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PUBLIC REGULATION OF THE OIL AND GAS INDUSTRY IN NIGERIA: AN EVALUATION

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ABSTRACT

Nigeria operates a command and control regulatory framework in the oil and gas sector.[1] This type of regulation was prevalent in the United States and Britain during the 1970s and 1980s.[2] Under this regulatory framework, regulators are deemed to be acting in the public interest. This article focuses on the extant public regulatory regime in the oil and gas sector in Nigeria. Generally, factors, such as red-tape, over-regulation and regulatory capture, amongst others, are some reasons militating against a command and control regulatory regime.[3] This article will contend that unless there is a paradigmatic shift in the state-oriented or public regulatory framework in the oil and gas sector in Nigeria, the fundamental ills or malaise afflicting the industry will not abate.

I. INTRODUCTION

This article focuses on the various legislative enactments governing the oil and gas regime in Nigeria. Laws regulating the oil industry directly

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1. Evaristus Oshionebo, *Transnational Corporation, Civil Society and Social Responsibility in Nigeria's Oil and Gas Industry*, 15 AFR. J. INT'L & COMP. L. 107-129 (2007).

2. R. Robert Baldwin, *Is Regulation Right*, Centre of Risk and Regulation at the London School of Economics and Political Science 1-5 (2000), http://eprints.lse.ac.uk/35976/1/IsRegulationRight.pdf.

3. *Id.*

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and other incidental laws and regulations will be analyzed. This article will be divided into six major sections for coherence. The first part dwells on the ownership and control of the oil and gas resources in Nigeria. This section will serve as an introduction to the oil and gas industry in Nigeria with its attendant political and socio-economic problems of the inhabitants of the Niger Delta region. A historical evolution of the ownership of oil and mineral resources in Nigeria will also be in focus.

The second part of the article will focus on the public regulation of the oil and gas industry in Nigeria. The legislative framework regulating the Nigerian oil industry, including the Constitution of Nigeria 1999, Land Use Act,[4] Petroleum Act,[5] Associated Gas Re-injection Act,[6] Environmental Impact Assessment Act (EIA),[7] Oil Pipelines Act,[8] Petroleum Act,[9] Hydrocarbon Oil Refineries Act,[10] Harmful Waste (Special Criminal Provisions) Act[11] and Petroleum (Drilling and Production) Regulations, amongst others, will be in focus.

The third part of this article will analyze the laws on gas flaring in the oil and gas sector in Nigeria.

The fourth part of this article will highlight the environmental impact assessment regime in Nigeria and analyze its effectiveness.

The fifth section will highlight the recent developments in the oil and gas industry, such as the Petroleum Industry Bill and the Local Content Act.

The sixth part will conclude the analysis, where the inherent weaknesses of the aforementioned laws and regulations will be brought to the fore.

II. THEORIES OF OWNERSHIP OF OIL

This section analyzes the various ownership theories and the ownership of oil and mineral resources in Nigeria. There are various strands of ownership of oil theories prevailing in different countries. Ownership rights

4. Now Land Use Act (2004) Cap. (202), Laws of the Federation of Nigeria [hereinafter LFN].
5. Petroleum Act (2004) Cap. (P10), LFN.
6. Associated Gas Re-Injection Act (2004) Cap. (20), LFN.
7. Environmental Impact Assessment Act (2004) Cap. (E12), LFN.
8. Oil Pipelines Act (2004) Cap. (07), LFN.
9. Petroleum Act (2004) Cap. (P10), LFN.
10. Hydrocarbon Oil Refineries Act (2004) Cap. (H5), LFN.
11. Harmful Waste Act (2004) Cap. (H1), LFN.

over oil are dependent on a number of factors or conditions,[12] such as "the political system in place at the time of the determination and the instrumentality of the law"[13] in any country. For example, in the United States, individuals can own the minerals situated on their lands. This is not the case in communist or socialist countries (for example, Cuba and North Korea) where individual ownership of property is stringently controlled by the State. The latter scenario is akin to the situation in Nigeria where most of the oil-related laws were promulgated by military regimes, which are typically unitary in nature and tend to be socialist or centrist inclined. Indeed, Nigeria's military rulers were at the forefront of centralising the ownership and control of oil and gas resources in the federal government of Nigeria.[14]

Generally, ownership of oil theories can be subsumed into different categories.[15] These categories include the domanial legal system theory of ownership, private ownership theory (which includes qualified ownership theory and absolute ownership theory) and State (or permanent) sovereignty over mineral resources under international law.[16] These various theories can also be subsumed under two strands of resolving ownership of mineral or oil and gas resources. These major strands of ownership of natural or mineral resources located under land, such as petroleum are present when:

(1) The mineral resources can be said to belong to the land owner; or
(2) The mineral resources belong to the State or either the federating part or part of the State where the resources are located, such as the province, state or local government.[17]

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12. Francisca Nlerum, *Reflections on Participation Regimes in Nigeria's Oil Sector*, NIGERIAN CURRENT L. REV. 145, 149 (2007-2010), *available at* http://nials-nigeria.org/pub/NCLR5.pdf.

13. *Id.*

14. For example, the Petroleum Decree (now Act) was enacted by the military administration of General Yakubu Gowon in 1969 during the course of the Nigerian-Biafra Civil War.

15. For an overview of the different categories of ownership theories, see Lanre Aladeitan, *Powering the Future: 21st Century Guide for Energy Practitioners: Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy*, 38 T. MARSHALL L. REV. 159, 160-8 (2013).

16. *See* YINKA OMOROGBE, OIL AND GAS LAW IN NIGERIA: SIMPLIFIED 31 (Malthouse Press 2001); Yinka Omorogbe & Peter Oniemola, *Property Rights in Oil and Gas Under Domanial Regimes*, *in* PROPERTY AND THE LAW IN ENERGY AND NATURAL RESOURCES (A. McHarg ed., OUP 2010); Nlerum, *supra* note 12, at 149.

17. Omorogbe & Oniemola at 119.

The first ownership theory in focus will be domanial or state ownership of natural resources. Simply, ownership of mineral resources can either belong to the owner of the land (wherein the mineral is situated) or to the State (which might be the part of the state, region or the local government wherein the mineral is situated).[18] The domanial system encompasses the vesting of ownership rights over mineral resources in the sovereign or State.[19] The origin of the domanial system is traced to the regalian system under Roman law.[20] During the Roman Empire (after the Punic War), the State (Roman Empire) became the owner of all the conquered territories and ownership of mineral resources was vested in the sovereign.[21] An example of a country with a domanial legal system is the United Kingdom, where the ownership of oil and gas is vested in the Crown by virtue of the Petroleum (Production) Act 1934 (now Petroleum Act 1998). Iran, the Kingdom of Kuwait, Papua New Guinea, Bulgaria, Ukraine, Bangladesh and Mozambique are additional examples of countries with a domanial legal system in the ownership of mineral resources.[22] Nigeria's domanial legal system of ownership of mineral resources is established by the provisions of the Nigerian Constitution, Petroleum Act and Exclusive Economic Zone Act, amongst other statutes, which vest the exclusive ownership of mineral resources in the federal government of Nigeria. These statutes will be elucidated upon in this article in the section on public (statutory) regulation of the oil and gas industry in Nigeria.

The two variants of private ownership of mineral resources are absolute and qualified ownership models. In absolute ownership theory, the land owner has exclusive ownership of the oil found in his land. However, the possessory interest in the minerals beneath a land is subject to the rule of capture.[23] The rule of capture entails the loss of rights to oil on a land by the land owner when the oil migrates to an adjoining land wherein it is produced.[24] The U.S. states of Texas, Pennsylvania and Arkansas are places where absolute ownership theory is the norm.[25]

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18. Omorogbe & Oniemola, *supra* note 16.
19. Nlerum, *supra* note 12.
20. Omorogbe & Oniemola, *supra* note 16.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. For an extensive analysis of the ownership of oil theory operational in Texas, see Emeka Duruigbo, *Realizing the People's Right to Natural Resources*, 12 WHITEHEAD J. DIPL. & INT'L REL. 111, 118-20 (2011).

Private ownership of mineral resources is the prevailing model in the United States. Under qualified ownership in the United States, the land owner is "said not [to] have title to the oil and gas *in situ* because of the fact that he can be divested by drainage without consent and without any liability on the part of the person causing the damage."[26] The land owner has a property interest in the land rather than a right of capture.[27] This theory is prevalent in California and Indiana. There, various exploration and prospecting rights are granted through the instrumentality of leases between the land owner and the mining company.[28] In the case of a common reservoir, the land owners are designated as collective owners with the same rights to prospect or take oil from the reservoir. Thus, the land owner has a qualified interest in the mineral resource arising from being one of the collective owners of the reservoir.[29] In *Elliff v. Texon Drilling Co.*,[30] the court held that the owner of a piece of land acquires title to the oil being produced on the land notwithstanding some parts of the oil that may have migrated from adjoining lands.[31]

Some international instruments have promoted the ownership of mineral or natural resources. For example, the United Nations General Assembly Resolution No. 626 (VII), which was adopted in 1952, states that "the right of people freely to use and exploit their natural resources is inherent in their sovereignty." Also, in 1962, the General Assembly adopted Resolution 1803 (XVII) (Permanent Sovereignty over Natural Resources), which provides for *inter alia*:

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

In 1974, the United Nations General Assembly adopted Resolution No. 3281 (XXIX). Article 2 of the resolution states that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its wealth, natural resources and economic activities."[32] Also, the Organization of Petroleum Exporting Countries

26. Omorogbe, *supra* note 16, at 32.
27. *Id.*
28. Omorogbe & Oniemola, *supra* note 16.
29. *Id.*
30. Elliff v. Texon Drilling Co., 210 S.W.2d 558, 575 (Tex. 1948).
31. Nlerum, *supra* note 12, at 150.
32. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2, U.N. Doc. A/RES/3281 (XXIX) (Dec. 12, 1974).

(OPEC), in its Resolution XVI 'Declaratory Statement of Petroleum Policy in Member Countries,' recommended that members should take active participation in and control over the oil and gas operations in their countries.[33]

Presently, this is no longer the prevailing slant of many developing countries. It can be argued that many developing countries now engage in the classical 'race to the bottom' syndrome to attract foreign direct investment (FDI)[34] in order to stimulate economic growth, employment and investment, amongst others. The 'race to the bottom' theory can manifest when "a country lowers its standards in order to gain competitive advantage over a foreign exporter."[35] 'Race to the bottom' syndrome also occurs when a country (in most instances, a developing one) has a weak regulatory regime in controlling foreign direct investment or the activities of multinational corporations, thereby permitting the continuation of poor labour standards in the country,[36] amongst others. Nigeria exemplifies a country engaged in the 'race to the bottom' theory to attract FDI, especially in the oil and gas industry. It is argued that by having a weak regulatory regime in the oil and gas sector, the Nigerian government is attracting foreign direct investment via the instrumentality of the foreign oil multinational corporations (MNCs) that operate in the sector.[37] On the other hand, it is contended that the weak regulatory regime and attendant challenges in the oil and gas sector in Nigeria serve as a disincentive to foreign direct investment.[38] Due to the inability of the Nigerian government to properly regulate the oil and gas sector, especially against the negative consequences of oil related activities by MNCs, foreign investors are now exposed to various risks occasioned by the hostility of the host communities.[39] Some of these risks include hos-

33. Omorogbe & Oniemola, *supra* note 16.

34. Eghosa Ekhator, *Regulation of Labour Standards: An International Perspective*, 2 J. GLOBALISATION & DEV. AFR. 11 (2009).

35. Kofi Addo, *The Correlation Between Labour Standards and International Trade*, 36 J. WORLD TRADE 285, 291 (2002).

36. Ekhator, *supra* note 34.

37. See *Access to Justice: Human Rights Abuse involving Corporations in Nigeria*, International Commission of Jurists, 1-3 (2012), http://documents.icj.org/Nigeria.pdf (arguing that due to successive governments' economic policies in Nigeria which promoted FDI by foreign MNCs has led to the permissive nature of the oil and gas industry in Nigeria where some MNCs commit human rights abuse and environmental abuses during the course of their operations) [hereinafter International Commission of Jurists]. Also see MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 53-55 (Cambridge Univ. Press 3d ed. 2010), for an analysis of the dependency theory in FDI.

38. George Akpan, *The Failure of Environmental Governance and Implications for Foreign Investors and Host States- A Study of the Niger Delta Region of Nigeria*, 1 INT'L ENERGY L. & TAX'N REV. 1 (2006).

39. *Id.*

tage taking of oil MNCs staff, sabotage of oil installations, armed rebellion, and activities of NGOs in highlighting the negative impacts of oil related activities amongst others.

According to Omorogbe and Oniemola from the aforementioned United Nations resolutions, there is a definite trend from the individual ownership of mineral rights to (host) State ownership or control of natural or mineral resources[40] in different countries. This was especially so in some developing countries wherein oil MNCs are seen as agents of doom and unequal partners in the economic development of such countries. This view was prevalent in the 1970s and early 1980s and may have been influenced by the subsisting view that the developing countries sought a change in international law via the instrumentality of the New Economic Order.[41] Presently, however, many of the member countries of the New Economic Order bloc that were at the forefront of state ownership of mineral resources remain mired in economic problems and their expected integration into the global or international economic system have been fraught with difficulties.[42] However, the position advocated by Omorogbe and Oniemola on permanent sovereignty of mineral resources can be criticized on the basis that "ownership and control of natural resources under the Resolution on Permanent Sovereignty over Natural Resources is a provision that guarantees a Nation's right to exclusive control over its natural resources against another State and not one that deals with intra-national ownership and control interests."[43] Thus, the question at this juncture is: in the context of the State's total ownership and control of oil and gas resources in the Nigerian oil and gas industry, is the Nigerian State a developer of the resources for public good?

In Nigeria, the federal government owns and controls the ownership of mineral resources. Laws, such as the Constitution of Nigeria, the Land Use Act and Petroleum Act, amongst others, vest the total ownership and control of mineral resources in the federal government to the detriment of the states, local governments and the local communities wherein the mineral resources are situated. One plausible argument for the federal government's ownership of mineral resources is that the minerals (oil and gas included) in or upon any land in Nigeria "are viewed by the state

40. Omorogbe, *supra* note 16, at 37.

41. Sornarajah, *supra* note 37.

42. Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 Geo. Wash. Int'l L. Rev. 33 (2006).

43. Rhuks Ako, Resource Control or Revenue Allocation: The Path to Sustainable Peace in Nigeria's Oil-Producing Communities, Paper Presented at the Nigerian Society of International Law 35th Annual Conference 4 (June 2005).

as public goods and government's intervention in their exploitation becomes simply a case of public use."[44] That is, the mineral resources are managed or held in trust on behalf of the Nigerian people by the federal government for the benefit and development of the country.

However, it is the general consensus that ownership of mineral resources by the federal government has been detrimental to the people of the oil producing areas of Nigeria. Itse Sagay is in support of this view and he states thus:

> Regarding the danger of private ownership of oil creating enormous wealth for a few people who would then misuse these funds, the question may be asked: Has central ownership and control prevented the emergence of a class of enormously wealthy individuals in Nigeria? Have the proceeds of oil been prudently and patriotically put to use? Regarding the country's extra sales of crude oil during the Gulf War alone, the Okigbo Panel noted that some US$ 12.4 billion is yet to be properly accounted for.[45]

Due to inherent weaknesses and corruption in the extant regulatory regime in the oil and gas sector of Nigeria, scholars have advocated ownership of mineral resources by the local communities or the indigenous people wherein the oil is found.[46] On the international plane, the various justifications for the ownership of mineral resources by local communities or indigenous people may include a right to development, economic self-determination, permanent sovereignty over mineral or natural resources and the rights of the local communities or people to benefit from the mineral resources, amongst others.[47] An example of an international convention that promotes the ownership and control of mineral resources

44. Wilson Akpan, *Oil, People and the Environment: Understanding Land-Related Controversies in Nigeria's Oil Region*, 5 (2010), http://www.codesria.org/IMG/pdf/akpan.pdf.

45. Itse Sagay, *Ownership and Control of Nigerian Petroleum Resources: A Legal Angle*, *in* Nigerian Petroleum Business Handbook 180 (V.E. Erhonsele ed., Advent Communications Ltd. 1997).

46. Kaniye Ebeku, Oil and the Niger Delta, People in International Law – Resource Rights, Environmental and Equity Issue (Rudiger Koppe, 2006); Duruigbo, *supra* note 42; F.O Ayodele-Akaakar, Appraising the Oil and Gas Laws: A Search For Enduring Legislation for the Niger Delta Region, 3 J. Sustainable Dev. Afr. 1, 7-8 (2001), http://www.jsd-africa.com/Jsda/Fallwinter2001/articlespdf/ARC%20-%20APPRAISING%20THE%20OIL%20and%20Gas.pdf.

47. Dunia Zongwe, The Legal Justifications for a People-Based Approach to the Control of Mineral Resources in the Democratic Republic of the Congo, Paper Presented at the Cornell Law School Inter-University Graduate Student Conference Papers Paper 12 (2008), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1040&context=lps_clacp.

is the Indigenous and Tribal People's Convention 1989. Article 15 of the Convention provides for the rights of the people to participate in the management, use and conservation of mineral or natural resources. Also, the Convention states that when the State has ownership and control of the mineral resources, the government shall consult with the people before undertaking any exploratory activities in such communities (Article 15(2)). Unfortunately, Nigeria has yet to ratify this Convention. Additionally, the African Charter on Human and Peoples Rights (African Charter), which has been domesticated into Nigerian law, bestows rights upon the people to own and control natural resources.[48] For example, Section 1 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act states that the African Charter shall "have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria."

Also, Article 21 of the African Charter provides that all peoples shall have the right to freely dispose of their wealth and mineral or natural resources. Notwithstanding the provisions of the International Convention of Indigenous and Peoples Rights and the African Charter, the federal government's ownership and control of natural resources in Nigeria is unscathed. In respect of the Indigenous and Tribal People's Convention, Nigeria has yet to ratify it. By virtue of Section 12(1) of the Constitution of Nigeria, no treaty shall have force in Nigeria except such a treaty or convention that has been enacted into law by the National Assembly. Flowing from this premise, the Indigenous and Tribal People's Convention 1989 is not applicable in Nigeria. In respect of the African Charter, it can be argued that the Charter promotes socio-economic rights, which are not justiciable under Nigerian law. By virtue of Section 6(6)(c) of the Constitution, the objectives and principles discussed under the heading of 'Fundamental Objectives and Directive Principles of State Policy' in Chapter II are neither justiciable nor enforceable.[49] However, there are contending views that both the African Charter and Section 6(6)(c) of the Constitution are justiciable and enforceable in Nigeria.[50]

48. African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (2004) Cap. (A9), LFN.

49. Eghosa Ekhator, *Improving Access to Environmental Justice Under the African Charter: The Roles of NGOs in Nigeria*, 22 AFR. J. INT'L & COMP. L. 63 (2014).

50. *See id.*

III. HISTORY AND EVOLUTION OF OWNERSHIP OF OIL IN NIGERIA

This section dwells on the evolution of the ownership regime in the oil and gas sector of Nigeria. This section will attempt a further elucidation of the legislative enactments in the oil and gas sector in Nigeria. Also, a brief analysis of the evolution of the various derivative or revenue allocation formulae in the Nigeria will be in focus.

Nigeria is a federal state with three tiers of government: federal, state and local. Nigeria's variant of federalism has been subject of numerous critiques and the subsisting view is that, the system is skewed to the advantage of the central or federal government.[51] Some of the laws accentuating the federal or central government's total control and ownership of mineral resources include the Constitution of Nigeria 1999, the Land Use Act, Petroleum Act, the Territorial Act, and the Exclusive Economic Zone Act, amongst others. The rigidity and totality of the federal government's ownership of oil resources (to the detriment of indigenous oil communities) has been one of the major reasons for the Niger Delta crisis.[52]

The Constitution also vests ownership in the federal government. Section 44(3) of the Constitution vests in the federal government, exclusive control and management of minerals, mineral oils and natural gas in Nigeria. The section states thus:

> Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[53]

51. Itse Sagay, Nigeria: The Unfinished Federal Project, Paper presented at the Eighth Justice Idigbe Memorial Lecture at the University of Benin Nigeria (Apr. 30, 2008), http://www.nigerianlawguru.com/articles/constitutional%20law/NIGERIA%20THE%20UNFINISHED%20FEDERAL%20PROJECT.pdf; Wumi Iledare & Rotimi Suberu, Oil and Gas Resources in the Federal Republic of Nigeria, Framework paper prepared for delivery at the Conference on Oil and Gas in Federal Systems (Mar. 3-4, 2010), http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework_Paper_Nigeria2.pdf.

52. Rhuks Ako, *Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice*, 53 J. AFR. L. 289 (2009).

53. Constitution of Nigeria (1999), *available at* http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm.

This constitutional provision is replicated in several legislation, including the Exclusive Economic Zone Act,[54] the Minerals and Mining Act[55] and the Land Use Act,[56] amongst others. Ako posits that due to the unique impacts of the Land Use Act (LUA) on the inhabitants of the Niger Delta (especially in expropriation of land by the government), the LUA was the final jigsaw that confirmed the totality of the federal government's ownership of mineral resources in Nigeria.[57] On the other hand, Ayodele-Akaakar contends that with the enactment of the Offshore Oil Revenue Decree in 1971, the totality of the federal government's ownership and control of mineral resources in Nigeria was confirmed.[58] Herein, the Offshore and Oil Decree Act abrogated the ownership rights of the states over mineral resources in their extant continental shelves, title to territorial waters and revenue (rents) accruing from the petroleum or oil and gas operations in such states.[59] By virtue of this law, ownership and control of mineral resources were now vested in the federal government. However, the LUA is attached to the Constitution by virtue of Section 315(1)(5)(d) and it can only be amended via constitutional amendment procedures, which are cumbersome.[60]

Furthermore, under the Constitution, the federal government's list or schedule of exclusive powers contains all matters relating to the regulation and management of the oil and gas industry.[61] These matters include export duties, mines and minerals (including oil fields, oil mining, geographical surveys and natural gas), incorporation and regulation of corporate bodies and taxation of profits, capital gains and incomes.[62] Arguably, these provisions of the Constitution have been used by the federal government to milk the Niger Delta of its wealth. Access to oil revenue by states and communities in Nigeria has been one of the triggers of conflicts in the Niger Delta.

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54. Exclusive Economic Zone Act (2004) Cap. (E11), § 2 (Nigeria).
55. Minerals and Mining Act (2007), § 1 (Nigeria).
56. Land Use Act §§ 1, 28.
57. Ako, *Nigeria's Land Use Act*, *supra* note 52, at 296-7.
58. Ayodele-Akaakar, *supra* note 46, at 7-8.
59. *Id.*
60. To buttress this assertion that the Land Use Act is difficult to amend, the Deputy Senate President of the Nigerian Senate, who is also the Chairman on the Review of the 1999 Constitution, averred that it was impossible to amend the LUA and that the amendment process failed to scale through the Third Reading during the Senate amendment process of the Constitution. *See* Omololu Ogunmade, *Ekweremadu Advocates Removal of the Land Use Act*, THIS DAY, Feb. 9, 2014, http://www.thisdaylive.com/articles/ekweremadu-advocates-removal-of-land-use-act/170938/; *see generally* Nat Ofo, *Amending the Nigerian Constitution*, 4 AFR. J. LEGAL STUDIES 123-48 (2010) (discussing the difficulties in amending the Nigerian Constitution).
61. Iledare & Suberu, *supra* note 51.
62. *Id.*

The next section undertakes an analysis of the various laws that accentuate the federal government's hold on oil revenues in Nigeria.

IV. LAWS ON OIL REVENUE ALLOCATION

In Nigeria, the allocation or distribution of federal revenue amongst the various states is done under a constitutionally recommended formula. By virtue of Section 162(1) of the Constitution, the Nigerian government shall maintain a special account to be called 'the federation account.' All the revenues collected by the federal government shall be paid into the federation account. Proceeds from the oil and gas sector in Nigeria contribute significantly to the revenue collected by the federal government. Furthermore, different factors are taken into consideration when allocating revenue amongst the various states in Nigeria. Under Section 162(2) of the Constitution, these factors include population of the states, internal revenue, land mass, population density, internally generated revenue or income, equality of the states and land mass. Thus, the Constitution provides for the formula for the distribution of oil revenues in Nigeria. This is known as the 'derivation principle.'[63] Derivation, in the Nigerian context, can be described as follows:

> Derivation is a factor of fiscal federalism which ensures that each unit of government contributes to the national coffers and receives equitably in return through revenue allocation. Derivation can be described as compensation for the loss in revenue or other economic activities through utilization of the land of any unit of governments (or communities) for national resource generation.[64]

Also, derivation refers to the arrangements for payments in rent in lieu of the use and exploitation of mineral resources in a land.[65] However, the allocation of revenue (especially oil revenue) has been a source of political and economic discord in Nigeria. The Niger Delta states (the oil producing states) have contended that with the advent of the derivation principle in Nigeria, the region is worse off.[66]

63. Amos Utuama, *The Niger Delta Crisis*, *in* FRESH DIMENSIONS ON THE NIGER DELTA CRISIS OF NIGERIA (Victor Ojakorotu ed., JAPSS Press 2009).

64. Ako, Resource Control, *supra* note 43, at 3.

65. *Id.* (citing Report of the Constitutional Conference Debates vol. III (1994-1995)).

66. Sagay, Ownership and Control, *supra* note 45; David Dafinone, *Resource Control: The Economic and Political Dimension*, (2001), http://www.dawodu.com/dafin2.htm.

The derivation principle has undergone various changes from the 50% provided for by the both the 1960 and 1963 Constitutions, to be allocated to the regions. While the military excursion was in power in Nigeria, it was at its lowest at 1.0%.[67] This was amended to 1.5% by the civilian administration of Shehu Shagari in 1982 and subsequently, to 3% by General Babangida's regime in 1992.[68] The derivation fund was increased to at least 13% during the civilian administration of Olusegun Obasanjo by virtue of Section 162(2) of the 1999 Constitution. Due to its ownership and control of mineral resources in Nigeria, the federal government collects the bulk of oil revenue accruing to Nigeria to the detriment of the states, especially Niger Delta states.

It is evident that there is a correlation between the reduced oil revenue accruing to the Niger Delta and the various laws that accentuate the federal government ownership of mineral resources. During the 1960s, when regions (as states were known in Nigeria during this era), controlled and owned the mineral resources within their territories, they had access to 50% of oil revenues or rents from their regions. However, when laws (such as the Petroleum Act amongst others) were promulgated which provided for the federal government ownership of oil resources, this had a negative impact on oil revenues accruing to oil producing states in Nigeria. Thus, a substantial percentage of the oil revenue in Nigeria accrues to the federal government to the detriment of the oil producing states. This was the contention in *Attorney General of the Federation v. Attorney General of Abia State*,[69] where the Nigerian Supreme Court affirmed the position of the federal government of Nigeria being owners of oil and mineral resources in Nigeria by virtue of Section 162(2) of the 1999 Constitution. This suit was a dispute between the federal government and the eight littoral states in Nigeria (Akwa Ibom, Bayelsa, Cross River, Delta, Ogun, Lagos, Rivers and Ondo) on the correct seaward boundary of the aforementioned states.[70] The Supreme Court held that the seaward boundary for the purposes of computing the amount of revenue due to the Federation Account accruing from the in-

67. Utuama, *supra* note 62. For the historical evolution of the derivation principle see I.R. Elvis-Imo, *Vindicating Property Rights of Peoples in the Niger Delta Through Interventionist Agencies*, *in* LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES (Festus Emiri & Gowon Deinduomo eds., Malthouse Press 2009). *See also* Ekanade Olumide, *Minorities and Resource Allocation in a Transitional State: The Nigerian Experience*, *in* HORROR IN PARADISE: FRAMEWORKS FOR UNDERSTANDING THE CRISES OF THE NIGER DELTA REGION OF NIGERIA (Lamonica, C & Omotola, J.S eds., Carolina Academic Press 2014).

68. Elvis-Imo, *supra* note 67.

69. Att'y Gen. Fed'n v. Att'y Gen. Abia State [2006] 6 NWLR (Pt. 764) 542–905 (Nigeria).

70. Omorogbe & Oniemola, *supra* note 16. For a detailed review of the case, see LAWRENCE ATSEGBUA, OIL AND GAS LAW IN NIGERIA: THEORY AND PRACTICE 11-21 (Ababa Press 3d ed. 2012).

come generated by mineral or natural resources from any state (littoral), in accordance with Section 162(2) of the Nigerian Constitution, is the low-mark of the surface or the inland waterways.[71] Also, the judgement of the Supreme Court confirmed the position of the federal government as being over-lords of mineral resources throughout Nigeria and that states have no claim to ownership over offshore mineral or natural resources.[72] The judgement also confirmed the position of the Nigerian Constitution that states are entitled to a certain percentage of the revenue derivable from such states to the Nigerian nation. The revenue accruing to mineral producing states is at least 13% by virtue of Section 162(2) of the Nigerian Constitution of 1999. In Nigeria, the federal government exercises full control over mineral or natural resources, while the other strands of government (local and state) are passive participants.

This has been one of the major reasons for the Niger Delta crisis because the oil producing communities have been divested of their ownership of oil found in their environment. The control of oil revenues, which is based on the (federal government) ownership paradigm of the oil and gas resources in Nigeria, deprives the host-communities from having a fair or equitable share of the resources.[73] On the other hand, it can be contended that the accrued revenue (derivation) is a kind of compensation to the oil producing states in the Niger Delta for the externalities of producing the oil (for example, in terms of pollution and other negative consequences accruing from the activities of oil MNCs).

In the recently concluded National Conference, which closed in August 2014, there was massive disagreement among the delegates (especially on the basis of ethnicity and geographical backgrounds) on resource control and increases in derivation funds due to the Niger Delta states.[74] The Conference delegates agreed on a set of compromises and one of its recommendations in respect of the derivation principle was the following:

> The Conference noted that assigning percentages for the increase in derivation principle require some technical details and

71. Omorogbe & Oniemola, *supra* note 16.

72. *Id.*

73. Rhuks Ako, Substantive Injustice: Oil-Related Regulations and Environmental Injustice in Nigeria, Paper Prepared for the Joint Workshop Organized by the IUCN Academy of Environmental Law, Environmental Law Centre and Commission on Environmental Law, entitled: Linking Human Rights and the Environment: A Comparative Review (Sept. 2010), https://community.iucn.org/rba1/resources/Documents/Rhuks%20Temitope.pdf.

74. *National Conference: Delegates Debate Report of 'Resource Control' Committee*, PREMIUM TIMES (July 8, 2014), https://www.premiumtimesng.com/national-conference/national-conference-delegates-debate-report-resource-control-committee/.

> considerations and therefore recommends that Government should set up a Technical Committee to determine the appropriate percentage on the issue and advise government accordingly.[75]

The view of this article is that the revenue due to the oil producing states accruing from the derivation principle should be increased to about 50% to aid the development of the Niger Delta region.

In the following section, laws that accentuate the federal ownership of mineral or oil resources will be analyzed.

V. LAWS REGULATING THE OIL AND GAS INDUSTRY IN NIGERIA

This section of the article will examine legislative enactments directly regulating the oil and gas industry in Nigeria. The first law in focus will be the Petroleum Act of 1969,[76] which is the first post-colonial law on the oil and gas sector. It defines 'petroleum' in Section 14 as "mineral oil (or any related hydrocarbon) or natural gas as it exists in its natural state in bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation." Also, Section 14 defines "natural gas" as gas obtained from boreholes and wells and consisting of hydrocarbons. It has been contended that the aforementioned definition does not distinguish between associated and non-associated gas.[77] Associated gas is the natural gas that emerges from oil wells (during the production process) and it is usually a mixture of methane and other hydrocarbons, such as ethane, butanes and pentanes, amongst others.[78] On the other hand, non-associated gas can be defined "as the natural gas which is in reservoirs that do not contain significant quantities of crude oil, where the volume of oil is small and where production of such gas does not

75. *Draft Report of the National Conference*, 595 (2014), https://media.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf.

76. Now Petroleum Act (2004) Cap. (P10), LFN.

77. Muhammed Ladan, Access to Environmental Justice in Oil Pollution and Gas Flaring Cases as Human Right Issue in Nigeria, Paper Presented at A Training Workshop for Federal Ministry of Justice Lawyers Organized by the Institute for Oil and Gas Law in Abuja Nigeria 34 (Nov. 28-30, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336093.

78. Birnur Buzcu-Guven et al., Gas Flaring and Venting: Extent, Impacts and Remedies, Paper Prepared by the Energy Forum of the James A. Baker III Institute for Public Policy as Part of the Study: Energy Market Consequences of an Emerging U.S. Carbon Management Policy, http://bakerinstitute.org/files/439/.

significantly affect recovery of the crude oil."[79] Gas flares, especially those resulting from associated gas, are highly prevalent in the oil and gas sector of Nigeria and this theme is explored in the section on gas flaring in this article.

By virtue of Section 1(1) of the Act, the "entire ownership and control of all petroleum in, under or upon any land in Nigeria is vested in the state," that is, the federal government of Nigeria. By virtue of Section 1(2) of the Act, this provision is deemed to apply to all land (including land covered by water) which is in Nigeria, under the Nigerian territorial waters, forms part of the continental shelf or forms part of the Exclusive Economic Zone of Nigeria. Furthermore, by virtue of Section 2(1) of the Act, only Nigerian citizens or companies incorporated in Nigeria can validly partake in the oil and gas industry. Such participatory activities include oil exploration, drilling, production, storage, refining and transportation.[80] Under Section 2 of the Act, companies can be granted various rights including oil exploration licences to explore for petroleum, a prospecting licence and an oil mining lease.

The Office of the Minster of Petroleum Resources in Nigeria is an important entity in the regulation of oil and gas industry by virtue of the Petroleum Act. The major feature of the Act is the mode of control exercised over the sector by the Minister of Petroleum Resources.[81] Some of the powers of the Minister include the power to grant and revoke licenses and make regulations, amongst others. This section will focus on the powers of the Minister to revoke licenses. Arguably, these powers of the Minister have been subject to abuse and, as will be highlighted in this section, have been subject of litigation in a plethora of cases.

The Petroleum Act contains procedures for the revocation of oil prospecting licenses (or oil mining licenses) by the Minister. Paragraph 23(1)(a) of Schedule 1 to the Petroleum Act states that the Minister may revoke any oil prospecting or mining licence where the licensee or lessee (oil companies) becomes controlled ultimately or indirectly by a non-Nigerian or foreigner. Also, by virtue of Paragraph 24 of the Act, the Minister of Petroleum Resources can revoke oil licences for the following reasons if, in his opinion, the licensee or lessee (oil firms) are not conducting their operations or activities continuously, or not conducting their operations in business-like manner in accordance with requirements

79. *Definition*, Oil and Gas Division of IQPC, http://www.oilandgasiq.com/glossary/non-associated-gas/.

80. Iledare & Suberu, *supra* note 51.

81. Ayodele-Akaakar, *supra* note 46, at 1.

approved for the lessee and not conducting their activities in accordance with good oil field practices. Also, oil licences can be revoked by the Minister by virtue of this paragraph if the oil firms (licensees and lessees) fail to adhere to the provisions of the Petroleum Act and other allied regulations or laws. Furthermore, oil prospecting or oil mining licences can also be revoked by the Minister if oil companies fail to pay their rent or royalties within the specified period and if they fail to submit reports on its operations or activities as the Minister may require of them.

The powers of revocation of oil licences vested in the Minister are provided in paragraphs 25-26 of Schedule 1 of the Petroleum Act. Paragraph 25 states that the Minister shall inform the licensee or lessee of the grounds on which the revocation is made or contemplated and shall invite the lessee or licensee to make any explanation if he so desires. Paragraph 26 posits that if the Minister is satisfied with the explanation given (by the licensee and lessee), he may invite the firms to rectify the matter complained of within a specified period of time. By virtue of paragraph 27, if the licensee or lessee provides insufficient explanation or does not rectify the matter complained of within a stipulated period, the Minister may revoke the license or lease. Furthermore, a notice sent to the last known address of the licensee or lessee or his legal representative in Nigeria and published in the federal gazette shall be sufficient notice to the licensee or lessee of the revocation of the license or lease (paragraph 28). Additionally, by virtue of paragraph 29, the revocation shall be without prejudice to any liabilities which the licensee or lessee may have incurred or any claim against them which may have accrued to the Nigerian government.

Kolo avers that the revocation procedure, as enunciated in the Petroleum Act, "encapsulates in a nutshell the principle of 'due process' and the concept of 'natural justice' as enshrined in the 1999 Nigerian Constitution."[82] Section 44(1) of the Constitution states that no moveable property or interest in an immovable property shall be compulsorily acquired except in the manner prescribed by law. Also, Section 36 of the Constitution provides for the right to fair hearing in determination of a person's civil rights and obligations in any matter for or against government or authority and such a person is entitled to fair hearing within a reasonable time by the courts (or any other tribunal).

82. A. Kolo, *Legal Issues Arising From the Termination of Oil Prospecting Licences by the Nigerian Government*, 19 J. Energy Nat. Resources & Envtl. L. 164, 172 (2001).

Oil prospecting or oil mining licenses can be classified as 'property' by virtue of Section 44(1) of the Constitution. Thus, licenses confer on the licensees or lessees, economic and commercial value or rights.[83] The Minister of Petroleum cannot unilaterally revoke or change the terms of such licenses.[84] Any breach or unilateral revocation of an oil prospecting or oil mining license can be argued to be a breach of contract and against the tenor of Section 44 of the Constitution.[85] A licensee can approach the courts to get redress if the procedure (on revocation of oil licensees) enshrined in the Petroleum Act is jettisoned and such revocation may be held to be void, invalid or unconstitutional by courts. Under the administration of late President Yar'adua, the oil prospecting licence of the Korean National Oil Company (KNOC) was revoked in January 2009. In August 2009, the Federal High Court sitting in Abuja declared President Yar'Adua's action to be illegal and unconstitutional.[86] The Court held that KNOC complied with the terms of the agreement and the Minister of State had no constitutional power to revoke the licence. It further held that the President, acting through the Minister of State for Petroleum, has acted beyond his powers (*ultra vires*) in the agreement. The Court held that the President had no authority to revoke the oil prospecting licenses because the Minister of Petroleum is the legal custodian in the revocation of oil leases in Nigeria. The Court also held that notwithstanding the provisions of Section 5(1) of the Constitution, which grants the President the power to revoke the licence by virtue of the Petroleum Act, only the Minister of Petroleum (and not a Minister of State) can validly revoke an oil prospecting licence.[87] The Court dismissed the preliminary objection of the defendants by stating that the power of revocation of oil licences by the Minister must adhere to the principles of fair hearing as enshrined in the Constitution.

Recently in 2012, the Supreme Court in *NNPC & Attorney General of the Federation v. FAMFA Oil Ltd*.[88] held that the Nigerian government must adhere to the process enshrined in the Petroleum Act and the Constitution when exercising its right to participate in any oil block or well in the oil and gas industry. The Court set aside the acquisition of a 50%

83. *Id.*

84. *Id.*; *see also* NNPC & Att'y Gen. Fed'n v. FAMFA Oil Ltd., [2012] 17 NWLR 148 (Nigeria).

85. Kolo, *supra* note 82.

86. *Court Voids Yar'Adua's Revocation of Korean Oil Prospecting Licence*, VANGUARD (Aug. 2009), http://www.vanguardngr.com/2009/08/court-voids-yaraduas-revocation-of-korean-oil-deal/ (last visited Dec. 20, 2014) (discussing the details of the unreported case).

87. *Id.*

88. NNPC v. FAMFA, *supra* note 84.

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stake by the Nigerian government in the Oil Mining Licence (OML) originally ceded or granted to FAMFA. The basis for the Court's decision was that the acquisition contravened paragraph 35 of the 1st Schedule of the Petroleum Act and Section 44(1) of the constitution.[89]

Discretionary powers of public officers can be controlled by various mechanisms. Some of these mechanisms include subjecting such decisions to public enquiry or scrutiny through publication of guidelines and approval of such guidelines by an independent body, amongst others.[90] Also, discretionary powers (or delegated legislation) exercised by public officers are subject to the tenets of administrative law.[91] The decisions of public officers are subject to administrative fairness and may be held to be void by courts if the appropriate procedures are not followed.[92] Decisions of public officers are subject to judicial review and judicial review in Nigeria is by virtue of Section 46(1) of the 1999 Constitution, which states that "any person who alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress." In *Abdulkarim v. Incar Nigeria Ltd.*,[93] the court held that judicial review gave the opportunity to courts in Nigeria to review administrative decisions with regards to their constitutionality, legality, rationality and regularity. In judicial review cases, the courts may grant remedies. These remedies may include an order of mandamus, order of injunction, declaration of rights, and the award of damages, amongst others,[94] against the public officers.

With regards to the Petroleum Act and its ancillary regulations, it is contended that the language used in the various regulations "permits regulatory discretion"[95] by the Minister. However, in exercising the discretionary powers, the Minister could be influenced by different considerations. These considerations may include bribery, the Minister's desire to placate or castigate local communities or accommodate the interests of

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89. T. Soniyi, *Supreme Court Voids FG's Acquisition of OML 127*, THIS DAY (May 13, 2012), http://www.thisdaylive.com/articles/supreme-court-voids-fg-s-acquisition-of-oml-127/115697/.

90. EVARISTUS OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS IN DOMESTIC AND INTERNATIONAL REGIMES: AN AFRICAN CASE STUDY 53 (Univ. of Toronto Press 2009). Also under Nigerian law, recourse can be made to administrative bodies for redress in such situations. The Public Complaints Commission [hereinafter PCC] is one of such administrative bodies wherein judicial review of administrative actions lies. For an analysis of the PCC, see International Commission of Jurists, *supra* note 37.

91. *See* International Commission of Jurists, *supra* note 37, at 36-37.

92. *Id.*

93. Abdulkarim v. Incar Nig. Ltd., [1992] 7 NWLR (Pt. 251) 1 (Nigeria).

94. International Commission of Jurists, *supra* note 37, at 39.

95. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90, at 52.

businesses.[96] Recently, licences have been revoked on the basis of political patronage in the oil and gas sector of Nigeria. For example, a prominent politician and businessman in Nigeria, who owned an indigenous oil company, had his company's oil license revoked allegedly because of his political differences with a former president.[97]

Furthermore, a major weakness in the allocation of oil licences in Nigeria is the susceptibility of the process to corrupt practices. This is mainly due to the fact that the allocation process is not well regulated and the absence of consultation.[98] The lack of consultation was highly pronounced during the military era in Nigeria. Former President Olusegun Obasanjo set out to make the allocation of oil licences and blocks more competitive and transparent by allowing the government to advertise the available blocks, the selection standards and the number of different bids received.[99] However, the bidding process was fraught with many shortcomings, including that the selection criteria were disregarded, some companies were forced into partnerships and a few companies were favoured ahead of the others.[100] Due to the shortcomings of the bidding process, probe panels were instituted to investigate the allocation of oil blocks procedures. Some of the findings of the panels included manipulation of the process, which resulted in the revocation of some oil blocks and the suspension of the Director of Petroleum Resources (DPR) in 2008.[101]

Section 9 of the Petroleum Act grants the Minister the power to make subsidiary regulations and some regulations have been made in pursuant to the provisions of the Act. Some of the subsidiary regulations include the Mineral Oils (Safety) Regulations, Petroleum Regulations, Petroleum (Drilling and Production Regulation) Regulations 1969, Petroleum Refinery Regulations 1974, Crude Oil (Transportation and Shipment) Regulations, Deep Water Block Allocations to Companies (Back in Rights) Regulations and Oil Prospecting Licenses (Conversion to Oil Mining Leases etc.) Regulations, amongst others. Some of these regulations will be analyzed in the next part of this paper. The regulations constitute a significant part of the legal framework in the oil and gas industry.

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96. *Id.*

97. For the facts of the court case, see C. Amanze-Nwachukwu, Danjuma Wants Court to Reverse Sale of Oil Block, THIS DAY (Oct. 12, 2006), http://www.legaloil.com/NewsItem.asp?DocumentIDX=1160950540&Category=news.

98. A. Gillies, *Reforming Corruption Risks Out of Nigerian Oil*. (Part One), (2009) http://www.cmi.no/publications/file/3295-reforming-corruption-out-of-nigerian-oil-part-one.pdf.

99. *Id.*

100. *Id.*

101. *Id.*

The analysis in the next section will bring to the fore the reasons for the ineffectual regulatory framework in the oil and gas industry in Nigeria.

A. Petroleum Regulations in the Oil and Gas Sector in Nigeria

The first regulation in focus will be the Mineral Oil (Safety) Regulations created by the Petroleum Minister as provided in Section 9 of the Petroleum Act. This Regulation defines 'good oil field practice', the standard required of oil companies operating in Nigeria by the Petroleum Act.[102] While this phrase 'good oil field practice' is not defined in the Petroleum Act, Section 7 of the Nigerian Minerals Oil (Safety) Regulations provides insight regarding its meaning thus:

> Where no specific provision is made by these Regulations in respect thereof, all drilling, production and other operations necessary for production and subsequent handling of the crude oil and natural gas shall conform with good oil field practice, which for the purpose of these regulations shall be considered to be adequately covered by the appropriate current Institute of Petroleum Safety Codes, the American Petroleum Institute's Codes or the American Society of Mechanical Engineers Codes.[103]

The prevailing industry standards in the United Kingdom and the United States are deemed to be the standards that oil MNCs should adhere to in Nigeria. Furthermore, there is generally poor enforcement and implementation of oil and gas regulations in Nigeria. Also, some statutes make provisions for lower standards to be operational in the oil industry. Such laws or regulations include the Federal Environmental Protection Agency (FEPA Act), which has been repealed,[104] the Department of Petroleum Resources (DPR) Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2001.[105] These regulations recommend standards that are lower than the oil industry standards envisaged by the Nigerian Minerals Oil (Safety) Regulations.[106] The oil MNCs ad-

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102. Petroleum Act Cap. (P10), *cited in* Engobo Emeseh et al., *Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?* 11 German L. J. 234 (2010).

103. Nigerian Minerals Oil (Safety) Regulations § 7, *cited in id.* at 245.

104. FEPA has been replaced by the National Environmental Standards and Regulation Enforcement Agency [hereinafter NESREA].

105. E.g., Emeseh, *supra* note 102.

106. *Id.*

here to the former regulations rather than the standard envisaged by the regulations made under the Petroleum Act. The major reason is that MNCs are trying to avoid the more rigorous standards inherent in Nigerian Mineral Oil (Safety) Regulations. Thus, this anomaly is a reflection of the parlous regulatory regime in Nigeria where the powerful MNCs choose the laws which they adhere to.

In the oil and gas sector, there is a close relationship between the government and major oil MNCs.[107] For example, the erstwhile Minister of Petroleum is a former 'External Executive Director' of Shell (Nigeria).[108] Arguably, the relationship between the oil MNCs and the Nigerian government shows that oil MNCs have effectively captured the regulatory and governance regime in the oil and gas sector. Furthermore, in the oil and gas industry, corruption is endemic and both the oil MNCs and government officials are involved in corrupt practices. For example, the illegal bunkering or criminal theft of crude oil trade in the Niger Delta is said to be committed by some local youths or community leaders, members of the Nigerian military, politicians, some high ranking officials of the NNPC and retired military officers.[109] Also, some oil MNCs engage in bribery and corruption to facilitate their stake in the lucrative oil contracts in the oil and gas sector of Nigeria.[110]

One plausible explanation for the lax regulatory regime in the oil and gas sector is the relationship between the government as both a regulator and player in the oil and gas industry in Nigeria. The NNPC is a major player in the oil industry and involved in joint venture agreements with oil MNCs. In joint venture agreements in the oil industry, NNPC is always the majority shareholder. A government as a partner in a business that it regulates is not an uncommon phenomenon. However, unless "robust, independent regulatory and oversight mechanisms are in place, conflicts

107. J.G. Frynas, *Corporate and State Responses to Anti-Oil Protests in the Niger Delta*, 100 AFR. AFFAIRS 27, 52 (2001).

108. FEDERAL GOVERNMENT OF NIGERIA, http://www.nigeria.gov.ng/2012-10-29-11-06-51/executive-branch/104-federal-ministry-of-petroleum-resources/184-ministry-of-petroleum-resources (last visited Dec. 20, 2014).

109. J.B. Asuni, *Blood Oil in the Niger Delta*, United States Institute of Peace Special Report (2009), http://dspace.cigilibrary.org/jspui/bitstream/123456789/26155/1/Blood%20Oil%20in%20the%20Niger%20Delta.pdf?1.

110. For example, Shell has admitted engaging in the systematic corruption and bribery of Nigerian oil officials. *See Shell Bribes Among Culture of Corruption*, BLOOMBERG (Nov. 5, 2010), http://www.bloomberg.com/news/2010-11-05/shell-bribes-among-culture-of-corruption-panalpina-admits.html.

of interest can result in violations of human rights."[111] The latter scenario exemplifies the oil and gas industry in Nigeria. The Department of Petroleum Resources (DPR) is an agency of the government that regulates and enforces policies and regulations in the oil and gas industry. It has been argued that considering the economic interest of the Nigerian state through its agency (NNPC) in the oil industry, it will be very unlikely for the DPR to effectively implement or enforce the oil and gas related regulations.[112] The DPR is not an independent body and it appears to be an extension of the state. Arguably, the relationship between the DPR and the oil MNCs appears to be one of partnership, which is a negation of the notion that an independent body should regulate the oil and gas industry.[113] The World Bank is against the idea that of government as a regulator and partner in the oil and gas industry and argues that "this situation has resulted in the government regulating oil pollution while at the same time being party to much of the oil-related environmental problems of the Niger Delta."[114]

The next set of regulations in focus will be the Petroleum (Drilling and Production) Regulations 1969 and the Petroleum Refining Regulations 1974. These subsidiary regulations were made by the Minister by virtue of the powers conferred on him by Section 9 of the Petroleum Act. Regulation 25 of the Petroleum (Drilling and Production) Regulations 1969 (PDPR) enjoins oil licensees or lessees (these are mainly oil multinationals in Nigeria) to:

> adopt all practicable precautions including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, water courses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life and where any such pollution occurs or has occurred, shall take prompt steps to control and if possible, end it.[115]

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111. Amnesty Int'l, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta*, 42 (2009), http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf.

112. International Commission of Jurists, *supra* note 37, at 39.

113. *Id.*

114. Industry and Energy Operations Division West Central Africa Department, *World Bank Defining an Environmental Development Strategy for the Niger Delta*, Vol II 45 (May 25, 1995), *cited in* Amnesty Int'l, *supra* note 111, at 42.

115. Petroleum (Drilling and Production) Regulations 1969, Legal Notice 69 of 1969, Regulation 25, *cited in* OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90, at 51.

Furthermore, Regulation 36 of the PDPR enjoins oil companies (licensees or lessees) to undertake their activities or "operations in a proper and workmanlike manner" in accordance with "good oil field practices." Also, Section 36 of the PDPR advises oil companies to maintain and keep their apparatus in good condition.[116] Section 40 of the PDPR enjoins the oil companies (licensees and lessees) to dispose of oil wastes from storage vessels into proper receptacles constructed in accordance with the law (Petroleum Act).[117] Also, the waste collected must be disposed of in the way and manner approved of by the Director of Petroleum Resources or as provided by any applicable law or regulations.[118] Under PDPR, the oil MNCs have obligation to decommission their oil facilities (when no longer being used) and restore the damaged land in that area to as far possible to its pre-existing condition.[119] Also by virtue of Regulation 35 of the PDPR, abandonment of oil boreholes and wells are prohibited except allowed in writing by the Director and derelict wells and boreholes must be secured properly.

The next regulation in focus will be the Petroleum Refining Regulations (PRR) 1974. Paragraph 43 (3) of the PRR provides thus:

> The Manager [of a Refinery] shall adopt all practicable precautions including the provision of up to-date equipment as may be specified by the Director [of Petroleum Resources] from time to time, to prevent the pollution of the environment by petroleum or petroleum products; and where such pollution occurs the manager shall take prompt steps to control and, if possible, end it.

Also, under Regulation 45(1), a contravention of this regulation carries a penalty of 100 (NGN) or imprisonment for a term of six months. Furthermore, various sanctions are prescribed by the Petroleum Act to promote the enforcement of the aforementioned regulations. Sanctions include the power of arrest without warrant, exercised by the Minister of Petroleum, over any person suspected of committing any offence in contravention of the act or its regulations by virtue of Section 8(d) of the Petroleum Act. Also, such a person or individual is handed over to a police officer as soon as practicable. However, the Petroleum Act does not state the pen-

116. *Id.*

117. Ebeku, *supra* note 46.

118. *Id.*

119. Oshionebo, Regulating Transnational Corporations, *supra* note 90.

alty that may be suffered by such an individual if convicted.[120] Also, Paragraph 24(1)(d) of the First Schedule and Section 2(3) of the Petroleum Act provides that the Minister can revoke any license or lease (of the companies) if they are not conducting their operations with 'good oil field practice.' This provision is not enforced due to a number of reasons and the penalty is rarely activated. The underlying reason for this is the economic importance of oil in the Nigerian economy and the importance of oil multinational corporations to the Nigerian economy.[121]

The regulations have been criticized by a number of Nigerian academics[122] on the basis of the imprecision of the wordings in the regulations. For example, in the PDPR, terms such as 'good oil field practice,' 'all practicable precautions' and 'prompt steps,' amongst others, are not defined, thus making such terms vague and ambiguous.[123] For example, it has been argued that the 'good oil field practice' expected of oil companies "might mean minimizing economic cost of production without regard to safety or environmental care."[124] Notwithstanding the safeguards (such as oil activities to be conducted in a vigorous and business-like manner, amongst others), the use of ill-defined terms in the Petroleum Act and its ancillary regulations promotes the "maximization of production rather than protection of the environment."[125] On the other hand, Oshionebo argues that notwithstanding the criticisms of the regulations by academics, it has the advantage of being flexible, thereby malleable or adjustable to recent developments in the oil and gas industry in Nigeria.[126] Arguably, an advantage is that 'good oil field practice' may lead to technological developments, which increase safety and could then be adopted without the need for legislative change. However, this will be dependent on its enforcement.

One major criticism of the oil and gas regulatory regime is the personification of the powers in the Petroleum Act and its incidental regulations in an individual, the Minister of Petroleum Resources or in the President of the country.[127] Whilst there are various academic and political arguments supporting the federal government's ownership and control of oil

120. EBEKU, *supra* note 46.
121. *Id.*
122. A.O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT'L L. & POL'Y 55-108 (1995).
123. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90.
124. Ekpu, *supra* note 122, at 79.
125. *Id.*
126. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90.
127. During President Olusegun Obasanjo's administration, there was no substantive Minister of Petroleum. The President acted as the Minister of Petroleum.

and gas resources in Nigeria, the consensus is that the federal government's "ownership and control of oil resources, has caused deep bitterness, resentment and a sense of majority oppression of the minority producers of oil."[128] Communities in the oil producing states feel exploited and cheated by the regulatory regime wherein the oil wealth (found in their lands) is taken without appropriate compensation, the Niger Delta environment is left in a state of pollution and other incidental negative consequences of the oil industry.

As a panacea, the Petroleum Act and its incidental regulations (and other laws evidencing the federal government's exclusive ownership and control of oil and gas resources in Nigeria) should be amended to promote active participation by indigenes of the oil producing states in the management of oil and gas resources.

The next section considers the statutory compensatory regime in the oil and gas industry. Payment of adequate compensation to victims of the activities of oil MNCs in the oil and gas industry in Nigeria has been at the centre of many conflicts in the Niger Delta. This section will undertake a critical analysis of the compensatory regime and proffer alternatives to improve its legal framework.

B. Statutory Compensation in the Oil and Gas Industry in Nigeria

Generally, in Nigeria, once an oil MNC has been given a permit or oil license (lease) by the appropriate authorities, it behoves on the state government to grant access to the land for oil and gas purposes to the MNC.[129] Any inhabitant or user of that land will be obligated to relocate because such land is being used for 'overriding public purposes' (in the oil and gas sector). The question at this juncture is: are the land users entitled to compensation for their loss of land and other incidental losses accruing from such expropriation under the law in Nigeria? There are various statutes regulating compensation occasioned by the activities of oil MNCs in the oil and gas industry. The laws include the Land Use Act (LUA),[130] the Oil Pipelines Act,[131] Minerals and Mining Act[132] and the Petroleum Act[133] with its incidental regulations. The first statute in focus

128. Ayodele-Akaarkar, *supra* note 46, at 9.
129. Amnesty Int'l, *supra* note 110. For the various types of leases in the oil and gas industry, see Atsegbua, *supra* note 71.
130. Land Use Act Cap. (202).
131. Oil Pipelines Act Cap. (07).
132. Nigerian Minerals and Mining Act (2007).
133. Petroleum Act Cap. (P10).

will be the LUA 1978.[134] In analyzing the laws on compensation, other statutes will be analyzed and contrasted with the LUA where necessary for further elucidation. Section 1 of the LUA vests the ownership of all land in the state. Section 1 of the LUA states thus:

> Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation are vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of Nigerians in accordance with provisions of this Act.

Section 28 of the Act permits the compulsory acquisition of land for oil and mining exploration. The governor of a state is permitted under Section 28(1) to revoke a right of occupancy for overriding public interest. 'Overriding public interest,' under Section 28(1)(b) of the Act, is the requirement of land by the government and, under Section 28(2)(c), it is "the requirement of the land for mining purposes or oil purposes or for any purpose connected forthwith." The LUA alienated people from their communal or traditional lands.[135] It has been argued that the LUA (which was originally a military enacted decree), due to its distinctive impacts on the Niger Delta people, was promulgated to deprive the people of active participation in the oil and gas sector of Nigeria.[136] Prior to the enactment of this Act, families and communities were "legally recognised as land owners and therefore were to be consulted before oil exploration could be initiated."[137] Also, the Act has affected compensatory rights available to the people deprived of their lands.[138]

In the area of compensation, the LUA has been a militating factor in the payment of adequate compensation claims. Section 29 (2) provides that:

> If a right of occupancy is revoked for the cause set out in paragraph (c) of subsection (2) of section 28 or in paragraph (b) of subsection (3) of the same section the holder and the occupier shall be entitled to compensation under the appropriate provi-

134. Land Use Act Cap. (202).

135. For a comprehensive review of the impacts of the LUA on indigenous land tenure system in Nigeria see P.E. Oshio, *The Indigenous Land Tenure and Nationalization of Land in Nigeria*, 10 B. C. Third World L. J. 43-62 (1990).

136. Ako, *supra* note 52.

137. R. Ako & P. Okonmah, *Minority Rights Issues in Nigeria: A Theoretical Analysis of Historical and Contemporary Conflicts in the Oil-Rich Niger Delta Region*, 16 Int'l J. Minority & Group Rts. 53, 58 (2009).

138. Ako, *supra* note 52.

> sions of the Minerals Act or the Petroleum Act or any legislation replacing the same.

Under the Petroleum Act 1969, Paragraph 36 of the First Schedule of the Petroleum Act states that:

> The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.

Also, Section 77 of the Minerals and Mining Act provides for compensatory sums (fair and reasonable) for damage done to the surface of the land wherein oil prospecting or mining has been attempted and compensates the owner for crops, trees, buildings or works damaged in the process.[139] Also, future earnings and loss of land occasioned by the activities of firms on land is excluded from the compensatory regime by virtue of the LUA.[140] The LUA is said to have ousted the jurisdiction of regular courts in litigation in oil-related and compensation cases by virtue of Sections 28, 29 and 47(2) of the Act.[141] The Land Use and Allocation Committee determines the quantum and adequacy of compensation under the Act. Under Section 2 of the LUA, the functions of the Land Use and Allocation Committee are discussed and include advising the governor on matters connected with management of land, the resettlement of people affected by the revocation of rights of occupancy on the basis of overriding public interest and settling disputes as to the amount of compensation payable under the Act for improvements on land.

However, the ousting of the jurisdiction of the courts by the LUA has been made redundant by virtue of Section 44 of the Constitution. Under Section 44, any property (movable or interest in immovable property) compulsorily acquired in Nigeria requires prompt payment of compensation and any person claiming compensation has access to a court of law, tribunal or body having jurisdiction in Nigeria in the determination of his interest in the property and compensation to be paid.[142] Thus, despite the

139. *Id.*
140. *Id.*
141. Ako, *Substantive Injustice*, *supra* note 73.
142. Ako, *supra* note 52.

provisions of the LUA ousting the jurisdiction of courts of law in the land, compensation cases are considered "contrary to the constitution and to the extent of its inconsistency, should be considered null and void."[143]

However, these aforementioned laws do not provide adequate compensation for land users living in the Niger Delta. The criteria used to compute or value the compensation claims to be paid by the oil MNCs include computation based on the value on "surface goods lost."[144] Under Section 20 of the Oil Pipelines Act, damage to surface goods (which is the basis of computation) includes crops, buildings and profitable trees. The value of the land is not taken into consideration by any of the aforementioned statutes when computing compensation claims in the oil and gas sector of Nigeria. The mineral or natural resources found in or upon the land "are viewed by the state as public goods and government's intervention in their exploitation becomes simply a case for public use."[145] This is a major disincentive of the compensation regime in the oil and gas sector. In Nigeria, especially in the Southern states (the Niger Delta is located in Southern Nigeria), land is of cultural importance to the indigenous land users.[146] These land users have sentimental or emotional attachment to the land. This attachment stems from either the land having been in the possession of the local community (or family) for centuries or from their ancestors (progenitors) being buried under such lands.[147] For compensation cases, the oil-related legislation does not take into consideration the emotional or sentimental attachment of land users when computing the value of surface goods on the land.

A major anomaly in the compensation regime in Nigeria is the value or worth of the compensation paid for by oil MNCs to land users in the oil and gas industry. The underlying reason for this anomaly is that the government owns the land (and the mineral resources) by virtue of the LUA. However, individuals in Nigeria do have rights of occupancy over their lands, which is akin to ownership.[148] Furthermore, scholars have con-

143. CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 1(3).

144. Amnesty International, *supra* note 111, at 24.

145. Akpan, *supra* note 44, at 5.

146. V.C. Uchendu, *State, Land, and Society in Nigeria: A Critical Assessment of Land Use Decree (1978)*, 6 J. AFR. STUDIES (1979).

147. *Id.*

148. For the definition of a right of occupancy, see Chilenye Nwapi, *Land Ownership, Mineral Development and Agriculture in Nigeria: An Examination of Key Issues and Challenges*, *in* RHUKS AKO & DAMILOLA OLAWUYI, FOOD AND AGRICULTURAL LAW: READINGS ON SUSTAINABLE AGRICULTURE AND THE LAW IN NIGERIA 33 (Afe Babalola Press 2015) ("a right granted by the governor to a person to hold and occupy a piece of land for a term of years upon a payment of specified rent and fulfilment of other covenants and conditions. . ."). *See also* Land Use Act § 5(1).

tended that a right of occupancy is "a mere lease, and it cannot be transferred or otherwise alienated without the consent of the governor."[149] As highlighted above, a governor can revoke a right of occupancy on the basis of 'overriding public interest.'

Notwithstanding the provisions of the LUA, oil MNCs do pay some form of payment to the land users of land wherein oil and gas activities are located. However, the contention is the quantum of the payment or compensation paid. The oil MNCs do strive to pay compensation on the basis of the market value of the land.[150] It is alleged that in the computation of the amount to be paid as compensation to land users or oil pollution victims in the Niger Delta, the land users or victims are not consulted in the scientific evaluation to establish the value of the property in question.[151] For example, in the event of an oil spill, many communities and oil MNCs may disagree on the cause of the spill.[152] However, the version of the cause asserted by the oil MNC is always held as the correct position by the Nigerian authorities because there is no independent means of verifying their assertions, thereby truncating many communities recourse to compensatory payments.[153] This action of the MNCs, in calculating the damage to the property of the victim, is called 'scientific evaluation.' Thus, it is alleged that during a typical 'scientific evaluation' by the oil MNC, the owner of the damaged property are not consulted to establish the owner's investment in his damaged property.[154]

Also, even when compensation is paid to the land users, the amounts are very abysmal. Aghalino gives an example of this from the 1980s when ELF (a major oil MNC in Nigeria) paid twenty eight thousand, four hundred naira (28,400) for the acquisition of 1.4 hectares land at Obodogwu village of Ndokwa East Local Government Area in the Niger Delta region.[155] In today's rate, twenty-eight thousand, four hundred naira is about one hundred and seventy-six dollars.[156] Oil MNCs justify such

149. Nwapi, *supra* note 148. *See also* Land Use Act §§ 21, 22.

150. Uchendu, *supra* note 146.

151. S.O. Aghalino, *Issues and Trend in the Payment of Compensation in the Oil Industry in Nigeria: 1969-1997*, 12 IBOM J. HIST. & INT'L STUDIES 186-208 (2005).

152. Amnesty Int'l, *supra* note 111, at 71.

153. *Id.*

154. Aghalino, *supra* note 151.

155. *Id*. Thus, "the value of money paid for land, acquisition for the construction of facilities for oil operation had been generally low." Aghalino, *supra* note 151, at 200. *See also* V.A. Akujuru & L. Ruddock, *The Determination of Compensation Payable in the Niger Delta for Compulsory Acquisition and the Need for Sustainable Practice*, 16 J. SUSTAINABLE DEV. AFR. 102, 108-110 (2014).

156. *Exchange Rate as of 30 September 2014*, XE CURRENCY CONVERTER, http://www.xe.com/ucc/convert/?Amount=28400&From=NGN&To=USD (last visited Dec. 20, 2014).

payments on the ground that most of the oil and gas activities occur in the rural parts of the Niger Delta and such rural lands do not possess an intrinsic economic or market value.[157] The view of this article is that oil MNCs (especially western based) consider lands in Nigeria as vestiges of colonial or neo colonial acquisitions with little or no market value. Arguably, there is a correlation between the value of land as evidenced in its oil and gas resources and the astronomical profits accruing to oil MNCs due to the oil and gas related activities in such lands. This has been a ground for discontent amongst the people of the Niger Delta towards the activities of oil MNCs in Nigeria. The relevant laws should be amended so that oil MNCs can pay appropriate taxes on their astronomical revenues or profit to the local communities wherein the oil and gas activities are located.

Recently, there have been slight increases in the quantum paid by the oil MNCs to land users or victims of environmental disasters occasioned by the activities in the oil and gas sector of Nigeria. Oil MNCs in Nigeria pay higher rates of compensation than the officially sanctioned rates.[158] In 1995, the recommended official rate was ₦1375 per hectare.[159] However, in 1997, the Oil Producers Trade Section (OPTS) of the Lagos Chambers of Commerce (a conglomeration of oil and gas companies who are members of the Lagos Chamber of Commerce) suggested compensation rates of ₦15,860 per hectare of land[160] as payment for crops (and other surface goods) damaged in such land. While OPTS compensation rates are higher, they are nonetheless still meagre and of limited economic value to the land owner or user.

Furthermore, the OPTS rates are set by the oil MNCs without consultation or participation of the affected communities in the compensatory process.[161] The oil MNC solely sets the rate of payments to be paid to the affected community or land user and thus, the compensation regime in Nigeria can neither be considered transparent nor fair.[162] However, oil MNCs often negotiate with the affected communities or their representatives by providing such communities with 'community development ini-

157. Akpan, *supra* note 44.
158. Aghalino, *supra* note 151.
159. J.G. Frynas, *Political Instability and Business: Focus on Shell in Nigeria*, 19 Third World Q. 457, 460 (1998).
160. Aghalino, *supra* note 151.
161. Amnesty Int'l, *supra* note 111, at 71.
162. *Id.*

tiatives,'[163] such as the provision of social amenities, the building of schools and hospitals or providing potable water in that community.

It is obvious that the various oil-related laws in Nigeria have been designed by the Nigerian state to deprive the Niger Delta people of adequate compensatory payments. The tenor of the compensatory regime in the oil and gas sector in Nigeria contravenes the International Covenant on Economic, Social and Cultural Rights, which Nigeria has ratified and acceded to. Article 11 of the Convention states that countries that are parties to the Convention should respect and observe the right of its citizens to have an adequate standard of living. However, this Convention is observed more in the breach by the Government of Nigeria via the instrumentality of oil MNCs in the oil and gas sector. Some of the breaches in the oil and gas industry in Nigeria of the Convention include the following:

> [H]olders of leases and licences and permits to survey under the Petroleum Act, Oil Pipelines Act and subsidiary legislation are entitled to engage in a range of activities – from cutting down trees and other vegetation, to dredging – without any adequate safeguards in terms of the impact of these activities on the environment and associated livelihoods of the communities.[164]

The consequence of this is that the human rights of the Niger Delta people are being breached and Niger Delta is a cesspool of environmental degradation occasioned by the lax regulatory regime and the activities of the oil MNCs. To redress the aforementioned problems inherent in the compensation regime, the federal government should respect its international obligations by adhering to the relevant international conventions. Furthermore, CSOs should apply pressure on the government to respect its international obligations.

Arguably, the LUA is not appropriate for analyzing the compensation regime in oil and gas litigation, especially for oil spills in Nigeria. The Oil Pipelines Act and the Mining Act provides for compensation related to oil spills. Section 29(1)(4) – (7) of the LUA expressly vests the compensation regime in the Minerals Act, Petroleum Act or any other legislation replacing the same. The compensation regime in the LUA is encapsulated in Section 29(1)(4) – (7). Section 29(1)(4) – (7) states thus:

163. *Id.*
164. *Id.* at 24.

> (a) the land, for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked;
> (b) building, installation or improvements thereon, for the amount of the replacement cost of the building, installation or improvement, that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer;
> (c) crops on land apart from any building, installation or improvement thereon, for an amount equal to the value a prescribed and determined by the appropriate officer.

The above provisions of the LUA are not applicable to oil-related compensation disputes in the oil and gas industry in Nigeria. Support for this view can be gleaned from various provisions of the Oil Pipelines Act. Section 20(5) of the Oil Pipelines Act states:

> In determining compensation in accordance with the provisions of this section, the court shall apply the provisions of the Land Use Act so far as they are applicable and not in conflict with anything in this Act as if the land or interests concerned were land or interests acquired by the President for Public Purposes.

In analyzing the compensation regime in the oil and gas industry in Nigeria, Deinduomo avers that Section 29(1) of the LUA is in conflict with Sections 11(5) and 20(2) of the Oil Pipelines Act with regards to compensation.[165] He makes an important distinction that the Oil Pipelines Act "provides for disturbance as a vital head of compensation."[166] This element of 'disturbance' in compensation matters is not available under the LUA.

165. G. Deinduomo, *An Overview of the Law Relating to Compensation for Oil and Gas Operations in Nigeria*, *in* LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES 164 (F. Emiri & G. Deinduomo eds., Malthouse Press 2009).

166. *Id*. For the views of estate evaluators involved in the compensation regime and who also contend that the LUA is not the appropriate law for compensation in the oil and gas industry, see G.K. Babawale, *Emerging Issues in Compensation Valuation in Oil Spillage in the Niger Delta Area of Nigeria*, 2 J. REV. GLOBAL ECON. 31, 34 (2013).

This article is in support of Deinduomo's view above. The basis for this is that the LUA expressly states that in compensation for petroleum and mining related disputes recourse shall be made to several laws including the Minerals Act and Petroleum Act, amongst others (Section 29(2)). Also, the LUA, in Section 1, vests all the land in each state in Nigeria in the governor to hold in trust and administer for the use and benefit of all Nigerians. Also, under Section 5, the governor grants statutory rights of occupancy to all persons with regards to any land in the state. The modern land owner in Nigeria is a tenant at will. Uchendu elucidates further on this by stating that the LUA makes the land user in Nigeria "a tenant at will on state land. . .The land user loses any proprietary interests in his land and his claims are restricted to improvement he made on land."[167] The state is the owner of the land and such land can be legally expropriated by the government under the LUA for mining or oil-related purposes by virtue of Section 28(2)(C) and Section 28(3)(b).[168] The LUA and the other related oil gas laws have combined to effectively deprive the inhabitants of the Niger Delta region of adequate compensation for oil-related damage or exploitation. In terms of access by individuals or victims in compensation matters, the Oil Pipelines Act grants a right of access to court for private individuals.[169] This right is limited to disputes in respect of the amount of compensation payable under any provision of the Act.[170]

Furthermore, the Petroleum (Drilling and Production) Regulations and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) also provides for compensation in oil-related matters. Under Regulation 21(2) of the Petroleum (Drilling and Production) Regulations (PDPR), "if the licensee or lessee cuts down or takes any productive tree, he shall pay fair and adequate compensation to the owner thereof." Also, Regulation 23 of the PDPR, states thus:

> If the licensee or lessee exercises the rights conferred by his licence or lease in such a manner as unreasonably to interfere with the exercise of any fishing rights, he shall pay adequate compensation therefore to any person injured by the exercise of those first-mentioned rights.

167. Uchendu, *supra* note 146, at 69-70.

168. However if the government or authority does not comply with the tenets of the Constitution, such acquisition will be held void by the courts. For an extensive analysis of recent Supreme Court judgements on land acquisitions in Nigeria, see O.O. Sholanke, *Three Supreme Court Cases on Compulsory Acquisition of Land in Nigeria*, 58 J. Afr. L. 266-77 (2014).

169. International Commission of Jurists, *supra* note 37, at 39.

170. *Id.*

Also, Part VIII of the EGASPIN states that "[a] spiller shall be liable for the damage from a spill for which he is responsible. Settlement for damages and compensation shall be determined by direct negotiation between the operator(s) and the landlord(s)." The present compensatory regime in the Niger Delta has been ineffectual.

Generally, in Nigeria, academics posit that the present compensation regime does not pay fair and adequate compensation to land users.[171] Strictly speaking, on the basis of the various laws regulating the compensation regime in the oil and gas sector in Nigeria, the oil MNCs are not obliged to pay compensation or payment for the loss of value for the land to the land users.[172] Due to the ineffectual public regulatory regime in the oil and gas sector in Nigeria, communities and other relevant stakeholders have relied on the principles of tort in trying to hold oil MNCs culpable for their actions in Nigeria.

The next section will focus on the gas flaring occurring in the oil and gas sector in Nigeria.

C. Laws on Gas Flaring in Nigeria

In Nigeria, gas flaring is mainly occasioned by the activities of the oil multinational corporations in the oil and gas sector. The Niger Delta is the hub of oil and gas exploration and other attendant activities in Nigeria. A majority of the inhabitants of the Niger Delta depend on their environment for their livelihood. Thus, agriculture, fishing and the collection of farm or forest products are the main sources of food for the inhabitants of the Niger Delta.[173] Environmental degradation occasioned by the activities of oil multinational firms poses tremendous challenges to the livelihoods of the inhabitants of the Niger Delta. Pursuant to that, it has been documented that the economic degradation inherent in the Niger Delta has exacerbated the levels of poverty in that part of Nigeria.[174]

The oil and gas industry is a highly technological driven sector of the Nigerian economy with various environmental problems occurring at the different stages of oil activities.[175] Gas flaring is one of such environ-

171. Aghalino, *supra* note 151; Uchendu, *supra* note 146.
172. Akpan, *supra* note 44.
173. Amnesty Int'l, *supra* note 111.
174. UNDP, Niger Delta Human Development Report, 2006, *cited in* Amnesty Int'l, *supra* note 111.
175. Kaniye Ebeku, *The Right to a Satisfactory Environment and the African Commission*, 3 Afr. Hum. Rts. J. 149-166 (2003).

mental problems occurring in the Niger Delta. This section will dwell on the incidence of gas flaring in Nigeria and the various statutes governing the regime of gas flaring.

Gas flaring has been a recurring decimal in the Niger Delta. Gas flaring occurs "when oil is pumped out of the ground, [and] the gas produced is separated and, in Nigeria, most of it is burnt as waste in massive flares."[176] Thus, in the process of refining, the natural gas, otherwise known as 'associated gas,' is removed from the crude oil being refined.[177] The practice of gas flaring can be traced to the activities of the colonial oil companies operating in Nigeria (before independence) who allegedly prioritised the economic benefits of their activities over the harsh consequence of gas flaring.[178] Presently, Nigeria flares are the second largest amount of natural gas in the world behind Russia; about 2.5 billion cubic feet of associated gas is wasted in Nigeria every day.[179] Shell (later Shell-BP), which began exploring for oil in Nigeria in the 1930s (and made the first export), has always engaged in gas flaring from the beginning of exploitation of oil in Nigeria.[180] The present oil multinationals engaged in the Nigerian oil and gas sector are no different. Arguably, firms, such as Shell, Exxon Mobil, Chevron Texaco, Agip and Total FinElf, amongst others, which are engaged in joint venture arrangements with the state owned Nigerian National Petroleum Corporation have exacerbated the incidence of gas flaring in Nigeria.[181] These oil multinationals are violating the tenets of Nigerian law, as would be seen later in a subsequent part of this section.

The law regulating the incidence of gas flaring in Nigeria is the Associated Gas Re-Injection Act (hereinafter AGRA),[182] which was enacted in September 1979. The purpose of this law was to compel oil and gas companies operating in Nigeria to submit their programmes for gas re-

176. Amnesty Int'l, *supra* note 111, at 18.

177. *See* Michiko Ishisone, *Gas Flaring in the Niger Delta: The Potential Benefits of Its Reduction on the Local Economy and Environment*, (2004), http://nature.berkeley.edu/classes/es196/projects/2004final/Ishone.pdf.

178. For historical antecedents of the British officials and companies who deliberately condoned gas flaring in Nigeria, see *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, Environmental Rights Action and The Climate Justice Programme (June 2005), http://www.foe.co.uk/resource/reports/gas_flaring_nigeria.pdf.

179. *See Country Analysis Brief Overview: Full Report (Nigeria)*, U.S. Energy Information Administration (Dec. 2013), http://www.eia.gov/countries/analysisbriefs/Nigeria/nigeria.pdf.

180. *Id.*

181. *Id.*

182. Associated Gas Re-Injection Act (2004) Cap. (A25), LFN.

injection and schedule for the implementation of gas re-injection.[183] Section 1 of the Act states that every firm producing oil and gas in Nigeria must submit to the Minister of Petroleum a preliminary programme encompassing – "(a) schemes for the viable utilisation of all associated gas produced from a field or groups of fields; (b) project or projects to re-inject all gas produced in association with oil but not utilised in an industrial project." Furthermore, under Section 2 of the AGRA oil and gas companies were obliged to submit to the Minister plans for gas re-injection by October 1, 1980 and the deadline for the cessation of gas flaring was January 1, 1984. Under Sections 3 and 4 of the AGRA, gas flaring is prohibited except with the consent of the Minister. Also, under Section 3, any oil and gas company engaging in gas flaring without a certificate by the Minister is engaging in unlawful activities and such a firm "shall forfeit the concession granted in the particular field."

Academics have posited from available evidence that, at the end of 1984, no oil and gas company or multinational firm has complied with the tenets of the aforementioned law.[184] The oil companies argued that the major difficulty inherent in the AGRA was the lack of resources to build or construct re-injection plants within the stipulated timeframe.[185] Thus, the deadline was shifted by a year and about 55% of oil fields were exempted from participating in gas re-injection plans.[186] It can also be argued that there was a lack of will power on the part of the Nigerian government to enforce the provisions of the AGRA due to the negative effects it would have on the nation's economy.[187] Thus, the economic interests of the oil multinational corporations supersede the health and general wellbeing of the inhabitants of the Niger Delta who are the victims of gas flaring.

In January 1985, the Associated Gas Re-injection (Continued Flaring of Gas) Regulations (AGRA Regulation) were promulgated. These regulations are made pursuant to the powers of the Minister in Section 5 of the AGRA (which relates to the powers of the Minister in respect of the

183. Simon Amaduobogha, *Environmental Regulation of Foreign Direct Investment (FDI) in the Oil and Gas Sector*, *in* LAW AND PETROLEUM INDUSTRY IN NIGERIA: CURRENT CHALLENGES 115 (Festus Emiri & Gowon Deinduomo eds., Malthouse Press 2009).

184. EBEKU, *supra* note 46.

185. Eferiokose Ukala, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices*, 2 WASH. & LEE J. ENERGY CLIMATE & ENV'T 97 (2011), *available at* http://law.wlu.edu/deptimages/journal%20of%20energy,%20climate,%20and%20the%20environment/March%2027,%202011%20-%20Ukala.pdf.

186. *Id.*

187. EBEKU, *supra* note 46; *see also* M. Kassim-Momodu, *Gas Re-Injection and the Nigerian Oil Industry*, 6/7 J. PRIVATE & PROP. L. 69 (1986/1987).

conditions wherein an oil company may continue the flaring of gas). Section 1 of the AGRA Regulation regulates the issuance of certificates authorising the continuation of gas flaring in particular fields when the following conditions are met:

> (a) where more than seventy-five per cent of the produced gas is effectively utilised or conserved;
> (b) where the produced gas contains more than fifteen per cent impurities, such as N2, H2S, C02, etc. which render the gas unsuitable for industrial purposes;
> (c) where an on-going utilisation program is interrupted by equipment failure:
> Provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
> (d) where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilisation point is less than 50,000 SCF/KM:
> Provided that the Gas to Oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject the gas in that field;
> (e) where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.

Thus, it is arguable that gas flaring is allowed under Nigerian law because the Petroleum Minister can legally permit the continuation of gas flaring by oil multinationals if any of the aforementioned conditions are met by oil companies. The regulations have emphasized economic benefits rather than ending the scourge of gas flaring in Nigeria.[188] Furthermore, Kassim-Momodu argues that "the effect of these regulations is the possible exemption of over 50% of the oil fields from the provisions of the Act."[189] Also, the fines provided by the law against gas flaring are minimal[190] and the government keeps shifting the gas flaring end date.[191]

188. EBEKU, *supra* note 46.

189. Kassim-Momodu, *supra* note 187, at 84.

190. In 2009, the Nigerian government developed the National Gas Pricing and Supply regulations, which increased gas flaring fines to US $3.50 for every MScf of gas flared. *See* G. Adeniji, Approaches to Gas Flare Reduction in Nigeria, Presented at the Global Gas Flaring Reduction Forum (Oct. 24-25, 2012), http://www.flaringreductionforum.org/downloads/ADENIJINIGERIA.pdf.

191. Engobo Emeseh, *The Niger Delta Crisis and the Question of Access to Justice*, *in* OIL AND INSURGENCY IN NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO VIOLENCE (C. Obi & S.A. Rustad eds., Zed Books 2011).

Consequently, gas flaring continues unabated and particularly as the sanctions do not serve as deterrent to oil MNCs in Nigeria.[192]

The Nigerian judiciary and the activism of civil society (including NGOs) in Nigeria have been the bulwark of opposition to the continued flaring of gas in Nigeria.[193] Also, Ladan has argued that Section 234 of the Criminal Code can be used to protect the Nigerian environment from the incidence of gas flaring.[194] Section 234(f) of the Code states that any person who causes inconvenience or damage to the public is guilty of a misdemeanour and liable for imprisonment for two years. However, the question at juncture is: can oil firms or their officials be held liable for gas flaring in the Niger Delta on the basis of this provision? The answer is not clear cut because oil firms can easily evade responsibility since the sub-section is worded in an ambiguous manner. Also, terms such as 'oil firms' or 'gas flaring' are not expressly mentioned in the Section 234, its sub-sections or other relevant sections of the Act. Furthermore, other difficulties inherent in the Criminal Code as a bastion for environmental protection (and gas flaring) in Nigeria include the fact that the penalty of imprisonment cannot be applied against oil MNCS. Furthermore, the applicable penalty for violating the code, which is imprisonment for six months or one year, is not a strong deterrent against gas flaring given the inability or reluctance of the Nigerian state to prosecute such cases.[195] Furthermore, oil MNCs are in continued breach of the statutory provisions of the AGRA by undermining a subsisting court's decision declaring gas flaring to be illegal in Nigeria.[196] The NGOs in Nigeria have utilised the African Commission on Human and People's Rights to hold the Nigeria government and oil multinationals responsible for the impacts of gas flaring and environmental degradation in the Niger Delta.

To redress the devastating impacts of gas flaring and the impunity exhibited by the oil MNCs in reducing gas flares, the Nigerian government has proposed in the Petroleum Industry Bill (PIB) 2012 that "any licensee

192. *See generally* U.J. Orji, *Moving from Gas Flaring to Gas Conservation and Utilisation in Nigeria: A Review of the Legal and Policy Regime*, 38 OPEC Energy Rev. 149-183 (2014).

193. For example, in *Gbemre v. Shell*, No. FHC/B/CS/153/05 (Nov. 14, 2005), the plaintiff filed a suit against Shell, the Attorney General and the Nigerian National Petroleum Corporation (NNPC) to end the practice of gas flaring. The court held that the extant gas flaring law "was inconsistent with the Applicant's right to life and/or dignity of human person" as enshrined in the Nigerian Constitution and the African Charter. *See* Ekhator, *Environmental Justice*, *supra* note 48, for an extensive analysis of the roles of NGOs in improving access to environmental justice in Nigeria.

194. Ladan, *supra* note 77, at 37.

195. Ebeku, *supra* note 46.

196. Gbemre v. Shell, No. FHC/B/C/153/05 (Nov. 14, 2005), *available at* http://www.climate-law.org/cases/case-documents/nigeria/ni-shell-nov05-decision.pdf.

who flares or vents gas without the permission of the Minister in (special) circumstances. . .shall be liable to pay a fine which shall not be less than the value of gas."[197] This provision has been criticized by Niger Delta activists on the basis that most of the oil MNCs that engage in gas flaring activities are in joint venture agreements with the Nigerian government (via the Nigerian National Petroleum Commission).[198] The question at this point is: will the Nigerian government fine any of its agencies involved in gas flaring? Also, the aforementioned provision of the PIB, wherein the fines to be paid by MNCs 'shall not be less than the value of gas,' is ambiguous and open to diverse interpretations. The next question is: does the government or oil MNCs calculate the value of the gas flared? Presumably the market value of the gas is fairly easy to ascertain. This provision should be expunged from the PIB. The contention of this article is that oil MNCs should be held directly and vicariously liable for the impacts of the gas flaring on the inhabitants of the Niger Delta.

Furthermore, Nigeria has developed many initiatives to discourage gas flaring by oil MNCs in the oil and gas sector.[199] These gas reduction initiatives in Nigeria are premised on a 'carrot and stick' approach,[200] which emphasises that oil MNCs be incentivised to engage in gas reduction and increment in financial penalties if they fail.[201] Notwithstanding assertions by the Nigerian government that gas flaring has significantly reduced, the prevailing view is that gas flaring in Nigeria is still rife and Nigeria is one of largest emitters of gas flares in the world.[202]

There are other laws that are relevant in environmental discourse in Nigeria. This section will briefly highlight a few of them. The Harmful Waste (Special Criminal Provisions) Act[203] prohibits the dumping (without the requisite authority) of harmful waste on any land, air and waters of Nigeria. The Hydrocarbon Oil Refineries Act[204] regulates the licens-

197. Petroleum Industry Bill (2009), *cited in Nigeria's Penalty for Gas Flaring Will Not Curb Emissions, Say Campaigners*, GUARDIAN (May 31, 2012), http://www.guardian.co.uk/environment/2012/may/31/nigeria-penalty-gas-flaring.

198. *Id.*

199. Some of these initiatives or mechanisms include the Nigerian Liquefied Natural Gas (Fiscal Incentives, Guarantees and Assurances) Act, the Associated Gas Framework Agreement (AGPA), the National Energy Policy and the Nigerian Gas Master Plan (NGMP). For an extensive analysis of these government initiatives, see Orji, *supra* note 192, at 154-61.

200. Adeniji, *supra* note 190, at 4.

201. R. Ako.& O. Oluduro, *Bureaucratic Rhetoric of Climate Change in Nigeria: International Aspiration Versus Local Realities*, *in* BIODIVERSITY AND CLIMATE CHANGE: LINKAGES AT INTERNATIONAL, NATIONAL AND LOCAL LEVELS 13 (F. Maes et al. eds., Edward Elgar Publishing 2013).

202. Orji, *supra* note 192.

203. Harmful Waste (Special Criminal Provisions) Act (2004) Cap. (H1), LFN.

204. Hydrocarbon Oil Refineries Act (2004) Cap. (H5), LFN.

ing and control of activities relating to the refining of hydrocarbon oil in Nigeria. The Oil in Navigable Waters Act,[205] under Section 1, prohibits the discharge of oil from a Nigerian ship into its territorial waters. The Criminal Code has various provisions protecting the Nigerian environment from pollution (water and air) and harmful noxious substances.

The next section focuses on environmental impact assessment in the oil and gas industry in Nigeria.

D. The Law on Environmental Assessment in Nigeria

The Environmental Impact Assessment Act (EIAA) of 1992 is another mechanism that enhances good environmental practices in Nigeria.[206] This Act serves as a guide on the procedures to be undertaken in considering the likely impacts of any project whether private or public on the environment. Also, the various states in Nigeria have their distinct environment sanitation laws regulating aspects of environment practices or sanitation in the states. The Environmental Impact Assessment Act is one of the few statutes in Nigeria that encourages public participation in the oil and gas industry in Nigeria. The EIAA is said to be a landmark in the Nigerian environmental protection regime because it is the first statute that allows public participation in the decision making processes relevant to development.[207] Thus, members of the public have access to information on such projects and participate in the decision-making process on the potential (negative or positive) impacts on their immediate environment.

Under the EIAA, oil MNCs (and other relevant project developers) shall not embark on projects without considering the environmental impacts at the early stages, except as permitted by law.[208] By virtue of Sections 2(2)-(3) of the EIAA, "where the extent, nature or location of a proposed is likely to significantly affect the environment," oil MNCs are expected to undertake an environmental impact assessment of the intended project. Under Sections 4(d) – (e) of the EIAA, an environmental impact assessment shall include a description of the proposed activities, assessment of

205. Oil in Navigable Waters Act (2004) Cap. (O6), § 1 LFN.

206. Environmental Impact Assessment Act (2004) Cap. (E12), LFN [hereinafter EIAA]. *See generally* Allan Ingelson & Chilenye Nwapi, *Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis*, 10 L. Env't & Dev. J. 35-56 (2014).

207. Yinka Omorogbe, *The Legal Framework for Public Participation in Decision-making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless*, *in* Human Rights in Natural Resource Development: Public Participation in Sustainable Development of Mining and Energy Resource 565-77 (David Zillman et al. eds., Oxford Univ. Press 2002).

208. EIAA § 2(1)(4).

the proposed activities, an assessment of the likely environmental impacts and alternatives to mitigate any negative impacts of the project, amongst others. Environmental impact assessment must be undertaken on the activities or industries listed as mandatory study activities in the schedule to the EIAA. The industries deemed as mandatory study activities under the EIAA include mining, petroleum, transmission activities and power generation. In respect of mandatory study activities, the EIAA provides in Section 23 that:

Where the Agency is of the opinion that a program is described in the mandatory study list, the Agency shall:

> (a) ensure that a mandatory study is conducted, and a mandatory study report is prepared and submitted to the Agency, in accordance with the provisions of this Decree; or
> (b) refer the project to the Council for a referral to mediation or a review panel in accordance with section 25 of this Decree.

Projects designated as mandatory study activities are vetted and approved by the Federal Ministry of Environment.[209] However, under Section 40(1)(b) of the EIAA, the Federal Ministry of Environment has the power to refuse the approval of a project if it is "likely to cause significant adverse environmental effects that cannot be mitigated and cannot be justified in the circumstances."

Section 7 of the EIAA allows public participation in environmental impact assessment in Nigeria. Section 7 provides:

> Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity.

This participatory model has been termed a "pluralist approach to regulation"[210] because it promotes the synergy of diverse groups (such as NGOs, ordinary members of the public and the government) in the envi-

209. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90, at 58; Omorogbe, *Public Participation*, *supra* note 207.
210. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90.

ronmental impact assessment discourse in Nigeria. Also, under Section 25 of the EIAA, in mandatory study activities projects, EIA reports shall be published and made available to the public in selected places and any person or individual can file comments on the conclusions and recommendations of such reports. Under Section 57, a public registry is expected to be established by the Federal Ministry of Environment containing information and records for enhanced public participation and access to justice. Furthermore, public participation in environmental assessment is pronounced in the review panel stage. Under Section 17(1)(c), comments filed by private individuals are taken into consideration in the review panel. Here, public concerns about the potential environmental impacts of a project may prompt the Federal Ministry of Environment to refer such to a review panel or mediation.[211] The Review Panel accentuates public participation in environmental impact assessments in Nigeria. Under Section 37(b), proceedings in the review panel stage are expected to be conducted in public "in a manner that offers the public an opportunity to participate in assessment."

Under Section 8 of the EIAA, an adequate period is expected to elapse wherein comments by the public are expected to be scrutinised before any proposed project is approved or authorised. Also, under Sections 9(1) – (2), the decisions reached must be in written form and made available to any interested person or group. Under Section 9(3), if no interested person or group requested for the report, the agency can publish it in any form wherein members of the public or interested parties interested in the project shall be notified. It has been argued that the aforementioned provisions are not strictly adhered to in the EIA process and it is often at the discretion of the project developer.[212] Two examples will suffice to buttress the above assertions. The first case is the Latins State/ Huron Project which was an Independent Power Project (IPP) arrangement between the Lagos State Government (a state in Nigeria), Enron Power Nigeria Limited and Yinka Folawiyo Power Limited.[213] The idea of the IPP was to improve the epileptic power supply in Lagos State. Enron Nigeria Limited requested that the environmental impact assessment, which is a mandatory requirement in emergency power barges projects, should be jettisoned due to the urgency of the project.[214] Omorogbe avers that it appears an EIA was not conducted during the

211. EIAA §§ 22(1)(b)(ii), 26(a)(ii), (27)(b).

212. Rhuks Ako, Resolving the Conflicts in Nigeria's Oil Industry - A Critical Analysis of the Role of Public Participation (2008) (unpublished Ph.D. thesis, University of Kent, United Kingdom).

213. Omorogbe, *Public Participation*, *supra* note 207.

214. *Id.*

course of the project.[215] The second example of Shell Nigeria will also buttress the assertions that some oil MNCs deliberately avoid engaging in environmental impact assessment of their projects. Here, it is alleged that Shell, who is the operator of the Nigerian Liquefied Natural Gas Project (NLNG) at Bonny, did not undertake an environmental impact assessment of the potential impacts of the project. The decision of Shell not to embark on an environmental impact assessment of the NLNG project was challenged in court by a Niger Delta environmental activist. In *Oronto Doulas v. Shell Petroleum Development Co. Ltd.*, the court held that the plaintiff (a well-known environmental activist) lacked the standing to sue Shell with regards to Shell's failure to observe the provisions of the Environmental Impact Assessment Act.[216]

An inherent weakness in the EAIA is that, in some instances, environmental impact assessments can be jettisoned. The Act creates some exceptions. These exceptions are found in Section 15(1). The Section states thus:

An environmental assessment of project shall not be required where –

> (a) in the opinion of the Agency the project is in the list of projects which the President, Commander-in-Chief of the Armed Forces or the Council is of the opinion that the environmental effects of the project is likely to be minimal;
> (b) the project is to be carried out during national emergency for which temporary measures have been taken by the Government;
> (c) the project is to be carried out in response to circumstances that, in the opinion of the Agency, the project is in the interest of public health or safety.

The above provisions negate the tenor of the EIAA. For example, notwithstanding valid objections to a proposed project, the President of Nigeria is within his powers to evade the statutory requirements for an EIA in oil and gas projects. Thus, oil MNCs with access or 'connections' to the President could potentially influence him to give approval to their proposed projects notwithstanding the negative environmental impacts of such projects. The discretionary powers of the President should be exercised reasonably and it is contingent on the projects posing minimal neg-

215. *Id.*
216. Oronto Doulas v. Shell Petroleum Dev. Co. Ltd., No. FHC/L/CS/573/96 (Dec. 15, 1998).

ative to the environment or public health.[217] The question here is: what are the 'minimal' adverse effects of a project? In Nigeria, the answer is not clear-cut. Citizens of the Niger Delta are not considered and the economic benefits of oil and gas projects outweigh the negative environmental impacts of such projects on the inhabitants of the Niger Delta.[218] The Nigerian courts have followed this economic consideration in many oil and gas cases.[219] In *Allan Irou v. Shell BP Development*, the court refused to grant an injunction against the defendants from polluting the plaintiff's land, creek and fish pond.[220] The court averred that such an injunction will tamper with the operations of the company and have a negative impact on the revenue accruing to the federal government.[221] Frynas contends that the judicial attitudes of judges have changed for the better and he gave a plethora of cases to buttress his assertions.[222] Ako, on the other hand, avers that Frynas' views are "overly optimistic especially when the judicial attitude is considered against the backdrop of environmental rights litigation."[223] This article contends that the economic contributions of oil MNCs to the Nigerian economy outweigh the negative or adverse effects of their activities according to the federal government and the judiciary. This article aligns itself with the views enunciated by Ajomo, who stated that:

> In the oil sector where environmental degradation is most prevalent, the all-pervading influence of the oil companies and the paternalistic attitude of judges towards them in matters relating to environmental hazards created by companies have made the enforcement of environmental laws ineffective. . .What the judges fail to recognise is that economic development can be compatible with environmental conservation.[224]

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217. OSHIONEBO, REGULATING TRANSNATIONAL CORPORATIONS, *supra* note 90, at 59.

218. Ambrose Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT'L L. & POL'Y 55 (1995).

219. *See* Chinda & Ors v. Shell-BP, 2 RSLR 1 (1974)*;* Shell-BP v. Usoro, SCNLR 121 (1960).

220. Allan Irou v. Shell BP Dev., No. W/89/71 (Aug. 26, 2008).

221. *Id.*

222. Jedzei Frynas, *Legal Change in Africa: Evidence from Oil Related Litigation in Nigeria*, 43 J. AFR. L. 12 (1999).

223. Rhuks Ako, *The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India*, 3 NUJS L. REV. 423, 436 (2010).

224. M. Ajomo, *An Examination of the Federal Protection Laws in Nigeria*, *in* ENVIRONMENTAL LAWS AND SUSTAINABLE DEVELOPMENT IN NIGERIA 22 (M. Ajomo & O. Adewale eds., Nigerian Institute for Advanced Legal Studies 1994).

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VI. NEW DEVELOPMENTS IN THE OIL AND GAS INDUSTRY IN NIGERIA

The Nigerian oil and gas industry has undergone changes or reforms in recent years. This section will highlight some of the recent developments in the industry. Recently, the Nigerian government enacted the Nigerian Oil and Gas Industry Content Development Act 2010,[225] which is otherwise known as the Local Content Act. It was signed into law in April, 2010. This Act provides that MNCs in the oil and gas sector in Nigeria should place ten percent of their annual profit in Nigerian Banks and contract their legal and insurance services to Nigerian firms. Also, the Act states that Nigerian companies must be the major actors in the issuance of oil fields, licences and in any subsisting contract in the Nigerian oil and gas sector.[226] The Act establishes the Nigerian Content Development Agency which has "the responsibility of putting in place a framework for continuous growth of Nigerian Content in the Nigerian Economy through a balanced programme of planning, target setting, monitoring, stimulating employment, improving contractor capability"[227] amongst others.

Furthermore, there is another law regulating MNCs in the works. This is the Petroleum Industry Bill (PIB),[228] which is yet to be passed into law. The PIB encompasses provisions dealing with the legal and regulatory framework for the oil and gas sector and to establish rules for the operation of MNCs in the sector. The intent of the PIB is to consolidate all the Nigerian laws and statutes into one legislative document.[229] The PIB is expected to increase transparency, accountability and good corporate governance in the oil and gas sector by removing confidentiality clauses through competitive bid processes for oil prospecting licenses.[230]

Nigeria is an active participant in the Extractive Industries Transparency Initiative (EITI). The EITI sets a global standard for transparency in oil, gas and mining.[231] It aims at promoting transparency and accountability

225. Nigerian Oil and Gas Industry Content Development Act (2010), *available at* http://www.oandoplc.com/documents/Development%20act.pdf.

226. Ladan, *supra* note 77. For an extensive analysis of the local content law see Atsegbua, *supra* note 70, at 224-243.

227. Ladan, *supra* note 77, at 39.

228. Nigerian Petroleum Bill, Nigerian National Petroleum Corporation, http://www.nnpcgroup.com/pib/index.html (last visited Mar. 19, 2012).

229. Emmanuel Egbogah, Status of the Petroleum Industry Bill, Paper Presented at the Lagos Petroleum Club (July 22, 2010), http://www.nigerianoilgas.com/StatusofPIBcolor.pdf.

230. *Id.*

231. Extractive Industries Transparency Initiative, http://eiti.org/node/22 [hereinafter EITI].

in payments made by extractive corporations to government and government agents.[232] In Nigeria the initiative is known as NEITI (Nigerian Extractive Industries Transparency Initiative). A number of oil MNCs that have signed up to this include Chevron Group, BG Group, Shell, Statoil, Total, CNOOC (China) and ONGC (India) amongst others.[233] The EITI Board designated Nigeria as EITI Compliant on March 1, 2011. The NEITI has a secretariat headed by an executive director and a governing board. The objectives of the NEITI Act 2007 include ensuring due process and transparency made by extractive companies to the coffers of the federal government of Nigeria, monitoring and ensuring accountability in revenue receipts of the federal government and elimination of corrupt practices in the payment process in the extractive industry, amongst others. The NEITI has published audit reports in respect of the oil and gas sector in Nigeria.[234] Thus, publication of such reports can be said to promote accountability and fairness in the oil and gas sector of Nigeria. However, this is not the case. It is said that NEITI is "increasingly becoming toothless and institutionally moribund."[235] Thus, NEITI has not achieved much in the Nigerian oil and gas industry. Corruption in the oil and gas industry and lack of political will on the part of the government to implement the NEITI, amongst other inherent difficulties, have accentuated the conundrum.

VII. CONCLUSION

From the analysis of the state regulation of the Nigerian oil and gas industry, it is obvious that the public regulatory regime in the oil and gas sector in Nigeria is ineffectual. A major impediment in the regulatory regime in Nigeria is the lack of political will by the regulatory agencies to enforce the laws and regulations in the oil and gas sector. A notable example is that no regulatory agency in Nigeria has instituted civil or criminal actions against the oil MNCs for breaching the provisions of the laws in the oil and gas industry.[236] This has made the oil MNCs to be more brazen in their activities and this is exemplified by their non-adher-

232. *Id.*

233. EITI Nigeria, http://eiti.org/Nigeria (last visited Mar. 3, 2012); Note: the various audit reports have been heavily criticized by the relevant stakeholders.

234. For an extensive analysis of the NEITI audits, see Eghosa Ekhator, *Regulating the Activities of Oil Multinationals in Nigeria: A Case for Self-Regulation?*, J. AFR. L. (forthcoming 2016).

235. G. Anthony, *The Petroleum Industry Bill (2009) and the Issue of Transparency and Accountability in the Extractive Industry*, *in* ENVISIONING A POST PETROLEUM NIGERIA 146 (G.U. Ojo ed., ERA Publishers 2010).

236. Engobo Emeseh, *The Niger Delta Crisis and the Question of Access to Justice*, *in* OIL AND INSURGENCY IN NIGER DELTA: MANAGING THE COMPLEX POLITICS OF PETRO VIOLENCE (C. Obi & S.A. Rustad eds., Zed Books 2011).

ence to the laws. One probable reason for this is the "dependent relationship between the government and oil and gas TNCs"[237] in Nigeria. Nigeria is said to lack the technological know-how to exploit its vast oil reserves and more than 70% of its revenue is generated from the oil and gas sector.[238] This dependent relationship, it has been argued, has led to the capture of the regulatory agencies and the Nigerian state by the oil MNCs.[239] Regulatory capture is especially evident in our previous analysis of the gas flaring activities in Nigeria and the attendant disregard of some oil and gas laws by the oil MNCs. Thus, it can be argued that oil MNCs 'blackmail' the Nigerian state with threats of divestment away from the oil and gas sector. So, the fear is that if the Nigerian state overly regulates the oil industry, investors and potential investors might refuse to invest in the Nigerian economy.[240] If the oils MNCs divest, this will lead to loss of jobs in the oil and gas sector and a reduction in the foreign export earnings of the Nigerian government. However, on the other hand, if there is proper and effective regulation of the oil and gas industry in Nigeria, oil MNCs or foreign direct investment will be attracted to Nigeria. The ineffective and inept regulatory regime in the oil and gas industry in Nigeria could be a disincentive to foreign direct investment.

From the foregoing analysis, it is clear that the regulatory regime in Nigeria is in need of structural and institutional changes. Due to the anomalies in the regulatory regime, communities and individuals have resorted to "extra-legal and violent self-help as more peaceful efforts have proved unsuccessful."[241] The violent self-help or militant activities in the Niger Delta have been met with full force of the Nigerian state in repressing such activities. The question at this juncture is: how do we redress the anomalies in the regulatory regime in the oil industry in Nigeria? One way of redressing the lacuna in the public regulatory framework in the oil and gas industry is that the extant laws be amended to reflect views of stakeholders, including NGOs and oil producing communities. Furthermore, the PIB might have positive impacts on the oil and gas sector when it is finally enacted.

237. Oshionebo, *Civil Society*, *supra* note 1, at 108.

238. *Id.*; ATSEGBUA, *supra* note 70.

239. Oshionebo, *Civil Society*, *supra* note 1.

240. *Id.*

241. Emeseh, *Niger Delta Crisis*, *supra* note 236, at 66. *See also* Violet Aigbokaevbo, *Environmental Terrorism in the Niger Delta: Implications for Nigeria's Developing Economy*, 2 INT'L ENERGY L. REV. 40 (2009).

This article has analyzed various legislative enactments governing the oil and gas regime in Nigeria. Here, laws regulating the oil industry directly and other incidental laws and regulations were in focus. The first part of this article focused on the ownership of oil in Nigeria. A historical evolution of the ownership of oil and mineral resources in Nigeria was attempted. Also various laws and subsidiary regulations, such as the Constitution of Nigeria 1999, Petroleum Act 1967, Gas Flaring Act, Oil Pipelines Act and Petroleum (Drilling and Production) Regulations, amongst others, were in focus. Other sections of the article included various themes such as laws regulating the oil and gas industry in Nigeria, laws on compensation in oil and gas industry in Nigeria, laws on gas flaring in Nigeria, laws on environmental protection and recent developments in the oil and gas industry in Nigeria. In analyzing the various themes in this article, the inherent weaknesses of the laws were brought to the fore. Recommendations were made, where appropriate, in redressing the weaknesses. However, this article contends that the effective and efficient enforcement of the regulatory framework by the government and its regulatory agencies will be panacea to the inherent weaknesses in the present regulatory regime in the oil and gas sector of Nigeria.