] *Supra (n20) Principle 7*
[330] *Ibid*

did not meet U.S environmental standards contravenes trade liberalization objective of the World Trade Organization (WTO).[331] In addition to Principle 12, States are prohibited from adopting unilateral trade measures addressing environmental issues outside an importing country. For example, the United State in enforcing its Marine Mammal Protection Act placed an embargo on countries in the Tuna supply chain.[332] The countries are as follows: Canada, Colombia, Costa Rica, Italy, Japan, Republic of Korea, Spain, the Netherlands Antilles, United Kingdom and members of the Association of Southeast Asian Nations.[333]

Principles 11 and 12 theoretically addresses the motive of green imperialism by developed countries as observed in the *Tuna-Dolphin case* analyzed earlier. However, Principle 11 does not stipulate a measurement for fair economic and social cost which may be borne by developing countries undertaking environmental operations in other territories. It is my view that Principle 12 contradicts the environmental protection objective under the Stockholm Declaration by prioritizing international trade as examined in the *Tuna-Dolphin case*. Therefore, in order to strike a balance country should show that an environmental protection measure is necessary for sustainable development such as economic growth and international trade. For example, the United States may prove that the Dolphins killed during the production of Tuna are sources of food, trade or export commodities. It should be noted that unlike the Stockholm Declaration, the Rio Declaration advocates for both human and environmental development. Thus, Principle 8 encourages States to eliminate patterns of production and consumption that are unsustainable.

Principle 10 creates rights and obligation for citizens in the management of environmental issues. The government is required to provide citizens access to information on the environment, participation in decision making process and right of access to justice and remedy. Citizens are one of the most important stakeholders in environmental management chain and this is because they are the primary victims of most environmental degradation. Public participation in environmental decision making is the operation of a democratic system in a State. However,

[331] *Mexico etc versus US: 'tuna-dolphin' Not adopted, circulated on 3 September 1991. Available at: <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm> accessed: 21/3/2020*
[332] *Ibid*
[333] *Ibid*

State officials may be reluctant to implement the opinions of unprofessional participants.[334] It is contended that compared to expert staff, citizen participation does not provide any reasonable information that aid government assessment of the environment[335] The State can work to resolve this obstacle by ensuring that citizens have all the information necessary for a productive environmental reporting and decision-making process. Lay citizen participants present their opinion as a story which is still useful to professional participants. Usually, professionals would interpret and edit in writing the reports of lay citizen participants.[336] Citizens affected by environmental hazards may sue perpetrators before a competent court of jurisdiction and seek remedy, damages or both. In cases of environmental violations by MNCs, citizens institute legal actions in their homes State.

Principle 15 encourages States to adopt a precautionary approach in protection of the environment. This means that the State must avoid environmental hazardous activities. The Declaration does not use the term "*principle*'' as adopted under Article 191 of the Treaty on the Functioning of the European Union. The Treaty narrowly defines precautionary principle as the prevention of environment hazards that cannot be remedied.[337] The precautionary principle is defined as taking remedial steps after threat of serious damage to the environment has been identified.[338] Therefore, it is not limited to the prevention of a damage which aims to alleviate the impact of an identified risk.[339] In order words, the precautionary principle undertakes more of a remedial than a preventive approach. However, scientific uncertainty could pose a challenge to the application of a precautionary approach.[340] Nevertheless, this should not be a reason for delaying the adoption of cost-effective measures for the prevention of environmental degradation.[341]

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[334] *Mihaly, M. (2009) Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions through Partnership with Experts and Agents. Pace Environment Law Review. 27(1) p.157*
[335] *Ibid, p.160*
[336] *Ibid*
[337] *Treaty on the Functioning of the European Union, art. 191, 2, Mar. 25, 1957, 2012 O.J. (C 326) 1.*
[338] *Renik, D. (2003) Is the precautionary principle unscientific? Studies in History and Philosophy of Science Part C: Studies in History and Philosophy of Biological and Biomedical Sciences. 34(2) p.329*
[339] *Kerry Bowan & Yousef Manialawy, Ethics, Communities and Climate Resilience in Zinta Zommers & Keith Alverson (eds) Resilience: The Science of Adaptation to Climate Change. (Elsevier, 2018) p.*
[340] *Ibid*
[341] *Rio Declaration, supra note 1, at Principle 15*.

Principle 17-23 outlines the procedures of environmental impact assessment that should be adopted by the State.

The Rio Declaration has a normative impact on today's environment law and its application. This means that the Declaration has led into the proliferation of new norms. For example, Principle 1 of the Declaration motivated the drafting of the 1994 WTO Agreement[342]. The Preamble to the WTO Agreement noted thus: "the optimal use of the world's resources in accordance with the objective of sustainable development seeking both to protect and to preserve the environment".[343] It is observed that legal instruments establish a relationship between economic growth and environmental protection which equals sustainable development. The principle of common but difference responsibilities (CBDR) under Principle 7 is equally reflected under Article 3 of the United Nations Convention on Climate Change (UNCC), Persistent Organic Pollutant Convention (POP), and the Minamata Convention on Mercury. The POP Convention requires developed countries to provide new measures and financial resources to eliminate production and use of persistent organic pollutants, disposal of POP in an environmentally friendly manner.[344] The Minamata Convention control the anthropogenic interference with mercury lead to adverse effects on human health and the environment. The principle of CBDR is found in the fourth paragraph of the preamble to the Minamata Convention.

Principle 10 on citizens' participation inspired the establishment of Aarhus Convention.[345] Principle 13 has introduced several environmental liability frameworks such as the liability regimes established under Annex VI of the 1991 Madrid Protocol on Environmental Protection to the Antarctic treaty,[346] Protocol on Liability and Compensation under the Basel Convention on Trans-boundary movement of hazardous waste.[347]

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[342] *Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154.*

[343] *ibid*
[344] *Article 12(3) of the Stockholm Convention on Persistent Organic Pollutants 2004*
[345] *Convention on Access to Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, 25th June 1998.*
[346] *Protocol on Environmental Protection to the Antarctic treaty 1991*
[347] *The Basel Protocol on Liability and Compensation adopted on 10th December 2009*

Finally, the Rio and Stockholm Declaration pioneered a liability, remedy and compensation regime in respect of environmental damage. However, while the Stockholm Declaration creates such regime for national governments, the Rio Declaration under Principle 13 creates an obligation for both national and international governments in this regard. Also, respective States shy away from this responsibility and have diverted accountability to the private sector. Both the Stockholm and Rio declaration establish responsibility for States to prevent the occurrence of environmental damage beyond their borders.[348] Both the Stockholm and Rio Declaration fosters a relationship between environment and development. Developed countries essentially focused on the environment but conceded on the inclusion of human development heavily initiated by developing countries. Thus, Principle 8 of the Stockholm Declaration emphasize on environmental and social development and Principle 3 of the Rio Declaration highlights on the right to development. Both Declaration, reflects customary international law and intended to shape future normative environmental practices.

Overall, the Rio Declaration has succinctly created a tremendous impact on environmental protection. One of the most important provisions of the Declaration is its emphasis on sustainable development which it defines under Principle 1 as the provision of a "healthy and productive life in harmony with nature".[349] However, the non-binding nature of the Declaration and most of the environmental laws has attracted criticism on their effectiveness.

3.2.5 United Nations Declaration on the rights of indigenous people.

Indigenous people in some States across the globe do not have the exclusive right to own or use land which they have possessed since its origin, except without the authorization of the government.[350] However, the United Nations Department of Economic and Social Affairs, advocates for the rights of indigenous people to own land with or without the consent of the government. The UN proclaimed that "Indigenous Peoples are inheritors and practitioners of

[348] *Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.*
[349] *Supra (n20) Principle 1*
[350] *McGregor, D., Whitaker, S., & Sritharan, M. (2020). Indigenous environmental justice and sustainability. Current Opinion in Environmental Sustainability, 43, p.38.*

unique cultures and ways of relating to people and the environment".[351] It defines indigenous people as communities, people and nations who have retained social, cultural, economic and political characteristics with pre-invasion and pre-colonial societies that are distinct from those of the dominant societies in which they live.[352] Despite their cultural differences, Indigenous Peoples from around the world share common problems related to the protection of their rights as distinct peoples"[353].

The Preamble of the Declaration provides indigenous people a right to their lands, territories and resources.[354] However, UNDRIP does not emphasize on the right to protect the lands of the indigenous people from harm. The right to land is different from the right to a clean land or environment in the sense that while the former deals with ownership, the latter focuses on the safety of the land. For example, a corporation may cause harm to an indigenous environment without claiming ownership of the land. In fact, in some cases, a corporation may seek the permission of the indigenes to carry out its operation on their land and yet cause hazard. This is also the case even where the corporation assure the indigenes of a clean and safe operation.

Another provision of the Declaration is the right of indigenous to control the development of their lands, territories and resources. Thus, Article 18 allows indigenous people to participate in decision making relating to the economic and cultural development of their land. The Declaration believes that this right is necessary to strengthen the institution, culture and traditions of indigenous people. In a situation where indigenous people control the activities of corporations within its locality, certain environmental hazards would be avoided. The people would be able to continue their tradition fishing and farming occupation because their waters and are not polluted by crude oil from the exploration activities of oil and gas operations. However, indigenes would need to have the required skill and knowledge to determine when a particular development would pose risk to their environment. Thus, indigenes must carefully conduct and

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[351] United Nations Department of Economic and Social Affairs, Indigenous People. Available at: <https://www.un.org/development/desa/indigenouspeoples/about-us.html> accessed: 22/3/2021

[352] United Nations Declaration on the Rights of Indigenous People. A manual for National Human Right Institutions. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> accessed: 22/1/2021, p.6

[353] Ibid, p.6

[354] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <https://www.refworld.org/docid/471355a82.html> accessed: 23/9/2021

examine a prior environment impact assessment and organize a monitoring team. Also, there is the likelihood of corruption between key community stakeholders and the corporation who are rather motivated by the personal interest than ensuring a clean environment for the community. An independent but expert monitoring team could be established to ensure robust compliance with environmental standards.

In conclusion, the UNDRIP recognizes the rights of indigenous people to determine their own economic and cultural development. This means that indigenous people can prohibits a corporation from exercising economic related activities on its land or within its territory whether the purpose of such restriction is for the protection of the environment from harm. Nevertheless, a criticism of the UNDRIP is its focus on self-determination, i.e., ownership of the land rather than protection of the land from hazardous practices. Another major criticism is that the Declaration only creates a set of obligations for State and is neither binding on States nor corporation.

3.2.6 Articles on the Responsibility of States for Internationally Wrongful Act

The International Law Commission (ILC) formulated the Draft Articles on the Responsibility of States for Internationally Wrongful Act (DARSIWA) following a debate by governments of over 50 states.[355] In 2001, the text was unanimously endorsed by the UN General Assembly at its 53rd session. The Draft Articles comprises of eight (8) main objectives which are outlined in Paragraph 3 of its General Commentary.[356] This chapter focuses on the second objective of the Draft Articles stated in Paragraph 3(b): "Determining circumstances in which conduct is to be attributed to the state as a subject of international law". The general rule of state responsibility is provided under Article 4 which states that, *the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the*

[355] *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.html> accessed: 12/7/2021 [hereafter referred to as DARSIWA]*
[356] *The 2001 Articles on Responsibility of States for Internationally Wrongful Acts 53 UN GAOR Supp (No 10) at 43; UN Doc A/56/83/2001*

State.[357] According to the ARSIWA, what constitutes an organ of the State is left to be determined by national law and not within the purview of the international law.[358] By virtue of the Companies and Allied Matters Act of Nigeria, corporations operating in Nigeria are a separate legal entity and are not organs of the State.[359]

In addition, ARSIWA specifically precludes the attribution of corporate conduct to the State either by reason of nationality or habitual residence of the corporation in the State.[360] The purpose is to recognize the autonomy of individuals for the responsibility of their own conduct. In the case of Nicaragua, the International Court of Justice (ICJ) established a threshold in which the actions of non-state entities can be attributed to the State.[361] The Court held that the conduct of persons or entities who are not state organs may be attributed to the state where such person or entity is completely dependent on the state.[362] The ICJ maintained this position in the Bosnia Genocide case.[363] However, the decisions of the Court in these cases were only applicable to armed groups and not MNCs.

Nevertheless, Article 5 of ARSIWA provides that actions of private persons or entities who are not organs of the State may be attributed to the State if such conduct was approved under a law in the State or as Article 8 provides: under the direction, instigation or control of the State or any of the State organs.[364] Article 5 defines 'entities' to include private companies exercising duties of a public nature which ordinarily should be executed by State organs.[365] It will difficult to hold oil and gas MNCs operating in Nigeria under this provision because oil and gas exploration activities in the country are largely operated by private companies. The purport of Article 8 in the case of MNCs can be examined from two perspectives. First, it implies that the home state through any of its organs may be held accountable if there is a clear link between the State's assistance to a parent company or subsidiary and the international wrongful act. The second instance is where the host state through any of its organs is held accountable for assisting a

[357] *Ibid, Article 4*
[358] *Ibid, Chapter 2, Paragraph 6*
[359] *Companies and Allied Matters Act CAP C20, 2020. Laws of the Federation of Nigeria.*
[360] *Ibid, Chapter 2, Paragraph 2*
[361] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Judgment) ICJ Reports 1986, 14*
[362] *Ibid*
[363] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) ICJ Reports 2007, 43*
[364] *Ibid, Chapter 2, para 2; Article 5 and 8*
[365] *Ibid, Article 5.*

parent company or its subsidiary in perpetrating a wrongful act. In addition to the element of direction control, ARSIWA and decisions of the International Centre for the Settlement of Investment Disputes (ICSID) show that State-owned corporation may be viewed as state organs and therefore their conduct could be attributed to the State.[366]

There is only one notable incident in Nigeria where a foreign country sponsored its domestic oil corporation to dump toxic oil waste in a rural community in Nigeria. This is popular known as the case of Koko toxic waste dump by a corporation which was under the control of the Italian government.[367] On the other hand, oil and gas spills by MNCs operating in Nigeria can barely be attributed to the Nigerian government because the latter do not direct these corporations to perpetrate such environmental hazards. As discussed in the latter part of this Chapter, the Nigerian government rather establishes environmental legislations for corporations to adopt preventive measures against oil and gas spills. The Nigerian government through its Ministry of Petroleum Resources only go as far as granting oil and mining license to corporations incorporated in Nigeria and meets the criteria for such exploration and production activity.[368] However, there are a few instances where the Nigerian government thorough the use of military forces has directed oil and gas corporations (non-State owned) in the violation of their human rights in a bid forcefully explore for oil in rural communities. This was the case alleged in *Kiobel v. Royal Dutch Petroleum Co,*[369] which I discussed in greater detail in Chapter 3.

In *Kiobel,* the claimants alleged that the Nigeria government had in the 1990s supported the corporation with armed forces in the destruction of lives and property in their community in order to forcefully engage in the exploration and production of oil in the community. The claimants instituted the suit before the U.S District Court and argued that the actions of both the Nigerian government and the corporation violated their rights under customary international law including the right to life, property and constituted unlawful arrest, crimes against humanity and inhuman and degrading treatment. The court dismissed their claims on the grounds that

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[366] *Article 8, Paragraph 6 of DARSIWA; Salini Costruttori S.P.A. v. Morocco, ICSID Case No. ARB/00/04, Decision on Jurisdiction, 32 (July 23, 2001); Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka, ICSID Case No ARB/09/02, Award, Violation of Treaty (Oct. 31, 2012). See also. Lee, J. (2015) State Responsibility and Government-Affiliated Entities in International Economic Law, Journal of World Trade 49(1) p.149*

[367] *Eguh, E.C., (1997) Regulations of Transboundary Movement of Hazardous Wastes: Lessons from Koko. African Journal of International and Comparative Law, 9(1), p. 135*

[368] *Section 2 of the Petroleum Act, (Cap. 350) 1969 Laws of the Federation of Nigeria (LFN)*

[369] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)*

customary international law does not give sufficient precision on determining the alleged violation. Unfortunately, the claimants did not raise the issue of state responsibility and had it done so, the court may have at least held the Nigerian government accountable even though the provisions of DARSIWA is not binding on States.

In another event which occurred in the South-South region of Nigerian in 1999, the Nigerian government deployed members of the armed forces to participate in the massacre of the indigenous people of Odi community, forcefully taking over their rights to oil resources in the region.[370] In 2013, the Federal High Court in Nigeria held the government accountable for gross breach of fundamental human rights and ordered the government to pay compensation in the sum over thirty-five billion Naira (equivalent to £62 million) to the affected community. In 2013, the matter was settled out of court as the government agreed to pay the community fifteen billion Naira (equivalent to £26 million)[371].

Although corporations may not be subject to the provision of ARSIWA, the actions of the military forces in violating the fundamental human rights of indigenous people of Nigerian communities may be attributed to the State. The military as envisaged under ARSIWA is an organ of the state which even if independent under national law, they hold a designated responsibility in exercising public functions or public power.[372] Unfortunately, in Nigeria, the police and military are not independent but controlled by the President or its executive arm of government. The Nigerian state would also be held accountable if the corporation was state-owned[373] but this was not the case in *Kiobel* or Odi Massacre. Notwithstanding, oil and gas spills by MNCs authorized by the Nigeria military or any other organ of the State is attributed to the State.

3.2.7 United Nations Guiding Principles on Business and Human Rights

Since the 1970s, there have been numerous attempts to establish an international legal binding treaty to regulate corporations. Previous legislative initiatives can be traced to the various

[370] *Onuegbulam, C. (2018) Restorative Justice Intervention in the Repression of Crime in Oil and Gas Production in Nigeria. Nnamdi Azikiwe University Journal of International Law and Jurisprudence, 9(2) p. 167*
[371] *ibid*
[372] *Chapter 2, Paragraph 6 of DARSIWA*
[373] *Article 8, Paragraph 6 of DARSIWA*

initiatives of the OECD and more recently the UN Guiding Principles (GPs) on Business and Human Rights proposed by Professor John Ruggie – Special Representative of the former UN Secretary General. The GPs is the first corporate responsibility framework endorsed by the United Nations.

In 2005, former UN Secretary General Kofi Annan appointed John Ruggie as Special Representative on human rights and transnational corporations and other business enterprises. In 2008, Ruggie developed a framework for policy makers to protect human rights and for businesses to respect human rights. On the 16th of June 2011, the United Nations Human Rights Council endorsed the Guiding Principle on Business and Human Rights: Protect, Respect and Remedy framework. However, he encountered certain challenges in the process such as; such as established principles that would suit the different specialization of diverse industries, having corporations who were ignorant of the adverse impact of their activities on human rights and the idea that human rights protection is an obligation exclusive to States. Also, it is difficult hold multinational corporations accountable for human rights violations considering their large number of subsidiaries and suppliers across the globe. Further, corporations have different cultural approach and relationship towards human rights.

The Guiding Principles embodies a polycentric governance.[374] The first is a governance system that involves the State both at domestic and international level. Second is a system which requires the participation of stakeholders. Third is a system that address corporate affairs and conduct. The GP creates an acceptable international framework for States to hold corporations accountable for human rights. It was only recently that States began to hold national corporations for human rights violations committed abroad.[375] In 2005 members of the United Nations pledged their commitment to address internal conflicts, react to violation using sanctions and commit to help States and victims in rebuilding, recovery, and reconciliation.[376] However, developed and developing countries such as China, Brazil and South Africa are still reluctant to

[374] *Ruggie, J. G., Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights, 23rd January 2015, p. 2. Available at: <http://ssrn.com/abstract=2554726> accessed 23/10/2020*

[375] *Tom Campbell, (2006) A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations, 16 Business Ethics Quarterly p.258.*

[376] *2005 World Summit Outcome, U.N. GAOR, 60th Sess., 1 138-9, U.N. Doc. A/60/L.1, available at http://www.who.int/hiv/universalaccess2010/worldsummit.pdf.*

interfere in the affairs of other States.[377] The governments of China and India are unbothered about the adverse global impact of the activities of their indigenous corporations.[378] These emerging economies have numerous corporations spread across globe and whose impact are increasingly influential.

While Ruggie was working on the development of the GPs, he conducted several surveys on the human rights practices of State governments and corporations. The survey showed that 20% of 102 corporate respondents had established human rights practices, 40% of which stated that they focused their code on rights of employees.[379] The corporations barely reflected international bill of rights on their internal policies. However, a few corporations highlighted on human rights under the Universal Declaration of Human Rights. On the issue of corporate accountability, corporation said they adopted external reporting and human rights impact assessments. A major criticism with these findings is that they are collected from a limited number of corporate respondents particularly from Asia and Latin America. On the other hand, human rights abuses were found in several sectors including extractive, manufacturing and financial. Human rights abuses in the extractive and manufacturing industry majorly focuses on environment pollution from toxic waste.

Ruggie's team sent a survey to the 192-member State of the United Nations to ascertain their response on human rights practices of corporations in their respective States.[380] Only 29 States responded to the Survey and from which only few monitored and informed corporations of their human rights responsibilities. States such as the United States, United Kingdom, Canada, France, Australia and Belgium allowed for extraterritorial jurisdiction over corporations who violate human rights abroad.[381] In other words, a corporation could be sued in its home State for human

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[377] Ben Blanchard and Ray Colitt, BRICS Urge Nonintervention in the Middle East and Northern Africa, REUTERS, 13 Apr. 2011, Available at http://www.reuters.com/article/2011/04/13/ ozatp-brics-trade-summit> accessed: 14/11/2019

[378] Kobrin, S.J. (2009) Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights, 19 Business Ethics Quarterly. p.364

[379] John Ruggie, Special Representative of the Secretary-General, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firms, Human Rights Council, 65 U.N. Doc. A/HRC/4/35/Add.3 (2007).

[380] John Ruggie, Special Representative of the Secretary-General, Human Rights Policies and Management Practices: Results from Questionnaire Surveys of Governments and Fortune Global 500 Firms, Hum. Rights. Council, 65 U.N. Doc. A/HRC/4/35/Add.3 (2007) p.3

[381] Ibid

rights abuses in a host State. Ruggie believed that international law may impose criminal punishment on corporation in the same way as national law.[382]

Obligation of States to protect

The GPs created an obligation for States to take steps to protect human rights abuses. In protecting its citizens from human rights abuses, States should adopt legislative means to promote a corporate norm which respects human rights. This can be achieved by host States providing human rights assistance and guidance to corporations domiciled in their territory; enforcement of extant domestic and international human rights laws; regulation of corporate sectors whose activities may adversely affect human rights. The GPs calls on States to directly regulate the activities of corporations which may require placing a ban on corporate activity adversely impacting human and environmental rights.

3.2.8 Responsibility of corporations to respect

On the duty of corporate responsibility to respect human rights, the GPs encourages corporations to examine the impact of their activities on human rights which although create obligation for States, remain non-binding.[383] For example, the right to access safe and portable water.[384] The right to water is an essential component of the right to life recognized under Article 3 of the Universal Declaration of Human Rights and the right to adequate standard of living under the ICESCR. Finally, States and corporations are encouraged to provide remedy to victims of human rights abuses. Remedies may be achieved through resort to a judicial mechanism or corporate mechanism.[385] Such judicial system must be accessible, transparent, legitimate, and equitable

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[382] John Ruggie, Prepared Remarks at Clifford Chance 2 (19 Feb. 2007), available at http:// www.reports-and-materials.org/Ruggie-remarks-Clifford-Chance-1 9-Feb-2007.pdf.

[383] On 28 July 2010, the UN General Assembly declared "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights." G.A. Res. 64/292, 1 1-2, U.N. Doc. A/RES/64/292 (2010).

[384] The Ceo Water Mandate, Corporate Water Disclosure Guidelines toward a common approach to Reporting Water Issues, (2012) Available at: <http://ceowatermandate.org/files/DisclosureGuidelines> accessed: 22/11/2019; Alia Karsan & Lesley Fleischman, Corporate Social Responsibility And The Human Right To Water, Available at: <http://www.hks.harvard.edu/cchrp/initiatives/ right-to water/study group/CorporateResponsibilityR2W.pdf> accessed: 22/11/2019

[385] Ibid

while corporate mechanism must involve the engagement and dialogue of all affected stakeholders.[386]

The due diligence policy requirement under the GPs comprises of four components. First, such policy must adopt human rights practices. Second, corporations should carry out impact assessment to show how it's potential and existing activities affects human rights.[387] Third, corporations should integrate human rights policies into its business objectives. This would enable all employees to be aware of their human right responsibilities. Human rights policy integration consists of three important criteria: (i) full leadership structure. This is to ensure that the activities of each business department are under the control and supervision. (ii) employee training. Employees should be training on relevant skills to conduct their activities with respect to human rights. (iii) building capacity in case of human rights risk. Capacity building requires the corporation to possess the necessary equipment, labour force. skills and funds to combat the occurrence of any human rights disaster arising from its operations. The fourth component of due diligence policy is for corporation to track the progress of its human rights obligations through monitoring, evaluation and auditing process which must be regularly updated.[388] However, the GPs does not provide for how corporations should evaluate its progress. Corporations may be unwilling to evaluate their performance for fear of the legal impact or reputational damage.[389]

Also, due diligence should apply to the company's business partners. This allows corporation may hold its affiliates accountable for human rights. For effective accountability, all relevant stakeholders should be able to monitor the performance of the corporation.[390] Therefore, Guiding Principles encourage corporation to engage in self reporting which should be publicized. The development of due diligence policies is crucial for the avoidance of human right abuses and the enforcement of human rights. It involves monitoring, evaluating and other necessary steps for the

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[386] *Ibid*
[387] *John Ruggie, Special Representative of the Secretary-General, Protect, Respect and Remedy: A Framework for Business and Human Rights, Hum. Rts. Council, 1 9, U.N. Doc. A/HRC/8/5 (2008).*
[388] *Ibid*
[389] *Institute For Human Rights And Business, The "State Of Play" Of Human Rights Due Diligence: Anticipating The Next Five Years 30 (June 2010), Available at: <http://www.ihrb.org/pdf/ The State of Play_oLHumanRightsDueDiligence.pdf> accessed: 23/10/2020*
[390] *John Ruggie, Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, 1 5, U.N. Doc. A/HRC/17/31 (2011)*

respect and protection of human rights. Without due diligent practices, corporation will be unable to fulfil the objectives of the GP in respecting human rights.

The eventual emergence of the GPs faced criticism from stakeholders such as State governments, corporations and NGOs. States were concerned about stunted economic growth in regulating business under voluntary norms particularly as this initiative has been introduced after the 2008-2009 global recession. Many corporations were reluctant to introduce additional responsibilities in a period of high unemployment rate.[391] In 2009, the United Kingdom said that it does not believe that there is a general obligation on State to protect human rights violations by corporations.[392] In 2013, several countries criticized the GPs for been a mere set of non-binding legal norms. Thus, countries such as Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador issued a statement to the United Nations stressing on the necessity of an international binding treaty to regulate multinational corporations.[393]

Corporations merely noted in their internal policy that the GPs existed but did not take steps to alter its business activities reflecting human rights.[394] According to Non-governmental organization, the voluntary initiative of the GPs does not have the required force to compel corporations to respect human rights. They anticipated an international binding treaty that would hold corporations accountable for human rights. Also, the human rights provisions under the GPs lacks clarity. For example, the GPs does not develop sector-specific human rights guidance for corporations who activities involve environmental matters such as the oil and gas industry. Human rights organizations across Europe, U.S and Africa noted that the GPs did not direct State to establish measures that would compel corporations to prioritize human rights in their

[391] *ILO, Global Employment Trends 2011: The Challenge Of a Jobs Recovery (2011), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@ dcomm/@publ/documents/publication/wcms1 50440.pdf.*
[392] *Letter from Daniel Bethlehem, Legal Advisor, Foreign and Commonwealth Office to Professor John Ruggie, Special Representative on Human Rights and Transnational Corporations and other Business Enterprises, United Nations (9 July 2009), available at http://www.reports-and-materials.org/U K-Foreign-Office-letter-to-Ruggie-9-Jul-2009.pdf.*
[393] *United Nations Human Rights, Regulating Transnational Corporations: A Duty under International Human Rights Law. Available at: <https://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf> accessed: 13/11/2019*
[394] *Special Representaive Of the United Nations Secretary-General For business & Human Rights, Applications Of The U.N. "Protect, Respect And Remedy" Framework (2011), available at: <http://www. Businesshumanrights.org/media/documents/applications-of-framework-jun-201 1.pdf> accessed: 23/10/2020*

respective trade and investment transactions.[395] Furthermore, the GPs did not establish any new obligation but only reflected existing international human rights standards. However, it is argued that this was because Ruggie was only aimed at achieving a consensus between all stakeholders on human rights standards.

The GPs fails to address the regulation of multinational corporations in host States. Host States noted that inability to regulate MNCs was due to the absence or lack of the following: an international legal framework, international monitoring body, information sharing between the host State and the home States, and uniform laws between the host State and the home State. However, the forty-seven member States of the OECD have incorporated some of the GPs on human rights and has developed Guidelines on Multinational Enterprises. The objective of the Guidelines covers environmental protection and every other aspect of human rights as it affects stakeholders. The OECD Guidelines provides for a monitoring and mediation body known as the National Contact Points. The latter part of this writing discusses the development and impact of OECD Guidelines in greater detail.

In order to implement the GPs, the UNHRC established the Working Group on Business and Human Rights. The Council called for recommendations from State, NGOs, and corporations and all relevant stakeholders.[396] The United Kingdom commenting on Principle 3 of the GPs called for Ruggie's team to stipulate that States may assist other States in the regulation of business activities in their territory.[397] However, the United Kingdom must note that such corporate regulation in the context of the GP is for the main purpose of protecting human rights. Sweden requested the working group to provide advice and recommendations on domestic laws and policies relating to business and human rights.[398] The limited response from governments shows that the States are hesitant in implementing and enforcing the GPs.

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[395] Statement by Alianza Social Continental et al. to the Human Rights Council, 17th Sess., Final Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Available at: <http://www.tni.org/sites/www.tni.org/files/ statement.pdf> accessed: 23/10/2020

[396] Submissions to Working Group, United Nations Human Rights Council, Available at: <http://www.ohrhr.org/EN/Issues/Business/Pages/Submissions.aspx> accessed: 16/10/2020

[397] Submission on Behalf of the Government of the United Kingdom of Great Britain and Northern Ireland, Available at: <http://www.ohchr.org/Documents/Issues/TransCorporations/ Submissions/States/UnitedKingdom.pdf> accessed: 22/09/2020

[398] Submission to Working Group, Ministry for Foreign Affairs of Sweden, Available at: <http:// www.ohchr.org/Documents/ssuesTransCorporations/Submissions/States/Sweden.pdf> accessed: 23/10/2020

However, some governments have taken legislative steps to curb environmental activities used to perpetrate human rights abuses. In 2010, the United States Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protect Act required American corporations to file annual reports in the Democratic Republic of Congo.[399] The report was to determine whether proceeds from minerals were used to finance armed groups responsible for perpetrating human rights abuses in Congo. The United State also required reporting on environmental issues for American corporations investing in Burma.

To conclude, while corporations may be willing to adopt the GPs, they have having challenges with understanding and implementation. Corporation with experience of human rights abuses were more motivated to develop policies to prevent and minimize risk posed to human rights. Corporations should seek to incorporate at minimum the International Bill of Rights.[400] States may need to reward corporations who comply with the GPs. Governments could issue bonus points in procurement bids to corporations that comply with the GPs, but these states must ensure that they do not discriminate among foreign and domestic corporations.[401] There may be issues as to who will decide if corporations are adhering to the GPs, and how can such performance be measured and validated? Finally, for procurement policies to serve as a sufficient incentive, the collaboration of large economies and home States to numerous MNCs such as the US, UK and the EU is required.

In order to ensure effective accountability, there is need for the GPs to be converted into an international binding treaty. This would require the re-examination of four key areas in the GPs namely: scope and content, subject, and enforcement. The scope and content mean the GPs as a treaty would need to be more specific on the types of human rights abuses. For example, murder, environmental pollution, production of substandard or defective goods, infringement on rights of privacy, poor labour conditions, etc. "A set of these kind of specific instruments is more likely to

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[399] *EU to Table Oil, Mining Transparency Bill, EuizAcriv, 4 Mar. 2011, Available at: <http:// www.euractiv.com/en/specialreport-rawmaterials/eu-table-oil-mining-transparency-billnews-502755> accessed: 20/10/2020*

[400] *Aaronson, S.; Higham, I. (2013). Re-righting business: John ruggie and the struggle to develop international human rights standards for transnational firms. Human Rights Quarterly, 35(2), p.333*

[401] *Ibid*

be adopted than a single overarching human rights framework".[402] The treaty may contain rules of *jus cogens* derived from customary international law. The treaty would contain criminal sanctions over human rights abuses caused by the commission of international crime. Access to remedy is vital consideration which the draftsmen must consider, including accompanying obstacles such as corporate structures, jurisdictional rules, procedure for claims and enforcement of judgments. Further, a proposed treaty must establish an extraterritorial obligation for States.

The "subjects" of such a proposed treaty refers to the class of people whom the treaty addresses or binding on. This would require deliberations on whether corporations are subjects of international law. Certain trade agreements and international instruments grants rights to corporation. For instance, under the European Convention on Human Rights, corporations have the right to make claims against States before the European Court of Human Rights.[403] Therefore, it is not impermissible to have an international binding laws creating obligations for corporate entities. Also, there is the issues of class of corporations will the treaty be made applicable. In order to avoid any loophole, it is important that the proposed treaty be made binding on transnational and domestic corporations. This is because a MNCs may establish an affiliate company in another State in a bid to evade human rights responsibility created by a treaty for MNCs.

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[402] Ramasastry, A., Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement, in Deva S., and Bilchitz, D. (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, (Cambridge University Press, 2013) p.35

[403] Rezai, S., and van den Muijsenbergh, W.H.A.M., Corporations and the European Convention on Human Rights, University of the Pacific, March 2011, p.47. Available at: http://www.mcgeorge.edu/Documents/Conferences/GlobeJune2012_Corporationsandthe.pdf

3.2.9 OECD Guidelines on Multinational Enterprises

The Guidelines are an annex to the OECD Declaration on International Investment and Multinational Enterprises.[404] The 2011 update is the fifth revision since the Guidelines were introduced in 1976. They cover responsible business conduct in area such as; human rights, environment, labour, disclosure, corruption, taxation and so forth. Thus, the Guidelines fully reflects the 2011 UN Guiding Principles on Business and Human Rights developed by the United Nation Special Representative on Business and Human Rights, Professor John Ruggie.[405]

Human rights abuse commonly caused by corporations includes health hazards, environmental pollution, deprivation of family life and source of livelihood as a result of environmental damage from mining, oil operations and other corporate environmental activities. Under Chapter IV of the Guidelines, businesses are encouraged to respect human rights within the international human rights obligations of countries in which they operate.[406] This also means, businesses should avoid the infringement of human rights and take steps to address adverse human rights impacts caused by their operations. Although, the OECD does not specify the human rights to be respected, it encourages business to refer to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998, International Labour Organization Declaration on Fundamental Principles and Rights at Work. The above-mentioned human rights instruments provide for the rights of indigenous people, right to healthy conditions of living, rights to food and shelter, right to a sustainable environment and so forth.

According to Guidelines, the duty to respect human rights is applicable to all corporations irrespective of their size, sector, structure, operation or ownership. The human rights duty expected of corporations is independent of the obligations of State to implement international human rights standards. Therefore, the failure of any State to implement human rights standard does not relieve corporations of their human rights duty. The Guidelines emphasizes on

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[404] OECD Guidelines for Multinational Enterprises, 2011 Edition. Available at: <www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> accessed: 11/11/2019
[405] UN General Assembly A/HRC/RES/17/4, 6 July 2011.
[406] OECD Guidelines for Multinational Enterprises, 2011 Edition. Available at: <www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> accessed: 11/11/2019

addressing human rights abuses which may take different forms such as monetary compensation to victims, and environmental clean-up. Corporations are advised have a policy committed to respecting human rights. Also, corporation are required to exercise due diligence prior to any operation which includes a thorough examination of the risk and adverse impacts of its activities. It is important such diligence is undertaken with the involvement of all relevant stakeholders likely to be affected by its operations. Furthermore, the Guidelines advise corporation to liaise with all stakeholders towards a sustainable remediation in the event of any adverse effect of its activities.

The Guidelines also introduced an implementation and dispute resolution mechanism exercised by a body known as the National Contact Point (NCP). The Guidelines requires that the NCP be established in every Member State. The NCP carry out investigations towards the settlement of disputes relating to alleged violation of the Guidelines. Although, decision of the NCP is non-binding on multinationals, they may be used by non-governmental organizations, trade unions and institutional investors to influence the behavior of the multinationals.[407] For example, an institutional investor may threaten to black-list a corporation if it fails to comply with the OECD Guidelines or decision of the NCP. Therefore, this describes the OECD as a soft law with hard consequences.[408]

However, the NCP is criticized for its government structure which does not give stakeholders a voice in its decision-making process.[409] For example, Canada NCP is exclusively comprised of government representatives. The NCP would be unable to reach a just outcome in an environmental pollution dispute which should require the participation of environmental experts having the knowledge to measure and ascertain the cause of an environmental harm. Therefore, a bipartite or multipartite structure should be encouraged under the NCP for the purpose of accountability of and transparency. Romania has a bipartite structure led by a mixture of government and business representatives. Its NCPs are comprised of both governmental and

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[407] Nieuwenkamp, R. (2013). The oecd guidelines for multinational enterprises on responsible business conduct. Dovenschmidt Quarterly, 2013(4), p.171
[408] Backer, L.C. (2009) "Rights and Accountability in Development (Raid) v Das Air and Global Witness v Afrimex: Small Steps Towards an Autonomous Transnational Legal System for the Regulation of Multinational Corporations", 10 Melbourne Journal of International Law. p.16
[409] OECD-ILO Conference on corporate social responsibility: Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalising Economy Available from: <https://www.oecd.org/daf/inv/mne/40807797.pdf> accessed: 01/11/2019

business representatives. Belgium, Denmark, Estonia, France, Luxembourg, Lithuania, Norway and Sweden possess a tripartite structure comprising of government, business and labour union. Chile, Finland has a quadripartite structure comprising of government, business, labour and NGOs. Another issue is that the government structure of the NCP may be confronted with the conflicting interest between pursuing a governmental related business development and monitoring its practices. Other challenges faced by the NCPs are lack of infrastructural facilities, funding, and qualified staff.

A major criticism of the Guidelines is that they are non-binding on multinational corporations.[410] Thus, there is the need for a comprehensive multinational treaty in order to ensure maximum adherence to human rights standards by MNCs. Although, member States have an obligation to implement the Guidelines in their respective national law, they cannot be held accountable under a particular national law because they are considered global citizens.[411]

It is my view that national implementation creates an indirect binding effect on multinational corporations. In 2009, the German enforcement authorities filed complaint against Volkswagen for increased level of pollution from its product which accounts for environmental harms caused by their automobiles.[412] Thus, it required the corporation to formulate climate protection policies, inform consumers about the climate impact these vehicles, and comply with its self-commitment to reduce emissions. In the English case of *Lubbe v. Cape Industries Ltd*,[413] the House of Lord would have allowed the MNC to be sued in South Africa (host State) but noted that legal representation for the claimants were unlikely if the suit was to be transferred to the South African courts. Also, most multinational corporations operate in countries through their subsidiaries registered in the host State. The act of registering a corporation (whether a subsidiary) under a national legal system indicates allegiance and subjectivity to the law of the State where the corporation is registered.

In addition, the Court of Appeal in the English case of *Adams v Cape Industries Plc,*[414] has held that the subsidiary company is considered a separate legal entity from its parents' company. It

[410] *Nieuwenkamp, R. (2013)., p.171*
[411] *Vendzules, S. (2010). The struggle for legitimacy in environmental standards systems: The OECD Guidelines for multinational enterprises. Colorado Journal of International Environmental Law and Policy, 21(3), p.451*
[412] *Ibid, p.484*
[413] *Lubbe v Cape Plc [2000] UKHL 41*
[414] *Adams v Cape Industries plc [1990] Ch 433*

noted that the court will lift the corporate veil where a defendant by the device of a corporate structure attempts to evade (i) limitations imposed on his conduct by law; Although the court did not specify the applicable law, its intention would most likely be international and national law (ii) such rights of relief against him as third parties already possess; and (iii) such rights of relief as third parties may in the future acquire. A third exception is where the subsidiary is a façade, i.e. a sham or cloak as established in the case of *Jones v Lipman.*[415] In contrast, the Court of Appeal in a latter case of *Chandler v. Cape*,[416] held that a parent company is liable for tortious act perpetrated by its subsidiary company. However, the Court did not exclude the subsidiary from a separate duty of care to stakeholders. Therefore, human rights victims may include both the MNCs and its subsidiary in filing an action under either the law of the host State or home State and protection of the victim is guaranteed where either of the States have implemented the OECD Guidelines.

Host States should ensure that MNCs operate through their subsidiary registered in the host State in order to be bound by national legislations which have implemented OECD Guidelines on the protection of human rights and the environment. If this is not made possible, victims of human rights abuses may still sue MNCs in the Court of the host State or home State. The Court may trigger the application of the Guidelines in holding MNCs or their subsidiary accountable for human rights. Therefore, the only drawback would be that the Guidelines have not received wide subscription from State governments. At the time of writing, only 47 countries have adopted the Guidelines.

Another form of enforcing the Guidelines among MNCs is the award of incentives. Adhering governments may implement policies that seek to award incentives to adhering MNCs. For example, the Dutch government pledged the issuance of export credits, overseas investments guarantee and inward investment promotion program to corporations who comply with the Guidelines and prepare a CSR policy that reflects the provisions of the Guidelines.[417]

3.3 Corporate Social Responsibility Policies of Multinational Corporations

[415] *Jones v Lipman [1962] 1 WLR 832*
[416] *Chandler v Cape plc [2012] EWCA Civ 525*
[417] *Organization of Economic Corporation and Development (OECD), Annual Report of the OECD Guidelines for Multinational Enterprises 2012*

Over the years, the concept and practice of Corporate Social Responsibility (CSR) has been part of the objectives of most businesses.[418] There have been various attempts to define CSR since the late 20th century.[419] CSR has different meaning and applications depending on the economic and social need of the country/community where the company operates. For example, the social responsibility of most corporations in China are usually the production of safe and high-quality goods, corporations in Germany are focused on the provision of employment opportunities, and in South Africa, CSR is particular about social development such as education and health care.[420] CSR is related to various concepts such as corporate accountability, business ethics, sustainable development, social and environmental accountability, or social investment.[421]

The European Commission in its Green Paper defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[422] It may also be defined as a concept in which companies operate in an "...economically, socially, and environmentally sustainable manner, while recognizing the interests of its stakeholders, including investors, customers, employees, business partners, local communities, the environment, and society at large.[423]

There is a clearly defined relationship between CSR and stakeholders as the latter enhances the former. The stakeholders are group of individuals which the corporations interact with and are likely to be affected by the actions and decisions of the corporations.[424] This definition is broad as it does not identify the group of individuals. However, stakeholders are usually employees, customers, creditors, local communities, the environment, government, or the public at large.[425] On the other hand, stakeholder theory is a system of stakeholders operating within the larger

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[418] Thrasyvoulou, A. (2016). Corporate social responsibility: Here to stay. Legal Issues Journal, 4(1), p.73.
[419] Carroll A. B. (1991). "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders, Business Horizons, July 1991, Vol 34(4): p.39
[420] Knox, S. (2007). "Corporate Social Responsibility and Business Decision Making" in Spiritual Motivation: New Thinking for the Business and Management, (eds. J. Ramsden, S. Aida, A. Kakabadse) Palgrave Macmillan, 147.
[421] Idowu, S.O. & Capaldi, N. & Das Gypta, L.Z.A. (2013). Encyclopedia of Corporate Social Responsibility. Springer Reference, v. p.4
[422] European Commission. (2001) 'Prompting a European Framework for Corporate Social Responsibility', Green Paper and COM 366, Brussels. At page 6 (par. 2(20-26)) Available at: <http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en0l.pdf> accessed: 10/09/2020.
[423] Dunne, S. (2007) "What is Corporate Social Responsibility?" Ephemera 7(2) p.372.
[424] Carroll, A. B. (1993). "Business society and stakeholders the business and society relationship" in 2nd ed. Business and Society: Ethics and Stakeholder Management. Cincinnati: South-Western Publishing.
[425] Ibid, p. 40

system of the host society that provides the necessary legal and market infrastructure for the firm's activities.[426] The objective of the stakeholder theory is to link the financial interest of the company with the interest of the shareholder.[427] This includes creating wealth and value for stakeholders.

It is important for corporations to consider the interest of stakeholders i.e., CSR, because corporations are based on the existence of stakeholders. For example, the employees are main contributors to increase in profit, creditors provides loan capital and supplies which boost competition.[428] Thus, where the interests of stakeholders are considered and enforced, it results in an increased long term benefits of the corporation particularly in market value[429] or profit maximization.[430] Also, CSR boost the reputation of the corporation as the stakeholders promotes their trust, loyalty and confidence in the corporation which attracts more customers and investors. Therefore, CSR is beneficial to both the society and the corporation.

Corporate Social Responsibility is a strategy that encompasses the economic, legal, ethical, and discretionary expectations of society from organizations at a given point of time.[431] The basic premise of the theory is that the operations of business firms are undertaken within the society in specific environment, known as the host community. The theory does not believe that a corporation "can do good only to help itself do well". Therefore, the mission of a company should not be restricted to the creation of profit for shareholders. Social responsibility rests upon the idea that business should be conducted with concern for the effects of business operations upon the attainment of valued social goals and companies have an obligation to consider society's long-run needs and wants, and that they engage in activities which promote benefits for society and minimize the negative effects of their actions.

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[426] Clarkson, M.B.E. (1994), "A Risk Based Model of Stakeholder Theory", The Centre for Corporate Social Performance & Ethics, University of Toronto. p. 36
[427] Ibid
[428] Ibid, p.36
[429] Jensen, M. C. (2001) 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' Journal of Applied Corporate Finance 14(8), p.246
[430] Zhao, J. (2014) The Curious case Stakeholder Theory: Calling a More Realistic Theory. International Trade and Business Law Review, p.3.
[431] Idama Oghenerobo, Corporate Social Responsibility: Assessment of Shell Petroleum Development Company of Nigeria's Compliance in Delta State 2010-2017. Department of Political Science, University of Nigeria, Nsukka. p.14

CSR centers on four valued social goals namely, philanthropic, ethical, legal and economic.[432] The philanthropic social goals consist of corporate activities towards improving quality of life. Ethical social goals is the responsibility of the company to do what is right, just and fair which includes a duty to avoid harm. Legal goals means that the company has a duty to obey the law of the society in which they operate. Economic goals mean the company should take steps towards maximizing profit.

The author considers the CSR one of the positive impacts encouraged under various investment laws as discussed in the earlier part of this Chapter. Most corporations have created a form of social responsibility policy as part of their objectives. For example, Shell Petroleum is committed towards social investment in Nigeria particularly in the areas of education, health, employment, electricity, and youth skills acquisition.[433] In the company's 2018 report on Social Investment in Nigeria, the company recorded the training of 7,072 Nigerian youths from 2003-2018, established of 20 health care facility, 8,758 secondary school grants and 5,165 university educational grants from 2011-2018.[434] The company has issued the sum of $239million equivalent to £44.36billion for community project from 2006-2018.[435] Some of the community project include; supporting Ogoni youth in the Ogoni environmental oil spills clean-up, raising the standard of living and combating crude oil theft in Ogoniland.

3.3.1 Gas Flaring Regulations.

Gas flaring is one of the most complex concerns, facing oil producing companies across the world. Gas flaring is the disposal or release of gas into the atmosphere, in most cases, when there is insufficient infrastructure to sell or use the gas.[436] It is the burning of associated gas from oil

[432] *Schwartz M. S. and Carroll, A. B. (2003). "Corporate Social Responsibility: A three-domain approach" Business Ethics Quarterly, Volume 13, Issue 4, p.504*
[433] *Shell, Communities, Available at: <https://www.shell.com.ng/sustainability/communities.html> accessed: 17/11/2019*
[434] *Shell, Available: <https://www.shell.com.ng/media/nigeria-reports-and-publications-briefing-notes/social-investment/_jcr_content/par/toptasks.stream/1554121810799/731ac545ca8fdeb89079ff34e3ea4f2dda1ca9c1/social-investment-2019.pdf> accessed: 17/11/2019*
[435] *Ibid*
[436] *Olawuyi, D. (2015) Principles of Nigerian Environmental Law; Afe Babalola University Press: Ado-Ekiti, Nigeria, p.6*

extraction into the atmosphere.[437] It is a process of oil extraction which may occur in the refineries, oil rigs, chemical plants or landfills.[438] Furthermore, apart from the ecological impact on flora and fauna, gas flaring constitutes a waste of useful resources that would otherwise be put to the dwindling energy crisis across the world, especially in developing countries[439]. The flaring of gas by Nigerian petroleum industries have contributed towards the harmful release of greenhouse gas in the environment.[440] This practice is a violation of the United Nations Convention on Climate Change 1992, and the Kyoto Protocol 1997, which seeks to alleviate the emission of carbon.[441] This has necessitated the Nigerian government to regulate associated gas disposal towards the prevention of gas flaring and mitigation of global climate change in the country. Gas flaring has damaged Niger Delta communities for over 30 years.[442] Since 1979, the Nigerian government have taken regulatory steps to prohibit gas flaring, beginning with the enactment of the Associated Gas Re-injection Act (AGRA).[443] The Associated Gas Re-Injection Act (AGRA), which was enacted to address the deficits of previous legislations in ending gas flaring in the Niger Delta, however, failed to fare any better than the previous legislations. The Act requires entities seeking to flare gas to obtain permission from the Minister of Petroleum.[444] The Minister determines the terms and conditions for gas flaring[445] and may revoke the lease or license of any holder who fail to obtain permission prior to engaging in gas flare.[446]

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[437] *Ibitoye F.I. , "Ending Natural Gas Flaring in Nigeria's Oil Fields" (2014) 7(3) Journal of sustainable Development 13-22*
[438] *Olujobi, J.O.; Olujobi, T.O. Comparative appraisals of legal and institutional framework governing gas flaring in Nigeria's upstream petroleum sector: How satisfactory? J. Environ. Qual. Manag. 2020.*
[439] *Olawuyi, D. Energy Poverty in the Middle East and North African (MENA) Region: Divergent Tales and Future Prospects. In Energy Law and Energy Justice; Guayo, I.D., Godden, L., Zillman, D.N., Montoya, M.F., Gonzalez, J.J., Eds.; Oxford University Press: Oxford, UK, 2020; pp. 254–272. [Google Scholar]*

[440] *Uremisan Afenotan, How serious is Nigeria about climate change mitigation through gas flaring regulation in the Niger Delta?.' (2022) 24(4) Environmental Law Review 288-304 at 295*

[441] *United Nations Convention on Climate Change 1992; Kyoto Protocol 1997*
[442] *'Gas Flaring in Nigeria – An Environmental Health Nightmare'. Available at: <https://foe.org/2009-05-gas-flaring-in-nigeria/> accessed: 13/2/2023*
[443] *No. 99 of 1979 (now Cap A25 Laws of the Federation of Nigeria 2004).*
[444] *ibid*
[445] *ibid*
[446] *ibid*

The Nigerian government took another regulatory step to alleviate gas flaring establishing the Flare Gas (Prevention of Waste and Pollution) Regulations 2018[447] The regulations aim to protect the environment of oil producing communities in the country including the Niger Delta region who suffer the nefarious effect of gas flaring during oil production. The regulation seeks to achieve social and economic objectives from the utilization and re-injection of gas rather than flaring which is a wastage of gas during the process of oil production. The regulation like previous enactments such as AGRA prohibits gas flaring except authorized by the Minister of Petroleum where it not feasible to re-inject or utilize the gas.[448] The Minister may suspend or revoke the lease or license of a holder who violate any provision in the regulation.[449] This discretion given to the Minister being a sole individual creates room for corruption such as permitting an entity to flare gas without adherence to environmental safety considerations.[450] Such corrupt practice would also thrive with the AGRA giving the Minister sole discretion to determine terms and condition of flaring gas,[451]

The regulation introduced a commercialization programme whereby the Federal government seize flared gas of oil corporations and transfer to third parties who are issued official permits for the proper disposal of such gas in a manner authorized by the Federal government but subject to terms stipulated in the permit. Potential permit holders undergo a competitive process as they bid for the disposal license. This commercialization strategy protects the environment from the deleterious effect of gas flaring and generates revenue for the federal government. Any entity that attempts to commercialize flared gas on its own terms without complying with the bidding process provided under the regulations shall be revoked of its certificate of gas flaring. The 2018 regulation imposes penalty on corporation who engage in gas flaring or fail to comply with the proposal disposal of flare gas. The AGRA imposed a penalty of less than half a dollar (ten naira) per 1,000 standard cubic feet of flared gas. The 2018 regulation increased the penalty to $2 per 1,000 standard cubic feet.[452] However, this current penalty remains insignificant to prevent corporation from engaging in gas flaring. Nevertheless, the Minister may suspend or revoke the

[447] *Government Notice No. 59, Gazette, (9 July 2018) No. 88, Vol. 105) B97 – 111. Came into force on July 5, 2018.*
[448] *Ibid, para 8*
[449] *Ibid, para 21*
[450] *Aye, I., & Wingate, E. O. (2019). Nigeria's Flare Gas (Prevention of Waste & Pollution) Regulations 2018. Environmental Law Review, 21(2), 119-127.*
[451] *Associated Gas (Reinjection) Act, Section 3(2)*
[452] *No. 99 of 1979 (now Cap A25 Laws of the Federation of Nigeria 2004).*

license of any non-compliant operator.[453] Meanwhile, oil producers and permit holders would not be liable for flared gas arising out of situations beyond their control such as community unrest, war or natural disasters.

The Petroleum (Drilling and Production) Regulations made pursuant to the Petroleum Decree of 1969 (now the Petroleum Act, which has been superseded by the recently enacted Petroleum Industry Act (PIA), 2021. Regulation 42 requires oil companies with oil prospecting licenses and leases to submit a viable feasibility study for associated gas utilization within five years of commencing operations. Yet, the Regulations failed to discourage gas flaring before the preparation of the feasibility regulations in Nigeria. This invariably meant that oil companies were free to flare gas, without any penalties, for five years until the feasibility study is submitted. The 2021 Petroleum Industry Act did not retain the certain powers of the Minister which were provided under the repealed Petroleum Act. Such powers include suspension or revocation of a lease or license holder for failing to comply with the Act or regulation,[454] demanding operation reports for petroleum lease or license holders,[455] keeping and inspection of records.[456]

While the Nigerian government have established several regulations, they have not been able to achieve energy justice with these policies. Gas flaring has inflicted procedural and distributive energy injustice in the sense that corporations do not consult the public before flaring associated gas.[457] Thus, oil producing communities have been exposed to environment and health hazards.[458] Insurance, security deposit, and environmental performance bonds by entities would ensure non-compliant corporations pay their penalties for anti-gas flaring violations.[459] Also, a community been a victim of environmental pollution would not be left out without a remedy. There has been rise in militancy and insurgency in vulnerable communities against corporations perpetrating gas flares.[460] These conflicts have dissuaded foreign investment in the country.[461] To mitigate environmental risk, oil and gas corporations should engage vulnerable communities in

[453] *Flare Gas (Prevention of Waste & Pollution) Regulations 2018.*
[454] *Petroleum Act 1969, s.8*
[455] *Ibid*
[456] *Ibid*
[457] *Babalola, A.A. and Olawuyi, D.S., 2022. Overcoming Regulatory Failure in the Design and Implementation of Gas Flaring Policies: The Potential and Promise of an Energy Justice Approach. Sustainability, 14(11), p.6800.*
[458] *Ibid*
[459] *Ibid*
[460] *Ibid*
[461] *Ibid*

its decision-making process relating to gas flaring. One of the barriers to alleviating gas flaring in Nigeria is the lack of recognition of human right norms in its anti-gas flaring regulations and in the issuance of oil and gas operation license.[462] Another barrier is the lack of representation for vulnerable communities who are unable to afford the high cost of litigation and inaccessibility to government records on gas flaring. Government should identify gas flaring sites, including economic, social, and cultural impact on vulnerable communities. Nigeria is yet to specific regulation to meet its zero-gas flaring commitment by 2030 under the World-Bank-led Global Gas Flaring Reduction (GGFR) program. The country did not meet its last deadline in 2008 given to the oil and gas industry to achieve zero gas flaring.

There are alternatives to gas flaring such as reinjection, liquefaction, pipeline distribution, and power utilization.[463] Developing countries have not fully utilized these alternative due to high cost of implementation, inadequate infrastructure, and lack of demand by municipal states.[464] The Global World Bank's Flaring reduction partnership ranks Nigeria 7th on global statistics for the flaring of associated gas.[465] It is claimed that an average of 85% of associated gas is flared by oil and gas entities in Nigeria.[466] In the oil industry, Nigeria engages in both upstream and downstream operations to which gas flaring is an upstream practice. The Nigerian constitution vest the control and management of all mineral productions include oil and gas extraction on the federal government.[467] However, this does give the federal government the authority to manage these resources in a manner that poses environmental or health risk.

[462] *Ibid*

[463] *Okoye, Adaeze. "Tax-deductible flare gas penalty payments in Nigeria: context, responsibilities and judicial interpretation." Journal of Energy & Natural Resources Law 39.3 (2021): 345-365 at 350*

[464] *Ibid*
[465] *Ibid*
[466] *Ibid*
[467] *Section 44(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended)*

Gas flaring is a clear wastage of resources which could contribute towards economic growth and development. Nigerian is one of the top ten countries enriched with natural gas reserve of least 100 trillion cubic feet.[468]

It is estimated that at least 800 mmscfd of natural gas was lost within 2016 to 2017[469] which would have generated a revenue of approximately $1 billion per year.[470] Flared gas could be used to generate electricity, cooking or industrial gas.[471] Currently, only 40 per cent of the Nigerian population has power supply which is not even consistent.[472] Excess gas could be used to generate power which the country has been lacking for many years. Also, upon the distribution or sale of gas, corporations are liable to certain tax payments such as petroleum profit tax, royalty, corporate income tax, and other government agency levies. Prior to 2018, the Federal Inland Revenue Service (FIRS) refused permit corporations to deduct flare gas fees for tax purposes. However, in 2018, the Federal High Court gave interpretation to the AGRA in the determination of the assessment of tax liabilities and held that such fees are deductible. This tax deduction is an anti-deterrent that would only encourage corporations to continue in the practice of gas flaring.

Notwithstanding, flaring associated gas should be prohibited as it has results in increased carbon emission, heat, and noise. Unlike unforeseeable oil spills, gas flaring is unique form of oil pollution because there is an intentional act of burning associated gas in which environment pollution is foreseeable. Consequently, the health of human beings, animals, vegetation, and waters are polluted. Therefore, it violates the right to life and dignity of the human person protected under the Nigerian constitution.[473] It also disrupts the obligation of the State to protect the environment and safeguard the water, air and land, forest and wildlife under the

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[468] Olujobi, J.O.; Olujobi, T.O. (2020) Comparative appraisals of legal and institutional framework governing gas flaring in Nigeria's upstream petroleum sector: How satisfactory? J. Environmental Quality Management

[469] Nigerian National Petroleum Corporation (NNPC), 'Financial and Operations Report' (November 2017). Available at: <www.nnpcgroup.com/portals/0/monthlyfinancial and operations data/full reports/nnpcmonthlyfinancialoperationsreportforthe monthofnovember2017.pdf> accessed: 22/2/2023
[470] M. Fidelis, 'How Nigeria Can Save $1b Yearly from Flared Gas' (The Guardian, 6 April 2018). Available at: <https:/guar- dian.ng/business-services/how-nigeria-can-save-10b-yearly-from-flared-gas> accessed: 21/2/2023
[471] Olujobi, J.O.; Olujobi, T.O. Comparative appraisals of legal and institutional framework governing gas flaring in Nigeria's upstream petroleum sector: How satisfactory? J. Environmental Quality Management. 2020.
[472] 'Gas Flaring in Nigeria – An Environmental Health Nightmare'. Available at: <https://foe.org/2009-05-gas-flaring-in-nigeria/> accessed: 22/2/2023
[473] Section 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended)

Constitution.[474] The effect of gas flaring on humans cannot be over emphasized. which includes, respiratory tract [475]diseases, diseases of the central nervous system and blood steam, cancers. Deformities in children, lung damage and skin problems have also been reported.

Thus, AGRA is viewed as unconstitutional and its provisions allowing for the flaring of gas is argued to be null and void to the extent of the constitution. [476] The Constitution fails to provide any remedy on the use or management of associated gas. It rather precludes victims from bringing lawsuits against the government for environment harm.[477] Unfortunately, the 2016 Gas Flaring Prohibition and Punishment and bill is pending at the National Assembly – legislative organ of government.

Over the last decade, there have been policies, industry guidelines and penalties put in place to combat the menace of gas flaring by oil and gas rich countries however, gas flaring remains a problem especially in the MEA region[478]. In Nigeria, for example, as far back as 1979, the primary legislation, the Associated Gas Reinjection Act 1979, fixed 1st of January 1984 as the deadline for all energy operators to stop gas flaring. More than three decades later, and with seven further missed deadlines, gas flaring remains a significant energy justice concern in Nigeria[479].

In the Niger Delta region of Nigeria, in both the villages of Ubenekang and Uquo, the local dwellers and villagers reported that the water in their rivers had become uninhabitable for fishes to survive. Furthermore, they their crops were also affected as they withered away, as a result of the rise in temperature from the excessive head, emanating from the flare sites located in their community. In addition to the negative health effect on the general populace, the country losses economically with billions of dollars' worth of gas burnt into the atmosphere daily. This waste

[474] *Ibid, section 20.*
[475] *Ovuakporaye, S. I., Aloamaka, C. P., Ojieh, A. E., Ejebe, D. E. and Mordi, J. C,. 'Effects of Gas Flaring on Lung*

[476] *Olujobi, J.O.; Olujobi, T.O. Comparative appraisals of legal and institutional framework governing gas flaring in Nigeria's upstream petroleum sector: How satisfactory? J. Environ. Qual. Manag. 2020.*

[477] *Section 6(6)(3) of the Constitution of Federal Republic of Nigeria 1999 (as amended)*
[478] *ibid*
[479] *Olujobi, J.O.; Olujobi, T.O. Comparative appraisals of legal and institutional framework governing gas flaring in Nigeria's upstream petroleum sector: How satisfactory? J. Environ. Qual. Manag. 2020.*

could have added to domestic use, to curb the ravaging effect of huge losses to gas flaring and oil spillages, recorded in the country over the years[480]. Although, the government makes 65 percent of its revenue through oil, it is estimated that the country losses billions of dollars, of its revenue annually through gas flaring[481].

Nigeria is evident that gas flaring regulations goes beyond legislative policies. Therefore, there is the need for countries to implement fail self-mechanism to address the issues of gas flaring. This approach will integrate human right values, in the implementation of gas flaring policies[482].

To implement a human right approach on gas flaring regulations, it is essential to diverge into the PANEL principles. Recent legislative development in Alberta, Canada is regarded as having one of the best policies regarding gas flaring currently in the world. For example, the Alberta's gas flaring policy highlights a decision tree and a right based management structure. [483],

This approach is all-inclusive whereby, it recognizes multi stakeholders in decision makings, but in the formulation to implementation process[484]. In addition to stakeholder's participation in decision making, Alberta's Energy Regulator (AER) publishes report on the volume of gas flared, with data analysis[485]. This approach highlights the human right norms as well as transparency and access to justice in the implementation of gas flaring policies.

However, some countries have developed National Action Plans (NAP). This is set up by governments, to integrate human right policies, like the PANEL principles in key sectors[486].

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[480] *Effiong, S. A. and Etowa, U. E., 'Oil Spillage Cost, Gas Flaring Cost and Life Expectancy Rate of Niger Delta People of Nigeria', (2012)2(2), Advances in Management & Applied Economics, pp. 211-228*

[481] *Arowolo, A. A. and Adaja, I. J., (2011), Trends of Natural Gas Exploitation in Nigeria and the Implications on the Socio-Economic Stability and Governance' in 35th Nigerian Statistical Association Annual Conference.*

[482] *ibid*

[483] *Alberta Energy Regulator (AER). 2021. Available online: **https://www.globalmethane.org/documents/oilgas_canada_reduced_emiss_prog.pdf** (accessed on 15 March 2022).*

[484] *ibid*

[485] *ibid*

[486] *Olawuyi, D. Corporate Accountability for the Natural Environment and Climate Change. In Cambridge Companion to Business and Human Rights; Ilias, B., Stein, M.A., Eds.; Cambridge University Press: Cambridge, UK, 2021. [**Google Scholar**]*

However, in as much as the government encourages the human right approach, without a legal framework that clearly spells public accountability at all stage of the implementation, it has left gas flaring laws unaddressed or unprotected at state level.

The prohibition of gas flaring in Nigeria is confronted with several obstacles. While AGRA demands oil corporations to submit their plans for the reinjection of excess gas, enforcement agencies have done little to ensure compliance.[487] Corporate entities assume that they would not make many profits from the utilization and commercialization of associated gas because they lack the infrastructure.[488] The weak enforcement of laws governing gas flaring is one of the impediments to preventing entities from perpetrating gas flares.[489] Legal enforcement can be undertaken from numerous dimensions such as technological innovation, and regulatory and non-regulatory incentives.

3.3.2 UNITED NATIONS HUMAN RIGHTS COUNCIL

The Human Rights Council of the United Nations, inspired by the principle of the UN charter, reaffirmed the Universal Declaration of Human Rights and the Vienna convention, on the 5th of October 2021, for the first time recognized that having a clean, healthy and sustainable environment is a human right and called on UN member states to cooperate in the implementation of these rights[490].

"The Human Rights Council, Guided by the purposes and principles of the Charter of the United Nations, Reaffirming the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action, and recalling the Declaration on the Right to Development, relevant international human rights treaties and other relevant regional human rights instruments, Reaffirming also that all human rights are universal, indivisible, interdependent and interrelated, Recalling General Assembly resolution 70/1 of 25 September 2015, entitled "Transforming our world: the 2030 Agenda for Sustainable Development," in which the Assembly adopted a

[487] *ibid*
[488] *ibid*
[489] *ibid*
[490] *Resolution 48/13*

comprehensive, far-reaching and people-centered set of universal and transformative Sustainable Development Goals and targets, Recalling also States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change, and the outcome of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in June 2012, and its outcome document entitled "The future we want"[491], which reaffirmed the principles of the Rio Declaration on Environment and Development, Recalling further all its resolutions on human rights and the environment, the most recent of which are resolutions 45/17 of 6 October 2020, 45/30 of 7 October 2020 and 46/7 of 23 March 2021, and relevant resolutions of the General Assembly, Recognizing that sustainable development, in its three dimensions (social, economic and environmental), and the protection of the environment, including ecosystems, contribute * State not a member of the Human Rights Council. 1 General Assembly resolution 66/288, annex. United Nations A/HRC/48/L.23/Rev.1 General Assembly Distr.: Limited 5 October 2021 Original: English A/HRC/48/L.23/Rev.1 2 to and promote human well-being and the enjoyment of human rights, including the rights to life, to the enjoyment of the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to housing, to safe drinking water and sanitation and to participation in cultural life, for present and future generations, Recognizing also that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a safe, clean, healthy and sustainable environment, and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights,[492]". With the implementation and recognition of this policy by the United Nations, it shows how important the world is beginning to recognize and appreciate the need for cleaner environment and sustainable development.

3.3.3 NIGERIAN LEGISLATIONS FOR HUMAN AND ENVIRONMENTAL RIGHTS PROTECTION.

[491] General Assembly resolution 66/288, annex

[492] Ibid.

The Nigerian legislature has enacted several laws that holds oil and gas multinational corporations and their subsidiaries accountable for human rights abuses. These legal approaches are either preventive or remedial measures particularly towards the protection of human lives and their environment. Some of these laws include; Constitution of the Federal Republic of Nigeria (as amended), Oil Pipelines Act,[493] Environmental Impact Assessment Act,[494] National Oil Spill Detection and Response Agency Act,[495] and the National Environmental Standards and Regulations Enforcement Agency Act.[496] In addition, the Department of Petroleum Resources being the central executive body that monitors and regulates the activities of oil and gas corporations has established a number of regulations such as Petroleum (Drilling and Production) Regulations 1969 (as amended), Flare Gas (Prevention of Waste & Pollution) Regulations 2018.

3.3.4 Constitution of the Federal Republic Nigeria

The Nigerian Constitution creates an obligation for the Nigeria federal and individual state government to 'protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.[497] However, Section 6(6)(c) of the Constitution states that this right shall be non-justiciable, i.e., it cannot be directly enforced by the court.[498] On the other hand, in the case of *Jonah Gbemre v. Shell PDC Ltd and Ors*[499] the Federal High Court granted leave to the applicant to institute a legal action against the MNC in a representative capacity for oil spills which affected his land and adjacent land of other members of the community. The Court also granted leave to the claimants to apply for an order enforcing their fundamental human rights to life and human dignity guaranteed under sections 33 (1) and 34(1) of the 1999 Constitution of Nigeria respectively.

3.3.5 Oil Pipelines Act

[493] *Oil Pipelines Act 1956, Laws of the Federation of Nigeria 1990*
[494] *Environmental Impact Assessment Act, 1992. Laws of the Federal Republic of Nigeria, 1990.*
[495] *National Oil Spill Detection and Response Agency Act, 2006 (No. 15 of 2006). Laws of the Federal Republic of Nigeria, 1990*
[496] *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007 (No. 25 of 2007). Laws of the Federal Republic of Nigeria 1990*
[497] *Section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).*
[498] *Ibid, Section 6(6)(c)*
[499] *Jonah Gbemre v. Shell PDC Ltd and Ors (2005) Suit No. FHC/B/CS/53/05*

The Oil Pipelines Act was established in 1956 and provides for remedial approach in holder oil and gas corporations responsible for environmental abuses. Generally, the Act regulates the construction, maintenance, and operation of oil and gas pipelines by license holders. Thus, Section 11 provides that a person whose land or interest in land is adversely affected by an oil pipeline construction, maintenance or operation, the oil pipeline license holder shall compensate the victim.[500] The Act emphasize that such damage caused to the victim includes breakage of any structure on the land or leakage of the pipeline.[501] The assessment of damage and amount of compensation is subject to an agreement between the license holder and affected party. In a situation where parties are unable to agree accordingly, the Court shall determine the amount of compensation for the injured party. The Oil Pipeline Act prohibits the invasion of a land for the purpose of establishing a pipeline without the consent of the landowner or occupier.[502] This is an unlawful possession that constitutes a form of environmental rights violation perpetrated by oil and gas corporation. This prohibition under the 1956 Act is in consonance with the fundamental human rights of Nigerian citizens to own property. Thus, the Act requires that a landowner or occupier be given 14(fourteen) days' notice of intention to undertake any pipeline construction.[503] However, the issuance of such notice does not automatically authorize a corporation to commence construction on the land. The landowner may object verbally or in writing to any proposed installation on his or her land. However, the Act authorize the Minister of Petroleum to compulsorily acquire the land for public purpose.[504]

There are some regulatory gaps with the 1956 Act that requires the immediate amendment the Nigerian legislature. The legislation is over 50 years old and does not reflect current technological advancement. Rather, the Act broadly refers to the use of 'necessary equipment' upon the grant of a license.[505] It is important for the Act to stipulate standard equipment and technological requirements to be adopted by applicants before a license is issued.[506] The Act

[500] *Section 11(5) of the Oil Pipelines Act, 1956*
[501] *Ibid, 11(5)(c)*
[502] *Ibid, Section 6(1)*
[503] *Ibid*
[504] *Ibid, Section 26*
[505] *Ibid, Section 5(1)*
[506] *Obioma Helen Onyi-Ogelle, (2020) Imperatives for the Amendment of the Nigerian Oil Pipelines Act. Journal of Energy Research and Reviews. pp.1-9*

does not provide for the monitoring of pipelines which is essential to avoid unexpected leakage of pipelines causing air and water pollution including harm to adjacent landowners. The provision of compulsory acquisition creates room for bias and corruption resulting in largescale infringement on the people's right to own property. Notwithstanding that landowner are compensated in cases of compulsory acquisition; it is necessary for the Act to define a threshold for when a land shall be acquired in interest of the public. The Act does not expressly prevent pollution of the environment but only provides compensation where a pollution occurs which indirectly encourages corporation to pollute the environment.

3.3.6 Petroleum (Drilling and Production) Regulation of 1969

The Petroleum (Drilling and Production) Regulation established in 1969 stipulates measures necessary for the prevention of environmental rights abuses by MNCs. It requires license holders to create safe and convenient route for the shipping of petroleum. This measure would prevent any leakage that may affect adjacent land or waters. It also requires license holders to possess updated equipment and must seek approval of their equipment from the Department of Petroleum. This is necessary to prevent pollution of navigable and territorial waters which may consequently affect marine life.

However, the 1969 Act records several challenges. For example, while it emphasizes on the protection of waters and marine life, it does not protect farmlands adjacent to petroleum drilling and production operations. Farming is an indispensable source of livelihood in Nigeria and Agriculture contributes an average of 22% to the country's Gross Domestic Product (GDP).[507] Corporations are prohibited from undertaking drilling and production activities in areas designed for public purpose unless permitted by the Minister of Petroleum.[508] This provision which has rarely been complied with is equally flawed because it does not provide for a solution in a situation where there are two competing public interest. For example, land or waters relied upon by a community as a source of livelihood is of public interest as the drilling and production of

[507] *Taiwo Oyaniran, (2020) Current State of Nigeria Agriculture and Agribusiness Sector, [Presentation at African Continental Free Trade Area (AfCFTA) Workshop. p.6*
[508] *Section 17(b)(i) of the Petroleum (Drilling and Production) 1969*

oil. The Regulation rather gives sole discretion to the Minister to decide an approach in such situation which creates an avenue for bias. Thus, the Nigerian petroleum industry have often supported corporations in oil drilling rather than the protection of community waters or farmlands, even though they claim that prior environmental impact assessment was conducted. .[509]

3.3.7 The Petroleum Industry Act (PIA) 2021

The Nigerian Petroleum Industry Act of 2021 repealed the Petroleum Act of 1969 and supersedes any other petroleum regulation with the aim of providing a more comprehensive regulation of the Nigeria oil industry and the operation of oil prospective, exploration and mining license.[510] The 2021 Act vest ownership of petroleum on any land on the State who may grant license to a Nigerian citizen or a corporation registered in Nigeria for the exploration or mining of crude oil discovered in the State.[511] The State may also grant oil prospecting and mining lease in favor an applicant who meets the requirement for such grant as shall be determined by the Minister of Petroleum. Typically, a grant of oil license or lease must be approved by the Governor of relevant State. However, the Act lacks transparency as it fails to outline the conditions necessary for the grant of a license or lease. The Act only protects landowners as to the use of their land for oil prospecting or mining in the sense that adequate compensation must be provided to a landowner before any interference by the licensee or lessee. The Minister may revoke an oil prospecting license or mining lease where the license or lease holder fail to comply with 'good international petroleum industry practices. Whereas the 1969 Act applied a lower and unrelatable standard known as 'good oil field practice'. However, there have been hesitations in applying such revocation powers because of the crucial importance of petroleum to the Nigerian economy.[512] The power of revocation to be determined solely by the Minister could be abused. However, the PIA manages this discretion by subjecting such power of the Minister to a written

[509] Momodu Kassim-Momodu, (2022) *Exercise of ministerial powers under Nigeria's petroleum industry act. Journal of Energy and Natural Resources,*
[510] *Ogunba, O. A. (2004). EIA systems in Nigeria: evolution, current practice and shortcomings. Environmental Impact Assessment Review, 24(6), p.643*
[511] *Section 1 of the Petroleum Act of Nigeria 2021*
[512] *Ele, M., (2022) Oil Spills in the Niger Delta-Does the Petroleum Industry Act 2021 Offer Guidance for Solving this Problem? Journal of Sustainable Development Law and Policy, 13(1), p.133*

recommendation of the Nigerian Upstream Regulatory Commission.[513] Overall, the PIA assigned to the Commission most of the powers previously performed by the Minister.[514] For example, the commission is responsible for the issuance of environmental standards and guidelines.[515] This bureaucracy and separation of powers is necessary for checks and balances in the petroleum industry.[516]

The 2021 Act defined the term good international petroleum industry practices in relation to environmental standards which the 1969 Act failed to do. It defined the term as those uses and practices that are, at the time in question, generally accepted in the international petroleum industry as being good, safe, economical, environmentally sound, and efficient in petroleum operations and should reflect standards of service and technology that are either state-of-the-art or otherwise appropriate to the operations in question and should be applied using standards in all matters that are no less rigorous than those in use by petroleum companies in global operations.[517] This implies that operators in the Nigerian petroleum industry adopts the best available technology (BAT) as its standard of operation and services. Oil corporations in Nigeria have the responsibility to implore international best standards and practices necessary for the prevention of oil spills. MNOCs such as Shell demands that the government share in the liability of paying fines determined by the court for environment damage. Therefore, it is expected that the Nigerian National Petroleum Limited reflected in the PIA (formerly Nigerian National Petroleum Commission under the ownership of the government) may now independently generate funds and be liable under the polluter-pays principle.[518] The PIA 2021 specifically provided a mechanism of funding for environmental management and remediation of environmental damage. It mandates the licensee/lessee to 'pay a prescribed financial contribution to an environmental remediation fund established by the Commission' for the rehabilitation or management of negative environmental impacts with respect to licence or lease.[519] It made such contribution a condition precedent for the grant of the license.[520] However, it did not go far

[513] *s. 96(1)(a)*
[514] *ss.4-28*
[515] *s.10(d)(f)*
[516] *Ele, M., (2022) p.147*
[517] *PIA 2021, s.318*
[518] *Ele, M., (2022) p.151*
[519] *s. 103*
[520] *s. 103(1)*

enough to provide for sources of additional funding where the available fund is insufficient to meet the environmental remediation cost.

The Act fails to provide a remedy to vulnerable persons who are victims of oil pipeline sabotage or vandalism by persons either engaging purely in oil theft or who are dissatisfied with MNOCs failing to develop explored regions. While MNOCs may not be the cause of such damage, they have a responsibility to show proof of sabotage as ruled by the Hague Appeal Court in Oguru v. Shell.[521] In other words, the corporation may have to show that such oil spill was not because of operational failure to provide adequate security to oil pipelines or standard leak detection installation.

Unlike other petroleum laws, the PIA provides effective measures in the prevention and response to oil pollution by MNOCs. However, there is still the issue of lack of capacity which is linked to lack of resources, insufficient finances, and lack of technological expertise.[522] The DPR and NOSDRA lack human and capital resources to perform and thereby rely on the corporations which they are expected to regulate.[523] This is a regulatory capture that undermines the monitoring powers of the agencies over the MNOCs.

3.3.8 National Environmental Standard Enforcement Agency (NESREA)

The National Environmental Standard Enforcement Agency (NESREA) replaced the Federal Enforcement Protection Agency whose core responsibility is the enforcement of both domestic and international environment protection laws. Section 7 particularly enumerates the functions and powers of the Agency towards the protection of the environment. As part of its functions, the Agency is required to liaise with stakeholders including corporations on environmental standards

[521] *Oguru, Efanga and Milieudefensie v RDS and SPDC, ECLI:NL:GHDHA:2021:132*

[522] *Worika, IL., Etemire, U., and Tamuno, PS., ‚Oil Politics and the Application of Environmental Laws to the Pollution of the Niger Delta: Current Challenges and Prospects' (2019) 17(1) OGEL 1, 14-15*

[523] *D. E. Omukoro, ‚Environmental Degradation in Nigeria: Regulatory Agencies, Conflict of Interest and the use of Unfettered Discretion' (2017) 15(1) OGEL 18- 19*

relating to oil and gas, disposal of hazardous waste, marine and wild life, ozone layer, climate change, sanitation and the prevention or mitigation of all forms of pollution.[524] Section 27(1) which relates to the operations of oil and gas corporations prohibits *the discharge in such harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines except where such discharge is permitted or authorized under any law in force in Nigeria.* There should be no law in Nigeria that allows the discharge of substances that is injurious to human health and their environment.

The Act provides for civil liability and punitive measures against non-compliant corporations. Thus, Section 31 imposes a fine of N2,000,000 (two million Naira) equivalent to £3,500. against a corporation who refuses an agent form exercising his or her functions under the Act and a fine of N20,000 each day such violation persist.

Some of the challenges with NESREA is the high degree of technical know-how involved in the execution of its functions.[525] This means the Nigerian government must ensure that the Agency is made up of personnel who have the relevant skill and knowledge to enforce environmental laws in the country. The government must provide the Agency with all the equipment and training required to perform its responsibilities. Another challenge is the corruption which exist between the Agency and corporations. Some corporations bribe the Agency or its representative in order to boycott certain environmental protection requirements.[526] Another factor which contributes to the non-compliance with Act is the lack of mechanisms to monitor and evaluate the effect and control of industrial pollution.[527] Also, the Act focusses more on imposing punitive measures on defaulting corporations rather than an absolute prohibition of harm. Other mitigating factors include lack of national database, insufficient staff, and numerous enforcement agencies. In addition to the NESREA Act, there are other domestic statutes which provides for civil liability and punitive measures against non-compliant oil and gas corporations. Such measures take the form of fines, compensation, and revocation of license. For example, Section

[524] *Section 7 of the NESREA Act 2007*
[525] *Mantu, John Ishaku, (2019) NESREA and the Challenge of Enforcing the Provisions of Environmental Impact Assessment Act in Nigeria. Available at: <https://ssrn.com/abstract=3410104> accessed: 22/6/2021*
[526] *Nduonofit, L.E. and Y.A. Nkpah, (2011) Politics and Underdevelopment in Africa. International Journal of Social and Human Development, 4, p.51*
[527] *Olalekan, R.M., O.O. Adedoyin and A. Ayibatonbira et al., (2019) "Digging deeper" evidence on water crisis and its solution in Nigeria for Bayelsa state: A study of current scenario. International Journal of Hydrology., 3, p.250*

60 of the Environment Impact Assessment Act (EIA) states that a corporation who fails to conduct an environmental impact act shall be liable on conviction to a fine of not less than N50,000 (fifty thousand Naira). This is an insignificant sum compared to the millions of dollars accrued by oil and gas corporations. This penalty is inadequate to ensure compliance with the provisions of the Act.

3.3.9 National Oil Spill Detection and Response Agency (NOSDRA) Act 2006

The National Oil Spill Detection and Response Agency Act (NOSDRA) recognizes civil liability and punitive measures against non-compliant corporations and where such non-compliance result in oil and gas spills. However, the Act also recognizes the criminal liability of corporation. Thus, Section 29 of the Act permits an officer of the Agency to conduct criminal proceedings with the consent of the Attorney-General of the Federation. Pursuant to Section 6(3), a company may be liable to a fine of up to 5 million Naira (equivalent to approximately £9,000) for failing to clean an oil or gas spill. The statutory provision of a maximum fine is not effective in holding corporations accountable because the statutes is unable to foresee level of hazards which may be perpetrated by the corporations. The impact of an environmental hazard may be worth more than a maximum fine provided under the Statute except the corporation is made to pay such fine for failing to undertake an immediate clean up but still compulsorily required to organize a rehabilitation of the affected environment and its inhabitants.

Section 31 posits that a corporation which fails to render assistance or issue facility in the cleaning of oil spills is liable on conviction to a fine of at least N500,000 (five hundred thousand Naira, currently equivalent to approximately £900) or two (2) years imprisonment. While this provision may be effective as it stipulates a minimum fine, it is unclear because it is silent on whether the corporation failing to render assistance is the same as the corporation which caused or contributed to the harm. It would be irrational to hold corporation criminally liable for non-assistance where it was not involved in the harm. Also, the Act fails to clearly distinguish the criminally liability of a natural legal person from an artificial entity rather it combined the punitive measures under both categories. For example, a literal interpretation of Section 29

would mean that a corporation can be imprisoned even though this is impracticable. Also, there is duplicity of functions between NESREA and NOSDRA as the former is equally empowered to address environmental concerns including oil and gas spills. This has led to an inconsistency on the amount of fine against non-compliant corporations provided under both legislations. Thus, while the NESREA Act stipulates a fine of N2,000,000 against non-compliant corporations, the NOSDRA Act stipulates a fine of N500,000 as such. The Nigerian legislature should take steps to either repeal the NOSDRA Act and incorporate its relevant provisions into the NESREA Act given that the latter has already has a stringent punitive measure particularly in the area of fines against non-compliant corporations.

In conclusion, the above legislations discussed in this section perform a pivotal role in prevention or remediation of environmental rights abuses in the country. Other legislations such as the EIA Act, and NOSDRA Act are discussed in greater details in Chapter six of this thesis. Nevertheless, there are certain lapses with these enactments which motivates one of the objectives of this thesis in recommending a new direction towards holding corporations accountable for human and environmental rights violations.

3.4.0 Criminal liability of corporations

Presently, human and environmental rights legislations in Nigeria largely focusses on civil liability. There are however a few enactments which recognizes corporate criminal liability in Nigeria such as Food and Drug Act[528]; Standard Organization of Nigerian Act[529]; NESREA Act[530]; Oil in Navigable Waters Act[531], NOSDRA Act[532] etc. There is the need to establish domestic laws in which oil and gas corporations may be held criminally liable for oil spills in developing countries considering the huge adverse effect of such pollution on human livelihood. Oil and gas corporations should be held criminally liable for murder or manslaughter given the loss of lives that follow the impact of oil spills.

[528] *Food and Drug Act Cap 150 LFN 1990*
[529] *Standard Organization of Nigerian Act Cap S9 LFN 2004*
[530] *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, (Laws of the Federation of Nigeria. No. 25 of 2007).*
[531] *Oil in Navigable Waters Act Cap O6 LFN 2004*
[532] *National Oil Spill Detection and Response Agency Act, 2006 (Laws of the Federal Republic of Nigeria. No. 15 of 2006).*

The Nigerian Criminal Code describes criminal responsibility as a liability relating to the punishment for an offence.[533] It also defines an offence as 'an act or omission which renders the person performing the act or omission liable to punishment under any Law.[534] Furthermore, both the Criminal Code and the Penal Code included corporations in the definition of persons.[535] Similarly, the Interpretation Act also provides that a person includes persons corporate or unincorporated.[536] It can therefore be concluded that companies in Nigeria can be prosecuted and held accountable for criminal offences perpetrated by their agents. However, the Criminal Code Act and the Administration of Criminal Justice Act being the foremost criminal law in Nigeria is being criticized for not adequately providing for the criminal liability of corporations[537] This lacuna is also evident under the Companies Act[538] and many other environmental legislations. As will be discussed in the next section, few legislations in Nigeria have only referred to the criminal liability of corporations in theory but directs the criminal penalty to its agents.

A legislation criminalizing environmental abuses by corporation would require the Court to consider the element of *mens rea* and *actus reus* of the corporation concerned which has been recognized in the United Kingdom by virtue of its Corporate Manslaughter and Corporate Homicide Act 2007. Since 2010, the Nigerian legislature has been making efforts to pass the Corporate Manslaughter Bill into law. The Bill seeks to criminalize acts of corporations that result in the death of a person or where the companies is in breach of relevant duty of care. The proposed bill undertakes a strict approach as it holds a corporation criminal liable where it is in breach of its duty of care whether any incident of death is recorded. The bill empowers enforcement agents and the courts to impose any amount of fine where a corporation is found guilty of manslaughter. However, the Court should consider several factors to determine the imposition fines including timely acceptance of responsibility, high degree of cooperation, efforts to remedy the adverse effects, a reliable safety record, and willingness to procure

[533] *Criminal Code Act LFN 2010, Cap C38.*
[534] *ibid*
[535] *Criminal Procedure Code, part VIII Chap XXVII; Criminal Procedure Act, Chap 11 part 51 and Administration of Criminal Justice Act 2015, part 47.*
[536] *Interpretation Act Cap I 23 LFN 2010, s 18(1).*
[537] *Ekundayo, V.N., Okechinyere, O. and Lalude, O.M., (2020) An Analysis of Corporate Criminal Liability in Nigeria. The Gravitas Review of Business & Property Law, 11(2), p.50*
[538] *ibid*

safety.[539] The Court may also give an order to publish the conviction of a corporation. While general principles of criminal law adopt imprisonment as the main penalty for criminal offences, it is only practicable to impose a civil penalty when it concerns criminal offences committed by corporations. The Courts are unable to sentence a corporation to jail as such penalty cannot be realistically enforced.

It is generally believed that a corporation cannot be held to be criminally liable. This is because *"Since a corporation is a creature of law, it can only do such acts as it is legally empowered to do, so that any crime is necessarily ultra vires and the corporation having neither body nor mind, cannot perform the acts or form the intent which are prerequisite of criminal liability."*[540] Therefore, it is the agent rather than the corporation that is indicted for corporate crimes. Also, given that the corporation does not independently have a mind of its own, it cannot be vicariously liable for the criminal act of its agents. Under general principle of criminal law, it is insufficient to prove a corporation's *actus reus* void of its *mens rea.*[541] Corporate mens rea comprises of corporate intent, knowledge and recklessness.[542] In establishing the *mens rea* of a corporate crime, the Court identifies and examines the decision of the board of directors being the alter ego of the company is considered as the mind of the company.[543] This is referred to as the identification principle.[544] It may also be called the Alter Ego doctrine or the Organic theory.[545]

However, the position has changed under English common law and the Nigeria legal system has assumed the legal obligation to give effect to such changes.[546] The colonization of Nigerian influenced the Nigerian Legal system to the extent that by virtue of Section 32 of the Interpretation Act, the Nigerian executive and judicial arm of government are required to give effect to certain English law such as rules of common law, doctrine of equity and Statutes of

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[539] Erhaze S., and Momodu D. (2015) Corporate Criminal Liability: Call for a New Legal Regime in Nigeria. Journal of Law and Criminal Justice. 3(2), p.67
[540] Smith, J.C. & Hogan, B. Criminal Law: Cases and Materials (London: Butterworths, 8th edition, 2002)
[541] Pearks, Gunston and Tee Ltd v. Ward, [1902] 2 KB 1
[542] Khanna, V.S., 'Corporate Mens Rea: A Legal Construct in Search of a Rationale' (1996) Harvard Law School Discussion Paper No 200 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/Khanna_200.pdf> accessed: 9/8/2019
[543] Steve Tombs and David Whyte,, The Corporate Criminal: Why Corporations Must Be Abolished. (Oxford: Routledge, 2015). p.23
[544] Erhaze, S. & Momodu D. (2015), p.67
[545] Ibid
[546] Yusuf, M. S. (2017). Criminal Liability of Corporate Persons in Nigeria. International Journal of Law, 3, p.32

General Application which were in force on 1st January 1990.[547] Prior to this time, English common law only held corporations criminally liable for non-feasance (i.e., failure to perform a legal obligation) and misfeasance (performance a legal obligation wrongly).[548]. In *R v Tyler* and *International Commercial Company Ltd*,[549] Bowen L. J. stated that the Interpretation Act of England 1889, provides that: "in the construction of any enactment relating to an offence punishable on indictment or on summary conviction, the expression 'person' unless the contrary intention appears, includes a body corporate".

The above principle is applicable in Nigeria as a rule of common law recognized under the Interpretation Act 2004. In *Abacha v Attorney General of the Federation*,[550] the Court in determining whether a company can be prosecuted for a crime held that a company can be prosecuted as a natural person. In other instances, corporations were held strictly liable for any of such violations.[551] Besides, some of the criminal actions of corporations are derived from its internal policy and for its benefit.[552] Meanwhile, the English court has earlier ruled that the criminal liability of corporations does not apply to all crimes such as perjury, murder, offences in which when a verdict of guilty is given and a sentence cannot be made or offences in which a corporation cannot be vicariously liable.[553] A criminal sentence of imprisonment or death penalty cannot be imposed on an artificial entity as held in the case of *Griffith v. Strudebraker*[554] and in the case of *Federal Republic of Nigeria. v. Thompson & Ors*.[555]

However, the English courts have in some cases held that corporate entities can be convicted for murder, voluntary or involuntary manslaughter where the directing mind and will (which establishes the *mens rea*) of the corporation is found guilty of gross negligence.[556] The proof of gross negligence in respect of a natural legal person is an essential requirement for establishing the *mens rea* of the corporation. Therefore, corporations could also be vicariously liable for the

[547] *Section 32 of the Interpretation Act, Chapter 192. Laws of the Federation of Nigeria 1990*
[548] *Erhaze & Momodu (2015) p.63*
[549] *R v Tyler and International Commercial Company Ltd. (1891). 2 Q.B. 588 at 592.*
[550] *Abacha v Attorney General of the Federation [2014] 18 NWLR (part 1438) 21.*
[551] *Pearks, Gunston & Tee, Ltd. v. Ward [1902] 2 KB 1; Mousell Bros. v. London & N.W. Ry., [1917] 2 K.B. 836*
[552] *R. v. East Kent Coroner ex p Spooner and Others (1988), R v. Adamako (1994), R v. Lawrence (1981)*
[553] *Moore v I Bresler Ltd [1944] 2 All E.R. 515*
[554] *Griffith v. Studebaker (1924) 1 KB. 102*
[555] *Federal Republic of Nigeria. v. Thompson & Ors, (1984)*
[556] *R. v. East Kent Coroner ex p Spooner and Others (1988) 152 JP 115, R v. Adomako (1994) 3 All ER 79, R v. Lawrence (1981) 1 All ER 974.*

criminal act of its agents.[557] This is to say, corporate crimes may be committed by either the corporation, its alter ego or agents which includes directors, employees and any other person acting on the corporation's behalf.[558] In establishing corporate manslaughter, the English courts adopts the test of gross negligence.[559] In order words, the court try to ascertain whether corporation owed the victim a duty of care and if such duty has been breached. The next step is for the court to determine whether such negligence resulted in the death of the victim(s). Oil and gas spills may occur as a result of either the negligence or recklessness of corporations. In proving murder or manslaughter by a corporation, the court looks out for the negligence rather than the recklessness of the corporation concerned.[560] Finally, the court examines the extent of breach or negligence by the corporation for a verdict of criminal guilt. In the case of an oil or gas spillage, this could be measured by number of lives lost as a result of inhaling toxic air, or the level of farmlands and water pollution in the affected region which equally affects the health and livelihood of victims. However, the Nigerian courts are yet to record a case where a corporation is convicted for murder or manslaughter.[561]

Therefore, the English courts have largely maintained the position that, a corporation may be criminally liable, but its directing minds or agents faces the penalty for such liability.[562] Accordingly, under Nigerian law, a corporation can only be held criminally liable upon evidence which relates to a directing mind and will in the company.[563] In the Nigerian case of *Romrig Nigeria Limited v FRN*,[564] the Court of Appeal held that the director of Romrig Nigeria Limited was the alter ego of the company. In *Inspector General of Police v Mandilas and Karaberis and Anor*,[565] the court jointly held liable the company and its manager for the offence of stealing. The ratio of the Court was founded on the general principle that a company acts through its agents and where those agents act within the confines of their employment, the owner, being the

[557] *Director of Public Prosecutions v. Kent Sussex Contractors Ltd., (1944). I K.B. 146*
[558] *Lederman, E. (2001). Models for Imposing Corporate Criminal Liability: from Adaptation and Imitation Towards Aggregation and Search for Self-Identity. Buffalo Criminal Law Review, 4, p.662*
[559] *ibid*
[560] *R v. Lawrence (1981) 1 All ER 974.*
[561] *Mrabure, K. and Abhulimhen-Iyoha A. (2020) A Comparative Analysis of Corporate Criminal Liability in Nigeria and Other Jurisdictions. Beijing Law Review 11(2) p.430*
[562] *Erhaze & Momodu (2015) p.68*
[563] *Slapper, G. (2010). Corporate Punishment. Journal of Criminal Law, 73(4), p.181*
[564] *Romrig Nigeria Limited v FRN (2017). LOR 15/12/2017.*
[565] *Inspector General of Police v Mandilas and Karaberis and Anor (1958). W.R.N.L.R.147.*

corporation, would be criminally and vicariously responsible even if it involves a case of fraud. The court further explained that wherever a statute defines an obligation in such a manner that a violation of the duty amounts to an offense, then where the Statutes has no provision either explicitly or indirectly to the contrary, a violation of that law by a corporation constitutes an indictable offense, notwithstanding that the statute is applicable to corporations or not. The Court seems to have focused on the application of the purposive rule of statutory interpretation which for in the opinion of the courts aims to correct a wrongful act.

However, there is still the issue of defining the directing minds of the company. While this can be found in the Memorandum of Association and Articles of Association, such company documents fail to differentiate between the alter ego and agents as directing minds of the corporations. This is even more complex with multinational corporations in which powers and functions are disseminated among persons at different subsidiaries. In such an instance, there is bound to be confusion on the distribution of responsibility and liability. This had led to difficulties in prosecuting corporation for their criminal actions. For example, in *Tesco Supermarket Ltd v. Nattrass*,[566] Tesco escaped liability because the House of Lords did not consider the store manager as part of the directing mind of the company, nor was the store manager allocated responsibilities by the directing mind of the company thereby leading to the harm. Employees in MNCs cannot be held criminally liable because they are acting under the direction of senior corporate officers who cannot be easily identified.

It is believed that individuals use corporation to perpetrate illegality.[567] This had caused dilemma for the legislature and the Courts on who to hold accountable, the individual? the corporation? or both? There is the confusion on what criminal sanction can be imposed on artificial entity having no *mens rea*. Thus, it is argued that corporations do not commit crime, but its agents do.[568] The common law rule in *Salomon and Salomon*[569] established that a company is different from its shareholders and would be considered an independent legal entity with a status of perpetual succession. The case also held that a company is responsible for its acts notwithstanding that

[566] *Tesco Supermarkets Ltd v Nattrass | [1971] 2 All ER 127*
[567] *Bruce Coleman, Comment, (1975) Is Corporate Criminal Liability Really Necessary, 29 Southwestern Law Journal, 29(4) p.908*
[568] *Andrews, (1973) Reform in the Law of Corporate Liability, Columbia Law Review. p.91*
[569] *Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22*

those acts were performed through a natural legal person. Accordingly, registered corporations in Nigeria have legal personality which means they carry legal obligations and can be held accountable where they fail or violate their legal obligations. The legal personality of corporations operating in Nigeria is recognized under Section 37 of the Companies and Allied Matters Act which provides thus: "*As from the date of incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company*".[570] The Act provides that any resolution or conduct of the members in a general meeting, the Board of Directors, or of managing director shall be attributed to the company.[571] it further states that, the acts of officers or agents will not be treated as acts of the company except the company through the members in the general meeting, board of directors or managing director expressly or impliedly authorized the agent to act in the matter in which case the company shall be civilly liable.[572]

Given the complex management structure of MNCs leading to difficulties in finding the guilty individual, it is justified to hold the corporation criminally liable. In some cases, the guilty individual(s) may be outside of jurisdiction and difficult to be accessed or extradited by the prosecution. This implies that corporate fines should only be executed where it is difficult to identify the guilty agent. This justification faces opposition on the basis that failure to proof the guilt of an agent does not make the corporation guilty of the crime.[573] In ordinary principal and agent relationship, the former is not held liable until found guilty on the basis that the agent was acting under the instruction of the principal. Therefore, a corporation should not be made guilty simply because it is difficult to prove the guilt of the agent.

The difficulty of proving guilt is as a matter of fact a human weakness in the administration of justice.[574] Besides, it is impossible to prove the *mens rea* of a corporation without proving the guilt of the agent who represents the corporate *mens rea*. Another concern with corporate criminal liability is that punishing a corporation would affect innocent shareholders such as

[570] *Section 37 of the Companies and Allied Matters Act CAP C20 2020, Laws of the Federal Republic of Nigeria*
[571] *Ibid, s.89*
[572] *Ibid, s.90*
[573] *Edgerton, (1927) Corporate Criminal Responsibility, Yale Law Journal, 36(1) p.833*
[574] *Ibid*

depriving them of their shares. However, the corporation including its shareholders benefit from an illegal act perpetrated by an agent. Therefore, it is unfair to allow a corporate entity escape punishment for an unlawful conduct in which it has derived some benefits. In addition, the act of holding the corporation liable rather than its agent avoids a situation of having an employee undertaking liability for a senior corporate officer.

Corporate criminal liability is effective when applied to regulatory offences and strict liability offences. Regulatory offences are criminal offences which stipulates punishment of fine or imprisonment not contained in the criminal code. In Nigeria, corporate regulatory offences are contained in the EIA Act, NESREA Act and NOSDRA Act. These regulatory offences prevent public harm by imposing penalties on corporations. The recognition of corporate criminal liability under statutes and common law damages the company's reputation and consequently deters the corporation from further criminal conduct. In order to enforce corporate criminal liability, the Nigerian legislature would be required to amend extant environmental legislations such as the EIA Act and other petroleum drilling and production related regulations such that any violation shall be considered a criminal offence. The legislature may also amend the Criminal Code provisions on murder and manslaughter to become enforceable against corporate entities. These Statutes may have a provision which reads: "the words 'person' or shall include associations, companies, corporations, firms, partnerships, societies, joint stock companies, and individuals". The Statutes should stipulate the criminal liability of the corporation for breach of its positive and negative obligations in respect of environmental protection.

The court should apply the statutes in holding corporations criminally liable for environmental hazards. The statutes and the courts in holding the corporation criminally liable for the act of its agent should establish whether the agent performed the illegal act in the course of employment and within his or her scope of authority. Also, the corporation may be convicted if the commission of the offense by the agent was authorized by the board of directors or a high-ranking officer in the company. The statutes and the courts should determine whether the agent intended to accrue some benefit in favour of the corporation. However, it is argued that an employee cannot be made to commit a corporate crime, if the director or supervisor rather than the corporation is held liable.[575] Nevertheless, if the above thresholds are provided under statutes

[575] *Mueller, (1957) Mens Rea and the Corporation, University Pittsburg Law Review 19(1) p.28*

and implemented by the courts, the attribution of illegal acts to corporations would not be limited to the actions of the board of directors or high-ranking officers in the company.

However, the corporation should be exculpated from liability where the board of directors, majority of the shareholder or minority shareholders exercised due diligence to avoid the occurrence of human or environmental rights violations. This is because the board of directors may undertake an illegal conduct even after objections from majority of the shareholders or an employee and vice versa. In the same vein, majority of the shareholders may proceed to enforce an unlawful act notwithstanding that minority of the shareholders has sought a court injunction against such conduct. The implies that the Court should not hold corporations liable on basis of the actions or decision of the alter ego of the company but should rather consider innocent parties who still desire the continuity of the corporation. Otherwise, the court may proceed to hold the corporation criminally liable but seek to protect innocent members of the company who were not directly involved or contributed to the harmful decision or conduct.

A strict approach would be that whether a corporation instructs its agents to act in compliance with the law, i.e., corporate policies or environmental laws in the State, the corporate entity should still be criminally liable where environmental harm is caused as a result of the agent's violation of such law. Thus, the difficulty in controlling subordinates can be considered a hazard for corporate officers. A stricter approach has been introduced in the American legal system which scholars refer to as aggregate theory in corporate criminal liability.[576] In the case of *United States v. Bank of New England,*[577] the court held the corporation criminally liable where a group of employees had no knowledge of a wrong caused by other employees. This approach would force corporations and its superior officers to undertake steps in preventing environmental disaster including where it requires members of the company or minority shareholders filing an action in court for an injunction restraining the corporation from embarking on an illegal conduct. In the case of an oil and gas corporation, such illegal conduct includes the deployment of substandard equipment or exploration in an area likely to affect human livelihood. Then Nigeria companies act empower any member of the company to request a court order of injunction against the company where;[578] (i) the company seeks to enter any illegal or ultra vires

[576] *Mrabure, K. and Abhulimhen-Iyoha A. (2020) p.430*
[577] *United States v. Bank of New England (1987). 821 F. 2nd 844 (1st Cir.), Cert. Denied, 484 U.S. 943.*
[578] *Section 343 of the Companies and Allied Matters Act 2020 CAP C 20 Laws of Federation of* Nigeria.

transaction, (ii) the directors are likely to derive a profit or benefit from such illegal conduct or negligent action (iii) any other act or omission, where the interest of justice so demands. The corporation could also terminate the employment of any unskilled labour force whose operation is likely to cause environmental disaster. Meanwhile, the attribution of criminally liability to the corporation should not absolve the agent of conviction. In addition, the corporation should still be criminally prosecuted even if the corporation decides a voluntary dissolution upon its perpetration of environmental disaster.

While corporations as a separate legal entity cannot be imprisoned or sentenced to death for a criminal action, the imposition of fine is the most common penal sanction on a corporate entity convicted of a crime as human or environmental rights abuse. It can be considered the only criminal sanction which can be imposed on a convicted corporation. The imposition of fines should be measured based on the amount of profit accrued from harmful operation of the corporation. Nevertheless, domestic statutes should not hesitate to stipulate onerous fines against corporations which perpetrate harm to the human lives or their environment. The statutes should clearly separate the criminal sanction of the corporation from its agents. There are three reasons for imposing criminal sanction against corporations namely, deterrence, retribution and restructuring. On the issue of criminal sanction acting as deterrence, a corporation is likely to avoid human or environment rights abuses for fear of being punished or fear of disapproval by stakeholders. On the other hand, corporations who are undeterred by criminal sanctions face punishment (retribution) for their abusive conduct which prevents them from perpetrating further crimes. Nevertheless, it should be noted that the purpose of criminal law is not to punish but to define social conduct that are intolerable. Criminal sanction is a salient ingredient in the process establishing corporate criminal responsibility and therefore the focus should be whether the imposition of a criminal sanction deter the corporation from committing such abuse in future. Accordingly, the justification for imposing fines on oil and gas MNCs is to deter their repetition of nefarious practices through its agents.

Criminal fines have been criticized as an ineffective deterrence against corporation due to the uncertainty of its application. The liability of all shareholders to pay criminal fine raises objections to corporate criminal liability considering that not all shareholder participated in the crime. Shareholders who usually considered as the corporate owners barely have control of the

management of the corporation as postulated under the Berle and Means theory.[579] However, it is argued that in some corporations, shareholders consent to bear the liability where the corporation commits a crime.[580] However, the shareholders liability is limited to their investment in the company. This is usually the case with corporations with limited liability status. Unlike the guilty agent, the corporation which includes the shareholders have the capacity to pay huge fines for such criminal liability determined by the court.

On the other hand, shareholders are expected bear the liability on grounds of public policy. That is to say, the interest of public supersedes the interest of shareholders. Nevertheless, while fines are effective criminal sanctions on negligent corporations, it would only be fair to impose criminal fines where the shareholders are equally the managers of the corporations. In such instance, it can be easily concluded that the corporation has been fairly and effectively fined for its criminal act. Therefore, there is a difference between fairness versus the effectiveness of fines as a criminal sanction on corporations. While it may be fair to impose fine on specific shareholders responsible for a criminal conduct, it may not effectively deter the corporation or that same shareholder from repeating such criminal act through the company. This is partly because while shareholder's personal resources may be limited, the corporation continue to hold a large revenue base. By way of an effective deterrent, corporate criminal fines are effective in encouraging managers to closely monitor the activities of their personnel. Also, the managers are deterred from engaging the company in criminal actions as a shareholder may institute a derivative action against the company in which the managers become personally liable to the fine imposed by the court.

It is argued that criminal fines are only adopted where civil liability of restitution is not possible.[581] This has been the case with oil and gas corporations operating in Nigeria as discussed in Chapter 5 of this thesis. Nigerian courts order corporations perpetrating oil spills in the region to undertake an immediate clean-up of the environment and pay compensation to victims of such environmental disaster. As will be examined int the next chapter, this position equally been supported by foreign courts adjudicating on oil spills in the Nigerian environment. Another criticism of corporate fines is that sometimes they are of small value and do not

[579] *Berle A. and Means G. The Modern Corporation and Private Property, (2nd edition Routledge, 1991).*
[580] *Coleman B., (1975) p.915*
[581] *Andrews (1973) p.94*

substantially diminish the profit derived from the criminal conduct of the corporation.[582] In such instance, one or more shareholders may even pay the fine from their personal income in return of corporate gain. On the contrary, it is argued that the imprisonment or fine against corporate officers rather than the corporation is an effective deterrent against corporations.[583] This is because punishment of guilty corporate agents would prevent them of engaging in criminal conduct. Corporate fines are fees which permits a corporation to engage in an unlawful conduct.[584] However, corporate fine remains effective if the corporation consequently terminates the employment of the guilty agent. Also, corporate fine remains enforceable in cases of strict liability offences as determined by statutes or the courts. The legislature should eliminate sentences which carries the imprisonment of agents for corporate crimes. This would lead the courts to only enforce criminal liability against the corporation. Alternatively, a balanced remedy would be for statutes and the courts to jointly hold the corporation and its agent criminally liable for the harm.

In conclusion, corporate criminal liability regulations have resulted in largescale controversy which developed by itself[585] Given that Nigerian criminal legal system has been focused on statutory provisions, establishing criminal liability would have greater force where there are Statutes that emphasize on the criminal acts of corporations. Such legislations should not be limited to cases of murder or manslaughter but must apply insofar as an oil or gas spill is evident. In addition, the Nigerian courts may emulate English common law precedents in holding corporations criminal liable for environmental violations. The top management in corporations should face criminal penalty, particularly prison sentence for crimes perpetrated by the corporation.

3.4.1 Civil liability of corporations: Judicial approach

[582] *Coleman B., (1975) p.921*
[583] *Mueller, (1959) Criminal Law and Administration, New York University Law Review 34(1) p.94*
[584] *Coleman B., (1975) p.921*
[585] *Mueller, G. O. W. (1957). Mens Rea and Corporation. University of Pittsburgh Law Review, 19, p.38*

The Nigerian legislature has established statutes which mainly holds corporations perpetrating such abuses under civil liability.[586] Thus, the Nigerian courts enforces for a compensation culture through damages. Therefore, in Nigeria, human and environmental rights abuse usually result in the institution of civil claims against MNCs before the Nigerian courts.[587] While some victims have recorded victory in such lawsuits, the Nigerian courts have rejected the claim of other plaintiffs for different reasons including locus standi, limitation action, pre-action notice, subject matter and territorial jurisdictional issues. On the other hand, victims were awarded compensation and an order against the corporation to clean up the affected environment based on duty of care, owed to the victims. In other cases, victims access such judicial remedies where the court finds that the corporation is in breach a statutory provision of regulation leading to the environmental hazard. For example, failure of the corporation to conduct thorough environmental impact assessment as required under the EIA act. Some of the reasons for imposing civil liability on the corporation are the third party or victim reasonably thought that the agent was acting on behalf of the corporation, encourage closer supervision of employees, and the corporation has the capacity to undertake the loss than the employee.[588]

In 2005, some plaintiffs in Idama Nigerian community, precisely located in Rivers State instituted a suit in a representative capacity against some oil and gas MNCs namely; Agip, Chevron, Total and a subsidiary of Shell – SPDC for gas flaring in their community.[589] The suit which was brought before the High Court was dismissed as the Court held that claims on environmental abuses cannot be instituted in a representative capacity.[590] In order words, the victims of the hazard must be identifiable and are the proper parties which possess the locus standi to institute an action before the Court. It can be observed that the court did not rule on the merit of the case, which is whether MNCs caused harm to the environment. However, this is a

[586] *Erhaze S., and Momodu D. (2015) Corporate Criminal Liability: Call for a New Legal Regime in Nigeria. Journal of Law and Criminal Justice. 3(2), p.67*
[587] *Rufus Akpofurere Mmadu, (2013) Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons From Kiobel. Afe Babalola University: Journal of Sustainable Development Law and Policy. p.150*
[588] *Coleman B., (1975) p.916*
[589] *Nigerian Communities v. SPDC, Total, Agip, Chevron, NNPC et al. [unreported] Available at: <https://www.business-humanrights.org/en/latest-news/gas-flaring-lawsuit-re-oil-companies-in-nigeria-2/> accessed: 4/5/2021*
[590] *Ibid*

technicality applied by the court in denying communities remedy for harm caused to the environment. The Nigerian courts should know that if such suits are not instituted in a representative capacity, it would result in multiplicity of actions diverse rulings.

The attitude of the courts in determining the jurisdiction of oil pollution cases was not consistent until amendments made under the Federal High Court Act[591] and the 1999 Constitution[592] which transferred oil and gas pollution disputes to the Federal High Court. Thus, in the case of *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah*,[593] there was a subject matter jurisdiction dispute in which the Nigerian Supreme Court was to determine whether the Court of Appeal was right in holding that the High Court has jurisdiction in respect of mines and mineral operations. The facts of this case were that a tree fell on the defendant/appellant's oil pipeline and punctured it. This damage impeded the free flow of crude oil through the said pipelines which was constructed along the plaintiff's swampland and farmlands. The defendant moved to repair the dented pipeline. However, the defendant refused to construct an oil trap (a device which traps oil in the soil) which consequently spilled crude oil onto the plaintiff/respondent's swampland and polluted the surrounding farmlands, fishponds and waters. The plaintiff instituted a claim against the defendant at the High Court in Nigeria for the sum of N22 million for damages resulting from the negligent activities of the defendant. The High Court awarded N22 million in favour of the plaintiff for the damage and loss caused by the defendant's oil exploration activities. The defendant's appeal to the Court of Appeal was unsuccessful. The defendants further appealed to the Supreme Court challenging the decision of the Courts below.

The Supreme Court held that the High Court did not have jurisdiction as disputes on mines and mineral operations was within the exclusive jurisdiction of the Federal High Court by virtue of Section 7 of the Federal High Court Decree 1991. The Plaintiff/Respondent counsel argued that the High Court was the proper jurisdiction because the cause of action arose before the 1991 Decree. The Supreme Court noted that the 1991 Decree was made while the trial was in process and therefore ousted the jurisdiction of the High Court. It can be observed that victims of oil and gas pollution did not enjoy a liberal access to justice particularly as the State High Courts were closer to the community of victims and would not comprise in any manipulations by the Nigeria

[591] *Section 7 of the Federal High Court Act, Chapter 134 L.F.N. 1990. – amended by Decree No.60 of 1991*
[592] *section 251 (1) (n) of the 1999 Constitution of the Federal Republic of Nigeria.*
[593] *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah (2001) 5 S.C. (Pt. 11) 1.*

Federal government who are responsible for establishing the Federal High Courts and the Federal High Court Act. However, the Supreme Court took a completely opposite approach in the oil pollution case of *Shell Petroleum Development Company of Nigeria Ltd v. Chief C.B.A Tiebo VII & Ors.*[594] At the time the claimant instituted the matter before the State High Court, the law in force gave jurisdiction to the State High Court to determine oil pollution cases. Accordingly, the Supreme Court held that the State High Court had jurisdiction over oil spillage cases because the applicable law is the law which existed when the cause of action arose.

Nigerian corporations or their subsidiary may be held accountable for environmental abuses on the grounds of strict liability introduced by the House of Lords in *Rylands v. Fletcher*.[595] However, some English cases differ on this position and has raised objections to the strictly liability doctrine against corporations, i.e., where the *mens rea* or intention of the corporation is not required to be proven. Thus, Lord Reid in *TESCO Supermarket v. Natrass*[596] held that an agent of a corporation should not be held strictly liable if he has done all he can do to prevent the offence.

On the other hand, international courts have approached remedy for environmental abuses with some degree of reluctance. In the case of *Kiobel v Royal Dutch Shell*, the United States Supreme Court held that corporations have no obligations under international law.[597] However, it can be argued that the Supreme Court dismissed the suit because it was instituted under the Alien Tort Statutes (ATS). The Act allows plaintiff to institute legal action before the U.S Courts against aliens for violations of international law.[598] The decision of the U.S Court implies that corporate entities cannot held liable for their tortious act. The Court did not give room for policy considerations in which corporation may become accountable for human rights violations under international law. Further, the Court's decisions mean that corporations are not subjects of customary international law. Although, the court recognized the supremacy of international law, the ATS did not require it to do so. The Act did not expressly exempt corporations from its

[594] *Shell Petroleum Development Company of Nigeria Ltd v. Chief C.B.A Tiebo VII & Ors [2005] 9 M.J.S.C 158.*
[595] *Rylands v. Fletcher [1868] UKHL 1*
[596] *Tesco Super Market v Natrass (1971) 2 ALL ER P. 129.*
[597] *Kiobel v Royal Dutch Petroleum Corporation., 569 U.S. 108 (2013).*
[598] *Alien Tort Claims Act, United States [1789]*

provisions. Besides, the Fifth amendment of the U.S Constitution list persons and entities that are not subject to the ATS and corporations are not mentioned.[599]

In conclusion, the resort to international courts for resolution of environmental rights violations by corporate entities is not guaranteed. Therefore, the Nigerian judiciary need to undertake a proactive approach in ensuring access to justice for victims of human and environmental rights abuses. An effective civil penalty would be to have the enforcement agency such as NESREA or the courts compulsorily wind up a corporation found guilty of environmental abuse. The enforcement agency or the court may revoke the license of a non-compliant corporations restraining it from operation in the affected State in that country. The next chapter would give an in-depth critical analysis of judicial approach to holding MNCs accountable for human and environmental rights abuses.

Furthermore, in a more recent case of *Centre for Oil Pollution Watch (COPW) v Nigerian National Petroleum Corporation*[600]**,** the Supreme court widened the scope of the locus standi, (ability and proper standing to commence suits in courts) rule, regarding the ability of environmental NGOs to sue in environmental law cases. The court held that similarly to other jurisdictions, that environmental NGOs have the locus standi (legal standing) to institute environmental cases in Nigeria, against both public and private entities to demand compliance with laws relating to the remediation, restoration, and protection of the environment. The court reasoned that NGOs have sufficient interest in ensuring that public and private entities comply with the rule of law, particularly as no single individual has ownership of the environment that exists for public good. Accordingly, every person, including NGOs, who in good faith seek the enforcement of laws aimed at safeguarding human lives, public health and the environment, should be considered proper parties with standing in law on such issues of public nuisance.[601] Thus, this decision marks the liberalization of the rule of standing with respect environmental claims.[602] Also, this decision indicates that the court's approach to climate matters focusses on greener measures rather than economic protectionism.[603] In addition, it solidifies a constitutional

[599] *Constitution of the United States, Fifth Amendment (1791)*
[600]*Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation N – SUIT NO: [2019] 5 NWLR [PT.1666] P.518*
[601] *Etemire, U. (2021). The future of climate change litigation in nigeria: copw nnpc in the spotlight. Carbon & Climate Law Review (CCLR), 2021(2), p.160*
[602] *Ibid, p.166*
[603] *Ibid, p.166*

and human rights claim which addresses climate issues affecting the environment. Therefore, by virtue of article 24 of the African Charter and section 33 (1) of the Nigerian Constitution, the right to environmental protection can be justiciable in Nigeria.[604]

These outcomes would successfully promote the growth of climate litigation in Nigeria, as well as achieve a full and effective mitigation of climate concerns.[605]

According to the court, "there is no gain saying in the fact that there is increasing concern about climate change, depletion of the ozone layer, waste management, flooding and global warming etc… Both nationally and internationally, countries and organizations are adopting stronger measures to protect and safeguard the environment for the benefits of the present and future … it is on account of this, inter alia, that I am of the firm view that this court, being a court of policy should expand the locus standi of the Plaintiff/Appellant to sue[606]". Furthermore, the court also expanded the scope of section 20 of the constitution of the Federal Republic of Nigeria 1999 per Justice Eko JSC "held that Section 20 of the Nigerian Constitution on duty to protect the environment by the State is justiciable when read together with, and in the context of, a provision like section 4(2) of the Constitution, on the power to make laws to give effect to section 20"[607]. In addition, the apex Court also recognized for the first time, that section 33 of the Constitution which guarantees the Right to Life, implicitly includes and constitutes a fundamental right to a clean and healthy environment for all[608]. The Court also affirmed the enforceability of the environmental right in Article 24 of the African Charter on Human and Peoples' Rights as domesticated in Nigeria by the African Charter Act, Cap. A9 LFN 2004[609]. The decision of the apex court, supports the constitutional human right and climate protection approach, earlier held by the federal high court, in the case of *Jonah Gbemre vs Shell and others*[610].

[604] *Osamuyimen Enabulele, Eghosa O. Ekhator, (2021) Improving environmental protection in nigeria: a reassessment of the role of informal institutions. Journal of Sustainable law and policy. 13(1)p.190*
[605] *Ibid, 165*
[606] *Ibid*
[607] *ibid*
[608] *ibid*
[609] *ibid*
[610] *Jonah Gbemre v. Shell PDC Ltd and Ors (2005) Suit No. FHC/B/CS/53/05*

3.4.2 Conclusion

The ICESCR creates obligations for States to protect the environment from harm which stems from the individuals' right to adequate standard of physical, mental and occupational health. This includes the responsibility of the State to prevent or remedy environmental hazards caused by MNCs. The covenant establishes the obligation of States to respect, protect and fulfil its responsibility in protecting the environment. However, it fails to determine the scope and extent of the environmental obligation of the State considering that some States lack the resources to enforce this specific right. Meanwhile, the ARSIWA recognizes the element of direction and control as the basis for attributing the negligent acts of corporations to the State. While this is effective in the remedy of potential environmental hazards, it does not deter the corporation for such hazardous practice except corporations are directly and independently held liable which ARSIWA fails to establish.

On the other hand, while the UNGP creates an obligation for States to protect human rights, it encourages corporations to respect such rights. The UNGP recommends that corporations exercise due diligence in its operations which includes the conduct of environmental impact assessment and stakeholder participation. It requires the State to provide access to remedy for victims of environmental-related abuses by corporations. The OECD incorporates the human rights provisions of the which includes the responsibility of corporations to act with due diligence and desist from operations likely to cause adverse effects on human rights. A significant feature of the OECD is the establishment of a quasi-judicial body known as the National Contact Point (NCP) with centers in each member State. The NCP provides mediation and conciliation relating to environmental hazard disputes between corporations and victims.

However, the weakness of international laws in failing to hold MNCs accountable for human rights violations under a binding legal framework cannot be overemphasized. International law was designed to create direct obligations for individual states and to the exclusion of non-state actors such as MNCs. However, States have the power and authority to regulate the activities of corporations operating within its territory. However, states are threatened by the large investments of MNCs necessary for the economic development of their respective regions such that they are reluctant to create laws unfavorable to MNCs. On the other hand, there have been attempts to establish international human and environmental rights law to directly address

operations of MNCs. Hence, the United Guiding Principles (UNGP), OECD Guidelines and Global Compact (GC) encourages businesses to respect human rights, and exercise due diligence within the sphere of their operations. Although, these legal frameworks specifically recommend a responsible conduct for businesses, they are mere non-binding legal rules and lacking in strong enforcement mechanisms. While the OECD have managed to establish NCP as an enforcement mechanism, it does not secure the independence of the NCP as a quasi-judicial body.

Nigerian environmental legislations such as its Constitution, EIA, NESREA and oil and gas industry regulations contributed towards regulating the subsidiaries of MNCs at the domestic level. However, there are several regulatory gaps that needs to be resolved including failure to settle issues of competing public interest between the host communities and generating the nation's revenue, failure to stipulate the requirement up-to-date equipment, lack of pipeline monitoring, non-justiciability of environmental rights under the constitution, and refusing to move away from a compensatory to a preventive regime.

The courts have held that a corporation can be held criminally liable where there is a directing will in human form.[611] The criminal liability of corporation which involves criminal fines, compulsory winding up, and imprisonment of directors would serve as effective deterrence against corporations who engage in human and environmental abuses.[612] However, where an agent of the corporation is solely involved in such abuse, the corporation shall be absolved of lability only if it took reasonable steps to prevent the harm which was eventually perpetrated by the agent.[613] On the other hand, the Nigerian court have leaned towards imposing civil liability on negligent corporations.[614] Thus, oil and gas corporations are made to pay fines including specific and general damages to victims of their harmful operations.[615]

CHAPTER 4

[611] *Kingsley Mrabure, & Alfred Abulihemen-Iyoha, (2020) A comparative analysis of corporate criminal liability in Nigeria and other jurisdictions. Beijing Law Review 11(2) p.429*
[612] *Ibid*
[613] *Ibid*
[614] *Edna Ateboh, P., & Raimi, M. O. (2018). Corporate civil liability and compensation regime for environmental pollution in the Niger Delta. International Journal of Recent Advances in Multidisciplinary Research, 5(6), p.3873*
[615] *Ibid*

LIMITATIONS TO EXISTING LEGAL FRAMEWORK ON ENVIRONMENTAL REGULATIONS OF OIL AND GAS MULTINATIONAL CORPORATIONS IN NIGERIA

4.1 Introduction

This chapter builds on the last chapter and carries this thesis forward by examining the limitations of the current legal framework through five selected cases which are used as case studies. This chapter critically examines these five case studies to demonstrate the occurrence of environmental disaster caused by oil and gas MNCs in Nigeria and the lacunae left by the current legal framework in addressing responsibility of these MNC's. These case studies examine the activities of corporations and particularly the threats they pose to environmental protection rights guaranteed under various public international laws as discussed in the previous chapter. Nevertheless, this chapter will detail the ways in which the Nigerian courts and foreign courts have made little attempt in holding negligent oil and gas MNCs accountable while providing remedy to victims residing in host communities. The five case studies examined are as follows: (i) Koko toxic waste dump[616] (ii) *Kiobel v. Royal Dutch Shell*[617] (iii) *Akpan v. Royal Dutch Shell and Shell Petroleum Development Company*[618] (iv) *Okpabi v. Royal Dutch Shell*[619] (v) Oil spills in Bodo - Ogoniland[620].

These case studies have been selected because they represent the problems that affect MNC responsibility for environment disasters. The Koko toxic waste dump notoriously marked the beginning of large-scale environmental pollution in Nigeria particularly the disposal of oil waste from foreign companies into Nigeria which was addressed by Nigerian government. The case of *Kiobel* is analysed to show how foreign courts cannot be entirely relied upon in the resolution of environmental disputes involving MNCs. It also shows how the Nigerian government supports MNCs in abusing human and environmental rights. The case of *Akpan* indicates some of the measures that have been introduced to address the problems outlined in *Kiobel* and in a like

[616] *Liu, S.F (1992) The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste, 8 Journal of Natural Resources & Environmental Law 121*
[617] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)*
[618] *Akpan (A.F.) & Anor v Royal Dutch Shell plc & Anor, District Court of The Hague, 30 January 2013, LJN BY9854/HA ZA*
[619] *Okpabi and others v Royal Dutch Shell Plc and another [2021] UKSC 3*
[620] *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC), 193*

manner, so has *Okpabi*. This work further examined the opinion of the Supreme Court of England which held that MNCs can be sued in their home states for harm arising out of the operations of their subsidiaries in a foreign state. Finally, the case of *Bodo* is analyzed to show how environmental disputes involving corporations can be amicably settled out of court. It examines the advantages of an out of court settlement both for the victims and the corporations and so considers another layer to the problems that this chapter sets out to present.

In analyzing the case studies, this chapter discusses other subject matters such as the form and impact of environmental damage as well as steps taken to ensure remedy of the damage. It draws the conclusion that oil, and gas corporations have the responsibility to respect the environment where it undertakes its exploration and production activities. Ultimately, the goal is to ensure the accountability of MNCs to host States and the remedy of subjecting negligent MNCs to courts in their home State.

4.2 Injustice by the Nigerian courts in adjudicating oil spill disputes

In the 1950s, Nigeria was found to be prospective oil country.[621] In 1951, an Anglo Dutch consortium, Shell D'Arcy, now known as Shell Petroleum Development Company, SPDC explored the Niger Delta region of Nigeria and drilled the first oil wellhead at Iho in Ikeduru close to the city of Owerri in Imo State[622] In 1956, Shell Petroleum discovered oil in commercial quantity in the Southern region of Nigeria, particularly a small rural community called Oloibiri in Bayelsa State. In 1958, oil production began in Oloibiri with over 5,000 barrels of oil produced each day.[623] That same year, Nigeria made its first crude oil export totaling 1.8 million barrels of oil production at a cost of 1.76 million Naira (presently equivalent to £3,000). Oil production rose to 415,000 barrels per day and fell to 142,000 barrel per day during the Nigerian civil war. After the civil war in 1970, oil production increased to 560,000 barrels per day. In 1972, Nigeria became a global major oil producer after it began producing 2 million barrel of oil per day.[624]

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[621] *Iyasara, A.C, Azubuike O.F., and Okehialam S.I. (2013) Management Of Oil Spills Due To Pipeline Corrosion In The Niger Delta Region Of Nigeria. Available at: <file:///C:/Users/HP/Downloads/MANAGEMENTOFOILSPILLSREVISED.pdf> accessed: 10/5/2020*

[622] *Oyri (1999)*

[623] *Ikein, 1991*

[624] *Nwokedi, 1985*

The discovery of oil has resulted in several oil and gas spills across rural communities in the Niger-Delta region of Nigeria. In fact, environmental degradation in Nigeria is mainly caused by oil and gas spills. These spills occur during the exploration and production activities of oil and gas MNCs. This form of environmental pollution cannot be overlooked because it poses health risk to individuals living within oil exploration or production sites. The occurrence of oil pollution takes different forms such as produced water discharge, improper disposal of oil waste, and accidental oil leaks. Notwithstanding, the forms of oil pollution, this hazard remains a complex environmental issue in the oil industry. Thus, victims of oil and gas spills particularly inhabitants of the Niger-Delta region have instituted tort claims locally and internationally against negligent MNCs for damage to their farmland and rivers. Some of the oil and gas MNCs responsible for oil spills in Nigeria include, Royal Dutch Shell (RDS), Chevron, Exxon Mobil and Agip.

In Nigeria, the court mainly hold oil and gas corporations accountable on both common law and statutory duty of care which they owe to persons likely to be affected by their operations.[625] The law requires parties to prove their case for the court to give direction on the enforcement of environmental laws. Considering that most environmental hazards give rise to a civil claim, the burden of proof is on the claimant and the standard of proof is on the balance of probabilities or preponderance of evidence. The plaintiff must prove ownership of the property damaged.[626]

In some cases, the Nigerian courts have held oil and gas MNCs accountable under the doctrine of strict liability established in *Rylands v. Fletcher*.[627] The rule stipulates that the occupier of a land is liable for damage to another where there has been an escape of a dangerous thing during a non-natural use of that land.[628] However, the rule accompanies the proof of certain elements and exceptions. The burden of proof is on the claimant to prove the following: That the defendant brought something onto his land; That the defendant made a "non-natural use" of his land; The thing was something likely to do mischief if it escaped; and the thing did escape and cause damage. However, the defendant may argue the following defenses: consent, common benefit, act of a third party, statutory authority, act of God or default by the claimant. Under the rule in

[625] *Abel Isaiah v. Shell Petroleum Development Corporation*
[626] *Sommer & Ors v. Federal Housing Authority (1992) 1 N.W.L.R (Pt.219) 548.*
[627] *Rylands v. Fletcher (1868) LR 3 HL 330. The Nigerian courts applied the rule in Machine Umudje v. Shell (1975) 9-11 S.C. 155*
[628] *Rylands v. Fletcher (1868) LR 3 HL 330*

Rylands, the claimant has a lesser burden because no proof of intention to cause harm is required.[629] Accordingly, the Supreme Court has applied the rule of *res ipsa luquitor*., i.e., the fact speaks for itself – to lighten to burden of proof on victims and hastily impose liability on the defendant. This rule assist victims of environmental pollution who have little or no knowledge of petroleum operations to prove negligence.

Even though MNCs are subject of Nigerian jurisdiction particularly its courts system, victims may be reluctant to file a claim against such large entity before the Nigerian courts due to delayed trial, procedural and substantive law error and lack of judicial independence leading to a corrupt judiciary involved in abuse of office, bribery, favoritism and unjust enrichment.[630] The victims may not even trust the Nigerian judiciary to fairly resolve disputes involving oil spills by subsidiaries of the MNCs. Foreign courts have assumed jurisdiction where defendants fail to prove that the judiciary where the cause of action arose was independent of the incumbent government.[631]

The Nigerian Criminal Code Act criminalizes the corrupt practices of public officials which includes judicial officers in the country. The Act specifically prohibits public officials from asking for or receiving property, benefit or bribe for themselves or any other person.[632] A judicial officer who violates this provision is guilty of felony and liable to seven years imprisonment.[633] Also, the Conduct of Conduct Bureau Act prohibits public officials from engaging in conflict of interest,[634] accepting gifts or benefits,[635] bribery,[636] and participating in the abuse of power.[637] In order to check and deter corruption, the Act requires public official to declare their assets upon assumption of office. The judiciary being the last hope of the common man is expected to administer justice without fear or favor.[638] Unfortunately, Nigeria is listed as one of the most

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[629] *Ibid*
[630] *Mmadu R.A., (2013) Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel. Afe Babalola University: Journal of Sustainable Development Law and Policy, 2(1) p. 153*
[631] *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A., 528 F. Supp. 1337, 1341 (S.D.N.Y. 1982)*
[632] *Section 98(1)(a) of the Criminal Code Act. Chapter 77. Laws of the Federation of Nigeria 1990.*
[633] *Ibid, 98(1)(b)(ii)*
[634] *Section 5, Code of Conduct Bureau and Tribunal Act, Chapter 58 Law Federation Nigeria 1990*
[635] *Ibid, Section 10*
[636] *Ibid, Section 11*
[637] *Ibid, Section 13*
[638] *Babatunde I.O & Filani, A.O. (2017) Corruption in Nigerian Courts: Fashioning the Way. Journal of Law and Global Policy. 3(1) p.1*

corrupt countries in the world[639] and a former reputable judge of the Nigerian Supreme Court, Oputa JSC publicly agreed that corruption has affected the Nigerian judiciary.[640] Although, the Criminal Code Act and the Code of Conduct of Bureau Act creates offences of corruption by public officials, there have been less enforcement of this provision against corrupt judges.[641]

The oil spill dispute in the case of *Shell Petroleum Development Company of Nigeria Limited v. Chief G.B.A Tiebo*[642] demonstrate that the Nigerian courts do not give adequate damages to victims of oil spills. In this case, the claimants were dissatisfied with the inadequate general damages determined by the High Court. Their appeal was dismissed by the Court of Appeal which led a further appeal to the Supreme Court. The Supreme Court dismissed the appeal and upheld the decision of the trial court noting that the power of the courts to award general damages is discretionary. It further held that the amount of an award of damages can only be interfered with if its "manifestly too high" or "manifestly too little", or if the trial judge relied on a wrong principle of damages in determining the award. The court pointed out that this was not the case in this instance because the Claimants had provided evidence of significant damage to crops, farmland, and rivers which justified the amount as per the award of general damages. In some cases, the court have refused to grant injunction in favour of claimants seeking to restrain the operations of the oil and gas MNCs because the mineral developed is necessary to generate revenue for the country.[643] The decisions of the Nigerian courts in oil and gas spills cases should be in the interest of justice rather than blackletter law or the interest of the State. The hazard perpetrated by oil and gas corporations have long lasting adverse effect on the lives and environment of victims. Therefore, the courts should feel compelled to ensure that negligent corporations provide adequate damages until victims are fully resuscitated.

The Nigerian courts have been reluctant to acknowledge locus standi in respect of suit brough in a representative capacity.[644] The current case law position is that in order to assume a locus standi to sue, the claimant must proof 'sufficient interest', i.e., 'an interest which is related to the

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[639] *Babatunde, I.O. (2014) Stamping Corruption out of our system: The Impact of National and International Legislations on Corruption Control in Nigeria. Journal of Law, Policy and Globalization, 23(1), p.101*
[640] *Oputa, C. (1996) Judiciary and Corruption. National Concord, Thursday, July 19, pp.9-10*
[641] *Wilson N.U. (2018) The Impact of Corruption on the Administration of Justice in Nigeria. Journal of Good Governance and Sustainable Development in Africa. 4(1), p.5*
[642] *Shell Petroleum Development Company of Nigeria Limited v. Chief G.B.A Tiebo (2005) 9 NWLR (Pt.931) 439*
[643] *Allar Irou v. Shell B.P Development Company (Nigeria) Limited Suit No. W/89/71 [unreported]*
[644] *Rufus Akpofurere Mmadu, (2013) p.161*

claimant and not a share common interest with general members of the public.'[645] In addition, claimants institute claims for damages resulting from an environmental hazard must proof damages suffered[646] However, in *Amos v. Shell BP Petroleum Development Company Limited*,[647] although the claimants shared a common interest, the court dismissed the representative suit on the grounds that special damages cannot be claimed where the losses suffered by the claimants are unequal. In addition, interest of all claimants in a representative suit must the same. In *Shell Petroleum Development Company Nig. Ltd v. Chief Otoko and Others,*[648] the Court of Appeal struck out the representative suit on the grounds that persons sought to be represented and the person acting on their behalf had different interest. For example, the court would not entertain a suit where the waters affected by the oil spills belongs to a particular set of claimants, but the affected aquatic inhabitants are owned by a different set of claimants in the same suit. The rationale behind the requirement for claimants to have a common interest is to save the time of the court in proving the same relevant issue in each individual suit.[649] Therefore, the Nigerian courts have not completely disregarded representative but have set parameters which must be complied with for a representative suit to be heard. While it is fair for the court not the hear claimants, who have no interest in the claim, the court should not consider the unequal losses of claimant having sufficient interest as a ground for striking out the suit. Instead, the court should decide the sharing of the proceeds from the general and special damages awarded to the claimants. The apportionment of damages remains a flaw in the legal system and the next chapter discussed the solutions in ensuring fair and equitable assessment of damages for victims of oil spills. The next section further probes the limitation of existing legal framework in failing to prevent the action of MNCs depositing toxic oil waste in the Nigerian environment.

4.3 Case study 3: Koko toxic waste dump in Nigeria

[645] *Ibid, p.161*
[646] *Ladan M.T., Enhancing Access to Justice on Environmental Matters: - Public Participation in Decision-making and Access to information. A paper presented at a Judicial training workshop on Environmental Law in Nigeria. Organized by the National Judicial Institute, Abuja and UNEP. Held at Rockview Hotel, Abuja, Between 6-10 Feb-May 2006.*
[647] *Amos v. Shell BP Development Company Ltd (1974) 4 ECSLR 48.*
[648] *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others (1990)6 NWLR (pt. 159-693.*
[649] *Nigerian National Petroleum Corporation v Sele (2004) ALL FWLR (pt. 223) 1859 CA Per. Muntaka-Coomassie JCA (as he then was). However, this suit concerns oil and gas spills perpetrated by the State-owned oil and gas corporation.*

In the late 1980s, two undisclosed Italian firms shipped 18,000 drums (approximately 8,000 barrels or 4,000 tons) of toxic chemicals from Italy and dumped in the farmland of Chief Nana (deceased) who resided in a small village called Koko located in the Niger Delta area of Nigeria.[650] While the names of the firms remain undisclosed, they operated a subsidiary in Nigeria and were owned and controlled by two Italian nationals named, Mr. Gianfranco Rafaelli and Mr. Desiderio Perazzi.[651] At the port, the Italian firms claimed that the waste were believed to be building materials and fertilizers.[652] Italy could only process 20% of its toxic waste, thus leading to the storage of such harmful substance in developing Africa and other parts of the world.[653] The firms compensated one Chief Sunday Nana and his family (all deceased) with $100 per month for their acceptance in storing the toxic waste.[654] Sadly, the toxic substance killed all members of the family because they drank from the drums of the toxic waste.[655] The chemical spillage was first found by Nigerian students in Pisa Italy and reported the incident to the Nigerian media.[656] It was the media who first visited the site to carry out an investigation on the cause and impact of the dexterous incident. The media found that over 2,000 toxic industrial waste had been deposited in the area and had now burst thereby creating an offensive atmosphere.[657]

In 1988, the Nigeria government discovered this nefarious practice at a point when the storage had begun to leak, and the residents fell sick. While the identity of the firms remained concealed, an investigation by the Nigerian authorities showed that the chemical contained a harmful substance called polyurethanes which was manufactured by Italian I.V.I.[658] Some independent British environmental experts investigated and found that the chemical contained Polychlorinated Biphenyl (PCB) which produces a high toxic compound known as Dioxin. Thus,

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[650] *Timeline, In the 1980s, Italy paid a Nigerian town $100 a month to store toxic waste—and it's happening again. Available at: <https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa> accessed: 23/10/2020*
[651] *Ladapo O.A., (2013) The Contribution of Cartoonists to Environmental Debates in Nigeria: The Koko Toxic-Waste-Dumping Incident. RCC Perspectives. p. 61*
[652] *Ibid*
[653] *Ibid*
[654] *Ibid*
[655] *Gwam, C. (2013). Human rights implications of illicit toxic waste dumping from developing countries including the U.S.A., especially Texas to Africa, in particular, Nigeria. Thurgood Marshall Law Review, 38(2), 241-296.*
[656] *Ladapo O.A., (2013). p. 61*
[657] *Ibid, p.61*
[658] *Ibid*

some Koko residents became inflicted with nausea, stroke and premature births poor vision, stomachache, headache and deaths as a result of the spillage.[659]

4.3.1 The advent and practice of toxic colonialism

Countries across the globe generate a total of 400 million tons of hazardous waste every year.[660] Developed countries generate the largest amount of hazardous waste at about 300 million tons.[661] The author observes that MNCs find developing countries as deposit sites for hazardous waste. This practice of toxic waste colonialism has been prevalent since the 1980s.[662] In 1979, a Colorado firm offered 25 million USD to the then President of Sierra Leone in order to dump large quantities of hazardous waste in its territory.[663] As a developing State, Sierra Leone did not have the financial and technological to process such huge toxic waste. MNCs believe that they can lobby the interest of underdeveloped and developing regions by offering a sum of money in exchange for human and environmental damage. However, the objectives of MNCs is not to deliberately cause harm to human lives and their environment but to devise cheaper means in growing their business. At the time, Italian firms had no means of processing large toxic waste. In addition, there was limited number of disposal sites in developed countries and a tremendous increase in the cost of disposal.[664]

Toxic waste colonialism focuses on the practice of transboundary movement of hazardous waste to developing countries and closely associated with exploitation, inequality and economic dependence.[665] It also relates to the underlying health and environmental risk suffered by underdeveloped and developing countries such as pollution of the atmosphere, groundwater, crops, and biodiversity. Money is a driving factor in the practice of toxic waste colonialism as

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[659] *Timeline, In the 1980s, Italy paid a Nigerian town $100 a month to store toxic waste—and it's happening again. Available at: <https://timeline.com/koko-nigeria-italy-toxic-waste-159a6487b5aa> accessed: 23/10/2020*
[660] *Ijaiya, H., Abbas, W. I., & Wuraola, O. O. (2018). Re-examining hazardous waste in Nigeria: Practical possibilities within the United Nations system. African Journal of International and Comparative Law, 26(2), 264-[ii].*
[661] *Ibid*
[662] *Kitt J.R. (1995) Note, Waste Exports to the Developing World: A Global Response, 7 Georgia International Environmental Law Review 485-494*
[663] *Liu, S.F (1992) The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste, 8 Journal of Natural Resources & Environmental Law 121*
[664] *Andrews A., (2009) 'Beyond the ban - can the Basel Convention adequately safeguard the interests of the world's poor in the international trade of hazardous waste?', 5 (2) Law, Environment and Development Journal 167 at169*
[665] *Ibid*

opposed to use of force adopted during historical colonialism. Host governments in developing countries consent to opening their territories for toxic waste deposits in exchange for financial gains from corporations operating in a developed country. Also, toxic waste colonialism thrives because developing countries lack stringent environmental regulations and enforcement which paves way for MNCs to dump their toxic waste. The availability of cheap land and labor in developing countries has made it cost effective MNCs involved in the shipment of toxic waste to underdeveloped and developing countries.

On the other hand, victims of hazardous waste believe that accepting meagre sum was a means of sustainable living. An example is described above is the Koko resident's collection of $100 per month from the Italian company. The community's compromise with the catastrophic behavior of the corporation is regrettable decision and counter sustainable as the toxic dump adversely impacted on lives and the environment that not even the $100 could remedy. The $100 offered by the Italian firms may be referred "hazardous compensation". This is a kind of compensation issued in exchange for human and environmental disaster to which such compensation is unable to remedy the occurrence of such disaster. It can be deduced that poverty in underdeveloped and developed regions has made them vulnerable targets to MNCs.

The laxity of the government in detecting toxic chemical spill in rural areas was apparent. The government is required to establish an effective mechanism for monitoring all activities that affect the public positively or negatively. Also, the home State of MNCs seem to support the harmful practices of these corporations in foreign jurisdictions. In addition, the host government and the media seem to be complicit in human and environmental abuse by MNCs because the identity of the company responsible for the Koko incident has not been made public till date. The escape of the Italian national further exposes Nigeria's weak prosecutorial system against perpetrators of environmental hazard.

4.3.2 The practice and financial incentive in cross-border waste trading by MNCs

The transportation of hazardous waste by MNCs could either take small, medium or large-scale deals.[666] Under the small-scale deals, the corporation transports the toxic waste to a fake address. The waste is move to the port until it leaks or smells for months, or people become ill. By then, the shipper cannot be traced. For medium scale deals, the corporation offers a sum to a person who accepts the storage of the toxic waste in his or her vacant land. This was the case with the Koko incident. For the large-scale deal, the corporation enter a contract with a poor importing country to dispose waste in its territory and promises to not cause any environment damage at an agreed monetary consideration. It turns to be that the corporation breaches the contract and rather deposits large toxic waste that becomes detrimental to the environmental of the poor importing country.

Typically, developing countries welcome hazardous waste trading because of its huge financial incentive particularly as they strive towards economic growth. MNCs and their home country equally gain profit from transboundary movement of hazardous waste as such disposal cost six times less than when disposed in their home country. On the 25th of May 1988, the International Herald Tribune newspaper reported that "hazardous waste is billion dollar a year business. No experience necessary. No equipment needed. No education requirement".[667] This statement utterly demeans developing countries and vividly exposes their vulnerability in patronizing hazardous waste business which enriches MNCs. In order words, human lives and their environment in developing regions can easily be polluted without any form of academic, technological or skill qualifications in so far as the waste trader has the funds necessary for negotiation and eventual trading. The above statement by the International Herald Tribune newspaper also means that MNCs perceive developing countries as being completely ignorant about environmental degradation and its consequences.

On the other hand, MNCs derive huge financial benefits from disposing hazardous waste in developing countries. In 1987, during the period of the Koko incident, corporations made as much as $20billion a year from transboundary movement of hazardous waste.[668] Mr. Gianfranco, the Italian perpetrator of the Koko incident acquired more than $4million in profits[669] far greater

[666] *Jean-Paul Dufour & Corinne Denis, (1988) The North's Garbage Goes South, World Press Review. 30-31*
[667] *Ibid page 32*
[668] *Liu, S.F (1992) The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste, 8 Journal of Natural Resources & Environmental Law 121*
[669] *Ibid*

than the insignificant sum if $100 paid every month to the Koko victims. Even though some developing countries earn hundreds of millions from toxic waste trading, MNCs benefit more than the importing country or person who accepts the toxic waste storage. This importing country still struggles with environmental clean-up and health challenges particularly as developing countries that do not have the facility and administrative structures to effectively dispose of the toxic waste. Therefore, developing State through MNCs seems to be spearheading a new form of imperialism in transporting toxic substances to developing regions of the world. It is for this reason that international law has created an obligation for States to control the cross-border the effect of the activities of their corporations.

4.3.3 Remedy for Koko community

The Nigerian government executed an investigation and seized the Italian ship used for transporting the toxic waste to Nigeria.[670] Some of the toxic wastes (approx 2,000 tons) were shipped back to Italy. The Nigerian government sought after Mr. Gianfranco Raffaelli who was responsible as clearing agent and moving the waste to Koko village.[671] Unfortunately, the Italian had fled the Nigeria borders. Nevertheless, the government arrested his partner Desiderio Perazzi alongside 14 Nigerians who aided the Italian perpetration in receiving the toxic waste.[672] All detainees were tried before a special tribunal.[673] The government stated that anyone found storing toxic waste would be shot and it mounted vigilante groups at all ports.[674] The government also directed those 5,000 residents in Koko village evacuate the region. Some of the residents protested the government's order.[675] In 1988, a total of 94 victims instituted a class action suit against the Nigerian Port Authority[676] and in 2009 (21 years later) the victims were awarded a compensation of ₦39.7m (approx $102,000).[677] The Nigerian government undertook three 'strident responses' against the Italian government.[678] First, it alerted the international

[670] *Ibid*
[671] *Ibid*
[672] *Ibid*
[673] *Toxic Waste Importers Face Execution, West Africa, June 20, 1988, at 1133.*
[674] *Lagos Domestic Service in English, Vigilantes to Combat Dumping, F.B.I.S.- A.F.R., June 23, 1988, at 25.*
[675] *Ibid*
[676] *Ibid*
[677] *Emma Arubi, (April 4, 2008) Nigeria: ₦39 Million relief for Koko toxic waste victims 21 years after. Vanguard. Available at: <https://allafrica.com/stories/200804041094.html> accessed: 22/2/2023*
[678] *Liu, S.F (1992) The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste, 8 Journal of Natural Resources & Environmental Law 121*

community. Secondly, it directed the Italian government to withdraw its diplomatic affairs from the country. Thirdly, it appealed to the International Court of Justice (ICJ). The Italian government complied with the order of the international community to clean up its spill in the Koko community.[679]

The intention behind evacuating the Koko residents is protect their health from the toxic waste deposited by the foreign company. Thus, the movement of victims away from their indigenous land is a consequence for environment damage. However, the victims perceived evacuation decision by the Nigerian government as a violation of their constitutional right to own property and even as first settlers.[680] This right is equally recognized under the UN Declaration on the rights of indigenous people. The government is expected to immediately organize a clean-up of the environment. The Nigerian government could have executed strident responses against the corporations who directly committed the act as it did with the Italian government. The pecuniary liability imposed on the Nigerian Ports Authority, the clean-up organized by the Italian government and the trial of the Koko residents as well as the Italian perpetrator explains that the government and citizens of host States and home States including MNCs, and their subsidiaries have a responsibility to protect the environment from harm and avoid environmental hazards. However, it is strange to find that only the Nigerian Ports Authority was made to pay monetary compensation and not the Italian firms except the corporations where under the ownership and control of the Italian government.

Although the directors of the violating company were held accountable, it is not sufficient remedy to only hold the directors liable for environmental hazards except where one or more directors without the consent of the company executed such action. This is in consonance with the company as a separate legal entity established in *Salomon v. Salomon*.[681] There are several actions which can be imposed on a violating corporation such as fines, suspension of corporate license or institution of criminal suit against the multination corporation in their home country or their subsidiary in the host country. However, the doctrine that a parent company is a separate

[679] *Ladapo O.A., (2013) The Contribution of Cartoonists to Environmental Debates in Nigeria: The Koko Toxic-Waste-Dumping Incident. RCC Perspectives. p. 62*
[680] *Section 40 of the 1979 Constitution of the Federal Republic of Nigeria (now Section 44 of the 1999 Constitution of the Federal Republic of Nigeria)*
[681] *Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22*

legal entity from its subsidiary as established by the Court of Appeal in *Adams v. Cape*[682] states that a suit can only be brought against the subsidiary where the action was unconnected with the parent company. In order words, for the parent company to be liable, an agency relationship must exist between the parent company and its subsidiary.

A significant sustainable remedy to the Koko toxic waste dump was the birth of the 1989 United Nations Basel Convention on the Control of Trans boundary Movement of Hazardous waste and Their Disposal. The objective of the Convention is to prevent hazardous waste disposal in developing countries except where the receiving country has issued its express consent. However, a challenge with the 1989 Convention is that not all countries are parties particularly developed countries. Italy has ratified the Convention. The United States only signed but did not ratify the Convention. As signing the Convention is subject to ratification, countries who are yet to ratify the Convention are not bound by its provisions. Therefore, there is still a portend movement of hazardous waste to underdeveloped and developing regions. It should be noted that hazardous waste are equally traded off to developed countries such as the United States and Germany but the latter have the financial resources and technology to process these waste as opposed to developing countries. However, a developing country as Uzbekistan have the capacity to process a large quantity of hazardous waste.[683] An interim measure is to completely avoid disposal in vulnerable countries until they attain a degree of sustainable development.

4.3.4 Legislative approach in addressing the Koko incident

In addressing the Koko incident, the Nigerian legislature enacted several legislations such as the Harmful Waste (Special Criminal Provisions) Act,[684] Environmental Impact Assessment (EIA) Act,[685] and few years later the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act.[686]

Also, the 1988 Koko toxic waste incident led to the establishment of the 1989 Basel Convention on the Control of Trans boundary Movement of Hazardous waste and Their Disposal. On the 13th

[682] *Adams v Cape Industries plc [1990] Ch 433*
[683] *Hazardous Waste by Country, Available at: <http://chartsbin.com/view/42087> accessed: 24/6/2020*
[684] *Harmful Waste (Special Criminal Provisions) Act Cap H1, Laws of the Federal Republic Nigeria 2004*
[685] *Environmental Impact Assessment (EIA) Act. Cap E12, Laws of the Federation of Nigeria 2004*
[686] *National Environmental Standards and Regulation Enforcement Agency (NESREA) Act 2007*

of March 1991, Nigeria signed and ratified the Convention to benefit from its objectives which includes achieving optimum capacity in the alleviation of cross border toxic waste dumping.[687]

5.3.5 Implication of hazardous dumping on international human rights

In 1993, the World Conference on Human Rights for the first time, viewed illicit dumping of hazardous waste as a human right issue.[688] In the conference, it was stated that the unlawful dumping of hazardous waste constitutes a severe threat to human life and health.[689] When harmful substances are improperly disposed in human environment, the physical and mental health of inhabitants could be adversely affected. This result in a violation of their human rights to life and health under international law. The practice of oil and gas corporations dumping toxic chemical waste in communities result in a breach of international human right to life and good health protected under Article 3 and 25 of the Universal Declaration of Human Rights.

Toxic wastes are characterised as chemical substances that are ignitable by friction and burn vigorously; they are corrosive; they react violently with water, generate toxic or explosive changes and are readily capable of detonation.[690] Victims inhale the toxins from these chemical waste products which damage their internal body organs such as the kidney or liver. Victims face the risk of drinking water or harvesting crops which have been polluted by hazardous waste. In order words, they are deprived of a right to food[691] as these toxins affect their breathing, hearing, smell, speech and possibly death as was the case with the Koko toxic waste disposal. In some cases, victims lose their liberty, including social and economic security because they are forced to leave their homes to avoid inhaling the toxic waste. Consequently, some community residents are left without homes because they no other clean environment to receive shelter. The Committee on Economic, Social and Cultural Rights has noted that forced eviction, particularly in a situation where people are forced to move without adequate preparation for rational

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[687] *Basel Convention Country Fact Sheet: Nigeria, Available at: <http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-CFS-Nigeria-1.English.doc> accessed: 30/8/2020*
[688] *Vienna Declaration and Programme of Action, 12 July 1993, (Secretariat of the World Conference, Vienna, 14-25 June, 1993) Part I, para II, p. 6,<http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.CONF. 157.23.En>, (UN Doc. A/CONF. 157/23) [hereinafter VDPAJ].*
[689] *Ibid*
[690] *World Health Organization Environmental Health Criteria Series, Volumes 100-187 of 17 November 1999.*
[691] *UN Doc. Res. 2000/10 of 17 April 2000.*

alternative sites is a clear violation of human rights.[692] Human rights violations of this nature are more likely and critical when victims comprise of a vulnerable population such as senior citizens and infants.

In addition, dumping of hazardous waste in the environment violates Article 6 of the ICCPR which states the inherent right to life shall be protected by Law and Article 12 of the ICESCR which guarantees the right to highest attainable standard of physical and mental health. For example, the right of Koko residents to live in a healthy and clean environment was violated when the Italian oil corporation disposed the toxic chemical waste in the community's living environment. Article 12(2)(b) particularly require States to take all necessary steps for the improvement of environmental and industrial hygiene. However, it can be argued that an act may not be considered a human right violation if the victim(s) gave their consent, but a proviso would be if only the victims knew of the consequences of such act. Generally, rural dwellers are uneducated and ignorant, and they are worse when it relates to modern or scientific development. It can be concluded that not every rural resident can decipher toxic from non-toxic waste. Otherwise, Chief Nana and his family would not have moved to drink from the toxic drums. Notwithstanding, the MNC has a responsibility to inform not only rural residents but the importing State of the content of every waste sought to be exported from their territory. This should be made a compulsory measure in addition to the requirements of 'notification' and 'prior informed consent' under the Basel Convention.

International response to the Koko incident through the Basel convention was cataclysmic step towards holding MNCs accountable for environmental degradation. While it is recognised that MNCs are major participants in waste trading, exporting countries have a responsibility to ensure eco-friendly disposal of the waste. Countries reserve the right to prohibit other States from disposing wastes that may endanger lives and their environment. The exporting country or MNC must ensure that they notify the importing country of the intent disposal and its content as well as obtain prior written consent. However, the importing country must prior to its written consent organise an assessment of the imported waste to determine its effect on human health and

[692] *Office of the High Commissioner for Human Rights, Economic, Social and Cultural Rights, Sixteenth Session, The right to adequate housing (Art. 11.1): forced evictions, 1997, General Comment 7, <www2.ohchr.org/english/bodies/cescr/comments.htm>, Compilation of General Comments.*

environment. Any country or MNC who deposit toxic waste in the territory of another shall responsible for any environmental clean-up and repatriating such waste to its territory.

It is important for states to address the implication of hazardous dumping on international human rights. State's creation of laws prohibiting hazardous dumping is a primary step in holding oil and gas corporation accountable and violators should be criminally prosecuted by the State. However, the concept of globalization and free trade in international law contributes to motivating oil and gas corporation to engage in illicit dumping. States remove trade barriers in other to foster economic objectives at the risk of other human rights. Also, the legal status of international law as non-applicable to corporate entities has made it difficult to hold corporate violators accountable. Unfortunately, the quest for economic growth weakens the enforcement of environmental standards and regulations. Nevertheless, developing countries must know that effective management and proper disposal of toxic waste is essential for sustainable growth and development.

4.4 The case of *Kiobel* – environmental dispute settlement in foreign courts

Ogoniland, a popular rural community in the Niger Delta region of Nigeria is among communities which have been heavily affected by oil spills from the activities of SPDC – a subsidiary company of Royal Dutch Shell. Since 1994, the inhabitants of Ogoniland have protested against the environmental devastating operations of Shell in their regions.[693] The series of oppositions by communities in Ogoniland led to the unjust execution of its foremost indigenous human and environmental rights activist Ken Saro Wiwa alongside eight others in 1995 by the Nigerian military regime of that era.[694] It has been more than a decade and Shell continue to ruin the Ogoni region with its oil exploration activities.

In September 2006, some natives of Ogoniland instituted a suit in a representative capacity before a U.S District Court against Shell, its subsidiary and the Nigeria government for wanton killings which it committed in the 1990s in order to explore the Ogoniland for crude oil

[693] *Kearney, Colin (2011). "Corporate Liability Claims Not Actionable Under Alien Tort Statute". Suffolk Transnational Law Review.*
[694] *Ibid*

development.[695] The plaintiff claimed that the MNC aided and abetted the Nigerian government in the killing, forceful exile, arbitrary arrest and displacement of the community dwellers. The plaintiff relying on the Alien Tort Statute (ATS) claimed that the actions of the MNC violated customary international law. The Alien Tort Claims Act gives foreign nationals the right to institute actions in U.S federal courts for violation of international law.[696] The District Court dismissed the claim of the plaintiff as it held that customary international law was unclear in defining the alleged crimes.[697] Customary international law was not particular on whether corporations may be held liable for such. criminal actions. The plaintiffs appealed to the Court of Appeal but their suit was dismissed on the basis that corporations cannot be held liable for violations of customary international law.[698] The plaintiffs filed for a judicial review before the U.S Supreme Court.[699] The Court held that the ATS does not apply to violations of international law committed abroad.[700]

On the issue of presumption against extraterritorial application of the ATS, it is unclear whether such prohibition assumed by the Supreme Court was the intention of the legislature. The presumption means that U.S courts are only required to apply the ATS where it touches and concerns the U.S territory, also referred as the touch and concern test.[701] According to the Supreme Court in *Kiobel*, the mere presence of the Royal Dutch Shell in the U.S is insufficient to satisfy the touch and concern test.[702] The U.S Supreme also refused the extra-territorial application of the ATS in the case of *Sosa v. Alvarez-Machain* on two main grounds.[703] First, the Court held it shall only have jurisdiction over claims of international law violations recognised by civilized nations and must be specifically defined. Secondly, the Court held that the ATS does not apply where the alleged violation took place outside of the United States. The Court further established four features in determining which tort can be instituted under the ATS namely: universality, obligatory nature, specificity and prudential considerations.

4.4.1 Universality

[695] *Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006)*
[696] *Alien Tort Claims Act 28 U.S.C. § 1350*
[697] *ibid*
[698] *Kiobel v. Royal Dutch Petroleum Co. 621 F.3d 111 (2d Cir. 2010)*
[699] *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)*
[700] *Ibid*
[701] *Cleveland, S. H. (2014). After Kiobel. Journal of International Criminal Justice, 12(3), p.552*
[702] *Supra (n7)*
[703] *Sosa v. Alvarez-Machain 542 U.S. at 736, 124 S.Ct. 2739*

On the issue of universality, the Supreme Court in *Sosa* made it clear it would only assume jurisdiction where the cause of action concerns an alleged violation of a law recognised under international law either via a treaty or customary norm. The right to life and healthy environment is a universal right recognised under the UDHR and the ICESCR respectively. However, the Declaration is not a treaty but referred to as a "statement of principles – a good example of an informal prescription given legal significance by the actions of authoritative decision-makers"[704] On the other hand, the Covenant although binding on the U.S, it is not self-executory under the U.S jurisdiction, i.e., it cannot be directly enforced by the U.S Courts.[705] Therefore, victims of oil spill disaster would encounter difficulty in holding MNCs liable before the U.S Courts for violation of their human rights. Notwithstanding, victims of oil spill hazards could claim that their right to life and healthy environment are recognised under customary international law and has attained the status of *ius cogens*, i.e., no derogation is permitted. Custom is viewed as the only universal source of law that is automatically binding on all states without the requirement of consent.[706] The human right to life and adequate standard of living including physical and mental health must fulfil the element of state practice and *opinio iuris* to be considered customary international law.

The Preamble of the UN Charter encourages State to promote social progress and better standard of living.[707] Accordingly, the global recognition and ratification of human rights treaties such as the UN Charter envisage a universal *opinio iuris* on the inalienable *erga omnes* nature of core human rights. This *opinio iuris* is not negated by the diverse views on the particular scope, meaning and *ius cogens* nature of human rights implemented differently by countries. Also, international legal practice supports an increasing *opinio iuris* that member State in the UN have a legal obligation to respect key human rights. In addition, the ICJ in *Barcelona Traction, Light and Company Limited*[708] noted that *erga omnes* obligation include the 'principles and rules on the basic rights of the human person'. The author opines that such basic rights equally relate to the right to life, respect and protection of the environment from harm.

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[704] Brownlie, Principles of Public International Law 472–481 (6th ed. 2003)
[705] 138 Cong. Rec. (Bound) - Daily Digest - Congressional Record (Bound Edition), Volume 138 (1992)
[706] Anthony D'Amato, (2010) Human Rights as Part of Customary International Law: A Plea for Change of Paradigms. Faculty Working Papers. Paper 88. Available at: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88> accessed: 21/10/2020
[707] Preamble of United Nations Charter 1945, Para 1
[708] Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment) [1970] ICJ Rep 3 para 33.

This implies that national courts have an obligation to give enforce customary international laws such as prohibition of aggression, prohibition of genocide, prohibition of crimes against humanity, basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, prohibition of torture and the right of self-determination. However, in 2003, the U.S Court of Appeal in *Flores v. S. Peru Copper Corp*[709] held that the right to life and health under the Declaration and the Covenant are quite vague and abstract to be considered customary international law. The court further criticised these rights as lacking specific enforcement standards.

4.4.2 Obligatory nature

The second requirement for the U.S court to assume jurisdiction is that the protection of the rights sought by the plaintiff must be an obligation of all states including the United States. In order words, such rights must produce an *erga omnes* effect. The ICJ acknowledge that human rights comprise of individual rights and *erga omnes* obligations based on treaties and general international law.[710]

4.4.3 Specificity

In *Sosa*, the Supreme Court held that the obligation or offense must be specific compared to the 18th century obligation of safe conduct (asylum) to foreign nationals, rights of ambassadors, and prohibition of piracy. Unfortunately, the right to life under the UDHR is not specific. It simply states "Everyone has a right to life". However, the International Commission of Jurist (ICJ) in its submission to the Human Rights Council (HRC) analysed the provision of right to life under international law. It noted that States have a positive obligation to protect and a negative obligation to respect the people's right to life against acts committed both by its agents or corporate entities.[711] The ICJ further noted that the duty of the State to protect human and environmental rights against the actions of corporate entities is recognised under the UN Guiding Principles and the Maastricht Principles on Extraterritorial Obligations of States in the Area of

[709] *Flores v. S. Peru Copper Corp 414 F.3d 233 (2d Cir. 2003)*
[710] *The Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114).*
[711] *United Nations Human Rights Committee, 114th Session of the UN Human Rights Committee. The International Commission of Jurists' initial comments in view of the Human Rights Committee's elaboration of a new General Comment on Article 6, the Right to Life, of the International Covenant on Civil And Political Rights. 12 June 2015*

Economic, Social and Cultural Rights.[712] Therefore, the state is required to investigate, prosecute and punish actions of private entities that infringe on human right to life. According to the ICJ, the right to life includes economic, social and cultural rights as envisaged under the ICESCR particularly the right to the highest attainable standard of health including the provision and safety of food and water.[713] The state must ensure that these rights are not violated by corporate entities.[714] Meanwhile, the right to environmental protection are stipulated under the ICESCR. On the other hand, environmental protection rights are specified under the ICESCR which provides for state obligation to improve all aspects of environmental and industrial hygiene.

The Court noted that in establishing specificity, the alleged offence must consist of elements to prove the commission of the offense, in order for the court to reach a decision. Therefore, victims in relying on a tortious claim must show that international law has established rules or element in proving the offence. Victims may prove tort elements such as duty of care, breach of duty, causation and remedy. Victims may also claim that the negligent activities of oil and gas corporations in the region threatens their peace and security guaranteed under UN Charter.

4.4.4 Prudential consideration

This is the third criteria considered by the Supreme Court on the interpretation of the ATS. According to the court, prudential consideration includes public policy, separation of powers, political questions, reticence of domestic courts to command foreign relations, and unwilling of the court to establish a practice. Some examples of public policy include statutes of limitation, exhaustion of domestic remedies, *hostis humanis generis* theory (enemy of mankind or foreign jurisdiction over all persons) or transitory tort doctrine (choice of law where the tort was committed).

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4.5 Akpan v. Royal Dutch Shell Plc – responsibility for parent companies over subsidiaries

[712] *Footnote 126 of the Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. adopted on the 28th of September 2011 by the International Commission of Jurist.*
[713] *Ibid, General Comment No. 12, supra note 12, para 15*
[714] *Supra (n720*

This case is analyzed to show the grounds in which MNCs and their subsidiaries are held liable by foreign courts and in this case, Netherland being the home state of the MNC – Royal Dutch Shell which has in fact been its headquarters since 2005. In November 1959, Shell drilled an oil well in Ibibio, a small village in Akwa Ibom State located in the Niger-Delta region of Nigeria. The wellhead of the oil well is locked above the ground by a material called a Christmas tree. In August 2006, a small amount of oil, approximately one barrel of oil spilled from the well. Towards the end of July and beginning of August 2007, a large volume of oil spilled from the same well. A report on this second oil spill was made to the SPDC in August 2007, few days after the incident. In November 2007, SPDC took steps to stop the oil spills by closing the valves of the Christmas tree installation but unfortunately over 600 barrels of oil had already spilled from the well. The Joint Investigation team (JIT) which comprised of Nigerian government agencies and representative of SPDC (in operation at the time of the spill) identified the cause of the oil spill as tampering or interference with wellhead. However, the claimant instituted a suit against the MNC and its subsidiary for damages caused to his land and fish ponds, alleging defective maintenance and materials adopted by Shell during the period of their operation in the affected region.[715] Unfortunately, the claimant was unable to proof his alleged cause of the oil spills.[716] On the other hand, Shell argued that the damages were caused by sabotage, i.e., unknown persons attempting to steal oil from the exploration site.[717]

4.5.1 Tort of Negligence

In *Akpan*, the claimants alleged that RDS and SPDC committed tort of negligence, tort of nuisance, tort of trespass to chattel or is liable under Nigerian law for damages based on the rule in *Rylands v Fletcher.*[718] In giving its judgment, the Dutch court applied the Nigerian legal system and the English common laws which are applicable to all states in Nigeria prior to its independence.[719] Nevertheless, the English common law system has authoritative force in the Nigerian judicial system till date. However, the Nigerian courts sometimes determine duty of care on a case-by-case basis otherwise referred to as the incremental approach. On the claim of nuisance, the Netherland District court in *Akpan* held that neither English law nor Nigerian law

[715] *Akpan v. Royal Dutch Shell/Shell Nigeria [2013] C/09/337050*
[716] *Ibid*
[717] *Ibid*
[718] *Rylands v Fletcher (1868) LR 3 HL 330*
[719] *Okpabi and others v Royal Dutch Shell Plc and another [2021] UKSC 3*

hold a party liable for nuisance on the grounds that it failed to prevent sabotage by third parties. The Court applied the tort of negligence test established under the English common law of *Donoghue v. Stevenson*.[720] It held that RDS and its subsidiary owe a duty of care to the claimant. It referred to the case of *Caparo v. Dickman*,[721] which identifies three justifications that determines the duty of care obligation of a party: (i) Defendant's foreseeability of the harm, (iii) proximity between the claimant and the defendant (iii) fair, just and reasonable to assume a duty of care. Nigerian law equally acknowledges the above criteria.

There is no general duty of care under Nigerian legal system by which a party (RDS) is required to prevent damage likely to be caused by third parties (SPDC). However, there are certain exceptions to this rule laid down by the House of Lords in *Smith v Littlewoods*[722] as follows: (i) a special relationship between the claimant and the defendant on the assumption of a duty of care owed to the claimant. (ii) a special relationship between the defendant and the third party. (iii) created a dangerous situation that could be used by the third party resulting to harm. (iv) the defendant had the knowledge of a dangerous situation caused by the third party which could be controlled by the defendant. Thus, the Dutch court held that RDS had a duty of care obligation because it controlled SPDC's activities in Nigeria. Moreover, RDS had a policy to prevent oil spills caused by its subsidiaries. The Dutch court also referred to the criteria laid down by the Court of Appeal in *Chandler v. Cape Industries Plc* where it was held that a MNC owe a duty of care to employee of the subsidiary where: (i) the business of the parent company and its subsidiary are the same. (ii) the parent company knows or ought to know of the relevant health and safety policies than the subsidiary. (iii) the parent company knew or ought to have known of the unhealthy working conditions operated by its subsidiary. (iv) the parent company knew or ought to have to have known that the subsidiary and the third parties relied on it for protection, such as a situation where the parent company had previously undertaken such protective measures. However, the Dutch court ruled that unlike the case of employees, there is no sufficient proximity between a parent company and persons living in the local community where its subsidiaries operate because of the unlimited number of people living in a community. It is

[720] *Donoghue v Stevenson* [1932] UKHL 100
[721] *Caparo Industries PLC v Dickman* [1990] UKHL 2
[722] *Smith v Littlewoods Organization Ltd* [1987] UKHL 18

my view that proximity between the RDS and members of the local community if the harm was not caused by sabotage but a direct action of the subsidiary.

Nevertheless, it is the court's view that SPDC may be held liable for failing to prevent third parties from inflicting harm to members of the local community. In other words, there is evidence of proximity between SPDC and members of the affected region. However, it is my view that if the courts find a special relationship between SPDC and the local community, such relationship equally exist between RDS and the local community because the RDS and SPDC are the same entity. The criticism here is that RDS and SPDC perform different business functions in the sense that while the former creates general policies from its headquarters in Hague, the latter is directly involved in oil production in Nigeria. Therefore, it is not reasonable to assume that RDS knew of the specific risk more than SPDC. Consequently, it cannot be concluded that RDS owed the local community a duty of care to prevent third party harm. In addition, the creation of an environmental damage prevention policy by RDS for SPDC is insufficient to conclude that RDS assumed a duty of care for persons likely to be affected by the operations of SPDC. It also does not establish proximity between RDS and members of the local community. Therefore, the Dutch District court ruled that RDS does not owe a duty of care to the claimant.

On the issue of whether the subsidiary – SPDC is liable for the oil spills under the tort of negligence, the court refers to extant statutes in Nigeria. Pursuant to Section 11(5)(b) of the Oil Pipeline Act, the operator of an oil pipeline or any of its ancillary installation shall pay compensation to a person who suffers damage by reason of neglect on the part of the operator or his agents. However, the court held there is no Nigerian law that holds an oil operation license holder liable based on tort of negligence, for failure to prevent third party sabotage of an oil pipeline or oil facility. The Nigerian courts have supported this ground for the exclusion of liability in respect of oil spills.[723] Nigerian case law precedent does not view the installation of oil and gas facility in an area as creating a dangerous situation which gives rise to duty of care for persons living within such facility even in the event of sabotage.

[723] The Court of Appeal gave the same ruling in *Shell Petroleum Development Company (Nigeria) Limited v Otoko* (1990)6 NWLR (pt. 159-693.

Nevertheless, the Court found SPDC liable under the duty of care test established *Caparo v Dickman*.[724] The failure of SPDC to undertake adequate measures in protecting the facility made it easy for third parties to loosen the wellhead of the facility, thereby resulting in oil spills. The Dutch court held that the corporation was unable to undertake its responsibility of oil production with care and void of oil spills. It held while there is the possibility of sabotage, if Shell had properly tightened the wellhead, there would have been no oil leakage. This implies that SPDC had an obligation to act with reasonable care and skill in the handling of the facility to prevent sabotage. Given that oil pipelines and oil facility sabotage frequently occur in Nigeria, the sabotage of the facility in the instant case was foreseeable. The test of proximity was satisfied as SPDC created a dangerous situation at the local community in which the risk of sabotage was reasonably foreseeable. As a result of SPDC's omission, the court held that it was fair, just and reasonable to conclude that the company had a specific duty of care on SPDC to prevent third party sabotage likely to affect members of the community including the claimant residing where the company installs its facility or carries out its operations. Therefore, the District court held SPDC liable for tort of negligence committed against the claimant including for damages which the claimant would suffer in future and infringement of the claimant's physical integrity by subjecting him to a polluted environment.

4.5.2 Ownership and possession

In establishing tort, the court considered the *locus standi* of the claimant. In order words, whether the claimant is the proper party to who a duty a care is owed by the MNC and its subsidiary. The court ruled that since the claimant is the owner of the land and fishpond, he has the right to institute claim for the damage to his property caused by the oil spills. The court also ruled that the claimant was entitled to a remedy because he was in possession of the land and fishpond. It cited the Nigeria case precedent in *Mogaji & Ors. V. Cadbury Fry Export Ltd.*[725], noting that where a person cultivates an agricultural land, he is in possession of that land. Another proof of ownership or possession is that the location of the land and fish ponds was specified.

4.5.3 Oil Pipeline Act and application of the rule in *Ryland v. Fletcher*

[724] *The three duty of care test namely; Foreseeability, proximity and fairness.*
[725] *(1972)*

The Nigerian Oil Pipeline Act[726] compels the holder of a pipeline operation license to pay compensation to an injured party as a result of any damage or leakage from the pipeline or any ancillary construction operated by the license holder. A literal interpretation of this provision reveals that the perpetrator or cause of the damage to the pipeline or ancillary installation is immaterial. This statutory provision codifies the strict liability rule in respect of environmental nuisance established by the House Lords in *Rylands v Fletcher*. However, because the leakage was cause by third party sabotage, the Court ruled that SPDC was not liable for the oil spills and damage caused to the claimant.[727] Third-party intervention was one of the exceptions identified by the House of Lord in the case of *Rylands*. The court also noted that the failure of the company to adequately clean the oil spills was not an offence under Nigerian law.

4.6 Okpabi v. Royal Dutch Shell Plc and another

In October 2015, two Nigerian communities – Bille and Oghale filed a claim in a representative capacity against Royal Dutch Shell before the UK High Court for severe oil spills in their regions occurred since 1989.[728] The livelihood and environment of at least 42,500 residents were affected by the disaster thereby seeking remedy for the large-scale pollution.[729]

Although the Shell operated in Nigeria mainly through its subsidiary – SPDC, the plaintiffs claimed that Shell failed to prevent the oil spills and organize immediate clean-up which resulted in the pollution of their farmlands and surrounding waters. The UK Technology and Construction Court granted leave of court to the plaintiff to institute claims against the corporation before the High Court. The corporation claimed that the oil spills occurred as a result of pipeline vandalism and illegal refining by Nigerian citizens who believe that they have been marginalized by the Nigerian government in community participation and allocation of oil revenues to the host community. The corporation also argued that proper jurisdiction to hear the suit was the Nigerian courts. In March 2016, the High Court ruled in favor of the corporation as it held that plaintiff cannot seek remedy for the alleged cause of action in England. The court

[726] *Section 11(5) of the Oil Pipeline Act (Decree No. 31 of 1956)*
[727] *Akpan v. Royal Dutch Shell/Shell Nigeria [2013] C/09/337050*
[728] *BBC News (12th February 2021) Shell in Nigeria: Polluted communities 'can sue in English courts' - BBC News. Available at: <https://www.bbc.com/news/world-africa-56041189> accessed: 10/10/2021*
[729]

particularly noted that there was insufficient evidence of Shell's oversight functions, control or directions in respect of its subsidiary operations.

On the 14th of February 2018, the Court of Appeal upheld the ruling of the High Court in stating that the parent company does not owe a duty of care to the claimants. The community residents further appealed to the Supreme Court with the support of NGOs and international human rights bodies who advocated for claimant's application to appeal at the apex court. In February 2021, the Supreme Court ruled in favor of the claimant that the suit can be heard in England on the grounds of the duty of care and control test which is discussed in the next sub-section. The court also granted an order that the subsidiary company may be joined to the suit. It must be noted that the decision of the Supreme Court was a preliminary issue of jurisdiction and not the final determination of the suit as the trial of the suit commences in 2022. In addition to providing access to justice, this section focusses on the basis and importance of filing legal actions against MNCs in their home state rather than the host state.

4.6.1 Duty of care and control test: legal actions against MNCs in their home state

If the decision of the Appeal Court was the final resolution in the *Okpabi* suit, future claims filed by victims of oil spill hazards by UK corporations would have been struck out or faced several dismissals for lack of jurisdiction and that the proper party is the subsidiary company. The reasons why the court decided that can be heard in England is based on evidence that the subsidiary company was controlled by the parent company domiciled in the UK. Therefore, both the parent company and its subsidiary owe a similar duty of care to third parties. Thus, the Supreme Court noted that whether a duty of care arises: "… depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary." In establishing the element of control, all relevant economic, organizational, and legal factors which creates a relationship between the parent and the subsidiary on a case-by-case basis are considered.

The control of a subsidiary by the parent corporation is likely to be accepted by the courts in favor of the claimant particularly in the absence of documentary proof.[730] Thus, the court may

[730] *Samantha Hopkins., et al, (2021) Okpabi and Others v Royal Dutch Shell plc and Another [2021] UKSC 3. Northern Ireland Legal Quarterly. 72(1) p.150*

disregard examining the extent of subsidiary management by the parent company and the claimant will have a less evidentiary burden.[731] This increases the potential for access to justice for victims of human rights abuses by MNCs operating through its subsidiary.[732] However, most MNCs establish tax management and group structure to mitigate tort liabilities.[733] Managerial structures of MNCs are more centralized and managerial decisions are not viewed as being assigned by a separate legal entity.[734] A parent corporation within a corporate group may limit its liability but does not seek to act independently from its subsidiary.[735] Nevertheless, if a parent company places itself in a position of managing the activities of its subsidiary, it shall be liable for the subsidiary's act as such.[736] This may prompt parent corporations to withdraw their responsibility including voluntary reporting for their subsidiaries.[737] Although, parent corporations may find it difficult to withdraw from voluntary reporting because it helps to minimize reputational risk that may be attributed to the parent.[738]

The court found that the health, safety and environmental (HSE) manuals, policies and standards used in the subsidiary company were established by the parent company. The court also attached relevance to the 2014 sustainability report of the SPDC which referenced RDS including the statement of two witnesses who were employees in the SPDC. The examination of internal corporate documents is relevant in order proof the negligent liability of a parent company for the actions of its subsidiary. In *Lubbe v Cape Plc*,[739] Lord Bigham emphasized on the responsibility of parent company to observe proper standards of health and safety by its overseas subsidiaries. The finding of parental control showed that there was a 'good arguable case' or 'triable issue' which is a jurisdictional requirement under paragraph 3.1(3) of the High Court Practice Direction 6B for the suit to be entertained.

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[731] *Ibid, p.156*
[732] *Ibid*
[733] *Tom Hadden, (2012) Accountable governance in corporate groups: the interrelationship of law and accounting. 22 Australian Accounting Review p.119.*
[734] *Ibid*
[735] *Peter Muchlinski, (2018) The changing face of transnational business governance: private corporate law liability and accountability of transnational groups in a post-financial crisis world. 18 Indiana Journal of Global Legal Studies 665*
[736] *Samantha Hopkins., et al, (2021) p.157*
[737] *Ibid*
[738] *Ibid*
[739] *Lubbe v Cape plc [2000] 1 WLR 1545*

The issue of control is only a prima facie point in the attribution of a negligent act to a parent company for the conduct of its subsidiary. The question is to what extent did the parent company take over or share in the management of activities with the subsidiary. There is a difference control and de facto management. A subsidiary company may be named in published material as being control of its affairs, but in fact delegate such affairs to its parent company. Nevertheless, a parent company is accountable to third parties where upon examination of the company documents, it presents itself as supervising or controlling the activities of the subsidiary company even if it in fact controls the subsidiary. There is no limit to the degree of management and control when it involves the relationship between parent companies and their subsidiaries. At some point, the parent may be a passive investor in the subsidiary company and at another point, the parent company may be largely involved in the reorganization of the group of companies as if it were a single economic unit with separate legal personality but ownership issues becomes immaterial.

In addition to the duty of care test, the Supreme Court examined whether the claim revealed a triable issue for the English court may assume jurisdiction. The court in relying on the Control Framework of RDS held that there is a real issue to be tried in the suit. the RDS Control Framework shows that the CEO and the RDS Executive Committee undertake numerous responsibilities including safeguarding and operating the company's facilities and assets in an environmental-friendly manner. Most of the reasoning of the court were adopted from its decision in *Vedanta Resources Plc and Konkola Copper Mines Plc v. Lungowe and Ors*[740] which immediately preceded *Okpabi*. In *Vedanta*, the Supreme court equally held that the parent company can be tried before the English court on substantive issues.

4.6.2 MNCs influence in host states

MNCs poses a negative impact on the livelihood of host communities, and this has been a cause for concern in the field of business and human rights.[741] The case of *Okpabi* reflects the importance of corporate accountability and remedy for victims of human rights violations.[742] The courts have begun to take a victim-centered approach to corporate liability rather than show

[740] *Vedanta Resources Plc and Konkola Copper Mines Plc (Appellants) v Lungowe and Ors. (Respondents) [2019] UKSC 20.*
[741] *Hopkins S., et al, (2021) Okpabi and Others v Royal Dutch Shell plc andAnother [2021] UKSC 3. Northern Ireland Legal Quarterly. 72(1) p.150*
[742]

support for corporate entities. The decision of the UK Supreme Court in *Okpabi* explains that in a MNC setting, parent corporations could be held liable for the actions of its subsidiaries. Also, a procedural significance was that the case was heard in a jurisdiction where the parent company was domiciled as opposed to where the adverse impact occurred – Nigeria. This shows the willingness of foreign states to protect and provide remedy for victims of oil and gas spills in developing countries.

4.7 *Bodo* oil spills in Ogoniland – the resort to out of court settlement

In 2008, two major oil spills were recorded in Bodo community, Ogoniland. The first oil spill occurred in October 2008 in which a 55-year-old Shell pipeline spilled 600,000 barrels of oil in Bodo – a rural community in Ogoniland, Nigeria.[743] Shell confirmed that the oil spillage was caused by a weld defect in the pipeline.[744] The second spill occurred in December 2008 as a result of equipment failure.[745] Crude oil contains hydrocarbons and it is the chemical and physical properties of hydrocarbons that cause damage to the environmental and human health. Therefore, the oil spills polluted the air and land of the Bodo region. Also, it contaminated the waters thereby destabilizing the fishing occupation of inhabitants in the community.[746] Air and water pollution affected the health of the people as they inhaled toxic air and drank contaminated water. Livestock and vegetation which the people depend for food were equally contaminated with hydrocarbon. The people were diagnosed with terminal and chronic respiratory diseases including severe cough, malaria and typhoid.[747] This environmental disaster affected the livelihood of about 69,000 people living in Bodo community.[748] The people of Bodo community instituted a legal action against Shell before the High Court in England where it had its registered office and claimed compensation for the damage and a thorough environmental clean-up.

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[743] Ahmed Idris, (31ST October 2017) Nigeria oil spills: Shell begins clean-up after 10-year delay. Aljazeera. Avaialable at: <https://www.aljazeera.com/news/2017/10/nigeria-oil-spills-shell-begins-clean-up-10-year-delay-171031113023508.html> accessed: 4/06/2020

[744] Day, M., Gonzalez, K., & Holland, O. (2015). Justice at Last for the Ogoni People. Environmental Law and Practice Review, 4, 135-147.

[745] ibid

[746] ibid

[747] Friend of the Earth International, (17th May, 2019) A journey through the oil spills of Ogoniland, Available at: <https://www.foei.org/news/oil-spills-ogoniland-nigeria-shell> accessed: 12/10/2019

[748] Vidal J. (3rd August 2011) Shell oil spills in the Niger delta: 'Nowhere and no one has escaped' Available at: https://www.theguardian.com/environment/2011/aug/03/shell-oil-spills-niger-delta-bodo> accessed: 20/11/2019

4.7.1 Causation and response: Shell oil spills in Bodo community

Shell claimed that a significant part of the pipeline was damaged by unknown persons who were possibly indigenes of the Niger Delta area. Shell did not however establish any basis for its claim. It did not say whether such damage was aimed at crude oil theft or to curb possible environmental pollution or a way by which indigenes express their agitations towards Shell for the insignificant or non-payment of royalties for the use of their land for crude oil exploration. The Oil Pipelines Act imposes liability on an oil corporation to pay compensation where it is responsible for oil spills.[749] Where the oil spill is not the fault of the company, the latter is only responsible to clean up the spill without payment of compensation for any consequential damage. Therefore, Shell tried to evade liability under this legal coverage and on the basis that pipeline was damaged by community dwellers. At face value, this would be considered as an unfair obligation. However, this statutory implementation can be considered a way of creating and enforcing corporate social responsibility (CSR) for oil and gas MNCs.

In addition, the English Court had ruled against Shell holding that where a licence holder fails to protect the pipeline, it shall be liable for any illegal bunkering by a third party.[750] Shell argued illegal bunkering by third party is a common law cause of action not covered by Oil Pipeline Act and to which the licence holder should not be made liable. It further argued that common law causes of action to which a company shall be liable are; negligence, nuisance and the strict liability rule in *Rylands v. Fletcher.*[751]

In examining the cause(s) of the Bodo oil spills, the author believes it is beyond the natural aging of a pipeline. The underlying cause of the spills is the failure of the company to maintain regular checks on its pipelines, identify pipelines which have been used over a specific period and organize a replacement accordingly. Therefore, the author refers to the natural aging of the pipeline as a mere "intervening cause" compared to the "root cause" being the company's negligent actions in its failure to maintain and replace pipelines before the expiration of their life span. In addition, the delay of Shell in shutting down a leaking pipeline worsened the effect of

[749] *Section 11(5) of the Oil Pipeline Act 1990 (as amended)*
[750] *Bodo Community v Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC), 193*
[751] *"The person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."*

the oil spill. The pipeline had been leaking for six weeks and it took Shell more than a month to shut down the pipeline.[752]

4.7.2 Litigation and Remediation

In 2012, the Bodo community in a representative capacity instituted a legal action in England where the company was incorporated otherwise may be referred to as its home State.[753] The institution of legal actions against SPDC and its parent company in the home State is a form of holding corporations accountable for human rights abuses. Although Shell had its headquarters in Netherland, it operated a registered office in London who gave the claimants the authority to institute an action before the English Courts. First, the claimants alleged that the oil spill prevention measures were substandard compared to required global standards. The claimants also argued that it is common industry practice for petroleum corporations to have early warning signs of pipeline leakage or any potential hazard. Therefore, oil spill prevention measures include, leak detection system for monitoring oil and gas flow and pressure of pipeline. Also, petroleum industries are required to fortify its infrastructures such as manifold.

Even before the institution of the lawsuit before the High Court in London, Shell had accepted liability for the oil spills and environmental hazard. However, they contended the extent of their liability. Nevertheless, the English court ruled that even though there is no basis of assessing the damages caused to the claimants, it is conceivable for the defendant (Shell) to pay what the court referred to as 'wayleave damages' other known as a *just allowance* for polluting the land belonging to the claimants. It was difficult to assess the environmental damage caused to the community because the affect land had no direct value. For example, it had no market operation, rental value, or infrastructural developments. Therefore, wayleave damages were an alternative method of determining loss in the instant case. It is for this reason that in-house counsel entered a mediation process with representatives of the affected community to agree on a just compensation for the environmental disaster.

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[752] Day, M., Gonzalez, K., & Holland, O. (2015). Justice at Last for the Ogoni People. Environmental Law and Practice Review, 4, 135-147

[753] Morgan A.D., (28th July 2017) Long-term effects of oil spill in Bodo. Available at: <https://www.aljazeera.com/indepth/inpictures/2017/07/long-term-effects-oil-spills-bodo-nigeria-170717090542648.html> accessed: 20/11/2019

4.7.3 Alternative Dispute Resolution (ADR) for Bodo community

In 2015, Shell entered an out of court settlement to pay the sum £55million ($68.62 million) as compensation for the health and environmental hazard suffered by the people of Bodo community.[754] This money was shared among 15,601 residents of Bodo community with each person receiving approximately $3,000. It is believed that this money would go a long way in impacting positively on the lives of the beneficiaries considering that more than half of the Nigerian population live on $2 per day. They could build a shelter even though it is a local construction or invest in a new source of livelihood.

Shell promised to clean up the spill in the affected region as captured in the report of the United Nations Environmental Programme on the environmental assessment of Ogoniland. The conduct of an environmental clean-up is in line with the Environmental Guidelines and Standards for the Petroleum Industry of Nigeria (EGASPIN). In 2017, the Body community revived the litigation against Shell for delay in cleaning up the environment, but the British High Court ruled that the matter be transferred to Nigeria where the oil spill incident occurred. At this point the host State responsible for the enforcement of human rights obligations of private entities which includes corporations. The MNCs bears the cost of enforcement by providing the necessary funds and labour required for the restoration of the environment. However, by virtue of the horizontal effect of international law the State may be liable and bear the cost of human rights violations committed by MNCs.[755]

Shell did not begin an environmental clean-up of the affected areas in Bodo community until September 2017, i.e., 10 years after the environmental disaster. Shell claimed that in August 2015, Bodo residents denied the clean-up team access to the community.[756] Also, delays in the conclusion of litigations on the oil spills impeded on the immediate remediation of the Bodo environment. The failure to timely organize an environmental clean-up leaves the pollution to last longer period and further deepens the adverse effect caused to the environment. However,

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[754] Business and Human Rights, Nigerian: Shell to start clean-up for 2008 Bodo oil spills. Available at: <https://www.business-humanrights.org/en/nigeria-shell-to-start-clean-up-for-2008-bodo-oil-spill-community-leaders-to-be-part-of-mediation-team-between-company-and-community> accessed: 7/7/2020
[755] Kinley D. & Joseph, S. (2002) Multinational Corporations and Human Rights, 27 Alternative Law Journal
[756] Business and Human Rights, Nigerian: Shell to start clean-up for 2008 Bodo oil spills. Available at: <https://www.business-humanrights.org/en/nigeria-shell-to-start-clean-up-for-2008-bodo-oil-spill-community-leaders-to-be-part-of-mediation-team-between-company-and-community> accessed: 7/7/2020

Shell and residents of Bodo community were able to agree on a compensation sum within a shorter period compared to historical environmental pollution in Nigeria which were usually remedied between 20 to 30 years.

4.8 Evaluation of the case studies as to the limitations of the current legal framework

4.8.1 Harmful Waste (Special Criminal Provisions) Act and Environmental Impact Assessment Act

The Harmful Waste (Special Criminal Provisions) Act of 1988 enacted by the Nigerian legislature to address the Koko toxic waste deposit does not completely prohibit the import of hazardous waste but requires lawful authority before waste entry into the country. Any person found guilty would be sentenced to life imprisonment and the lands of collaborators are seized. The Act is enforceable against corporations. On the other hand, 1992 Environmental Impact Assessment Act, requires every person to research and measure the environmental consequences prior to the execution of any activity or development. EIA is a 'systematic process to identify, predict and evaluate the environmental effects of proposed actions in order to aid decision making regarding the significant environmental consequences of projects, developments and programmes.[757]

However, the above laws do not specifically apply to MNCs. This would be left to the interpretation of the domestic courts. For example, there have been plethora of cases concerning environmental violations of MNC subsidiaries in Nigerian and the courts have not hesitated to sentence any such subsidiaries found guilty of environmental pollutions.[758] In other instances, subsidiary corporations have opted for out of court of settlements with the affected communities. These environmental violations have been particularly common with the subsidiaries of oil and gas corporations in Nigeria.

There are cases of corruption which affects the dispensation of environmental justice for vulnerable communities in developing regions. Corruption may take the form of judicial or administrative bribery with the perpetrator, extortion, embezzlement, fraud, and favoritism. In

[757] *Ibid*
[758] *Alagoma & Ors v. Shell Petroleum Development Corporation Limited (2013) LPELR-21394(Court of Appeal), Okoni v. Nigerian Agip Oil Corporation CA/PH/131/2009 (Court of Appeal), Abel Isaiah v Shell Petroleum Development Corporation Limited.*

2011, one of the largest waste managers in the United Kingdom was caught involving in e-waste which it disposed to Nigeria.[759] Also, it has been reported that truck pushers bribe environmental agency at designated ports to dispose their waste.[760] Developing and Least developed countries derive huge financial benefits from hazardous waste dumping not mindful of the harm caused to the environment. The financial benefits are stored in the personal accounts of government officials and private individuals; hence these countries have been labelled as promoting bad governance. This act of corruption has portrayed environmental protection as an asset only affordable to the rich.[761] In order words, the private wealthy class use their own funds to clean up their environment. Another major flaw at the national level is that some of the domestic enactments are ineffective because they do not involve stakeholder consultation.

Basel convention

In view of the 1989 Basel Convention, the author argues that if MNCs in developed countries are prohibited from trading in transboundary movement of hazardous waste, developing countries would not have an opportunity to welcome such trade in its territory except where it has the financial and technological capacity to process such waste.

In the same vein, if developing countries prohibit the import of toxic waste, MNCs would not offer such trade except where it believes that the developing country has the financial and technological capacity to process or safely dispose such waste. The signature of parties is an expression to act in good faith and in accordance with the objects and purpose of the treaty. The ratification indicates consent to be bound by the provisions of the treaty. Unfortunately, most African countries have not implemented the Convention in its national law.[762] Nigeria has done so by establishing the Harmful Waste (Special Criminal Provisions) Act 1988 and a number other environmental legislation. In defining the term hazardous waste, Annex 1 to the Convention list all wastes to be controlled by State parties and as defined under Annex III, characteristics of hazardous waste are explosive substance, flammable fluid and solids,

[759] Wasley, A., (16th May 2011) 'UK e-waste illegally dumped in Ghana', The Ecologist, Available at: <http://www.theguardian.com/environment/20 11/may/16/uk-ewaste-dumped-ghana> accessed: 26/3/2020
[760] Taiwo, A.A. (2009) 'Waste management towards sustainable development in Nigeria: a case study of Lagos state', 4 (4) International NGO Journal 178.
[761] Terada, C. (2012) Recycling electronic wastes in Nigeria, putting environmental and human rights at risk', 10 (3) Northwestern Journal of International Human Rights. 154-72.
[762] Ijaiya, H., Abbas, W. I., & Wuraola, O. O. (2018). Re-examining hazardous waste in Nigeria: Practical possibilities within the United Nations system. African Journal of International and Comparative Law, p. 267

combustible, organic peroxide, corrosive, ecotoxic and toxins. Defining the characteristics of hazardous waste is necessary for the identification of harmful waste not listed under Annex I. The Convention however excludes household waste subject incineration.

A summary of the Convention's objectives was to mitigate the transboundary movement of hazardous waste, ensure hazardous waste are treated and disposed at the country of generation, and to reduce the source of generating hazardous waste. Reducing the generation of waste is a sustainable solution to ending trans boundary dumping of toxic substances. These objectives were motivated by the need to prevent adverse impact of hazardous waste on the human health and their environment. The violation of the Convention objectives amounts to a criminal offence. Furthermore, the Convention developed three core obligations for States as follows: First, it attributed liability to States for the unlawful disposal of harmful waste by corporations or State entities. Secondly, it requires hazardous waste to be regulated by the government rather than the private sector. According to the Convention, transboundary movement of hazardous waste require "notification" from the exporting State and "prior informed consent" from the importing State. This implies that the Convention did not impose an absolute ban on the transportation of hazardous waste to developing States. However, the Convention failed to explain what form of notification is required of the exporting country. It is my view that the form of notification required by the Convention is not a mere notice rather such it must state all the dangers linked the imported waste. Upon notifying the importing State, the Convention should provide for the assessment of waste from the exporting country. This is necessary for the importing State to determine the toxicity of an imported waste. Thirdly, importing country reserve the discretion to prohibit the importation of hazardous waste.

Many West African states were not satisfied with the Basel convention because it failed to address the attitude of developed countries in dumping toxic waste in African regions.[763] This led to the adoption of the Bamako Convention on the Ban of the import to Africa and the control of transboundary movement and management of hazardous waste in West Africa. Compared to the Basel Convention, the Bamako Convention did not allow for notification or prior informed consent of the importing State. The Bamako Convention also prohibited the trading of radioactive waste. Paragraph 7 encourages increasing mobilization in Africa for the prohibition

[763] *ibid, p. 267*

of transboundary movement of hazardous waste and their disposal in African countries. The Bamako convention specifically protects Africa (being a less developed and vulnerable region) from hazardous waste as opposed to the Basel convention which is open to all countries in the world. Both Conventions recognises the sovereign right of a State to ban the entry or disposal of foreign hazardous waste in its territory. However, some of the major flaws with the Conventions is that it contains no mode of enforcement or punishment for violators.

Creating a balance between profit maximization, economic growth and environmental protection

Current legal framework has failed to create a balance between profit maximization for the corporations, economic growth for the host state and environment protection for inhabitant of exploration and production activities. It is observed that MNCs dump hazard waste in developing countries in order to save money which could be used for safe disposal of hazardous waste such as recycling or reclamation. Sometimes, the disposal charges are not ridiculously expensive compared to what to the annual returns of the company or compared to the pecuniary liability they would incure for improper or unsafe disposal of hazardous waste. Illegal methods of disposal prevalent in developing countries are cheaper. Developing countries are constantly seeking ways of acquiring of more financial resources to service their debts and do not consider the money offered by MNCs as cheap. There is a contention between the desire for economic growth and environmental protection even though the latter is argued to be a component of economic growth particularly for the purpose of sustainability. Some developing countries do not have the resources to approve of imported waste or to enforce its environmental regulations. This may motivate port agents to compromise in illicit dumping of toxic waste in developing regions. The lack of resources may lead to importing countries' acceptance of all kinds of toxic waste and in higher quantities.

Rapid response to environmental disaster

In addition, the law should ensure that MNCs organise immediate clean-up after an environmental disaster. In the case of the Koko toxic waste, the MNCs took three years to involuntary pay for an environmental clean-up and compensation victims of the hazardous waste. This implies that the MNC would not have willingly organised a clean-up but for the agitations

of the Ivorian government and civil actions. It would be different if a MNC unintentionally dump toxic waste in an area or is ignorant of the effect of improper toxic waste dump. Sadly, some MNCs deliberately dump hazardous waste in an improper manner and know the adverse effect of such disposal.

Refusal of host State and home State courts to entertain the prosecution of parent corporations

While the four determinants set by the Supreme Court in *Sosa* provides a guide on the reliance of the ATS, it fails to identify the applicability of the above requirements to national and multinational corporate entities. Meanwhile, the U.S Code allows the federal court to assume jurisdiction of any civil action instituted by or against any corporation on the ground that it was incorporated by or under an Act of Congress.[764] District courts can only assume such jurisdiction where the United States owns more than one-half of the company's capital stock.[765] Contrary to the decision in *Kiobel*, it can be argued that this provision implies that the federal court can have jurisdiction over tortious actions committed abroad by U.S corporate entities.

However, the decisions of the U.S Court of Appeal can be criticized for inconsistent adjudication considering that prior to this time it had acknowledged the extraterritorial application of the ATS even in relation to MNCs. In the 1980 case of *Filartiga*,[766] the U.S court applied the ATS in respect of an alleged claim that the Paraguayan defendant committed torture against the Paraguayan plaintiff in Paraguay. This was an appreciated step by a foreign court to liberalize human rights regime across sovereign states. It shows that States could establish universal accountable mechanism to address heinous human rights violations.[767] This extraterritorial recognition of human rights accountability across national borders was extended by U.S Court of Appeal to be binding on MNCs in the cases *Kadic v. Karadfic*[768] and *Doe I v. Unocal Corp*[769]

Oil and gas pollution is a heinous human rights violation which deprived victims of their right to life when they inhale the toxic air causing their death; their right to a sustainable environment when oil spills pollute their air, land, waters, their right to adequate standard of living when they are unable to feed as a result of such pollution. Therefore, the foreign court should examine the

[764] *28 U.S. Code § 1349.Corporation organized under federal law as party.*
[765] *Ibid*
[766] *Filartiga r. Pena-Irala, 630 F2d 876 (2d. Cir. 1980).*
[767] *Cleveland (2014) p.552*
[768] *Kadic v. Karadfic 70 F3d 232 (2d. Cir. 1995)*
[769] *Doe I v. Unocal Corp 395 F3d 978 (9th Cir. 2003)*

impact of oil and gas pollution on human lives and the environment rather than directing extraterritorial suits to where the cause of action arose. Although, it may be argued that the foreign courts are mindful not to encroach on the sovereignty of the home state including its nationals. Notwithstanding, it should be noted that the sovereignty of a state includes protecting the rights of the people particularly for a country like Nigeria where human and environmental rights protection are guaranteed under its Constitution[770] and same is considered the *grundnorm* of the nation.[771] Section 1 stipulates that the Constitution and its provisions are supreme and shall have binding force on the authorities and persons in Nigeria.[772] Therefore, when foreign courts protect Nigerian victims from harm, they are equally protecting its nations sovereignty.

MNCs are rarely subjected to the national law or courts of the host State because of their transnational legal status. Some of these MNCs are more powerful either economically, politically or having a greater population than a State particularly a developing States in dependent on foreign direct investment for economic development. MNCs may threaten to withdraw its economic contribution if a state attempts to tighten its regulations on corporate activities. Notwithstanding, subsidiaries of MNCs may still held accountable under the courts of host States for human rights abuses. However, victims of human rights abuses remain reluctant to choose the jurisdiction of host States for reasons such as complicity in human rights violations, corruption, injustice, or delayed trial. The United States Federal Alien Torts Claim Act (ATCA) of 1789 allows aliens to pursue legal actions in US federal courts for human rights breaches within and outside the United States. However, following the threshold and judgements of the U.S Supreme Court in *Sosa* and *Kiobel*, victims of oil spill hazards would have to cross a very difficult hurdle in claiming remedy before the U.S courts.

On the other hand, the 2021 decision of the Supreme Court in *Okpabi* has caused a paradigm shift which allows legal claims against MNCs in their home state. Historically, the practice has been that a legal matter should be instituted where the cause of action arose including acts perpetrated by MNCs in foreign jurisdictions.[773] It has been argued that the term "MNC" is a

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[770] *Chapter II and IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended).*
[771] *Fowowe Adetomiwa, (2021) The Need for the Provision of a Referendum in the Nigerian Constitution. Adekunle Ajasin University, Available at: <https://ssrn.com/abstract=3767425 or http://dx.doi.org/10.2139/ssrn.3767425> accessed: 22/10/2021*
[772] *Section 1 of the Nigerian Constitution*
[773] *ibid*

façade which merely portrays a legal entity that does not exist. MNC is a group of separate legal entities incorporated and subject to the laws of the countries where they operate.[774] A distinctive feature of a MNC is the location of its headquarters in a country known as the home State and has subsidiaries operating in other countries.[775] The international character of MNCs hinders host countries from engaging in effective collective negotiations with the subsidiaries of MNCs. Also, the labour regulations of host States are not applicable to MNCs.[776] As a result of this conflict, host states now attempt to directly regulate MNCs.[777] Nevertheless, host States have since the 1970s intervened in the activities of MNCs, setting conditions for MNCs desiring to invest in their respective States.[778] Host states intervene in the affairs of MNCs in two distinct ways namely; limiting its strategic freedom and threatening its managerial autonomy. While the former creates fiscal and regulatory basic principles, the latter influences the internal workings of the MNCs in their decision-making process.

The courts in host States exercise jurisdiction over MNCs.[779] For example, a Belgian court upheld a prescribed statutory notice period of a MNC over a domestic corporation.[780] Meanwhile, foreign states are hesitant to regulate activities of foreign corporations that are purely extraterritorial in nature.[781] Accordingly, even where the foreign state has jurisdiction, the foreign court might dismiss the case on grounds of *forum non conveniens.* For example, the U.S Supreme Court in the case of *Kiobel* held that it would have heard the suit against the MNC – RDS on the merit only if the alleged violation by the corporation occurred in the United States. In other words, the Supreme Court was indirectly saying that the appropriate forum was the host state where the incident occurred. *Forum non conveniens* is equally adopted by courts in the

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[774] Lal, Sanjaya, 1973. "Multinational enterprises and social policy: International Labour Office Studies and Projects, New Series, No. 79. Geneva: International Labour Office, 1973. Pp. x + 182. Sw.F. 17.50," World Development, Elsevier, vol. 1(8), pages 82-83
[775] Supra (n1) p.3
[776] Ayres, J., & Nothstein G., (1976) The Multinational Corporation and the Extraterritorial Application of the Labor Management Relations Act. Cornell International Law Journal 10(1) p.4
[777] Ayres, J. (1976) p.5
[778] Doz Y. and Prahalad C.K., (1980) How MNCs Cope with Host Government Intervention. Harvard Business Review.
[779] Ayres, J & Nothstein G., (1976) p.5
[780] Chen v. Ideal Standard (Belgium Labor Court of Nivelles, 1972)
[781] Miguel Juan Taboada Calatayud, Jesús Campo Candelas & Patricia Pérez Fernández (2009) The Accountability of Multinational Corporations for Human Rights' Violations. Constitutional notebooks of the Fadrique Furió Ceriol Chair. p.179

home country of the MNC in relation to unlawful conduct perpetrated by an affiliated entity to the MNC operating in the host country.[782]

However, the refusal by home state courts to try MNCs based on the doctrine *forum non conveniens* that the harm occurred in a foreign country disregards proof of substantive liability.[783] Therefore, reference to the doctrine upon the determination of a choice of law reveals a draconian outcome rather than the delivery of justice or convenience. Both the home state and host state courts should be given the discretion to determine whether there is a compelling interest they seek to fulfil in the application of the respective laws. A compelling interest for the home state court may be to try MNCs where it would apply its domestic law rather than having host state courts try MNCs where they are subject to a foreign law. In such instance where the host state courts apply its domestic provisions to the MNC, the purpose of the home state legislation in which the MNC was created is defeated. Also, the home state court in applying its domestic law being a familiar law both to the court and MNC solves any problem which may arise if conflict of laws are to be applied. Aside the ATS, the U.S Courts have established private and public interest factors in determining *forum non conveniens*. These factors as examined below can be adopted by home state courts in the determination of jurisdiction for the extraterritorial actions of their MNCs.

In the case of *Gulf Oil Corporation v. Gilbert,*[784] the U.S federal district court in determining the appropriate forum for the suit took into consideration private factors such as access to evidence, availability of witnesses, cost of transportation and the cost of trial in the chosen jurisdiction. The court examines the financial capacity of both the defendant to defend the suit in its jurisdiction and the plaintiff to pursue the action in the alternative forum. The courts considered public interest factors such as avoidance of congestion in the courts, interest in having jurors to view the trial and inconvenience in the application of an unfamiliar law. In either of the above factors, the burden of proof is on the defendant including proof a fact that an alternative forum is available. Therefore, *forum non conveniens* is a tool used to dismiss tort claims instituted outside the jurisdiction of where the cause of action arose, i.e., extraterritorial claims. This tool is particularly adopted where the joint inconvenience to the defendant and to the court outweigh the

[782] *Ibid*
[783] *Joshua Rose, (1986) Forum Non Conveniens and Multinational Corporations: A Government Interest Approach. North Carolina Journal of International Law and Commercial Regulations. 11(1), p.700*
[784] *Gulf Oil Corporation v Gilbert., 330 U.S. 501 (1947).*

claimant's interest in the choice of forum. The public interest factors portray a subjective approach which aims at convenience instead of administration of justice.

On the other hand, it is argued that MNCs hold a transnational legal status and are therefore not direct subject to national jurisdictions except for the jurisdiction of its home States where it was established.[785] MNCs only become subject of host state jurisdiction through their subsidiary operating in the host state concerned.[786] Since the 1990s, the practice of filing legal actions against MNCs in their home states have been defined by the English courts in a number of cases. The English courts have established grounds that allows claimants to pursue legal actions against MNCs in their home states. In the case *Adams v Cape Industries Plc*,[787] the company was a parent company established in the UK and specialized in the mining of asbestos. The company subsidiary has caused injury to the claimant in Texas. The claimant filed a suit against both the parent company and its subsidiary before the Texas court. The court ruled in favor of the claimant and the latter sought to enforce the judgment in the home country of the parent company – United Kingdom. The English High court refused to recognize the judgment of the Texas court against the parent company on the grounds that the latter had no presence in Texas and cannot be said to have a presence through its subsidiary.

This implies that the English court would have entertained the suit if the harm occurred in the UK where the parent company was present. In addition, the Court of Appeal held that a MNC can only be sued in the host state where the parent company and the subsidiary are viewed as a single economic unit, where the subsidiary was acting as an agent for the parent company, or the subsidiary is a mere façade.[788] In the case of *Lubbe v Cape Plc*,[789] the House of Lords (now Supreme Court) allowed the MNC to be tried in England for misconduct committed by its subsidiary in South Africa on the grounds that the claimant no longer had legal representation in South Africa.

[785] *Kronstein, (1952) The Nationality of International Enterprises, 52 Columbia Law Review 983, 993-98*
[786] *ibid*
[787] *Adams v. Cape Industries Plc [1990] Ch 433*
[788] *Ibid*
[789] *Lubbe v. Cape Plc [2000] UKHL 41*

In relation to oil and gas spills, the Nigerian courts have barely adjudicated disputes directly involving MNCs except through their subsidiary operating in the country.[790] Accordingly, victims of oil and gas spills file legal action before the Nigerian court against SPDC, SNEPCO, NLNG, SNG (subsidiaries of Shell) rather than the parent company – RDS. The case of *Okpabi* contributes to legal development that allow claimants to bring legal actions against MNCs before the court in the home State where MNC is established. Therefore, domestic courts across the world should be viewed as global adjudicators for both state and non-state actors.[791] They are considered co-creators of international order.[792]

Ultimately, the role of non-state actors such as MNCs are the main focus on the issue of global governance.[793] Municipal courts must seek to settle laws from different jurisdiction even as globalization unites various legal systems.[794] The courts usually serve as a channel to resolve disputes between global actors and even use their adjudication role in extraterritorial claims.[795] Municipal courts participate in global governance, they do not only solve functionalist problems but could change global politics by transforming the location of political contestation and building the nature of political interactions.[796] International political tussles over critical issues such as human rights, property rights, and sovereignty begins to evolve through courts across the world. Municipal courts may serve as mechanisms for endogenous change in the international order, i.e., they possess the ability to redefine global actors such as MNCs, determine critical norms, and influence their interaction structure.

Failure to hold parent corporations accountable for actions of their subsidiary

The author disagrees with the reasonings of the Dutch Court in the case of *Akpan v RDS and Anor*[797] which excluded the parent company from liability. The parent company is expected to

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[790] *ibid*
[791] *Kharaman, F., Kalyanpur, N. and Newman A., Domestic courts, transnational law, and international order. European Journal of International Relations. p.184*
[792] *Ibid, p.185*
[793] *Büthe, T, Mattli, W (2011) The New Global Rulers: The Privatization of Regulation in the World Economy. Princeton, NJ: Princeton University Press.*
[794] *Ibid*
[795] *Putnam, TL (2016) Courts Without Borders: Law Politics, and US Extraterritoriality. Cambridge: Cambridge University Press.*
[796] *Farrell, H, Newman, AL (2014) Domestic institutions beyond the nation-state: charting the new interdependence approach. World Politics 66: 331–363.*
[797] *Akpan (A.F.) & Anor v Royal Dutch Shell plc & Anor, District Court of The Hague, 30 January 2013, LJN BY9854/HA ZA*

direct its subsidiary towards the prevention of oil spills including the ability to clean-up oil spills adequately and timely. While it can be understood that Nigerian court have rarely held the parent company liable for the actions of its subsidiary, the Dutch court have held the parent company liable on the basis that the RDS and SPDC constitute a single economic unit or that SPDC is only an agent of RDS as established in the case of *Adams v Cape Industries Plc*.[798] However, such approach would have created a landmark decision in which a foreign court held a parent company accountable for the actions of a Nigerian subsidiary. On the other hand, oil and gas corporations are expected take stronger preventive approach against oil spills whether caused by sabotage, defective or antique material. Although, this is in contrast with the position under Nigerian law in which an oil corporation is not liable in the event of sabotage. However, unlike the Dutch court, the Nigerian courts fail to consider the positive obligation of the corporation to prevent sabotage by undertaking adequate measures in protecting the oil pipeline or oil facility.

Alternative Dispute Resolution (ADR) in environmental dispute

The Nigerian legislature and international community should create a binding obligation for MNCs to adopt ADR in the settlement of environmental disputes. This would encourage both local and multinational oil corporations to foster speedy resolution of environmental damages resulting from oil spills. This would consequently reduce the adverse impact on human lives and property. However, the government agencies must ensure the enforcement of all decisions from an ADR process. Although, the case of *Bodo* was settled within a shorter period of 8 years compared to other environmental disputes, the Nigeria government was not prepared to enforce the outcome of the ADR process.

4.9 Conclusion

The above case studies analyse the role of the Nigerian courts and foreign courts in holding corporations accountable for human and environmental rights abuse. The Nigerian judiciary has made a commendable effort in holding oil and gas MNCs accountable under the common law duty of care and strict liability codified in its Oil Pipeline Act. However, the independence of the Nigerian judicial system is necessary to fully and effectively hold oil and gas MNCs accountable

[798] *ibid*

for these violations. It is observed that victims of oil and gas spills suffer judicial setbacks such as corruption, delayed trial and procedural and substantive law injustice in human and environmental disputes arising from oil and gas spills. For example, dismissal of a suit because the claimants' losses are unequal, refusing an injunction against an oil and gas MNC in the interest of the State rather than the lives and environmental of the people, and the exercise of judicial discretion breeding uncertainty in respect of awarding general damages.

From the above discussion, it is observed that there are various reasons why claimants may choose to file legal actions against MNCs in foreign jurisdiction particularly the home state of the MNC. Other basis for filing a suit in the home state is to enable the claimant to directly sue the parent company which has the larger financial resources to undertake extensive liability as may be determined by the Court. Another reason may be the view that due to the transnational legal status of MNCs, they are not subject to the jurisdiction of all States. Hence, the domestic courts have rather held their subsidiaries accountable for human rights violations. Legal actions against MNCs are usually instituted in their home state. In addition, a suit against the parent company domiciled in England gives the English court jurisdiction to entertain the suit as the Nigerian courts cannot be entirely trusted in the administration of justice and fairness even where the subsidiary of the MNC is the principal party to the suit. A Nigerian judge may be compromised considering the economic benefit of the country from the corporation. The bias of a Nigeria judge is likely because the executive arm of government is involved in the appointment of judges in the country. Therefore, it can be concluded that there is lack of independence in the Nigerian judicial system and this adversely affects the regulation and accountability of oil and gas MNCs operating in the country.

MNCs should be held accountable for human rights abuses before the courts in their home State. Therefore, States should clearly codify this form of accountability in their respective domestic laws to avoid uncertainty. The advent of globalization should view domestic courts across the globe as a transnational judicial institution having the jurisdiction over cause of actions arising outside their territory. However, if the Nigeria judicial system strengthens its institution, there will be less need to institute claims in foreign or home State courts. This implies that the Nigerian courts must be open to try MNCs in order to discourage reliance on extraterritorial judicial suits by victims of oil and gas hazards. Alternatively, Nigeria should adopt a quasi-

judicial system or ADR in the settlement of human and environmental disputes arising from oil and gas spills. This would ensure that victims receive timely and adequate response to such environmental disaster. It would prevent the corporations from being trapped under the doctrine of *lis pendens* which can affect their business operations and output.

CHAPTER 5

5.1 BEST PRACTICES TOWARDS THE PREVENTION AND MITIGATION OF ENVIRONMENTAL ABUSES BY OIL MULTINATIONAL CORPORATIONS.

Introduction

This Chapter discuss various legislative and enforcement measures which can be adopted by host States in the regulation of oil and gas MNCs to prevent or mitigate the environment effect of their activities in the exploration and production of crude oil, waste disposal and other connected operations in developing communities in Nigerian and across Africa. This chapter opines that total prevention of environmental disaster is a challenge and therefore MNCs can only do so much to alleviate the adverse effect of its environmental operations. Therefore, this chapter encourages MNCs to embody best practices such as prior environment impact assessment (EIA), voluntary disclosures, stakeholder participation, and installation of durable facilities. On the other hand, the State should undergo the responsibility of creating a binding legislation that contains the above best practices which shall be binding on MNCs through their subsidiaries. In order words, the State should compel MNCs to operate through their subsidiaries in host States given that MNCs are recognised as having transnational status above national laws. In Nigerian, for example, the Department of Petroleum Resources (DPR) may suspend the exploration license

of the parent company's pending when they register a subsidiary company in the host state which would undertake activities on behalf of the parent company and as a single economic unit.

Environmental impact assessment (EIA)

Environmental Impact Assessment (EIA) involves a team of expert who examines the physical, social and ecological positive and negative effect of an intended project.[799] It is also defined as *systematic examination of unintended consequences of a development project or program, with the view to reduce or mitigate negative impacts and maximize on positive ones*.[800] At the end of such environmental study, an EIA report is prepared. EIA is a planning and decision-making tool.[801] That is to say, it is used to identify, predict and evaluate potential environmental, economic and social impacts of MNCs activities. It seeks to mitigate potential adverse environmental impacts thereby supporting environmental, economic development which are sustainable. In addition, it aims to protect human health. On the other hand, it is a decision-making tool because an EIA report may culminate into an effective environmental policy. With the conduct of an EIA, MNCs are able to decide whether to proceed with a project or what controls may be adopted. Also, it is used to develop procedures which are proposed to relevant organs such as MNCs and governmental agencies. Although an EIA may be undertaken upon the execution of a project, such assessment must be conducted before the performance of any proposed environmental activity to easily prevent or mitigate environmental disasters. In addition, a prior EIA saves the cost of pulling down or re-building projects.

There are a number of international frameworks on EIA. For example, the 1982 World Charter of Nature emphasize on the conservation of land, seas, ecosystem and organisms which might be affect by human conduct.[802] In 1987, the United Nations presented a framework titled *Goals and Principles of Environmental Impact Assessment.* In 1989, the World Bank released *Environmental Assessment Directive* which screened projects having adverse effect on the environment. The 1992 Rio Declaration on Environment and Development provides that EIA

[799] *Momtaz S. & Kabir Z., The Quality of Environmental Impact Statements, In "Evaluating Environmental and Social Impact Assessment in Developing Countries" (Second Edition, 2018).*
[800] *El Haggar, S.M. Rural and Developing Country Solution, In "Environmental Solutions", (2005)*
[801] *Biamah E.K. & Kogo B., Kenya: A Natural Outlook, In "Developments in Earth Surface Processes", (2013)*
[802] *Article 11 of the World Charter of Nature 1982*

shall be undertaken for proposed projects likely to have significant negative impact on the environment.[803] Although, the above legal instruments are not binding, they provide an authoritative framework in which environmental impact of projects may be measured. However, the EIA provision under the Rio declaration is been criticized as a low threshold for determining the necessity of an EIA.[804] Article 206 of the United Nation Convention on the Law of the Sea sets a strict threshold in this regard as it requires "*reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments…"* Similar provision is found in the Convention on Biological diversity (CBD)[805] and Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention)[806]

The Preamble to the CBD affirms that the conservation of biological diversity is common to humankind and that nations are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner. Article I of the CBD expresses the egalitarian and redistributional objectives of the Convention as follows: The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies and by appropriate funding.[807] The substantive provisions of the CBD relevant to this research are General Measures for Conservation and Sustainable Use (Article 6), Identification and Monitoring (Article 7), In-situ Conservation (Article 8), Ex-situ Conservation (Article 9), Incentive Measures (Article 11), Research and Training (Article 12), Public Education and Awareness (Article 13), Impact Assessment and Minimizing Adverse Impacts (Article 14), Access to and Transfer of Technology Article 16),

[803] *Principle 17*
[804] *Boyle A. (no date) Developments in International Law of EIA and their Relation to the Espoo Convention Available at: <https://unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar_Boyle.pdf> accessed: 2/2/2021*
[805] *Article 14 Convention on Biological diversity, 1993*
[806] *Convention on Environmental Impact Assessment in a Transboundary Context 1997*
[807] *Article 1 of the Convention on Biological Diversity, June 5, 1992. 1760 U.N.T.S. 79*

Exchange of Information (Article 17), and Technical and Scientific Cooperation (Article 18). However, there is no mechanism to implement every area of the Strategic Plan and limited support to enable countries to fulfill their obligations and aspirations. Also, there is inadequate flow of financial resources to developing countries. Furthermore, another severe challenge in nature conservation is inadequate field staff in protected areas and indigenous reserves in developing countries.

The International Court of Justice (ICJ) has also contributed to setting thresholds on when an EIA is required. Although its decision relates to Transboundary context, it may be adopted and applied in respect of oil MNCs operating in foreign countries. In *Pulp Mills on the River of Uruguay,*[808] the ICJ applying the Espoo Convention noted that an EIA can be conducted in respect of a project carrying a known risk with a potential to cause significant adverse impact. Meanwhile, in a bid to buttress the importance of EIA, the ICJ held that the Espoo convention is a general requirement of international law and not a mere treaty obligation.[809] Therefore, the Court enforced the provision of the convention on the parties i.e., Argentina and Uruguay even though they were not member States. In the case of *Land Reclamation,*[810] the ICJ required the assessment of risk before an EIA is presumed. In *Southern Bluefin Tuna,*[811] the ICJ required the parties to undertake further studies before the Tuna fishing quota is increased under an EIA agreement. Except for the Rio Declaration which sets a weak threshold, the above regulations and ICJ decisions shows that evidence of risk is required before an EIA is suggested and it is immaterial that the risk is uncertain or without a remedy.[812] The author disagree with this threshold put forward under international law because some risk can be unforeseeable which makes the collection of evidence prior to an EIA impracticable. I would suggest that EIA should be conducted whether there is evidence of a risk of harm. However, an EIA may not be required where an identified risk is too remote or a mere speculation.

EIA in the Nigeria oil and gas industry context

[808] *Pulp Mills Case (Provisional Measures) (Argentina v. Uruguay) ICJ Reports 2006.*
[809] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment of 20th April 2010.*
[810] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), decision of 1 September 2005.*
[811] *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, decision of 4 August 2000.*
[812] *Alan Boyle, Developments in International Law of EIA and their Relation to the Espoo Convention*

Nigeria is a member State to most international environmental laws including the Stockholm Declaration and Rio Declaration which provides for environmental impact assessment. The country has implemented these laws in its domestic legislation thereby binding on the State. There are other domestic legislations which addresses environmental safety standards by oil corporations. A typical example is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) adopted by the Department of Petroleum Resources (DPR), Nigeria. Also, the Nigerian Environmental Impact Assessment Act (EIA) prohibits public or private project without prior EIA.[813] The Act states that an environmental assessment is required where the Federal, State or Local government is the proponent of the project or where it leases land for the execution of a proposed project. Therefore, land leased or licensed to MNCs for oil and gas development or waste disposal cannot be operated without assessment and report of the Agency.[814] The Act specifies that an EIA must be conducted prior to any oil and gas field development, construction of offshore pipelines in excess of 50 kilometres in length and waste disposal.[815] The EIA Act should not have limited environmental assessment of projects or land granted by the host State because damage may still be caused to the environment and human lives where MNCs fail to undertake prior environmental assessment of any given project whether or not supported by the host State. The EIA Act should have learnt from the case of Koko toxic waste disposal in which the corporations without prior environmental assessment utilized a land for waste disposal not granted to it by the Nigeria government and thereby caused severe damage to environment of members of the community.

In addition, the EIA Act states that environmental assessment is not required where in the opinion of the President or the Council the environmental adverse effect of a project is likely to be minimal. The environmental effect of a project can only be determined when an assessment has been conducted. The Act does not provide any basis or justification for the overriding opinion of the President or the Council which may in some cases be invalid. In the same vein, the exclusion of environmental assessment where the Agency is of the opinion that the project is in the interest of public health and safety is not reliable without environmental assessment and public consultation.

[813] *Section 2 of the Environmental Impact Assessment Act (2004) CAP (E12), LFN*
[814] *Ibid, s.12*
[815] *Ibid, Schedule 12 and 18*

The National Environmental Standard and Regulations Enforcement Agency (NESREA) is responsible for the enforcement of EIA. The Agency shall not permit the execution of a project which pose threat to the environmental particularly where same cannot be mitigated. While the industry or government department organises the EIA, the Agency supervises and examines the activity.[816] The host State determines the specific content of an EIA which may vary depending on the industry. In Nigerian, the Department of Petroleum Resources (DPR) outlines the specific content of an EIA applicable to its oil and gas industry. An oil corporation may add to the content prepared by the host State. The specific content of an EIA must take into account "the nature and magnitude of the proposed development and its likely adverse impact on the environment"[817] Also, regulatory bodies may offer advice on the appropriate assessment of potential impacts on the environment including biodiversity. For example, the UK Department for Environment, Food and Rural Affairs (DEFRA) suggests the assessment of gains and losses of the number of species, amount of space for species and environmental changes.

The impact of oil and gas operations in the environment influences the ecosystem by changing ecological components including biodiversity, productivity and renewable organic material from plants and animals. The EIA of an oil and gas exploration project involves identification, prediction, evaluation, and mitigation of impacts before the commencement of the project.[818] Identification under an EIA process includes the establishing accurate baseline data and controlling the sites for the operations. Afterwards, there are baseline prediction on the changes of ecological conditions in response to oil and gas project development.

An environmental impact assessment of an oil and gas exploration project would cover accidental oil and gas discharge, infrastructural installation, and natural resources.[819] The assessment identifies habitats and species in an exploration zone; whether such creatures are to be afforded protection as provided under the United Convention on the Law Sea (UNCLOS); and whether the project would adversely affect these creatures. Many deep-sea species usually have low metabolism, slow growth, and long-life spans.[820] Many deep-sea ecosystems assemble

[816] *Ibid, ss. 6 & 10*
[817] *Ibid*
[818] *Cordes et al, (2016) Environmental Impacts of the Deep-Water Oil and Gas Industry: A Review to Guide Management Strategies. Front. Environ. Sci.,*
[819] *Cordes et al, supra (n20)*
[820] *McClain, C. R., and Schlacher, T. A. (2015). On some hypotheses of diversity of animal life at great depths on the sea floor. Marine Ecology. 36, 849–872*

diverse creatures.[821] In some habitats, species can re-assemble faster after their ecosystem is disturbed,[822] but in most deep-sea ecosystems, it is difficult for creatures to re-assemble.[823] These features make deep-sea species sensitive to anthropogenic operation such as petroleum activities causing oil and gas pollution.[824]

Environmental monitoring is crucial step after an EIA of oil and gas projects. However, monitoring may be conducted before, during and after the impact.[825] The purpose of monitoring is to detect impact of accidental and specific operations.[826] Unfortunately, MNCs in the oil and gas industry receives minimal attention and equipment than the EIA. Some host States have low monitoring requirements. Most oil and gas corporations and jurisdictions do not engage in long-term monitoring in deep-sea.[827] A notable exception is the monitoring systems built in deep waters off Angola for the purpose of recording long-term natural and anthropogenic alterations in the ecosystem and to understand recovery speed from impacts which are not foreseeable.[828] In addition, monitoring is required to be carried out after production and during decommissioning.[829]

In some jurisdictions such as England, Wales and the United States, the Court had ruled that EIA must not organise an in-depth assessment of every part of a project, test every hypothesis or

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[821] *Glover, A. G., and Smith, C. R. (2003). The deep-sea floor ecosystem: current status and prospects of anthropogenic change by the year 2025. Environmental Conservative. 30, 219–241*
[822] *Van Dover, C. L. (2014). Impacts of anthropogenic disturbances at deep-sea hydrothermal vent ecosystems: a review. Maritime Environment Res. 102, 59–72.*
[823] *Vanreusel, A., Hilario, A., Ribeiro, P. A., Menot, L., and Arbizu, P. M. (2016). Threatened by mining, polymetallic nodules are required to preserve abyssal epifauna. Sci. Rep. 6:26808.*
[824] *Clark, M. R., Althaus, F., Schlacher, T. A., Williams, A., Bowden, D. A., and Rowden, A. A. (2016). The impacts of deep-sea fisheries on benthic communities: a review. ICES J. Mar. Sci. 73 (Suppl. 1), i51–i69*
[825] *Underwood, A. J. (1994). On beyond BACI: sampling designs that might reliably detect environmental disturbances. Ecol. Appl. 4, 3–15.*
[826] *Iversen, P. E., Green, A. M. V., Lind, M. J., Petersen, M. R. H., Bakke, T., Lichtenhaler, R., et al. (2011). Guidelines for Offshore Environmental Monitoring on the Norwegian Continental Shelf. Oslo: Norwegian Climate and Pollution Agency.*
[827] *Hartman, S. E., Lampitt, R. S., Larkin, K. E., Pagnani, M., Campbell, J., Lankester, T., et al. (2012). The Porcupine Abyssal Plain fixed-point sustained observatory (PAP-SO): variations and trends from the Northeast Atlantic fixed-point time series. ICES J. Mar. Sci. 69, 776–783.*
[828] *Vardaro, M., Bagley, P., Bailey, D., Bett, B., Jones, D., Clarke, R., et al. (2013). A Southeast Atlantic deep-ocean observatory: first experiences and results. Limnol. Oceanogr. 11, 304–315*
[829] *Iverson, supra (n*

provide solutions to every problem.[830] Some oil corporations may perceive this rationale as bias because of fears that their project may be rejected after a background assessment revealing minor environmental risk which can be remedied. However, this may not necessarily mean that a project would be rejected based on a background assessment in so far as an EIA is exercised in good faith with significant scientific and technical evidence of risk. The host State may direct a MNC to review an EIA that is perceived to be inadequate.[831] On the other hand, some corporations may oppose an in-depth assessment because it attracts additional cost. Considering that some corporations may hide under the cloak of a background assessment which may not reveal any risk, an in-depth assessment is necessary to discover adverse environmental impact of a proposed project not discoverable under a background assessment. However, an in-depth assessment should not be required to the extent of non-environmental risk. Hence, the United Nations Environmental Programme (UNEP) Goals and Principles, which states that "only the environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance".[832] That is to say, an in-depth impact assessment should be supported in so far as it relates to the environment including living and non-living things such as air, water, plants, animals, and humans.

On the other hand, oil and gas MNCs are encouraged to adopt Strategic Environmental Assessments (SEAs). This involves a broad or regional assessment of environmental impact of a project. The aim of SEA is to support regulatory bodies in the identification of development alternatives for sustainability and conservation across national and global regions.[833] Notwithstanding the benefit of SEA, their application by oil and gas MNCs is limited.[834] Examples of regional assessments for offshore oil and gas development are known from Canadian Atlantic waters (e.g., LGL Ltd., 2003), the Norwegian Barents Sea (Hasle et al., 2009),

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[830] *Prineas v. Forestry Commission of New South Wales, 49 LGERA (1983) 402; Belize Alliance of Conservation Non-Governmental Organisations v. Dept. of Environment, UKPC (2003) No.63; Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989)*

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[832] *Principle 5 of United Nations Environmental Programme: Goals and Principles of Environmental Impact Assessment. Issued January 16, 1987.*

[833] *Jay, S. (2010). Strategic environmental assessment for energy production. Energy Policy 38, 3489–3497*

[834] *Noble, B., Ketilson, S., Aitken, A., and Poelzer, G. (2013). Strategic environmental assessment opportunities and risks for Arctic offshore energy planning and development. Mar. Policy 39, 296–302*

the UK offshore area (e.g., Geotek Ltd. and Hartley Anderson Ltd., 2003), and the Gulf of Mexico (e.g., Minerals Management Service, 2003).

Meanwhile, the effectiveness of an EIA system is reflected in the report addressing all potential environmental challenges. The report may also assess the impact of the proposed project on humans and property. According to the EIA Act, following the execution of an EIA, a report must at least contain the following:[835]

i. Description of the project.
ii. Description of the environment likely to be affected and must specify relevant information to identify and evaluate the environmental effect.
iii. Practical description of activities.
iv. Identification of measures to mitigate adverse environmental impacts of proposed project.
v. Identification of inadequate data which may be encountered in computing required information.

One of the major challenges in the enforcement of the EIA Act is the lack of technical and scientific experts within the Agency. These two groups of experts are important in the conduct and production of an EIA report. The technical expert is expected demonstrate experience in the design of capacity development actions; they are to ensure that environmental, economic, social and cultural conditions of EIA are adequately defined; development of a project plan for assessment, inspection of proposed project sites, reaching out to stakeholders to gather information relating to the potential impact of a proposed project. Another major challenge is low funding managed by Agency. The government should adequately fund the Agency in order to boost the quality of their enforcement, particularly in the examination and supervision of environmental assessment of a proposed project. The Agency lacks adequate personnel and cannot delegate its official functions in taking decision relating environmental assessment process listed under Section 15 namely: (i) screening or mandatory study; (ii) mandatory study by a review panel; and (iii) design and implementation. There is also the challenge of corrupt officials who compromise with MNCs in the violation of the EIA Act such as not demanding for

[835] *Ibid, section 4*

an EIA from a corporation or fabricating an EIA report in order to give approval to particular project. MNCs are likely to present a report which suits their interest over the public interest or host communities.

In conclusion, MNCs who fail to organise a prior EIA of their project risk causing damage to the human lives, organisms and their environment. Therefore, MNCs should be aware that they suffer severe pecuniary loss when they fail to undertake environmental assessment of proposed project. Such pecuniary loss arises from the cost of environmental rehabilitation and compensations to victims of ecological disaster. Also, the failure of States to enforce an EIA constitutes a breach of international law obligation.

Mandatory reporting and disclosures

Corporate reporting and disclosures are a form of corporate social accountability and a response to environmental concerns in the 1960s and 1970s.[836] In the history of stakeholder-oriented disclosure, investors were viewed as representing the broader stakeholder community, thereby placing investors over every other corporate interest. Shareholders vote directors who receive remuneration that could cause bias and align their interest with that of shareholders.[837] When stakeholders demand corporations to publish information on an environmental impact of its project, corporations have no obligation to do so without representing investor interest in such disclosure.[838] Corporate disclosures should not only be made to investors but all stakeholders including local communities, competitors, employees, and regulators. Stakeholders require the information to contribute towards the country's economic development. Investors would only influence corporate project in their favor at the expense of other stakeholders.

It was the aftermath of Bhopal gas disaster in India during the 1980s and public agitations that resulted in the publication of the first environmental report.[839] Since then, there have been significant developments in the patterns of corporate reporting. There has also been an increase in the number of reports, broader scope of issues, and standardization. In 1992, it was only very

[836] *Emeseh, E & Songi O. (2014) CSR, human rights abuse and sustainability report accountability. International Journal of Law and Management. 56(2) p. 142*
[837] *Jeffrey N. (2007) Gordon, The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices, 59 Stanford Law Review. 1465, 1530-31*
[838] *Lipton, A. M. (2020). Not everything is about investors: The case for mandatory stakeholder disclosure. Yale Journal on Regulation, 37(2), 499-572.*
[839] *Emeseh, E & Songi O. (2014) CSR, human rights abuse and sustainability report accountability. International Journal of Law and Management. 56(2) p. 142*

few corporations in the chemical, oil and gas industry that participated in reporting and disclosures. Currently, there are over 3,000 corporation from a broad range of sectors across the globe which engage in reporting. More than 80% of 250 MNCs issue sustainability reports on their environmental, social and governance (ESG) performance.[840] Corporations across Europe are major complaints with reporting. In Europe, corporations are required to make annual disclosure of their operations.[841] In 2014, the European Union passed a directive requiring corporations to disclose information on their environmental impact, respect for human rights, and anticorruption measures to meet the needs of all stakeholders.[842] Although reporting covers a wide range of issues, as of 2008 only 15 per cent of reported issues relates to the environment performance of corporations. In the area of standardization, there is the Global Reporting Initiative (GRI) which provides global standards for sustainable reporting and disclosures on environmental, economic and social performance, their impact and how they are managed. However, the term 'sustainability' under the GRI has been criticized for its limitation to the relationship between a single corporation and the environment. It is argued that sustainability extends to the relationship between past and present corporations and their environment.[843] In fact, it covers the environmental, social and financial performance of a corporation also known as the triple bottom line sustainability. It also covers core issues such as business ethics, health, labour and safety, human rights, and other socio-economic impacts of operations. Therefore, mandatory reporting and disclosure should be made applicable to the above issues.

The quality of a disclosure is as important as the disclosure itself. The quality of a disclosure deals with the specific content of the report and not merely environmental description of the project. A report should disclose the risk associated with a project. For example, Section 10 of the Code on Corporate Governance 2011 provides that a board may set up a risk management committee to engage in risk profiling, risk management, and risk-reward strategy. However, this is not a binding requirement for corporations. With proper reporting and disclosure, communities

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[840] Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660 and 83/349 as regards disclosure of nonfinancial and diversity information by certain large companies and groups SWD(2013) 127 final.
[841] Darren Bernard et al., (2018) Size Management by European Private Firms to Minimize Proprietary Costs of Disclosure, 66 Journal of Accounting and Economics. 94, 96-98
[842] Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups
[843] Gray, R. and Milner, M. (2002), "Sustainability reporting: who's kidding whom?", Chartered Accountants Journal of New Zealand, Vol. 81 No. 6, pp. 66-70

can examine the projects of MNCs and pressure them to revise their operations. In addition, mandatory reporting and disclosure would enable regulators to draw from the contents of corporate reports and develop an effective legislation which addresses environmental and social impacts of MNCs activities. Regulators may welcome the involvement of stakeholders in the regulation process.

Mandatory reporting and disclosures are essentially required of MNCs for the purpose of public transparency. The lack or regulations requiring mandatory disclosures by MNCs contributes to the evasion of project monitoring. Depending on the subject matter, several authors have referred to the phrase 'corporate disclosure' with words such as Social and Environmental Disclosures (SEDs), Corporate Environmental Reporting (CER), social reporting, financial reporting etc. In general, corporate disclosure is defined as a mainstream media which contains and disseminates information on corporate activities to particular interest groups.[844] Corporate disclosure media may be verbal including advertising, annual reports, brochure, newsletter, public relations.[845] Most MNCs operates a website which contains advertisements and other disclosures.

Corporate disclosure may be divided into mandatory or voluntary disclosure and may either relate to the financial or non-financial disclosure by a company. While mandatory disclosures are imposed by law, voluntary disclosures are information which the company chooses to disclose without any form of regulatory obligations. Since the 1970s, the difficulty in accessing capital propelled oil corporations to develop the quality and depth of data disclosed to investors.[846] The issue of disclosure to members of the public have not really been of particular concern to oil corporations. Apparently, investors have for many years been given disclosure priority because of their financial contribution which contributes to keeping MNCs afloat. Meanwhile, all stakeholders have equal right to social and economic disclosures (SEDs) of company's activities.[847] While a few companies engage in SEDs to members of the public, other have

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[844] *Abdo, H. and Aldrugi, A. (2012), "Do companies' characteristics play key roles in the level of their environmental disclosures?", Energy Research Journal, Vol. 3 No. 1,*

[845] *Buhr, N. (1998) 'Environmental performance, legislation and annual report disclosure: the case of acid rain and Falconbridge'. Accounting, Auditing & Accountability Journal, 11(2): 163-190.*

[846] *Picchi B., (1986) Oil and Gas Disclosures: Uses and Shortcomings. Energy Exploration & Exploitation Vol. 4, No. 2/3, SPECIAL ISSUE: North American Energy Markets Conference, Toronto, Canada, p. 207*

[847] *Deegan, C., Rankin, M. and Tobin, J. (2002), "An examination of the corporate social and environmental disclosures of BHP from 1983-1997: a test of legitimacy theory", Accounting, Auditing & Accountability Journal, Vol. 15 No. 3, pp. 312-343.*

remained behind the scenes.[848] MNCs should realise that social, economic and environmental disclosures are crucial as their activities affects the public. This section focuses on social and environmental disclosures by MNCs to the public especially host communities. The rationale behind the disclosure of social or environmental information is to monitor accountability and transparency of the effect of corporate activities on the public and their environment. Stakeholder groups particularly host communities have become increasingly concerned about how corporation relate with their society and the environment. The corporate world should provide more information about the effect of its operations in the environment. Social and environmental disclosures by MNCs should be made a mandatory requirement under the national legislations of developing host States.

Given the lack of mandatory reporting requirements or standards, the accuracy of corporate reports become unfounded as a result of unreliable information from regulatory agencies in host countries. The sustainability reports of MNCs would not always reflect the veracity of its operations. For example, a development project of MNC may be ambiguous, omissive, and misleading.[849] Another example would be where in a company's report, project which are for the benefit of the corporation are labelled as community development projects for food, water, health and education provisions. However, it is hoped that persons with knowledge of truth would publicly expose any false content in the report.[850] Unfortunately, there are no binding domestic and international law to hold corporations accountable for false reports. This is partly because of the voluntary and self-regulation framework of CSR. Corporations should be held accountable for misleading statements reported and disclosed intentionally or negligently. In other instances, a corporation would only publish favorable or positive information rather than the undesirable aspects of its operations.[851] Corporation avoid disclosures that would result in media attention or disclosures that reports on the criticism of stakeholders. Some corporations do not adopt standard form of reporting or credible external auditing which is a requirement of most reporting guidelines such as the GRI. Following the above criticisms, reporting and disclosures by

[848] Odhiambo Odera Albert Scott Jeff Gow , (2016),"Differential reporting of social and environmental disclosures between local and foreign oil companies in Nigeria", Social Responsibility Journal, Vol. 12 Issue 3 p. 415
[849] Emel, J., Makene, M.H. and Wangari, E. (2012), "Problems with reporting and evaluating mining industry community development projects: a case study from Tanzania", Sustainability, Vol. 4, pp. 257-277.
[850] Cynthia Estlund, (2011) Just the Facts: The Case for Workplace Transparency, 63 Stanford Law Review 351-373
[851] Walden, W.D. and Schwartz, B.N. (1997), "Environmental disclosures and public policy pressure", Journal of Accounting & Public Policy, Vol. 16, pp. 125-154.

corporations have been described as ‘greenwashing’. This means the reports lack vital information and are only fabricated as actualizing environmental responsibility.

Notwithstanding the shortcomings in corporate reporting and disclosure, they may be useful in relation to stakeholder and legitimacy theories. They may also be relied upon by environmental experts, the media and competitors in the challenge of corporate claims through a legal system which could develop into an information regulation. It should be noted that reporting and disclosure are ordinarily made to large group of stakeholders who entitled to corporate information as shareholders, in so far as the stakeholders are affected by such information. Stakeholders influence sustainability reporting through negative campaigns by environmental groups, disruption of corporate projects by local communities which could in turn affect the productions, profits and shares of the corporation concerned. Sustainable reporting promotes communication between the corporation and stakeholders. Meanwhile, corporations view reporting as a strategy used to give legitimacy to corporate actions which are detrimental to its reputations. On the contrary, legitimation is not the key objective in corporate reporting. An internal characteristic of a corporate report is the establishment of an indirect regulation that would pressure MNCs to change their behaviors. Therefore, it is important that corporate reporting shifts away from stakeholder legitimacy to stakeholder accountability. Public disclosure has proven effective in several instances. For instance, the Toxic Release Inventory (TRI) Program which discloses the level toxic waste released by corporations has led to a reduction in greenhouse gas emissions in the United States. This is due to public pressure reaction to published information. Another example is the public pressure mounted on Starbucks which resulted in their commitment to pay more tax after their evasive tax practices was disclosed.

The implementation of mandatory reporting and disclosure requirements under a binding national legislation would force MNCs to record credible information in its reports and possible have them audited rigorously. Also, core issues such as environment assessment, stakeholder consultation and access to remedy would be covered in the report of MNCs. First, host government should ensure that MNCs operates through a subsidiary registered in the host country. Then, the reporting and disclosure requirements would be made mandatory by implementation in a binding national legislation which would hold the subsidiaries accountable

under an enforceable legal system rather than a voluntary initiative. On the contrary, it is argued that corporations are expected to adhere to ethical standards without any form of legal penalty.[852] MNCs would resist any binding legal provision that impedes on the wealth maximization in favor of its shareholders. In addition, a total reliance on a binding legislation to eradicate the environmentally and socially harmful operations by a corporation is unsafe as MNCs could lobby their interest in a particular country. If MNCs fail to disclose their projects and its adverse environmental impact, the media would do so, thereby placing the reputation of MNCs at global risk. Technologies and apps may be developed to publicize corporations' harmful environmental practices and to enable stakeholders investigate the social and environmental performance of MNCs. Once the reputation of a MNC is affected, it becomes a political target by various national governments while adherent corporations enjoy some form of regulatory forbearance. Companies are concerned for their reputation and will reform their practices in order to avoid negative publicity.[853]

The lack of mandatory reporting requirements and standards is the reason why they are not accorded universal recognition and corporations do not practice them systematically.[854] However, it is feared that the implementation of mandatory reporting requirement under national law may not improve the quality of reports. This is as a result from the insignificant level of compliance in countries having mandatory reporting requirements such as Australia, France and Norway. Also, the lack of clarity with reporting guidelines contributes to non-compliance and consequently affects the report quality.[855] MNCs should specify a reporting guideline such as the GRI which it would apply in the preparation of its reports. On the other hand, there is the need for effective enforcement by a government agency to achieve maximum compliance.[856]

Disclosure policy is reflected in legislations of some developing States. For example, the Nigerian EIA Act acknowledges public notification in respect of EIA report of a proposed

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[852] *Einer Elhauge, (2005) Sacrificing Corporate Profits in the Public Interest, 80 New York University Law Review. 733, 748-53*
[853] *David Vogel, (2005 The Market For Virtue: The Potential And Limits Of Corporate Social Responsibility 46-52*
[854] *Nahal, S. (2002), Mandatory CSR Reporting: France's Bold Plan, BUS. FOR SOC. RESP., 14 June, available at: <www.bsr.org/BSRResources/Magazine/CSRTrends.cfm?DocumentID=844> accessed: 30/08/2020*
[855] *Baue, W. (2002), "New French law mandates corporate social and environmental reporting", available at: <www.socialfunds.com/news/article.cgi?sfArticleId=798> accessed: 30/08/2020*
[856] *Bubna-Litic, K. (2008), "Environmental reporting as a communications tool: a question of enforcement?", Journal of Environmental Law., Vol. 20, pp. 69-85.*

project.[857] This also applies to report submitted by a mediator or review panel in respect of a proposed project referred by NESREA.[858] It also establishes a registry in which members of the public may view the assessments relating to a proposed project.[859] This is to enable members of the public give their comments on the report of such project. However, NESREA needs to employ scientific and technical experts as MNCs are likely to select a limited number of project information or their impacts for public disclosure. Also, some of the disclosed information may be fraught with errors as a result unskilled personnel. The Freedom of Information (FOI) Act enacted by the Nigerian legislature in 2011 gives citizens the right to access environmental information held by public authorities. However, the Act only allows for the disclosure of public records. This would apply to MNCs which are registered as public companies. However, it is important that records of private firms are equally disclosed to the public because some MNCs operate through subsidiary companies which are registered as private companies in host States. For example, in Nigeria, Royal Dutch Shell – a public enterprise operates through its subsidiary Shell Development Company of Nigeria Limited (SPDC). Private companies must disclose information which are likely to affect members of the public. However, enforcement of corporate environmental disclosure is covered under NESREA Act which requires the prior disclosure of private and public project which may negatively affect the environment.

Intergovernmental organisation, regional adjudicatory bodies, and municipal courts have equally expressed their concerns over environmental disclosures. For example, the International Financial Reporting Standard Board (IFRSB) requires firms to information on their activities which may influence the environment. Global Reporting Initiative (GRI) is responsible for the promotion of social, economic and environmental sustainability through developing a reporting framework globally used by all types of businesses. As a result, countries like China, Denmark, The Netherlands and Norway have made environmental reporting a compulsory disclosure in the company's annual reports. In the case of *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*[860] the applicants accused the Nigeria government of refusing to disclose the danger of crude oil exploited in their environment *(Ogoni communities).* The African Commission Human and Peoples Right citing Article 16 and 24 of the African Charter of

[857] *ss.7 and 24 of the Environmental Impact Assessment Act*
[858] *Ibid, s. 39*
[859] *Ibid, s. 55*
[860] *(2001) African Human Rights Law Reports 60*

Humans and Peoples Right[861] held that the Nigerian government has a duty to provide and enforce public access to information especially for members of communities exposed to hazardous activities.

The need for corporate environmental reporting disclosure stems from the fact that every democratic regime naturally recognises public participation. Public participation which includes access to environmental information depends on the volume of information made available to the public.[862] The health and survival of humans depends on what happens in their immediate environment. Therefore, it is reasonable for members of host communities to be informed on activities which may adversely affect their surroundings. Consequently, community stakeholders should engage in the decision-making process to prevent environmental harm and takes advantage of project developed by MNCs within their environment. Corporate disclosure is necessary to improve the image and enhances goodwill of MNCs.[863] Such disclosure correct any negative reputation of the corporation caused by the environmental disasters. Lack of disclosure would result in an uneven dissemination of information between the managers and shareholders. Voluntary disclosure of environmental reports by the parent company reduces the cost of operating through their subsidiary. This is because such disclosure would show an aligned interest between the parent companies and their subsidiaries. When MNCs refuse to engage in disclosures, their reputation is at risk and may be attacked by the public through peaceful or violent protest, media criticism, pressure from NGOs, demonstrations and strikes.[864]

When a report is published by a corporation, there is the tendency for directors or other members of the company to influence the disclosure of the report. Therefore, the board of directors should be independent for effective monitoring of the published reports. Other factors which play a crucial role in determining the disclosure of sustainability reports are board size (BS), and independence of the board. A large corporate board would disrupt the effectiveness of a decision making on a reporting disclosure. A board of directors exceeding seven or eight

[861] *African Charter of Human Rights. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)*
[862] *Pring G. and Noe S.Y. (1993) 'The Right to Participate in Decisions that Affect the Environment' 10(2) Pace Environmental Law Review, p. 694.*
[863] *Abdo, H. and Aldrugi, A. (2012), "Do companies' characteristics play key roles in the level of their environmental disclosures?", Energy Research Journal, Vol. 3 No. 1,*
[864] *Islam, M.A. (2015), Social Compliance Accounting: Managing Legitimacy in Global Supply Chains: CSR, Sustainability, Ethics & Governance, Springer, Switzerland.*

members cannot be effective in communication, coordination, and decision-making.[865] There would be disagreements on what should be disclosed which means that there is the likelihood that not every project information would be disclosed. Secondly, independent directors would persuade other directors to voluntary disclose more data about the company to stakeholders. Thirdly, regular boards meetings of MNCs would enhance the quality of disclosures.[866] Frequency board meeting means that reports would be scrutinised before they are published. Board meetings serves as a sound checking system and therefore the scrutiny of reports directly by the board would reduce agency cost which are usually adopted by the Board to write the companies reports.

The implementation and enforcement of mandatory disclosure in a national legal system signifies a political struggle between the liberalist and the progressives. The libertarians believe in the freedom to undertake their business operations without or less involvement of the governmental regulation such as a imposing a mandatory disclosure. Meanwhile, a progressive government desires a stronger and direct forms of business regulation such as the establishment of disclosure laws. Disclosure laws has a way influencing private transactions. For example, if an oil multination corporation seeks to install a pipeline within a community, the community representatives would enter into an agreement with the corporation for royalty on the use of their land, a representation and warranty that such installation would not cause harm to their environment; and access to remedy in the event of harm. As a result of such disclosure, the corporation is compelled to adopt safe installation route, expert manpower and durable materials for its operations. Therefore, the disclosure of information determines the scope of representation and warranties.

Community stakeholder participation

It is important for host communities to participate in the decision-making process affecting their environment. Members of host communities may be represented by their local governments in influence development projects within their region.[867] The host community directly benefits from

[865] *Florackis, C. (2008), "Agency costs and corporate governance mechanisms: evidence for UK firms", International Journal of Manageria1 Finance, Vol. 4 No. 1, pp. 37-59.*
[866] *Chou, H.I., Chung, H. and Yin, X. (2013), "Attendance of board meetings and company performance: evidence from Taiwan", Journal of Banking & Finance, Vol. 37 No. 11, pp. 4157-4171.*
[867] *Marc B. Mihaly, (2009) Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents, 27 Pace Environmental Law Review. 151, 167*

the environment as their source of livelihood and therefore it is logical that they are given the opportunity to decide and explain to MNCs how they benefit from their environment sought to be explored. The State or MNCs may not comprehend the importance to a local community of particular cultural sites, lands, resources, or the community's perception of impacts.[868] The aim of community stakeholder participation is to enforce the right of citizens in the maintenance of an environment of a specified quality.[869] However, community participation is not limited to the consultation of members of the community for environmental assessment and prevention of pollution but extends to the right of a community in deciding whether or not their environment should be explored by MNCs. In the Nigerian context, Ken Saro Wiwa opposed the operations of Royal Dutch Shell in Ogoniland because oil production had polluted the environment and the people were marginalized as they did not derive any benefit from the activity of the MNC on their land.[870] It is observed that the Ogoni people were also protecting their environment from extortionist or exploitation. This means that a community may object to a development project even where it poses no environmental risk. Notwithstanding, local communities' participation must give priority in mitigating potential environmental and social hazards rather than seeking for financial or short-term economic gains from MNCs. State governments have not shown willingness to protect local communities and have in most cases pursued their personal or State interest with little or no attention to the local government level.[871]

In recent decades, local communities across the world have acquired rights and powers under domestic and international law, which they can use to influence development project of MNCs.[872] Environmental right is a form of human rights which calls for public participation.[873] This way, the people become part of environmental governance.[874] For example, In the United States, local regulatory powers on environmental protection is derived from the State.[875]

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[868] Mililani B. Trask, Afterword: Implementing the Declaration, in Indigenous Rights in the age of the UN Declaration 327, 327 (Elvira Pulitano ed., 2012)
[869] du Plessis, A. (2008) Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights, Potchefstroom Electronic Law Journal. 11(1) p.24
[870] DW, (no date) Why Nigerian activist Ken Saro-Wiwa was executed. Available at: <https://www.dw.com/en/why-nigerian-activist-ken-saro-wiwa-was-executed/a-18837442> accessed: 22/08/2020
[871] Foster G., Community Participation in Development, Vanderbilt Journal of Transnational Law. 18(1) p.45
[872] Ibid, p.46
[873] du Plessis, A. (2008) Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights, 11 Potchefstroom ELEC. Law Journal. 1 p.24
[874] ibid
[875] Green S.D., (2004) Development Agreements: Bargained-for Zoning that Is Neither Illegal Contract nor Conditional Zoning, Capetown University Law Review 33(1) 383, 386

However, all states have allocated certain powers to local governments, including the authority to promulgate land-use regulations in the interest of the public. Thus, in a particular instance, more than 400 local governments across the United States mounted pressure on the petroleum industry to quit the use of fracking method during oil or gas production.[876] MNCs adopts fracking method in the extraction of oil and gas in developing countries such as Nigeria, Angola etc.[877] Fracking causes adverse impacts such as; air pollution, noise pollution, groundwater contamination, truck traffic, vibration of the earth crust, etc. Local governments in America established ordinances restricting drilling operations to specific areas, reducing hours of operation, and introducing several mitigations and safeguards. Some Local government established ordinances to ban the use of fracking method in oil and gas exploration.

Pursuant to Schedule 4 of the 1999 Constitution of Federal Republic of Nigeria, a local government has the right to participate in the development of natural resources.[878] However, the constitution prohibits engagement in the exploitation of natural resources within its territory.[879] Therefore, MNCs should partner with the local governments as this would enable both parties exchange information and have a foreknowledge of the likely adverse effect of development projects on the environment of host communities. However, the constitutional responsibility of the local governments in Nigeria to provide sewage and waste disposal[880] may lead to MNCs evading liability for improper disposal of toxic waste causing pollution to human lives and their environment. MNCs would argue that their actions were as a result of the failure of the community representatives provide a proper waste disposal. Therefore, host communities should be involved from the initial stage of economic, environmental and social assessment of a proposed project. While MNCs share information on the project risk, community representatives would identify the usefulness of environmental resources likely to be affected and make the necessary provisions within their constitutional or statutory responsibility. Community stakeholder participation involves indigenous people and local groups deriving economic

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[876] Alex Ritchie, (2014) On Local Fracking Bans: Policy and Preemption in New Mexico, 54 National Resources Journal. 255, 258-59

[877] Royal Dutch Shell, (no date) Tight and Shale gas. Available at: <https://www.shell.com/energy-and-innovation/natural-gas/tight-and-shale-gas.html> accessed: 22/08/2020; Olufola Wuse (29th July 2012) Available at: <https://megathoslawpractice.wordpress.com/2012/07/29/oil-and-gas-hydraulic-fracturing-in-nigeria-pros-and-cons/> accessed: 22/08/2020

[878] Schedule 4, Paragraph 2(b) of the Constitution of Federal Republic of Nigeria, 1999 (as amended)

[879] Ibid

[880] Ibid, Paragraph 1(h)

benefits from development projects. Usually, host communities negotiate with MNCs on the derivation of certain economic benefits for exploring their land. Such benefits include; provision of clean water, construction of proper sewage or waste disposal, adequate medical facility, scholarships, employment, royalties, profit and production sharing etc. However, for purposes of personal interest and public policy, the government or MNCs are mindful of giving host communities control over development projects. Communities are engaging in development as regulators, law enforcement agents, commentators, and economic actors.

Under international law, Chapter 4, Article 18 of the United Nations Declaration on the Rights of Indigenous People guarantees the right of indigenous people to participate in decision making which may affect the economic and cultural development of their land. Agenda 21 of the Rio Declaration encourages States to promote sustainable development through increased local control of resources, local institution-strengthening and capacity-building. Agenda 21 also supports a community-driven perspective to sustainability, which includes wide recognition of community participation in sustainable management and protection of natural resources within the local environment. There are three ways in which local communities may influence the development projects of MNCS namely:[881] (i) regulatory powers and profit/production sharing (ii) EIA requirement and public participation in environmental decision making and enforcement (iii) safeguards for indigenous people. From the above, it is observed that public participation is only a subset to influencing the projects of MNCs. Host communities influence the projects of MNCs through the establishment of Local government bye-laws and resolutions between the corporation and the community. Local government bye-laws may contain land-use plans, site plans and zoning. This means land should be divided into zones, specify permissible areas of development, stipulate goals, policies and requirements for local development in particular locations. This is necessary for the protection of natural resources within the environment and alleviation of pollution and its sources. States must establish or allow Local governments to establish bye-laws which would protect their environment from harm and in which they may secure economic benefits.

It is unfortunate that sometimes where local communities consent to the development of a project in their environment, the State deprive them of their economic benefits. Also, State cooperate

[881] *Foster G., Community Participation in Development, Vanderbilt Journal of Transnational Law. 18(1) p.45*

with MNCs to proceed with a project which would cause environmental and economic disaster to local communities. This is because representative of the State are either particular about their personal financial interest or limited economic benefits accrued by the State rather than sustainable development of local communities. However, in giving regulatory powers to local governments, it should be noted that local communities do not have sufficient local capacity or accountability and this would weaken environmental standards of enforcement. There is also the concern that the community lack the expertise to assess its benefits and risk. It is for this reason that the State would need to deploy and train persons who shall be responsible for enforcement in local communities. For example, the Nigerian environmental agency, NESREA is empowered to supervise and examine the assessment of proposed projects within the environment of Federal, State or Local government.[882] On the other hand, it is feared that if more revenues are allocated to local communities, there is the possibility of uneven economic distribution among communities or its members. This may result in community division and separatist movement competing for equal economic benefits.

Nigeria has taken legislative steps towards recognizing community participation in the EIA of proposed projects. The EIA Act gives members the right to comment before and after the Agency makes a decision on the EIA of the proposed project.[883] Members of host communities should also be allowed to give their comments during a project assessment. As assessment is ongoing, community dwellers need to be present in identifying the importance of all environment resources which may have been overlooked by MNCs. Pursuant to the EIA Act, the report on an EIA must be publicized by the Agency.[884] Also, a deadline must be set within which members of public may submit their opinions on the report. Unfortunately, many EIA reports are not made accessible to obtain public comments.[885] Under Nigerian jurisprudence, the Lower Court in *Baytide (Nig) Ltd v. Aderinokun*,[886] held that where the comment of the public on an EIA of a project is absent, any authority to construct such project shall be invalid and void. It should be noted that MNCs in Nigeria particularly in the oil and gas industry obtain a licence from the Nigerian Ministry of Petroleum Resources. This implies that a MNC holding such oil

[882] *Section 49 of the Environment Impact Assessment Act*
[883] *Ibid, ss. 7 and 9(3)*
[884] *Ibid section 24*
[885] *Baytide Nigeria Limited V. Mr. Kayode Aderinokun & Ors. (2013) LCN/5881(CA)*
[886] *Ibid*

exploration, prospecting or mining licence have the authority to explore for oil and gas without an environmental assessment or public comment as such. Therefore, it is important for the Ministry of Petroleum Resource to synergize its objectives with NESREA in ensuring that oil and gas multinationals undertake an environmental assessment of the proposed oil development area before a licence is issued. The government agency should respond to comments received by members of the public. Where majority of members of a community oppose a proposed project for fear of environmental degradation, the agency can still veto the majority decision of the community[887] in so far as two or more independent expert can assure the environmental safety of the community. Studies show that highly technical comments of experts on economic and scientific issues influence the opinion of decision-makers.[888] This affects the position of the local community to influence decision making. However, this would only affect low-income communities who are unable hire an expert to represent them or uneducated communities having difficulties in communication.

The pressure for community stakeholder participation is a result of the failure of national government to protect the environment of local communities from the adverse effect of the activities of MNCs. Thus, community stakeholders engage in environmental impact assessment which ordinarily should be undertaken by the State environmental agency. The participation of community stakeholders gives legitimacy to the decision-making process undertaken by the State or MNC. It is argued that the lack of State government's concern for the environmental protection of local areas is attributed to the lack of resources and motivation to enforce environmental laws.[889] Domestic government in developing countries should promote the formal rights of host communities to address their legitimate environmental and social concerns about development projects of MNCs. Private mechanisms such as the signing of a development agreement between a MNC and an affected community is also considered to be instrumental in reflecting the concerns of host communities. This is because with such development contracts, there is a direct accountability to the community and void of governmental interference. Development contracts are entered on case-by-case basis compared to the permanent status of

[887] *Alice Kaswan, (2003) Distributive Justice and the Environment, 81 N.C. L. REV. 1031, 1128-29*
[888] *Nicholas A. Fromherz, (2013) From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects, 116 W. VA. L. REV. 109, 143*
[889] *Coplan K.S.,(2014) Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law, 25 Colombia National Resources Energy and Environmental Law Review 61, 65*

regulatory enactment. For example, series of development contracts can be created to address different environmental issues such as oil and gas pollution and toxic waste disposal. A regulation would mostly refer to these issues as "development projects" or "environmental degradation". Even where the regulation attempts to reflect different environment concerns, it lacks the specificity required in a private agreement. Also, representatives of host community have the opportunity to bargain and negotiate the terms of a development project contract. The flexibility of development contracts allows for parties to negotiate on environmental standards and guidelines. This is in contrast with the one-size-fits-all method which is common with public regulations.

On the other hand, there are certain limitations with private development agreements. Enforcement may be marred by corruption among parties in the sense that community representative may accept bribe over projects that places the environment at risk. Also, the MNC may not provide full disclosure which is by default required of every development project under public regulation. In addition, environmental benefits may not be evenly distributed to all affected communities. In order words, a MNC would only avoid damage to the environment of a community with whom a development project contract has been entered. This may lead to social disruption of an on-going project in the host community. In some cases, bargaining would be unproductive as community stakeholders may object to unfavorable terms that may endanger their environment. Host communities still needs regulatory support in order to negotiate on development projects which threatens their environmental safety. For example, local communities in Colorado were able to influence oil corporations to concede to technical restrictions on their fracking operations as these communities could have delayed or refused to grant certain local regulatory approvals that the corporations required.[890] Therefore, private agreements between MNCs and host communities are best considered as supplements to public regulations rather than an alternative. The more rights and powers that host communities can secure under a binding regulation, the more influential they would be in their negotiation of private contracts with MNCs for sustainable community interest.

National governments are skeptical in allocating control to local communities. This is because the government seeks to maintain its power and privileges including that of other interest groups.

[890] *Foster G., Community Participation in Development, Vanderbilt Journal of Transnational Law. 18(1) p.98*

Also, other negative effects which must be addressed include weak local regulatory standards, overexploitation of resources, corrupt officials, economic disparity and social conflicts. There are also fears that host communities would reject proposed project even when environmental risk is unlikely.[891] However, these problems may not arise depending on the capacity of the local government and the available mechanisms to hold them accountable for their actions. In this case, the capacity of the local government would mean their ability to hire technical and scientific experts who would assess the projects of MNCs and report its environmental and social impact on the host community.

MNCs should develop policies and guidelines which seeks to protect the interest of local communities.[892] The policies and guidelines should be reflected in private agreements between MNCs and local communities.[893] International financial institutions have set standards such as IFC Performance standards and Equator principles demanding the consultation of local stakeholders in the evaluation of environmental and social risk as a pre-condition for the issuance of a loan facility. It should be noted that the stakeholder referred to in this instance are people who are likely to be affected by the project development. While an *informed consultation* is required in respect of mainstream communities,[894] a *free, prior and informed* consent is required from indigenous groups.[895] The Policy draws a distinction between mainstream communities and indigenous communities. While mainstream communities are considered as urban or developed areas, indigenous communities are the most vulnerable who lack the capacity to exercise rights to their land and resources as a result of their poor economic and social status.[896] IFC Performance

[891] *Spence D., (2013) Responsible Shale Gas Production: Moral Outrage vs. Cool Analysis, Fordham Environmental Law Review 25(1) 141, 183*
[892] *Elisa Morgera, From Corporate Social Responsibility to Accountability Mechanisms, in Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards 321, 325 (Pierre-Marie Depuy & Jorge E. Vifiuales eds., 2013)*
[893] *Elisa Morgera, (2007) Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation, 18 Colombia Journal of International Environmental Law and Policy 151, 183*
[894] *Equator Principles (June 2013), Available at: <http://www.equatorprinciples.com/resources/equator.principlesIll.pdf> accessed: 20/8/2020*
[895] *International Financial Corporation, Performance Standards On Environmental And Social Sustainability (Jan. 1, 2012), Available at: <http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffdla5d13d27/PSEnglish_2012_FullDocument.pdf9 MOD=AJPERES> accessed: 20/8/2020*
[896] *Ibid, Performance Standard 7 (Indigenous)*

Standards further provides that indigenous communities must be compensated for damage done to their environment. The compensation must be sustainable and commensurate with the nature and extent of the adverse impact. The IFC establishes a framework to remedy any environmental non-compliance against members of indigenous communities. The remedy framework emphasizes on the compensation of communities exposed to environmental and social risk as well as impacts of the project.[897] This IFC Performance Standards and Equator Principles may not offer adequate protection[898] but have addressed the environmental concerns of a number of communities. Also, they are non-binding but hold persuasive status as it can refuse the funding or investment on a project likely to pose environment and social risk.

The OECD Guidelines for Multinational Enterprises creates an obligation for enterprises to take into account the views of local communities planning and decision making in respect of project which may significantly impact these communities.[899] Compared to the remedy framework of the IFC, the National Contact Point Centre is not an effective resolution mechanism under the OECD. The NCP is regulated by the government and therefore there is likelihood of bias. The panel involved in the non-judicial settlement lack relevant expertise in relation to the subject of matter of disputes. The United Nation on Business and Human Right equally encourages community stakeholder participation in the assessment of environmental risk relating to development projects. However, the above international instruments are non-binding but MNCs may be pressured to comply the above provisions to avoid reputational damage.[900]

Local host communities should be allowed to participate in the enforcement of environmental laws. This right should be provided under national legislations and contractual agreements between host communities and MNCs. An effective enforcement measure would be permitting affected community representative legal action by way of an injunction against the government environmental agency or MNC who falsify or forces the implementation of an EIA report or project that poses risk to the environment. Such private rights of action would prevent

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[897] Ibid, Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) and Performance Standard 7 (Indigenous)
[898] Shalanda H. Baker, (2012) Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects, 30 Wisconsin International Law Journal. 668, 675
[899] Organization For Economic Co-Operation & Development. (OECD), OECD Guidelines For Multinational Enterprises (2011), Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed: 23/8/2020
[900] Milton C. Regan, Jr. & Kath Hall, (2016) Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights, 84 Fordham Law Review. 2001, 2007

environmental pollution particularly where agency has no adequate basis for granting approval to such project. Private rights of action for local communities is important because sometimes government environmental agency may not have the resources or are not motivated to pursue legal actions against defaulting corporations.

It can be concluded that the idea behind public participation for the purpose of environmental protection is for the latter to identify parts of their environment and resources which are of crucial importance, so that MNCs can carry out their operations in a manner that would not endanger their lives, environment or resources of the communities. The decentralization of regulatory powers or decision makings process of MNCs activities in favour of local communities is necessary for environmental protection. Local communities are exposed to the risk of MNCs projects and are also the likely victims of environment hazard. Therefore, it is important for MNCs to collaborate with members of host communities or their representative local governments in undertaking a prior environmental assessment. Centralization of decision on environmental projects would only lead to environmental degradation in communities and resistance movements. Local communities clamouring for participation out of a desire to secure benefits from MNCs must not be neglected. This is to avoid a resistance movement that would lead to deliberate perpetration of environmental disasters such destruction of oil and gas pipelines by aggrieved members of the community.

Environmental management and safety practices

Environmental safety operation means identifying and fixing barriers to safety in the execution of projects which may pose damage to the environment such as oil spill from offshore petroleum operations or improper toxic waste disposal. Example of safety barriers are the failure to maintain oil and gas pipelines, installation of substandard facility or equipment, lack of expertise etc. Therefore, safety barriers may be characterized into the following: (i) technical error (ii) human error (iii) operational error (iii) design error causing latent failure. Some environmental safety practices which should be adopted before or during oil and gas exploration or waste disposal are: (i) routine inspection (ii) testing and adequate tools for prompt response (iii) maintenance (iv) record keeping and (v) personnel training.

Routine inspection and Record keeping

Inspection must be done in compliance with industry standards. Key facilities which should be inspected in oil and gas operations include pipelines, transformers, elevators, and spill kit materials. Vehicle loading and unloading oil should be inspected to ensure they have wheel locks, and all truck outlets are properly sealed. Oil found in rain and sea waters should be drained and disposed in accordance with hazardous waste regulations. This is necessary to prevent the wide spread of chemical across territorial waters. All inspections must be recorded and stored safely for a period of 3(three) years in compliance with standard record keeping procedures. Also, oil spill and toxic waste must be reported.

Testing and adequate tools for prompt response

It is important to test the integrity of oil containers to ensure their durability and probability of leakage. The type of testing required for containers depends on their sizes and design which will help personnel adopt visual inspection of oil containers and waste deposits. If through visual inspection, containers are observed to likely leak, then integrity testing should be conducted immediately. Integrity testing should be conducted after repairs of any facility. Generally, testing must be conducted by a qualified inspector. MNCs must provide all tools required for the prompt response to an oil spill from the field, pipes or tanks.

Personnel training

The training of personnel is important to avoid human error leading to environment disaster. Therefore, all personnel should be adequately trained on the safe exploration, handling and storage of oil. Personnel should also be fully equipped and trained on the safe disposal of toxic waste. Training should be on an annual basis and should cover the following: (i) inspection and documentation (ii) oil loading and unloading (iii) oil spill response and notification (iv) spill incident reporting (iv) equipment breakdown.

International standard facilities and maintenance

The facilities used by MNCs must comply with specifications and approval of an international standard. These facilities must be durable and less likely to cause harm to human lives or their environment either directly or indirectly. For example, the measurement of standard facilities in

the oil and gas industry are: ability to resist corrosion, cost, resilience and turgidity.[901] Nevertheless, some oil and gas MNCs struggle with the maintenance of oil pipelines. As discussed in the preceding Chapter, the disastrous oil spills in Bodo community was as a result of aging pipelines of over 50 years old which was long due for maintenance or replacement. In Nigeria, many of the oil pipelines which have a life span of about 15 years, yet used for more than 25 years without replacement thereby leading to corrosion. Also, the installation of offshore pipelines for the transportation of crude oil and gas are exposed to various weather conditions which leads to either external or internal corrosion.

The composition of crude oil such as oxygen, nitrogen, and sulphur compound are causes of corrosive pipelines which are usually made of iron.[902] However, pure water without any of the above soluble substance is less corrosive to oil pipelines but this depends on the types of substance. For example, chromate and phosphorus mixed with water minimizes corrosion.[903] On the other hand, substances such as carbon dioxide, hydrogen, oxygen and sodium chloride which are general components of oil field waters causes pipeline corrosion.[904] In addition to oil field water components, oil pipelines may fail due to tropical weather conditions. In the field of oil and gas development, corrosion is not limited to pipelines but extends to flowlines, storage tanks, and equipment such as gaskets, hose, valves, pumps, rivets, seams and manifold.

As a maintenance and preventive measure, MNCs in the oil and gas industry should regular clean pipelines and other equipment. They should procure stainless or corrosive resistance alloy[905] even though this may attract high-cost implications. The plain carbon steel pipes are considered the best means of transferring crude oil and gas from the holes to the well head because of its durable thermo-mechanical components.[906] Oil and gas MNCs should undertake regular monitoring and inspection to identify and replace corrosive pipelines. Cathodic protection control method is considered the most effective and efficient way of maintaining crude oil and

[901] *Unueroh, U. Omonria G., Efosa O. and Awotunde M., (2016) Pipeline Corrosion Control In Oil And Gas Industry: A Case Study Of Nnpc/Ppmc System 2a Pipeline. Nigerian Journal of Technology, pp. 317*
[902] *Ibid*
[903] *Ibid*
[904] *Onyekpe B. Corrosion in Oil and Gas Production. Ambik Press: Benin City, 2002.*
[905] *Popoola, L.T. et al, (2013) Corrosion problems during oil and gas production and its mitigation. International Journal of Industrial Chemistry.*
[906] *Ibid*

gas pipelines.[907] Cathodic protection is *a system in which external corrosion is controlled with direct current forced from the anode (corrosion zone) through the electrolyte to the structure (cathode) being protected.*[908] Simply put, it is the passing of electric direct current (dc) to the metallic structure (pipeline) to avoid corrosion. The anode through which electric current flows is made of metal. Thus, the anode would first loses its electric current before the steel pipeline is affected. The anode is connected to a device called rectifier which replenishes the anode with more electrons, thereby protecting the pipeline from corrosion. Other corrosion preventive measures are; the use protective coatings or inhibitors. On the other hand, regular cleaning is important to remove debris which build up to corrode pipelines. This can be done with the use of chemical or a mechanical tool called "a pig". The pig is passed through the pipeline and washes away debris until the pipeline is in clean condition. The cleaner the pig, the cleaner the pipeline.

In addition, oil pipelines should be repaired or replaced where they are vandalized by members of host communities due to uneven or no benefits accrued to them from the extraction of their own natural resources. However, a lasting preventive measure is to allocate adequate royalties to landowners or members of host communities. Apart from corrosion, other factors which result in pipeline damage are pressure surge, wall thickness, and welding defects. Therefore, the above mechanical defects are also reasons for regular maintenance of oil pipelines. According to the Canadian federal law, oil and gas pipelines should be inspected every three weeks or at least 26 times each year.[909] Oil and gas developing countries should adopt this inspection frame to avoid pipeline damage which in turn poses great economic, environmental and human disaster.

Once an oil spill is recorded, contaminated materials should be properly disposed to avoid mixture with clean waters or re-use by community residents. MNCs should adopt an oil spill contingency plan which must be set up before the occurrence of an oil spill. This is a plan for the immediate response and removal of oil spill which may cause harm to the environment. Other

[907] *Ibid*
[908] *Iyasara, A.C (2007), Review of Corrosion control in Oil and Gas Industry. M.Eng Corr. Monograph. FUTO, Nigeria*
[909] *Electronic Code of Federal Regulation, Canada. [July 27, 1981]; Section 195.412 - Inspection of rights-of-way and crossings under navigable waters.*

maintenance and safety precautionary measures include;[910] (i) tightening of engine bolt (ii) replace hydraulic lines and fittings which wear out as a result of abrasion or expertise to sun and heat. (iii) install bilge suck to prevent the discharge of oily water (iv) avoid overflowing the oil tank or sewage (v) close bilge pump while refuelling (vi) apply absorbent pad or a fuel collar to hold oil drippings.

Ecosystem approach

The ecosystem approach (EA) is a legal or policy strategy on the management of living and non-living things which includes, land, crops, water, climate, and animals.[911] It is also considered as the management of living things in relation to the environment. This approach is a response to increasing depletion of global environmental resources. It operates as a legal binding obligation to protect the environment, biodiversity and aims to achieve sustainable development. In order words, it can be adopted as law to regulate both living and non-living things. EA focusses on the past and present effects or impacts of environmental activities. In this context, effects or impacts refers to changes in the ecosystem. EA also serves as a precautionary approach which should be adopted even where an activity poses no large-scale risk of harm.

The ecosystem does not have a consistent reaction to environmental actions or events resulting in a degree of uncertainty. Therefore, EA adopts an adaptive management process to respond to complex ecosystem process.

In the context of international environmental law, ecosystem approach calls for ecological sustainability. It is argued that ecological approach under international environmental law is anthropocentric, i.e., it focusses on human existence rather than plants, animals or the

[910] *National Ocean and Atmospheric Administration, (21st February 2019) Tips for preventing small vessel oil spills. Available from: <https://response.restoration.noaa.gov/about/media/tips-preventing-small-vessel-oil-spills.html> accessed: 24/8/2020*

[911]

environment.[912] Nevertheless, it carries the phrase – ecosystem approach. Under international environment law, EA was first utilized in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) which was adopted in 1980. The Convention embraces the relationship between marine living resources and their environment. The Preamble to the Convention particularly recognizes the importance of ecosystem integrity but provides no definition of the term. However, one of the objectives of the Convention is to prevent or minimise the risk of a changing marine ecosystem which cannot be reversed until after a period of at least 20 years.

Mitigation and Environmental management strategies

As earlier stated, mitigation is one of the steps in EIA of oil and gas projects which means avoidance, reduction, restoration and compensation.[913] These environmental management strategies could form operational conditions in order to avoid adverse impact to marine ecosystem.[914] A thorough impact assessment may reveal that an integrated conservation approach is also required as a form of mitigation for vulnerable habitats around oil and gas exploration area and organisms recovering slowly from disturbed motion in deep-sea waters. This approach may take the form of spatial management, activity management such as restrictions on the quantity crude oil discharge, use of water-based drilling fluids, and temporal management, i.e., management of organisms during their breeding seasons.[915] The Nigerian oil and gas industry should incorporate in its domestic legislation a commitment to these mitigation or environmental management approach to adverse environmental impact of oil and gas development.

Activity management

[912] *Alexander Gillespie, International Environmental Law, Policy and Ethics (OUP 2000).*
[913] *World Bank (2012). IFC Performance Standards on Environmental and Social Sustainability. Washington, DC: World Bank. Available at: <http://documents.worldbank.org/curated/en/101091468153885418/IFC-performance-standards-on-environmental-and-social-sustainability> accessed: 23/1/2021*
[914]
[915] *Cordes et al, supra (n20)*

Activity management in EIA involved the prohibition or restriction of certain operations or discharges. It may also require the use of certain technologies to reduce environment impact of oil and gas development. An example is the prohibition of drilling muds having its base covered in diesel oil. These fluids are not easily decomposed and they have high toxicity which may poses risk to the environment.[916] For example, the Convention for the Protection of the Marine Environment of the North-East Atlantic also referred to as the OSPAR Convention prohibits member States from discharging organic waste into the North-East Atlantic.[917] Also, permits are required for the use, reinjection and discharge of chemicals including drilling muds and cuttings containing hydrocarbons from the reservoir.[918] The prohibition of these discharges has contributed to the reduction of drilling impacts on the environment. Therefore, countries are encouraged to migrate from drilling wells using oil-based muds to drillings wells using water-based muds.[919] The Convention requires produced water to be discharged into subsurface formations or washed to achieve the national limit of oil-in-produced water discharge before disposal into the sea.[920]

Activity management also includes the use of air gun power to drive mammals away from an exploration area and to stop operation when a marine mammal is spotted at an exploration zone.[921] Activity management may also be applied to the decommissioning of an oil and gas facility. For example, the OSPAR Convention prohibits the dumping of abandoned or non-usable infrastructures in European waters. While this provision does not include some large installations, infrastructures are required to be disposed onshore. However, it is feared that the process of removing these offshore infrastructures and their disposal on land may cause greater

[916] *Davies, J. M., Bedborough, D. R., Blackman, R. A. A., Addy, J. M., Appelbee, J. F., Grogan, W. C., et al. (1989). "Environmental effects of oil-based mud drilling in the North Sea," in Drilling Wastes, eds F. R. Englehardt, J. P. Ray and A. H. Gillam (London: Elsevier Applied Science), 59–90.*
[917] *Article 5 of the Convention for the Protection of the Marine Environment of the North-East Atlantic.*
[918] *Ibid*
[919] *Gray, J. S., Clarke, A. J., Warwick, R. M., and Hobbs, G. (1990). Detection of initial effects of pollution on marine benthos: an example from the Ekofisk and Eldfisk oilfields, North Sea. Mar. Ecol. Prog. Ser. 66, 285–299.*
[920] *Ahmadun, F. R., Pendashteh, A., Abdullah, L. C., Biak, D. R. A., Madaeni, S. S., and Abidin, Z. Z. (2009). Review of technologies for oil and gas produced water treatment. J. Hazard. Mater. 170, 530–551*
[921] *Compton, R., Goodwin, L., Handy, R., and Abbott, V. (2008). A critical examination of worldwide guidelines for minimising the disturbance to marine mammals during seismic surveys. Marine. Policy 32, 255–262*

harm than if they are abandoned at sea. Under the United States jurisdiction, structures may be abandoned at their offshore construction site as anthropogenic reefs.[922]

Temporal management

Temporal management is the adoption of measures to reduce development impact on marine mammals including fish and seabirds.[923] This strategy of environmental management is not largely applied by host governments or MNCs. Restriction of seismic survey along marine mammal route is adopted as a measure under temporal management.[924] Gradual or soft-start operation may commence during daylight for good visibility of marine mammals and to slow down or halt seismic operations where necessary.[925] In addition, rapid response to emergency oil spill is an essential temporal management strategy.

Spatial management

Spatial management is the prohibition of activities from the environment of vulnerable species. This is done by establishing exclusion zone and marine protected areas (MPAs) under domestic legislation and made binding on MNCs operating in the host State. In the United Kingdom, these are in form of designated Marine Conservation Zones, Nature Conservation Marine Protected Areas, or Special Areas of Conservation. In the United States, they are designed as National Marine Sanctuaries, National Monuments, fisheries management areas, or, in the case of the oil and gas industry, Notice of caution are issued to Lessees. In Canada, Marine Parks, Marine Protected Areas, Sensitive Benthic Areas are designated

The United Nations Convention on Biodiversity developed a framework known as ecologically or biologically significant area (EBSA). Another spatial management approach is called "vulnerable marine ecosystem" (VME). This is popularly used in fisheries management and is viewed as an ecosystem that is easily polluted as a result of its physical and functional vulnerability. VME was established under the mandate of the United Nations Food and

[922] *Kaiser, M. J., and Pulsipher, A. G. (2005). Rigs-to-Reef Programs in the Gulf of Mexico. Ocean Dev. Int. Law 36, p.121*
[923] *Ibid, p.125*
[924] *Compton et al, supra (n127) p.258*
[925] *Ibid, p. 258*

Agricultural Organisation (FAO, 2009) to aid in the evaluation and control of the impacts of ground fisheries outside of national jurisdiction. Therefore, it is important to protect certain locations from exposure to hydrocarbon exploration due to their environmental value and sensitivity to the effects of hydrocarbon.[926] The strategy of keeping oil and gas activities distant from sensitive deep-water is important for the protection of marine habitats as some of these organisms such as coral and cold-seep environment have a high biomass that can extend from the industry exploration site to the deep-sea community.[927]

Many jurisdictions call for the avoidance of deep-water crude oil activities within the marine ecosystem. However, there are no legislation which specify mandatory set-back distances from marine species. Instead, the need for spatial delimitation is evaluated based on specific circumstances prior to the execution of the project. Some of the circumstances taken into consideration include; the amount and type of plant and animal species within an exploration zone and amount of oil discharge. An exception is the United States EEZ which has established restriction zones in high-density deep-water communities.

MARPOL 73/78 - Prevention of oil pollution from shipping vessels

Shipping vessels is one of the popular means adopted by MNCs in the transportation of crude oil by sea.[928] However, it has resulted into numerous large scape pollution of international waters and marine resources. In the 1980s, virtually 2 million tons of oil was discharged in the sea. For example, the arrest of Exxon Valdez in 1989 resulted in approximately 35,000 tons of oil spills with over 250,000 sea birds killed. Remediation of the damage cost over $3.5 billion.[929] The large-scale loss of marine resources and financial burden to clean-up call for urgency to prevent oil pollution from shipping vessels.[930] The realization of ocean damage led to the development of international laws preventing marine pollution. Mitigating oil pollution from vessels remains a challenge even with the establishment of the International Convention in the Prevention of

[926] *Olsen, E., Holen, S., Hoel, A. H., Buhl-Mortensen, L., and Røttingen, I. (2016). How integrated ocean governance in the Barents Sea was created by a drive for increased oil production. Mar. Policy 71, 293–300.*
[927] *Levin, L. A., Baco, A. R., Bowden, D., Colaco, A., Cordes, E. E., Cunha, M. R., et al. (2016). Hydrothermal vents and methane seeps: rethinking the sphere of influence. Front. Mar. Sci. 3:72.*
[928] *Mark Szepes, MARPOL 73/78: The Challenges of Regulating Vessel-Source Oil Pollution. Manchester Review of Law, Crime and Ethics, (2013) 2, 73-109.*
[929] *John M Weber, Robert E Crew, 'Deterrence Theory and Marine Oil Spills: Do Coast Guard civil Penalties Deter Pollution?' (2000) 58 J Environmental Management 161.*
[930] *Nickie Butt, 'The Impact of Cruise Ship Generated Waste on Home Ports and Ports of Call: A Study of Southampton' (2007) 31 Marine Policy 591*

Pollution from Ships signed in 1973 and modified by its 1978 Protocol also referred to as MARPOL 73/78. Annex 1 of the convention is the most laudable effort to curb marine pollution from crude oil shipping.[931] All members of the European Union have adopted the Convention.[932] After the Convention was signed, marine pollution from oil vessels reduced from 2 million tons in the 1980s[933] to 450,000 tons in 2007.[934] Following the International Tanker Owners Pollution Federation Limited (ITOPF) statistical records, there were four spill over 700 tonnes in 2013 but zero spills over 700 tonnes in 2020.[935] The goal of Convention is to completely eradicate oil leakage from shipping vessels. Even though this objective has not been achieved, the Convention mitigates oil discharge at sea and the adverse environmental impact of oil shipping operations. Although, the 1982 United Nations Convention is a significant international agreement which encourages States to adopt measures to prevent, reduce and control pollution of the marine environment,[936] its text is not as comprehensive and detailed as MARPOL 73/78.

On the other hand, there is the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) entered into force on the 26th of July 1958. OILPOL was the first multilateral agreement that specifically addressed the control of oil pollution. The 1958 Convention prohibited the discharge of oil waste within a 50 nautical-mile coastal zone. This implies that vessels could discharge outside of the stipulated costal zones.[937] Also, this prohibition did not apply to commercial oil vessels. These limited scopes were flaws that hindered OILPOL from achieving its central objective of mitigating marine pollution. In addition, the Convention shifted the responsibility of monitoring oil discharge to coastal and port States who had no ability to do so. Furthermore, flag States were generally reluctant to hold violating vessels accountable. Prior to MARPOL 73/78, oil companies formulated a strategy to

[931] *Manfred Nauke, Geoffrey L Holland, 'The Role and Development of Global Marine Conventions: Two Case Histories' (1992) 25 Marine Pollution Bulletin 74*
[932] *Mark Szepes, Supra (n1) 102*
[933] *Andrew Griffin, 'MARPOL 73/78 and Vessel Pollution: A Glass Half Full or Half Empty?' (1994) 2 Indiana J Global L Studies 489.*
[934] *Patricia Birnie, Alan Boyle, Catherine Redgwell, International Law and the Environment (3rd Edition, OUP 2009) 398.*
[935] *Oil Tankers Spill Statistics 2020. Available at: <https://www.itopf.org/knowledge-resources/data-statistics/statistics/> accessed: 20/2/2021*
[936] *Article 194(1) of MARPOL*
[937] *R Michael M'Gonigle, and Mark W Zacher, Pollution, Politics and International Law: Tankers at Sea (University of California Press 1979) 84.*

reduce oil discharge at sea known Load on Top (LOT).[938] LOT means oil revenues are collected and disposed after the tanks are cleaned.[939] However, there remained significant oil discharge at sea.

The 1973 International Conference on Marine Pollution attended by 71 marine States comprising of developed and developing countries birthed the International Convention for the Prevention of Pollution from Ships.[940] The Convention came into effect in 1983 and made up of Annex I-VI. Pursuant to Article 6(1), State parties have a responsibility to use *all appropriate and practicable measures of detection and environmental monitoring adequate procedures for reporting and accumulation of evidence.* Annex I which consist of thirty-nine regulations particularly focusses on Regulations for the Prevention of Pollution by Oil. Annex 1 generally prohibits the discharge of oil or oily mixtures for the purpose saving the ship or human life.[941] It also prohibits the discharge where the ship or its equipment is damaged[942] except where the ship owner or master had an intention to cause damage, or they found the damage reasonably foreseeable. [943] While the Convention allows for operational discharge of oil at sea, it prevents oil pollution which are accidental. Thus, pursuant to Regulation 15D, *vessels* are allowed for the operational discharge of oil residue at sea from ships and oil tankers only in compliance with the Convention. The Regulation however sets a standard that must be satisfied before ships of 400 gross tonnage and above discharge outside special areas, discharge in special areas and ships below 400 gross tonnage in coastal regions except Antarctica.[944] Ships of 400 tonnage and above is required to process its oily mixture through an oil filtering equipment. For Ships below 400 gross tonnage, oil or oil mixture may discharge in reception facilities.

The standard or requirement for discharge outside and in special areas are almost similar such as: the ship must be in transit at sea; equipment ensuring that oil content entering the sea does not exceed 15 parts per million; oil mixture is not sourced from cargo pump-room bilges on oil

[938] *Jeff B Curtis, 'Vessel-Source Oil Pollution and MARPOL 73/78: An International Success Story (1984) 15 Environmental Law 689.*
[939] *http://shipinspection.eu/load-on-top/*
[940] *M'Gonigle (n7) 107*
[941] *Regulation 4(1)*
[942] *Regulation 4(2)*
[943] *Regulation 4(2.2)*
[944] *Regulations 15(A), (B) and (C)*

tankers; and oil mixture from tanks is not mixed with oil cargo residues.[945] The difference however is that discharge in special areas require an alarm arrangement such that once oil content exceed 15 part per million, the discharge automatically stops. This is necessary because special areas are parts of the sea which are pollution sensitive.[946] *According to Annex 1, these are areas that for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil is required.*[947] This definition takes into account the existence and protection of living and non-livings in the marine environment. It also aims to prevent the likelihood of a discharge on these areas which due to high currents and waves may flow into areas where the ecosystem would be significantly affected. Thus, the Convention outlines specials areas as the Mediterranean Sea Black Sea, Baltic Sea, Red Sea, Gulf areas, Antarctica, North West European waters, and the Oman area of the Arabian sea.[948] Therefore, vessels sailing in these seas adopt the Load on Top (LOT) system whereby dirty ballast residue and tank washing are stored in slop tanks.[949] Alternatively, vessels may discharge dirty ballast into reception facilities. Similarly, Regulation 34 set conditions for any oil discharge by an *oil tanker* outside special area, within special areas and for oil tankers less than 150 gross tonnage. Conditions for discharge from oil tankers outside special area are: the tanker is at least 50 nautical miles away from the nearest land; the tanker is en route; and the instant rate of oil content discharge is not beyond 30 litres per nautical mile.[950] Meanwhile, discharge from oil tankers into special areas is prohibited. Tankers less than 150 gross tonnage are prohibited from oil discharge into the sea but can be stored on board and any excess may be discharged to reception facilities.[951] The provision also stipulates damage stability requirements for oil cargo tanks in case of collision.[952]

[945] Regulation 15(C)
[946] Jeff Curtis, (1998) Comment: Vessel-Source Oil Pollution And MARPOL 73/78: An International Success Story? 15 Environmental Law 679, 684
[947] MARPOL Convention, Regulation 1(11)
[948] Ibid, Regulation 1(11).
[949] Jeff Curtis, Supra (n17) 695
[950] MARPOL Convention, Regulation 34 (C)5
[951] *Ibid, Regulation 34(C)6*
[952] *Ibid, Regulation 28*

In general, oil or oily mixtures discharged from ships or cargo area of oil tanker must not contain chemical or substances likely to endanger the marine environment.[953] Also, oil residues from either ships or cargo area of oil tankers which are unable to be discharged in compliance with the Regulations, should be discharged in reception facilities.[954] Reception facilities are described as tanks for oil residue which cannot be discharged into the sea due to a construction, operational or equipment non-compliance with Annex 1 to the Convention.[955] State parties are required to construct a reception facility at their various port. As of 2013, many States were yet to enforced this provision as a result of the cost implications particularly for developing countries who are unable to afford an average of $USD 500 million to build one reception facility.[956] The inability to afford a reception facility is a major hindrance to the enforcement of discharge standards.[957] In addition, any visible oil discharge at sea must be investigated in order to determine whether there has been a violation.[958]

Standard of equipment, monitoring and construction requirements

Annex 1 stipulates the required equipment for different specification of ships and oil tankers. For example, oil tankers of 150 gross tonnage and above must possess an oil discharge monitoring and control system, oil water/interface detector.[959] Although an excess discharge can be identified, it is difficult to monitor the exact amount of discharge.[960] This is a contributing factor to developing States' reluctance in implementing the Convention.[961] Given that aerial surveillance in measuring discharge is costly, there is the need to develop technologies for the collection of such evidence. As members states lack the resources to monitor oil slick on the high seas, oil discharges are monitored through visual inspection of oil slick around a vessel.[962] Some member States adopt ineffective means such as checking the amount of oil residues in the slop

[953] *Ibid, Regulation 15(D)(8)*
[954] *Ibid, Regulation 15(D) and 34(D)*
[955] *Ibid, Regulation 12*
[956] *Mark Szepes Supra (n1) 101*
[957] *Ronald B Mitchell, Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance (The MIT Press 1994) 205*
[958] *Regulation 15(D)(7)*
[959] *Regulations 31 and 32*
[960] *Rebecca Becker, 'MARPOL 73/78: An Overview in International Environmental Enforcement' (1997) 10 Georgetown Int Environmental Law Review 637*
[961] *Mitchell, supra (n20) 454*
[962] *Mattson, supra (n9) 182*

tanks.[963] An amount of oil residue below normal level in the tank is evidence that an illegal amount of oil have been discharged into the sea.[964] Tankers of 20,000 deadweight and above must have a crude oil washing (COW) cleaning system.[965] This cleaning system spray heated oil on the tank walls.[966] The heated oil absorbs the leftover residue into useable oil which is collected using regular cargo. This system expels the need to discharge dirty ballast in the sea. Pumping and piping system for the discharge of dirty and oil contaminated water.[967] Regulation 13 provides standard dimensions for pipe connections through which the oil and oil mixtures are discharged into the sea. Segregation ballast tanks for the separation of oil contaminated water.[968] Double hull and double bottom for oil tankers of 600 tonnes deadweight and above.[969] On the other hand, oil filter is an essential requirement for ships of 400 tonnage and above discharging oil outside or within special areas.[970] The filter must only have the capacity to discharge oil content into sea at a quantity not exceeding 15 parts per million.[971]

Survey, Inspection and Certification

Oil tankers of 150 tonnage and above as well as ships of 400 tonnage and above must be surveyed.[972] The purpose of the survey is to assess, inspect and measure the equipment, fittings, systems, materials, structure and other arrangements in connection with the ship which must comply with the specifications prescribed under the Annex. For example, the structure of cargo area of tankers shall not exceed 30,000 cubic meters or a maximum of 40,000 cubic meters.[973] The area must have pump-room button protection.[974]A survey is conducted within every five (5) years and an annual survey within a period of 3 months before or after every one year of the International Oil Pollution Prevention (IOPP) Certificate.

The Oil Record Book accounts for machinery space operation which takes place in the ship. This includes, discharge of oil contaminated water, cleaning of oil fuel tanks, oil bunkering and

[963] *ibid*
[964] *Ibid*
[965] *Regulation 33*
[966] *Mattson, supra (n9) 184*
[967] *Regulation 30(1) and (2)*
[968] *Regulation 18*
[969] *Regulation 19*
[970] *Regulation 14 and 15*
[971] *Regulation 14(6)*
[972] *Regulation 6*
[973] *Regulation 26*
[974] *Regulation 22*

collection and discharge of oil residues in reception facilities. The inspection of these records is expected prior to the issuance or renewal of a certificate.

Emergency plan under MARPOL

The Convention requires vessel operators to have an emergency plan in response to oil pollution accident.[975] The master or any other person must report any oil pollution incident.[976] The Convention fails to stress the urgency of reporting an oil pollution incident. The essence of such report is not merely for documentation in the oil record book but to mitigate the oil discharge and its impact on maritime resources as well as the possibility of air pollution. There must be persons or authorities on board the ship to whom an oil pollution incident is reported. Also, it is expected that the authorities have a detailed knowledge and description of action on how to immediately respond to such incident. Response agents on board are required to liaise with national and local authorities on reducing oil discharge.

Overall, the administration takes into account the size, age, operational area and structural conditions of the ship in the prevention of marine pollution from crude oil vessels. Flag, Coastal and Port States have a duty to implement the Annex 1 Regulations in their respective domestic law. This voluntary nature is considered as one of the weaknesses of the Convention. Without MARPOL, vessels would be discharging about 10 million tons of crude oil per year across coastal or port States.[977]

The jurisdiction of Flag States

Some States encounter jurisdictional challenges in the enforcement of the Convention. There is the dilemma on which State has the responsibility to enforce the MARPOL: the nationality of the ship owner, the nationality of the ship, the country where the ship is registered (flag state), or the nationality of master. The Permanent Court of Justice ruled in the *Lotus* case that the flag State is responsible for the enforcement of ship regulations particularly when the ship is on high sea.[978]In order words, the country where the ship was registered must prevent marine pollution from oil

[975] *Regulation 37(1)*
[976] *Regulation 37(2)*
[977] *Ronald B Mitchell, Supra (n20) 82.*
[978] *The Case of the S.S. Lotus (France v. Turkey). Permanent Court of Int'l Justice, P.C.I.J. (ser. A) No. 10 (1927). This was supported by Article 217 of United Nations Convention on the Law of the Sea (UNCLOS III) which came into force on the 16th of November 1994.*

vessels by complying with the Regulations stipulated under Annex 1 of MARPOL 73/78. This includes the use of all appropriate and practicable measures of detection and environmental monitoring adequate procedures for reporting and accumulation of evidence.[979]

However, the flag State cannot enforce MARPOL where the ship has arrived at a Port State.[980] The exclusive jurisdiction of flag States to enforce international rules and regulations over ship has been criticized due to concerns that flag States may not comply diligently to their international obligations and there are no means of reviewing flag State enforcement.[981] There are no laws which may penalize or hold a flag State accountable for dereliction of its international obligations. Even though Port and Coastal States may report a violation to the flag State, only flag States has the prosecutorial powers to institute proceedings against a ship.[982] Since the introduction of flag of convenience (FoC), flag States have been reluctant to prosecute ships. FoC is the registration of vessels in a country other than where it was manufactured or operates.[983] The implication of FOC adversely impacts on the enforcement of MARPOL because a ship owner could register a ship in another country in order to evade construction, equipment and discharge standards under MARPOL 73/78. Also, ship owners register the vessel under a State where it would not be subject to prosecution or tax liability. Such flag States have no connection with the ship, the flag State authorities do not bother visiting the Ship ports, the Ship owners may not even complete registration in such flag State, and the flag State reduces the operation cost for ship owners.[984] Again, it is easy for flag States including FoC to be compromised because they benefit from revenue generated from the registration of ships.

The jurisdiction of Port States

Historically, port States only had a responsibility to prevent marine pollution from oil vessels and to address violations that occur within its internal or territorial waters. The third United Nations Conference on the Law of the Sea (UNCLOS III) extended the jurisdiction of port States to violations of international regulations (including MARPOL) in respect of ships outside its

[979] *Article 6(1) of MARPOL 73/78*
[980] *Birnie (n7) 401*
[981] *Mark Szepes (n1) p.89*
[982] *Becker (n23) 631*
[983] *Mark Szepes (n1) p.89*
[984] *Mark Szepes (n1) p.89-90*

territorial waters.[985] By virtue of Article 6(1) of MARPOL, port state have a responsibility to use *all appropriate and practicable measures of detection and environmental monitoring adequate procedures for reporting and accumulation of evidence.*[986] However, the Port State can only respond to a violation outside its territorial waters with the permission of the flag State[987] Where a Port State begins proceedings against a ship for violation(s) outside its territory, the flag State is given six(6)months from the beginning of the proceedings to correct such violations.[988] Thus, UNCLOS III provide a mode of enforcing the MARPOL Convention to ensure the prevention of marine pollution from crude oil vessels. However, a port state is not obliged to act or prosecute when informed of a violation by a coastal State. It may decide to report a violation incident to the flag State to avoid the cost of instituting proceedings against the vessel and its master or owner. The flag State is responsible for the cost of bringing proceeding against violators of the Convention.[989] Where a port state lacks fund to pursue legal proceedings against a violator, the International Maritime Organization should assume such judicial action.

On the other hand, the jurisdiction of port States have been enhanced by the MARPOL Convention for the purpose of significantly combating marine pollution from oil-sourced vessels. Parties to the MARPOL Convention, either the port state or flag state have the power to inspect all vessels to ensure they possess a valid International Oil Pollution Prevention (IOPP) certificate which must correspond with the condition of the ship or its equipment.[990] The port State has the power to prohibit a ship not having valid certificate from sailing.[991] A valid certificate is evidence showing that a ship does not pose any unreasonable threat of harm to marine ecology.[992] The certificate is valid for a period of 5 years after which the ship owner is required to renew the certificate.[993] The port State may however permit the ship to proceed to the nearest port for the purpose of repairs.[994]

Fines and Detention of vessels as a form deterrence.

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[985] *Article 218 of the United Nations Convention on the Law of the Sea, 1994.*
[986] *Article 6(1) of MARPOL 73/78*
[987] *Article 218(2)*
[988] *Article 228*
[989] *Becker (n38) 637*
[990] *Article 5(2) and Regulation 11 of Annex 1 to the MARPOL Convention.*
[991] *Ibid*
[992] *Ibid*
[993] *Regulation 10*
[994] *Ibid*

Judicial fines and detention of ship are also considered preventive measures against discharge violation. However, the MARPOL Convention does not provide for adequate compliance measures as this is the responsibility of State parties. Port State refusal of a ship to sail where it has not valid certificate not adequate enforcement. This is because flag State could issue a certificate that does not comply with the construction, operational and equipment requirements of the ship or oil tanker under the Convention. Detention of ships is a more effective form of deterrence compared to fines because of the financial impact on the ship owner or vessel operation. This implication of vessel detention means the company or persons concerned can no longer embark on shipping operations in respect of the arrested vessel. The port state does not suffer any cost in detaining a vessel. However, the gross domestic income (GDI) of the port state would be adversely affected if it relies on the crude oil as its source of revenue. Detention can be enforced without any judicial hearing.

Conclusion

This chapter concludes that there are various best practices for the prevention, mitigation or remediation of environmental hazards by oil and gas MNCs. These practices are reflected in both domestic and international laws. For example, the Nigerian EIA act stipulates a preventive strategy by requiring MNCs to organize an initial assessment of the impact of their operation on the environment. From an international perspectives, preventive and mitigation practices are covered under and Convention on Biological Diversity including the Stockholm Declaration and Rio Declaration as discussed in Chapter 4. A major strength with these legislations is that they undertake an ecosystem approach that protects both living and non-living things within the human environment. There are still issues of funding for developing countries, inadequate staffing and enforcement.

The preventive strategies under Annex 1 of the MARPOL Convention have resulted in a reduction of the quantity of oil discharged from ships into the sea. The success of MARPOL is attributed to it is ability to ensure compliance by State parties. International regimes deal with critical issues that affects the natural and social world.[995] Developing States encounter financial challenges in the enforcement of the Convention including the power to prosecute defaulting

[995] *Helmut Breitmeier, The Legitimacy of International Regimes (Ashgate Publishing Limited 2008) 1*

ships by virtue of the UNCLOS. The provision of Annex 1 which shipping companies find expensive to comply with are the discharge standards under Regulation 15 and 34. Shipping companies take the risk in discharging oil into the sea than the use of reception facilities which may carry exorbitant port charges or cause delay. Shipping companies are inclined to undertake such risk because of the less likelihood of sanctions and the direction of adverse impact on the ship or ship owner where a sanction is imposed. Therefore, Port States should make port reception facilities available, reduce it charges and effectively sanction violators. Nevertheless, the legal frameworks discussed in the chapter is yet to be fully and effectively utilized given the non-binding nature of international law on corporations. This contributes to the author's argument for a binding bilateral investment treaty (BIT).

CHAPTER 6

RECOMMENDATION AND CONCLUSION

6.1 Introduction

This final chapter establishes novel measures in which environmental degradation can be prevented or largely mitigated. It focuses on the creation of bilateral investment treaties (BITs) between Nigeria and home States of oil MNCs. It emphasizes the need to incorporate stringent environmental protection clauses into BITs. This legal framework which takes the form of a treaty should create a binding legal responsibility for State parties and their corporate affiliates. This binding element on foreign investors has been precluded in most BITs.[996]

In order to formulate an effective BIT, developing countries must impose binding environmental obligations on MNCs and be aware of the challenges encountered in negotiating such a treaty particularly with developed countries where these MNCs are domiciled. For example, in most

[996] *Madhav Mallya, (9th October, 2020) Opinio Juris. India's Race to the Bottom: Bilateral Investment Treaties and the New Draft Environmental Impact Assessment Notification. Available at: <http://opiniojuris.org/2020/10/09/indias-race-to-the-bottom-bilateral-investment-treaties-and-the-new-draft-environmental-impact-assessment-notification/> accessed: 21/4/2021*

BIT treaties, a State party would usually bargain towards the protection of its own political interest, thereby calling for an asymmetrical investment relationship. In addition, developed countries negotiating a BIT seek to protect the investment of their investors through increase in profit and expansion of their market in the host State. The government in developing countries should exercise a strong bargaining power under a BIT emphasizing the "prohibition of environmental pollution by oil and gas MNCs." Such prohibition must not be viewed as challenging the political interest of MNCs operating in the host community even though it may diminish the profit of the corporations. The inclusion of an environmental clause under a BIT would force MNCs to develop cleaner means of oil and gas production which is necessary for the protection of lives, property and biodiversity in general. Investor-protection under BITs including the protection of political interest and profit maximization is still sustained insofar as the host state is protected from environmental disaster by foreign investors.

6.2 History of BIT consummation in Nigeria

The evolution of BITs in Nigeria can be traced to the country's need to strengthen foreign direct investment (FDI).[997] Prior to relative economic growth in Nigeria, the country was in huge external debt, gross domestic product (GDP) declined and poverty level increased.[998] As a result, the pursuit for foreign capital to develop local resources became necessary for economic growth and development.[999] FDI introduced new technologies, new products, management skills and generated employment.[1000] Globalization is another factor which precipitated the evolution of BITs. Globalization is a process where two or more countries are involved in the interdependent trading of goods, services, capital, or technology.[1001] The promotes economic, cultural, political, and social relations between countries. The implementation of FDI has supported the promotion of globalization.[1002] For example, there have been an increase in capital mobility among major

[997] *Ejims, O. 'The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?' (2019). ICSID Review-Foreign Investment Law Journal, 34(1), p.70*
[998] *Osunkwo, F. O. (2020) Foreign Direct Investment and Economic Growth Of Nigeria (1980-2018) Journal of Economics and Business, 3(1), p.399*
[999] *Ibid, p.401*
[1000] *Ibid*
[1001] *Gorgulu, M.E., (2015) Foreign Direct Investment in the Globalizing World. Economic and Social Development, International Scientific Conference on Economic and Social Development. 11(1) p.94*
[1002] *Ibid*

industrial states and developing economies.[1003] Countries bearing such economic approach fosters free trade and accessibility to listed stock markets.[1004]

On the other hand, BITs are said to have emerged in a bid to protect investors, provide them with rights and benefits, and resolve investment disputes.[1005] Historically, BITs were signed between developing and developed countries and could currently be signed between developing countries.[1006] Thus, in 1990, Nigeria signed and entered into force its first BIT.[1007] It was an investment agreement between Nigerian and France.[1008] Nigerian has signed thirty-one bilateral investment treaty.[1009] The country signed its most recent BIT in 2016 with Morocco, Singapore, and United Arab Emirates. However, none of the 2016 treaties have been in force.[1010] BITs possess its legal authority from the Vienna Convention on the Law of Treaties which emphasizes on the fundamental role of treaties in the history of international relations.[1011]

6.3 The introduction of BIT for environmental protection

BITs primarily encapsulate an economic objective which is to support foreign direct investment ("FDI") between the two State-parties to achieve economic growth for both parties.[1012] Also, BITs include a dispute settlement mechanism that authorizes foreign investors to file claims against host states before international arbitral tribunals.[1013] There are over 2,500 BITs across the globe.[1014] The first BIT was agreed 63 years ago between Germany and Pakistan in 1959. The purpose of BIT is to bring together two countries, (i.e. an investor-state relationship) with similar

[1003] *Ibid*
[1004] *Ibid, p.97*
[1005] *Wolfgang Alschner & Dmitriy Skougarevskiy, Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice (June 7, 2016) TDM Special Issue on International Arbitration Involving Commercial and Investment Disputes. Available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791474> accessed: 12/4/2023*
[1006] *Ibid*
[1007] *UNCTAD, Investment Policy Hub, Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria> accessed: 12/4/2023*
[1008] *Ibid*
[1009] *Ibid*
[1010] *Ibid*
[1011] *Preamble to the Vienna Convention on the Law of Treaties 1969.*
[1012] *Lahey, T. (2019). Using Bilateral Investment Treaties to Promote Corporate Social Responsibility and Stimulate Sustainable Development. Rutgers Business Law Review, 15(1), p.1*
[1013] *Ibid, p.1*
[1014] *Lahey, T. (2019). Using Bilateral Investment Treaties to Promote Corporate Social Responsibility and Stimulate Sustainable Development. Rutgers Business Law Review, 15(1), p.1.*

investment objectives which cannot be achieved on a multilateral platform. However, the author is of the view that BIT must not only be viewed as the achievement of investment objectives but investment processes which include environmental protection. The author opines that There are two distinct features of BITs which are crucial to this writing. First is the corporate entity factor and second is the binding factor. The author believes that the obligations of the investor or MNCs apply to both the parent and subsidiary companies.

The corporation entity factor is the inclusion of companies as a party to BIT. The author also defines this as the direct applicability of BITs to corporations. Bits create obligations for MNCs - a factor which cannot be achieved under public international law. The host State must ensure that Corporations carry general and specific obligations given that they are recognized legal entities. General obligations involve compliance with all investment laws applicable in the host State. Specific obligations of corporations under BITs should include respect for human rights and protection of the environment of the host State. States possess the sovereignty to protect society and its environment from harm by foreign investors.[1015] The nature of BITs and the subject matter they regulate require the use of broad language to achieve a specific level of flexibility to enable BITs adapt to future environmental, social or political changes. Nevertheless, the treaty may give interpretation to broad terms. For example, the term 'expropriation' shall mean the right of the host State or its representatives to reclaim the property of the investor in the interest of the public including protection of human and environmental rights. By virtue of this public interest doctrine, the term - expropriation cannot be viewed as a denial of peaceful enjoyment of an investor's possession. The compliance or enforcement of these obligations guarantees sustainable economic development of the host State. It also presents corporations as responsible social actors. The reason for corporate obligations is primarily associated with the several occasions of human rights and environment abuses across the globe particularly in Africa as discussed in previous chapters of this writing.

Traditionally, BITs confer certain enforceable rights on foreign investors such as the right to investment protection, right to file legal action against the state party etc. BITs acknowledge

[1015] *Suzanne A. Spears,(2010) The Quest for Policy Space in **A** New Generation International Investment Agreements. Journal of International Economics. and Law, p.1037-38*

MFN treatment obligations to investors. The principle of MFN treatment requires a state party to give the most favorable tariff and regulations to the other parties to the treaty. Stabilization clauses also manage risk by assuring investors that the laws related to their investment will not change, and in the event of any such change, the investor will be compensated for any resulting harm. These clauses appear in different form and scope and may be divided into three broad approaches: 1) freezing clauses which makes new laws inapplicable to the investment, 2) economic equilibrium clauses which require foreign investors to comply with the new laws provided that they are compensated by the host state for the cost of compliance, and 3) hybrid clauses which mandates the host state to indemnify the foreign investors prior to any regulatory changes. The author opines that the application of these clauses should either be expunged or accompany an exception under BIT, particularly where it is in the best interest of the public.

In examining current investment relations, companies practically undertake all large-scale investment operations.[1016] Companies are used to mobilize financial and human resources for investments and to enhance the production of goods and services. The corporate institution having a set of legal rules and incentives is of central importance to contemporary society.[1017] It is the most important organisation in the world which competes with governmental institutions.[1018] The company is a central economic institution that has generated laudable community benefits and development but has bemoaned its evolution and weaknesses in recent years. It is for these reasons that BITs must stipulate CSR obligations geared towards protection of the environment. Such human and environmental rights obligations must apply to existing, new and future investments between the host State and the investor.

The second distinct characteristic of a BIT is the binding factor. This is a feature that requires both parties to comply with every provision of the treaty and impose legal or economic sanctions where either party fails to do so. Therefore, both the host State and MNCs must show willingness to be bound by the treaty by executing the legal document and creating domestic laws implementing the provisions of the treaty. However, the failure of domestic implementation

[1016] *OECD Business and Finance Outlook 2016, The impact of investment treaties on companies, shareholders and creditors. Available at:<https://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf> accessed: 12/6/2021*
[1017] *Ibid*
[1018] *Ibid*

should not in any way waive the rights and obligations of parties under the treaty including the obligation of the MNC to avoid causing harm to the environment of the host State. However, on the enforcement of the Belize-UK BIT,[1019] the government of Belize argued that the BIT is not binding because it did not reflect the regulations of Belizean Law.[1020] The author maintains that a BIT should remain binding except (i) it fails to protect the environment of the host State or; (ii) where compared to the domestic law of the host State, the BIT does not stipulate 'comprehensive' protection for the environment of the host State. The ultimate objective in this regard is to avoid creating a floodgate where MNCs would derogate from the provisions of BITs based on the lack of domestic implementation. In a situation where international agreements are set aside by a single party (i.e. the investor), it may have a very negative effect on the whole foreign policy of the host State.

The binding nature of BITs should carry hard law language such as "shall" and "must" as opposed to soft terms such as "encourage" or "advice". Accordingly, the Netherlands Model BIT is criticized for adopting non-binding language under Article 7 which reads thus: "The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party..."[1021] The author is of the opinion that BITs should preclude MNC-investors from filing lawsuits which targets comprehensive environmental standards of host States. This should be the position particularly where the MNC-investor is seeking a remedy that requires the court, tribunal or legislature to derogate from the statutory provisions of the host State. In any case, MNC-investors may be granted compensatory reliefs rather than an approval to proceed with projects likely to damage the environment and pollute human lives. In 1996, an American based fuel additive company named Ethyl Corporation attempted to file legal action over a Canadian ban on

[1019] *Agreement on Reciprocal Promotion and Protection of Investments Between the Government of Belize and the United Kingdom. Adopted and entered into force on 30th April 1982.*
[1020] *British Caribbean Bank v Attorney General of Belize and the Minister of Public Utili- ties, Civil Appeal No 30 of 2010 [2011],*
[1021] *Netherlands Draft Model BIT, Agreement on Reciprocal Promotion and Protection of Investments Between [third party country] and the Kingdom of the Netherlands, Adopted 22nd March 2019. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> accessed: 12/4/2021*

trade on the fuel - MMT relying on the North Atlantic Free Trade Agreement (NAFTA).[1022] The Canadian legislature adopted the ban due to suspicions of MMT being a neurotoxin which also destroys automobile exhaust systems. Canada's removal of the ban exposed Canadians to MMT-laced gasoline for six years.[1023]

6.4 Environmental Protection Clauses under BITs

One of the key objectives of a BIT should be health and environment safety. Accordingly, it is crucial for all BITs to incorporate a clause that protects the environment, especially for oil and gas exploration investments which largely involves the environment. For example, the Morocco-Nigeria treaty makes specific reference to environmental protection.[1024] The host State is given the right under the treaty to regulate environmental related matters.[1025] Article 13(2) particularly focusses on the discretionary determination in respect of regulation, compliance, investigation and prosecution of environmental matters by State parties. However, the use of the term "discretion" in this treaty provision may lead to parties viewing environmental matters as being of a voluntary nature. Thus, parties would be more likely to perpetrate environment abuses or dissuade from practices necessary environmental protection. Article 14(3) requires investors to implement a precautionary principle and engage in responsible environmental practices.[1026] Meanwhile, Article 18 requires investors to maintain an environmental management system and

[1022] *International Institute for Sustainable Development, Private Rights, Public Problems. Winnipeg: International Institute for Sustainable Devel- opment and World Wildlife Fund, 2001. pp. 71-72.*
[1023] *Finn, Ed. Filling Our Tanks (And Brains) With the Wrong Fuel. Canadian for Policy Alternatives, September 2004.*
[1024] *Gazzini, T. (2017). The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties. Investment Treaty News, 8(3), 3.*
[1025] *Zugliani, N. (2019). Human Rights in International Investment Law: The 2016 Morocco–Nigeria Bilateral Investment Treaty. International & Comparative Law Quarterly, 68(3), 769*
[1026] *Article 14(3) and 18*

to 'not manage or operate the investments in a manner that circumvents international environmental obligations to which the host state and/or home state are Parties.

Most developing countries already have laws which protect both their aquatic and terrestrial environment. The provision of such key domestic and international environmental laws may be embedded under BITs which would consequently compel MNCs to organise an environmental impact before undertaking any operation. For example; Section 2 of the Nigerian EIA Act prohibits public and private projects without an initial assessment of the environmental impact.[1027] Section 55 requires every information and report in relation to an assessment to be accessible to the public.[1028] This would enable the host State through independent experts to monitor compliance with EIA measures in connection with proposed oil and gas project(s). BITs should require MNCs adopt the precautionary principle in their EIA process. The UN Conference on the Environment and Development views the precautionary principle as ensuring *full scientific certainty* necessary for the prevention of environmental pollution.[1029]

BITs should compel MNCs to comply with every EIA procedure contained in the environmental regulation of the host State even though it would require the Nigeria legislature to establish robust environment regulations for the primary purpose of ensuring that MNCs avoid polluting the environment of host States. As part of a comprehensive EIA process, MNCs should submit a remediation plan and possibly a bank guarantee where they perceive any slight violation of environmental law which may cause harm to living or non-living creatures. Having BITs which directly address MNCs solves the ‘biggest problem’ of exante public international laws in failing to create binding regulations for non-State actors.

Environmental protection clauses should create direct enforceable rights for relevant stakeholders including citizens of host States, particularly members of communities where oil and gas exploration activities take place or environmental pollution occurs. The creation of enforceable rights includes the right of any citizen of a host State to file a complaint before a

[1027] *Section 2, Environmental Impact Assessment Act (CAP E12 LFN 2004).*
[1028] *Ibid, Section 55*
[1029] *Rio Declaration on Environment and Development (A/CONF.151/26, vol. I) and Agenda 21 (A/CONF.151/26, vol. II), adopted by the United Nations Conference on Environment and Development on 14 June 1992*

tribunal. Besides, host States may be forced to unilaterally terminate BITs if investors continually file claims against the host State. Therefore, BITs should embody a polycentric international legal system which would combat the actions of host State governments in encouraging MNCs to pollute the environment. Currently, MNCs apply to the host State government as a requirement for any form of exploration. There is the need for community stakeholders' involvement in the grant of oil and gas exploration license which must be reflected under the BIT. In the event of a decision conflict between the host government and the host community, the decision of the latter should take precedence because they are the population that directly suffer the adverse effect of exploration activities by MNCs.

An environmental protection clause should grant the host State or community to revoke the land or licence of an oil and gas MNC where its operations are likely to endanger public health and the environment. This should be included as "overriding public interest" and should be included in section 28 of the Land Use Act 2004[1030]. The author believes that an environmental clause which permits the host State or community to confiscate land granted to a MNC for exploration activities in a bid to protect human lives and the environment does not constitute expropriation of foreign investment. International law recognizes direct and indirect expropriation and their impediment on foreign investments.[1031] Direct expropriation is unlawfully taking the title of the property owner.[1032] Examples of direct expropriation are the nationalization of the oil industries in Libya (1970s), Kuwait (1980s) and Venezuela (2000s).[1033] On the other hand, indirect expropriation is where the host State establishes regulations which are not economically viable for the foreign investor.[1034] While current BITs adopt expropriatory clauses to prevent compulsory acquisition of investors' property by the host State, the latter should be given the authority to seize such properties where they pose a threat to the environment. This re-emphasizes the need for an EIA by an independent expert appointed by the host State to ascertain whether the operations of the investor would adversely affect the environment.

[1030] *Section 28 Land Use Act 2004*
[1031] *Zhu Y., (2019) Do Clarified Indirect Expropriation Clauses in International Investment Treaties Preserve Environmental Regulatory Space? Harvard International Law Journal. 60(2) p.380*
[1032] *ibid*
[1033] *ibid*
[1034] *ibid*

In other words, land issued to a MNC should only be reclaimed by the host State government or community stakeholders in the interest of the public. This proposed environmental regulatory measure is similar to Section 28 of the Nigerian Land Use Act which authorizes the Governor of a State to revoke the property right of occupancy for the purpose of overriding public interest.[1035] However, the host State or community must not exercise such power in a discriminatory manner or void of due process. In a situation where the MNC has made financial commitment towards the acquisition of the land for exploration or any operation thereof, the host State has an obligation to compensate the corporation for such financial loss.

An environmental protection clause must provide access to justice whether before or after an environmental disaster. This can be achieved by allowing citizens of host States to file claims before an arbitration tribunal to adjudicate such environmental disputes. Arbitrators should apply their discretion in deciding whether an action exercised by a state Party falls should be defined as necessary to achieve legitimate policy objectives such as protection of the environment. In addition, State parties should authorise open resolution of disputes to enable in-depth transparency of the BIT regime and extensive publication of treaty decisions to facilitate study on the need to protect human rights and their environment. The host State including victims should be allowed to access information and participate in matters that concern their environment. In the event of environmental pollution, the corporation must organise an immediate clean-up and provide compensation to victims. These provisions are reflected under the domestic laws of some host States such as the NOSDRA Act in Nigeria. Therefore, access to justice involves the enforcement of environmental laws and provision of remedies for environmental damage.

6.4 Conclusion

It has been emphasized in this writing that MNCs play a pivotal role in the economic expansion of developing countries including urban regions and rural communities in Nigeria. They invest their financial resources and contribute their technological expertise in the exploration and production of crude oil in the country. However, the nature of their activities does not guarantee sustainable economic development but rather cause harm to the environment and this is

[1035] *Section 28, Land Use Act, 2004 Laws of the Federation (LFN) 2004.*

particularly the case when oil spills from their facility during operations. Human beings within such an environment inhale the toxic air from oil spills which further pollutes their land and water resources. Since 1972, there have been international efforts to regulate the activities of MNCs, especially in a manner that protects the environment of their operations. Thus, the Stockholm declaration, Rio declaration, Global Compact, UN Guiding Principles, and OECD Guidelines hold MNCs accountable for the adverse impact of the operations on the environment of host States. Unfortunately, these international regulations are non-binding and enforceable given the state-centric nature of international law.

Therefore, international and domestic governments should work towards the enforcement and monitoring of environmental laws in order to achieve sustainable protection of human lives and their environment from the adverse effect of oil and gas productions by MNCs. A lot has already been done on enactment of laws which only in theory achieves this purpose but in practice, leaves a loophole. The Nigerian government should take necessary steps to implement the provisions of the UN Guiding Principle and UN Global Compact into its domestic law. On the other hand, developed countries should hold their domicile corporations accountable by implementing and enforcing the provisions of the OECD Guidelines particularly as it relates to the protection of human rights and the environment.

In negotiating BITs, State parties should impose direct binding environmental obligations on MNCs and take practical steps towards the enforcement of environmental protection clauses. Both domestic and international environmental law provisions should be reflected under BITs. In the event of disputes, arbitrators should be sensitive to environmental considerations rather than focusing on investor-protections. Developing countries must eschew from encouraging "*Race to the Bottom*" by forfeiting their human and environmental rights protections with the aim of boosting its revenue base. Developing countries should understand that there is greater economic loss when the environment is polluted because the environment is an indispensable feature for sustainable production. In addition, if BITs adopt similar standards over a long period of time, they could evolve into customary international law.

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