

**An appraisal of the law relating to oil pollution in
the inland, territorial and maritime waters of
Nigeria**

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**Thesis Presented for the Degree of Doctor of
Philosophy**
In the College of Law and Management Studies
University of KwaZulu-Natal
Pietermaritzburg Campus

December 2012

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DECLARATION

I, Kayode Babatunde Oyende, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work or any part of it has been, is being, or is to be submitted for another degree in this or any other university.

Kayode Babatunde Oyende

Date

ACKNOWLEDGEMENTS

I acknowledge the Lagos State University, Ojo Lagos, my employer, for granting me training leave to proceed to the University of KwaZulu-Natal, South Africa to pursue this PhD programme. I also wish to acknowledge the financial assistance of the University of Kwazulu- Natal in the form of a grant for the sum of R 25, 000 which covered the cost of travel to attend conferences and other research materials that assisted me in the course of carrying out research on the thesis.

I thank Professor Michael Kidd for his able supervision of the thesis and for his immense patience in seeing the work to its end. I cannot also fail to mention the contributions of Professor Marita Carnelley, research professor of Law at the University of Kwazulu-Natal and Professor Ed Couzens for going through some chapters of the thesis and for making very useful comments that enriched the quality of the thesis.

I hereby place on record the efforts of Mrs. Rose Kuhn and Mrs. Shadia Alli of the Law library of the University of KwaZulu-Natal for placing valuable legal materials at my disposal. I also thank Rose for organising seminars that greatly enlightened me on the very complicated legal system of the United States of America.

A very big thank you to my wife, Mrs. Olayinka Oyende, for keeping the home front and for taking care of the children during my absence. To my children Faith, Favour and Delight, thank you for coping with my frequent absence from home.

Lastly but not the least, I thank God Almighty for seeing me through the end of the thesis and for His many travelling mercies during the course of the PhD programme.

ABSTRACT

This dissertation titled ‘An appraisal of the law relating to oil pollution in the inland, territorial and maritime waters of Nigeria’ examines whether the law governing oil pollution in Nigeria is satisfactory in so far as determining issues of liability and compensation for oil pollution are concerned. The thesis examines a research hypothesis on the determination of the question whether the law adequately caters for victims of oil pollution occurring in the inland, territorial and maritime waters of Nigeria and if not, what are the observable defects and how can these defects be remedied.

Not only has there been a considerable environmental degradation in Nigeria occasioned by oil exploration and exploitation, particularly in the areas around the Niger Delta, but there has been serious socio-economic consequences pertinent to sustainable development of Nigeria as a nation. These impacts and the government’s attempts to tackle the problems have been the focus of this thesis.

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Map: 1 Political map of Nigeria

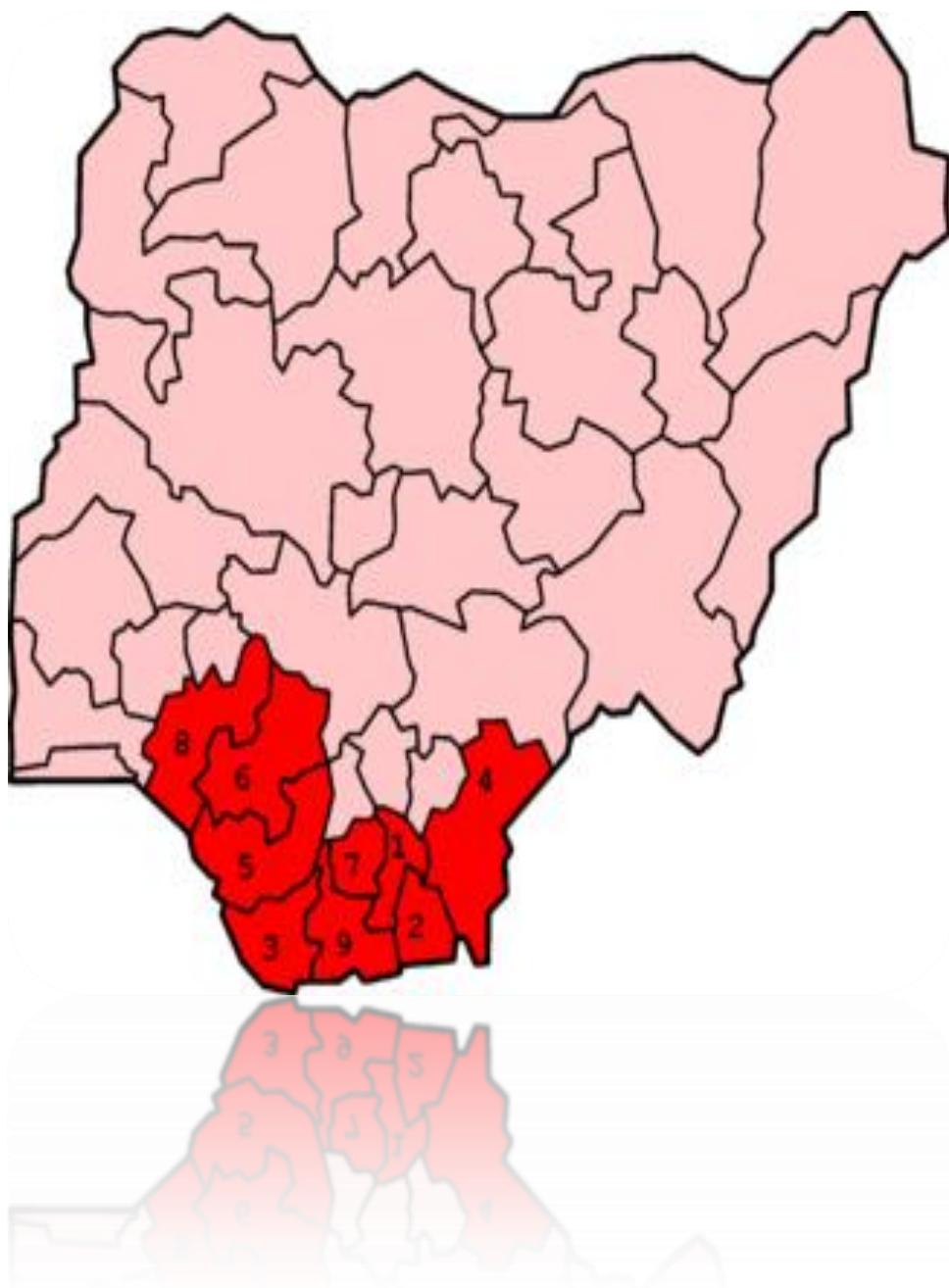
CIA Fact Book on Nigeria

Source: <http://geography.about.com/od/findmaps/ig/CountryMaps/Map-of-Nigeria.htm>

Map 2: Map of the Niger Delta of Nigeria showing the offshore oil producing areas marked green.



Source: Rigzone.com



Map 3: Political map of the Niger Delta states of Nigeria showing the onshore oil producing areas marked red.

Source: 325px-Niger Delta states (2).png

Chapter 1: An appraisal of the law relating to oil pollution in the inland, territorial and maritime waters of Nigeria

1.1 Background to the study - Introduction

The environment is nature's gift to humankind. Living things depend on it for the sustenance of life basically because of their dependence on the environment for food, transportation and for recreation. The environment has been described as "that which surrounds an individual or a community; at any point in its life cycle both physical and cultural surroundings."¹ (The) "Environment" in the modern context of sustainable development encompasses the physical and social factors of the surroundings of human beings and includes land, water, atmosphere, climate, sound, odour, taste, energy, waste management, coastal and marine pollution, the biological factors of animals and plants, as well as cultural values, historical sites, and monuments and aesthetics.² The environment is roughly divided into two: the biotic and the abiotic. The biotic environment has been defined as the biological parts of the surroundings that interact with an organism, including competitors, predators, parasites and prey. Interactions within a population are sub - classified as the social, sexual and parent-offspring environment.³ The abiotic environment has been defined as the non-biological element pertaining to or characterised by the absence of life or living organisms or physical components of an ecosystem. The abiotic environment contains elements such as water, oxygen, sodium, chloride, nitrogen, carbon etc. and other physical and chemical influences such as temperature, light, humidity, pH etc. ⁴The complex ecosystem involving humans, the fishes and mammals in the oceans , the plants of the earth and other micro-organisms gives a delicate balance to the environment which ought to be sustained.

The process of development, through industrialisation, although necessary for the progress of humankind, has brought into its wake the threat to the environment through pollution arising from the disposal of industrial wastes, spillage of crude oil into the seas and rivers through accidental discharge etc. This pollution is all encompassing; affecting the water, (including fresh water and marine), land (including the underground and the topsoil) and the air (i.e.

¹ P Bellamy Academic's Dictionary of Environment (2007) 154.

² United Nations Environment Programme (UNEP) Training Manual on International Environmental Law (2006) Chapter 2 at 15.

³ Bellamy op cit 57.

⁴ Bellamy op cit 1.

everything above the ground). It also constitutes health hazards to all living creatures, terrestrial, aquatic and the birds of the air.

The earth's surface consists of both land and water. Over 97% of the water is made of the world's oceans which is too salty to drink. Less than 3% of the water on earth is fresh water. Of this amount, only about one third is available for humans and wildlife to drink and use. Over 2% of this is frozen into polar ice sheets and glaciers and therefore unsuitable for use.⁵

The diminution in the quantity and quality of water - both freshwater and marine through pollution by oil and other substances and the sustainability of the ecosystems, both biotic and abiotic, is the focus for this study.

The other constituent of this study is oil. Oil, also known as hydrocarbons, has grown in importance since the invention of the internal combustion engine system in the nineteenth century. The industrial revolution has not only brought about the increase in output through the manufacturing process, but it has brought about addiction of machines to a source of energy which is based on fossil fuel. This fossil fuel is the source of the hydrocarbons which produces the energy for the industrial wheels to grind. The grinding has the effect of producing the energy needed for our cars to move, produces heat for our homes, electricity for our computers and other electronic gadgets, and sadly pollution to our environment.

Crude oil is an organic compound which is soluble or insoluble in water. Oil products are used for energy or as raw materials for plastics. Mineral oils are produced from crude oil, although there are other naturally occurring minerals oils that are non-petroleum based like lipids, essential (ethereal) oils, and wood- derived oils.

Petroleum based oils are derived from oil that was formed in the depth of the crust of the earth. The word petroleum is from the Greek word *Petros/Latin (petra)* which means rock, and the Greek *elaion/Latin oleum (oil)*. The term petroleum is today normally used to refer to a common denominator - crude oil (mineral oil) and natural gas i. e. the hydrocarbons from which various oil and gas products are made. Petroleum then is a collective term for hydrocarbons, whether solid, liquid or gaseous.⁶

Crude oil consists of hydrocarbons which are formed in the earth's crust over a long period of time. The basic components are hydrogen and carbon. Carbon is formed from the remains of animals and plants which have been laid in the earth's crust over millions of years. Under intense pressure and heat, these fossils are turned into substances capable of being processed

⁵ M K Hill *Understanding Environmental Pollution* (2004) 2nd edition, 239-240.

⁶ See United Nations Environmental Programme (UNEP) publication available at <http://oils.gpa.unep.org/about.htm> accessed on 11 October, 2011.

into fuel. The liquid fuel that is produced from crude oil is called petroleum which when burned produces energy.⁷

When pumped out of a well and processed, *crude oil* is a mixture of thousands of different chemical components, mainly organic compounds- hydrocarbons- which usually make up about 95% of the crude oil (however hydrocarbon contents as low as 50% may also occur). These hydrocarbons vary in toxicity and degradability, and range from volatile, light materials like propane and benzene, to heavy compounds such as bitumen, asphaltenes, resins, and waxes. The remaining five per cent of the crude oil is made up of small amounts of oxygen, nitrogen, sulphur, and traces of some fifty other elements, mainly metals. Low-sulphur oil is in particularly high demand, since it does not need to be desulphurised prior to use for heating or fuel (unleaded fuel).

Nigeria has a rich deposit of crude oil with naturally occurring low- sulphur content (Bonny Light)⁸ and it commands a high price at the international oil market. The composition of crude oil depends on the “raw materials” from which the crude oil was originally formed, and on the conditions that prevailed during the formation and thereafter. Physical properties and chemical composition may vary from one reserve to another and even between different depths in the same well.⁹ Thus every crude oil is unique.

Before being used as fuel (for energy generation, machinery and vehicles), or as a raw material in the petrochemical industry, crude oil is refined into different *factions*. At the refinery, crude oil is separated into light and heavy fractions, which are converted into various products, such as petrol, diesel oil, jet oil, etc.

1.1.2 Non-petroleum based oils- lipids, essential oils, and wood-derived oils

Lipids, which contain fatty acids, may be of animal origin- such as, e.g., whale oil, sea and fish liver oil, lard and milk fat- or of vegetable original, for example palm oil, rapeseed oil, sunflower oil, olive oil and coconut oil. Essential (ethereal) and wood-derived oil are usually natural, including e.g. wood-derived oils like resin/rosin oils, as well as oils from flowers or fruits, such as essence of roses, oil of lavender, jasmine, violet, orange, etc. They can also be

⁷ The burning of fuel oil produces carbon dioxide when carbon reacts with oxygen in the atmosphere to produce C0₂. Human activities emit more than 6 billion tons of C0₂ into the atmosphere each year.

⁸Bonny Light refers to the name of the peculiarly low sulphur content of crude oil found in the area called Bonny in the present day division of Rivers state of Nigeria.

⁹ UNEP publication ibid.

manufactured synthetically for use in plants (e. g. silicone fluids and tung oils), or in foods and perfumes.¹⁰

The above categories of oils are sources of energy for all living things including plants, animals and humans. The products that are derived from them are also very useful from the point of view of sources of energy, whether renewable or non-renewable sources of energy. As humans are the major players in the energy market, it is essential that the sources of energy be infinite in order to meet the insatiable needs of humans. Unfortunately our focus is on the non-renewable sources of energy like fossil fuels and this portends great danger to the present and future generations of humans if these sources of energy should dry up.

Another challenge arising from this finite source of energy is that fossil fuels cause pollution to the environment as a result of the carbon which is released when the fuel is consumed. In the process of combustion, carbon combines with oxygen to produce carbon dioxide which is a source of pollution as it depletes the sources of oxygen that we breathe in. The exchange of air between man and plants bring about harmony and balance in the ecosystem because humans breathe in oxygen and breathes out carbon dioxide. The carbon dioxide which is breathed out becomes a substance useful to the plants which is absorbed. Where there is large scale clearing of forests, the carbon dioxide is not absorbed and it therefore constitutes a source of pollution to the environment. Unfortunately, for development to take place, these are inevitable i. e. the clearing of large forests to make way for living apartments for humans or for the purpose of developing large industrial estates.

The challenge therefore is for humans not to halt their developmental wheels, but to ensure that the advance to greater development is matched by a corresponding reduction on the environment of all polluting substances arising from oil or other sources of energy. The goal is therefore to produce a cleaner, healthier and safer environment which is essential for the continuation of life on earth, both for present and for future generations of humans. This is the kernel of the concept of sustainable development.

The concept of sustainable development first attained prominence during the presentation of the World Commission on Environment and Development¹¹(WCED) Report. The report defined sustainable development as development that meets the needs of the present without

¹⁰ Ibid.

¹¹ 1987, Brundtland Commission Report. The United Nations released the Brundtland Report titled “Our Common Future”. For further discussion on this concept see Chapter two.

compromising the ability of future generations to meet their own needs. In 1992, the United Nations convened a conference on Environment and Development (UNCED) otherwise called the Rio Conference, held in Rio de Janeiro, Brazil followed up on this concept by declaring it as its basis for action under Agenda 21.¹² It declared under Principle 4 of its Declaration “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Furthermore Agenda 21, in discussing the modalities for implementing sustainable development provided that “laws and regulation suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action, not only through “command and control” methods, but also as a normative framework for economic planning and market instruments.”¹³

This thesis shall discuss more on the concept of sustainable development when it considers the three pillars of sustainable development under the theoretical underpinnings of the Nigerian laws on the development and protection of the environment.

These are also international conventions where representatives of States discuss details of the Conventions before they are formalised into treaties. International Conventions (Treaties) are primary sources of law on oil pollution in Nigeria.¹⁴ The Nigerian state is a party to many international Treaties and multilateral Agreements that have as their subjects the protection of the environment¹⁵. Nigeria has also been represented at many international conventions that have been held before independence and after independence since 1960. One of these conferences is the Stockholm Conference.¹⁶

¹² A/Conf.151/26 (1991). Agenda 21 has 40 chapters and over 800 pages. It is a comprehensive and detailed blueprint for the future implementation of sustainable development. Agenda 21 was adopted by Nigeria on 3-14 June 1992.

¹³ See chapter 8 paragraph 13 of Agenda 21.

¹⁴ See Article 38(1) of the Statute of the Permanent Court of the International Court of Justice (PCIJ later ICJ). Nigeria is a signatory to the Charter of the United Nations and is also a member of the ICJ.

¹⁵ See e. g. United Nations Conference on the Human Environment adopted on June 16, 1972. Nigeria is a signatory to that convention. See also I.L.M. 1972 American Society of International Law Vol. XI Number 2 pages 1416-1469.

¹⁶ The preparation for the Conference started with the Resolution of the United Nations General Assembly dated 24 January 1972 and contained in A/RES/2850 (XXVI). See I.L.M Vol. XI Number 2 427 and the text of the Stockholm Declaration

at <http://www.unep.org/Documents.Multilingual/Default.asp?documentID=97&ArticleID=1503> (accessed 12-12 2012) Nigeria is a signatory to the Stockholm Declaration. The Resolution amongst others, recommended that the UN Secretary General should circulate in advance to members, (a) the draft declaration on the human environment; (b) a draft action plan, constituting a blue print for international cooperation to protect and enhance the present and future quality of the environment for human life and well-being; and (c) such other draft proposals as may be ready for consideration by the Conference.

The Stockholm Conference is important in that it created a global awareness to environmental concerns and also brought about a more co-ordinated approach to international environmental issues and had a great influence on subsequent developments, the most significant achievements being the creation of the United Nations Environmental Program (UNEP) and the adoption of Principle 21¹⁷

The growth and development of commerce occasioned by the transportation of crude oil from one country to another for the purpose of trade and production is fraught with hazards with the advent of the super tankers and accidents arising from their operations. In the recent past, the operations of these super tankers and the spilling of large volumes of oil into the oceans have been a source of concern to the international community. Examples are the *Torrey Canyon* disaster of 1967 in England and the *Exxon Valdez* accidental pollution of the coasts of Alaska in 1989. This is because whatever happens in one country invariably affects other countries of the world.

1.2.1 What is oil pollution and why is it a problem?

We shall examine the definition of oil pollution from a contextual viewpoint. The definition of oil pollution is being taken from the context of the definition of pollution. To ‘pollute’ is (to) “make unhealthily impure” to “corrupt” to “make ritually unclean.”¹⁸ The Black Law’s Dictionary defined “polluting” as “to corrupt or defile; the contamination of soil, air and water by noxious substances and noises.”¹⁹ The Criminal Code Act of Nigeria²⁰ does not provide a definition of pollution *per se* but states that “any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir, or place so as to render it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanour, and is liable for imprisonment for six months.”²¹

Pollutants are introduced into the environment as a result of human activity. Anything that pollutes is a pollutant. It may have its source in a physical, chemical or biological activity. Such materials affect the usefulness of any recreational resort since they tend to alter the physical, chemical or biological balance of the environment. With regard to oil pollution, this

¹⁷See P Sands *Principles of International Environmental Law* (2003) 40.

¹⁸ Webster’s Dictionary (1991) at 778.

¹⁹ 8th edition at 1197.

²⁰ Cap C38 LFN 2004.

²¹ See s 245.

thesis refers to the pollution of the environment (land, water, and air) by substances such as oil - crude oil, fuel oil and its associated components.

The National Environmental Standards and Regulations Enforcement (Establishment) Act of Nigeria (NESREA) defines pollution as:

Man-made or man-aided alteration of chemical, physical or biological quality of the environment beyond acceptable limits and ‘pollutants’ shall be construed accordingly.²²

This definition recognizes the role of man as an agent in the process of pollution of the environment. This is in tandem with the definition of pollution contained in the preamble to the United Nations Convention on the Law of the Sea: ²³

Introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in deleterious effects as harm to living resources, and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction in amenities.²⁴

The above quotation is a definition of pollution of the marine environment. The definition is a mirror of the definition of marine pollution provided by the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP):

Marine pollution is defined as the introduction by man, directly or indirectly, of substances or energy into the marine environment which results or is likely to result in harm to living resources, hazards to human health, hindrance to marine activities and impairment of the quality of sea-water and reduction in amenities.²⁵

This definition has also been followed by the Nigerian Parliament which defined pollution under the National Water Quality Standards²⁶ as ‘generally the presence of matter or energy whose nature, location or quality produces undesired environmental effects.’ Clearly we can see that pollution is engendered on the environment by the activity of man as an agent of change. Furthermore, pollution is brought upon the environment as a consequence of the transformation of the environment through the production of matter or energy. In effect, pollution is an inevitable consequence of development and growth brought about by the action of humans.

²² S 37 of the NESREA Act No 27 2007.

²³ UNCLOS 111 signed in 1982 at Montego Bay, Jamaica.

²⁴ Art 1(4).

²⁵ The definition adopted in 1970 by the United Nations Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP) text found in UNESCO DOC.SC/MD/19, 1 June 1970 and cited with approval in several legal documents and in particular the United Nations Conference on the Human Environment held in Stockholm in 1972. See further Winston Anderson, *The Law of Caribbean Marine Pollution* 1997, 3 fn 1.

²⁶ See The National Water Quality Standards 1991.

Petroleum is not the only component which may be produced from crude oil. There are other varieties of oil like diesel oil, kerosene which is used for cooking, jet oil which is used as fuel by aircrafts, bitumen which is a bi-product from crude oil and is used in road construction etc. The statutes regulating oil pollution in Nigeria recognize these different categories of oil. For instance the Oil in Navigable Waters Act and the Petroleum (Drilling and Production) Regulations²⁷ prohibit pollution arising from ‘any oil or a mixture of oil’. Under the Petroleum Regulations, the oil must not merely be present, but must be such that ‘might contaminate the water, bank or shore line or which must cause harm or destruction to fresh water or marine life.’²⁸

1.2.2 The effects of oil pollution

Pollution produces physical and biological effects ranging from mildly irritating to lethal.²⁹

The physical issues are things we can see such as when oil spills into the sea and coats everything it touches. It fouls boat hulls, piers pilings and shore structures. It kills fish and birds and spoils the beauty of nature. It also makes the beaches unusable. In addition to the destruction of the aesthetic effects of beaches, clean-up operations are costly and time consuming. The clean-up operations may also involve using chemicals which are detrimental to the living organisms in the seas. In a report carried out by scientists on some Nigerian rivers to determine their water quality, it was revealed that water that was once rich in natural resource is rapidly becoming scarce in quantity (high demand) and the quality is deteriorating in many places as a result of pollution by oil and related substances. Owing to population increases, rapid industrialisation and rural-urban migration, much water is utilised for various purposes.³⁰

The most serious result of the biological effects of oil pollution is the harm it does to humans and on the food chain of animals, birds, and marine life.³¹ Pollution resulting from oil can destroy vegetation that produces food and shelter. It can seriously disrupt the balance of

²⁷ Made pursuant to s 9 of the Petroleum Act 1969.

²⁸ See S 25 of the Regulations.

²⁹See Naval Advancement, integrated Publishing available at <http://www.tpub-products.com/archive/../../subscript> accessed 15-05-2012.

³⁰Sees the Report of the Environmental Pollution Research Unit (EPRU) of the Institute of Oceanography, University of Calabar prepared after conducting various tests to assess the water quality of the major tributaries that drain into the Cross River estuary (1989) by F Asuquo, (Ajayi and Osibanjo) 1981, (Adeniyi and Mbagu) 1983,(Imevbore) 1970, (Asuquo) 1989, Environmental Pollution of the Great Kwa River at Calabar, Nigeria: A case study. Journal of Applied Sciences in Environmental Sanitation 6 (3) 287-298.

³¹Naval Advancement op cit.

nature, and in extreme cases, cause the death of humans. Pesticides, which include herbicides and insecticides, can damage crops; kill vegetation; and poison birds, animals and fish. The widespread use of pollutants such as oil, chemicals, and fertilizers, pollutes our waterways. This poses great danger to our water supplies. Water pollutants are also dangerous to all forms of marine life. Oil contamination of marine water kills all forms of marine life e.g. surface-swimming animals and sea birds, shell fish and other types of marine life are also affected in the case of oil that settles at the bottom of the seas.³²

Remediation is the correction of something bad or defective. Once we find a problem with something, such as pollution, for example, we begin working on ways to prevent it and to actually remove pollution from our environment. It may involve the use of physical,³³ chemical or biological processes. Furthermore, the contaminated site can be isolated and targeted for the purpose of clean-up. It usually takes a long time to restore the environment to its pre-impact status, if this is possible, and the remediation is also not without cost to the party responsible for clean-up. Physical equipment like Booms- orange-tubes equipment floating on top of water has been used for clean-up. There are also skimming devices used to scoop up oil from the surface of the water. These are then collected and physically removed. The chemical process of remediation involves using of dispersant (chemical agents such as surfactants, solvents, and other compounds used to reduce the effect of oil spills by changing the chemical and physical properties of the oil). The biological process of remediation is called bio-remediation- which involves the use of micro-organisms or biological agents to break down or remove oil. The danger about this is that the chemical agents used may be

³²For example, under ideal conditions, microbes can degrade the organic constituents of petroleum hydrocarbons such as gasoline or diesel fuel, to carbon dioxide and water. This is the concept behind a technology being used by the U.S. Department of Energy to remove petroleum contamination from soils that also contain low levels of radioactive materials. The combination of hazardous materials (petroleum) and radiation places this soil in the regulatory category of mixed waste, for which disposal is extremely difficult. By using biodegradation to remove the petroleum component, the remaining soil can be classified as low-level radioactive waste, which has an accepted disposal mechanism. For further reading see Pollution Issues available at <http://www.pollutionissues.com/Br-Co/Cleanup.html> accessed 18-05-2012.

³³The physical removal of contaminated soil and groundwater has been, and continues to be, a common cleanup practice. However, physical removal does not eliminate the contamination, but rather transfers it to another location. In ideal cases, the other location will be a facility that is specially designed to contain the contamination for a sufficient period of time. In this way, proper removal reduces risk by reducing or removing the potential for exposure to the contamination. Removal options vary dramatically for soil and groundwater, as described below. For further reading see : <http://www.pollutionissues.com/> ibid.

hazardous to the marine organisms. In the case of bio-remediation also the organisms may be alien to the environment and so form part of the problem rather than the solution.³⁴

Pollutants produced by ships in the course of their operations are similar in nature to those generated by municipal and industrial operations.³⁵ Despite all these side effects of pollution relating to substances induced by oil pollution, we are constrained to add that in this modern world of great industrial and technological advancement, pollution is an inevitability which we must live with. What we may try to do is to lessen the effect of oil pollution as far as possible.

1.2.3 Issues to be investigated in the study

The issues to be investigated in this study relate to the following:

What is the state of Nigerian law on oil pollution particularly with regard to liability and compensation for victims of oil pollution with a view to making suggestions for reform of the law and policy?

To examine the strengths and weakness(es) of the Nigerian law on oil pollution (looking at its negative and positive aspects) as is being applied by the regulatory agencies in order to ascertain if the mechanisms for curbing oil pollution and its effects comply with international best practices and

Where there are deficiencies in the law and policy, to make recommendations for their reform.

Crude oil production has grown in importance in recent times because currently there is no cheaper alternative to it as a form of energy.³⁶ Unfortunately, in the production of crude oil and refining into liquid petroleum, a lot of spillages do occur mainly due to human error.³⁷

Human errors occur due to common mistakes made by humans, for instance in the loading and discharging of crude oil on board ships. Other operational causes of spillages are equipment failure or faulty pumps.

Crude oil also known as ‘black gold’ has also grown in importance over the years as a source of energy. The importance of oil in the international energy market and its ready source of

³⁴For further reading see J Laumer, *The Anatomy of an Oil Spill Cleanup: What works and what doesn't* available at <http://treehugger.com/corporate-responsibility/the-anatomy-of-an-oil-spill-cleanup-what-works-and-what-doesnt.html> (accessed 12-11-2012).

³⁵See Naval Advancement (n 29) above.

³⁶Currently international efforts are being directed at renewable forms of energy which are not cheap compared with fossil fuel source of energy. The renewable forms of energy are bio fuels, wind and solar energy amongst others.

³⁷See Table 1.

revenue have combined to make the oil industry an engine of development. Nigeria³⁸ is the sixth largest producer of oil in the world. The important place of oil in the Nigerian economy can be seen from the fact that it accounts for over 95% of the foreign earnings of the country.³⁹ The main concern here is the effect on the environment of the spillage of large volumes of oil which invariably leads to pollution and degradation of the environment. In Nigeria, statistics from the Department of Petroleum Resources, which was a Department under the Nigerian National Petroleum Corporation (NNPC) statutorily charged with monitoring oil spills arising from the operations of the oil companies but now a parastatal under the Federal Ministry of Petroleum Resources, has indicated that the volumes of crude oil spills were enormous, especially in the years 1978 to 1980.⁴⁰

The Department of Petroleum Resources (DPR) is charged with the statutory responsibility of regulating the production, inland transportation and export of crude oil. Where in the course of oil exploration a spill occurs, the exploring company is mandated to report the incident to the DPR. The Shell Petroleum Development Company of Nigeria (SPDC) in its annual Spill Performance Report for 2009 reported that the total number of spills in 2009 was 132 against an average of 175 per year between 2005 and 2009. Thieves and saboteurs were identified as the causes of the majority of these spills. For instance, spills measuring about 103,000 barrels from SPDC facilities in 95 incidents were attributed to thieves and saboteurs who drilled holes in the pipelines to siphon crude oil. This accounted for almost 98% of the volumes of oil spilled during the year 2009.⁴¹

³⁸ Nigeria is a country situated in West Africa, an oil producing country and has Abuja as its federal capital.

³⁹http://www.opec.org/opec_web/static_files_project/media/downloads/publication/ASB2009.pdf accessed August 31, 2010.

⁴⁰ See columns 4 and 5 of table 1 below.

⁴¹ See the report at http://www-static.shell-com/static/nga/downloads/pdfs/briefing_notes/oil_spills.pdf. Accessed August 31, 2010.

Table 1⁴²

1976-2008 OIL SPILL DATA			
NO	YEAR	INCIDENCE OF SPILLS	QTY SPILLED (barrels)
1	1976	128	26,157.00
2	1977	104	32,879.00
3	1978	154	489,294.00
4	1979	157	694,170.00
5	1980	241	600,511.00
6	1981	238	42,722.00
7	1982	252	42,841.00
8	1983	173	48,351.30
9	1984	151	40,209.00
10	1985	187	11,876.60
11	1986	155	12,905.00
12	1987	129	31,866.00
13	1988	208	9,172.00
14	1989	195	7,628.16
15	1990	160	14,940.82
16	1991	201	106,827.98
17	1992	378	51,187.96
18	1993	428	9,752.22
19	1994	515	30,282.67
20	1995	417	63,677.17
21	1996	435	46,353.12
22	1997	339	81,727.85
23	1998	399	99,885.35
24	1999	225	16,903.96
25	2000	637	84,071.91
26	2001	412	120,976.16

⁴² Source: Department of Petroleum Resources (DPR), Lagos.

27	2002	446	241,617.55
28	2003	609	35,284.43
29	2004	543	17,104.00
30	2005	496	10,734.59
31	2006	461	13,772.92
32	2007	482	10,848.00
33	2008	740	49,524.80

Statistics in the recent past have shown that there is an increasing trend in the pollution of the environment arising from oil spillages. There are two categories of oil spills. Onshore oil spills and offshore oil spills. The following were reported between 1976- 2008 as total volumes of oil spills and also the number of oil spills incidents.⁴³ The statistics relate to both offshore and onshore spills. The increasing trend (from 496 in 2005 to 740 in 2008) shows that the problem is one that needs to be urgently addressed.⁴⁴

The causes of oil spill incidents have also been captured from data emanating from Department of Petroleum Resources (DPR).

⁴³An incident is any occurrence or a series of occurrences having the same origin, which causes a discharge of oil from a ship, tanker or offshore installation or which creates the likelihood of such a discharge.

⁴⁴ There were 198 oil spills at Shell facilities in the Niger Delta in the year 2012 alone, releasing around 26,000 barrels of oil according to Data released by Shell. 161 of these spills were caused by sabotage or theft (so claimed Shell), while 37 incidents were caused by operational failure.

Table 2: CAUSES OF OIL SPILL INCIDENTS⁴⁵

	1995	%	1996	%	2003	%	Av%
Accidents	2	0.6	0	0%	8	1.4	0.7
Corrosion	78	21.8	124	28.5	41	7.4	19.23
Equipment failure	92	25.7	112	25.8	153	27.5	26.33
Leakage	11	3.1	25	5.8	27	4.9	4.6
Operator Maintenance/ Human Error	25	7	24	5.5	20	4	4.18
Rainfall/Overflow	12	3.4	5	1.2	0	0	1.5
Unknown/Others	34	9.5	35	8.1	94	17	11.5
Sabotage	94	26.3	108	25	212	38.1	29.8
Sandout/Erosion /Wave	10	2.8	2	0.5	1	0.2	1.2
Total		358		435		556	

The data above is the summary of oil spill incidents and their sources. A comparison of the data for 1995 and 1996 years shows that there is an average increase of the cause of oil spill incidents arising from corrosion and equipment failure (21.8% and 25.7 per cent). The same cause is attributable to the year 2003 (19.23 and 26.33 per cent). Another cause of oil spillage which is as a result of sabotage activities accounts for a high percentage (25%) in 1996 and there is an average increase of 29.8% for the year 2003.⁴⁶ Other forms of sabotage are the

⁴⁵Source: Department of Petroleum Resources (DPR).

⁴⁶ See the explanation on sabotage in the later part of this chapter and chapter 5 of the thesis.

deliberate breaking of the pipelines by economic saboteurs and the spilling of the contents into the water and farms, causing pollution.

Oil spillage arising from operator maintenance/ human error accounts for a low percentage of the spillage (5.5%) is the average for the years 1995 and 1996. The percentage was also on the decrease for the year 2003 (4.18%) which may be attributable to the increased awareness and strict enforcement of regulations by the regulatory authorities.⁴⁷

Recent statistics emanating from one of the major oil exploration and production (E & P) companies have confirmed the trend in the causes of the oil spills. The Shell Petroleum Development Company (Nigeria) Ltd. (SPDC) is a joint venture between the Nigerian National Petroleum Company (NNPC), Shell International, Elf Ltd. and Agip Oil Company Ltd., charged with the responsibility of exploration and production of oil anywhere in Nigeria and particularly at the Niger Delta. SPDC's operations in the Niger Delta are spread over 30,000 square kilometres. They include a network of more than 6,000 kilometres of flowlines and pipelines, 90 oil fields, 1,000 producing wells, 72 flowstations, 10 gas plants and two major oil export terminals at Bonny and Forcados.⁴⁸ The SPDC published in 2008 that saboteurs spilled almost 48,000 barrels of oil in 140 incidents- an average of one leak every two and half days. In the said report, about 40,000 barrels was attributed to the activities of armed gangs blowing up pipelines with explosives in 10 separate incidents.⁴⁹ This represents spillages due to operational causes.⁵⁰ These statistics materially differ from the one given by the DPR.⁵¹ One reason that may be given for the disparity is that the causes of oil spillage due to sabotage in the official figures may have been downplayed due to political reasons.

1.2.3.1 Legal analysis of the causes of oil pollution

States being subjects of International law are obliged to protect the environment from the effects of oil pollution. This is borne out by the various obligations contained in international Conventions addressing the pollution of the environment, especially the Law of the Sea Convention and the oil pollution conventions. Several agencies of the United Nations,

⁴⁷These are not the most recent figures, but they are the ones that I could find after making several visits to the DPR office, Lagos.

⁴⁸ See the advertorial of the Shell Petroleum Development Company at its website at www.shell.com.ng/

⁴⁹ See the full report at http://www.shell.com.ng/home/content/nga/environment_society/taking_an_integrated_approach/environmental_challenges/ accessed 27-08-2011.

⁵⁰ See http://www.shell.com.ng/home/content/nga/environment_society/respecting_the_environment/oil_spills/ accessed 27-08-2011.

⁵¹See Table 2 above.

especially the International Maritime Organisation (IMO) have been active in this regard. Text writers like Abecassis, Sands, Hunter, Salzmann, Zaelke, Kiss and Shelton, Glazewski, and Chao to name a few have also written in this regard. These writers however wrote with their different perspectives in mind and offered different approaches to the causes of oil pollution and the associated problems depending on their audience.

Existing literature on oil pollution and its causes found in the course of this research point to different directions as regards the causes of oil pollution in Nigeria. While there is a convergence of opinions that the cause of oil pollution is traceable to the operations of the oil companies,⁵² different writers hold different opinions as to the different roles played by the oil companies.⁵³ Some are of the view that sabotage by unknown persons is responsible for a greater proportion of the causes of the oil spills.⁵⁴ Where sabotage is attributable, the legal regime that will be applied will depend on whether the existing law provides for remedies in respect of sabotage.⁵⁵ Others are of the view that the laws and regulations were enacted a long time ago and their drafters were more interested in the conservation and exploitation of existing resources rather than the preservation of the environment. However a few are of the opinion that the regulatory agencies are weak and ineffective and worse still they overlap in their functions and operations leading to greater inefficiency.⁵⁶ These are at best unsatisfactory approaches as they tend to look at the symptoms rather than the causes. We also observed that all the existing literature consulted in the course of the preparation for the thesis concentrated more on inland pollution of water bodies by oil and very few wrote on the

⁵² These causes are due to operational causes like accidental spills, oil tanker accidents, pipeline leakages, routine clean-ups and discharge, leakage at drilling rigs, dumping of waste oil, ruptures or blowouts of offshore oil wells etc. See for further reading U.D. Ikon, An introduction to Environmental Law, (2010), 205, J. N Nwankwo & D. O. Irechukwu, Problem of Environmental Pollution and Control in the Nigerian Petroleum Industry (1983), Lagos, See also articles by learned writers in peer reviewed Journals e.g. Ajomo, Oil in Nigeria in Elias (ed.) Law and Social Changes in Nigeria (1972), O. Adewale, *Environmental Pollution in the Petroleum Industry* (1991), Justice, Vol.2, No. 12., see also Ajomo, and O. Adewale (Jnr), Environmental Law And Sustainable Development in Nigeria (1994) NIALS Conference series No. 5.

⁵³ See A. A. Adedeji and R. T. Ako *Legal Response to the Control and Management of Oil Pollution in Nigeria, Current perspectives and in Law, Justice and Development* in Onibokun and Popoola , A. O. eds. Essays in Honour of Honourable Justice Belgore, S.M. A. (1998).

⁵⁴ See also U.D Ikon, op cit., L Atsegbua, *Introduction to Nigerian Environmental Law*, (2012), Atsegbua, Akpotaire and Dimowo, *Oil and Gas Law in Nigeria, Theory and Practice*, (2004),

⁵⁵ It is submitted that it does not and this issue will be discussed in greater detail in chapters 2 and 5.

⁵⁶ See the contributions of diverse writers in the *Environmental Law and Policy* Simpson & Fagbohun (eds.) (LASU) (1998), See also M.T. Okorodudu-Fubara, Law of Environmental Protection (1994), T. Okonkwo, The Law of Environmental Liability (1997), and I Worika Environmental Law and Policy of Petroleum Development (2002) among others.

causes of oil pollution due to marine oil pollution.⁵⁷ Popoola for instance discussed the International Marine Pollution Conventions and their relevance to Nigeria in relation to the liability for oil pollution but did not discuss the aspect of compensation for oil pollution and the lacuna in the Nigerian Oil Pollution Laws.⁵⁸

The existing literature is unsatisfactory too when we examine Nigerian laws regarding liability and compensation for oil pollution. Nigerian laws that we shall examine in this thesis are deficient as regards specific duties imposed by the law on polluters of the Nigerian environment by oil and other substances. Vague duties are imposed by statutes and were there are serious violations; the sanctions are either lenient or outdated. Amokaye⁵⁹ agrees with this position while Fagbohun⁶⁰ is of the opinion that the regulatory agencies should be strengthened for greater enforcement and that there should be capacity building and the fine-tuning of operational inter-agency cooperation to increase efficiency. On compensation, almost all the writers agreed that reliance on the traditional common law principles like the rule in *Rylands v Fletcher*, Negligence and Nuisance do not assist in solving the problems created by oil pollution and that the compensation provided are inadequate.⁶¹ They all fall short of suggesting a better approach to the problems.

Looking at issue one that is what is the state of Nigerian law and policy on oil pollution particularly with regard to liability and compensation for victims of oil pollution with a view to making suggestions for reform of the law and policy. The thesis proceeds to do justice by looking at the theoretical basis for appraising the Nigerian law on oil pollution. This present study examines the concept of sustainable development; the polluter pays principle, the precautionary principle, and the tool of strict liability as touchstones for appraising the problems identified. The existing laws are then evaluated based on these theoretical benchmarks and where there are gaps or shortcomings, suggestions are made for a reform of the law and policy. The study shall also look at other jurisdiction like the United States of

⁵⁷ See Y Omorogbe *Environmental Issues in the Oil Industry*, (2001), See also Y Omorogbe, *The Legal Framework for the production of Petroleum in Nigeria*, (1997). See also Omorogbe: An appraisal of Nigerian Gas Legislation (1985/86) 20 G, TLR in Ikoni, op cit 209.

⁵⁸ See A Popoola., *Oil Pollution in Nigeria's Marine Environment: Implications for Sustainable Development and Challenges for the Law* (1998). See also U.D. Ikoni, *supra*, M T Ladan Recent Trends in Environmental Law and Justice in Nigeria (2012), F Emiri and D Gowon, *Law and Petroleum Industry in Nigeria* (2009), and L Atsegbea *Oil and Gas Law in Nigeria –Theory and Practice* (2012) among others.

⁵⁹ See G Amokaye *Environmental Law and Practice in Nigeria* (2002).

⁶⁰ O Fagbohun The *Law of Oil Pollution and Environmental Restoration, A Comparative Review*, (2010).

⁶¹ See also M T Okorodudu-Fubara *Environmental Law in Nigeria* (1990) and L. Mbanefo, Essays on Nigerian Shipping Law, (1998), Emiri and Gowon *supra*, O Akanle *Pollution Controls Regulation in the Nigerian Oil Industry* (1991) NIALS , C Ikorukpo *Managing Oil Pollution in Nigeria: towards an interactive approach* and numerous articles in the Daily newspapers like The Guardian, The Vanguard e.g. A Susu, *Oil Spill and You*, Vanguard, Monday May 25, 1998, etc.

America being an oil producing and consuming country in the West with advanced law on oil pollution, and the Republic of South Africa, an African country which although does not produce oil in significant quantity, is nevertheless a major consumer of oil and has grappled with similar problems faced by Nigeria. These two jurisdictions are then compared with the Nigerian system as a way of eliciting benchmarks for the improvement of the Nigerian law and policy as it relates to oil pollution.

The bases for the comparisons between the United States of America (US) and the Republic of South Africa are that in the case of the US, it is a major oil producing and consuming country with country-wide coastal areas which makes it a big player in the maritime arena and its laws on oil pollution in a federal arrangement like Nigeria are well developed. This shall be demonstrated later on in this thesis in chapter six. Another basis for the comparison is that the US has a written constitution like Nigeria, and the operation of its constituent's elements, like the States and the Counties, is federal in nature and similar to the states and local governments of Nigeria.

In the case of the Republic of South Africa, (RSA) although RSA is not a major oil producing country, it is a major oil consuming country. The fact that RSA stands between the interfaces of major oil transporting routes: the Atlantic and the Pacific Oceans, coupled with a well articulated policy on the management of its environment, a progressive and environmentally friendly mixes of laws and policies, informed the comparative study. This shall be demonstrated in chapter seven of this thesis.

1.2.3.2 The characteristics of oil pollution and marine pollution

(a) Marine oil pollution

The increase in economic activity in recent years has led to great demand for crude oil for both domestic and industrial uses. This has happened in both the developed and developing countries of the world. The unequal geographical distribution of fossil fuel all over the globe has also meant that crude oil had to be transported from one area of the world to another by tankers. This poses a significant threat to the oceans and marine animals and the coastal and estuarine systems of the world. On the global level, in the course of transportation, crude oil spills into the marine environment causing pollution. It has been estimated that oil spills to marine environment may have reached up to now six(6) million metric tons: about 44% of oil spills resulted from land sources and refineries, 35% total ship generated (tanker fatigue and

failure, leakage from ships and tanker collision due to heavy traffic), 10% from natural seepage and 10% from atmospheric fallout.⁶²

In the case of marine oil spills, the causes of these are attributable to spillage arising from operational causes such as mechanical failure of equipment or collision of tankers. Crude oil spills may also be due to many other causes such as oil well blow-outs,⁶³ corrosion of pipelines and tanks, burst and leaking pipelines or flow-lines, over pressure failures, and overflow of process equipment components, failures along pump discharge manifolds, sabotage to well heads and flow-lines. Spillages may also occur from rigs, oil wells, pipelines, manifolds, valves, hoses, and tankers during cleaning of bilges.⁶⁴

The advent of super tankers brought in its wake the transportation of crude oil from one country to another. Spillages which do occur in this fashion are said to occur from operational causes as outlined above. There are various laws and regulations put in place by international organisations and national institutions to ensure that the oceans and the seas are safeguarded from tanker operations and spillage resulting from operational causes like faulty valves and hoses.⁶⁵ Apart from oil spills, there are other hazards of the oil industry which are the result of accidents and other natural causes. The incident of the *Torrey Canyon* occurred as a result of an accident. Accidents were also the causes of oil discharge in the incidents of the *Exxon Valdez* and *The Erika*.

In the case of *The Torrey Canyon*, an incident that occurred was the running aground of a super tanker (large ship) off the South West Coast of England in March, 1967. It resulted in the spilling of large volumes of crude oil over the coasts of Britain and France. After this monumental disaster the International Community convened a diplomatic conference in Brussels in 1969 to address the problem associated with the lack of a legal framework to deal with the problem of accidental pollution.⁶⁶

The *Exxon Valdez* incident occurred in 1989 at Prince William Sound in the state of Alaska, United States of America due to a combination of factors like adverse weather conditions,

⁶² E Bourdarios & C Carvounis, Oil Transport Management and Marine Pollution Control: Oil Spill Prevention in T. N. Veziroglu ed. Environmental Problems and Solutions, Greenhouse Effect, Acid Rain and Pollution, (1975), 399.

⁶³ A blow-out is the uncontrolled release of crude oil and /natural gas from a well after pressure control systems have failed.

⁶⁴ Fagbun op cit (n 60) 162.

⁶⁵ We shall examine the laws and regulation in detail in chapters 3 and 4.

⁶⁶ J Smith The “*Torrey Canyon*” pollution and marine life: a report by the Plymouth Laboratory of the Marine Biological Association of the United Kingdom (1970), 57.

human error and negligence. The accident involved a ship *Exxon Valdez* which ran aground when it hit Bligh reef in the Prince William Sound. Crude oil poured into the pristine coast of Alaska, damaging the coastline, killing birds and animals. The clean-up operation that was conducted took several weeks to commence because of adverse weather conditions.⁶⁷ Fortunately Nigeria has been lucky to escape the accidents in the nature of the *Exxon Valdez* despite the fact that a large proportion of crude oil is transported from Nigeria to other countries of the world via super tankers. Much of the crude oil spills which have occurred within Nigeria arose from oil leakage through a network of pipelines from the point of production to the refineries and from operational causes in the course of oil exploration, both onshore and offshore. This shall be elaborated upon in subsequent chapters.⁶⁸

The incident of the *Erika* occurred in 1999 and it involved the spilling of about 14,000 tonnes of heavy fuel oil off the coast of Brittany (France). About 24, 000 birds died from the ingestion of the oil spilled. Several kilometres of coastline were contaminated with the spilled oil.⁶⁹

Oil pollution which occurs in the marine environment may also be attributed to bunker operation by ships. A bunker ship is a type of vessel used to transport freight from one port of shipment to another. In the course of the transportation, the ship uses fuel for its operation. A ship carrying large quantity of crude oil also stores oil in its bunkers for the purpose of using refined oil for fuel. A by-product of this oil is discharged into the sea as a result of operational causes. In a study carried out by the United Nations Royal Commission on Environmental Pollution (1981) it was found out that in the case of oil pollution of the sea, 60% occurred through discharges from land, 20% from tanker operations (accidental and deliberate discharges) while the remaining 20% consists of oil released during shipping operations.⁷⁰ The shipping operations are also known as bunker operations.

Apart from accidental discharges occasioned by collision, grounding, etc. or other causes, there are also deliberate discharges of oil by tankers. Masters of ships deliberately pump oil

⁶⁷ See the report as contained in the Encyclopaedia of the Earth available at http://www.eoearth.org/article/Exxon_Valdez_oil_spill?topic=58075 accessed 2-06- 2012.

⁶⁸ See chapter 5 for full discussion on this.

⁶⁹ See the report as contained in the *The Guardian* available at <<http://www.guardian.co.uk/news/gallery/2008/jan/16/1>> accessed 30-05-2012.

⁷⁰ Report referred to in the article by E. O. Idowu & M Usoro Oil Pollution from Ships in Nigerian Territorial Waters *Nigerian Journal of Maritime Law* (2002) Vol. 2 No. 1 at 6.

and oil residue overboard during *deballasting*⁷¹ and tank cleaning and during pumping of engine room with bilges and sludge. Much of the pollution of the marine environment by oil is attributable to these causes.⁷²

The problems associated with marine oil pollution also includes the mitigation of the accident where it has been caused and compensation for loss of farmlands or livelihood to the victims of the accidents.

In redressing harm done to a party where pollution incident has occurred either through accident or by negligence, it is necessary for some measures to be taken by the state having responsibility to mitigate the accident and redress harm to the victim. In order to deter harmful acts and remedy damage as fully as possible, legal consequences are attached to those acts which cause injury.⁷³ This entails the development of liability rules to determine the incidence of liability for the purpose of redress.⁷⁴

The general international legal framework of international norms for combatting vessel-source pollution is outlined by Articles 194(3)(b), 211, and 217-221 of the Third United Nations Conference on the Law of the Sea (UNCLOS 111).⁷⁵ Article 194(3) (b) provides that the measures taken to enforce the Convention should include those designed to minimise to the fullest possible extent:⁷⁶

- (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.

⁷¹ Ballast water refers to water which is pumped into the tank of a ship after the discharge of oil to maintain the stability of the ship on water. Deballasting is the removal of the water, after the oil cargo is loaded on board the ship.

⁷² See R Neuman Oil in Troubled Waters: The International Control of Marine pollution (1970- 1971) 2 *J.Mar. L. & Com* 349.

⁷³ A Kiss and D Shelton *International Environmental Law* (1991) 347. Among the various elements required to establish liability- causality, identifying the wrongdoer, proof and measurement of harm- an issue common to domestic and international environmental law is determining the *legal basis or degree of fault necessary to impose liability*. See further Kiss and Shelton op cit for other elements that determine liability of parties.

⁷⁴ Nigerian laws are replete with various rules to ascertain liability.I shall deal with these rules in chapter 2.

⁷⁵Held at Montego Bay, Jamaica in 1982.

⁷⁶See further A Kiss & D Shelton op cit 174. These measures which are preventive in nature will be discussed in detail in chapter 3.

The damage from a spill may affect more than one country.⁷⁷ There are also difficult questions involving jurisdiction where the accident occurs over a vast area cutting across national and international frontiers. The polluting agent itself—oil and other hydrocarbons—tend to spread quickly over the surface of the sea, aided by strong wind, so that a spill may rapidly disperse over an enormous area, forming a slick only a few molecular layers thick.⁷⁸ Various international Conventions have been convened by the maritime nations of the world to address these problems. This thesis shall examine them along with the domestic laws of Nigeria to see their strengths and weaknesses.⁷⁹

(b) Inland pollution of freshwater by oil

Inland waters mean all waters on the landward side of the baseline of the territorial sea.⁸⁰

For the purpose of a proper delineation of the inland waters of Nigeria, the Merchant Shipping Act⁸¹ defined “inland waters” to include any part of the sea adjacent to the coast of Nigeria certified by the Minister to be waters falling by international law to be treated as within the territorial sovereignty of Nigeria apart from the operation of that law in relation to territorial waters.⁸²

The environmental protection of inland waters poses extremely complicated problems.⁸³ Freshwater accounts for only 2.7 per cent of the earth’s water, of which less than half a per cent is surface water, found in lakes and rivers.⁸⁴ The “Helsinki Rules” provides that each state within an international drainage basin has the right to a reasonable and equitable part of the beneficial use of the basin waters.⁸⁵

⁷⁷ The wreck of the *Torrey Canyon* in 1967 is a case in point. The vessel was registered in Monrovia and flew the Liberian flag. It was owned by a Bermuda company which was a subsidiary of a United States corporation. The crew was Greek, and the vessel was on charter to the British Petroleum Company Ltd. The accident occurred on the high seas off the coast of Great Britain, and pollution damage was suffered by Great Britain and France.

⁷⁸ See Neuman op cit (n 72 above).

⁷⁹ See chapter 3 post.

⁸⁰ See section 29 of the National Inland Waterways Authority Act Cap N47 LFN, 2004.

⁸¹ Cap M11 LFN 2004.

⁸² See s 381 of the MSA supra. In conventional law of the sea terminology all waters landward of baseline (low-water mark) are inland waters and waters seaward of baseline are maritime waters. The latter include zones such as the territorial sea (usually 12 nautical miles), the Exclusive Economic Zone (usually 200 nautical miles) etc. The Minister under the above mentioned s 29 of the National Inland Waterways Act has delineated the inland waters of Nigeria and their basins. . See n 83 below.

⁸³ Kiss and Shelton, op cit 202.

⁸⁴ Ibid.

⁸⁵ Art 4. See International Law Association (I.L.A.), Report of the Committee for the Uses of the Waters of International Rivers, Report of the Fifty-Second Conference, Helsinki, 1966, at 484 (1966). In 1982, the ILA adopted the Montreal Rules on Water Pollution in an International Drainage Basin to update the Helsinki Rules

The Helsinki Rules provide some guidelines on how the principle of equitable and reasonable utilisation is to be implemented. Thus an equitable share of the transboundary water resources will depend on: the geography of the basin, including the extent of contribution of water by each basin State, in particular the hydrology of the basin, the climate affecting the basin; past and current utilisation of the water of the basin; the economic and social needs of each Basin State; the size of the population that depends on the water in each basin; comparative costs of alternative means of satisfying the economic and social needs of each Basin State; the availability of other resources, the avoidance of unnecessary waste in the utilisation of the water of the basin in each Basin State; and the practicality of compensation to one or more of the co-basin States as means of resolving conflicts amongst users, as well as the degree to which the needs of the Basin State may be satisfied without causing substantial injury to a co-basin State.⁸⁶

Inland waters in Nigeria and their basins include all navigable rivers like the rivers Niger and Benue, the rivers Sokoto, Ogun, Hadejia, Kaduna, Gongola, Katsina-Ala, and Cross River etc, and their tributaries. Apart from these rivers, there are also smaller bodies of water enclosed by the lagoons, like the Lagos Lagoon, the creeks, etc which are also regarded as internal waters for the purpose of the National Inland Waterways Act.⁸⁷

The pollution of these water bodies by crude oil is a major source of oil pollution of the environment. An estimated 9 to 13 million barrels (1.5 million tons) of oil has spilled into the Niger Delta over the past 53 years, representing about 50 times the estimated volume spilled in the Exxon Valdez Oil Spill in Alaska in 1989.⁸⁸ This is not only peculiar to the oil producing area of Nigeria, e.g. the Niger Delta but has become one of international concern.

This thesis shall now give detailed reports of the effects of oil pollution as they occurred in different parts of the world.

⁸⁴taking into account developments in theory and practice since 1966.” ILA, Report of the Sixtieth Conference (Montreal, 1982), pp. 1-3, 13, 535 et seq.

⁸⁶Art 5.

⁸⁷See the second schedule to the Act ibid. All these rivers, especially the Niger and Benue Rivers flow across international boundaries and empty their contents into the Atlantic Ocean through a network of tributaries and creeks in Nigeria.

⁸⁸Leschine, et al 1993, Weiner et al 1997 in T Imoibe & T Iroro Ecological Restoration of Oil Spill Sites in the Niger Delta, Nigeria, Journal of Sustainable Development in Africa (Vol. 11), No.2 2009 at 55. The legal regime dealing with this shall be examined in chapter 5.

1.3.1 The physical effects of oil pollution on living organisms.

(a) Impacts on fishes

In Eastern Europe, a report carried out by scientists in Lithuania on the accidental spillage of oil on the Butinge Terminal (Baltic Sea, Lithuania), (a semi enclosed sea rich in marine life), found out that oil spilled into the environment has multiple negative effects on aquatic organisms, including reducing the growth and feeding of fish. The report also found out that crude oil caused a variety of adverse effects in early life stages of fish. Behavioural responses of fishes were also noticed to coincide with the presence of toxicants in their environment. The fishes were also studied and they appeared to produce forms of ecologically significant phenotypic adaptation, allowing them to survive in the altered environment. Changes in behavioural responses in the natural environment can lead to disturbances in animal migration, distribution and survival in biotopes.⁸⁹

(b) Impacts on sea birds

Oil spills have impacts on sea birds. A study carried out to measure the consequences of petrochemical ingestion on seabirds found that the immune systems and stress levels of birds were affected. The immune system is a target of toxicants leading to the suppression of their red blood cells. The secondary effects of this are that the birds become less resistant to bacterial infection and this leads to morbidity. This may greatly affect their survival rate. Furthermore where oil spills occurred and the birds were examined, their feathers were found to have been contaminated with oil making it difficult for air to penetrate their skin and therefore this led to asphyxiation of their breathing systems.⁹⁰

Pollutants are also known to have affected the number of birds in the marine environment. Some of these birds are predatory birds who feed on fishes in a complex ecosystem involving humans who also feed on these fishes. In a study carried out on these interrelationships seabirds were used as bio monitors. It was found out that the effect on seabirds of chronic oil pollution (i.e. the sum of operational discharges by ships at sea, small accidents at sea, natural seeps, and rivers run-off shore installations etc.,) can be assessed by means of beach sea birds surveys. Busy sea shipping lanes and areas with extensive offshore operations lead to very

⁸⁹ See N Kazlauskienė, G Svecevicius, L Petrauskienė, and M Vosyliene (2010), Behavioural Responses of Medicinal Leach and Rainbow Trout Exposed to Crude Oil and Heavy Fuel Oil in Ontogenesis *Polish Journal of Environmental Studies* Vol. 19, No.2 429-433.

⁹⁰ K T Briggs, M E Gershwin et al, Consequences of petrochemical ingestion and stress on the immune system of seabirds *ICES Journal of Marine Science*, 54:718-725, 1997.

high oiling rates. That is, (the proportion of dead birds found to have oil in their feathers) were high among stranded birds on nearby coasts. Beached bird surveys (BBS), if coupled with the chemical analysis of feather samples, can be effective indicators of pollution of the seas by lipophilic⁹¹ substances.⁹²

(c) Impact on humans

(i) The effect on humans

- Pollution of the source of drinking water, killing of fishes in the ponds thereby resulting in the distortion of the occupation of people who are essentially fishermen, widespread suffering resulting from water - borne diseases and the endangering of human health through the ingestion of fishes whose physiology have been modified by cancer inducing hydrocarbons.

(ii) The effect on the ecosystem

- The destruction of the ecosystems. An ecosystem is formed by the interaction of a community of organisms with their physical environment.⁹³ Ecosystems can be highly complex. For instance according to a study carried out over the years on an area affected by persistent oil spills indicated the following:
 - physical smothering effects on flora and fauna;
 - physical and chemical alteration of natural habitat
 - lethal or sub-lethal toxic effects on flora and fauna; and
 - Changes in biological communities resulting from oil effects on key organisms⁹⁴

(d) Contamination of the ground and source of underground water

The ground where oil exploration is taking place often suffers from prolonged degradation as a result of oil exploration activities. This occurs in two stages; pre-oil exploration activities

⁹¹Having an affinity for lipids. A lipid is an organic compound insoluble in water but soluble in organic solvents; essential structural component of living cells (along with proteins and carbohydrates).

⁹² RW Furness and CJ Camphuisen Seabirds as monitors of marine environment *ICES Journal of Marine Science*, 54 726-737 1997.

⁹³Worldweb- Microsoft Corporation, 2007.

⁹⁴ Dicks *The Environmental Impact of Marine Oil Spill- Effects, Recovery and Compensation* paper presented at the International Seminar on Tanker Safety, Pollution Prevention, Spill Response and Compensation 6 November 1998, Rio de Janeiro, Brazil.

when the oil site is cleared to make way for the equipment that will be used for the oil drilling and post- exploration activities when the ground suffers from the effects of oil that is spilled due to exploration activities and human errors. Once production starts, other issues crop up such as the production of water- often salty and the disposal of the produced water-sometime mixed with crude oil, which has environmental impacts on the ground around the exploration site. The effect of this is the contamination of the ground and the wells around the exploration site. This fact was corroborated by the report of the United Nations Environmental Programme (UNEP) conducted on a Shell Petroleum Development Company site in Ogoniland, Rivers state of Nigeria. The report jointly commissioned by Shell and the Federal Government of Nigeria conducted a series of examinations of the groundwater and the soil of the impacted site. Several laboratory tests were conducted on the soil and the samples of ground water taken from the site. The report made several findings amongst which are that the ground has been heavily contaminated with oil due to the prolonged spillage of crude oil. The report also discovered a large collection of underground water in aquifers⁹⁵which are a crucial source upon which the region's entire population depends for drinking water. The protection of these aquifers is therefore vital. In some areas affected by localised pollution of water close to the surface, a well can be up to 50 meters deep. In such cases, immersible pumps are used to draw water. A large number of wells drilled in this coastal area produced brackish (salty) water which was not fit for drinking. In some areas, brackish groundwater can be found at depths greater than 200 metres below ground level.⁹⁶ The water was found to be brackish as a result of contamination with oil.⁹⁷

Oil spills on land also cause the ground to become toxic and this constitutes a danger to plants and animals who feed on these materials. This is a great problem not only in oil producing areas of the Niger Delta of Nigeria⁹⁸ but also in the oil producing areas of the world.

⁹⁵ An underground bed or layer yielding ground water for wells and springs.

⁹⁶ See Report by UNEP titled "Environmental Assessment of Ogoniland (2011) available at www.unep.org/nigeria accessed 27-08-2011 at page 30. From the report the source of the water was polluted by oil leaking from pipelines.

⁹⁷ UNEP report ibid.

⁹⁸The Niger Delta refers to the region between Imo State in the East and Benin River in the West and extends over an area of some 70,000 sq. km consisting of over 20,000 sq. km. of wetlands and comprising of Delta, Edo, Rivers, Bayelsa, Akwa Ibom, Imo, Ondo, Abia and Cross River States. Together these states account for 7.5% of Nigeria landmass. The entire Niger Delta covers a coastline of 560 Km, about two-thirds of the entire coastline of Nigeria.

(e) Damage to water systems

One of the most disturbing findings of an Amnesty International Report⁹⁹ is that the water system- the rivers, streams, ponds – have, for decades, been the receiving bodies for oil spills and waste discharge, including waste water and dumped drilled waste. Rivers and creeks have also been subjected to dredging and canalization. The cumulative effect of this is that the water system which people rely on for fishing as an occupation is contaminated. Tens of thousands of families are affected by this as they rely on fishing for their sustenance and survival. Oil pollution of the rivers kill fish, their food sources, the fish larvae and damage the ability of fish to reproduce, causing both immediate damage and long-term, cumulative harm to fish stocks.¹⁰⁰

The report also made finding that oil pollution has affected the shell fish population. The fishing of Oysters and Periwinkles, which are the occupation of women, have significantly reduced in number due to the oil pollution of their habitat. In K-Dere area of Ogoniland, there was a finding that shell fish have totally disappeared because of the pollution. Cockles have also disappeared for the same reason. The report concluded that the reduction in the number of shellfish and cockles has undermined access to protein for the community.¹⁰¹

(f) Damage to Farms and Natural Resources

The right¹⁰² of the people of Niger Delta to a decent environment and well-being have been affected by continuous degradation of the environment due to oil spillage and allied causes. Many people in the Niger Delta, and indeed the whole of Nigeria, rely on agriculture for food and their livelihood. Oil pipelines run across farmlands and other oil infrastructure, such as well heads and flow stations, are often close to agricultural land.¹⁰³

Compensation for the destruction of crops arising from oil spillage is usually inadequate because the oil companies are unwilling to compensate the farmers on the ground that the oil

⁹⁹See Amnesty International Report : Petroleum Pollution and Poverty in the Niger Delta Index AFR/44/017/2009 at 27available at www.amnesty.orgaccessed 10 June 2011.

¹⁰⁰Ibid.

¹⁰¹Amnesty International site visit to K-Dere, Rivers State Box 5 of the AI Report.

¹⁰² The Constitution of the Federal Republic of Nigeria, 1999, recognises some basic rights like right to life,(s 33) right to freedom of movement (s 35), right to fair hearing (s 36) and expression (s 39) right to association, (s 40) right to freedom of religion, (s 38) right to hold, express, and impart opinion (s 39 (2) etc. These rights are guaranteed and enforced under the Fundamental Rights provision of the Constitution. However some economic rights like right to health, right to food, shelter and employment are recognised but not enforceable as they are subject to the ability of the government to provide for the citizens based on the limits of available resources. These economic ‘rights’ are said to be non-justiciable.

¹⁰³AI report at 30.

pollution was caused by sabotage.¹⁰⁴ The long term effect of this is that the right to food which is a fundamental human right is affected. This is closely linked to the right of the people to a decent, healthy environment under Articles 12 and 24 of the African Charter of Human and Peoples Right to which Nigeria is a party and even domesticated the Convention in her statute books.¹⁰⁵

Heavy oils (crude oil, No. 6 fuel oil and Bunker C) also cause damage to natural resources like water ways, beaches etc. Where there is an oil spill, this does not readily mix with water and leave less evaporation and dilution potential. These oils tend to weather slowly. Heavy oil can cause severe long-term contamination of intertidal areas and sediments. Heavy oils have impacts on waterfowl and fur-bearing marine mammals. Clean-up of heavy oil is difficult and usually long-term.¹⁰⁶

In the other oil producing areas of the world, a long term impact of oil spillage is the gradual degradation of the soil and aquatic environment. In a study carried out by some researchers in the Amazon Basin of Ecuador in 1987 by the Ecuadorian Government, it found elevated levels of oil and grease in all of the 36 samples taken from rivers and streams near production sites. That study also found that a shortage of dissolved oxygen in the majority of water samples had seriously harmed the aquatic ecosystem.¹⁰⁷ In 1989 another Ecuadorian Government study of 187 wells found that crude oil was regularly dumped into the forests and into bodies of water. Furthermore, in 1994 a study carried out by the Ecuadorian environmental and human rights organization *Centro de Derechos Económicos y Sociales* (the Center for Economic and Social Rights) also found highly elevated levels of oil pollutants in the streams and rivers of the Oriente area. Concentrations of poly-nuclear aromatic hydrocarbons were 10 to 10,000 times greater than the levels recommended by the Environmental Protection Agency of the United States of America. In 1998 an independent local laboratory that is frequently used by the oil companies surveyed 46 streams in the Oriente region. The laboratory found contamination by total petroleum hydrocarbons (TPH) in areas of oil activities, while no water contamination was found in areas without such

¹⁰⁴Under Nigerian law, there is no compensation where the cause of the oil spill is due to sabotage. See Amnesty International report *supra*. This shall be expanded upon later on in chapter 5.

¹⁰⁵See further discussion in Chapter 4.

¹⁰⁶The discussion of how oil pollution is addressed will take place in chapter 4 when we deal with the Oil pollution law and governance issues.

¹⁰⁷See Corporación Estatal Petrolera Ecuatoriana. Análisis de la contaminación ambiental en los campos petroleros Libertad y Bermejo. Quito: CEPE; 1987 in Miguel San Sebastián and Anna-Karin Hurtig Oil exploitation in the Amazon basin of Ecuador: a public health emergency available at http://publications.paho.org/english/TEMA_San_bastian.pdf accessed 2-09-2011.

activities. In 1999 the *Instituto de Epidemiología y Salud Comunitaria “Manuel Amunárriz”* (“Manuel Amunárriz” Institute of Epidemiology and Community Health), a local non-governmental organization concerned with health issues, undertook water analyses for TPH in communities near oil fields and also in communities far away from the fields. Those analysed showed high levels of TPH concentrations in rivers used by the communities that were close to the oil fields. In some streams, hydrocarbon concentrations exceeded by more than 100 times the limit permitted by European Community regulation.¹⁰⁸

A similar study from the Amazon basin of Ecuador showed that both peasants and indigenous people reported that many local streams and rivers, once rich in fish now support little or no aquatic life; cattle are reportedly dying from drinking from contaminated streams and rivers.¹⁰⁹ This clearly shows that the problem is not only peculiar to the oil producing areas of Nigeria but a global one and may affect living things on earth if not quickly addressed.

Furthermore oil also leaks into the sea in the course of oil exploration causing harm to the marine environment and having a devastating impact on marine life. In the United Kingdom (UK), an estimated 1,300 barrels of oil leaked into the North Sea causing sheen upon the surface of the sea and harming birds – razorbills, puffins and guillemots. These birds were unable to fly after their feathers were affected by oil.¹¹⁰ Also the presence of oil on their feathers may lead to blocking of their skins by oil causing loss of body temperature, breathing problems and morbidity.

Oil spills also affect wildlife and their habits in many ways. The severity of the injury depends on the type and quantity of oils spilled, the season and weather, the type of shoreline, and the inland waters, the types of waves and the tidal energy in the area of the spills.

Other effects of oil spills on the environment are pollution of the source of drinking water for domestic use in urban areas. A national newspaper’s report¹¹¹ in Nigeria showed that residents in a suburb of Lagos called Diamond Estate complained that their underground drinking water source has been contaminated by substances suspected to be Premium Motor

¹⁰⁸Ibid.

¹⁰⁹See Kimerling J Amazon Crude, New York: Natural Resources Defence Council, 1991 in M San Sebastian, B Armstrong & C Stephens Outcomes of Pregnancy among Women Living in the Proximity of Oil Fields in the Amazon Basin of Ecuador International Journal of Occupational Environmental Health 2002: 8: 312-319.

¹¹⁰ See The Guardian, UK available at <http://www.guardian.co.uk/environment/2011/aug/15/north-sea-oil-spill> accessed on 16 August 2011.

¹¹¹Vanguard Nigeria Online Edition February 14, 2011.

Spirit (PMS). The officials of the Nigerian National Petroleum Corporation (NNPC) and its subsidiary the Pipelines and Product Marketing Company, (PPMC), moved in and drained over 450, 000 litres of PMS from oil leak site which was identified close to the said Diamond Estate. Nothing was however mentioned concerning the cleaning up of the leaked petroleum on the underground water which is a source of drinking water to the inhabitants of the neighbourhood, and the remediation of the environment, which is a residential area, and which posed a grave danger to the health of residents who may have ingested the spilled petroleum in their drinking water.

With this array of problems arising from the effect of oil pollution, one may ask whether there are no laws or regulations put in place by the authorities to tackle this phenomenon. The short answer is that there are indeed laws and regulations enacted since the time of oil exploration in the early sixties to tackle the problems but the problem has always been with the mechanism for enforcing these laws and regulations.

1.3.1.2 The legal and institutional framework for dealing with oil pollution problems

The arrays of the problems highlighted above are not without responses from the institutions and agencies created by government. The legislature has also enacted laws to tackle these problems. The responses shall be classified into five heads as follows.

(a) Prevention, (b) Remediation, (c) Liability, (d) Clean-up and (5) Compensation.

(a) Prevention

The common adage is that prevention is better than cure. The obvious way to tackle oil pollution is to prevent it if it is possible. This is the rationale for enacting laws that for instance forbid oil companies who are not licensed from carrying out oil operations in Nigeria.¹¹² This way, the government can assess the capability of these companies to conduct oil exploration, production and export of petroleum products in accordance with the law before issuing out licences to them.¹¹³ The reality however is that these companies usually satisfy the process of obtaining licence but nevertheless oil pollution still occurs due to causes outlined earlier on in this chapter. If prevention is therefore not feasible, then the alternative is to remediate the pollution after it has occurred.

¹¹²See ss 1 and 4 of the Petroleum Act, Cap P 10 LFN 2004.

¹¹³This is known as command and control system of controlling pollution.

Sabotage is also a very important factor in the causes of the oil spillages that we observed. It is not very clear whether unknown persons carry out the act of sabotage as a form of protest against the oil companies that are perceived to be benefiting more from the resources which ought to benefit the communities where oil is being explored, or whether they carry out the act of sabotage as a form of rebellion against the federal government for denying the community of essential infrastructure or amenities. However, the Nigerian government's attitude has been to deny compensation to claimants on the ground of sabotage.¹¹⁴This attitude produced negative results as we shall see later in this thesis. There is therefore a need to reappraise this strategy and re-strategise for greater effectiveness of the law.

(b) Remediation

The process of remediation is akin to applying medicine to a person who is sick in order to restore him back to health. This involves identifying the cause of the polluting substance, identifying the polluted site and cleaning-up. The process is not without cost and a mechanism has to be devised to channel the cost appropriately. For instance, if it is established that the activities of oil companies is responsible for the pollution, it will make economic sense to make the oil companies come up with the necessary plans for remediation and also to ensure that the cost for remediation is borne by the polluter.¹¹⁵

(c) Liability

Liability under the law is the obligation and responsibility borne by the person concerned for any breach of the law. 'It implies the notion of answerability as it indicates accountability for an act and the obligation to answer for it. This liability may add incentive to take due care to avoid damage...',¹¹⁶

If it is impossible to prevent pollution by stopping oil production outright, which is not feasible in view of the importance of the revenue from oil to the national economy, then certain measures must be taken to apportion liability to those individuals or companies responsible for the pollution. This will require the development of legal rules to make some persons liable for the violation of such legal rules.

¹¹⁴See Amnesty International Report (see n92 above). See s 5.4.2.2 for further discussion on the denial of compensation on the ground of sabotage.

¹¹⁵The provision for this under Nigerian law shall be examined in chapter 4 of the thesis.

¹¹⁶T.A Mensah, The International Legal Regime for the Protection and Preservation of the Marine Environment from Land –based Sources of Pollution in *International Law and Sustainable Development*, A Boyle & D Freestone (eds.), (1999) at 76.

The incentive to obey a legal rule, as we can see, is a function in part of the *probability* that a violation will be punished.¹¹⁷ Where there is a probability that one's conduct will be affected by another, there exists liability on the part of that other person to affect the former person by the exercise of that power. Thus, such person (the latter) becomes *liable* to the former through the exercise of such power. In this way Posner posits that liability and power are correlatives.¹¹⁸ Conversely where liability is imposed and punished, it will be a disincentive to potential polluters.

(d) Clean-up

Where an oil spill occurs, it is imperative that the spill be cleaned up. Clean-up measures are usually costly. How is this clean-up done and who pays for the cost of the clean-up? Posner also submits that there are three approaches in the public regulation of pollution. The first is for the legislature or an administrative agency to prescribe the specific measures that the polluter must take to avoid the sanctions of the law (input control). For example, a municipality might be required to install a certain kind of sewage treatment plant; an automobile manufacturer may be required to install a particular type of emission control device etc.

A second approach is to establish the level of pollution emission that is tolerable, to compel the polluters, under penalty of injunction or fine, not to exceed that level, but to leave a choice of method to the industry (output control). This is a better approach to the first though not so simple or efficient as it may seem.¹¹⁹

The third approach is to tax pollution. This is done by making the tax rate for each pollutant to be set equal to the estimated cost imposed by the pollutant.¹²⁰ For example, a firm subject to a pollution tax would compare its tax costs with the costs of reducing the tax by installing pollution-control equipment, reducing its output or otherwise changing its operation to reduce pollution. If a net tax saving would be possible through one of these measures, it would adopt it, otherwise it would pay the tax and continue to pollute.¹²¹ This approach is quite similar to the imposition of strict liability in tort.¹²² The revenue derived from the imposition of the tax

¹¹⁷R Posner *Economic Analysis of Law* (2011) 125.

¹¹⁸Ibid.

¹¹⁹Posner op cit 279.

¹²⁰Posner at 280.

¹²¹Ibid. See further discussion on the use of economic instruments to control pollution in chapter 2.

¹²²Id.

would then be used by the government to pay for the cost of the clean-up. This is the approach used by the United States government in the setting up of the Superfund.¹²³

(f) Compensation

Compensation is akin to reparation for an injury. It may involve the payment of money to another person to compensate him for the injury inflicted. We shall look at how Nigerian law deals with compensation for victims of oil pollution. Is the compensation provided under the law adequate, if not what can be done to remedy this defect?¹²⁴

1.3.2 *The history of oil exploration in Nigeria*

The history of oil exploration in Nigeria dates back to 1908 when a German Company came to Nigeria to prospect for oil. The German company established a Nigerian subsidiary known as the Nigerian Bitumen Company which came into the present Ondo State of Nigeria to prospect for bitumen (tar sands). However the activities of the company were permanently interrupted by the First World War (1914-1918).¹²⁵

Oil exploration activities resumed in 1937 when an Anglo- Dutch Consortium known as Shell D'Arcy (the forerunner of today's Shell Petroleum Development Company of Nigeria), came to the scene. The oil exploration activities were again interrupted by the Second World War (1939-1945) and it was not to resume operations until 1946 when Shell entered with a joint venture with British Petroleum.

The production of oil in commercial quantities began with the discovery of oil by the Shell D'Arcy Company and the British Petroleum Joint Venture at a village known as Oloibiri in the present day Bayelsa State in 1956. Following this discovery, crude oil shipment began to be exported to Europe. Since this development Nigeria has been contributing an average of 2 million barrels of oil per day to the world oil market. Currently, Nigeria's proven oil reserves are estimated to be about 35 billion barrels.¹²⁶

Oil companies operating in Nigeria have left in their trails contamination of the environment as a result of their oil exploration activities. The extent of this contamination depends on the

¹²³See further discussion of this in chapter 6.

¹²⁴See chapter 5 for further discussion on this.

¹²⁵ See Y Omorogbe, *The Legal Framework for the production of Petroleum in Nigeria* Journal of Energy and Natural Resources Law (1987) vol. 15 273.

¹²⁶ See detailed report at http://www.opec.org/opec_web/static_files_project/media/downloads/publication/ASB2009.pdf accessed August 31, 2010.

environmental practices and the technology used by the oil companies. Oil i.e. crude oil rarely exists on its own below the earth surface. It is often found in a mixture of natural gas, mud or sand and water. This formation contains a high concentration of hydrocarbons i.e. the compounds of hydrogen and carbon which when broken down produces fuel oils. When the crude oil is extracted, the ‘formation water’¹²⁷ found with the crude oil must be separated and treated before being discharged into the environment. This is because the water is toxic and can cause harm to fishes and humans who may ingest it. There is therefore a need to separate the water from the oil compounds. This is done at the oil refineries.

1.3.3.3 Summary of oil pollution problems

The summary of these findings are that oil pollution has grave consequences for the environment, on plants and animals, fishes, birds and humans and the scourge of this pollution is such as to threaten the survival of humans and all living things. It also poses a great threat to the safety of ships on the oceans thereby fettering the growth of international trade and the wealth of nations. The gradual degeneration of the environment both in terms of the quality and the quantity is alarming and this should pose grave concern to governments and policy makers. In the Nigerian context, the problems are myriad and the solutions to these problems shall be the preoccupation of this thesis.

As we shall see later, part of the problems arising from dealing with the effects of oil pollution on the environment has to do with the fragmentation of several regulatory agencies having overlapping functions. The laws that govern oil pollution are also scattered in various statute books, federal and state laws and international conventions inclusive. We shall look at this in greater detail when we discuss these laws in chapters three and four.

Further to this, an observation of the laws shows that they do not adequately provide for harm caused by oil pollution. This produces a negative effect on the law as victims of these harms are left with no redress. The statutory enactments and common law provisions will be examined in the course of this thesis to determine the adequacy or otherwise of these laws. Nigerian laws on the marine environment are also largely derived from International Conventions. Some of these International Conventions have provisions that deal with the issues of liability and compensation. Some of the International Conventions have been acceded to by Nigeria, while some are yet to be ratified, but some of the Conventions acceded

¹²⁷This is water found with oil at the time of oil exploration.

to have provisions that are yet to be domesticated which hamper the enforcement of these provisionsas regards the environment.

1.3.3.4 Statement of the research question

The central research question is: What is the state of Nigerian law on oil pollution particularly with regard to liability and compensation for victims of oil pollution with a view to making recommendations for reform of the law and policy. A positive aspect of the law as we shall see is that it seeks to prevent harm to the environment, although it is another thing to determine how effective it is in doing this. Sub- questions will be: Does the law as it is provide adequate remedies for victims of oil pollution? Where oil spills occur inland, are the victims able to seek adequate remedies under the law? With the knowledge that oil spillage has a deleterious effect on the environment, should Nigeria stop oil exploration entirely? This solution may not be feasible because of the importance of oil as the mainstay of the Nigerian economy. A more practical solution would be to lessen the effect of oil spillage on the environment through either preventing the spillage from occurring or after it has occurred to see how to restore the environment to its pre-impact status. This is not without some cost. The study will look into the incidence of cost as it seeks to examine the laws and regulation in order to evaluate them in the light of theories like the polluter pays principle, the preventive principle etc.

The study will also examine the provisions on remediation of the environment where harm has already been done. We will also examine if there is any provision under our law that seeks to compensate the victim for any harm done to him or her. This shall be examined in greater detail when we look at the statutory and common law remedies provided for oil pollution in Nigeria. On the international sphere, are there adequate remedies for dealing with oil pollution occurring on the territorial and international waters of Nigeria? Are Nigerian laws in line with international best practices when measured alongside international standards? Is Nigeria lagging behind and is there a need to catch up? In answering these questions this thesis shall have recourse to the laws in other countries to see how they have dealt with similar problems and how Nigerian legislators and policy makers may borrow a leaf from this.

1. 3.4.5 Research methodology

The research methodology will be desktop-based and will involve an examination of the primary and secondary sources of the laws and regulations on the environment especially with emphasis on liability and compensation for damage arising from oil pollution in Nigeria. Where necessary recourse will be made to the internet sources to obtain materials that will be used to conduct comparative studies with the other countries.

The research methodology will also utilize the analytical approach which involves a study of the concepts and definitions of terms in the environmental law context. A contextual analysis of the laws of Nigeria is also examined in the context of primary and secondary sources of the law on oil pollution. A comparative study of the law between the United States of America, being a maritime country with advanced law on oil pollution and South Africa, being an African country with similar development with Nigeria, is also carried out to derive recommendations for the improvement of Nigerian law on oil pollution.

1.3.4.6 Definition of some important terms relevant to the study

(1) Inland waterways- inland waterways include all waterways, rivers, creeks, lakes, tidelands, lagoons below the low water baselines of Nigeria as defined in the National Waterways Act. The waterways are used for navigation by seagoing ships. These include navigable waterways, inland waterways, river ports and internal waters of Nigeria, excluding all direct approaches to port under or pursuant to the Nigerian Ports Authority Act up to 250 metres beyond the upstream edge of quay of such ports, and shall be under exclusive management, direction and control of the National Inland Waterways Authority.¹²⁸

(2) Inland water means all waters on the landward side of the baseline of the territorial sea¹²⁹. The study refers to this body of water as freshwater.

(3) The Territorial Waters of Nigeria:-

The act which governs the territorial water of Nigeria defined it as follows:

The territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from low water mark) or of the seaward limits of inland waters¹³⁰

¹²⁸See s 11 of the National Inland Waterways Authority (NIWA) Act. See also the case of Gani-Tarzan Maritime Enterprises Ltd. v Caravelle Resources and Investment Ltd. & anr (2011) 14 NWLR (Pt 1266) 125 at 150.

¹²⁹ Section 29 of the Act.

The maritime waters for the purpose of this study refer to the navigable rivers of Nigeria, within the country and the oceans. These are the inland waterways, the coastal waters and the seas including the oceans.¹³¹ Offshore oil drilling has become a main source of petroleum yielding additional reserves to Nigeria and therefore of importance in its revenue potential. The prospecting for petroleum resources is also fraught with the pollution of the environment through oil spillages arising from this operation. The study will also examine the problems associated with this. The legal regulation of the offshore drilling activities will also be examined in order to forestall any form of circumvention of existing regulations, if any, by the operators. Marine water refers to the body of water which forms the seas and oceans and is generally saline. All other terms shall be explained in the course of this thesis.

1.4 .1 Summary of Chapters and conclusions

The thesis is divided into eight chapters. Chapter one contains the background to the study. It examines the problem associated with oil pollution in all its ramifications. Oil pollution being an inevitable consequence of development cannot be completely wiped out hence there is a need to control its deleterious effects. Chapter two discusses the theoretical foundation which underpins the oil pollution laws on the environment in the light of the emerging environment law principles of sustainable development; the polluter pays principle, the preventive principle and the tool of strict liability. Chapter three examines International Conventions governing the pollution of the marine environment with particular reference to oil pollution. Chapter four discusses the law and governance of oil pollution issues in Nigeria. It also examines the oil industry and its importance to the economy of Nigeria. Chapter five discusses aspects of the law relating to inland water pollution by oil. In this regard the thesis considered the problems associated with the transportation of crude oil through the inland waters by vessels and/ or by oil pipelines. Chapters six and seven are comparative studies of the United States of America and the Republic of South Africa with the laws of Nigeria in order to elicit the strengths and weaknesses of these laws on oil pollution and as a benchmark for measuring the Nigerian system. Chapter eight concludes with a summary of findings and recommendations for the government and policy makers.

¹³⁰ S. 1 of the Territorial Waters Act Cap T5 LFN 2004 prescribed the territorial waters of Nigeria as 12 nautical miles from the baseline from which the breadth of the territorial sea is measured.

¹³¹ See the second schedule made pursuant to s. 10 of the National Inland Waterways Act supra.

The thesis explored Nigerian law, statutes, received Common Law and Equity together with the policy of government to know to what extent the laws provide for liability and compensation for victims of oil pollution. A set of recommendations and conclusion are provided at the end of the analyses.

Chapter 2: Theoretical bases for dealing with oil pollution problems

Since the preservation of mankind required the sustainability of essential resources necessary for the preservation of life, the goal of human social flourishing would have seemed, to the seventeenth century mind, to be in complete harmony with a goal of preserving and enhancing the natural environment. Property rights were thus inherently and intrinsically tied to environmental responsibilities.¹³²

2.1 Introduction

We have seen in chapter one the danger that oil pollution poses to the environment if not controlled. The operators in the oil industry, namely the multinational oil companies do not go out to ensure adequate protection of the environment being companies that are out to make profits for themselves and their shareholders. It is the duty of the government, the various regulatory authorities as revenue earners from the taxes imposed on these oil companies, to deploy adequate policies for the protection of the environment. There has been no want in the number of laws and regulations deployed by the government and the agencies in this regard. However, the environment is continually abused and degraded despite the existence of these laws and the regulations. The aim of this chapter is to set out yardsticks against which the laws and regulations will be measured. The laws or regulations shall be evaluated based on the principles enunciated by the United Nations and their specialised agencies under the emerging international law theories on the environment¹³³ like the principle of sustainable development, the principle of prevention of harm to the environment¹³⁴, the precautionary principle, the polluter pays principle and the tool of strict or absolute liability.

2.2 The National Policy on the Environment

One noticeable feature with regard to Nigerian laws on the protection of the environment is that the laws evolved in a manner that was consistent with a national policy on the environment. The National Policy on the Environment was the brainwork of the Federal Environmental Protection Agency (FEPA). An agency created by the Federal Government of

¹³² S Coyle & K Morrow *The Philosophical Foundations of Environmental Law*, (2004) 50-51.

¹³³ These principles are the bedrock of customary international law- one of the key sources of international environmental law and these principles shall be elaborated upon in this chapter and also in chapter four.

¹³⁴ The principle of prevention of harm to the environment, otherwise called the preventive principle, along with the principle of sustainable development are the twin pillars of customary international law. Countries are to refrain from acts that would endanger harm to the environment of another neighbour country. This was enunciated in the *Trail Smelter Arbitration U.S v Canada* 1931-1941, 3 U.N.R.I.A.A 1905. See further discussion below (n 224). The principle of prevention also featured prominently in the consideration of the judgment of the International Court of Justice (ICJ) in the case involving *The Republic of Argentina v The Republic of Uruguay* (The Pulp Mills Case). See full discussion on this case later on in this chapter.

Nigeria in the wake of the Koko incident. The Agency was put directly under the Presidency during the administration of General I. B. Babanginda. The Agency was headed by the Director – General who was directly responsible to the military President.

The National Policy on the Environment (NPE) states in paragraph 8 under the subject heading “Legal Arrangement” thus:

The legal framework as a component of the national environmental policy should be designed as an instrument that recognises the need to achieve a balance between environment, development and socio-economic considerations.

To ensure this role, action shall be taken to:

- a. periodically evaluate current legislation with a view to updating existing provisions;
- b. streamline all legislation and regulations relating to the environment with a view to re-organising them into a holistic and integrated compact that recognises the cross-sectoral linkages of the environment;
- c. prescribe jurisdictional boundaries for law making on the environment as well as provide clear responsibilities to promote coordination and eliminate overlapping of functions among the various tiers of government; provide for the development of appropriate law for environmental emergencies.¹³⁵

The thrust of this policy is to use legislation as a means of environmental protection towards achieving sustainable development in the domestic sphere:

- a. to secure a quality of environment adequate for good health and well-being;
- b. conserve and use the environment and natural resources for the benefit of present and future generations;
- c. restore, maintain and enhance the ecosystems and ecological processes essential for the functioning of the biosphere to preserve biological diversity, and the principle of optimum sustainable yield in the use of living natural resources and ecosystems;
- d. raise public awareness and promote understanding of essential linkages between the environment, resources and development; and encourage individual and community participation in environmental improvement efforts; and
- e. co-operate in good faith with other countries, international organisations and agencies to achieve optimal use of transboundary natural resources and effective prevention or abatement of transboundary environmental degradation.¹³⁶

¹³⁵ See s 8.0 titled Legal Arrangements of the National Policy on the Environment (Revised edition) at 39.

¹³⁶ See NPE publication op cit at 3. There was a provision in the former National Policy on the Environment (1989) clause 6.0 (c) which stated that action shall be taken to :- ... (a)
(b) ...

As part of its strategy of achieving the goal of sustainable development, the Nigerian National Assembly (Parliament) enacted a series of statutes to transform these policies into reality. The policy goal is to achieve sustainable development in the country.

Policy goal

The National Policy on the Environment is basically a programme of actions rooted in a conceptual framework within which the linkages between environmental problems on the one hand and their causes, effects and solutions on the other hand can be discerned. This is achieved in the Policy document through five major policy initiatives:

- a. preventive activities directed at the social, economic and political origins of the environmental problems;
- b. abatement, remedial and restorative activities directed at the specific problems identified, and in particular:
 - problems arising from industrial production processes;
 - problems caused by rapid population growth and the attendant excessive pressure of the population on the land and other resources; and problems due to rapid growth of urban centres.
- c. design and application of broad strategies for sustainable environmental protection and management at systemic or sub-systemic levels;
- d. enactment of necessary legal instruments designed to strengthen the activities and strategies recommended by this POLICY;
- e. establishment/emplacement of management organs, institutions and structures designed to achieve the policy objectives.¹³⁷

(c) make it a constitutional duty of governments... Federal, States and Local- to safeguard the environment and aspire to have a safe and healthy nation. This clause has been omitted in the Revised NPE (1999) without justification. The omission has led to the disregard for environmental rights by the various governments in the Federation and citizens who have been denied the right to a clean and healthy environment and thereby been denied access to court and remedy on the ground of lacking locus standi to institute the action. See the case of *Oronto Douglas v Shell Petroleum Development Co. Ltd.* (1999) 2 NWLR (pt 591) 1. This omission has been further criticised by MT Okorodudu-Fubara in her paper presented at a Workshop titled ‘New Issues in Environmental Law’ delivered at the World Environment Day Distinguished Lecture series 2011 made personally available to the candidate and is on file with the Candidate. (See page 10 of the paper). However the position of the law on locus standi and the justiciability of environmental rights has been changed with the enactment of section 20 of the Constitution and the enactment of a federal Rule, Fundamental Rights (Enforcement Procedure Rules, 2009 which came into effect on 1 December, 2009).

This rule made pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999 declares in its Preamble that “1. The Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially when it exercises any power given it by these Rules or any other law and whenever it applies or interprets any rule. 2. Parties and their legal representatives shall help the Court to further the overriding objectives of these Rules. 3. The overriding objectives of these Rules are as follows:

The Constitution, especially Chapter IV, as well as the African Charter, shall be *expansively* and *purposely* interpreted and applied, with a view to advancing and realising the rights and freedom (emphasis added) contained in them and affording the protection intended by them.

¹³⁷ See NPE policy goals as enunciated in NPE revised Policy (1999) at p. 4.

For instance, in the production process, it is the aim of the policy to eliminate oil wastes which may be hazardous to human and animal health. Oil wastes which are hazardous occur in the process of exploration, processing and production of crude oil into petroleum and in industries where petrochemicals are used in the production process. By the thrust of the policy document, hazardous wastes generators ought to be responsible for the management of their waste from *cradle to grave*.¹³⁸

Clearly it is the focus of the policy makers to use legislation as a tool to protect the environment from pollution and eliminate any harmful waste arising from the generation to the disposal of the harmful (hazardous waste). Thus the policy underpinning this law is to eliminate pollution from *cradle to grave*. However for guidance to the definition, I turn to the provision of section 15 of Act No. 42 which defined hazardous waste as:

Harmful waste means any injurious, poisonous, toxic or noxious substance, and in particular, includes nuclear waste emitting any radioactive substance if the waste is in such quantity, whether with any consignment of the same or by different substance, as to subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health; and the fact that the harmful waste is placed in a container shall not by itself be taken to exclude any risk which might be expected to arise from the harmful waste;¹³⁹

Notwithstanding this, it would appear that the Nigerian authorities prior to the *Koko* incident promulgated regulations for the protection of the environment on an *ad hoc* basis and without any national policy in mind. The *Koko*¹⁴⁰ incident arose in 1988 when some ship loads of toxic nuclear waste materials were dumped on a farm in Koko town near the Sapele river in the former Bendel State of Nigeria, now Delta State. The toxic materials were imported illegally from Italy by an unscrupulous contractor who did not have regard to the dangerous nature of the toxic/ nuclear wastes nor cared for the health of the about 15, 000 local inhabitants of the village where it was dumped. In a swift response, the Federal Government enacted the Harmful Wastes (Special Criminal Provisions) Decree¹⁴¹ which prescribes that under section 1 of the Act that it is an offence for anyone without lawful authority to carry, deposit or possess any harmful waste for the purpose of dumping, and anyone who imports, or negotiates; the importing or sale of, harmful waste equally commits an offence.

¹³⁸ The **cradle to grave** principle entails that steps be taken from the stage of commencement of production and afterwards to the disposal of the product to reduce or eliminate pollution.

¹³⁹ S 15 of Act 42 of 1988.

¹⁴⁰See Sylvia F Liu, The Koko Incident: Developing International Norms for the Transboundary Movement of Hazardous Waste, 8 J. Nat. Resources & Env't L. 121 at 131 in B Chator & K Gray op cit fn 32.

¹⁴¹ Now Act no 42 of 1988.

Furthermore, under section 6 the penalty for the offence created shall be life imprisonment. Where the offender is a body corporate, the directors shall be liable, whether they acted knowingly or negligently, to life imprisonment.¹⁴²

The philosophical underpinnings of this law are the polluter pays principle and the prevention of harm principles. The Polluter Pays Principle will be dealt with here and the prevention of harm or preventive principle later on in this chapter. The Polluter Pays Principle (PPP) originated during the United Nations Conference on the Human Environment (UNCHE) held in Stockholm on June 16 1972.¹⁴³ The principle entails that a person who produces pollution or is involved in any polluting activity be responsible for the costs of preventing and dealing with any pollution caused by that activity, instead of having the costs passed to somebody else. In other words, the costs of preventing pollution should be paid by those responsible for the pollution. The costs also include the cost of remedying the environment or restoring the environment to the state in which it was before the introduction of the pollution. I shall critically discuss the polluter pays principle when we discuss the use of strict liability as a tool for assessing damage done to the environment later on in this chapter.

2.3.1 The precautionary principle

The next most important conference after Stockholm that enunciated the precautionary principle in the protection of the environment is the Rio Conference.¹⁴⁴ The principle had its origin in the West German environmental law notion of the *Vorsorgeprinzip*, the principle of foresight.¹⁴⁵ It is enunciated in Principle 15 of the Rio Declaration which states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of a serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

¹⁴² See s 15 of the Act which provides for life imprisonment for the offence. See also M T Okorodudu-Fubara, *Law of Environmental Protection*, 150, who tends to justify such harsh punishment on the ground that the Federal Government of Nigeria enacted the harsh Decree to protect the land and health of Nigeria during a period of rampant dumping of toxic wastes by hostile states.

¹⁴³ Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf. 48/14/Rev. Although originally recommended by the Organisation for Economic Cooperation and Development (OECD) Council in May 1972, the polluter pays principle is still highly controversial, particularly in developing countries where the burden of internalising environmental cost is perceived as being too high. See further D Hunter J Salzman and D Zaelke *International Environmental Law and Policy* (2002) 412.

¹⁴⁴ The United Nations Conference on Environment and Development (UNCED) also known as the Rio or the ‘Earth’ Summit took place in Rio de Janeiro, Brazil, on 3-14 June 1992. The Declarations of the Principles enunciated at the Summit are contained in the UNEP Handbook on Environmental Law. It also contains Agenda 21, the implementation strategy for the Declaration.

¹⁴⁵ J Glazewski *Environmental Law in South Africa* (2005) 2nd edition, 18.

The precautionary principle provides guidance in the development and application of environmental law where there is scientific uncertainty. Under the National Policy on the Environment, this principle is recognised.¹⁴⁶ The principle assumes that natural systems are vulnerable rather than disposable.¹⁴⁷ It prefers prevention to remediation, focuses on the relevance of scientific data to developmental decision-making and carries an obligation to take precautionary measures in proportion to potential damage.¹⁴⁸ It is akin to the concept of reasonable foreseeability of harm in the law of tort, and is preventive in nature.¹⁴⁹ The principle has been accepted into many international treaties. Article 3 of the United Nations Framework Convention on Climate Change¹⁵⁰ provides:

The parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific uncertainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.

In the same vein, section 4(3) (f) of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of Hazardous Wastes within Africa,¹⁵¹

... requires that each party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails *inter alia*, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking appropriate measures to implement the precautionary principle to pollution prevention through application of Clean Production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumption.

Translating the principle into action can have far-reaching practical application. It involves taking preventive action and willingness to take action in advance of scientific proof or evidence of the need for action. A wholesome application of this principle at municipal level will require a national government to take decisions and measures to curtail activities that may likely have an adverse impact on the environment. It will also require activities and

¹⁴⁶ See below.

¹⁴⁷ Amokaye, *op cit* 97.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Id.*

¹⁵⁰ 31 I.L.M 849 (1992).

¹⁵¹ 30 I.L.M (1991), henceforth Bamako Convention. See also Art 3(1) to the 1996 Protocol to the London Convention. Nigeria has ratified the Bamako Convention.

substances which may be harmful to the environment to be regulated, even if no conclusive or overwhelming evidence is available as to the harm they may cause to the environment.¹⁵²

Policies aimed at preventing pollution such as waste minimisation through design changes, input substitutions and other Clean Production methods should be encouraged.¹⁵³

The NPE next provides for the operation of the precautionary principle which is defined as:-

The precautionary principle which holds that where there are threats of serious or irreversible damage, the lack of full scientific knowledge shall not be used as a reason for postponing cost-effective means to prevent environmental degradation¹⁵⁴

The *White Paper on Environmental Management in South Africa*¹⁵⁵ recognises the concept of the precautionary principle which was the underlying objective of section 28 of the National Environmental Management Act (NEMA).¹⁵⁶ These principles contained in section 2(1) of the Act are to ‘serve as the general framework for environmental plans;’¹⁵⁷ serve as guidelines by reference to which any organ of state must exercise any function when taking decisions in terms of NEMA or any other Act concerning the environment;¹⁵⁸ ‘serve as the principle by which a conciliator must act’¹⁵⁹ and finally ‘guide the interpretation, administration and implementation of this Act and any other law concerned with the protection and management of the environment.’¹⁶⁰

Unlike South Africa, Nigeria has no comprehensive legislation on the management of the environment in the nature of NEMA. The regulatory agencies confer functions depending on the subject matter and the enabling law that brings them into existence. This can sometimes be problematic where there are various regulatory agencies performing similar or sometimes conflicting functions. In the case of the Federal Environmental Protection Agency Act (FEPA):¹⁶¹

The agency shall, subject to this Act have responsibility for the protection and development of the environment and biodiversity conservation and sustainable development of Nigeria’s

¹⁵² Amokaye, op cit 99.

¹⁵³ Ibid.

¹⁵⁴ See NPE op cit at p 1.

¹⁵⁵ Published in GN 749 In GG 18894 of 15 May 1998.

¹⁵⁶ Act 107 of 1998.

¹⁵⁷ S 2(1) (b).

¹⁵⁸ S2(1) (c)

¹⁵⁹ S2(1) (d).

¹⁶⁰ S2(1) (e).

¹⁶¹ See Cap 131 Laws of the Federation of Nigeria, 1990, as amended by the Federal Environmental Protection (Amendment) Decree (now Act) No. 59 of 1992 and further amended by FEPA (Amendment) Decree (now Act) No. 14 of 1999.

natural resources in general and environmental technology, including initiation of policy in relation to environmental research and technology.¹⁶²

This section 5 has been repealed and re-enacted as section 7 of the NESREA Act¹⁶³ which is responsible for the enforcement of standards on the environment. Section 7 includes other functions like enforcing environmental control measures through registration, licencing and permitting systems other than the oil and gas sector;¹⁶⁴ and presumably this includes setting standards and issuing authorisation and permits to companies or individuals who are engaged in activities that may pollute the air, water and land of Nigeria. The emphasis on the issuance of these permits or authorisation in industries ‘other than the oil and gas sector’ presupposes that the Agency will have power to set standards over the oil and gas sector. It will also have power to enforce these standards. The Directorate of Petroleum Resources (DPR) is already saddled with this function i.e issue permits and authorisation and set standards.¹⁶⁵ It is a duplication of functions and leads to fragmentation of agencies to include this as part of the function of NESREA.¹⁶⁶

2.4 *The concept of sustainable development*

Although as we stated earlier, the Brundtland Report brought the concept of sustainable development to the limelight,¹⁶⁷ the Brundtland Commission did not invent the term sustainable development.¹⁶⁸ The Commission’s definition of sustainable development remains the most famous of the term: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.¹⁶⁹ Six months prior to the Stockholm Conference, developing countries of the world sponsored and passed a resolution on development and environment specifically aimed at influencing the outcome of the Conference. The resolution emphasized the developing countries’ strong desire that global concerns over environmental protection should not interfere with their development agenda and that environmental policy should be left to the individual States.¹⁷⁰ In a

¹⁶² S 5 of the FEPA Act.

¹⁶³ See s 7 (e) of the National Environmental Standards and Regulations Enforcement Agency Act (NESREA) no. 25 of 2007 which provides: s 7 The Agency shall ‘enforce compliance with guidelines and legislations on sustainable development of the ecosystem, biodiversity conservation and the development of Nigeria’s natural resources,’

¹⁶⁴ S 7(j).

¹⁶⁵ See further Part 1 of EGASPIN (2002).

¹⁶⁶ See further discussion on the function of the DPR in chapter 4.

¹⁶⁷ See s 1.1.2 above.

¹⁶⁸ Hunter, Salzman , and Zaelke, op cit 180.

¹⁶⁹Ibid.

¹⁷⁰ Hunter, Salzman and Zaelke *op cit* at 171.

publication titled “*Only One Earth*”, a background report to the conference authored by Barbara Ward and Renee Dubois, it was declared:

“Now that mankind is in the process of completing the colonization of the planet, learning to manage it intelligently is an urgent imperative. Man must accept responsibility for the stewardship of the earth...” The word stewardship implies, of course, management for the sake of someone else. But in practice the charge of the U.N. to the Conference was clearly to define what should be done to maintain the earth “as a place suitable for human life not only now, but also for future generations.”¹⁷¹

The opinions canvassed by these authors paved the way for the more famous ‘*Our Common Future*’ described earlier on. The Stockholm Conference had three major products: The Action Plan to protect the global environment, the United Nations Environment Programme and the related Environment Fund; and the Stockholm Declaration on the Human Environment.¹⁷²

In the opinion of Hunter, Salzman and Zaelke, without using the term, the *Stockholm Declaration* helped to lay the groundwork for the subsequent acceptance of the concept of sustainable development. The *Declaration* emphasized the importance of integrating environment and development, of reducing and eliminating pollution, and of controlling the use of renewable and non-renewable resources.¹⁷³ The most important principles of the *Stockholm Declaration* are principles 1 and 21 which state:

Principle 1 states:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

And Principle 21 states:

States have, in accordance with the Charter of the United Nations and the principles of International law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

¹⁷¹ Text of B Ward & R Dubos, *Only One Earth: The Care and Maintenance of A Small Planet* (1972) at 9 found in Hunter and Zaelke, op cit 173.

¹⁷² Hunter and Zaelke op cit 174.

¹⁷³ ibid.

This Principle 21 was repeated almost exactly as Principle 2 of the *Rio Declaration* and is now recognized as an important cornerstone of the statement of customary international environmental law.¹⁷⁴

The “three pillars” of sustainable development are economic development, social development and environmental protection.¹⁷⁵ These three pillars are equally important and need to be pursued simultaneously and with equal effort. A useful analogy is an African three-legged cooking pot: unless all the legs are equal in length and strength the pot will be unstable.¹⁷⁶

What is to be ‘sustained’ in sustainable development? Hunter et al posit there are three things. (a) Nature, (b) life support systems, and (c) community. The first life to be supported is that of humans. Subsumed in this group are emphasis on the classic natural resources- which while found in nature, are particularly useful for people. These natural resources are classified as either renewable or non-renewable, flow or stock, these resources have preoccupied many generations seeking to exploit, conserve or preserve them.¹⁷⁷ Others are forms of production-primary products and production inputs to include the value of aesthetics, recreation and the absorption and cleansing of pollution and waste.¹⁷⁸

The concept of sustainable development was also the focus of the World Summit on Sustainable Development (WSSD) which took place in Johannesburg, South Africa in 1992. The Conference deliberated on the dimensions of sustainable development which include ensuring coherence and consistency in policy formulation; promoting transparency and participation; strengthening policy formulation and coordination; integrating sustainable development priorities into macroeconomic policies; reforming structures and processes of

¹⁷⁴ This is known as the principle of state responsibility and is complemented by the duty of states to give notification of disasters or emergencies likely to harm other states and possibly by entering into consultation with them. The need for notification and consultation in cases of transboundary environmental risk is grounded in customary international law as established in the two old cases of *Corfu Channel* and the *Lac Lanoux*. See fn 125 in I. O. Smith *Sustainable Development and Environmental Diplomacy: Reconciling Economic Growth with Environmental Protection By the Year 2000 and Beyond* in Simpson & Fagbun, *Environmental Law and Policy* (1998) 244 at 264.

¹⁷⁵ M Kidd *Environmental Law* (2011) 16.

¹⁷⁶ Ibid.

¹⁷⁷ Hunter et al at 2006.

¹⁷⁸ Ibid.

international finance and trade institutions; and promoting fair and equitable in the World Trade Organization (WTO).¹⁷⁹

2.4.1 Sustainable development and governance

Sustainable development has been effective as a slogan in shaping the policy of government. The concept as we stated earlier evolved out of the need to connect the three ends of the tripod: economic development, social development and environmental protection. The concept has also proved resilient according to Meadowcroft:¹⁸⁰

...(in) tackling the essential dilemma confronting the modern world- “how to continue the quest for progress in a context where the basic needs of much of the world’s population are not being met, while the pressures humankind is imposing on the global environment are already having grave and irreversible consequences- while leaving relatively open the precise definition of the problems and solutions.¹⁸¹

The author went further to propose six uses that sustainable development may be put to enhance governance. The first is that the idea of sustainable development was formulated because of dissatisfaction with the existing ‘unsustainable’ patterns. So, improved governance is required to change the ‘trajectory’ onto more sustainable lines.¹⁸² The second use is the need to steer human societies in desirable directions. The third use is the development of a change agenda which will bring about a profound transformation of current practices. Fourthly, collaboration is needed among all sorts of societal actors, including businesses, civil–society organisation, and ordinary citizens to bring about deep–seated reforms. Fifthly, government at all levels is to play an active role to back up the change agenda because they have the financial, organisational and legal resources to do so. And finally that democratic government and institutions are required to bring about the aforesaid change.¹⁸³ The author concludes that the experience over the past two decades suggests that one cannot make progress towards sustainability without new governance mechanisms, and that there is also a critical place for good old-fashioned- regulative and redistributive-state action.¹⁸⁴

¹⁷⁹ See J Bernstein Sustainable Development Governance Challenges in the New Millennium in *International Environmental Law-Making and Diplomacy Review* (2004) 31 at 32.

¹⁸⁰ J Meadowcroft Sustainable Development in *The SAGE Handbook of Governance M Bevir* (ed.) (2011) at 537.

¹⁸¹ At 536.

¹⁸² Ibid.

¹⁸³ At 537.

¹⁸⁴ At 539.

The principle of sustainable development has also been given judicial recognition by the International Court of Justice (ICJ) in a dispute involving *Hungary v Slovakia*.¹⁸⁵ The ICJ was confronted for the first time with the issue of how to balance environmental protection with the need for development.¹⁸⁶ The Gabčíkovo case revolved around a 1977 treaty between Hungary and Czechoslovakia (to which Slovakia was the successor) to build and jointly operate a system of locks on the Danube River. Articles 15 and 19 of the treaty provided that the parties would ensure that water quality in the Danube would not be impaired by the project. Hungary suspended work on the project due to opposition from the Hungarian public on the environmental consequences of the project. When Hungary refused to resume work on the project, Slovakia unilaterally constructed and eventually put the project to operation by drastically reducing the flow of the Danube downstream thus affecting Hungary's interest in the river.

In the course of its analysis, the Court acknowledged the existence of environmental norms as part of the general corpus of international law. In reconciling the environmental and developmental conflicts of the situation, the Court directed the parties to consider the principle of sustainable development, a principle that both Hungary and Slovakia agreed was applicable to the situation.¹⁸⁷

In a separate opinion, Judge Weeramantry declared that the principle of sustainable development is “thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.”¹⁸⁸

2.4.2 Nigeria and sustainable development

The Nigerian government fully subscribes to the concept of sustainable development as evident in its incorporation into the NPE as stated earlier. It provides thus:

¹⁸⁵ The Gabčíkovo-Nagymaros Project decided by the ICJ on September 25 1997. 1997 ICJ 7; Reprinted in 37 ILM 162 (1998).

¹⁸⁶ op cit 336.

¹⁸⁷ Hunter and Zaelke at 337.

¹⁸⁸Id at 346. Judge Weeramantry’s opinion is that the concept of sustainable development are universal legal principles applicable not just to Slovakia and Hungary in determining issues of development and environment but sustainable development exists independent of enacted laws and that can only be determined by rational intelligence. He posed a question why modern irrigation systems fail after some years and traditional irrigation systems survive generations of humans. He therefore concluded that the principles of sustainable development are principles *erga omnes* i.e. principles owed to the community of states- as opposed to any one specific state.

Nigeria is committed to a national environmental policy that will ensure sustainable development based on proper management of the environment. This demands positive and realistic planning that balances human needs against the carrying capacity of the environment. This requires that a number of complementary policies, strategies and management approaches are put in place which should ensure, among others, that:

- * environmental concerns are integrated into major economic decision-making process;
- * environmental remediation costs are built into major development projects;
- * economic instruments are employed in the management of natural resources;
- * environmentally friendly technologies are applied;
- * Environmental Impact Assessment is mandatorily carried out before any major development project is embarked on.¹⁸⁹

This policy, in order to succeed must be built on the following sustainable development principles:¹⁹⁰

- The precautionary principle which holds that where there are threats of serious or irreversible damage, the lack of full scientific knowledge shall not be used as a reason for postponing cost-effective means to prevent environmental degradation;
- Pollution Prevention Pays Principle (3p+) which encourages Industry to invest positively to prevent pollution;
- The polluter pays principle (PPP) which suggests that the polluter should bear the cost of preventing and controlling pollution;
- The user pays principle (UPP), in which the cost of a resource to a user must include all the environmental costs associated with its extraction, transformation and use (including the costs of alternative or future uses forgone);
- The principle of intergenerational equity which requires that the needs of the present generation are met without compromising the ability of future generations to meet their own needs;
- The principle of intra-generational equity which requires that different groups of people within the country and within the present generation have the right to benefit equally from the exploitation of resources and that they have an equal right to a clean and healthy environment; and
- The subsidiary principle which requires that decisions should as much as possible be made by communities affected or on their behalf by the authorities closest to them.¹⁹¹

The subsidiary principle has been deleted from the first draft of the 1999 Revised Policy and is being replaced with the principle of Participation which provides thus:

The Principle of Participation which requires that decisions should as much as possible be made by communities affected or on their behalf by the authorities closest to them.¹⁹²

¹⁸⁹National Policy on the Environment, NPE 1999 1. The Revised Policy (1999) added a new bullet point “Environmental monitoring and auditing of existing major development projects are routinely carried out”.

¹⁹⁰ My analysis of the policy.

¹⁹¹At page 2.The revised NPE (1999) deleted the subsidiary principle and replaced with the Principle of Participation. See page 1 of the revised policy. A new paragraph “Environmental Monitoring and Auditing of existing major development projects are routinely carried out” has also been added. See page 42 of the Revised Policy (1999).

This new policy thrust is based on fundamental re-thinking and a clearer appreciation of the interdependent linkages among development processes, environmental factors as well as human and natural resources. Since development remains a national priority, it is recognized that the actions designed to increase the productivity of the society and meet the essential needs of the populace must be reconciled with environmental issues that had hitherto been neglected or not given sufficient attention.

The Policy has as its main objectives the achievement of sustainable development in Nigeria and in particular to:

- a. secure a quality of environment adequate for good health and well-being;
- b. conserve and use the environment and natural resources for the benefit of present and future generations;
- c. restore, maintain and enhance the ecosystems and ecological processes essential for the functioning of the biosphere to preserve biological diversity and the principle of optimum sustainable yield in the use of living natural resources and ecosystems
- d. raise public awareness and promote understanding of the essential linkages between the environment, resources and development, and encourage individual and community participation in environmental improvement efforts; and
- e. co-operate in good faith with other countries, international organisations and agencies to achieve optimal use of transboundary natural resources and effective prevention or abatement of transboundary environmental degradation.¹⁹³

These policy objectives are lofty and well conceptualised. In furtherance of these objectives, appropriate legislation and institutional frameworks have been put in place.

The Federal Environmental Protection Agency (FEPA) is a case in point. The successor to the Federal Environmental Protection Agency (FEPA),¹⁹⁴ the National Environmental Standards and Regulation Enforcement Agency, the (NESREA) also has sustainable development of the nation's resources as its cardinal objectives. The legislature has also translated the concept of sustainable development into reality through the enactment of the following subsidiary regulations under the NESREA Act. They are:

¹⁹² The subsidiary principle was not defined in the draft Policy before its deletion from the final draft. Even the current 1999 NPE Revised Policy is yet to be adopted by the relevant authorities and may still undergo further policy alterations.

¹⁹³ At page 3.

¹⁹⁴ FEPA as an environmental protection agency has been abolished and its functions replaced by a new agency the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act no 25 2007 promulgated by Government Notice No. 61 of 2007. However the regulations enacted under the defunct FEPA are still in force.

- National Environmental (Wetlands, River Banks and Lake Shores Protection) Regulations;¹⁹⁵
- National Environmental (Watershed, Mountainous, Hilly and Catchment Areas) Regulations;¹⁹⁶
- National Environmental (Sanitation and Wastes Control) Regulations;¹⁹⁷
- National Environmental (Permitting and Licensing System) Regulations;¹⁹⁸
- National Environmental (Access to Genetic Resources and Benefit Sharing) Regulations;¹⁹⁹
- National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations;²⁰⁰
- National Environmental (Ozone Layer Protection) Regulations;²⁰¹
- National Environmental (Food, Beverages and Tobacco Sector) Regulations;²⁰²
- National Environmental (Textile, Wearing Apparel, Leather and Footwear Industry) Regulations;²⁰³
- National Environmental (Noise Standards and Control) Regulations;²⁰⁴ and
- National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations.²⁰⁵

Others enacted in 2011 are

- National Environmental (Protection of Endangered Species in International Trade) Regulations;²⁰⁶
- National Environmental (Soil Erosion and Flood Control) Regulations;²⁰⁷
- National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations;²⁰⁸
- National Environmental (Desertification Control and Drought Mitigation) Regulations;²⁰⁹
- National Environmental (Surface and Groundwater Quality Control) Regulations;²¹⁰

¹⁹⁵S.1.26 of 2009.

¹⁹⁶S.1. 27 of 2009.

¹⁹⁷S.1. 28 of 2009.

¹⁹⁸S.1 29 of 2009.

¹⁹⁹S.1.30 of 2009.

²⁰⁰S.1.31 of 2009.

²⁰¹S.1.32 of 2009.

²⁰²S.1.33 of 2009.

²⁰³S.1.34 of 2009.

²⁰⁴S.1.35 of 2009.

²⁰⁵S.1.36 of 2009.

²⁰⁶S.1.16 of 2011.

²⁰⁷S.1.12 of 2011.

²⁰⁸S.1.15 of 2011.

²⁰⁹S.1.13 of 2011.

²¹⁰S.1.22 of 2011.

- National Environmental (Coastal and Marine Area Protection) Regulations;²¹¹
- National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations;²¹²
- National Environmental (Electrical/Electronic Sector) Regulations;²¹³
- National Environmental (Non-Metallic Minerals Manufacturing Industries Sector) Regulations²¹⁴
- National Environmental (Construction Sector) Regulations;²¹⁵
- National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations;²¹⁶
- National Environmental (Base Metals, Iron and Steel Manufacturing/Recycling Industries Sector) Regulations;²¹⁷ and
- National Environmental (Domestic and Industrial Plastic, Rubber and Foam Sector) Regulations²¹⁸

Inherent in these Regulations are salient areas of synergy and features relevant for regulating the environment.²¹⁹ Some points of synergy include: the adoption of licensing and permit system; the inclusion of the polluter pays principle; the use of environmental management plans; the introduction of effluent pollution abatement measures; the use of monthly discharge monitoring report; the recognition of environmental auditing; obligations to embrace best practices; and the implementation of stiffer fines, punishment and sentencing; and capacity building initiatives.²²⁰

In South Africa, the concept of sustainable development has been invoked by the Constitutional Court to protect the environment in order to give effect to section 24 of the Constitution which deals with the recognition of environmental rights. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management*,

²¹¹S.1.18 of 2011.

²¹²S.1.20 of 2011.

²¹³S.1.23 of 2011.

²¹⁴S.1.21 of 2011.

²¹⁵S.1.21 of 2011.

²¹⁶S.1.11 of 2011.

²¹⁷S.1.14 of 2011.

²¹⁸S.1.17 of 2011.

²¹⁹ See for further reading M T Ladan Review of NESREA Act 2007 and Regulations 2009-2011: A new dawn in Environmental Compliance and Enforcement in Nigeria LEADS Journal vol.8/1/2012 116 available at www.lead-journal.org/content/12116.pdf accessed 2/2/2014.

²²⁰See also M T Okorodudu-Fubara *Country Report: Nigeria Legal Developments, 2009-2011* IUCN Academy of Environmental Law e-Journal Issue 2012(1), 170.

Department of Agriculture, Conservation and Environment, Mpumalanga Province,²²¹ the Court stated that-

The role of the courts is especially important in the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyments of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. The trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out.²²²

The Nigerian governments, both Federal States and Local governments also subscribe to the principle as expounded earlier on in the National Policy on the Environment.²²³ However, appropriate governance, management and delivery systems as well as legal mechanisms are still urgently needed, especially at the national (state) and local levels, to develop the necessary social, political, and financial capacity required to operationalise sustainable development.²²⁴

To operationalise sustainable development, it is necessary for the government at all levels, federal, state, and local governments to realise that there is a present ‘unsustainable trend in natural resources utilisation’. By this we mean that all the focus so far has been on the maximum exploitation of one resource- oil. This is a dangerous reliance as oil deposit is a finite resource and can be depleted at any time. As this thesis asserted, oil earnings account for about 97% of the earnings of the country. The overreliance on this single resource will definitely lead to over-exploitation and consequently depletion. Apart from this problem, the existing pattern of neglect and the pollution of the environment by the oil operators because they happen to be the ‘cash cow’ of the economy will eventually lead to environmental degradation, loss of aesthetic value, poor yield from agricultural produce, unemployment and poverty. Attempts should therefore be made in the present to douse tension in the oil sector by diversifying the economic base of the country, focusing on the hitherto moribund mineral

²²¹2007 (6) SA 4 (CC). See also *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd.*, 2008 (2) SA 319 (CC).

²²²Para 102. See also E Couzens *Filling station jurisprudence: Environmental Law in South African Courts and the Judgment in Fuel Retailers Association of Southern Africa v D-G Environmental Management*, et al (2008) SAJELP vol. 15 pt. 1 23.

²²³The Nigerian state operates a three -tier systems of government comprising of the federal government at the centre, the state government and the local governments. There are at present thirty-six states in the federation and each state has state Houses of Assembly that make laws for the state. These laws are made on subjects that are outside the Exclusive Legislative List of the Federal government. Matters on the Exclusive List include defence, banking, currency, marriages, etc.

²²⁴K Nnadozie Environmental Regulation of the Oil and Gas Industry in Nigeria in B Chator and K Gray (eds) *International Environmental Law and Policy in Africa* (2003) 103 at 107.

sector, towards eradication of poverty and socio-economic growth and development of Nigeria.²²⁵

2.4.3 The preventive principle

The Nigerian law on the environment is also underpinned by the preventive principle. An obligation of prevention also emerges from the international responsibility not to cause significant damage to the environment extra-territorially.²²⁶ The preventive approach seeks to avoid harm (to the environment) irrespective of whether or not there is transboundary impact or international responsibility.²²⁷

In the case involving two neighbouring countries that share a common natural resource like a water way, the preventive principle is to be applied in such a way that country A will refrain from acts that will affect the sharing of the resource by country B or put in another way, country A would need to put country B in contemplation before engaging in acts that would affect the interests of country B. In the *Pulp Mills* case²²⁸ Argentina sued Uruguay in the International Court of Justice (ICJ) arguing, amongst other things, that Uruguay had breached a Treaty obligation to consult before doing anything that might affect the river Uruguay which is a natural waterway shared by both countries.

On 26 February 1975, the Argentine Republic had signed a Treaty with the Republic of Uruguay which entered into force on 18 September 1976 (hereinafter the 1975 Statute). By the terms of the treaty, Argentina claimed that the Republics of Uruguay and Argentina were to establish a joint regime for the use of the river. Under the 1975 Statute, any dispute between the parties which cannot be settled by direct negotiations may be submitted by either party to the ICJ. Argentina claims that direct negotiation between the parties have failed.

The 1975 Statute deals with “obligations of the Parties regarding the prevention of Pollution and the liability resulting from damage inflicted as a result of “pollution” and sets up an

²²⁵For more discussion on the concept of sustainable development and Nigeria see Y Oke Africa and the Quest for Mining Sustainability: A Comparative Evaluation of the Mineral Law of Nigeria with South Africa and Ghana (2008) SAJELP vol. 15 Part 2 183-184.

²²⁶ See The Trail-Smelter Arbitration 1931-1941, 3 U.N.R.I.A.A. 1905. This is a case that involved trans-frontier pollution and the source of the pollution was a Canadian Aluminium smelting plant which emitted fumes that damaged wheat crops belonging to farmers in the United States. The case laid down important principles of customary international law to the effect that states must not allow their territory to be used for activities that will damage the interests of other states.

²²⁷ UNEP Training Manual, op cit 33.

²²⁸ *Argentina v Uruguay* decided on 20 April 2010. See the text of the judgement at <http://www.icj-cij.org/docket/files135/10779.pdf> (accessed 27-1-14).

Administrative Commission of the River Uruguay (hereinafter CARU, its Spanish acronym), whose functions include regulation and co-ordination. Argentina submits in particular, that Articles 7 to 13 of the 1975 Statute provide for an obligatory procedure for prior notification and consultation through CARU for any party planning to carry out works liable to effect navigation, the regime of the river or the quality of its waters.

Aargentina states that the Government of Uruguay, in October 2003, “unilaterally authorised the “Spanish Company ENCE to construct a pulp mill near the city of Fray Bentos”, a project known as “Celulosa de M’ Bopicua (hereinafter CMB) and claims that this was done without complying with the above-mentioned notification and consultation procedure. It maintains that despite its repeated protests concerning “the environmental impact of the proposed mill”, made directly to the Government of Uruguay and to CARU, “the Uruguayan Government had persisted in its refusal to follow the procedures prescribed by the 1975 Statute”.

The ICJ was then invited by the state of Argentina to declare that the Republic of Uruguay, by its conduct, has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which the instrument refers, including but not limited to:

- (a) the obligation to take all necessary measures for the optimum and rational use of the River Uruguay;
- (b) the obligation of prior notification to CARU and to Argentina;
- (c) the obligation to comply with the procedures prescribed in Chapter 11 of the 1975 Statute;
- (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect the biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
- (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries.

By eleven votes to three, the ICJ found that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the Statute of River Uruguay. The court held also that it had not found sufficient evidence to conclude that

Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora.

The court further held concerning the conduct of Environmental Impact Assessment (EIA) that

“...a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.²²⁹

The provision of the Environmental Impact Assessment (EIA) Act²³⁰ requires that an environmental impact assessment shall be conducted by any public or private person wishing to embark on a project with a view to determining their environmental impacts.²³¹ The underlying principle for this provision is to allow the values of environment and development to be reconciled by calling for the integration of environmental and development concerns at all levels of decision making.²³²

One important obligation that flows from this concept of prevention is prior assessment of potentially harmful activities.²³³ Since the failure to exercise due diligence to prevent transboundary harm can lead to international responsibility, it may be considered that a properly conducted EIA might serve as a standard for determining whether or not due diligence was exercised.²³⁴ Preventive mechanisms also include monitoring, notification, and exchange of information, all of which are obligations in almost all recent environmental

²²⁹ See at para 204 of the judgment. Kidd in a presentation on the above case made available to me (to which I am eternally grateful) neatly tied up the principles of prevention, precautionary principle, intergenerational equity and sustainable development together by providing a rationale for the judgment as not being based on the 1975 Statute of the River Uruguay alone but also based on the general principles of law encompassing the principles of general International Environmental Law and the principles of intergenerational equity as enunciated in various international conventions and declarations. This he submits not only makes the ICJ to be a court of law alone but also a court of justice.

²³⁰ Formerly Decree No 86 of 1992.

²³¹ See s 2(1) (1) of the EIA Decree, now Cap E 12 LFN 2004.

²³² P. Sands *The Greening of International Law: Emerging Principles and Rules*, in A Amokaye *Environmental Law and Practice in Nigeria* 2004 at 17.

²³³ See UNEP Training Manual op cit, 33.

²³⁴ Ibid.

agreements.²³⁵ The responsibility for the conduct and approval of the EIA in Nigeria is vested in the Nigerian Environmental Protection Agency.²³⁶

Under the preventive principle, emissions standards have been set for different types of industries.²³⁷ These provide for restrictions on release of toxic substance into Nigeria's ecosystem. The other mechanisms are the provision of monitoring mechanisms for the industries, the requirement that the industries shall use the best available technology in the prevention and treatment of waste and the requirement for environmental audits and penalties for contraventions.²³⁸ The pertinent question is whether the agency saddled with the responsibilities have the requisite training and equipment to carry out these functions. Experience so far shows the exact opposite and the general excuse is that there is not enough money to carry out these functions.

The use of authorisation²³⁹ is also another effective means of preventing pollution damage.²⁴⁰ An instance worthy of mention is contained in the regulation governing the transportation and shipment of crude oil.²⁴¹ The exportation of crude oil overseas is governed by the issuance of permits from the Department of Petroleum Resources. Under section 6 of the aforesaid Regulation of the Petroleum Act, the Department of Custom and Excise shall ensure that there is proper documentation of any shipload of crude oil to be exported outside Nigeria which shall also include the fact that such a consignment has complied with all the technical standards concerning loading and the payment of excise duties and royalties to the government. This is also known as the 'command and control' approach of the use of economic instruments to control pollution. Any ship which fails to conform to these standards

²³⁵ Ibid.

²³⁶ See s 63(1) of the Act. The Agency is now known as National Environmental Standards and Regulations Enforcement Agency (NESREA). The EIA Act came into force in December 1992.

²³⁷ See S.1.9 Pollution Abatement in Industries and Facilities Generating Wastes Regulations Official Gazette FRN No. 42 1991.

²³⁸ This requires that environmental monitoring and auditing of existing major development projects are routinely carried out . See the Revised NPE (1999) page 1.

²³⁹ An environmental authorisation may be defined as 'A written order, document or certificate that may be issued by a competent authority (government department, minister, authorised official) to an applicant to grant the applicant permission to perform certain acts or activities that may have an impact on the environment.' See further Wessels *Environmental Authorisations and Mining Organisation* (MSc Environmental Management North-West University 2005) 19.

²⁴⁰ Pollution damage is any loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil. We shall discuss this more in detail in chapter 3.

²⁴¹ See Crude Oil (Transportation and Shipment) Regulations made pursuant to Section 9 of the Petroleum Act. Section 6 of the Regulation provides that no ship, tanker or vehicle in which crude oil is carried shall depart from Nigeria for any reason whatsoever without full documentation... by the appropriate authorities and without specific authorisation by designated officers of the Department of Customs and Excise any other Government agency having authority in that regard.

will be denied permission to export Nigerian crude abroad. In this way, the use of authorisation will ensure that the pollution of the seas during loading or unloading of crude oil is prevented. Other duties imposed by international multilateral agreements are the duties to notify states affected by certain activities,²⁴² the duty to enter into consultations,²⁴³ and the duty to exchange information on regular basis. This is enshrined in Principle 9 of the Rio Declaration which states thus:

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Closely following this duty is Principle 10 which states thus:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision – making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.²⁴⁴

In conclusion under this section, we state that the principles of sustainable development, the precautionary principles, the polluter pays principle and the preventive principles are the theoretical bases underpinning the laws and regulations on the protection of the environment, whether they concern pollution of the sea, territorial waters, inland waters, the atmosphere, soil or the protection of human life or living resources.²⁴⁵ Nigerian laws and regulations also aspire to conform to this standard. Kidd²⁴⁶ however is of the opinion that pollution cannot be

²⁴² See the Basel Convention on Hazardous Wastes, 1989, and the Rio Convention on Biological Diversity, 1992.

²⁴³ See the UN/ECE convention on the Trans-boundary Effects of Industrial Accidents, Helsinki, adopted March 17, 1992. 31 I.L.M. 1330.

²⁴⁴ Ladan submits that this principle imports into Nigerian laws on the environment the requirement of environmental justice which are namely access to court, the principles of *locus standi* and Access to court for judicial remedies. Access to court involves (a) access to information which is necessary for decision making, even if the information is in the domain of public authorities, (b) access to participation which is defined as the opportunity for citizens to provide informed, timely and meaningful input and influence decisions on general policies, strategies and plans on various levels and on individual projects that have environmental impacts, and (c) access to justice is defined as the abilities of citizens to turn to impartial arbiters to resolve disputes over access to information and participation in decisions that affect the environment. Such impartial arbiters include mediators, administrative tribunals and courts of law, among others. See for further reading M T Ladan, Enhancing Access to Justice On Environmental Matters:- Public Participation in Decision- Making and Access to Information available at <http://mtladan.blogspot.com> accessed 27-1-14.

²⁴⁵ UNEP Training Manual op cit at 33.

²⁴⁶ M Kidd op cit 10. See also M Kidd, *Environmental Crime- Time for a Rethink in South Africa?* (1998) 5 SAJELP 181 at 183.

completely prevented as it is an inevitable side effect of human life.²⁴⁷ Due diligence can be made to assess prior harm and where applicable take measures to alleviate the damage that may occasion on the environment. This is because once the environment is damaged for whatever reasons; it becomes difficult to provide remediation²⁴⁸ for the damage or to restore the environment to its previous position before the damage.

However where damage has been done, then there is need to mitigate the damage. In mitigating the damage, clean up measures are carried out by the NESREA and other agencies of government. However, the issue that comes to mind is who bears the cost of this clean up operations? Is it the polluter, the government or the citizens who pay taxes to the government?

This will lead us to the next section which is to assess the use of the tool of strict liability as an instrument in determining liability for harm being done to the environment and to see whether there are adequate provisions under Nigerian law for determination of liability. I shall first proceed by discussing the concept of liability for environmental pollution in tort law.

2.4.4 Liability for environmental pollution

Liability is used in the context of damage caused by a *tortfeasor*²⁴⁹ who inflicts harm on another person and thus occasions damage in the process. Under the law of tort, liability is used to assess harm being done to a person or his property.²⁵⁰ Kiss and Shelton submit that in spite of legal efforts to prevent pollution and protect the environment, human activities and accidents both give rise to environmental damage.²⁵¹

Liability for international environmental harm encompasses the concept of state responsibility for breaches of international law but also includes liability for harm resulting from an activity permitted under international law; that is, strict or absolute liability regarding activities for which the state is responsible.²⁵² According to the learned authors, various elements required to establish liability are causality, identifying the wrongdoer, proof and

²⁴⁷ Op cit at 10.

²⁴⁸ See s 1.2.2 above for the definition of remediation.

²⁴⁹ The civil wrong (tort) refers to a precursor of harm who inflicts damage to another and who becomes liable for such harm according to some settled principles.

²⁵⁰ This is so because the law of Tort developed in the eighteenth century in England during the industrial revolution and was primarily aimed at protecting interests in property. See Winfield & Jolowicz on Tort 18th edition 55.

²⁵¹ A Kiss and D Shelton *International Environmental Law* (1991) 347.

²⁵² Kiss and Shelton ibid.

measurement of harm- an issue common to domestic and international environmental law is determining the legal basis or degree of fault necessary to impose liability.²⁵³

The second element is (b) the link of causality between a culpable act and the damage suffered must be established. In other words, the damage must not be too remote or too speculative.²⁵⁴ For instance if there is an oil spill in State X and the coastline of a State Y is damaged, the damage must be such that would be traceable to the oil spill, for instance we can see evidence of oil on the surface of the water of the coast of State Y making swimming to become unpleasant, or making sailing on a speed boat dangerous. However, it is also sometimes difficult to establish a causal link where for instance the noxious effect of a pollutant may not be felt ‘until years or decades after the act.’²⁵⁵ This problem presented itself in the Chernobyl nuclear accident in 1986 when a nuclear reactor exploded in the former USSR immediately causing twenty-nine deaths, but which long term effect may produce directly or indirectly thousands of cases of cancer.²⁵⁶

Under Nigerian law, liability for an act may be provided by statute or be determined by the principles of common law, and equity.²⁵⁷ Through the reception provision²⁵⁸ we have torts²⁵⁹ like negligence, nuisance, trespass, battery etc. being part of Nigerian law. A person who inflicts harm on another person is called a tortfeasor and he becomes liable to that other person for any injury inflicted. Where the harm is proved to be the direct cause of the injury inflicted by the tortfeasor, damages (which may be a monetary compensation or any other form of compensation) is awarded to compensate the injured person. There are two types of damages which may be awarded by the court. General damages are awarded where the court is convinced that there is an injury which flows directly from the act of the tortfeasor. It is awarded to compensate the injured party and restore him to the position that he was before the infliction of the injury. Special damages are awarded in a situation where the court finds the injury is attributable to a particular act. For example where a contract is awarded by A to B to organise a party, B in anticipation of the monetary gain from the contract prints

²⁵³Kiss and Shelton op cit 350.

²⁵⁴Kiss and Shelton at 360.

²⁵⁵Kiss and Shelton, *ibid*.

²⁵⁶*Ibid*.

²⁵⁷Through an instrument enacted by the British Colonial administration called the reception provisions, English law became applicable in Nigeria as part of Nigerian law.

²⁵⁷ See Ordinance No.3 of 1863 which Introduced English law into the Colony of Lagos.

²⁵⁸This is an omnibus provision that imported English statutes before the year 1900 and principles of Common Law and Equity into the Nigerian legal system. See further discussion in chapter 4.

²⁵⁹A tort is a civil wrong.

invitation cards and buys foodstuffs to prepare food for the party. B may also employ cooks to prepare food for the party. Where A cancels the contract without sufficient cause, special damages may be claimed by B for the cost of the printing of invitation cards and the wages of the cooks may also be claimed under special damages. The court however insists that special damages must be strictly proved. For instance the printer must be called to give evidence of printing and the cost of the printing before B can claim under special damages. General damages are awarded as a matter of course where the court holds there is a breach of contract; special damages must be strictly proved.²⁶⁰

In the case of trespass to the person, it is a requirement that there must be an intention to trespass which must be direct.²⁶¹ Negligence requires fault to establish liability for instance and it rests upon a duty of care owed by one person to another a breach of which occasions damage on that other person.²⁶² Nuisance for instance may not be direct but is predicated on ownership of property. A person who complains that another person inflicts injury upon him in nuisance must prove that he owns property in that vicinity and that his enjoyment of that property is being disturbed by the tortfeasor. Where he is able to succeed in proving his claim, the court will award him damages to compensate him for the loss of enjoyment of this property. There are other qualifications for instance, relating to the categories of nuisance, whether private nuisance or public nuisance, who can sue etc, who can be sued and what the person must prove etc.²⁶³

The determination of liability to persons and property and the principles governing same are fairly settled under Nigerian tort law. This is because many of the judges who adjudicate over these cases are familiar with the principles and were trained under the English law. However when it comes to applying these tort law principles to the environment there are problems encountered because environmental concern is a fairly recent thing in Nigeria.

²⁶⁰See Winfield & Jolowicz on Tort op cit supra.

²⁶¹ If a man enters into another's house without lawful invitation, that is trespass that is intentional. But it will not constitute trespass for instance if he is being pursued and he runs into the house to take refuge from this pursuers.

²⁶²It does not require intent to establish negligence because a man will be presumed to intend the consequence of his act. For example if P derives a car with a faulty break and worn out tyres, if an accident occurs and Q is injured, P will be liable in negligence even though he did not intend to hurt Q. The test that will be applied will be that of a reasonable man who ought to know the consequence of driving around a car with a faulty break and worn out tyres.

²⁶³For further reading see the following- Winfield & Jolowicz on Tort op cit 78.

On pollution for instance, the cases that have been adjudicated by the courts have relied on the traditional principles contained in the cases of *Rylands v Fletcher*²⁶⁴ (strict liability), *Donoghue v Stevenson* (Negligence) and the evidential rule of *Res ipsa loquitur*²⁶⁵ to apportion liability. These principles are not without their shortcomings because when the tort law was developed in the 18th century in England, the primary interest was to protect private interests in land and not to protect the environment.²⁶⁶

Under national law, there are a variety of statutes that have been enacted which recognise that the environment needs to be protected from harm. These laws are- (a) The Criminal Code,²⁶⁷ (b) The Oil Pipelines Act,²⁶⁸ (c) The Oil in Navigable Waters Act and its Regulations,²⁶⁹ (d) The Petroleum Act,²⁷⁰ (e) The Oil Terminal Dues Act,²⁷¹ (f) The Associated Gas Reinjection Decree (now Act)²⁷² and (g) The Mineral Oil Safety Regulations²⁷³ which deal with different subjects with the sole aim of reducing the incidences of oil pollution in the country. These laws will be discussed in greater detail later. However there is still another point and this has to do with oil pollution occurring in the marine areas of Nigeria and areas beyond national jurisdiction. This is because these areas fall within the areas known as the global commons²⁷⁴ and what happens in one country or territory has a spill over effect in other neighbouring countries.

Oil spilling across maritime waters knows no boundaries. It therefore requires the cooperation of States sharing maritime boundaries to deal with this menace. Principle 13 of the Rio Declaration²⁷⁵ lays down obligation of States to deal with this. It provides:

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an

²⁶⁴ See full discussion on the principle of law laid down in this case and its applicability to environmental pollution in Nigeria in section 5.3 below.

²⁶⁵ Latin word meaning the thing speaks for itself.

²⁶⁶ Simon Ball and Stuart Bell, Environmental Law 2nd Edition 1994, 142.

²⁶⁷ Cap 42 Laws of the Federation of Nigeria and Lagos, 1958.

²⁶⁸ Now Cap 07 LFN 2004.

²⁶⁹ Now Cap 06 LFN 2004.

²⁷⁰ Cap P 10 LFN 2004.

²⁷¹ Cap 08 LFN 2004.

²⁷² Associated Gas Re-injection (Continued Flaring of Gas) Regulations 1979 (as amended). Now Cap A 26 LFN 2004.

²⁷³ Made pursuant to section 9 of the Petroleum Act,

²⁷⁴ International Law imposes on all States certain rights and duties with respect to the environment in the world's common spaces. General customary international law requires that all States behave in a manner so as not to cause harm to the environment of areas beyond the jurisdiction of any state including, *a fortiori*, the high seas, outer space, and the Antarctic. See generally E Weiss, S McCaffrey, D Magraw, (eds.) *International Environmental Law and Policy* (1998) 529.

²⁷⁵ See n 144 above.

expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Nigeria in furtherance of this objective enacted for the first time in the 1999 Constitution the provision which protects Nigeria's global environment. Section 20 provides:

The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

We can see that this provision covers the internal jurisdiction of Nigeria. What law covers the global commons which are contiguous to Nigeria?

For instance Nigeria is an oil producing and exporting country. Nigeria also imports goods from other countries of the world. In the course of these activities there are bound to be accidents involving collision by ships in the transportation of goods. There may also be the spillage of large volumes of oil in the coast of Nigeria due to incidents arising from accidents or causes due to operational discharge. How will the law handle the issue of liability?

In the past we have seen the approach that was used (with reference to the law of torts). But this approach did not achieve the expected result because of what we identified as restrictions or qualification used in the application of the common law rules. Statutes enacted by Nigerian authorities also apply within Nigeria and they do not have application in another country or on the high seas. The incident of the *Torrey Canyon*²⁷⁶ for instance which resulted in the pollution damage occasioned by oil to the coasts of Britain and France did not find any precedent in the English law before the incident.²⁷⁷ The compensation claimed by the claimants for the oil spillage could not be adequately met under the existing statute law and the common law. Under English law for instance, the damage that resulted from the incident amounted to \$6m but the owner of the ship had only a limitation²⁷⁸ of \$1.25m which created a problem of insufficient damages to claimants.²⁷⁹

²⁷⁶An accident happened in March 1967 off the Shetlands Islands off the coasts of Great Britain which involved a super tanker that spilled large quantities of oil in the sea. The spilled oil damaged the coastal fauna, killed sea beds and led to widespread damage to fishes and other sea mammals.

²⁷⁷W Chao *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (1996) Kluwer Law 10.

²⁷⁸The concept of limitation of liability is a maritime concept designed to cap the limit of liability payable by a party liable for an incident. The amount above this limit will not be paid to the injured party in accordance with public policy. The justification for this is to ensure that risky businesses continually enjoy the flow of investment by investors. This concept and the justification for limiting liability will be fully discussed in chapter 3.

²⁷⁹See S Baughen, *Shipping Law*, 3rd edition at 335.

There are also other problems encountered by Nigerian courts in the determination of liability which relates to the jurisdiction of the court. For instance, under the Constitution of the Federal Republic of Nigeria, 1999, oil spillage is not listed under the exclusive jurisdiction of the Federal High Court, it therefore implies that both the Federal and State High Courts have concurrent jurisdiction. However in practice, a litigant may have his matter challenged under the ground of suing in the ‘wrong court’.²⁸⁰ A litigant who sues in a state court may lose his case for an injunction on the ground that the act being complained of was done by an agency of the Federal Government and so the state court lacks jurisdiction.²⁸¹

The other aspect of jurisdiction relates to subject matter jurisdiction.²⁸² By subject matter jurisdiction, Ladan submits that the matter may be defeated because the subject matter falls outside the scope of the remedies that the court is empowered by law to administer. In *Shell Petroleum Development (Nigeria) Ltd., v Abel Isaiah*,²⁸³ the facts of this case are that in July 1988, an old tree fell on the defendant’s/appellant’s oil pipeline and indented it. The said indention hindered the flow of crude oil through the damaged pipeline which caused a spill of crude oil through the damaged portion of the pipelines into the farmlands and swamp belonging to the plaintiffs/respondents. The defendant (Shell) engaged the services of a contractor to repair the damaged pipeline. In the cause of the repairs, the defendant neglected to construct an oil trap (a device constructed in the soil for the purpose of trapping oil in the course of such repairs) so that crude oil flowed freely and spilled onto the plaintiffs/respondents’ swampland and polluted the surrounding farmlands, streams and fishponds.

²⁸⁰See s 251(1) of the Constitution of the Federal Republic of Nigeria, 1999, (hereinafter 1999 Constitution). This section provides that the Federal High Court shall have exclusive jurisdiction to the exclusion of any other court in civil causes and matters in (n) mines and minerals (including oilfields, oil mining, geological surveys and natural gas); see also S.1(1) (e) of the Admiralty Jurisdiction Act Cap A5 LFN 2004 which gives jurisdiction to (e) any claim for liability incurred for oil pollution damage. See also the case of Oyetomi v Mobil Producing Nig. (Unlimited) (2005) 3 FHCLR 137 where the court held that oil spillage is not an admiralty matter and that the Federal High Court has jurisdiction to hear and determine the matter.

²⁸¹Jurisdiction is the power of a court to hear and determine a matter. Jurisdiction is a threshold matter and where the court holds that it lacks jurisdiction, it declines hearing of the matter and the case comes to an end. The case would not be heard to determine its merits. This also affects the determination of the liability of the parties on the merits of the case.

²⁸² M T Ladan submits that jurisdictional issues in Environmental Law relates to subject matter jurisdiction, locus standi, pre-action notice, and limitation of action. See M T Ladan, *Access to Environmental Justice in Oil Pollution And Gas Flaring Cases as Environmental Issues in Nigeria* being a seminal paper presented at a Workshop organised by the Institute for Oil and Gas Law for Lawyers of the Federal Ministry of Justice at Abuja, Lagos, between November 28-30, 2011.

²⁸³ (2001) 5 S.C. (Pt 11) 1.

The claim of the plaintiffs/respondents at the High Court for damages was successful. The defendants appealed unsuccessfully to the Court of Appeal, hence the appeal to the Supreme Court. At the Supreme Court, the issue for determination was whether the State High Court has jurisdiction in claims pertaining to mines and minerals including oil fields, etc., by virtue of the Federal High Court Amendment Act²⁸⁴ which provides that matters pertaining to mines and minerals, including oil fields, oil mining and geological surveys and natural gas fall within the jurisdiction of the Federal High Court and not the State High Court. The Supreme Court held, applying s. 230 (1) (o) of the Constitution (Suspension and Modification) Decree 107 of 1993 that the subject matter (oil spillage from damaged pipeline) falls within the subject matter jurisdiction of the Federal High Court and that the State High Court (trial court) lacks jurisdiction to hear the matter. The learned Counsel to the respondents argued that the Decree (now Act) which ousted the jurisdiction of the court was enacted after the course of action arose and therefore should not have been applied to the case. The Supreme Court held otherwise. The Supreme Court held that although the Decree was an amendment to the Federal Constitution, from the moment the Decree (now Act) was signed, the jurisdiction of the trial court was ousted. This pronouncement certainly truncated the reliefs being sought by the plaintiffs/respondents.

Another illustration of a similar case on subject matter jurisdiction will be appropriate here. In *Shell Petroleum Dev. Co. (Nig.) Ltd. v Amaro*,²⁸⁵ the plaintiffs sued the defendants for fair and adequate compensation and/damages due and payable to the plaintiffs for loss of income from fishing, destruction of economic trees and domestic animals, inconvenience and sufferings, destruction of fishing materials and fishing grounds. The case was filed in the state High Court. Now under the Admiralty Jurisdiction Decree No 59 of 1991, any claim for liability incurred for oil pollution damage must be filed at the Federal High Court.²⁸⁶ The defendants relying on this provision and also section 7(1), (5) and (6) of the Federal High Court Act²⁸⁷ moved the court to dismiss the matter on the ground that only the Federal High Court has exclusive jurisdiction to decide on cases involving oil pollution damage. The court decided that the Federal High Court has exclusive jurisdiction. It is instructive here to quote the dictum of Rowland J.C.A.

²⁸⁴ Decree No. 107 of 1993 which came into force on November 17 1993.

²⁸⁵(2000) 10 NWLR 248.

²⁸⁶See s 1(1)(e) and s 19 of the Admiralty Jurisdiction Decree (now Act) Cap A5 LFN 2004.

²⁸⁷(Amendment) Decree no 60 of 1991.

It should be noted also that ex facie, oil spillage is not listed under subsection 1 or 2 of section 7 of Decree No 60. It is not mentioned in any sections of the Decree 107 of 1993. It is also very significant that oil spillage is not listed in section 251(1) (a) and (b) of the 1999 Constitution of the Federal Republic of Nigeria which deals with the exclusive jurisdiction of the Federal High Court.²⁸⁸

Apart from this problem, the owners of the ship causing the pollution may not be Nigerian nationals and the ship may also be a foreign registered ship. The implication of this is that to sue the owners in a Nigerian court may be futile because of the lack of power of Nigerian courts to exercise jurisdiction over a foreign registered ship.²⁸⁹

All these issues came up in the *Torrey Canyon* and the realisation of an appropriate legal regime to deal with accidental pollution of the sea by oil led to the signing of International Conventions on liability. These Conventions and other similar Conventions shall be examined in detail later on to see how they attempt to wrestle with the problems of pollution damage to the environment resulting in the degradation of the environment by oil.²⁹⁰

This thesis shall now look at the concepts of fault liability, strict liability, and absolute liability as tools for determining liability for environmental damage.

2.4.5 Civil Liability Regimes for Environmental Damage

There are basically three types of civil liability regimes for environmental damage.²⁹¹ They are:

(a) Fault liability. In this case liability is based on ‘fault’ or wrongdoing. Here the plaintiff or complainant must prove that the perpetrator of the fault (defendant) acted with intent or that (s)he acted negligently or without due care. For negligence to be established, there must be a duty of care owed by the defendant to the plaintiff, the defendant must have breached that duty and damages must have resulted from the breach.²⁹² The tort of negligence is based on the existence of a duty of care, the breach of that duty and causation in fact or law.²⁹³ The law of the tort of negligence remains the most dynamic in terms of scope and

²⁸⁸ At pages 266-267 para. A-C of the judgment.

²⁸⁹ The domestication of MARPOL 73/78 by the enactment into law of International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol, Ratification and Enforcement), Act No. 15 2007 which came into force on 11 April, 2007 has now made MARPOL 73/78 to be enforceable in Nigerian courts. See s 1(a), (b) and (c) of the Act . For further reading on this see M T Ladan, *Recent Trend in Environmental Law and Justice in Nigeria*, (2012), available at www.mybooks.com at p 73.

²⁹⁰ See chapter 4 of the thesis.

²⁹¹ Our concern here is with civil liability for environmental damage as the criminal aspects of liability is outside the scope of this thesis.

²⁹² *Donoghue v Stevenson* (1932) A.C. 562.

²⁹³ Amokaye op cit 45.

development.²⁹⁴ Fault may be difficult to establish, especially in environmental cases where legal rules may not be clearly established and evidence difficult to obtain.²⁹⁵

(b) Strict liability. Under strict liability, fault need not be established or proven before liability ensues. Here the perpetrator need not act correctly or incorrectly. Once the plaintiff is able to prove that the harm that was done was caused by the defendant's conduct, liability is presumed. However the defendant may escape liability if he is able to prove that the damage was caused by (i) an Act of God (or natural disaster), (ii) an act of war, or (iii) by the interference of a third party (*novus actus intervenience*).

The concept of strict liability in tort is founded on the premises that a man acts at his peril, and incurs liability for damage caused by an act which comes within one of the forms of action even though the damage is the result of pure accident.²⁹⁶

Strict liability as a tool of determining criminal liability of offenders may be a creation of statute and it often used in statutes to create offences that are regarded as serious or grave. For instance under Nigerian law, it is an offence to foul the public water works, selling unfit food or drink, etc under the Criminal Code.²⁹⁷ This is so because the crime of fouling of water is being made a criminal offence irrespective of fault on the part of the wrongdoer. Under civil law, strict liability is also used to determine liability in nuisance, negligence and other common law rules as laid down in *Rylands v Fletcher*.²⁹⁸ Briefly the facts of this case were that an independent contractor engaged to construct an underground water tank near a disused coal mine did not block one of the shaft leading to the coal mine. Water penetrated through this shaft and flooded the unused coal mine adjacent to the reservoir and affected the plaintiff's mine. The plaintiff subsequently sued for damages and succeeded. Mr. Justice Blackburn giving a rationale for this rule declared:

We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything that is likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so is *prima facie* answerable for all damage which is a natural consequence of its escape.²⁹⁹

²⁹⁴Ibid. The categories of negligence are never closed remarked Lord Denning Master of the Rolls.

²⁹⁵ SC McCaffrey & MC Zucca Training Manual on International Environmental Law Chapter 5 at 57. Legal evidence in environmental law cases are difficult to obtain because of the dichotomy between causation and the effects which we discussed earlier on.

²⁹⁶ See per Lord Fraiser in R. H.M. Bakeries (Scotland) Ltd. V Strathclyde Regional Council, Law Times, May 17, (1985), 214 in Fagbohun op cit at 279.

²⁹⁷ See s 245 Criminal Codes, Cap C 38 Laws of the Federation of Nigeria (LFN) 2004.

²⁹⁸(1868) LR 3 H L, 330. The thesis shall discuss more of this in subsequent chapters.

²⁹⁹ Per Blackburn L J (1868), L. R. 1 Ex. 265 at pp. 270 – 80..

Under Environmental Law, for instance the Civil Liability Convention (CLC), 1969 the owners or operators of tankers are to be responsible³⁰⁰ for any oil spillage arising from their operations.³⁰¹ The rationale for strict liability here is that an actor that profits from potentially harmful or inherently dangerous activity should be held liable for the harm that results from the harmful activity. This is also another application of the “Polluter Pays Principle” (PPP). When it comes to the application of these principles to the environment however, there are problems because of the attitudes of some courts who have held in some cases that the principles of strict liability applied, for instance where the nature of the activity involved is hazardous, like the dumping of hazardous waste cases, and in others the courts have held otherwise. Two cases arising in America will be used to illustrate this point. In *State Department of Environmental Protection v Ventron Corporation*,³⁰² the New Jersey Supreme Court considered whether a company that owned a mercury processing plant which had polluted a tidal creek and a neighbouring land would be strictly liable for damages caused. The court found that disposal of waste containing mercury was an abnormally dangerous activity for which the company would be held strictly liable.³⁰³

However, in *Avemco Insurance Co. v Rooto Corp.*,³⁰⁴ the court declined to hold that the handling or storage of hazardous chemicals constitute an ultra – hazardous activity. Briefly the facts of this case are that the operation of the defendants’ business required the holding of hydrochloric acid in large vats on their premises. The Plaintiffs who insured airplanes parked near an airfield adjacent to the defendants’ premises complained that the occasional emissions of acid mist coinciding with the refilling of the vats constituted an ultra-hazardous activity which affected and injured their clients and that the defendants should be held strictly liable. After the incident, *Rooto* reported the defendant to the Police who then charged the defendant with criminal conduct.³⁰⁵ After a discussion of Michigan law, the district court held that “Michigan law does not require a landowner, occupier like the defendant here to anticipate and protect against the intervening criminal acts of third parties.” The third parties are the clients who were injured by the fumes coming from the vats of the defendants.

³⁰⁰This refers to State responsibility in international law which makes the subjects of a state to be strictly liable for any act that affects the interests of other states. See further Kiss & Shelton op cit 348.

³⁰¹ See Art.3 (1) of the Civil Liability Convention, CLC 1969.

³⁰² 468 A. 2d 150 (N. J. 1993).

³⁰³ See also *Sterling v Velsicol Chemical Corp.*, 647 F. Supp. 303 (W.D. 1986).

³⁰⁴ 967 F. 2d 1105 (6th Cir. 1992) at 1106-1108.

³⁰⁵Here under Michigan Law, it is an offence to produce hydrochloric acid without adequate means of storage.

Courts in Nigeria have applied the principles of strict liability to determine liability in cases involving contamination of oil wells,³⁰⁶ leaking fuel tanks that leach into ground-water and contaminate drinking water wells,³⁰⁷ amongst others. The use of strict liability however is on a case-by-case basis and will depend on the nature of the activity and the defendant's management of that activity.³⁰⁸

Fagbohun commented on the difficulty encountered by the courts in holding one type of activity as hazardous, applying the rule in *Rylands v Fletcher*, and holding another set of activity as non-hazardous and drew two conclusions. The learned author submits that the tort cases rests firmly upon the idea of negligence, and the second is that it has close connections with the factual circumstances that may give rise to an action in nuisance.³⁰⁹ The learned author continued, "Invariably, this close nexus has not been without effect because defences against strict liability actions have largely been structured along the lines of defences in respect of these other concepts. The way these several defences have been used to hedge in the strict liability principles is what has provoked the question – "just how strict is this liability?"³¹⁰ The author explained this further with the requirements of 'non –natural user' of land and concluded that that requirement is required in negligence and not under strict liability which does not require negligence.³¹¹

This qualification of the concept of 'non-natural user of land' to the principle of strict liability was laid down in *Rylands*.³¹² It was first mentioned by Lord Cairns in the House of Lords, although not mentioned in the judgment at the lower court.³¹³ It seems plain that Lord Cairns meant that in order for the rule to apply the defendant must have brought to his land something which was not there in its natural state. For instance in the case of *Rylands v Fletcher* there would have been no liability if the water had been a natural lake or naturally flooded area rather than man-made reservoir. With time, it came to mean that the use had to be 'some special use bringing with it increased danger to others and must not merely be the

³⁰⁶ *Umudje and anor. v. Shell B.P. Petroleum Development Co. (Nig.) Ltd.* (1975) 9-11 S. C. 155, 173-174.

³⁰⁷ See *Shell Petroleum Development Co. Ltd. v Amaro & ors.* (2000) 23 Weekly Reports of Nigeria 111, (2000) 10 NWLR (Part 675) 248 where the court held that the accumulation of crude oil in a waste pit was a non-natural user of land and the defendant was held liable for damage caused by it.

³⁰⁸ These cases will be discussed fully in chapter 5 when the thesis discusses compensation for oil spillage in inland waters of Nigeria.

³⁰⁹ Fagbohun op cit 281.

³¹⁰ Ibid.

³¹¹ Fagbohun at 282.

³¹² (1868) LR 3 H L, 330

³¹³ Fagbohun at 280.

ordinary use of the land or such a use as is proper for the general benefit of the community'.³¹⁴

This, it is submitted is in accordance with reason and the courts are quite justified in protecting an aggrieved plaintiff from acts that are considered to be dangerous and constitute threat to the health and well being of the community. However with increasing urbanization and industrialization, the confinement of the use of land to agricultural use or natural use no longer made sense. This is the dilemma that the courts faced and a new rule emerged to accommodate increasing dangerous activities that nevertheless benefited members of the community.³¹⁵

The rule in *Rylands v Fletcher* has comparatively rarely been the basis of a successful claim in the English courts since 1900.³¹⁶ This is largely because of the defences of act of a third party and statutory authority and, above all, the very restrictive attitude taken by many twentieth century cases to the concept of non-natural use.³¹⁷ Briefly in conclusion, strict liability as a tool is used to apportion blame where the defendant's nature of activity is hazardous and the reason for this is that a person who carries out a dangerous activity should be held responsible for the harm it causes to the environment. The act of the defendant is such that a reasonable man ought to foresee the consequence of such conduct. The Polluter Pays Principle also ensures that the defendant compensates the plaintiff for damages resulting from the consequence of his hazardous activities.

2.4.6 The rule of foreseeability in nuisance

Where the category of nuisance is a public one, the courts have held, amongst other things that for a plaintiff to succeed, damages resulting from the conduct of the defendant, must be proved. This followed from the principle enunciated in the case of *Ballard v Tomlinson*³¹⁸ which makes liability to be strict where the defendant is relying on his natural right to abstract underground water. The rule of foreseeability in nuisance was thus firmly established. It was no longer required that the plaintiff had to prove that the defendant was negligent in the management of his affairs on his land. Once it could be foreseeable that harm would result to the plaintiff or a third party, the strict liability rule would apply.

³¹⁴ Lord Moulton in *Rickards v Lothian* (1913) A C 263

³¹⁵This new rule is the rule of foreseeability which is based on the standard of a reasonable man who can foresee that such damage could result from the consequence of the defendant's conduct.

³¹⁶ See Law Comm. No. 32 (1970), p.7 in WVH Rogers (ed.) *Winfield & Jolowicz on Tort* (2006) 696.

³¹⁷ Ibid. See more discussion on this in Chapter 5.

³¹⁸ [1885] 29 Ch D 115.

The case of *Cambridge Water Company v Eastern Counties Leather Plc*³¹⁹ illustrates how the use of a solvent (a hazardous chemical) in the manufacturing process and its storage which constituted a non-natural use of the defendants' land could not found liability in nuisance on the ground that the pollution of the water supply of the plaintiff was not *foreseeable* at the time of the pollution. On appeal by the plaintiffs in respect of the dismissal of their cause of action, the Court of Appeal followed the principle enunciated in the case of *Ballard v Tomlinson*³²⁰ allowed the appeal on the ground that the nuisance complained of was an interference with the natural right incidental of the ownership of land (i.e. the right to abstract uncontaminated ground water), and liability was therefore strict. The defendants appealed to the House of Lords which allowed the appeal and distinguished the case of *Ballard v Tomlinson* from this case on the ground that the harm being complained of by the defendant could not have been *foreseeable* by the plaintiff at the particular time. Thus under this rule, foreseeability is a prerequisite for the recovery of damages.

The optimism expressed by the court of appeal decision, commented Fagbohun, had shown that the principle of *Rylands v Fletcher* may yet have a new life.³²¹ The reversal by the House of Lords however dampened this optimism. Lord Goff stated in his judgment that the law was settled to the effect that 'foreseeability of harm is a ... prerequisite of the recovery of damages in private nuisance as in the case of public nuisance.'³²²

Other issues that have led to the criticisms of the principle of strict liability, in its application to the environment, relate to the defences that may be raised to environmental liability claims. For instance, there is a state of the art defence in America against 'failure to warn' claims, in which a defendant claims not to have known and to have had no reasonable ability to know the hazard or risk at the time of plaintiff's exposure or injury.³²³

2.4.7 The Polluter Pays Principle and its application under Nigerian laws

We have stated earlier that the Nigerian law is underpinned by the Polluter Pays Principle (PPP). The PPP is an economic system of cost allocation to make the polluters pay for the pollution they cause. It is another way of internalising the cost of pollution instead of passing the cost over to the public. The PPP refers to a device of internalising environment costs by

³¹⁹ [1994] 2WLR 53.

³²⁰ [1885] 29 Ch D 115.

³²¹ Fagbohun at 282.

³²² See as per Lord Goff (1994) 1 All ER 53 at 72.

³²³ See *Anderson v Owens –Corning Fiberglas Corp.*, 281 Rptr.528, 810 p. 2d 549 (Cal. 1991) in Fagbohun op cit at 283.

making those who benefit from the environmental damaging activity to bear the cost of the damage.³²⁴

The PPP should be distinguished from the User Pays Principle. In the User Pays Principle (UPP) it is the user that pays for the right to pollute. This is done through charging the user for emitting polluting substances into the environment. The cost recovered from this charges therefore goes into environmental reparation and compensation.³²⁵

Akinnusi observed that the PPP is an elusive concept because it is not clear whether it means that the person producing the pollution should pay for all costs of eliminating pollution or whether he must pay to continue pollution or that there is an acceptable level of pollution and if the polluter does not exceed that level, he does not have to pay at all.³²⁶ Whatever may be the case, he continued, it must be pointed out that in reality it is not the polluter that pays but rather the consumer of the products through the imposition of higher prices to cover costs incurred.³²⁷ Under the preventive principle as stated earlier, the polluter may decide to pay the penalties imposed for exceeding the emission targets and continue the pollution, while passing the cost over to the final consumer.

The Polluter Pays Principle is particularly meant for giving appropriate remedies to victims of damage from environmentally harmful activities in Nigeria.³²⁸

Under section 21 of the defunct FEPA Act, the spiller of a hazardous substance shall be responsible for the removal of the spill in addition to the payment of the applicable fine under the Act. The spiller shall also be responsible for any cost thereof including the cost of removal which may be incurred by any Government body or agency in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge;³²⁹ and costs of third parties in the form of reparation, restoration, restitution or compensation as may

³²⁴D Pallangyo *Environmental Law in Tanzania* Law Environment and Development (LEAD) Journal International Environmental Law Reserch Centre (IELRC) (2007) 26 at 38 available at www.lead-journal.org/content/07026.pdf accessed 12 August 2012.

³²⁵Nigerian Policy on the Environment subscribes to both the Polluter Pays Principle (PPP) and the User Pays Principle (UPP).

³²⁶ See M Purdue ‘*Integrated Pollution Control in the Environment Protection Act 1990: A Coming of Age of Environmental Law?*’ (1991) Modern Law Review 534 at 536 in A Akinnusi , *A Comparative Analysis of Approaches To Air Pollution Control* Unpublished dissertation component submitted in partial fulfilment of the requirements for the degree of Masters of Laws in Environmental Law in the School of Law, University of Natal, Pietermaritzburg, 1999.

³²⁷Ibid.

³²⁸See Amokaye op cit 101. Under s 12(1) and (2) of the Harmful Wastes (Special Criminal Provisions) Act, the person responsible for the importation of toxic substances shall be liable for the damage caused by such toxic materials.

³²⁹S 21(a) of the defunct Federal Environmental Protection Agency Decree No 58 of 1988.

be determined by the Agency from time to time.³³⁰ This is an application of the Polluter Pays Principle and it is designed to internalise the cost of environmental pollution and liability. However this section has been repealed and there is no equivalent enactment under the NESREA Act. This constitutes a negative feature of the law of liability for oil pollution in Nigeria. The law did not also provide for statutory compensation for oil pollution for victims of pollution caused by a spiller, there is also no clear cut definition of a responsible party.³³¹ The compensation that is provided is under the Oil Pipelines Act.³³²

(c) Absolute liability. This is a type of liability that is imposed where for instance the activity is an ultra-hazardous one like the case of the construction of a nuclear reactor. It allows for no defences, except an Act of God.

2.4.8 Conclusion

The theoretical foundations of Nigerian law on oil pollution are to be found in the National Policy on the Environment, the concept of sustainable development, the precautionary principle, the polluter pays principle, and the preventive principle. The tool of strict liability is also useful in determining liability. With regard to oil pollution of the environment, the Nigerian authorities need to do more by aligning policy objectives with other framework laws like enacting a national framework act on the holistic management of the environment in the nature of NEMA of South Africa. This Act provides for rules and policy instruments useful for the determination of the policy objectives of the agencies of government. The principles of sustainable development as enshrined in Agenda 21³³³ should also be rigorously pursued to realise sustainable development in the true sense. On liability for environmental pollution, we found that there is no law governing statutory liability by spillers. The determination of liability by resorting to the principles of Common Law and Equity as we shall see is fraught with problems. I shall now proceed to discuss regulation of oil pollution in the territorial and maritime waters of Nigeria.

³³⁰ S 21 (b).

³³¹ The section allows for an exception to liability where the owner or operator can claim that the discharge was caused by solely by natural disaster, an act of war, or by sabotage.

³³² See further discussion in chapter 5.

³³³ See fn 12 above. See more discussion in chapter 5.

Chapter 3:

The International Marine Oil Pollution Conventions and the Regulation of oil Pollution in the Territorial and Maritime Waters of Nigeria

3.1 Introduction

This chapter will discuss the international marine oil pollution Conventions and their significance to Nigeria. The thesis will examine their different provisions dealing with oil pollution of the territorial waters and the Exclusive Economic Zones (EEZ). These constitute the territorial and maritime waters of Nigeria.³³⁴Oil pollution occurs in these zones and has been the subject of International Conventions. The examination will include a discussion on the maritime zones which is necessary for ourunderstanding of the Conventions. This discussion will be descriptive because the Conventions are not really the focus but merely instrumental to the theme of the thesis. The focus will be on those conventions dealing with issues of liability for oil pollution identified in the previous chapters. Some of these Conventions as this thesis shall show contain provisions which are not suitable given the Nigerian situation, and where some of the provisions are suitable, the Nigerian Parliament is yet to domesticate them for a variety of reasons.In the case where the Conventions have been domesticated, the thesis will examine whether the domestication has occasioned problems relating to the implementation of the Conventions etc. It is also the focus of this chapter to look at the issue of compensation for oil pollution damage.

The maritime zones of Nigeria also consist of the inland waterways, (i.e. those rivers that are navigable by sea going ships), the coastal waters and the seas including the oceans.³³⁵This chapter shall be dealing with the territorial waters first because this is convenient as it can be taken along with the oil pollution occurring in the Exclusive Economic Zones as these constitute Nigeria's marine environment.

³³⁴These are referred to as maritime waters of Nigeria and they consist of the body of water that are generally saline as distinct from freshwater.

³³⁵ See definition of terms in chapter one. The unusual topography of Nigeria which includes two international rivers, Rivers Niger and its tributary the Benue river that flow through the land of Nigeria and empties their contents into the Atlantic ocean via the Delta forming a rich deposit of alluvial contents in the region known by the political appellation of the Niger Delta, explains the inclusion of the maritime zones to embrace inland waterways. The Benue River is a tributary of the Niger and it flows out of Nigeria to the Republic of Cameroon on the western part of Nigeria. These maritime zones are to be distinguished from the waters enclosed by the territorial seas, also generally called the marine waters in the everyday use. These waters lie seaward of the baseline (low-water mark) and are generally saline in nature.

It is pertinent to reiterate here that before the incident of the *Torrey Canyon*,³³⁶ there was no international legal regime governing *accidental* pollution of the sea by oil. The incident of the Torrey Canyon and the response of the international community began a process of designing an appropriate legal regime dealing with accidental pollution of the sea by oil.

3.1 *The scope of the marine environment*

The marine environment of a nation consists principally of oceans, bays, estuaries and other major water bodies on the seaward side of the mean water mark.³³⁷ In relation to Nigeria these comprise in addition to internal waters the following:

- (a) Territorial Sea³³⁸
- (b) Contiguous Zone³³⁹
- (c) The Continental Shelf³⁴⁰

The Continental Shelf has been defined as the natural prolongation of the land territory, to the continental margin's outer edge, or 200 nautical miles (n.m.) from the coastal State's baseline, whichever is greater. States Continental Shelf (CS) may exceed 200 nautical miles (n. m) until the natural prolongation ends. However it may never exceed 350 n.m. from the baseline.³⁴¹ (See Figure 1³⁴² below). The Continental Shelf is an area that is rich in natural resources including great varieties of fish and abundant oil and gas resources. Construction of pipelines, the laying of submarine cables and oil and gas platforms and other installations may also take place in the continental shelf.

³³⁶See discussion in chapter 1.

³³⁷See Dictionary of Military and associated terms, US Department of Defence (2005.)

³³⁸Territorial Waters Act Cap T5 LFN 2004. See also Art 3 of the Law of the Sea Convention (LOS) 1982.

³³⁹This zone is contiguous to the territorial sea and reach up to 24 nautical miles from baseline. See Art 33 LOS. See also Art 6 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. Within this zone a coastal state might exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea. Under LOS the contiguous zone is subsumed in the territorial sea. This zone has lost much of its purpose as states are now permitted to claim a territorial sea of twelve miles with full sovereign rights and an exclusive economic zone of 200 miles. Consequently many states no longer claim a contiguous zone. See J Dugard, *International Law, A South African Perspective* (3rd ed) 364.

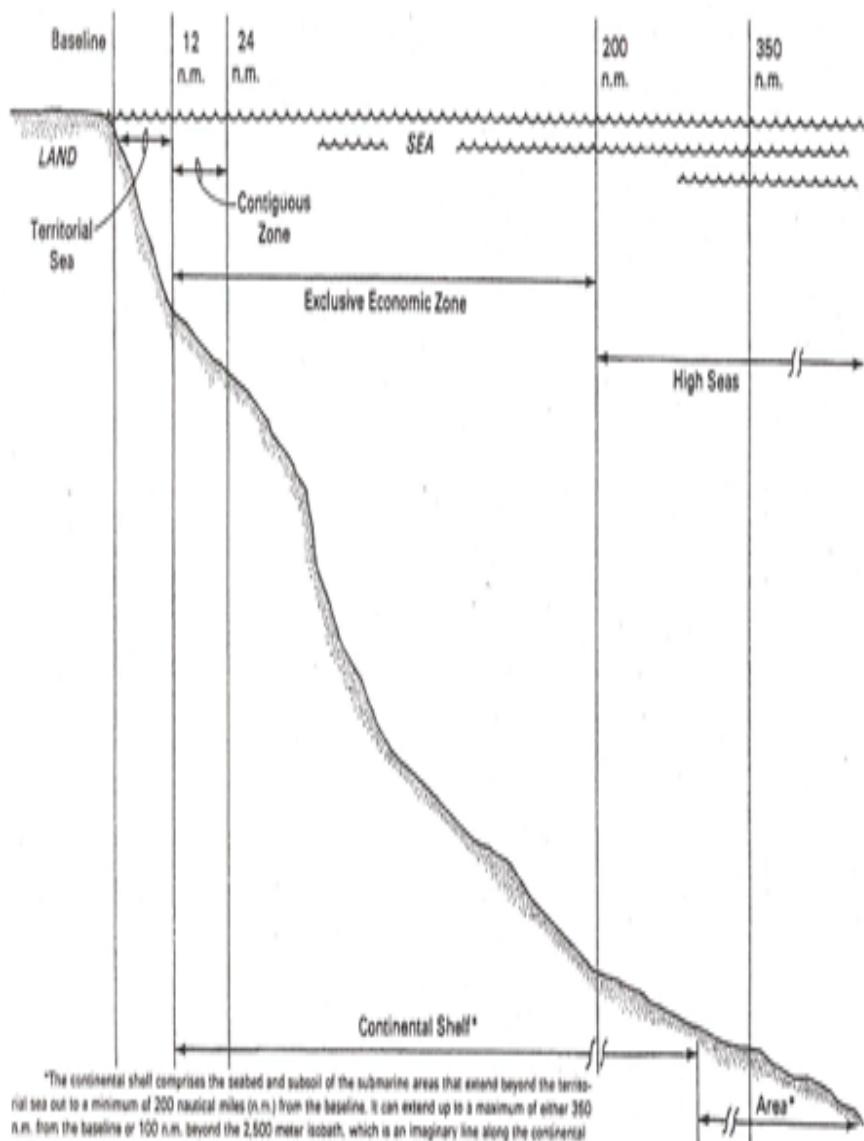
³⁴⁰ See Art 76 LOS. Coastal States have sovereign rights to explore and exploit the continental shelf; the shelf can extend at least 200 nautical miles and more under specific circumstances. See also J Glazewski op cit 41 and s 1(1) Exclusive Economic Zone Act Cap 116 LFN 1990.

³⁴¹ Article 76 of the Law of the Sea Convention 1982.

³⁴²Source <http://iilj.org/courses/documents/SketchDepictionofMaritimeZonesunder1982Convention.pdf>(accessed 14-11-2011).

see

CHART 9-1.
LOS Convention: Sea Claims Structure



*The continental shelf comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea out to a minimum of 200 nautical miles (n.m.) from the baseline. It can extend up to a maximum of either 350 n.m. from the baseline or 100 n.m. beyond the 2,500 meter isobath, which is an imaginary line along the continental shelf at a constant depth of 2,500 meters. See LOS Convention, Article 76. The Area comprises the seabed and ocean floor beyond the limits of national jurisdiction, or beyond the continental shelf. See LOS Convention Article 111)

Nigerian laws have limited legal provisions dealing with pollution from offshore installations situated in the “Deep offshore”³⁴³ and in the Continental Shelf. This phenomenon is not peculiar to Nigeria alone. A commentator on Russian Law also made the same observation. After observing the paucity of Russian law in the area of offshore oil exploration, the writer commented on a dearth of the provisions of international Conventions in this area by declaring thus:

...However, only a limited number of legal provisions dealing with pollution from offshore installations can be found in international conventions.³⁴⁴

Pollution hazards also may occur in the Continental Shelf like the disposal of platforms from oil and gas exploration, flaring of natural gas, and discharges of formation waters into the sea.³⁴⁵ These issues were confronted by the United Nations in the series of negotiations leading to the signing of the Law of the Sea Convention, 1982.

(d) High Seas³⁴⁶

There is an important principle of international law which refers to the freedom of the High Seas. This principle was first articulated by a Dutch thinker Hugo Grotius.³⁴⁷ He advocated that the High Seas is so vast that it cannot be seized by anyone and is not subject to ownership of any body. It forms part of the *res communis*.³⁴⁸ It therefore follows that vessels on the high seas are subject to no authority except that of the state whose flag they fly.

This general principle has been widely accepted and embodied in Article 6 of the Geneva Convention on the High Seas:

Ships shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas.³⁴⁹

³⁴³ “Deep Offshore” means any water depth beyond 200 meters. See section 17 of the Deep Offshore And Inland Basin Production Sharing Contracts Decree 9 1999 (now Act) Cap D3 LFN 2004. Available at <<http://www.nigeria-law.org/Deepooffshore>> and Inland Basin Production Sharing Contract Decree 1999.htm last visited on 14th June 2011.

³⁴⁴ M Kashubsky Marine Pollution from the Offshore Oil and Gas Industry: Review of Major Conventions and Russian Law (Part 1) *Marine Studies* November-December (2006) 3.

³⁴⁵ C Brown, International Environmental Law in the Regulation of Offshore Installations and Seabed Activities: The Case for a South Pacific Regional Protocol in M Kashubsky op cit 3.

³⁴⁶ Article 86 of LOS 1982.

³⁴⁷ (1583-1645) Acclaimed to be the father of international law, wrote a monumental treatise *De Jure Belli ac Pacis Libri Tres*. (Kelseys Translation 1925) 7th ed. His *Mare Liberum*, advocated that the high seas cannot be seized by anybody or owned by any person and therefore no state can exercise jurisdiction over it.

³⁴⁸i.e a property owned by the general community and not subject to individual ownership.

³⁴⁹ 450 UNTS 82; (1958) 52 AJIL 842.

In exceptional cases however such as piracy, slave trade, collisions and in order to exercise the principle of hot pursuit, other states may interfere with this exclusive jurisdiction. As this thesis shall show later in the case of oil pollution, certain international conventions provide for intervention on the high seas by nations other than the flag state.³⁵⁰

The High Seas are those parts of the seas not included in the exclusive economic zone, the territorial sea, or internal waters.³⁵¹ Ships flying the flag of a state have exclusive jurisdiction of the flag state on the High Seas.³⁵² In exceptional cases however such as piracy, slave trade, collisions and in order to exercise the principle of hot pursuit, other states may interfere with this exclusive jurisdiction.³⁵³ Nigeria, although is not originally a party to the Convention, has since ratified it. This Convention was amended in 1973 by a Protocol allowing for intervention on the High Seas in cases of pollution by substances other than oil.³⁵⁴

3.2 The definition of marine pollution under the International Marine Pollution Conventions

The ecological damage caused by oil spillage has become a major concern of the international community. The Convention on the High Seas, 1958³⁵⁵ and the Law of The Sea Convention, 1982 (LOS) contain provisions which direct states to take steps to prevent pollution of the seas.³⁵⁶ The LOS Convention obliges states to ensure that their own ships do not engage in pollution activities and permits them to exercise jurisdiction over foreign ships responsible for pollution on their territorial sea and the EEZ.³⁵⁷ As regards the protection of the marine environment from pollution, some academic writers are of the opinion that the Geneva Conference on the Law of the Sea, 1958 and the Geneva Conventions have little to say on the subject.³⁵⁸ Articles 24 and 25 of the High Seas Convention, 1958 do require states to prevent oil pollution from ships, pipelines, and seabed operations, and pollution from radioactive substances, but they fall short of acknowledging a more comprehensive duty to

³⁵⁰ See the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (The Intervention Convention) made in Brussels in 1969 and which entered into force in 1975.

³⁵¹ Art. 86.

³⁵² Art. 6 of the Geneva Convention on the High Seas.

³⁵³ The Intervention Convention (n 302) supra.

³⁵⁴ See 1973 UNTS 3. Nigeria is not a signatory to this Protocol.

³⁵⁵ Article 24. This has been superseded by the Law of the Sea Convention 1982.

³⁵⁶ Dugard op cit 372.

³⁵⁷ Ibid.

³⁵⁸ P Birnie, A Boyle & C Redgwell *International Law & the Environment* (2009) 3rd edition 386.

prevent marine pollution or protect the marine environment, and offer no definition of the term ‘pollution’.³⁵⁹ Birnie, Boyle & Redgwell continued that:

...[i]n practice, the 1958 Conventions seemed to suggest that states enjoyed substantial freedom to pollute the oceans, moderated only by the principle that high seas freedom must be exercised with regard for the right of others].³⁶⁰ This view was not contradicted by the 1954 London Convention,³⁶¹ which did not entirely prohibit discharges of oil from ships at sea, or by the International Atomic Energy Agency (IAEA)’s regulations which permitted the disposal of low-level radioactive waste.³⁶²

However the coming of UNCLOS 111³⁶³ changed all that. Articles 192-5 of the 1982 UNCLOS declared: ‘States have the obligation to protect and preserve the marine environment’ by regional treaties and by other multilateral agreements negotiated progressively since 1954’.³⁶⁴

On what can constitute pollution of the marine environment, the definition offered by UNCLOS 111 is instructive it defines it as:

[T]he introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in deleterious effects as harm to living resources, and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction in amenities.³⁶⁵

Howarth and McGillivray³⁶⁶ posit that this definition of ‘marine pollution’ is concerned exclusively with the consequences of human activities, thereby excluding natural forms of water contamination. For instance synthetic organic compounds such as PCBs and artificial radionuclides do not occur naturally and so a zero baseline can be set for the purposes of regulation.³⁶⁷ It seems to the authors therefore that most of the substances that could be said

³⁵⁹Ibid.

³⁶⁰Birnie, Boyle & Redgwell op cit 387.

³⁶¹ See the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, made in London on 12 May, 1954.

³⁶²Ibid.

³⁶³Otherwise referred to as Law of the Sea Convention (LOS) 1982 the two acronyms are used interchangeably in this thesis.

³⁶⁴Ibid.

³⁶⁵Art 1(4) LOS 1982.

³⁶⁶W Howarth and D McGillivray, *Water Pollution and Water Quality Law*, (2001), 973.

³⁶⁷Ibid.

to pollute the marine environment must have been introduced to it by man and must have altered its natural state. Oil for instance may be found seeping naturally into the waters and around parts of the British coast and this will not constitute pollution.³⁶⁸ More particularly however, the restriction of the definition to the ‘introduction...of substances or energy’ can be seen as limiting those human actions which fall within the scope of regulation so as to exclude human-induced alterations in water quality or composition more generally.³⁶⁹ The definition is also couched wholly in terms of the damaging consequences of human activities upon the marine environment, it is the consequence of the input, rather than the input as such, that is the ‘pollution’.³⁷⁰ Thus pollution would be the human modification of the marine environment which renders it less suitable for use than it would be in its natural state.

Finally the learned authors noted that the definition of marine pollution in the LOS 1982 makes no direct attempt to identify what such polluting substances might be. Instead it leaves it to regional treaties to identify what particular substances will be regarded as causing ‘pollution’ in particular circumstances.³⁷¹

Nigerian law follows the definition of marine pollution as contained in the Merchant Shipping Act³⁷² which defined marine pollution in exactly the same terms as the definition given in Article 1(4) of the Law of the Sea Convention, 1982.³⁷³

3.2.1 *Sources of marine pollution*

Marine pollution could arise from a variety of sources. For purposes of convenience, three broad sources of pollution of marine and coastal waters have been identified.³⁷⁴ They are:

- Marine sources. Pollution from marine sources results mainly from shipping, navigation and offshore prospecting and mining activities. More specifically this category includes accidental discharges from vessels of fuel or cargo as a result of navigational accidents and the carriage of hazardous goods;³⁷⁵ or it could result from operational discharges from vessels, like ships in the course of cleaning or ballasting operation, or pollution resulting from exploration of oil and other

³⁶⁸See fn 10 Ibid.

³⁶⁹Ibid. See for example Art 21(2) of the Convention on the Non-Navigable Uses of International Watercourses, 1997.

³⁷⁰Ibid.

³⁷¹Ibid.

³⁷²No 27 of 2007.

³⁷³See n317 above.

³⁷⁴ Glazewski op cit, 635

³⁷⁵ ibid

mechanical devices in the course of mining operation and from other installation devices operating in the marine environment or sea bed. Marine pollution could also result from deliberate disposal of garbage like plastics or sewage dumped directly into the sea.

- Land based sources of pollution. This refers to pollution of coastal waters from land based sources. Pollution in this category may result from a number of sources. For instance it could either be land based, such as release of toxic or harmful substances to the seas in the course of transportation, or sea-based including seepage i. e. in the form of storm-water run-off in both urban and rural areas which are contingent to the seas, waste carried down rivers, the deliberate dumping of industrial waste arising from effluents discharged from industries situated in urban arrears, sewage treatment plants, etc.
- Atmospheric pollution. This category includes gas exchange and particulate deposition as seen, for example, in the case of trace metals in vehicles exhaust fumes.³⁷⁶ This includes the flaring of gas in oil producing areas which combines with elements in the atmosphere to produce acid rain and are invariably washed down to the seas and oceans. The classification is not done in accordance with any logical sequence; it is only for the purpose of convenience.

The Marine Pollution Conventions include: The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (The OILPOL),³⁷⁷ the 1972/1996 London Dumping Conventions, the 1973/8 MARPOL Convention and the 1982 UNCLOS. This thesis however, shall concentrate on the oil specific marine pollution Conventions and these are the OILPOL, which was replaced by the MARPOL and its Protocols and Annexes, the Convention on Civil Liability for Oil Pollution Damage, 1969 and its 1992 Protocol which deals with liability and compensation issues arising from the effect of oil pollution on the environment.

There are also regionally applicable treaties concerning marine pollution. They are the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 (the OSPAR Convention) applicable to the United Kingdom and other European Countries,³⁷⁸ and in West Africa; the Convention for Co-operation in the Protection and Development of

³⁷⁶ Glazewski, op. cit. ibid.

³⁷⁷Henceforth reference shall be made to the OILPOL acronym throughout this thesis.

³⁷⁸For the text of the Convention see 32 ILM 1069 (1993).

the Marine and Coastal Environment of the West and Central African Region and Protocol, 1981.³⁷⁹ Under Article 5 of this Convention, the Contracting Parties undertake to take all appropriate measures in conformity with international law to prevent, reduce, combat and control pollution in the Convention area (i.e. marine environment, coastal zones and related inland waters falling within the jurisdiction of the State of the West and Central African Region, from Mauritania to Namibia inclusive) caused by dumping from ships and aircraft, or by normal or accidental discharge from ships, and shall ensure the effective application in the Convention of the internationally recognized rules and standards relating to the control of this type of pollution.³⁸⁰

These marine oil pollution Conventions shall now be examined in detail.

3.2.2 The International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (OILPOL)

OILPOL³⁸¹ was the first Convention to deal with *intentional* discharges of oil into the marine environment. The Convention was the outcome of a conference held by countries and their representatives in 1954 in London. The Convention prohibits the discharge of oil and oily mixtures by tankers within an area of 50 miles of land within certain prohibition zones.³⁸² The prohibited zones are (a) The Adriatic Zones containing an area spanning the coasts of Italy and Yugoslavia and extending over a distance of 30 miles from land,³⁸³ (b) The North Sea Zone consisting of the Coastlines of Belgium, Denmark, the Federal Republic of Germany, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, (c) the Atlantic Zone, (d) the Australian Zone.

The discharge of oil or of any oily mixture from such ship shall not be prohibited when the ship is proceeding from a port not provided with such reception facilities as are referred to in Article VIII.³⁸⁴ Article III also exempts a ship from sanction under the Convention if the

³⁷⁹This Treaty came into force on 5th August 1984. The signatories to the Treaty are Nigeria, Benin, Congo, Gabon, Gambia, Ghana, Guinea, Ivory Coast (now Cote d'Ivoire), Liberia, Mauritania, Senegal and Togo. See further E Idowu & M Usoro Oil Pollution from Ships in Nigerian Territorial Waters, *The Nigerian Journal of Maritime Law NJML* (2002) vol. 2 No. 1 at 6.

³⁸⁰See Annex 1(a) of the Guidelines made pursuant to Art 7 of the Protocol to the Convention which requires each state party to prepare a report which shall contain an identification of the source of the pollution (e.g. identity of the ship) where appropriate.

³⁸¹OILPOL was adopted at London on 12 May 1954 and entered into force on 26 July, 1958. It was amended in 1962.

³⁸² Art 111 and Annex A.

³⁸³ Annex A.

³⁸⁴ Art III(2)(b).

discharge of oil or an oily mixture was done for the purpose securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea.³⁸⁵

With respect to the discharges that are not permitted under the Convention, the government of a Contracting State may impose penalties under the law of the territory of such a State and the penalties which shall be imposed shall not be less than the penalties which is applicable in the law of that Contracting State.³⁸⁶

Where the oil mixture is less than 100 parts per million it is deemed not to foul the surface of the sea.³⁸⁷ Subject to the provisions of Articles IV and V, Ships are required to carry an “oil record book” in the form prescribed by the Convention³⁸⁸and the book may be inspected by any of the contracting states.³⁸⁹Contracting states are obliged to report any violations by any of the Convention standards to the governments of the state in which the violator is registered.³⁹⁰In turn, the government is required to punish the violator under its national laws, which must provide for penalties “adequate in severity to discourage any such unlawful discharge”.³⁹¹

This Convention has been domesticated by the Nigerian National Assembly (Parliament) by the enactment of the Oil in Navigable Waters Act.³⁹² This domestication was done through incorporation by reference by virtue of section 335 of the Merchant Shipping Act. Section 335 of the Act is significant. The section domesticates International Conventions that deal with ship source pollution. It provides:

As from the commencement of this Act, the provisions of the following International Conventions and Agreements shall apply:

- a) International Convention for the Prevention of Pollution from ships, 1973/1978 and the Annexes thereto;
- b) Convention Relating to Intervention on the High Seas in Cases of Threatened Oil Pollution Casualties, 1969;

³⁸⁵ Art IV(1) (a).

³⁸⁶ Art VI.

³⁸⁷ Art 111.

³⁸⁸ Art IX (1).

³⁸⁹ Art IX (4).

³⁹⁰ Art X.

³⁹¹ Art VI. See further the text of the Convention at:

<http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE000578.txt> (accessed 25 September 2010).

³⁹² See Oil in Navigable Waters Act Cap 06 LFN 2004.

- International Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1972;
- c) International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990;
 - d) International Convention on Civil Liability for Oil Pollution Damage 1992;
 - e) Convention on Limitation of Liability for Maritime Claims, 1976 and the 1996 Protocol thereto;
 - f) Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 and its Protocol of 1992;
 - g) Basel Convention on the Control of Trans boundary Movements of Wastes and their Disposal, 1989; and
 - h) Any International Agreements or Convention not mentioned in paragraphs (a) to (h) of this subsection which relates to the prevention, reduction or control of pollution of the sea or other waters by matters from ships; to which Nigeria is a party.

Out of the enumerated Conventions, three of the oil pollution Conventions that deal with liability and compensation issues are.³⁹³

- a) The Convention on Civil Liability for Oil Pollution Damage 1969 (accession by Nigeria on August 5, 1981; otherwise called the Civil Liability Convention) (CLC), it entered into force in 1975.
- b) The Convention on International Oil Pollution Compensation Fund 1971 (accession by Nigeria on December 10, 1987); Otherwise called the IOPC Fund Convention. The Convention entered into force in 1978.
- c) The International Convention for the Prevention of Pollution from ships, 1973/1978 and the Annexes thereto

It is significant to note here that the OILPOL Convention has already been superseded by the MARPOL³⁹⁴ and this explains why it was omitted in this section 335. Therefore the discussion of the Nigerian domesticated version of the OILPOL Convention is merely

³⁹³We shall deal with these three Conventions on liability and compensation later on in this chapter.

³⁹⁴International Convention for the Prevention of Pollution from Ships, 1973. This will be discussed in detail later on in this chapter.

academic. For the purpose of fulfilling the provisions of the OILPOL Convention pursuant to Art VI³⁹⁵ above the government enacted an Act³⁹⁶ and promulgated a schedule to the Act.³⁹⁷

3.2.3 Exceptions under the OILPOL

The discharge of oil outside the fifty mile zone and designated prohibition zone is unregulated by the Convention.³⁹⁸ The Convention does not also apply to naval ships.³⁹⁹

A vessel may also escape liability if oil is discharged in order to secure the safety of the ship and save life at sea or where the discharge has resulted from damage to the ship.⁴⁰⁰

Also the ship master or owner may plead the defence of sabotage and establish absence of negligence.⁴⁰¹ As one commentator put it, there were many loopholes in the Convention which made its enforcement difficult. The various exceptions also made the Convention to be practically useless in the combating of intentional pollution of the Sea by oil.

The loopholes contained in the OILPOL made an observer to declare that the only burden placed upon the oil transportation industry by the 1954 OILPOL Convention was “the extra time spent outside the prohibition zone discharging cleaning residues.⁴⁰² OILPOL was amended in 1962 and 1969. Further amendments were adopted in 1971 concerning the arrangement for the limitations of tanker size but this never came into effect until OILPOL was superseded by MARPOL.⁴⁰³

3.2.4 Criticisms of the OILPOL

Under the OILPOL Convention, 1954, the accidental spillage of crude oil into navigable waters was not punishable. There are also other criticisms of the OILPOL ranging from the many exceptions it allowed for the discharge of oil. For example under Article 4(1) of the Convention it will be a defence to an offence for an offender to prove that oil was discharged

³⁹⁵ See n311.

³⁹⁶ See the Oil in Navigable Waters Act supra.

³⁹⁷ See L. N. 101 of 1968 made pursuant to sections 5 and 7 of the Act. The provisions of this schedule shall be discussed later.

³⁹⁸ Art 111.

³⁹⁹ Art 11.

⁴⁰⁰ Art IV.

⁴⁰¹ Art VII.

⁴⁰² Curtis (1985) 687 in J Gray *Vessel Source Pollution and Key International Conventions: A Case for Change*. Unpublished PhD dissertation of the University of Auckland New Zealand (2002) 85.

⁴⁰³ See text of the third amendment at

<http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE000576.txt> (accessed 1-12-2009).

for the purpose of saving life, or to prevent damage or destruction of vessel or cargo.⁴⁰⁴ A polluter can also raise the defence of accident where the polluter can prove that the polluting substance (oil) escaped as a result of damage to his vessel, or leakage therefrom, and that all reasonable and urgent steps were taken to contain the discharge and reduce its impact on the environment.⁴⁰⁵

There are other shortcomings of the OILPOL. Damage caused by non-persistent oils or chemical products from ships are not covered.⁴⁰⁶ This shortcoming has however been redressed with the coming into force of MARPOL which shall be discussed in due course.

Furthermore, pollution damage resulting from the escape of oil from any ship or tankers not carrying oil in bulk as cargo is not covered. In other words, the damage must be as a result of oil being carried by a ship as cargo. The Convention will not for instance cover damage to a pleasure boat. Will the scenario painted above cover damage resulting from oil that escapes from say a ship X carrying oil as cargo and this fouls the coast of country Y and causes damage to the hotels situated on the coasts of country Y? The short answer to this is that the OILPOL Convention would apply as far as the oil escaping from the ship was intentional but not accidental. This created a gap in the law which was addressed later by the MARPOL Convention.

The other criticism of the OILPOL is that it did not cover pollution damage resulting from the escape of oil from vessels used in the carriage of oil in the course of inland transportation of oil (i.e. outside the fifty mile zone) and oil escaping from offshore installations, land installation and pipelines.⁴⁰⁷

3.2.5 *The Oil in Navigable Waters Act (ONWA)*

The Act⁴⁰⁸ created the following anti-pollution offences:

- (a) Discharge of oil into prohibited sea areas.
- (b) Discharge of oil into Nigerian waters.
- (c) Failure to install oil pollution equipment on ships.

⁴⁰⁴L Atsegbua, V Akpotaire & F Dimowo (eds.) *Environmental Law in Nigeria, Theory And Practice*, (2004) 22.

⁴⁰⁵Art 4(2)(a).

⁴⁰⁶Usoro op cit. 21.

⁴⁰⁷Usoro op cit 22.

⁴⁰⁸Oil in Navigable Waters Act, 2004.

- (d) Failure to keep records of oil matters.
- (e) Failure by harbour authority to provide oil reception facilities.
- (f) Failure to report the presence of oil in harbour waters.⁴⁰⁹

Prior to the enactment of this Act, the liability of any person for oil pollution in Nigeria's territorial waters was not covered under any statutory provision.⁴¹⁰ This constituted a negative aspect of Nigerian law on oil pollution. Aside from the absence of statutory provisions, the remedy for an individual affected by damage caused by oil pollution from ships laid at common law, in nuisance, trespass and/or negligence.⁴¹¹ However, with the enactment of the Act, it became a statutory offence to discharge any oil form a ship into a part of the sea that is prohibited area within 50 miles from land.⁴¹²

Furthermore, the potential liable parties for any act of discharging oil into the territorial waters of Nigeria are:

- (a) the owner or master of a vessel; or
- (b) the occupier of land; or
- (c) the person in charge of an apparatus⁴¹³

The Act creates criminal offences where oil is discharged from a vessel or land or from an apparatus used for transferring oil from one vessel to another or from one vessel to an area within the prohibited zone. This provision is preventive in nature and is designed to ensure that Nigeria's territorial waters does not become a dumping ground for ships sailing without adequate reception facilities for their oil wastes and residues.

The Act also makes it an offence for ships sailing without adequate reception facilities for their oil wastes. The Act also requires the provision of oil reception facilities at every port for the discharge of ballast water from vessels as such times and subject to such conditions as the

⁴⁰⁹See S 1 of the Oil in Navigable Waters Act, supra.

⁴¹⁰This is because this area is covered by International law.

⁴¹¹P Usoro *Pollution in Ports: Legal Issues* A publication of Paul Usoro & Co., Marine and Environmental section 21.

⁴¹²Ibid.

⁴¹³See ss 3(1) (a) – (c) of the Act.

harbour authority may impose.⁴¹⁴ The making of an entry in any record which is false under this section is punishable by a fine of not exceeding N1, 000 (USD\$6) or an imprisonment for a term not exceeding six months.⁴¹⁵ The detail of the regulations concerning this are provided in the schedule attached to the Act.⁴¹⁶ The Act has also civil provisions for violators and criminal provisions for prosecution of offenders. This prosecution is entirely at the discretion of the State and was not provided for under the OILPOL Convention.⁴¹⁷

3.2.6 *The Regulations made under the Oil in Navigable Waters Act (ONWA)*

The Minister may make regulations requiring the keeping of records relating to the transfer of oil to and from vessels while they are within the seaward limits of the territorial waters of Nigeria and any requirements imposed by virtue of regulations made under this section, shall in the case of vessels subject to the requirements made under subsections (1) of this section, be additional thereto.⁴¹⁸

The Regulations made pursuant to the Act are contained in the schedule attached to the Act. The Regulation contain provisions amongst which are the provision of equipment such as oil water separators on board ships to separate oil from a mixture of oil and ballast water,⁴¹⁹ the provision of oil discharge records,⁴²⁰ oil transfer records,⁴²¹ and detailed precautions to be taken when loading, discharging or bunkering⁴²² oil.⁴²³

⁴¹⁴Usoro op cit 21. The author submits that this provision is both preventive and punitive in nature as the harbour authorities may enter on board such ships to inspect these facilities and may detain the ship for non compliance with this provisions.

⁴¹⁵See s 7(5) (b).

⁴¹⁶ See further below the detail of the Regulations and their analyses.

⁴¹⁷ See Art V1.

⁴¹⁸S 7(2). This has already being done. See Government Notice no. L. N. 101 of 1968.

⁴¹⁹ Reg. 2(1).

⁴²⁰ Reg. 3(1). The master of every Nigerian ship (not being a tanker) of 80 tons gross tonnage or over which uses fuel oil shall maintain such record as relates to the following, that is –

- (a) Any occasion on which oil or a mixture containing oil is discharged from his ship for the purpose of securing safety of any vessel or of preventing damage to any vessel or cargo;
- (b) Any occasion on which oil or a mixture of oil is found to be escaping, or to have escaped, from any such ship in consequence of damage to the ship or by reason of leakage;

⁴²¹Reg. 4(1). There shall be kept by the master of every vessel, whether registered or not, and of whether nationality a record of the particulars hereinafter specified relating to the transfer of oil to and from the vessel while it is within the seaward limits of the territorial waters of Nigeria.

⁴²²Bunker oil is defined as ‘hydrocarbon mineral oil, including lubricating oil used for the operation or propulsion of a ship, or any residue of such oil’.

⁴²³Reg 5(1).

The Regulations do not apply to the vessels of the Nigerian Navy, nor to any Government ships in the service of the Nigerian Navy.⁴²⁴ ‘Ships’ is defined in the Act to include any sea-going vessel of any type whatsoever, and also includes floating crafts (whether self-propelled or towed by another vessel) making a sea voyage.⁴²⁵ The Act and its regulations apply to ships registered in Nigeria and this has been criticised as one of the shortcomings of the Act for being restrictive.⁴²⁶

3.2.7 Sanctions provided under the Oil in Navigable Waters Act (ONWA)

The Act prescribes a fine of N1, 000 (USD \$6) for any violation of the regulations prohibiting the discharge of oil.⁴²⁷ This amount may be a lot of money when the Act was enacted over forty years ago but by today’s standards the amount is laughable. The sum is not likely to serve as deterrence to anyone who violates its provision. The provision of the Harmful Waste (Special Criminal Provisions) Act⁴²⁸ which deals with dumping of toxic waste has a more realistic view of sanctions to deter would be infringement of the law.⁴²⁹

Violations under the Act are to be prosecuted before a Magistrate who shall exercise jurisdiction for the trial of any offence in respect to which a summary trial is prescribed under the Act and shall impose any penalties prescribed.⁴³⁰ This is also another shortcoming of the Act because Magistrate courts have their jurisdiction limited by the limit to the fine they can impose.⁴³¹ This outdated penalty and its lack of deterrence will be discussed further when this thesis considers the provisions of the International Convention for the Prevention of Pollution from Ships.⁴³² Currently, the provisions of the Oil in Navigable Waters Act and its Regulations are the applicable law with respect to the pollution of the sea by oil under Nigerian law.

⁴²⁴S 16.

⁴²⁵S 20. The definition of a ship here includes any sea-going vessel of any type whatsoever. This definition will appear to cover vessels of any kind designed to carry oil, whether crude oil or refined petroleum. However the vessel must be in motion i.e making sea voyage.

⁴²⁶S 16(2) of the Act.

⁴²⁷S 7(1).

⁴²⁸42 of 1990.

⁴²⁹See further discussion on this in chapter 4.

⁴³⁰S 12(5).

⁴³¹In Lagos State for instance, the maximum amount a Chief Magistrate can impose is N250, 000 (about \$1, 500). See Magistrate Court Law of Lagos State, 2004. This amount can easily be paid by any foreign ship and with impunity continue to pollute Nigerian waters.

⁴³²Otherwise called MARPOL 73 it was adopted on 2 November 1973.

3.2.8 International Convention for the Prevention of Pollution from Ships (MARPOL)

The International Convention for the Prevention of Pollution from Ships (MARPOL) is a follow-up Convention to the OILPOL. Since the discharge of oil outside the fifty mile zone is unregulated by the Convention, it follows that an appropriate legal regime must develop to regulate the disposal of oil and oil residues outside the fifty mile zone and the prohibited areas. This is an area where the ballast water and other types of wastes are discharged, in the absence of the provision of waste reception facilities.⁴³³ An IMO conference was convened on 2 November 1973 and adopted two instruments. The first one entitled “*International Convention for the Prevention of Pollution by Oil from Ships*, 1973, which never came into force, and the second “*Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil*”.⁴³⁴

In 1978, a Conference on Tanker Safety and Pollution Prevention took place in London and the outcome was a Protocol to amend the 1973 MARPOL Convention. The 1973 MARPOL Convention contains Annexes 1 and 11 which are compulsory for all members. Annex 1 contains regulation for the prevention of pollution by oil. Annex 11 contains provisions for the control of pollution by noxious liquid substances other than oil. The 1978 Protocol incorporated by reference Annexes 1 and 11 but limits its scope so as to relieve the Parties of their obligations under Annex 11 for at least three years (Article 11).⁴³⁵ Annex 111 contains regulation for the prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form. Annex IV contained provision for the Prevention of Pollution by Sewage from Ships. Annex V contains provision for the prevention of Pollution by Garbage from Ships. Annex VI contains provision for the Prevention of Air Pollution from Ships. Annexes 111, IV, V and VI are optional to parties. The Protocol to amend MARPOL 73 entered into force on 2 October 1983.⁴³⁶ Nigeria ratified MARPOL 73/78 in May 2002 and has since domesticated the provisions of MARPOL.⁴³⁷

⁴³³ J Gray op.cit 86.

⁴³⁴ Gold (1973) 58 in Gray op.cit. 90.

⁴³⁵ P Sands and P Gallizi Documents in *International Environmental Law*(2004) 289.

⁴³⁶ Annexes 111, IV and V have come into force.

⁴³⁷ See International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act No. 15, 2007 which came into force on 11 April 2007.

The Act which domesticated MARPOL 73/78 is International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act No. 15, 2007 which came into force on 11 April 2007. The Act states in its preamble: An Act to enable effect to be given in the Federal Republic of Nigeria to the International Convention for the Prevention of Pollution from Ships, 1973 and the 1978 Protocol; And for Related Matters. The Act then attaches to its Schedule MARPO 73 and its Protocol of 1978. The Act further provides that MARPOL 73/78 shall have the force of law in Nigeria and shall be given full recognition and effect; and be applied by all authorities and persons exercising legislative, executive and judicial powers.⁴³⁸

3.2.8.1 Provisions of MARPOL 73/78 on the prevention of marine pollution from ships

The Convention (MARPOL 73/78) categorised ship generated wastes which can pollute the marine environment into four categories:

First is oil waste which is a mixture of oil with sea water, including fuel residues and sludge. Annex 1 deals with this.

Second are chemicals. This includes noxious liquid substances carried in bulk in parcel tankers, dry bulk carriers or in portable containers. Annexes 11 and 111 deal with this and contain regulations for their carriage.

Third is sewage which is generated by passengers and crew. Annex 1V deals with this.

Fourth is garbage which originates from wastes generated by the crew and passengers in the course of the maintenance of the ship, of carriage of cargo by the ship and in the operation of fishing activities by trawlers. Annexes 1V and V, which are optional, deal with this.

Annex V1 deals with the prevention of air pollution from ships. This refers to emission from the exhaust pipes of the ship in the course of operation and although it is a significant form of pollution is outside the scope of this thesis.

Article 1 of MARPOL 73/78 lays down the general obligation of parties to that Convention. It provides that parties shall take all necessary measures to prevent the pollution of the marine environment either through the discharge of harmful substances or effluents containing such substances.⁴³⁹ It is also provides that the reference to the present Convention shall constitute at

⁴³⁸ See s 1(a), (b), and (c) of the Act.

⁴³⁹ See Art 1(1) of MARPOL 73/78.

the same time a reference to its Protocol and the Annexes.⁴⁴⁰ Harmful substances include any substance which if introduced into the sea, is liable to create hazards to human health, harm living resources and marine life, damage amenities or interfere with other legitimate uses of the sea.⁴⁴¹ Discharge in relation to ‘harmful substance’ or ‘effluents’ containing such substances means any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying.⁴⁴² Discharge does not include dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter⁴⁴³ or release of harmful substances directly arising from the exploration, exploitation and associated off-shore processing or sea-bed mineral resources⁴⁴⁴ or release of harmful substances for purpose of legitimate scientific research into pollution abatement and control.⁴⁴⁵

‘Ship’ is defined as a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.⁴⁴⁶ The Convention shall apply to ships entitled to fly the flag of a Party to the Convention (the flag state)⁴⁴⁷ or ships not entitled to fly the flag of a Party but which operate under the authority of a Party.⁴⁴⁸ These provisions are important in that they determine who can be the subject of an enforcement action under the MARPOL. The Convention does not apply to any warship, naval auxiliary or other ship owned or operated by the State and used, for the time being on government non-commercial service.⁴⁴⁹

Under Annex 1 oil tankers are to carry on board a certificate called the Maritime Safety Certificate which is expected to show that the ship has complied with the provisions of MARPOL and the ship can be inspected by Port States and may prevent the ship from sailing if it poses an unreasonable threat of harm to the marine environment.⁴⁵⁰ Regulation 10 allows the discharge of oil in certain areas and regulates the amount of oil that may be discharged.⁴⁵¹ The construction of oil tankers of over 70, 000 tonnes or more is also regulated by the

⁴⁴⁰ Art 1(2).

⁴⁴¹ Art 2(2).

⁴⁴² Art 3(a).

⁴⁴³ The London Dumping Convention, 1972. Art 3(b)(i).

⁴⁴⁴ Art 3(b) (ii).

⁴⁴⁵ Art 3(b)(iii).

⁴⁴⁶ Art 2(4).

⁴⁴⁷ Art 3(1) (a).

⁴⁴⁸ Art 3(1) (b).

⁴⁴⁹ Art 3(3).

⁴⁵⁰ See Reg. 9 of the Protocol to MARPOL 73/78.

⁴⁵¹ See Reg.10 of the Protocol to MARPOL 73/78.

provision of specialised tankers called Segregated Ballast Tanks (SBT) which are to be used for carrying of *ballast water*⁴⁵². To reduce the amount of oil-water mixture discharged on shore, the washing of the tanks carrying crude oil must be done by the use of crude oil. The crude oil discarded is to be offloaded to a reception facility provided by the coastal state. The regulation also provides that tankers of over 5000 dead weight ton(dwt) are to be fitted with double hulls or an alternative design approved by the IMO so as to reduce the risk of oil spillage in the event of an accident.⁴⁵³

The major criticism of MARPOL 73/78 is that it lacks a self-enforcing mechanism. This is because “(the) primary responsibility for the effective application of vessel safety and environmental standards laid down in international instruments rests with flag states”.⁴⁵⁴

“They have an obligation to ensure that their flag vessels comply with the applicable international rules and standards relating to vessel safety and pollution control.”⁴⁵⁵

Flag states refer to states having jurisdiction over the ship. The primary basis for the regulation of ships is the jurisdiction enjoyed by the State in which the vessel is registered or whose flag it is entitled to fly (‘the flag state’).⁴⁵⁶ It is the flag state which is responsible, for instance, for regulating safety at sea and the prevention of collisions, the manning of ships and the competence of their crews, and for setting standards of construction, design, equipment, and seaworthiness.⁴⁵⁷ Under MARPOL 73/78 these duties are imposed on the flag states.⁴⁵⁸

However there are ships flying ‘flags of convenience’.⁴⁵⁹ The flag of convenience states are more content with the money they get from the registration of these ships in their registry and the annual renewals and they bother less about the conditions under which these ships operate. For the successful operation of MARPOL and all other Conventions dealing with pollution and safety at sea, there is a need for strict compliance with the Conventions and

⁴⁵²Ballast water refers to water carried on board the ship after its cargo has been offloaded to ensure the stability of the ship.

⁴⁵³Reg. 13.

⁴⁵⁴Gray op cit. 8.

⁴⁵⁵Ibid.

⁴⁵⁶Birnie et al op cit 400.

⁴⁵⁷Art 94, 211(2) of UNCLOS 1982.

⁴⁵⁸Birnie op cit 401 fn 94.

⁴⁵⁹Flags of convenience is a term under shipping law and practice which refers to the practice of registering ships under conditions that allow for minimal cost to the operation of the ships. The ships registered in this way do not operate under strict guidelines of the flag states, are not expected to pay tax to the authorities of the flag states and they sometimes engage cheap labour to reduce the cost of their operations in order to maximize profits. However they do not pay due regard to regulations on pollution and other guidelines.

regulations. Typically flags of convenience states are those so-called third world countries like Liberia, Panama and Honduras.

On the other hand coastal states have the responsibility under UNCLOS to regulate shipping and other activities taking place on their coasts. It is the duty of a coastal state to ensure that all vessels calling on its ports comply with the standards of the coastal state. In the enforcement of this duty, the coastal state is empowered to enter and undertake physical inspection of the vessel to determine any violation of the international rules and obligations and even of the regulation of the coastal state.⁴⁶⁰ UNCLOS also extends the enforcement power of coastal and port states, at the expense of the flag state's exclusive authority by redefining and strengthening the latter's obligations towards the protection of the marine environment.⁴⁶¹ This delicate balance contained in the UNCLOS and the MARPOL 73/78 has certainly led to improvements but not eliminated vessel-source pollution.⁴⁶²

States are required to submit to the IMO secretariat information on non-compliance to MARPOL which they often fail to do and this has severely limited the ability of MARPOL to enforce its provisions with regards to vessels source pollution.⁴⁶³ Furthermore, under the UNCLOS 111,⁴⁶⁴ enforcement of regulation on vessel–source marine pollution is left to flag states which, as we have seen in ships flying flags of convenience, are very weak.⁴⁶⁵

The obvious advantage that MARPOL has over the OILPOL is that it extends regulation beyond the 50 nautical miles prohibition zone and also regulates the amount of oil that can be discharged.⁴⁶⁶

Within the prohibited area, the coastal state also has sovereignty to enforce measures like boarding a foreign vessel to arrest the crew where there is sufficient evidence that the ship has discharged harmful substances or effluent on board the ship, inspection of the foreign vessels for compliance with the provisions of MARPOL, even if the ship is outside the territorial zone but within the EEZ.⁴⁶⁷

⁴⁶⁰See Art 220 UNCLOS 1982.

⁴⁶¹Birnie et al op cit 400.

⁴⁶²Ibid.

⁴⁶³Birnie op cit 409.

⁴⁶⁴ See Art. 217 of UNCLOS 1982.

⁴⁶⁵ Port states can detain for lack of valid certificates, only flag states have the responsibility for imposing fines and penalties on the foreign vessels and the flag states laws determine the scope of such fines and penalties.

⁴⁶⁶ Art. 1(1) MARPOL 73/78.

⁴⁶⁷ See Art. 6 of MARPOL 73/78, Arts. 58 (3) and Art. 211 of UNCLOS 111.

Before the domestication of the MARPOL 73/78 by the Nigerian Parliament,⁴⁶⁸ MARPOL 73/78 could not be enforced in Nigeria.⁴⁶⁹ For instance serious violation of pollution control standards by foreign vessels sailing into Nigerian territorial waters was impossible to enforce because the MARPOL Convention relies heavily on the coastal state to enforce these standards.⁴⁷⁰ An example will further elucidate this assertion. Let us consider a scenario where a foreign registered ship sailing into Nigerian waters discharges oil or oil residues off the coast of Nigeria but within the Exclusive Economic Zone. The ship also makes false declaration in its Oil Record Book (ORB) lying to hide the fact that it poured oil into the Nigerian territorial waters. When the ship sails into Nigerian waters, will the law enforcement authority have authority to board the ship and inspect the ship and if so under which law? It is submitted that the Nigerian maritime authority (the police or the officials of the Nigerian Navy) will have authority to do so if the ship is within the Nigerian territorial waters and Nigeria is a party to the MARPOL Convention.⁴⁷¹ However, it is arguable under the provisions of MARPOL 73/78 that the crew of the ship and even the ship owners (assuming that the ship is a foreign registered ship) can be tried in Nigerian courts for violation of the criminal provisions of the Convention. This submission is based on the provision of Article 4 of the MARPOL 73 Convention which is reproduced below:

Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law.⁴⁷²

This is particularly so because Nigeria has not enacted into law the provisions of MARPOL pertaining to criminal offences.⁴⁷³

3.2.8.2 *Certification and inspection under the MARPOL 73/78*

It is the duty of the flag state as this thesis stated earlier to ensure that all vessels flying its flag comply with the technical standards set by MARPOL. This includes the inspection of the

⁴⁶⁸ See International Convention for the Prevention of Pollution from Ships, 1973 and 1978 (Ratification and Enforcement) Act No. 15, 2007.

⁴⁶⁹ See above.

⁴⁷⁰ See above.

⁴⁷¹ Art 1(1) of MARPOL 73/78.

⁴⁷² Art 4(1) of MARPOL 73/78.

⁴⁷³ The domesticated Act merely attached MARPOL 73/78 as a schedule to Act No. 15 of 2007 and it is submitted that this Act does not include the criminal provisions of MARPOL 73/78 in compliance with Art 4(4) of MARPOL 73/78.

vessel at regular intervals and the issuance of an ‘international oil pollution prevention certificate’.⁴⁷⁴ This certificate provides *prima facie* evidence that the ship complies with the requirement of MARPOL. Where there is noncompliance with this provision, it is the duty of the port state to prevent the ship from sailing unless it can do so without presenting an unreasonable threat of harm to the marine environment. The options open to the port state is to detain the ship in port until it can show evidence of compliance. However, the port state must not unduly delay the ship.⁴⁷⁵

The question which can be asked at this juncture is can a port State which is not a signatory to MARPOL detain a ship under this provision? Our submission is that it can provided the ship is within its territorial waters in which case the port state will be exercising its powers as a coastal State under Article 211 of the UNCLOS 111.

Article 211 provides:

1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.
2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.
3. States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

⁴⁷⁴See Annex 1, regulations 4,5, and Art 5(1) which provides:

Subject to the provisions of paragraph (2) of the present Article a certificate issued under the Authority of a party to the Convention in accordance with the provisions of the Regulations shall be accepted by the other Parties and regarded for all purposes covered by the present Convention as having the same validity as a certificate issued by them.

⁴⁷⁵Art 7.

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

This thesis strongly posits, reinforced by the submission of Igbokwe that the operative words are that “states acting through competent international organisations” which will include such organisations established under the International Maritime Organisations and other like organisations or conventions. Even though the said port State might not have ratified the provisions of MARPOL, it can take enforcement actions under the provisions of UNCLOS to which virtually every nation is a party, except the United States of America.⁴⁷⁶

However in conclusion under this section, this thesis reiterates its assertion made above that MARPOL 73/78 is not a self-executing Convention as it relies on the flag and coastal states to enforce its provisions. This is regarded as one of its shortcomings.⁴⁷⁷ For example in the case of *United States v Royal Caribbean Cruises Ltd.*,⁴⁷⁸ the facts of which are that on February 1, 1993, a Coast Guard aircraft on patrol in the Caribbean observed a Liberian flag cruise ship, owned by the Royal Caribbean Cruises Ltd. (RCCL), discharging oil in Bahamian waters while en route to the United States. On the vessel’s arrival in Miami Florida, the Coast Guard boarded her for examination of her Oil Record Book (ORB). The examination revealed that there was no entry for the discharge of oil in Bahamian waters. The ship being registered in Liberia, the US Department of State referred the matter to government of Liberia with information contained in a referral obtained by the Coast Guard investigation mentioning both the discharge violation, and the failure to log discharges in the ORB. The Liberian government responded that there was reasonable doubt that the vessel in question was in violation of MARPOL. The government therefore recommended that the allegation be expunged. A grand jury in Miami later indicted RCCL for knowingly and wilfully using a false writing, the ORB, and presenting same to the Coast Guard in violation of 18 U.S.C. S 1001. The court then concluded that MARPOL was not self-executing and was implemented in the United States through the country’s domestic law, i.e. the Act to

⁴⁷⁶See M Igbokwe, The Law of the Seas and the Regulation of Marine Pollution (2001) a seminar presentation at the Lagos State University (LASU) Ojo, Lagos, in partial fulfilment of the award of LL.M in Maritime and Commercial Law.

⁴⁷⁷I could not find any Nigerian case law on this point hence the resort to the United States of America for guidance on case law.

⁴⁷⁸11 F. Supp. 2d 1358, 1998 AMC 1817 (S.D. Fla. 1998).

Prevent Pollution from Ships (APPS) which is the US statute domesticating MARPOL73/78.⁴⁷⁹ The defendant's (RCCL) motion for the dismissal of the case was denied.

3.2.8.3 *Provision of port reception facilities*

States parties to MARPOL are required to provide port reception facilities for oil residues or wastes from the ships.⁴⁸⁰ This is a facility that is provided at the port where these wastes are collected. The provision of this facility was a contentious issue at the time of the negotiation of the MARPOL because delegates from developing countries were reluctant to commit their country to a provision that has enormous financial implication. For the Nigerian delegation, the heavy financial burden which the Convention would impose on all participating states meant that it should contain provisions enabling those states without adequate financial means to request technical assistance at the very least.⁴⁸¹

In Nigeria, the authority saddled with the responsibility of ensuring compliance with the provision of MARPOL is the Nigerian Maritime Administration and Safety Agency (NIMASA). In a publication in the online edition of the *ThisDay* Newspaper the management of NIMASA issued a statement to the effect that NIMASA promises to implement IMO resolutions. The Director-General of NIMASA led a delegation of its management to inspect a waste reception facility constructed by a private firm - African Circle Pollution Management Limited situated at Snake Island, Apapa, Lagos.⁴⁸² The implication of this is that the Nigerian authority is yet to officially provide its own port reception facility as mandated by MARPOL. The non-compliance with this relevant provision of MARPOL is regrettable.

The Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP) also reports that in the early 1990's consistently noted a decline in the operational discharges of oil and oil spillages at sea from tankers, and concludes that the entry into force of MARPOL 'had a substantial positive impact' in reducing operational pollution from all types of

⁴⁷⁹ For further discussion of this case and the issues concerning the self – enforcement of MARPOL 73/78 and other issues bordering on the enforcement of criminal sanctions under MARPOL 73/78 see O Olagunju Criminalization of Seafarers for Accidental Discharge of Oil: Is there Justification in International Law for Criminal Sanctions for Negligent or Accidental Pollution of the Sea? *Journal of Maritime Law & Commerce* Vol. 37 No. 2, (2006) 219 at 228 fn 27.

⁴⁸⁰ Annex 1 & 11.

⁴⁸¹ IMCO DOCMP/Conf/SR/13 4.3.75 –Summary record of the Thirteenth Plenary Meeting, page 9 in Gray op cit. 92.

⁴⁸² See *ThisDay* publication online 8 May, 2011.

vessel.⁴⁸³ The persistence of these operational discharges indicate a continuing inadequacy on the provision of port reception facilities, a long-standing problem despite the obligation to provide them placed on port states by the MARPOL Convention,⁴⁸⁴ and the efforts of IMO through advice and assistance to ensure compliance.⁴⁸⁵

3.2.8.4 *Provision concerning tanker size*

The Protocol to MARPOL 1973 provides that tankers of over 5000 dead weight ton (dwt) are to be fitted with double hulls or an alternative design approved by the IMO so as to reduce the risk of oil spillage in the event of an accident.⁴⁸⁶ This provision was originally contained in the OILPOL but could not be enforced immediately because it would hurt commercial interests. By an IMO resolution, the enforcement of the regulation by parties was postponed to the year 2015.⁴⁸⁷

The provision of waste reception facilities, which will demonstrate government's readiness to comply with the resolution of the IMO, be implemented without delay. The government should also fast-track the process of enacting the criminal provisions, with the penalties for violations substantially more severe than is presently obtainable under the ONWA Act and its Regulations. The thesis shall now turn its attention to the Convention that deals with issues of liability and compensation- The Civil Liability Convention (CLC) 1969.

3.2.8.5 *The Civil Liability Convention 1969*

The Civil Liability Convention (CLC) arose out of the incident that happened on board the *Torrey Canyon* and the inability of the existing legal regime then to deal with incident that happened purely by accident.⁴⁸⁸ The incident led to the convening of an international Conference in Brussels and the outcome was the Civil Liability Convention, 1969.⁴⁸⁹ Under the provisions of the CLC the ship owner is entitled to limit his liability if the loss arose from an incident which does not result from his actual *fault* or *privity*.⁴⁹⁰ It is appropriate here to examine the concept of limitation of liability. A person is said to be liable to another where that person suffers loss or damage at the hand of the other. Legal liability in tort (delict) or

⁴⁸³See Birnie op cit fn 141. GESAMP, The State of the Marine Environment (Nairobi, 1990); id, Reports and Studies No 50: Impact of Oil and Related Chemicals on the Marine Environment (London, 1993).

⁴⁸⁴Annex 1 Reg 12.

⁴⁸⁵Birnie, op cit 412.

⁴⁸⁶See Reg 9 to the Protocol of MARPOL 73/78.

⁴⁸⁷See <http://www.imo.org/About/Conventions/Pages/Action-Dates.aspx> (accessed 19-11-2011).

⁴⁸⁸See above.

⁴⁸⁹The Convention entered into force in 1975.

⁴⁹⁰See Article 3(2), of the CLC 1969.

contract may thus be invoked legally to compensate the loss suffered by the other person.⁴⁹¹ This redress is however subject to certain limits. Certain provisions of the law would require that the damage resulting from the act be reasonably foreseeable, as for instance in the case of claims under negligence. Others limit liability in the case of artificial persons to the property attributable to the artificial persons. It is trite, for instance, under the corporate liability principle of corporations, that the directors of a company cannot be held personally liable for the debts owned by the company.⁴⁹²

In maritime law, the law draws a somewhat similar line by allowing a shipowner in appropriate circumstances to limit his liability. This is done by calculating the freight rates for the carriage of the cargoes based upon estimates of its potential liability as a carrier, and as the operator of a ship which can cause damage when going about its normal daily business.⁴⁹³ Upon the same estimates of exposure, the shipowner will be given rates for marine insurance liability cover, generally through his P & I (Protection and Indemnity) Club assurers. The higher the exposure, the higher the premium. The higher the premium, the higher the freight rate.⁴⁹⁴

Unpacking this further, Hare⁴⁹⁵ submitted that in modern law a ship-owner⁴⁹⁶ may limit his liability for oil pollution damage. Claims arising from damage caused by oil or other hazardous or noxious substances, cargo loss or damage and other delictual or tortious claims may also be covered.

The notion of a shipowner being liable for less than the actual damage caused by his ship, with or without fault, is founded in public policy.⁴⁹⁷ It is a concept which stems from a desire, spanning many centuries, to stimulate shipping for the benefit of international commerce.⁴⁹⁸ It

⁴⁹¹J Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, (1999), 514.

⁴⁹²See *Salomon v Salomon* (1897) AC 22. This was a case which involved one Mr. Salomon, a Merchant, who carried on business under a name which he later incorporated under the Act. He subsequently transferred his assets to this incorporated company and secured its assets as a secured creditor. The company went bankrupt. Creditors of the company sued to attach the assets of Mr. Salomon and he contended that the assets belonged to the liquidated company and having satisfied the secured creditors, the unsecured creditors could not be satisfied. The court held that the company was separate from his owners and that the assets of the company could only be used to satisfy the debts of the company and nothing more.

⁴⁹³Hare, *op cit* 380.

⁴⁹⁴Ibid.

⁴⁹⁵J Hare *Shipping Law & Admiralty Jurisdiction in South Africa*, (1999), 514.

⁴⁹⁶A ship is a large boat designed to carry passengers or cargo by sea (Oxford Advanced Learner's Dictionary) 2010 at p. 1363. A ship-owner is a person or company that owns ship or ships. Ibid. The master of a ship is the captain of the ship. He has a duty to propel the ship and navigate it to its destination. The master of a ship may not be an employee of the ship-owner where the ship is a chartered ship under a shipping contract.

⁴⁹⁷Hare *op cit* 381.

⁴⁹⁸Ibid.

is also for the benefit of the insurance community resulting in the capping of a shipowner's potential exposure to claims, cargo interests, and assists in the orderly distribution of risks to all concerned with the maritime business. The principles of limitation of liability have also ensured steady flow of investments into the shipping industry which is perceived to be a business fraught with risks. Furthermore, where the ship carries cargo such as oil and an accident happens, the principle of limitation of liability ensures that the owner of the ship is able to share his loss with the cargo owners.⁴⁹⁹

3.2.8.6 *Some important concepts under the CLC 1969*⁵⁰⁰

(a) Actual fault or privity rule.

The phrase "actual fault or privity" was not defined in the Convention but is of common law origin in the determination of the incidence of liability between a claimant and the person liable for a claim. Hare⁵⁰¹ quoting Buckley L. J. refers to it as:

‘the words “actual fault or privity” in my judgment infers something personal to the owner, something blameworthy in him, as distinguished from constructive fault, or privities such as *the fault or privity of his servants or agents....*’ (italics added).⁵⁰²

"Privity" on the other hand, by its dictionary meaning includes 'participation in the knowledge of something private or secret, usually implying concurrence or consent'.⁵⁰³

It was contended that the 'actual fault or privity rule' had the effect primarily to exclude liability where the ship owner had acted without fault. That is where no fault or *culpa* can be directly attributed to him. If no fault could be found in him, then he is absolved from liability to third parties. Where there is fault on the part of the defendant in a contractual relationship and it occasions harm on the plaintiff and/or a third party, this fault could be the basis of excluding the party at fault from the benefit under the contract.

When applied to shipping contracts, when most ships are owned by their masters⁵⁰⁴ it was a comparatively easy factual enquiry to determine. Nowadays however, shipping contracts are

⁴⁹⁹ Limitation of liability has been enacted into law by the Nigerian Parliament. See ss 351-355 of the Merchant Shipping Act, Cap M 11 LFN 2004.

⁵⁰⁰ See the text of the CLC 1969 at

http://www.imo.org/Conventions/contents.asp?doc_id=660&topic_id=256 (accessed 30 September 2010).

⁵⁰¹ Hare, op cit 520. See also previous discussion on liability in chapters 1 and 2.

⁵⁰² *Lennards Carrying Company v Asiatic Petroleum Company* [1915] A C 705.

⁵⁰³ Per the *Shorter Oxford English Dictionary* cited in Hare op cit 521.

⁵⁰⁴ Most ships are no longer owned by their masters because the "master" may now be a corporate entity with a corporate office and a board of Directors to direct its affairs.

a function of complex corporate structures devised by lawyers purposely to muddy the waters of ownership and control.⁵⁰⁵

When applied to the law of tort, fault or privity takes a different meaning. The tort of negligence is the breach of a legal duty to take care which results in damage undesired by the defendant to the plaintiff. The tort (delict) of negligence generally entails some forms of careless conduct which is usually, although not necessarily the product of inadvertence.⁵⁰⁶ In relation to the act of third parties the issue of causation must be established between the act or omission and the harm complained of for legal liability to ensue.⁵⁰⁷ This has led to the formulation of a series of tests such as the “reasonable foreseeability” test, the “harm test”, the “but for” test, “the neighbourhood test” and the principles enunciated in the cases beginning from *Donoghue v Stevenson*⁵⁰⁸ to the *Ocean Stemship Co. Ltd. V Liverpool and London War Risk Assurance Limited*⁵⁰⁹

The concept of limitation of liability when applied in the shipping context enables the ship owner to exclude liability where the damage resulting from the act causing pollution is not directly caused by him (i. e. the shipowner). Gauci⁵¹⁰ also submitted that it is probable, *prima facie*, to argue that the reference to the word ‘personal’ act or omission appearing in the Convention on Limitation of Liability and in CLC Protocol (1992) rules out any possibility of an application of the *alter ego* formula and thus further strengthens the right to limit liability. The *alter ego*⁵¹¹ is otherwise known as the corporate personality principle which companies find convenient to carry on their activities in a bid to limit liability.

Under international law, the principle of limitation of liability found a place under the 1924 Limitation Convention. The 1924 Limitation Convention was in effect, an international adoption of the English Merchant Shipping Act of 1894.⁵¹² Section 503 of the Act, (which applied to both British and foreign ships), allowed limitation of liability for loss of life,

⁵⁰⁵Hare, *ibid.*

⁵⁰⁶ W.N.H.R. Winfield & Jolowitz on Tort, (1988) 91.

⁵⁰⁷ See Corbett J A, *Minister of Police v Skosama* 1977 (1) SA 31 (A) in Neethling J *Casebook on the Law of Delict* 412.

⁵⁰⁸ (1932) A C 55.

⁵⁰⁹(1946) 1 K. B. 561.

⁵¹⁰ G Gauci, Limitation of Liability in Maritime Law: an anachronism? *Marine Policy Vol. 19, No. 1.* (1995). 72. See also the case of *The Eurysthenes*2 Lloyd’s Rep. 171.

⁵¹¹ Defined as a person whose personality is different from your own but who shows or acts as another side of your personality. See A S Hornby *Oxford Advanced Learner’s Dictionary* (2010) 8th edition 41.

⁵¹²For further reading on the history of limitation of liability see J Hare, Limitation of Liability- A Nigerian Perspective available at <http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/lmliab-nigeria.pdf> accessed 15-05-2012.

personal injury or damage to property which took place without the shipowner's fault or privity.⁵¹³

This 1924 Limitation Convention was found not to have harmonised the international law in this area,⁵¹⁴ and as being "...the result of laborious compromise..."⁵¹⁵ Accordingly, the Comite Maritime International (CMI) revisited the subject of limitation of liability in the 1950's and produced the Convention Relating to Limitation of Liability of the Owners of Seagoing Ships, which was signed in Brussels in October 1957 and entered into force in 1968 (the 1957 Limitation Convention).⁵¹⁶

The 1957 Limitation Convention was ratified or acceded to by 46 states, of which 11 have since denounced in favour of the later 1976 Convention.⁵¹⁷ The result of this shift is that forfeiting the right to limit liability based on fault was jettisoned for the right of the shipowner to limit his liability in accordance with the provisions of the Limitation of Liability Convention, (LLMC), 1976. Under this later Convention, a shipowner's right to limit his liability will only be removed "if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly with the knowledge that such loss would probably result."⁵¹⁸ Meaning the shipowner loses his right to limit liability where he is personally at fault.

Consequently the CLC 1992 has redefined liability arising from pollution damage as follows:

A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.⁵¹⁹

One other feature of the LLMC 1976 is that it shifts the burden to the claimant who, to break limitation, must itself prove that the intent, recklessness and knowledge of the defendant ship owner or charterer caused the loss.⁵²⁰

⁵¹³J Hare op cit 5.

⁵¹⁴Dillon in Hare, op cit fn 30.

⁵¹⁵Dillon in Hare, op cit. 6.

⁵¹⁶Hare ibid.

⁵¹⁷Griggs, Limitation of Liability for Maritime Claims: The search for International Uniformity (1997) *Llyods Maritime and Commercial Law Quarterly* 369 in Hare op cit fn 32.

⁵¹⁸Article IV of the LLMC. As we shall see later when we discuss the IOPC Convention, this provision has cost the shipowner to lose his "shield" and his insurers a significant higher exposure.

⁵¹⁹I shall discuss more on this in subsequent chapters.

⁵²⁰Hare Limitation of Liability- Part 11 The 1976 Regime: Suitable for Nigeria & South Africa? Available at <http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/lmliab1976.pdf> accessed 15-05- 2012.

Under Nigerian law, the concept of limitation of liability is well founded as this thesis posited earlier on. Section 352(1) provides:

Subject to Sections 354 and 354 of this Act, the following claims, whatever the basis of liability shall be, shall be subject to limitation of liability.

- (a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or, in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting there from
- (b) claims in respect of loss relating from delay in the carriage by sea of cargo, passengers or their luggage;
- (c) ...
- (d) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;
- (e) ...
- (f) claims in respect of floating platforms constructed for the purpose of exploring or the natural resources of the sea-bed or the subsoil thereof;
- (g) claims in respect of the raising, removal, destruction, or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

Claims set out in Subsection (I) of this section shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise⁵²¹. However, claims set out under paragraphs (d), (e) and (g) of subsection (I) of this section shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.

In the history of maritime claims in Nigeria, one judgement delivered by the Federal High Court fell under the first category i.e. the judgement delivered by Mohammed J of the Federal High Court, Port Harcourt Division in *Spliethoff's Bevrachtingskantoor B. V. (THELELIEGRACHT) v The A-G of the Federation (sued on behalf of (a) The Inspector General of Police and (b) The Nigerian Navy and Others)*⁵²². Briefly the facts of this case were that the Plaintiff's ship collided with the police jetty as well as several other boats moored alongside with that of the defendants. The ship damaged the boats and the jetty. The ship was detained. While the ship was detained the defendants through the police made

⁵²¹Section 352 (2) of the Act.

⁵²²Vol. 3 Nigerian Shipping Cases (1988) 372, 1988 Vol. 3 Commonwealth Law Reports (CLR)

claims against the ship owners for damage done to their property. The plaintiffs, after negotiation, paid to all the claimants (the defendants) a total sum of N499, 377.52 in full and final settlements of their total claims. The plaintiffs later filed the present action seeking declarations that they were entitled to limit their liability under the Merchant Shipping Act 1962 to the sum of N53, 165.97 and asked that the defendants be ordered to refund the excess money paid to them. Mohammed J held that they were entitled to do so under the Merchant Shipping Act 1962 as long as the accident occurred without their actual fault or privity.

The court however held that since the plaintiffs/claimants voluntary paid the defendants in order for their ship to be released, they cannot turn around and invoke the provisions of sections 383 of the Merchant Shipping Act 1962.⁵²³

(b) The concept of insurance

The CLC 1969 introduced the concept of insurance into the merchant shipping business which has revolutionised the sector by encouraging investment in the maritime business and raised the amount available for compensation for victims of oil pollution.

The preamble to the CLC 1969 states:

CONSCIOUS of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk,

CONVINCED of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,

DESIRING to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,

HAVE AGREED as follows:

The CLC, 1969 was adopted to ensure that adequate compensation is paid to persons who suffer oil pollution damage resulting from maritime casualties involving oil carrying ships.⁵²⁴

⁵²³I cannot find any other Nigerian cases under this section to establish other heads of limitation of liability. The issue concerning limitation of liability affects the compensation that can be claimed under the law by any person injured by pollution accident or incident. See further the discussion on compensation under chapter 5 of this thesis.

“Ships” means any sea-going vessel and any seaborne craft of any type whatsoever actually carrying oil in bulk as cargo.⁵²⁵

The Convention places the liability for such damage on the owner of the ship from which the polluting oil escaped or was discharged.⁵²⁶ The Convention requires ships covered by it to maintain insurance or other financial security in sums equivalent to the owner’s total liability for one incident.⁵²⁷ The Convention applies to all seagoing vessels carrying oil in bulk as cargo, but particularly to ships carrying more than 2000 tons of oil which are required to maintain insurance in respect of oil pollution damage.⁵²⁸

The obvious advantage of this is that in the event of a pollution incident, all the claimant needs to do is sue the insurance company directly in the country where the pollution incident occurs. This makes it convenient instead of suing the owners of the ship.⁵²⁹

The CLC also provides that the shipowner shall be liable for any pollution damage caused by oil which has escaped or been discharged from a ship at the time of an incident provided that damage was caused on the territory including the territorial sea of a contracting State and to preventive measures⁵³⁰ taken to prevent or minimize such damage.⁵³¹ Pollution damage includes, amongst other costs, the cost of preventive measures⁵³² when taken, and the damage caused by these measures.⁵³³

The CLC Convention has been given effect in Nigeria through Merchant Shipping (Civil Liability for Oil Pollution Damage and Compensation) Regulations.⁵³⁴ Formerly, for a vessel as large as 10,000 tons, the limitation figure would be a mere N475, 000.⁵³⁵ But now for a vessel of more than 5,000 tons the limit shall be 4, 510,000 units of account calculated

⁵²⁴ Introduction to the CLC as contained in the IMO website above.

⁵²⁵ Art 1(1) of CLC 1969.

⁵²⁶ Ibid.

⁵²⁷ Id.

⁵²⁸ Id.

⁵²⁹ L Mbanefo, op cit 69.

⁵³⁰ ‘Preventive measures’ is defined in Art 1(7) as ‘any reasonable measures taken by any person after an accident has occurred in order to prevent or minimise damage.

⁵³¹ Art 11.

⁵³² A preventive measure is a measure taken immediately after the occurrence of a pollution incident to prevent further spread of the oil pollution. It involves the provision of Booms for instance to contain the spread of the oil and the use of dispersants to spread the oil over a large surface area. It also includes the cost of putting these measures into effect.

⁵³³ The damage caused by these measures may include for instance the use of chemicals which may have deleterious effects on fish and wildlife.

⁵³⁴ See S.1.21 of 2010 which came into effect on 9 March, 2010.

⁵³⁵ This is calculated on the basis of N47 per ton in accordance with S 383 of the Merchant Shipping Act 1962 discussed above.

on the basis of a unit of account as announced by the International Monetary Fund (IMF) which usually corresponds to the unit of exchange of the countries parties to the Fund.⁵³⁶ For a vessel between 5,000 to 140,000 tonnes, the limit shall be 4,510, 000 units of account for the first 5,000 tonnes plus 631 units of account for each additional tonnes and for a vessel 140,000 tonnes and above, the limit shall be 89,770,000 units of account.⁵³⁷ By this amendment, the Regulation has given effect to the provisions of the Protocol to the Civil Liability Convention 1992 (which is based on the LLMC 1976), as regards to the ability of the ship owner to limit his liability under the Convention and the maximum ceiling recoverable from the ship owner.

(c) The definition of ship

The CLC 1969 defined ship as any sea-going vessel and any sea-borne craft of any type whatsoever, actually carrying oil in bulk as cargo.⁵³⁸ From this definition, it follows that the definition of ship is sufficiently wide to cover almost any type of craft which must be carrying oil as cargo at the time of the incident. This has caused conflict with the definition of a ship in the interpretation of national laws.⁵³⁹

For instance, under section 444 of the Merchant Shipping Act (MSA) of Nigeria⁵⁴⁰ ship is defined as:

A vessel of any type whatsoever not permanently attached to the sea bed, including dynamically supported craft, submersibles of any other floating craft which shall include but not limited to Floating Production Storage and Offloading (FPSO) Platform as well as Floating Storage and Offloading (FSO) Platform.

Furthermore, the ship must be carrying oil at the time of the pollution accident. It follows that if the vessel was a submersible or any other floating craft or platform, the Convention shall not apply. The definition of ship does not also include bunker ships.⁵⁴¹

⁵³⁶ At present the unit of account from Naira to the United States Dollars is 157.25(NGN) to \$1 (USD) which is available from day to day on the IMF website.

⁵³⁷ See Reg 8(a) (b) and (c) of S.1.21 of 2010 cited above.

⁵³⁸ See Art 1.

⁵³⁹ See ‘*The Slops*’ case discussed below and the amendment to Art 1 by the new Article 2 (1) of the 1992 CLC Convention.

⁵⁴⁰ Act no 27 2007.

⁵⁴¹ W Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (1996) 106.

As submitted earlier, one of the shortcomings of the OILPOL was the restricted definition of ships.⁵⁴² A ship would only qualify to be one under the Convention if it was actually carrying oil as cargo at the time of the incident. This restriction unduly affected claimants who had genuine claims arising from a maritime incident. With the event of the *Torrey Canyon* and the realisation of the maritime community of this lacuna in the law, the industry operators came together to resolve the problem of liability.

Between the CLC 1969 and the CLC 1992 several industry schemes were adopted to resolve the problems associated with liability for oil pollution by ships. One of these schemes is Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP). On January 7, 1969, the TOVALOP Agreement was signed initially by seven oil companies namely B.P Tanker Company Ltd., Esso Transport Company Inc., Gulf Oil Corporation, Mobil Oil Corporation, Shell International Company Ltd., Standard Oil Company of California and Texaco Inc. This agreement came into operation on October 6, 1969 when 50 percent of the tankers of the world (as measured by gross tonnage) became subject to it.⁵⁴³

By the terms of the Agreement, participating companies agreed amongst themselves to reimburse national governments for expenses reasonably incurred by them to prevent or clean up pollution of coast lines as the result of the negligent discharge of oil from one of their tankers, which was presumed to be at fault, unless this was disproved.⁵⁴⁴ There was a U.S \$100 per grt or \$10 million limit, whichever is less.⁵⁴⁵ Under Clause 1V of the agreement, each party undertakes that, subject to terms and conditions of the agreement, he will assume liability for pollution damage caused by oil which has escaped or which has been discharged from any tanker owned by him and which has been involved in an incident, and that he will also assume liability for the cost of threat removal measures taken as a result of the incident. ‘Ship’ is defined in the agreement as ‘any sea-going vessel and any seaborne craft of any type whatsoever, designed and constructed for carrying oil in bulk as cargo, whether or not it is actually carrying oil at the time of the incident. This definition covers tankers and bunkering ships.⁵⁴⁶ It is important to note this shift in the definition of ships to include tankers and

⁵⁴²See s 3.2.4. above.

⁵⁴³DW Abecassis and RL Jarashow *Oil Pollution from Ships International, United Kingdom and United States Law and Practice* (1985) 304.

⁵⁴⁴Abecassis and Jarashow op cit 305.

⁵⁴⁵Ibid.

⁵⁴⁶See Clause 1(m).

bunker ships which may not be carrying oil at the time of the incident. This definition has been preserved by the Protocol amending the CLC 1969.⁵⁴⁷

The second limb of TOVALOP, contained in Clause VI, ensures that the tanker owner is insured against liabilities which he has voluntarily assumed, and also ensures that he can be reimbursed for any preventive measures taken after a spill and for any threat removal measures taken before it. Furthermore, the owner shall exercise his best efforts to take such measures. Each party must establish his financial capability to fulfil his obligation to the satisfaction of the International Tanker Owners' Pollution Federation Ltd., a company set up to administer the agreement.⁵⁴⁸ TOVALOP has since given way to CRISTAL.⁵⁴⁹ CRISTAL was amended again with effect from June 1 1978 to reflect the provisions of the Fund Convention (which was soon to come into force) as far as was felt desirable. Therefore, TOVALOP and CRISTAL have formed an integrated voluntary scheme close in scope to the 1969 Liability Convention and the 1971 Fund Convention, whereby the cost of a pollution incident is divided between the shipowner(s) and the cargo interests in such a manner that the cargo interests only contribute when the shipowner(s)' interest's contribution is insufficient.⁵⁵⁰

In conclusion therefore, I refer to the submission of Hunt that:

[w]hat in essence has been created are mechanisms through which victims of oil spills are offered certain amounts as compensation upon the terms and conditions of interest groups which cause the pollution. Those who do not accept these offerings have to face the uncertain prospects of success in expensive lawsuits.⁵⁵¹

It is submitted that this is consistent with the polluter pays principle and that the definition of ships should be consistent with vessel carrying oil as cargo. Since the vessel carrying oil as

⁵⁴⁷ See Art 2(1) of the 1992 CLC which replaced the CLC 1969.

⁵⁴⁸ Abecassis and Jarashow op cit 307.

⁵⁴⁹ Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution which came into effect on April 1 1971.

⁵⁵⁰ Abecassis and Jarashow op cit 311.

⁵⁵¹ See EV Hunt A comparative analysis of the Civil Liability and Fund Conventions, TOVALOP and CRISTAL, the U. S. Federal Oil Pollution Act and U.S. State Legislation, as legal mechanisms regulating compensation for tanker-source oil pollution damage as of February, 1994 being an unpublished LL.M thesis submitted to the University of Natal in partial fulfilment for the award of an LL.M degree in Maritime Law, 1995 at 350.

cargo will be responsible for the spillage arising from the cargo which it carries.⁵⁵² Therefore the Merchant Shipping Act of Nigeria should be amended accordingly by adding the phrase “actually carrying oil in bulk as cargo” to the definition of ships.

“Ships” is defined in the said Merchant Shipping Act as:

“Ship” means a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles of any other floating craft which shall include but not limited to Floating Production Storage and Offloading (FPSO) platform as well as Floating Storage and Offloading (FSO) platform;⁵⁵³

Under the Protocol to the CLC 1992 Convention, the definition of ship includes vessels such as FPSO and FSO which are not conventional ships and are not designed to be carrying oil from place to place.

“Ship” means any sea -going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk abroad.⁵⁵⁴

(d) The definition of oil.

“Oil” is defined under the Civil Liability Convention, 1969 as any persistent oil such as crude oil, fuel oil, heavy duty oil, lubricating oil and whale oil, whether carried on board a ship as

⁵⁵² This is to bring the Merchant Shipping Act Cap M11 LFN 2004 in line with the 1992 Civil Liability Convention to which Nigeria is a party and has ratified the provisions of the Protocol to the Convention through the Act which domesticated the Convention.

⁵⁵³ See also s 361 of the Merchant Shipping Act which provides thus: “ Ships include every description of lighter, barge or like vessel used in navigation in Nigeria and however propelled, and any structure, whether completed or in the course of construction, launched and intended for use in navigation as a ship or part of a ship, and the tonnage of any such structure shall for the purposes of this chapter, be ascertained as provided by subsection (2) of s 363 of this Act with regard to foreign ships.” This definition is in direct contrast to s 1 of this same Act which provides thus: 1. Ship means any vessel other than (a) a vessel propelled solely by oars or paddles, or (b) a vessel which has been generally exempted from the provisions of this Act by the Minister under Chapter 95 of this Act, or (c) a vessel which has been partially exempted under provisions of this Act by the Minister under chapter 95 of this Act to the extent of such exemption. It is observed that within the same Act there are several conflicting definitions of ships. The definition of ships under the MSA is therefore in need of reform. See also G Elias Admiralty Jurisdiction: Some Notes on “Ships” and “Ports” (2001) *NJML* Vol. 1 No. 1 38.

⁵⁵⁴ Art 2(1) of the Protocol to the International Convention on Civil Liability for Oil Pollution Damage, (CLC) 1992. This distinction is important as it affects what can constitute pollution damage from ships and the amount of compensation payable under the Conventions. See further discussions on pollution damage below.

⁵⁵⁴ Art 2(1) of the Protocol to the International Convention on Civil Liability for Oil Pollution Damage, (CLC) 1992. This distinction is important as it affects what can constitute pollution damage from ships and the amount of compensation payable under the Conventions. See further discussions on pollution damage below.

cargo or in the bunkers of such a ship.⁵⁵⁵ Under the CLC, 1969 liability is limited to pollution caused by ‘persistent oil’ from tankers on the high seas and territory of a State Party. ‘Persistent oil’ such like ‘crude oil, fuel oil, heavy duty oil, lubricating oil and whale oil whether carried on board a ship as cargo or in the bunkers of such a ship.’⁵⁵⁶ It follows that CLC 1969 does not cover damage resulting from all other categories of oil. This has also brought about a restriction to its applicability in dealing with the more usual type of damage resulting from other categories of oil extracted from crude oil.⁵⁵⁷ For instance Kerosene and Premium Motor Spirit (PMS) popularly called petrol.

The CLC 1969 was the answer to the inadequacy of the OILPOL to deal with accidental pollution and its provisions on limitation of liability was very helpful to the insurance business and also encouraged investment in the shipping business which is very precarious and fraught with risks. But it also has another shortcoming which has to do with the insufficiency of the definition of pollution damage under the Convention.⁵⁵⁸ This shall be examined further in the next section.

There are also other criticisms against the ceiling of compensation payable under the CLC 1969. Many countries complain that the amount payable as compensation was too low. Some countries like the United States (US) refused to ratify the Convention. The dissatisfaction led to the convening of another conference which brought into existence another Convention - The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.

3.2.8.7 *The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (The Fund Convention, 1971)*

The IOPC Fund came up in response to the inadequacy of the CLC as regards compensation to be paid to victims of oil pollution damage. The IOPC Fund provides supplementary compensation to be paid in cases where the totality of claims exceed the ship owner’s liability

⁵⁵⁵ Article 1(5) of the CLC 1969.

⁵⁵⁶ Article 1(5) CLC 1969.

⁵⁵⁷ W Chao op cit 107. Persistent oil are heavy oils that do not biodegrade easily and so are of significance in clean up operations. Biodegradation is the process whereby microbes present in seawater break down oil to water soluble compounds and eventually to carbon dioxide and water. Many types of microbe exist and each tends to degrade a particular group of compounds in crude oil. However, some compounds in oil are very resistant to attack and may not degrade. See further Global Marine Oil Pollution Information Gateway Facts on oils available at <http://oils.gpa.unep.org/about/about.htm> accessed 11-10-2011.

⁵⁵⁸ See Art 1(6) of CLC 1969.

limit or where compensation is not obtainable from a ship owner who is exonerated from liability or is incapable of meeting his CLC obligations.⁵⁵⁹ Only those states which have become parties to the CLC can become members of the IOPC Fund. The Fund is financed by persons who receive crude oil or heavy oil in a contracting year. This implies that the contributors to the Fund need not be governments, but could be persons like oil companies. The Fund assembly determines the amount of levies to be contributed for the payment of claims and administrative expenses.

The contribution is payable only by persons who imports oil in quantities exceeding 150, 000 tons per annum. The IOPC Fund will not pay compensation where the pollution results from a warship or acts of war and where the spillage results from an unidentified source.⁵⁶⁰

3.2.8.8 *Compensation under the IOPC Fund*

The maximum amount payable under the 1971 IOPC Fund in respect of any single accident is SDRs 60 million (about \$76 million). The Fund indemnifies the ship owner for a part of the aggregate amount of his liability under the CLC to the limit of US \$42 for each ton of the ship's tonnage.⁵⁶¹ This regime continued till 1976 when it was found out that the liability limits were insufficient, especially after the Torrey Canyon incident described earlier on. A Convention on Liability was held in 1976 in Brussels and a series of amendment was proposed to the 1957 Convention. This led to the 1984 Protocol to the 1976 Liability Convention.⁵⁶²

The 1984 amendments were finally incorporated into the international liability system when another IMO diplomatic conference was convened in 1992. As incorporated in these revised protocols, CLC 1992 and the Fund Convention 1992 (both came into force in May 1996). As more States ratified or acceded to the 1992 Conventions, the original conventions rapidly lost significance and the 1971 Fund Convention was terminated altogether on 24th May 2002.⁵⁶³

At the same time when the 1969 Civil Liability Convention and the 1971 Fund Convention were being negotiated, two corresponding voluntary industry schemes were adopted. These two schemes were known as TOVALOP (Tanker Owners Voluntary Agreement concerning

⁵⁵⁹ Chao Wu, Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System, *Spill Science & Technology Bulletin*, Vol.7, Nos.1-2, 107.

⁵⁶⁰ L Mbanefo, *supra*, 70.

⁵⁶¹ This amount is calculated based on the provisions of the Limitation of Liability Convention, 1957.

⁵⁶² L Mbanefo *supra*.

⁵⁶³ See information provided on the IMO website at www.imo.org.

Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution).⁵⁶⁴ The purpose of these industry schemes was to provide benefits comparable to those available under the Civil Liability Convention and the Fund Convention in States which had not ratified those Conventions. Both TOVALOP and CRISTAL were intended to be interim solutions and to remain in operation only until the international Conventions had worldwide application. As a result of an increasing number of States denouncing the 1969 and 1971 Conventions and ratifying the 1992 Conventions, the 'old regime' also lost importance. The 1971 Fund Convention ceased to be in force on 24 May 2002 when the number of 1971 Fund Member States fell below 25. The 1971 Fund is therefore in the process of being wound up but will continue its operations until all pending claims arising from incidents occurring up to 24 May 2002 have been settled.⁵⁶⁵ By voluntary agreements of member states both TOVALOP and CRISTAL have been wound up. Nigeria is a signatory to the 1992 Fund Convention and has denounced the 1969 Convention altogether.⁵⁶⁶

Below is the list of Conventions that have been acceded to, ratified, to or denounced by Nigeria.

Table 3⁵⁶⁷

Conventions	Accession	Ratification	Denunciation
CLC 1969			X
Fund Convention 1971	X	X	
Fund Protocol 1976			
Fund Protocol 1992	X	X	
Fund Protocol 2003			
CLC Protocol 1976			
CLC Protocol 1992	X	X	

⁵⁶⁴See previous discussions above.

⁵⁶⁵www.imo.org ibid.

⁵⁶⁶ See Table 3 below.

⁵⁶⁷: www.imo.org/conventions/mainframe.asp?topic_id=248.

Intervention Convention 1969	X	X	
Intervention Protocol 1973			
London Convention 1972	X	X	
London Convention Protocol 1996	X	X	
MARPOL 73/78 Annex 1/11	X	X	
MARPOL 73/78 Annex	X	X	
MARPOL 73/78 Annex IV	X	X	
MARPOL 73/78 Annex V	X	X	
MARPOL 73/78 Annex VI	X	X	
Ballast Water Convention 2004	X	X	

An x indicates that the Convention has been acceded to, ratified or denounced.

3.2.8.9 *The definition of pollution damage*

The CLC 1969 defined pollution damage as:

“Pollution damage” means loss or damage caused outside the ship carrying oil by contamination resulting from the escape of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.⁵⁶⁸

Under Nigerian law pollution damage is defined as

“pollution damage” means a loss or damage outside a ship carrying oil in bulk as cargo arising from the escape or discharge of oil from a ship, whenever such escape or discharge may occur, and includes the cost of measures taken to prevent or minimise damage and any further loss or damage caused by such measures; and pollution damage with the State or within any Convention Country includes measures taken outside the State or, as the case may be, such Convention Country to prevent or minimise pollution damage within the State or within that Convention Country;⁵⁶⁹

⁵⁶⁸ See Article 1(6) CLC 1969.

⁵⁶⁹See Reg 45 of Merchant Shipping (Civil Liability for Oil Pollution Damage and Compensation) Regulations 2010.

This definition mirrors closely the definitions of pollution damage in the CLC 1969 and CLC 1992 Conventions. While under the Protocol to the CLC 1992, the definition of pollution damage is broader. Pollution damage here refers to damage caused by oil escaping from the ship and fouling the ports and waters, killing fishes and destroying all objects within its vicinity. Pollution damage also covers damage suffered in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a state party to the Convention.⁵⁷⁰ The flag state of the tanker and the nationality of the ship owner are irrelevant for determining the scope of the application of the concept.⁵⁷¹ An incident happened on 12 December 1999, which brought out the divergence between the two Conventions (i.e. the CLC 1969 and the 1971 Fund Conventions) on the application of the concept of pollution damage and the measures taken to contain the effects of the pollution damage.

An oil tanker, the Erika, carrying over 30, 000 tonnes of toxic fuel, split in half and sank in the Gascoigne Gulf, around 60 nautical miles from West Brittany in France. 20, 000 tonnes of fuel containing the most toxic components of oil was split into the sea. The consequence was the pollution of over 400 kilometres of French coast by oil and over 150, 000 birds were killed. More than 250, 000 tonnes of oily waste was collected from shorelines and temporarily stockpiled.

A clean – up operation commenced immediately and continued to the spring of 2001 until it was completed by November 2001. Total SA, the French oil company, engaged a contractor to deal with the disposal of the recovered waste and the operation was completed in December 2003.⁵⁷² The cost of the waste disposal was estimated at some €46 million (£44.5 million).⁵⁷³

3.3. 1 The legal disputes arising from the incident

The investigation carried out on the incident revealed that the owner of the ship, Tevere Shipping, was incorporated in Malta, while the operator was an Italian company which classified the ship for certification in Italy by RINA. The time charterer for *Erika* was Selmont Amership and Total acted as the freighting company, the voyage charterer and the

⁵⁷⁰ Art 3(a) (i) and (ii) of the Protocol to CLC 1992.

⁵⁷¹ See previous discussion on MARPOL 73/78 above.

⁵⁷² For a more detailed report of the incident and the process that led to the final determination of all the claims involved see The International Oil Pollution Compensation Fund annual report, 2008 published at http://www.iopcfund.org/npdf/AR08_E.pdf. last visited on 17th November 2009.

⁵⁷³ At page 77 of the report.

vetting agency. The plaintiffs comprise the French state, different environmental pressure groups, the French coastal regions, towns and others affected by the resultant pollution.⁵⁷⁴ It was contended at the trial that compensation under the Conventions is for pure-economic loss alone whereas most legal systems recognise the admissibility of claims for consequential economic loss.⁵⁷⁵ Pure economic loss is covered under the Conventions, like the recovery of the cost of fishing net that was affected by an oil spill and damage to property owned by hotel owners in the vicinity of the oil spill which may affect the income of the owners. But other losses like damages arising from breach of contracts by third parties are not covered as this falls under consequential loss.⁵⁷⁶

Another issue that was contentious was the definition of ‘ships’ and ‘pollution’. There is a divergence between national courts’ interpretation and the provision in the CLC 1992 Fund Convention. This came to bear in the ‘Slops’ case.⁵⁷⁷ Ship is defined in the treaties as:

any sea-going vessel and sea - borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk abroad⁵⁷⁸

It follows that the Conventions (CLC1992 and the Fund Convention 1992) will apply both to oil tankers and combination of carriers, which are carrying oil or oil residues at the time of an incident. In the ‘Slops’ incident, a craft (‘Slop’ originally designed for carriage of oil in bulk at sea was later modified to become a floating oil waste facility) and the question that arose then was whether the ‘slop’ satisfied the definition of a ship under the International Fund for Compensation to Oil Pollution Damage, 1971 (The FUND Convention.) The IOPC Fund Assembly held that it did not. The matter was then referred to the Greek Court and the national court held that the definition of a ship included ‘slop’.

⁵⁷⁴D Adetoro & S Adetoro Resolving Disputes involving Accidental Pollution by Oil: What are the challenges? *European Energy and Environmental Law Review* (2009) 18: 4, 209.

⁵⁷⁵Ibid 212. Economic loss is defined as loss resulting from damage to property belonging to a third party or injury to a third party. If D negligently damages the property of X, X can sue D for that damage and consequential loss resulting from it (for example unavoidable loss of revenue while the property is being repaired). See Winfield & Jolowicz, *Tort*, 17th edition 194.

⁵⁷⁶Under both Conventions, loss or damage claimed should result from an escape or contamination from ‘oil’. See also M Jacobson, *Uniform Admissibility of the International Regime on Liability and Compensation for Oil Pollution Damage* in TM Ndiaye and R Wolfrum, *Law of the Sea, Environmental Law and Settlement of Disputes*, (2007), 429.

⁵⁷⁷The ‘Slop’ is a special type of vessel which was modified to carry oil on board of a ship. The definition of a slop and the argument about whether it qualifies as a ship was extensively discussed in the article by J Harrison below.

⁵⁷⁸Art. 1.1 CLC 1992, Art.1.2 1992 Fund Convention.

The incident like the ‘Slop’ made a commentator to conclude that the scope of international regime with regard to the use of vessels for storage and transfer operations is unclear.⁵⁷⁹ In the *Slop* incident the Greek Supreme Court held that the *Slop* was a ship within the definition of ship in the 1971 IOPC Fund convention while the IOPC executive committee rejected this claim.⁵⁸⁰ This conflicting view also came into the determination of the issues in the *Erika*.⁵⁸¹ The Greek Supreme court held that defendants were criminally liable for the pollution and endangering of lives of others. Although a majority of the plaintiffs had been able to secure measure of compensation for the material damage from the IOPC, the court granted the difference or shortfall which was not paid by the IOPC Fund. The court allowed damages for injury to reputation and public and also went ahead to affirm the plaintiffs’ right to claim compensation for environmental damage.⁵⁸²

3.3.2 Implication of the judgment on the International Legal Regime and the lesson for Nigeria

The first implication is that the protection against liability offered by the Conventions (i.e the CLC and Fund Conventions) to ship owners has been jettisoned by municipal courts. In the judgment⁵⁸³ under consideration Article L218-22 of the French Environment Code which provides for criminal liability for pollution following a marine incident was preferred over the provisions of the Civil Liability Convention.

Secondly, it is clear that the concept of pollution damage,⁵⁸⁴ which is not well detailed in the Conventions, is being left to be determined by the Contracting States’ municipal legal systems and this brings about divergence in the amount of compensation payable, especially in the assessment of damage arising from economic loses, to members or contracting States under the 1992 Fund Convention.⁵⁸⁵

⁵⁷⁹ J Harrison, *Conflicting interpretations- The Slops incident and the Application of the IOPC Liability and Compensation Regime to Offshore Storage and Transfer Operations* Journal of Environmental Law 20: 3 (2008) , 455-464.

⁵⁸⁰ See earlier discussion above.

⁵⁸¹ See the discussion in chapter 1.

⁵⁸² See as per the article of *Adetoro & Adetoro* (n520) discussed above.

⁵⁸³i.e the *Erika* case discussed above.

⁵⁸⁴ Article 1(6) of the CLC defined pollution damage as (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures.

⁵⁸⁵ *Adetoro & Adetoro*. op.cit. 213.

The implication of this is that the international regime will not function effectively. The Fund institutions have stressed that a uniform interpretation of the treaties is vital for the fair and effective functioning of the international regime. In Resolution No. 8 adopted in May 2003, the Administrative Council, acting on behalf of the Assembly of the International Fund called upon '*the courts of the State Parties to the 1992 Conventions (to) take into account the decisions of the governing bodies of the 1992 Fund and the 1971 Fund relating to interpretation and applications of these Conventions*'.⁵⁸⁶(Italics added).

See also an explanatory note supplied by the Secretariat of the IMO on the operations of the IOPC Fund Convention, 1992.⁵⁸⁷

3. 3.3 Conclusion

In this chapter this thesis examined the major marine oil pollution Conventions and discovered their limitations. The problems associated with the application of some of these Conventions, especially where Nigerian law is deficient has been noted where appropriate. Some of the Conventions obviously have lapses or gaps especially in the area of definitions of oil and ships, liability limits andof non compensation for pollution damage that does not resultfrom ships carrying oil as cargo that is making their enforcement difficult under national jurisdictions. The thesis also noted that Nigerian law did not provide for liability under the MARPOL since the Convention has not been domesticated. However, there is provision for limitation of liability through the domestication of the CLC 1992 Convention. The thesis therefore recommendsamendment where necessary.

On pollution damage it is suggested that the definition of pollution damage should be widened to include damage resulting to the environment and which causes an impairment of the environment and the cost of reasonable measures of reinstatement actually undertaken or to be undertaken.⁵⁸⁸

As it was also observed, Nigerian laws also need to be improved especially where the thesis identified inadequacy as far as low statutory compensation is concerned. The thesis observed that there is a progression of international law from the era of liability based on fault under

⁵⁸⁶ Resolution No 8 on the interpretation and application of the 1992 Civil Liability Convention and the Harrison J, *supra.*, 460. Harrison argued with equal force that this resolution has the force of customary international law and is binding on the State Parties. But whether it is going to be applied by the national courts is a different issue.

⁵⁸⁷ Available at <http://www.iopcfund.org/npdf/genE.pdf> accessed on 31/05/2010.

⁵⁸⁸This follows the model of the United States Oil Pollution Act, 1990 which shall be discussed in chapter 6 of this thesis.

the OILPOL to the regime of liability based on strict liability under the CLC. There is a need for the Nigerian legislature to follow this international trend specially directed at the amelioration of the discrepancy noted in the international regime. Furthermore there is also a need to increase the amount of statutory compensation payable under the present law.

Chapter 4: Oil pollution law and governance in Nigeria

Introduction

This chapter will discuss generally the oil industry and specifically about the problems associated with oil pollution in Nigeria. The chapter will also examine other national laws that have been enacted to grapple with the problems that have been identified. It is structured as follows. The first part will consider in outline the International Conventions⁵⁸⁹ to which Nigeria is a party⁵⁹⁰ but which have not been domesticated.⁵⁹¹

The second part will deal with the domestic enactments, which is largely centred on the inland or freshwater pollution. National acts shall be the focus under this part. The subsidiary enactments under these laws will also be discussed and the part C will conclude this chapter by looking at other sources of laws that govern environmental pollution in Nigeria including International Agreements and Conventions referred to as Multilateral Environmental Agreements.

The significance of this discussion in the third part is that Nigeria has an obligation under these Multilateral Environmental Agreements which must be fulfilled in the light of the growing importance of these multilateral Agreements and to serve as an impetus to the enactment of subsequent national legislation on the environment.

4.1.1 An overview of the oil industry in Nigeria

The discovery of oil in Nigeria dates back to 1956 when oil was first discovered in commercial quantity at Oloibiri field in present day Bayelsa state. Since then oil production has grown steadily with daily production growing to 2.5m barrels per day.⁵⁹²

⁵⁸⁹This is because Chapter 3 has already discussed this in details.

⁵⁹⁰Nigeria becomes a party to an international agreement or treaty when its representatives sign or ratify or accede to an agreement or treaty. Signature to a treaty is an act by which a state provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the state's intent to examine the treaty domestically and consider ratifying it. While signing does not commit a state to ratification, it does oblige the state to refrain from acts that would defeat or undermine a treaty's objective and purpose. Ratification is an act by which a state signifies an agreement to be legally binding by the terms of a particular treaty. To ratify a treaty, the state first signs it and then fulfils its own national legislative requirements. Accession is an act by which a state signifies its agreement to be legally bound by the terms of a particular treaty. See IMO website at <http://www.imo.org/about/conventions/Pages/Home.aspx> (accessed on 24 May 2010).

⁵⁹¹This refers to the practice whereby international conventions are assimilated into national law.

⁵⁹² O. Fagbohun, The Imperatives of Environmental Restoration Due to Oil Pollution in Nigeria, *Stellenbosch LR* (2007) 350.

There are major oil exploration activities taking place in the region bordering the southern part of the country now known by the political appellation of the Niger Delta. Oil exploration also takes place offshore off the coasts of Nigeria.⁵⁹³ Olagunju writing on the consequence of not addressing the environmental impact brought about by oil pollution in the Niger Delta declared:

In the case of Nigeria, the crisis generated by the demand of the Niger-Delta people of the southern region of the country over the exploitation of the natural resources-petroleum and natural gas- later led to attacks on ships and crews in the area. Before the escalation of violence, there had been subtle demands by the people for the control of their own resources, but the Nigerian constitution only allowed a centrally controlled system whereby all powers concerning finance, fiscal allocation and control of mineral resources are vested in the Federal Government, leaving the States to depend solely on the centre.⁵⁹⁴

The dislocation in the allocation of resources and dismal distribution of development projects over a long period of time eventually leads to poverty and social discontents. The problems may also lead to social dislocation and violence. The writer continued:

The problem came to a head in 1995 when some of the leaders of the agitating groups for resource control- Ken Saro Wiwa and eight others - were hurriedly tried for murder by the then maximum Nigerian military dictator, General Sanni Abacha and summarily executed thereafter. From then onwards, all onshore and offshore exploration of crude oil in the Niger-Delta became hyper- risk with attacks on ships, oil rigs and platforms by those tagged as ‘militants’ in the region. With the passage of time, the attacks became piratical with all sorts of robbery, hijackings and kidnappings, turning the region into one of the hotspots alongside Somalia above.⁵⁹⁵

There is a certain phenomenon found amongst countries that are rich in resources yet poor in terms of economic development; it is known as a resource curse. In general, the “resource curse” is exemplified by the possession of an abundance of resources of a state, relative slower and inhibited economic growth, a high rate of poverty, higher levels of conflict and repression, and prevalence of corrupt state practices when compared with countries of minimal resources.⁵⁹⁶

⁵⁹³See chapter 1.

⁵⁹⁴G Olagunju, Piracy Jure Gentium: The Resurgence of the Old Problem as a New Challenge in International Maritime Law, *Journal of African and International Law (JAIL)* (2011) Vol. 4 No. 2 309 at 315.

⁵⁹⁵Ibid. (Footnotes omitted).

⁵⁹⁶ See V. Ojakorotu, Victims of Oil Conflict in Africa: A Case Study of the Niger Delta in Nigeria,*Acta Criminologica* (2010) 23(2), 1.

According to Ojakorotu, the massive amount of wealth mined from the Niger Delta region does not correlate with the existing shabby socio-economic conditions in the region. The Niger Delta Crisis emerges out of this disparity, and presently, it is Nigeria's most controversial national issue. Therefore, the dynamics of the crisis in the Niger Delta area are largely centred on the abundance of oil reserves, the presence of multinational oil companies involved in resource extraction, the anti-social and undesirable state policies, the existence of an array of distinct minority ethnic groups as the historical inhabitants of the area, and decisively, the endemic poverty and deficient socio-economic development in the area, despite the immense resource wealth of the region.⁵⁹⁷

4.1.2 The aftermath of the resource curse.

The environmental impact of oil spillages and the need to earn revenue by government to further its developmental programmes have created a challenge which governments at all levels must address to the end that they must not only meet the developmental goals of today, but must sustain the environment for future generations. There is therefore a need for 'sound environmental management practices and policies to complement economic development.'⁵⁹⁸ However, the Niger Delta represents a noteworthy case study for the aftermath of the "resource curse", since the immense wealth generated through oil from the region is in sheer contrast with the painful reality that the people of the region face due to the administrative disregard of the national government that controls the accrued wealth. Inadequate, disintegrating infrastructure and public services, socio-economic deprivation, widespread poverty and intermittent conflict have become the norm in the area.⁵⁹⁹ Widespread kidnapping of oil workers, violence and killing are the norm and this only goes to worsen the problem of underdevelopment in the region.⁶⁰⁰

4.1.3 The organisation of the Nigerian Oil industry

The Nigerian oil industry is made up of an upstream sector comprising exploration, drilling, production and transportation of crude oil; and a downstream sector comprising refining, storage, importation, transportation, distribution and marketing of the petroleum products.

⁵⁹⁷ Ibid.

⁵⁹⁸ O. Fagbohun, op. cit. 349.

⁵⁹⁹ Amnesty International Report (2009).

⁶⁰⁰ Recently however, there is a relative peace in the region due to the granting of amnesty in 2010 by the Federal Government to militants who laid down their arms in exchange for amnesty and training in peace and reconciliation.

Government participation in the upstream sector is undertaken through the vertically integrated state owned oil company, the Nigerian National Petroleum Corporation (NNPC) and Joint Ventures (JV) between the NNPC and International Oil Companies such as Shell, ExxonMobil, ChevronTexaco, Elf, Agip and Pan Oceanic Corporation, who act as operators of the oil interests, and account for the vast majority of crude oil production. The NNPC has an average of 60% participating interests in these joint ventures, which is managed by a subsidiary, the National Petroleum Investment Management Services. The Production Sharing Contract (PSC) has become the preferred mode of conducting petroleum operations, particularly in the allocation of new oil blocks.

Oil exploration and production has been mainly onshore within the Niger Delta through the international oil companies mentioned above, although there has been a recent surge in offshore oil exploration activity.⁶⁰¹

4.1.4 The regulation of the Nigerian oil industry and oil pollution

The Nigerian state, recognising the importance of the oil industry to the nation's economy cannot outrightly ban the exploration of oil simply because of the effects of oil pollution on the environment as outlined in chapter 1. Nevertheless through the law, it tries to deal with the effects of oil pollution on the environment and the people by regulating the oil industry and controlling pollution using legal instruments. These legal instruments will be divided into two for the purpose of convenience.

Part A- Marine oil pollution Conventions⁶⁰² and legislation on inland water pollution.⁶⁰³ There are other provisions of the law deriving their sources from neither of these broad divisions, like the Constitution and International Customs; these shall also be dealt with in this chapter.

Part B - Inland Water pollution

There is no international Convention that covers inland water pollution for the obvious reason that this area of the law is regulated by national legislation. However the Nigerian parliament has enacted laws to regulate this area. These laws are enumerated as follows:

- a) The Petroleum Act and its Regulations⁶⁰⁴
- b) The Oil Terminal Dues Act⁶⁰⁵

⁶⁰¹ S Awogbade, S Sipasi and G Iroegbunam, *Nigeria Getting the Deal Through- Oil Regulation in 31 Jurisdictions Worldwide 2008* Aelex Legal Practitioners and Arbitrators 114.

⁶⁰²This has been dealt with in chapter 3.

⁶⁰³This we shall proceed to deal with.

⁶⁰⁴Cap P 10 LFN 2004, and the Mineral Oils Safety Regulation.

- c) The Oil Pipelines Act⁶⁰⁶
- d) The National Environmental Standards and Regulation Enforcement Agency⁶⁰⁷ Act and its Regulations,
- e) The Harmful Wastes (Special Criminal Provisions)⁶⁰⁸ are some of the important ones.

This chapter shall deal with these acts one by one.

(a) The Petroleum Act

The principal act governing the oil industry and its operations is the Petroleum Act. It was enacted in 1969 and is currently being reviewed by the National Assembly for the purpose of replacement. Under section 9 of the Act,⁶⁰⁹ there is a provision for the Minister of Petroleum to make regulations for the oil industry. The Minister has exercised this power to make the following regulations:

- 1) Petroleum (Drilling and Production) Regulations⁶¹⁰
- 2) Petroleum (Mineral Oils and Safety) Regulations⁶¹¹

Under the Petroleum (Drilling and Production) Regulations, the holder or lessees of petroleum licence is to adopt all ‘practicable precautions’ for the prevention of pollution of water courses.⁶¹²

The licensee or lessee shall adopt all practical 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 contaminated the water, banks, or shoreline or which might cause harm or destruction to freshwater or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.

This Regulation has been criticised for conferring vague duties on the holder of a petroleum licence since the meaning of ‘practicable precautions’ was not defined in the Regulation.⁶¹³

⁶⁰⁵Cap 07 LFN 2004.

⁶⁰⁶Cap 06 LFN 2004.

⁶⁰⁷No 27 of 2007.

⁶⁰⁸Act 42 of 1988.

⁶⁰⁹See s (9) (1) (b) (iii).

⁶¹⁰See para 25 Petroleum (Drilling and Production) Regulations 1969.

⁶¹¹Para 36 of the Regulations ibid. The Act under which this regulation was made has been repealed and the regulations made under the said Act are deemed to have been made under the Petroleum Act, 1969.

⁶¹²See Reg 25.

Apart from this vague duty imposed by the Regulation, there are other provisions which have been criticised for their focus more on dissipation of petroleum in the course of exploration and not specifically targeted at preventing environmental pollution.

The licensee or lessee shall maintain all apparatus and appliances in use in his operations and all boreholes and wells capable of producing petroleum, in good repair and condition, and shall carry out all his operations in a proper and workmanlike accepted by the Director of Petroleum Resources as good oilfield practice; and without prejudice to the generality of the foregoing he shall, in accordance with these practices, take all steps practicable⁶¹⁴

to control the flow and to prevent the escape or avoid waste of petroleum discovered in or obtained from the relevant area...

prevent damage to the adjoining petroleum bearing-strata;

except for the purpose of secondary recovery as authorized by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata.⁶¹⁵

With regard to the location of oil facilities in the upstream sector especially at the upstream sector, the operators are enjoined to prevent the escape of petroleum into the environment specifically:

(d) prevent the escape (of crude oil) into any water, well, spring, stream, river, lake, reservoir, estuary or harbour⁶¹⁶

and with regard to the downstream sector which involves the refining of the crude oil and the transportation of same through a network of pipelines the regulation provides that the operator shall

(e) cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings structures and other property thereon.⁶¹⁷

These Regulations have also been criticised as regulations put in place by the authorities with the aim of capturing the oil reserves as much as possible and ensuring that the oil that is produced is not dissipated through waste.⁶¹⁸

⁶¹³ See Y Omoregbe, *Oil and Gas Law in Nigeria*, (2001) 156.

⁶¹⁴ See Reg 37.

⁶¹⁵ Ibid.

⁶¹⁶ Reg 37 ibid.

⁶¹⁷ Reg 37 (e).

⁶¹⁸ See KSA Ebeku, *Judicial Attitudes to Redress for Oil Related Environmental Damage in Nigeria*, (2003) 12(2) RECIEL at 202. The author argued that the prevailing judicial thinking during the early 70's when all the laws and regulation governing oil exploration activities were enacted was to ensure that the mainstay of the

It may indeed have been necessary to enact laws that tended to protect Nigeria's economic resources like crude oil which is a mainstay of the economy in order to enhance Nigeria's sustainability and preservation of its resources, but from the angle of environmental protection these laws and regulations are not suitable.

The Regulations also enjoin all licensees to provide 'up to date equipment' approved by the Director of the Department of Petroleum Resources to use in the process of oil exploration and production. The Regulations do not however provide a definition of 'up to date' equipment. The licensees are also expected to carry out their operations in a proper and workmanlike manner in accordance with regulations and practices accepted by the DPR as 'good oil field practices'. The Regulations did not also define what it means as 'good oil field practices'.⁶¹⁹

The effect of not imposing specific duties on the oil operators is that they cannot be held accountable for failure in carrying out their duties in protecting the environment in the course of oil exploration and production. Where also the duties are vague, the laws and regulation cannot fulfil their role of preventing damage to the environment or making accountable the oil operators who degrade the environment.

Furthermore on the provision of 'up to date equipment' is the Director of Petroleum Resources a repository of all knowledge on 'up to date equipment'? If the DPR does not have scientific knowledge of the equipment that is up to date, how can he give approval for the use of such equipment? Moreover if the person who recommends the equipment is also the approving authority, the operator is thereby absolved of legal responsibility.

On the issues bordering on liability for oil pollution, the Nigerian laws that are examined in this chapter tackle the matter depending on whether the pollution occurs either in the inland or territorial waters of Nigeria.

The question to be asked again is: where there is a leak or spillage, who is liable for such a leakage? This question may look simple enough but the answers are not easy to come by looking at the provision of Nigeria's laws. The question of liability will depend on whether the oil pollution occurs inland or in the territorial waters of Nigeria. If the pollution occurs in

economy, oil revenue is not disturbed. This attitude placed less emphasis on the protection of the environment from harm. This thesis is in total agreement with this observation, although this attitude is regrettable from the point of view of environmental protection and sustainability of the Nigerian oil industry.

⁶¹⁹ See Reg 36.

the inland waters, Wilson⁶²⁰ submits that the liability for oil pollution falls upon the operator of the facility and is a function of the interplay of various factors such as:

- A law (legislation) or other regulation imposed by the government or any of its agencies;
- A contract, such as the operating contract or contract between the operator and a third party;
- A general duty imposed by the civil (case) law; and in the case of the operator, stipulations under the licensing agreement.

This submission by Wilson does not include the liability for oil pollution in the territorial and maritime waters which we have dealt with in the previous chapter.

However where the oil spills occur in the marine waters, it is the domain of International Conventions which have been initiated by the International Maritime Organization (IMO), an agency of the United Nations organization. With regard to pollution of the marine or salt water by tanker accidents the problem transcends domestic jurisdictions because of the interconnectivity of the world and its oceans which are important means of transport and commerce. To safeguard the oceans from pollution caused by tanker accidents, International Conventions midwifed by the IMO have been initiated and signed by member countries.⁶²¹

Other Acts are:

(b) Oil Terminal Dues Act

This Act deals with the exportation of crude oil by the oil companies after production.

(c) The Oil Pipelines Act provide for a right of access for any licensee or an operator of an oil concession to construct pipelines for the purpose of transporting crude oil and gas. It also provides for the payment of compensation for trees, crops and farm produce that are in the right of way of the pipelines. There are Regulations made under the Act:

Section 11(5) creates a civil liability on the person who owns or is in charge of an oil licence. He would be liable to pay compensation to anyone who suffers physical or economic injury as a result of a break or leak in his pipelines.

⁶²⁰ I Wilson, *Liability for oil pollution in Nigeria* Modern Practice Journal of Finance & Investment Law (MPJFIL) Vol. 3 No. 2 (1999).

⁶²¹ See previous discussion on these marine pollution Conventions in chapter 3.

Section 17(4) establishes the grant of a licence subject to regulations concerning public safety and prevention of land and water pollution.

Section 9 (1) (b) of the Oil Pipelines Regulations⁶²² establishes the requirement of environmental plans. Regulation 26 makes punishable any contravention of the aforesaid section and is punishable with a fine of N500, 000 and /or imprisonment term of six months.

(d) The National Environmental Standards and Regulation Enforcement Agency (NESREA) and its Regulations

This thesis earlier discussed the establishment of the NESREA agency and its functions.⁶²³ The Agency carries out its functions through the enactment of regulations that prohibit the discharge of effluents by industry operators. The Agency prohibits the discharge of any effluent into the land or water of Nigeria. Regulation 1(1) of the National Effluent Limitation Regulations⁶²⁴ requires industry facilities to have anti-pollution equipment for the treatment of effluents. Regulation 3(2) requires submission to the agency of a composition of the industry's treated effluents.⁶²⁵

The Agency also carries its operations by prohibiting the release of hazardous substances into the air, land or water of Nigeria beyond approved limits set by the Agency.⁶²⁶

The Agency requires the operators of industry to report a discharge if it occurs and to submit a comprehensive list of chemicals used for the production to the Agency.⁶²⁷

On the type of technology recommended for the industries, the Agency states that:

Ideally, each pollution source shall be detoxified with the installation of anti-pollution equipment based on the Best Practical Technology (BPT) and/or Best Available Technology (BAT). In cognisance of the high cost of imported BPT and BAT, and the non-availability of local environmental pollution technology, Uniform Effluent Standards (UES) is normally based

⁶²² Made pursuant to the Act See Cap 07 LFN 2004.

⁶²³ See chapter 2 above.

⁶²⁴ Made pursuant to the FEPA Act as discussed in chapter 2.

⁶²⁵ It enjoins any industry which discharges effluent to treat such effluent to conform to a uniform level as specified in Schedule 2 to the regulation. This is to ensure assimilation by the receiving water to which the effluent is discharged.

⁶²⁶ See s 1 of the Pollution Abatement in Industries and Facilities Producing Waste Regulations (1991).

⁶²⁷ Ss 4 & 5 of the Regulations ibid.

on the pollution potential of effluent for the effectiveness of current treatment technology.⁶²⁸

(e) The Harmful Wastes (Special Criminal Provisions)⁶²⁹

The Harmful Waste Act prohibits, without lawful authority, the carrying, dumping or depositing of harmful waste in the air, land or waters of Nigeria. The following sections are notable:

- Section 6 provides for a punishment of life imprisonment for offenders as well as the forfeiture of land or anything used to commit the offence.
- Section 7 makes provision for the punishment accordingly, of any conniving, consenting or negligent officer where the offence is committed by a company.⁶³⁰
- Section 12 defines the civil liability of any offender. He would be liable to persons who have suffered injury as a result of his offending act.

Section 12 (1) and (2) provides *inter alia*:

Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage except where the damage-

(a) was due wholly to the fault of the person who suffered it;

or

(b) was suffered by a person who voluntarily accepted the risk thereof.⁶³¹

Section 12 (2):-

In this section, “damage” includes the death of, or injury to any person (including any diseases and any impairment of physical or mental condition).

⁶²⁸See further pages 26-45 of the Guidelines and Standards for Environmental Pollution Control in Nigeria (EGASPIN), 1991.

⁶²⁹Act 42 LFN 2004.

⁶³⁰This section provides that the officer of the company as well as the company will be liable to be proceeded against.

⁶³¹Italics added.

While this provision has the intendment of making the polluter to pay for depositing harmful wastes on the environment, it however provided a defence to the polluter if the dumping was due wholly to the fault of the person who suffered it. It is contended that by exempting the polluter on the ground that the damage causing injury or death was due to the fault of the injured (where the injured person is also the importer) or where the injured voluntary accepted the risk, (for instance where the injured person obtained some form of economic benefit from the importer), this will be importing into strict liability the element of fault.⁶³²This thesis therefore agrees with the submission by Salami⁶³³that subsections 12 (1) (a) and (b) of the Act should be amended by deleting them.

There are other laws like the Water Resources Act⁶³⁴, the Criminal Code⁶³⁵ and the Public Health Act at the federal level. At the state level we have the Environmental Sanitation Law of Lagos State⁶³⁶ which focuses on environmental sanitation and protection. It punishes in varying degrees acts like street obstruction, failure to clean sidewalks, cover refuse bins or dispose wastes properly. The Environmental Pollution Control Law of Lagos State makes it an offence to cause or permit a discharge of raw untreated human waste into any public drain, water course or onto any land or water. This offence is punishable with a fine not exceeding N100, 000 (One hundred thousand naira) and in the case of a company, a fine not exceeding N500, 000.⁶³⁷

For the purpose of protecting the inland waters of Lagos state, the law provides that no person shall cause or knowingly permit any trade or sewage effluent or fluid waste to be discharged into any drain or drainage system, river gorges, water courses or any part thereof, except at such a place as may be authorised by the Ministry.⁶³⁸

The Water Resources Act⁶³⁹ is targeted at developing and improving the quality and quantity of water resources. The following sections are important. Section 5 provides authority to the operator of a water resource to make pollution prevention plans and regulations for the protection of fishes, flora and fauna of Nigeria.

⁶³²See A Salami *Statutory Control of Municipal and Industrial Water Pollution* in Simpson & Fagbahun (eds) op cit chapter 20 at 332.

⁶³³Supra.

⁶³⁴ Cap W 2 LFN 2004.

⁶³⁵ Especially sections 245-248 which deal with offences ranging from water fouling, to the use of noxious substances to pollute the health and environment of Nigerians.

⁶³⁶See Edict No 3 of 1998 now Lagos State Environmental Sanitation Law of Lagos State 2004.

⁶³⁷ See s 12, Laws of Lagos State of Nigeria, 2004.

⁶³⁸See s 10 (1).

⁶³⁹See n560 above.

Section 18 makes offenders liable for punishment for contravening the Act. The Act prescribes a fine not exceeding N2, 000 or an imprisonment term of six months. An additional fine of N100 is also imposed for everyday the offence continues.⁶⁴⁰

Apart from these laws and regulations, there are governmental agencies which are established to provide the institutional frameworks for the enforcement of the laws and other functions relating to the regulation of inland water pollution. This thesis shall now discuss these agencies and their functions.

4.1.5 The Department of Petroleum Resources (DPR)

The Department of Petroleum Resources (DPR) is a government parastatal responsible for the regulation of production, and inland transportation of crude oil through a network of pipelines. Oil companies, both local and international are obliged to report to the DPR⁶⁴¹ any oil spillage arising from their operations. The DPR also maintains oil production, export and import statistics and ensures that all operators in the oil industry comply with environmental standards and procedures for environmental control as stipulated in the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002.⁶⁴² EGASPIN contained interim guidelines for monitoring, handling, treatment and disposal of effluents, oil spills and chemicals drilling, mud and drill cuttings by lessees and oil operators etc. EGASPIN has the following objectives:

1. Establish guidelines and standards for the environmental quality and control of the petroleum industry taking into account existing local conditions and planned programmes;
2. Provide, in one volume, for the operator and other interested persons a comprehensive integrated document on pollution abatement technology, guidelines and standards for the Nigerian Petroleum Industry;

⁶⁴⁰See other lists of Acts and Regulations at <http://www.elri-ng.org/newsandrelease2.html> (accessed 12 -10-2011).

⁶⁴¹ See Regulation 21 Mineral Oil (Safety) Regulation which provides: Reg. 21(5) Whenever a gas or oil fire occurs at a well, block station or other installation handling problem, a report of the circumstances and probable cause shall be forwarded to the nearest inspector and to the Director of Petroleum Resources (DPR) within forty-eight hours.

⁶⁴² These guidelines were first issued in 1991 by the DPR and revised in 2002 and are in the process of being reviewed again.

3. Standardize the environmental pollution abatement and monitoring procedures, including the analytical methods for various parameters.⁶⁴³

Marine transportation and export of crude oil is also regulated by the DPR, the Nigerian Navy, the Nigerian Custom Service, the Federal Ministry of Transport, and the Nigerian Ports Authority, the National Maritime Authority now the Nigerian Maritime Administration and Safety Agency (NIMASA) and the National Inland Waterway Authority.⁶⁴⁴

4.1.6 The Modus operandi of the DPR

In order to effectively evaluate and monitor the discharges into the environment, the petroleum industry is conveniently divided into six stages of operations namely, exploration, production, terminal operations, hydrocarbon processing, oil transportation and marketing operations. Each of the six stages of the petroleum industry has discussions on processes of operation, sources and characteristics of wastes, treatment and control of wastes, as well as monitoring, effluent limitations and standards.⁶⁴⁵ It appears from some sections of the EGASPIN regulations that the approach being used in the control and management of the pollution arising from petroleum exploration is the *cradle to grave* approach.⁶⁴⁶ See part 1 of EGASPIN which provides:

- Wastes arising from petroleum Exploration and Production (E & P) e.g. spent drilling fluid/wastes, well treatment wastes, drill cuttings, oil/product/chemical spillage & leaks, oil/hydrocarbon product sludge/debris/scales, spent oil/catalyst, produced sand/formation water, garbage etc.

And

- Wastes arising from gaseous emissions shall be treated in accordance with *cradle to grave* principles.

⁶⁴³See Part 1 of EGASPIN (2002).

⁶⁴⁴ see Oil Regulation in 31 Jurisdictions Worldwide, Aelex Legal Practitioners, 2008.

⁶⁴⁵See Part 1 of the introduction supra.

⁶⁴⁶See Chapter 2 above.

The approach is to regulate land contamination arising from petroleum activities and impose obligation on oil operators to manage and remedy contaminated land in a “sustainable use” manner.⁶⁴⁷ The “sustainable use” approach then consists of three elements:

- (a) Ensuring that land and water resources are suitable for their current use - in other words, identifying any land or water resources where contamination is causing unacceptable risks to human health and the environment, assessed on the basis of the current use and circumstances of the land, and returning such land and underground water to a condition where such risks no longer arise (“remediating” the land);
- (b) Ensuring that land and groundwater are made suitable for any new use, as official permission is given for that new use - in other words, assessing the potential risks from contamination, on the basis of the proposed future use and circumstances, before permission is given for the development and, where necessary to aid unacceptable risks to human health and the environment, remediating the land before the new use commences; and
- (c) Limiting the requirements for remediation to the work necessary to prevent unacceptable risks to human health or the environment in relation to the current use or officially permitted future use of the land.⁶⁴⁸

The significance of these guidelines is that they supplement the government regulations and laws on petroleum drilling and exploration. These guidelines have legal backing of the DPR regulations as they are subsidiary⁶⁴⁹ rules guiding the operation of the oil industry.

Under and by virtue of Part 11 paragraph 3.4.1 of the EGASPIN Guidelines except otherwise specifically permitted by the Director of Petroleum Resources, whole drilling mud/fluids, spent drilling mud/fluids, brine, drill cuttings, well treatment wastes, desk drainage or

⁶⁴⁷ Amokaye op cit 174.

⁶⁴⁸ For more of the guidelines see Part V111 of the EGASPIN Guidelines supra.

⁶⁴⁹ These rules are supplementary to the Regulations made under the Petroleum Act and have the same binding force as the Regulations made under the Act.

residues thereof, from water and oil/synthetic based muds from drilling activities shall not be discharged directly or indirectly into:

- (1) Any inland waters (fresh, brackish, (tidal or non-tidal) or (reservoir)
- (2) Swamp, coastal or near shore waters and shallow offshore
- (3) Any pit on land/swamp other than approved temporary holding retention pit(s) and /or steel tanks so designed and utilized that there shall be no overflow, leakage or seepage.

There is an exception under paragraph 3.4.1 such discharges shall be permitted in offshore (discharge zones) areas 12 nautical miles away from the shoreline and of depth not less than 200 feet provided the limitations specified in Article 3.5.6.1 are satisfied. These limitations are the exceptions granted under the Oil in Navigable Waters Act.

For the prevention of oil spill and the provision of a counter measure plan, paragraph 5.1.1 provides that all spillages of crude oil/chemical/oil products shall be reported to the Director of Petroleum Resources in accordance with the Oil Spillage/Notification Reporting Formats contained in ‘A’, ‘B’ and ‘C’ of Appendix V11-B2.⁶⁵⁰ In addition, a Joint Spillage Investigation (JSI) team, comprising of the Licensee/Operator/Spiller, Community and DPR shall be constituted within 24 hours of spillage notification to investigate the spillage.

Paragraph 5.1.2 makes provisions for crude oil/chemical spillage and contamination clean-up certification. Under this head, clean-up efforts for all inland and near shore spillage of crude oil, product and chemicals, shall be subjected to clean-up certification, as provided for in the oil/chemical spill/contamination clean-up certification forms.⁶⁵¹ The Director of DPR is the appropriate authority to grant approval for any remediation/rehabilitation method that would be used to clean-up/restore impacted sites.

Parts 111, deals with Production and Operation while Parts 1V, V, and V11 deal with Terminal Operations, Hydrocarbon Processing Operations, Oil and Gas Transportation and Marketing Operations respectively.

⁶⁵⁰See the schedules attached to the EGASPIN 2002.

⁶⁵¹See the forms E and F of the schedules of EGASPIN supra.

The EGASPIN document is a massive conglomerate of operational provisions and directives having the aim of providing sound environmental management practices to the operators of the oil industry. Parts 1V and V make provision for necessary and appropriate action to be taken by the DPR to safeguard human health and welfare in the event of a disaster or emergency arising from the spillage of any of the substances mentioned above which is likely to affect and or impact on a third party, where the response of the licensee is inadequate. All expenses reasonably incurred shall be in accordance with the polluter pays principle and shall be recovered from the licensee.⁶⁵²

Part V111 contains the provision for the preparation of an Environmental Evaluation (Post-impact) Report (EER) and an Environmental Impact Assessment (EIA) report for the assessment of a new project being sought to be sited in order to properly plan for and monitor such a project and to prevent further degradation of the environment. Where an oil spill has already occurred and has impacted on the environment, a post- impact report (EER) must be prepared in order for the regulatory authority to restore the environment to its pre-impact state. The appropriate tools for bringing this about are contained in the Oil and Gas regulations enacted pursuant to the Petroleum Act and this is to be enforced by the Minister of Petroleum Resources.⁶⁵³

4.1.7 Preventive act as a form of pollution control by the DPR

There are enough provisions in the EGASPIN Guidelines on the oil industry for the regulation of the oil sector in order to prevent or minimise oil pollution. Part VIII provides for the preparation of both an EER and an EIA report on any new project.Under section 2 of

⁶⁵²This provision runs contrary to s 21 of the repealed FEPA Act (see chapter 2 above). The responsibility given here to the Director of the DPR is in conflict with the responsibility given to the Director of the National Oil Spill Detection and Response Agency (NOSDRA). The functions of NOSDRA are - (1) Responsibility for surveillance and ensuring compliance with all existing environmental legislation and the detection of oil spills in the Petroleum Sector;

(2) Receiving of reports of oil spillages and coordinate oil spill response activities throughout Nigeria;
(3) Coordinating the implementation of the NOSCP for the removal of hazardous substance as may be issued by the Federal Government;

(4) Encouraging regional co-operation among member States of West African Sub-region and Gulf of Guinea for combating oil spillage and pollution in our contiguous waters. See further s 7 of the NOSDRA Act No 15 of 2006 available at <http://environment.gov.ng/about-moe/departments-agencies/agencies-parastatals/national-oil-spill-detection-and-response-agency-nosdra/> accessed 20-5-2012. However, in the event of a conflict between the provisions of the Guidelines of the EGASPIN and the NOSDRA Act, the Act prevails.

⁶⁵³See s 9 of the Petroleum Act Cap supra.

the EIA Act, no project can be embarked upon by any public or private person without authorization and without prior consideration of their environmental effects.⁶⁵⁴

Where the extent, nature or location of a proposed project or activity is such that is likely to significantly affect the environment, its environmental impact assessment shall be undertaken in accordance with the provisions of this Decree.

The operative phrase in this provision is that the activity is likely to *significantly affect the environment*. In such a case the EIA must be carried out by the proposer unless the project is such as is exempted from prior authorization under section 15 of the Decree.⁶⁵⁵ Under section 4 of the Act, an Environmental Impact Assessment (EIA) shall include at least the following minimum matters i.e.:

- a) a description of the proposed activities;
- b) a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
- c) a description of the practical activities, as appropriate;
- d) an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and long-term effects;
- e) an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measure;
- f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;
- g) an indication of whether the environment of any other State, Local Government Area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives;

⁶⁵⁴ S 2(1)(1). See the Environmental Impact Assessment Act No 86 of 1992.

⁶⁵⁵ A schedule attached to the Act contains a list of such activities requiring EIA authorization as Agricultural land development, Airport construction, Drainage and Irrigation, Land reclamation of 50 hectares or more, Fisheries and Aquaculture Projects, Forestry, Housing, Industrial production of chemicals, Road construction, Port development, Mining, Petroleum production and exploration, Oil and Gas, Power generation and transmission, Construction of dams and reservoirs, construction of nuclear-power stations, Quarries, Railways, Transportaion and development of recreational infrastructures, Water treatment and disposal, Municipal sewage and groundwater development and construction of reservoirs.

- h) a brief and non - technical summary of the information provided under paragraph (a) to (g) of this section.⁶⁵⁶

4.1.8 Provision for Oil Spill Contingency Plan (OSCP)

Under Part B of the aforesaid Part V111 of EGASPIN, there is also a provision for contingency planning for the Prevention, Control and Combating of Oil and Hazardous Substances Spills. An Oil Spill Contingency Plan (OSCP) is an organised and predetermined course of actions to be pursued in the event of a spill.⁶⁵⁷ This orderly arrangement of events to contain and control an oil spill incidents shall be compiled in a document by all operators in the petroleum industry for approval by the Director of Petroleum Resources, and subsequent implementation by the operators.⁶⁵⁸ Licence holders for exploration, prospecting, exploitation, hydrocarbon processing, transportation, marketing etc. of Petroleum Resources are required by legislation to take/adapt Practical Precautions and/or all steps Practicable to prevent pollution.⁶⁵⁹ Some of these regulations include Regulations 25 and 36 of the Petroleum (Drilling and Production) Regulations 1969,⁶⁶⁰ Regulation 43(3) of the Petroleum Refining Regulations 1974 and Regulation 17(3) of the Oil Pipeline Ordinance Cap 145 as amended by Oil Pipelines Act 1965.⁶⁶¹ In 1980, the DPR issued guidelines for preparing first level Contingency Planning for the Petroleum Industry. These guidelines have been updated for first and higher level of responses. Each licensee/lessee is required to prepare and /update its plan accordingly.⁶⁶²

The details of the Oil Spill Contingency Plan (OSCP) are further provided as follows:

4.1.9 The purpose/objective of the Oil Spill Contingency Plan (OSCP)

The Oil Spill Contingency Plan has basically three functions:

- (1) To ensure that the environment is protected.
- (2) To ensure that manpower, equipment and funds are available to effectively contain and clean up oil spills and,

⁶⁵⁶ Ibid. The requirement of provision (f) above recognises that there are gaps in the existing body of knowledge which ought to be taken into consideration when a project that is likely to have a significant impact on the environment is to be carried. This echoes the precautionary principle discussed above. See section 2.3.1 above.

⁶⁵⁷ Egaspin 2002 Part B of Part V111 Paragraph 1.0.

⁶⁵⁸ Ibid.

⁶⁵⁹ Para 1.1.1 of EGASPIN supra.

⁶⁶⁰ Already discussed above.

⁶⁶¹ Para 1.1.2

⁶⁶² Para. 1.2

(3) To ensure that good record-keeping is maintained and accurate information concerning the spill is disseminated to the public and government. The operator is required to state the objectives of the OSCP as it affects its operations.⁶⁶³

Each operator or facility owner shall describe the areas of operation.⁶⁶⁴ The operator is to identify before hand, all sensitive areas that should be protected in the event of a spill.

The content of the OSCP must also reflect statements on the following: policy on oil pollution, prevention and management among others; purpose and objective of the oil spill contingency plan as it affects the operator's operations; description of facilities and areas of operations;⁶⁶⁵ organisation chart of the response team showing the chain of command for the spill control together with responsibilities of the principal staff; a plan of equipment content which should contain a minimum number of appropriate containment equipment that can effectively be used in the environment within which the facility is operated; a containment procedure and clean-up of spills; contemporary communication network system linking all facilities owned and operated by the operator;⁶⁶⁶ the disposal plan for oil and debris; the press release procedure; procedure for accurate recording of oil spill and cost of clean-up; and procedure for remediation/rehabilitation of affected area.⁶⁶⁷

One of the obvious major shortcomings of the EGASPIN Guidelines is that all powers of monitoring, compliance and enforcement is concentrated in and around the DPR and the Director of Petroleum Resources.⁶⁶⁸ This arrangement puts enormous responsibility upon the Director of Petroleum Resources and his staff who are not sufficiently trained and well equipped to meet the challenges of this office.⁶⁶⁹ There is therefore a need for a program of training and retraining of the staff of the DPR to carry out its onerous responsibility of monitoring the oil operators in their formulation and implementation of their OSCP.

This thesis shall now consider another Agency responsible for protecting the environment from oil pollution and its effects.

⁶⁶³Para 2.2.1.

⁶⁶⁴Para 2.3.

⁶⁶⁵ Fagbohun op cit 325.

⁶⁶⁶Ibid.

⁶⁶⁷Id.

⁶⁶⁸ Fagbohun op cit.

⁶⁶⁹Fagbohun op cit 328.

4.2.1 The provisions governing liability for oil pollution under the Federal Environmental Protection (FEPA) Act

The Federal Environmental Protection Agency (FEPA) was established as a single agency under the Presidency with a Director-General at its head. The agency has been scrapped and its function now performed by a Commission but only the law that set up the Agency has been repealed.⁶⁷⁰ By the FEPA Decree⁶⁷¹ certain regulations were enacted which though not specifically targeted at oil pollution from ships, set standards for effluent discharge, industrial and hazardous waste discharge and management.⁶⁷² The regulations are (1) National Effluent Limitation Regulations,⁶⁷³ (2) Pollution Abatement in Industries and Facilities Generating Wastes Regulations;⁶⁷⁴ and Management of Solid and Hazardous Waste Regulations.⁶⁷⁵ These regulations have not been repealed and they are presumed to be in force.

Under section 20(1) of the Decree, the discharge (in harmful quantities) of hazardous substances into the air or upon the land or into the waters of Nigeria without permission or authority is made a criminal offence. Section 21(1) relates to oil spill or blowout. The section provides for additional liability for owner or operator of any vessel or onshore or offshore facility from which hazardous substances is discharged. The owner or operator bears full responsibility for the cost of removal or restoration of the natural resources damaged or destroyed by the discharge.⁶⁷⁶

From this provision, it appears that the Act is underscoring the polluter pays principle and the prevention of harm to the environment principles. The Polluter Pays Principle makes the person responsible for the cause of pollution to pay for the removal of the said pollution or the restoration of the environment to its pristine state.⁶⁷⁷ However section 21(1) (b) provides that the owner or operator shall also be liable for costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by the Agency from time to time. From this provision it can also be deduced that where there is a discharge of harmful or hazardous substances (which includes oil), into the water, land or air of Nigeria, without the necessary permission by the appropriate authority, the owner or operator which

⁶⁷⁰See s 36 *National Environmental Standards and Regulation Enforcement Agency (Establishment) Act no 25* 2007 promulgated by Government Notice No. 61 2007.

⁶⁷¹All enactments made by military regimes in Nigeria are styled ‘Decrees’ and they are deemed to have been made by the National Assembly with the commencement of the 1999 Constitution. See transitional provisions under the said Constitution.

⁶⁷²E.O Idowu & M Usoro Oil Pollution from Ships in Nigerian Territorial Waters,(2002)*Nigerian Journal of Maritime Law* (NJML) 6 at 17.

⁶⁷³S.1.8 of 1991.

⁶⁷⁴S. 1.9 of 1991.

⁶⁷⁵S.1.15 of 1991.

⁶⁷⁶S 21(1)(a) of the Decree.

⁶⁷⁷See discussion in chapter 2.

may include a ship, a filling station or a motor tanker will be held liable for such discharge. Where anyone contravenes this provision, he is liable to the penalty specified under section 35 or 36 of the FEPA Act.⁶⁷⁸

The difficulty in this provision is that it does not clearly specify the criteria for knowing the owner or operator for the purpose of ascertaining who shall bear ‘full responsibility’ for the cost of removal. This is very important for the purpose of knowing who the responsible party is. For instance, the owner of a filling station may not be the operator. If the operator is found to have discharged oil for instance carelessly into the environment and the owner is proceeded against, this according to Kidd⁶⁷⁹ will undermine the Polluter Pays Principle because the owner may not be involved in the day to day running of the filling station and is now made to bear ‘full responsibility’ for the cost of the removal. Furthermore in the area of monitoring and enforcement there is no clear demarcation of the Agency or Department that will be responsible for apprehending the offending ship or motor tanker, vessel or operator. Usoro submitted that ‘a quick decision must be taken specifying the monitoring and enforcement authorities with clearly delineated tasks in order to avoid disputes as to overlapping or usurpation of functions with respect to enforcement powers under the defunct FEPA’. ⁶⁸⁰

On the restoration of the land affected by the pollution, the sections 35 and 36 cited made it the duty of the owner or operator to restore the land but did not stipulate how this is to be done. This is a negative feature of the law and worse still the section has been repealed and a new section has been enacted under the NESREA Act which provides that the Minister shall ‘by regulations prescribe any specific removal method, financial responsibility level for owners or operators of vessels, or onshore or offshore facilities notice and reporting requirements.’⁶⁸¹

⁶⁷⁸Ss 35 or 36 of the FEPA Act prescribes a fine not exceeding N20, 000 (about USD\$ 125) or imprisonment for a term not exceeding two years or to both such fine and imprisonment. For a corporate offender the company or business entity will pay N500, 000 (about USD\$ 3, 125) and in addition to such payment restore the polluted area to acceptable level approved by the defunct FEPA. See further A Salu Legal, *Regulatory and Enforcement Aspects of Pollution Control* being a paper presented at the International seminar on “Technology Innovation on Pollution Management for Sustainable Development in this Millennium” organised by Lagos State Environmental Protection Agency and JUTCO- Pollutec Nigeria Limited held at the MUSON Centre, Onikan, Lagos between 9-12 October, 2000.

⁶⁷⁹M KiddShould Bad Law Be Remediated?The Contaminated Land Provisions in the National Environmental Management Waste Act Vol. 16No 1 SAJELP 1 at 5.

⁶⁸⁰Usoro *Pollution in Ports: Legal Issues* supra.

⁶⁸¹See s 28 of the NESREA Act, 2007. No such regulations has been made under this section.

Apart from the problem of ascertaining the producer of the pollution and apportioning costs where necessary, there is also the problem of determining or ascertaining compensation or damages payable to the injured party. Wilson⁶⁸² again submitted that there is no statutory definition or stipulation of the basis of assessment of fair and adequate compensation.⁶⁸³ A resort has therefore often been made to the principles of tort (delict) which as we shall see later are not easy to determine.⁶⁸⁴

Another problematic area for dealing with the problems associated with oil pollution of the environment is pollution emanating from offshore exploration and exploitation activities. A significant proportion of oil pollution occurs in Nigeria's territorial waters which emanates from the activities of multinational oil companies.⁶⁸⁵ Blow outs, ruptured or burst pipelines occur during the exploration of oil offshore by these companies.⁶⁸⁶ When this offshore oil exploration is carried out, there is a need to load the crude oil into offshore storage equipment. A significant proportion of oil pollution occurs in the port environment due to these causes.⁶⁸⁷

For instance, to tackle the problem of loading and transportation of crude oil overseas, the National Assembly (Parliament) enacted the Oil Terminal Dues Act.⁶⁸⁸

This Act was enacted to tackle the problem associated with pollution of ports arising from point source pollution due to port activities.⁶⁸⁹ The Act provides for the levying and payment of terminal dues on any ship loading or evacuating oil at any terminal in any port in Nigeria; and in respect of any services provided at those ports.

The Act directs that the master or owner of a ship is to pay any terminal dues levied pursuant to section 1(1) of the Act. The Act also domesticates the provision of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (OILPOL Convention),⁶⁹⁰ and attaches the said Convention as a schedule to the Act.⁶⁹¹ Of particular importance is section 6 of the Act which provides:

⁶⁸² See n567 above.

⁶⁸³ I Wilson op. cit. at 333.

⁶⁸⁴ See detailed discussion on this issue in Chapter 5 post.

⁶⁸⁵ See Table 1 in chapter 1.

⁶⁸⁶ The statistics cover both onshore and offshore oil pollution.

⁶⁸⁷ Usoro op cit 16.

⁶⁸⁸ Cap 08 LFN 2004.

⁶⁸⁹ Usoro op cit 2. See chapter 5 for more discussion on point-source and non –point sources of pollution.

⁶⁹⁰ This has already been dealt with in chapter 3.

⁶⁹¹ See the provisions of the second schedule to the Act.

If any oil or mixture containing oil is discharged into any part of the sea referred to in subsection (1) of this section—

(a) from a pipe-line or any apparatus used for the purposes of transferring oil from or to a vessel;

(b) from a vessel; or

(c) as a result of any operation for evacuating oil,

the owner of the pipe-line or the owner of the vessel or the person in charge of the operation, as the case may be, is guilty of an offence under section 3 of the Oil in Navigable Waters Act (as applied by this section).⁶⁹²

It is pertinent at this juncture to ask whether this is enough as protection under Nigerian law to deal with offshore oil exploration activities.⁶⁹³ This is because the oil discharges occurring from platforms and ships is a major source of point source pollution. If an accident, in the nature of the Deepwater Horizon that happened in the Gulf of Mexico in April 2010⁶⁹⁴ should happen in Nigeria, can Nigerian law deal with it? For instance a French oil company Total engaged in the exploration of oil on its Akpo offshore field in Nigeria reported an accident on a drill ship. The drillship which belonged to a Houston – based Transocean Company was involved in oil exploration when an explosion occurred and three men were reportedly thrown overboard. One person died as a result and two were injured. The company shut down the drilling rig as a precautionary measure. The Akpo field commenced operation in 2009, located in OML 130, about 200 kilometres offshore Port Harcourt and in water depths ranging from 1,100 to 1,700 metres. At peak production, the field is expected to produce 225,000 barrels of oil per day, out of which nearly 80 percent is condensate.⁶⁹⁵ The point being made here is that there are increasing activities of all exploration activities offshore involving mobile offshore drilling units (MODUS) and High- Specification Floater (submersibles and drillships) and other Floater like the Floating Production Storage and

⁶⁹²See previous discussion in chapter 3.

⁶⁹³Bonga is the first deepwater project for the Shell Nigeria Exploration and Production Company(SNEPCO). The discovery well is located in Oil Prospecting Licence (OPL) 212 which was awarded during Nigeria's first round of deepwater frontier acreage awards in 1993. SNEPCO operates the field on behalf of Nigerian National Petroleum Corporation (NNPC) under a production sharing contract (PSC), in partnership with ESSO (20%), Nigerian Agip (12.5%) and Elf Petroleum Nigeria Limited (12.5%). Crude oil production from the field first started in November 2005 and the first shipment from the field was made in February 2006. See further Bonga Deepwater Project, Niger Delta, Nigeria available at <http://www.offshore-technology.com/projects/bonga> (accessed 20 October 2012).

⁶⁹⁴See chapter 6 for further discussion on this issue.

⁶⁹⁵Thisdayonline 03 August 2010.

Offloading (FPSO)⁶⁹⁶ yet the regulatory environment for the operations of these ships and drilling platforms are not put into place or are not enforced strictly by the regulatory authorities.

Usoro submits again that Nigeria cannot claim compensation from the oil companies for oil pollution damage resulting from onshore or off-shore oil spills and burst pipelines under the Civil Liability Conventions and the Fund Convention. This is because such oil installations are excluded from the definitions of ships in the Conventions.⁶⁹⁷

The Department of Petroleum Resources (DPR) also has responsibility for the monitoring of the crude oil being exported abroad and this role is also statutory assigned to the Agencies created under the defunct FEPA. This function is carried out in conjunction with the Nigerian Navy and the Nigerian Maritime Administration and Safety Administration (NIMASA).

This thesis shall now look at other sources of Nigerian laws on the environment generally.

Part C

4.2.2 *Other sources of law on oil pollution*

4.2.3 *The Constitution.*

The Constitution of the Federal Republic of Nigeria, 1999, makes provision for the protection of the environment. Section 20 states for instance:

The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.

Prior to the enactment of the above provision of the Constitution, previous constitutions⁶⁹⁸ had no provision concerning the environment. In Nigeria, environmental concern was almost non-existent until the *Koko* incident mentioned earlier on.⁶⁹⁹

The 1999 Constitution also provides that no treaties shall have any force in Nigeria unless such a treaty has been enacted into law by the National Assembly (Parliament).⁷⁰⁰

⁶⁹⁶A Floating Production Storage and Offloading (FPSO) unit is a floating vessel used by the offshore oil and gas industry for the processing of hydrocarbons and for storage of oil. The stored oil can be offloaded to a tanker or less frequently transported through a pipeline. A vessel used only to store oil (without processing) is referred to as a Floating Storage and Offloading Vessel (FSO).

⁶⁹⁷This has already been discussed in chapter 3.

⁶⁹⁸Prior to the enactment of the present 1999 Constitution, Nigeria has had six Constitutions which had no provisions for safeguarding the environment. They are the Clifford Constitution 1922, The Richard Constitution 1946, The MacPherson Constitution 1954, The Independence Constitution 1960, The Republican Constitution 1963, The Constitution of the Federal Republic of Nigeria 1979, and the present Constitution of the Federal Republic of Nigeria, 1999 which is in the process of being reviewed again.

⁶⁹⁹See chapter two above.

⁷⁰⁰Section 12 (1) of the Constitution of the Federal Republic of Nigeria, 1999, (hereafter 1999 Constitution).

It provides thus:

No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

The implication of this is that no treaty or convention acceded to by Nigeria is of any force unless it is domesticated by an act of the National Assembly. We have earlier mentioned that the 1999 constitution is unique, amongst other constitutions enacted before it, in that it was the first and only Nigerian constitution to contain provisions safeguarding the environment.⁷⁰¹ Although it has been contended that this section is only hortatory and it is not binding on the organs and institutions of government because it falls under Chapter 11 of the Fundamental Objectives and Directive Principles of State Policy which are not justiciable. They are not justiciable in the sense that no action can lie against any organ of state for failure to comply with the provisions of the section.⁷⁰²

Section 6(6) (c) provides:

The judicial powers vested in accordance with the foregoing provisions of this section:

(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 11 of this Constitution.

The non – justiciability of this chapter and its provisions is contrary to the right created under the Fundamental Enforcement Rights provision in Chapter 1V of the same constitution as any person who alleges that any of the provision of the said chapter IV has been breached can apply to the High Court of the State for the enforcement of the fundamental right of that person.⁷⁰³

South Africa has however moved away from this position to recognise environmental rights as human rights and therefore be protected (when contained in state constitution) as

⁷⁰¹ See s 20 of the 1999 Constitution.

⁷⁰²This chapter 11 titled Fundamental Objectives and Directive Principles of State Policy was not in previous constitutions but was added by the 1979 Constitution to provide for the objectives of the state and the right and duties of its citizens. However its provisions cannot be enforced against organs of the state. See the deliberations of the Constituent Assembly 1978 on the debate on this chapter. See also s 6(6) (c) of the 1999 Constitution.

⁷⁰³See section 46(1) of the 1999 Constitution.

fundamental rights.⁷⁰⁴ Reference may be made to the South African Constitution which specifically provided for the incorporation of constitutional environmental rights as rights protected by the Constitution of the Republic of South Africa.⁷⁰⁵

Section 24 of the Constitution of the Republic of South Africa⁷⁰⁶ provides:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
 - i.) prevent pollution and other ecological degradation;
 - ii.) Promote conservation; and
 - iii.) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

It is further argued that an anthropocentric or human right approach reflects a holistic view of humanity in which humans are central.⁷⁰⁷ And that a healthy and sustainable natural environment should be holistically maintained for the sake of human well-being as opposed to for the environment's own sake.⁷⁰⁸ Section 24 affords legal protection to environmental rights in South Africa as a species of human right and it is recommended that the Nigerian constitutional drafters should follow this emerging trend. The right enshrined under section 20 ought to be delisted and re-enacted under the Fundamental Rights Enforcement Chapter which is Nigeria's equivalent of the Bill of Rights.⁷⁰⁹

⁷⁰⁴See A du Plessis *Perceptive Approaches to the Interpretation and Realisation of South Africa's Constitutional Environmental Right*(2009) SAJELP Vol. 16 Pt.2 131.

⁷⁰⁵ See s 24 of the Constitution of the Republic of South Africa 1996.

⁷⁰⁶Act 108 of 1996.

⁷⁰⁷ The term anthropocentrism is derived from the Greek words *anthropos* human being and *kentron* centre n 19 of A du Plessis op cit. 133.

⁷⁰⁸Ibid. This view contrasts sharply with the ecocentric approach to environmental protection. The ecocentric approach posits that rights should be afforded to the natural environment and that the rights accorded to people should be interpreted not in terms of the value they afford to humanity, but strictly in line with the environment's intrinsic worth. The ecocentric approach is also directly related to what is known as deep ecology philosophy, biocentrism, and environmental ethics. For further reading on this see A du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) unpublished PhD dissertation of the North –West University, (Potchefstroom Campus), South Africa, 36.

⁷⁰⁹See generally the opinion expressed by Wale Ajai, *Achieving Environmental Protection through the Vehicle of Human Rights:Some Conceptual, Legal and Third World Problems* (1995) 2 U.B.L.J. 41 in L. Atsegbea, V Akpotaire & F Dimowo, *Environmental Law in Nigeria Theory and Practice* (2004) 9.

4.3.1 International customs

Customary international environmental law, according to Glazewski,⁷¹⁰ is another source of law on pollution generally. These customary rules are reflected in international law decisions as well as in other ‘hard’ and ‘soft’ law sources. In the context of pollution generally, a case that readily comes to mind is the *Trail Smelter Arbitration*⁷¹¹. This case is about a dispute between the United States and Canada arising from the damage allegedly caused to wheat crops from an iron smelter in Canadian territory. In finding in favour of the USA the tribunal held that:

...under the principles of international law, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

This dictum which is expressed in the Latin maxim *sic utere tuo et alienum non laedas*⁷¹² is another important milestone in the development of international customary law as regards state responsibility in the context of environmental concerns as was reaffirmed in Article 1(4) of the 1982 Law of the Sea Convention (hereafter referred to as LOS) and was also reaffirmed in Principle 21 of the 1972 Stockholm Declaration which state thus:

States have, in accordance with the Charter of the United Nations and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁷¹³

These declarations have assumed the status of the principles of customary international law as enshrined in these international instruments. Although, there is no specific provision in the Nigerian Constitution admitting of customary international law, the principles are assimilated into Nigerian law by virtue of the various Conventions and Treaties to which Nigeria is a party.⁷¹⁴ One of these is the United Nations Charter itself and Article 38(1) of the Charter of

⁷¹⁰J Glazewski op cit at 36 supra.

⁷¹¹ Trail Smelter Arbitration *U.S v Canada* (1938 and 194) in Harris *Cases and Materials on International Law* 1991 243-6.

⁷¹² One should use his property in such a way as not to cause damage to others.

⁷¹³Principle 21 of the Stockholm Declaration 1972 and Principle 2 of the Rio Declaration 1992.

⁷¹⁴ See Article 38(1) of the ICJ statute discussed above.

the International Court of Justice.⁷¹⁵ Another of this multilateral treaty is the African Charter on Human and Peoples Rights.⁷¹⁶

4.3.2 Regulations and rules on the environment as published by government agencies and Departments

There is a growing body of rules and regulations enacted by government agencies on the environment. In terms of the regulation of environment, these rules are of prime importance. The government also tends to publish guidelines from time to time which cannot be ignored. Under the Nigerian Constitution, administrative agencies are a creation of the executive arm of government.⁷¹⁷ Their regulations are sometimes ignored for political reasons. The guidelines published by these agencies under the hand of a Minister or other government official are primary sources of law on any subject and are binding.

However, there are other Declarations of Environmental Agencies contained in the United Nations Organs otherwise called “soft laws”. Soft law is an important innovation in international law-making that describes a flexible process for States to develop and test new legal norms before they become binding on the international community.⁷¹⁸ Although not binding, they have the effect of shaping the making of laws through consensus in accordance with the aims and objectives of the United Nations and their Agencies. An example is Agenda 21⁷¹⁹ the declaration of the United Nations Conference on the Earth otherwise called the Rio Conference.⁷²⁰ This principle 15 which introduced the precautionary principle⁷²¹ has greatly influenced Nigerian law on oil pollution.

4.3.3 The incorporation of multilateral environmental agreements into Nigerian law

As noted earlier in this thesis, no treaty becomes enforceable in Nigeria unless it is specifically enacted into law by the National Assembly.⁷²²

⁷¹⁵ In contradistinction however see s 232 of the Constitution of South Africa, 1996 which provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

⁷¹⁶ Ratification and Enforcement Act Capt 10 Laws of the Federation of Nigeria 1990.

⁷¹⁷ See s 5 of 1999 Constitution.

⁷¹⁸ Hunter et al op cit 349.

⁷¹⁹ See UNCED Doc A/Conf/151/4.

⁷²⁰ n 124 above.

⁷²¹ See s 1.2.2 above.

⁷²² S 12(1) 1999 Constitution.

This provision is generally regarded as the ‘dualist’ approach to the incorporation of treaties into national laws.⁷²³ The rationale for this rule is the age old struggle between international law and national or ‘municipal’ or ‘domestic’ law for sovereignty. Dixon and McCorquodale opined that states have used the concept of sovereignty to protect a state against the intervention of international law into its national legal systems.⁷²⁴

The Monists are of the view that municipal courts are obliged to apply rules of international law directly without the need for any act of adoption by the courts or transformation by the legislature.⁷²⁵

This view stems from the Latin maxim “*pacta sunt servanda*”⁷²⁶ and its corollary “*clausula rebus sic stantibus*”.⁷²⁷ Unless there is a fundamental change in circumstances which make it impossible for the agreement freely entered into by state parties to be obeyed, a treaty⁷²⁸ once concluded between nations becomes law and binding and its provisions cannot be wished away or overridden by domestic law.

All treaties, whether bi-lateral or multinational, may be governed by the Vienna Convention on the Law of Treaties.⁷²⁹ There are treaties that establish rules of international law and are of general nature. They are known as law-making treaties like the Charter of the United Nations and Article 38(1) of the Statute of the International Court of Justice (ICJ), and the United Nations Convention on the Law of the Sea, 1982 which created peremptory rules of international law with respect to the uses of the sea by the nations of the world. There are also treaties that address issues of common interest between two or more states and are known as bilateral or multilateral treaties. States may express their consent to be bound to a treaty by way of ratification, acceptance, approval or accession and are subsequently regarded as parties to the treaty.⁷³⁰

⁷²³ See J Dugard op. cit 47.

⁷²⁴ M Dixon and R McCorquodale *Cases and Materials on International Law* (4ed 2003) 454.

⁷²⁵ Dugard id.

⁷²⁶ “agreement must be obeyed” Article 26 of the Vienna Convention. “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

⁷²⁷ A tacit condition attached to all treaties to the effect that they will no longer be binding as soon as the state of facts and conditions upon which they were based changes to a substantial degree.

⁷²⁸ A treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation. See Art 2(1) (a) of the Vienna Convention.

⁷²⁹ Concluded May 23, 1969. See A. Olagunju, *Abacha v Fawehinmi: Between Monism and Positivism- An Exposition of the Application of International Treaty in Nigeria* LASU Law Journal vol. IV Issue1 (2001)101.

⁷³⁰ Articles 14 and 15 of the Vienna Convention on the Law of Treaties (hereinafter referred as Vienna Convention).

States' consent to be bound by a treaty could be subject to the provision of article 46 which provides thus:

A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

Olivier, citing several authorities, posits that there is consistent judicial and arbitral authority for the international law rule that a state cannot rely on its municipal law to avoid its international obligations.⁷³¹

With regard to environmental law, states also enter into several multilateral and bilateral agreements. By multilateral environmental agreements (MEA) we refer to international agreements entered into by Nigeria and other State Parties with International Institutions such as the United Nations and its agencies whose provisions have binding effect on the environment.⁷³² It is contended in this thesis that some of these agreements have suffered implementation arising from the haphazard nature of their enforcement by diverse regulatory agencies and lack of direct enforcement mechanisms.

In line with the dualist approach adopted by Nigeria, these agreements are not directly enforceable since there is no specific legislation passed by the National Assembly. However, the Nigerian State practice is to incorporate these agreements into its laws by mere reference in some specific environmental legislation, specifically environmentally related ones.⁷³³

Couzens⁷³⁴ submits that as a sub-category of the second approach, (i.e. the incorporation by reference of principles of Multilateral Environmental Agreements), it is possible for a state to

⁷³¹ M Olivier, *Enforcement of International Law* (2002) 9 SAJELP 151, fn 4. See also Alabama Claims Arbitration (1872), Moore Arbitrations 653-656, Exchange of Greek and Turkish Populations Case Advisory Opinion (1925) PCIJ Reports series B 20; Free Zones Case (1932) 46 PCIJ Reports series A/B 167.

⁷³² See <http://www.mfe.govt.nz/laws/meas> which defined MEA thus: "Multilateral Environmental Agreements (MEA) are agreements between states which may take the form of "soft-laws" setting out non-legally binding principles which parties will respect when considering actions which affect a particular environmental issue or "hard- law" which specify legally- binding actions to be taken to work toward an environmental objective". (Accessed 23 September 2010). Examples of MEAs are the Framework Convention on Climate Change, 1992 (FCCC), ratified on 8 September 1993, The Convention on Biological Diversity 1992 (CBD) ratified on 16 September 1993 and The Montreal Protocol on substances that Deplete the Ozone Layer, 1989 ratified on 21 July 1988 amongst other.

⁷³³ See s 335(3) of the Merchant Shipping Act, 2007 which refers to Convention and Agreements relating to the Prevention of Pollution by Ships (MARPOL 73/78) and its Annexes although there is no specific legislation domesticating the MARPOL Convention into Nigerian law.

⁷³⁴ E Couzens The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law (2005) 30 SAYIL 128.

incorporate the principles of an MEA without directly incorporating the MEA itself – “in order to provide greater environmental protection than does the MEA.”⁷³⁵

This approach it is submitted was the approach used to incorporate the Montreal Protocol⁷³⁶ on Substances that Deplete the Ozone Layer, 1987 and the Rotterdam Convention on Prior Informed Consent (PIC) Procedure⁷³⁷ into the domestic law on the management of hazardous substances and toxic wastes in Nigeria.

The approach adopted in the Montreal Protocol,⁷³⁸ which is a framework convention,⁷³⁹ is that it spells out obligations in general terms leaving it for later negotiations to detail more precise obligations. Nigeria ratified the Vienna Convention,⁷⁴⁰ which was the parent Convention to the Montreal Protocol, on 31 October, 1988 and also acceded to the Protocol to the Montreal Convention on the same date.⁷⁴¹ The principles of the said Conventions were then introduced into Nigeria law starting with the definition of hazardous substances.

Section 37 of the aforesaid NESREA ACT defined hazardous substance as follows:

Hazardous substance means any chemical, physical or biological and radioactive material that poses a threat to human health and the environment or any such substance regulated under international conventions to which Nigeria is a party or signatory e.g. Montreal Protocol, Rotterdam Convention, Stockholm Convention etc. and includes any substance designated as such by the President of the Federal Republic of Nigeria by order published in the Federal Gazette.

It is submitted in this thesis that by incorporating these aforementioned agreements directly into the domestic laws, the MEA becomes directly enforceable both internationally and domestically.

It is also submitted that this is an example of the influence of the precautionary principle of environmental law in the making of the above law. The drafters of the law by defining

⁷³⁵This as it appears to Couzens is what States appear to do as a matter of state practice and not necessarily what is correct to do.

⁷³⁶ See s 37 of the NESREA Act supra on the definition of hazardous substance.

⁷³⁷ See Rotterdam Convention, (1999) 38 I.L.M. 1 adopted on September 11, 1998.

⁷³⁸ The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer 1987, bans the use of substances that deplete the ozone layer and provides a Multilateral Fund to allow for the transfer of technology and funds from developed to developing country.

⁷³⁹ See Glazewski op. cit. 45. A framework convention usually spells out the obligations of the parties in broad terms, leaving it to later conventions to flesh out the details.

⁷⁴⁰ Done at Vienna, Austria on 23 May 1969. The Convention entered into force on 27 January 1980. Presently 112 States have ratified the Convention. See United Nations Treaty Series, vol. 1155 at p. 331.

⁷⁴¹ See the status of countries that ratified the Vienna and Montreal Conventions at http://ozone.unep.org/Ratification_status/ accessed 10-05-2011.

hazardous substances through making reference to the Montreal Protocol and the Rotterdam Conventions acknowledge the limit of knowledge available to them in that area. The precautionary principle entails the application of preventive measures in situations of scientific uncertainty where a cause of action may cause harm to the environment.⁷⁴²

An example of a ‘wholesale incorporation’,⁷⁴³ is Article 24 of the African Charter for Human Rights⁷⁴⁴ which came up for determination in the case brought by Chief Gani Fawehinmi, a Nigerian human rights activist, against the then maximum military ruler of Nigeria General Sani Abacha.

Article 24 provides:

All peoples shall have the right to a general satisfactory environment favourable to their development.

There arose a controversy on whether this provision can avail a person seeking for the enforcement of his fundamental human rights under the constitution of Nigeria where such a Constitution has had many of his provisions, especially on human rights, ousted by a decree.

In *Fawehinmi v Abacha*,⁷⁴⁵ the facts briefly were that the applicant, a legal Practitioner and human rights activist, was detained by the agents of the respondents for criticizing military rule. The applicant was forcibly taken from his house at about 6 a. m and driven to the headquarters of the State Security Service and detained without warrant and without stating the reason for his arrest and detention. The applicant went to court with an application for his release and the enforcement of his fundamental human rights under the African Charter for Human Rights. In their reply to the application, the respondents denied that the African Charter for Human Rights was applicable under the then unsuspended provisions of the 1979 Constitution. For instance, in relation to Article 24 cited above it was contended by the respondents that its provisions were inferior to the provisions of a decree and the Constitution. This contention was rejected by the Supreme Court which held that Article 24 was made in the nature of a Treaty which has ‘international flavour’ and the provisions could not be whittled away by a decree or any domestic enactment. The court also held that

⁷⁴² M Kidd op cit page 8 fn 47 citing with approval Fugle & Rabie at 97.

⁷⁴³ E Couzen’s coinage see n 681 above.

⁷⁴⁴ Ratification and Enforcement Act Cap 10 LFN 1990 wholly incorporates the provision of the African Charter on Human and Peoples’ Rights adopted by the 18th Assembly of Heads of States and Governments of Africa in June 1981 at Nairobi, Kenya.

⁷⁴⁵ See the case of *Fawehinmi v Abacha & ors* (2006) 6 NWLR (pt. 660) 228 delivered by the Supreme Court of Nigeria on 28 April 2000.

although there were no special procedure in the domestic law incorporating the procedure for the enforcement of the provisions of the African Charter in Nigeria, a party seeking to enforce the provisions of the Charter could commence an action either by way of writ of summons or any other procedure permitted by law such as the Fundamental Rights (Enforcement Procedure Rules).⁷⁴⁶ The Supreme Court upheld the application and ordered the respondents to pay to the applicant the sum of N10, 000, 000 (about \$60, 000) for damages.

This is an example of wholesale importation of an international treaty which gives such treaty direct enforcement under domestic jurisdiction. Although it is conceded that the decision in *Fawehinmi v Abacha* bordered on the enforcement of the applicant's fundamental human right to life as enshrined under the said Charter and Article 24 which deals with an environmental right, it is suggested that the nature of the MEA will dictate the procedure that will be used to apply it to the particular situation or circumstance for the purpose of enforcement.⁷⁴⁷

⁷⁴⁶ See Olagunju op cit. The Fundamental Rights (Enforcement Procedure Rules) are made pursuant to section 46(3) of the Constitution of the Federal Republic of Nigeria, 1999.

⁷⁴⁷ The general steps in formulating multilateral agreements are normally as follows: (1) The initiation of the process begins on the proposal of some state, inter-governmental organisation (IGO) organ or non-governmental organisation (NGO), or even an individual. The proposal is then examined by an appropriate organ of the IGO to which that proposal was made to determine the need for and the potential utility of the proposed instrument, its relationship to existing international law, the chances of successfully negotiating a useful instrument likely to be acceptable to a significant number of states, and the expected length and cost of the project. If there is a conclusion to proceed, decisions are taken as to how to do so and in particular as to which organ of the IGO the principal or at least the initial work should be assigned.

(2) The formulation of the treaty which is often a multistage process. It normally starts with any necessary preliminary studies and then proceeds to the preparation of an initial draft (at least of the central provisions) by: the proposing state(s); an organ consisting of governmental representatives or of experts; the secretariat of the sponsoring IGO; a special rapporteur; or possibly even interested NGO(s). This draft is then considered by bodies with expertise in the substance of the proposed treaty (e.g., environment or disarmament) or in purely legal matters. Thereupon it is normally submitted one or more times to governments or to organs consisting of governmental representatives and, since many stages of the treaty-making process take place in public (particularly in respect of environmental agreements), may be subject to NGO, media, and other forms of public scrutiny. Finally, a drafting committee may perfect the text, as far as it has been agreed, ensuring both internal consistency as well as concordance between the various language versions to which the treaty is to be concluded. (3) Once the formulating process has been completed, resulting either in a perfected text or in one that has merely a restricted number of open questions, the project is transferred to a senior IGO organ. That organ must then decide whether to proceed to the **conclusion** of the instrument, which requires a decision as to whether the then existing text is likely to result in a treaty that a sufficient number of interested states will ratify. For further reading see Texts and statutes of all the multilateral treaties deposited with the UN Secretary General available at <http://www.un.org/depts/treaty/generalstepsinformulatingmultilateralagreements> accessed 19-1-2011.

In conclusion to this chapter, we will refer to the American practice as regards international agreements. Contrary to the other jurisdictions where parliament must pass a bill to domesticate the provisions of a treaty, the power to negotiate an international agreement or treaty lies with the President of the United States in conjunction with the Senate.⁷⁴⁸ The United States' President by virtue of an Executive Order delegates this function to the Secretary of State.⁷⁴⁹ This was the procedure used with regard to the amendment to section 7 of the Federal Water Pollution Control Act of 1972.⁷⁵⁰

The Federal Water Pollution Control Act (FWPCA) provides for the delegation to the Secretary of State certain functions with respect to the negotiation of international agreements relating to the enhancement of the environment. The executive order when published becomes operative immediately and in this way the American Congress is able to keep pace with its commitments with respect to Multilateral Environmental Agreements.

4.3.4 Conclusion

This chapter examines the Nigerian oil industry and the problems of oil pollution and its impact on the environment. The chapter also examines some national legislation on marine pollution and other enactments on relating to inland water pollution. The chapter also looked into the sources of other laws on the environment to identify the attempts by the legislative arm of government and government itself to combat the scourge of oil pollution. The growing importance of MEA's as a source of law generally on the environment was also examined. In the next chapter the thesis shall discuss compensation issues arising from oil pollution of inland waters.

⁷⁴⁸ See Article II section 2 of the Constitution of the United States of America.

⁷⁴⁹ See Executive Order no. 11742 of October 23 1973 with regard to section 7 of the Federal Water Pollution Control Act Amendment of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment made under the hand of President Richard Nixon.

⁷⁵⁰ Public Law 92-500, 86 Stat. 898 which was effected vide an Executive Order no. 11742 of October 23, 1973 made under the hand of President Richard Nixon.

Chapter 5: The Regulation of Oil Pollution in the Inland Waters of Nigeria

Introduction

This chapter will examine the law and regulation put in place by the Nigerian Parliament to control the pollution of the inland waters of Nigeria by oil. The discussion will entail the issues pertaining to oil spillage occurring during the inland transportation of crude oil through oil pipelines and pollution issues arising from this. The aspects of these laws dealing with point source and non-point sources of pollution will also be examined.

5.1 *Oil Pollution of inland waters*

Aside from the pollution of freshwater by oil spillage in the course of transportation of crude oil through oil pipelines, there are other causes of pollution of freshwater due to what is known as point source pollution and non-point source pollution. The National Policy on the Environment enjoins the Nigerian State to protect pollution of freshwater from point source and non- point sources of pollution.⁷⁵¹

(a) Point source pollution

Section 38 of the Federal Environmental Agency Act⁷⁵² defines point source pollution as including pollution that is released from a stationary or fixed facility such as industrial or municipal waste discharged through pipelines, ditches, lagoons or wells. These are discharges of effluents and wastewater into open rivers, lagoons and estuaries or improper management of industrial sewage disposal plants located across the country.⁷⁵³ There are also improper management of sewage disposal plants which when discharged carelessly cause water pollution.⁷⁵⁴ In industrial areas, operators are forbidden from discharging of industrial effluents and solid sewage into the marine environment without adequate treating and

⁷⁵¹ See the National Policy on the Environment publication of the Federal Ministry of Environment, 1989 at page 14

⁷⁵² See also s 16 (1) and (2) of Cap 131 LFN 1990.

S 16. (1) The Agency shall, as soon as possible after the commencement of this Act, establish effluent limitations for new point sources which shall require application of the best control technology currently available and implementation of the best management practices.

(2) The Agency shall, as soon as possible after the commencement of this Act, establish effluent limitations for existing point sources which shall require the application of the best management practices under circumstances as determined by the Agency, and shall include schedules of compliance for installation and operation of the best practicable control technology as determined by the Agency.

⁷⁵³ A G Amokaye op. cit. 426.

⁷⁵⁴Ibid.

discharging of these in a manner consistent with the Waste Regulations.⁷⁵⁵ Where the effluents are discharged from an oil drilling platform, they can constitute a source of pollution of the marine environment i.e. surrounding rivers, creeks and this may be washed into the oceans and seas.

Also concerning the underground water which may also suffer pollution by oil or substances containing oil, the Federal Ministry of Environment forbids the injection of these materials into underground water or into sewers which are connected to the source of this underground water.⁷⁵⁶ In schedules 12 and 13 of the aforesaid Regulation, the legal and scientific criteria for determining whether a certain waste is dangerous or not are contained in Regulations 6 to 19 of the Regulation. A ‘waste’ is considered to be hazardous if it falls within and possesses such predetermined “listed” characteristics described in FAC-000-0009903 and FAC-000-000-9904 classifications.⁷⁵⁷ The specified characteristics are: explosive, oxidising, highly inflammable, irritant, corrosive, harmful, toxic, carcinogenic, infectious, mutagenic, teratogenic and nutagenic. The categories of waste set out in Schedule 6 broadly covers hospital waste, halogenated organic substances, culture, halogenated hydrocarbon concentration, poly-cyclic aromatic hydrocarbon concentration, (PAH), polychlorinated dibenzo p-dioxins and polychlorinated biphenyls (PCB) etc. These chemicals may also contain compounds of hydrocarbons which are the main constituents of crude oil. Any person who produces or holds such waste must obtain a permit from the Federal Ministry of Environment (FME) authorising him to store, treat or deposit toxic waste within Nigeria.⁷⁵⁸ The specified wastes shall not exceed the effluents limitation specified for each industry.⁷⁵⁹

In the United States of America, the term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.⁷⁶⁰

⁷⁵⁵See S.1.9 Pollution Abatement in Industries and Facilities Generating Wastes Regulations Official Gazette FRN No. 42 1991.

⁷⁵⁶S.1.15 of 1991 Management of Solid and Hazardous Waste Regulations Official Gazette FRN No. 102 1991.

⁷⁵⁷FAC is an acronym for FEPA Agency Classification devised by the Agency to classify toxic chemicals.

⁷⁵⁸Amokaye op. cit. 309.

⁷⁵⁹An "effluent limitation" means any restriction established by the Agency of quantities, rates and concentration of chemical, physical, biological or other constituents which are discharged from point sources into the waters of Nigeria; S. 38 ibid.

⁷⁶⁰See s 502 Clean Water Act definitions (14).

Under South African law, the National Water Act⁷⁶¹ is the statute that regulates the pollution of a water resource or water course. It establishes a licensing system which controls activities that are capable of polluting or degrading water resources. These activities include:

- (a) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;
- (b) disposing of waste in a manner which may detrimentally impact on a water resource;
- (c) disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process...⁷⁶² The Department of Water Affairs And Forestry regulates the issuance of the necessary permits for the purpose aforesaid.⁷⁶³

The penalties stipulated for violations under the FEPA Act are the payment of the sum of N100, 000 (USD\$ 625) fine for an individual and if a corporation the sum of N500, 000 (\$3, 125).⁷⁶⁴

5.2 Regulations put in place to enforce compliance

Laws and Regulations do not abate pollution of inland waters unless they are enforced and complied with. The defunct FEPA created an Inspectorate and Enforcement Department which was vested with the authority to enforce environmental protection laws, and checking and effecting compliance of industries with these regulations and laws related to industrial pollution. The Agency also coordinated, and liaised with the activities of other sectorial groups such as Federal Ministry of Industries, Health, Petroleum Resources, States and Local Governments on industrial compliance. For its day to day activities the Inspectorate and Enforcement Department was divided into three divisions:

- Standards, Regulations and Registration responsible for setting or reviewing standards, formulating regulations and issuing permits as well as accrediting environmental consultants and contractors.

⁷⁶¹36 of 1998.

⁷⁶²S 21 (f) - (h) of National Water Act.

⁷⁶³ There are other regulations which are issued by provincial authorities under the Health Act which shall be discussed under the appropriate section in subsequent chapters.

⁷⁶⁴S 20(1) of the FEPA Act. Under s 27 (2) of the NESREA Act the offence is punishable with a fine not exceeding N1, 000,000 for an individual person (\$6, 250) and for a corporate body in addition to the sum of N1, 000,000, an additional sum of N50, 000 (\$312) is imposed for everyday the offence subsists.

- Chemical tracking responsible for chemical notification procedure, hazardous waste traffic control and monitoring of imported chemicals from cradle to grave.
- Compliance Monitoring responsible for checking and effecting compliance of industries with standards and pollution abatement strategies.
- There was a Public Complaints Unit attached directly to the Office of Head of Enforcement for prompt actions in addition to these three divisions.⁷⁶⁵

The NESREA Act provides that the Agency shall, on the commencement of this Act, establish effluent limitations for new point sources which shall require application of the best control technology currently available and implementation of the best management practices.⁷⁶⁶ This has been done with the enactment of two regulations to govern the control of effluent arising from Mining and Mineral Resources operations⁷⁶⁷ and the National Environmental (Non-Metallic Mineral Manufacturing Industries Sector).⁷⁶⁸ The Agency shall, on the commencement of the Act, review effluent limitations for existing point sources which shall require the application of the best management practices, under circumstances as determined by the Agency, and shall include, schedules of compliance for installation and operation of the best practicable control technology as determined by the Agency.⁷⁶⁹

Notwithstanding the existing regulations in force, other than the oil and gas sector, the Agency may make regulations on effluent limitations, on existing and new point sources, for the protection of human, animal, marine and plant life.⁷⁷⁰ One is at a loss why the section excluded the review of existing regulations on the oil and gas sector, considering the fact that the sector is very important in the determination of the majority of the sources of point source pollution arising from oil exploration activity. The existing regulation made by the Department of Petroleum Resources (DPR) was last reviewed in 2002.⁷⁷¹ Other regulations which have been enacted by NESREA outside the oil and gas sector are National

⁷⁶⁵The Inspectorate and Enforcement Department has now been replaced by the appropriate enforcement division at the Federal Ministry of Environment and the Inspectorate Division of the National Environmental Standards and Regulations Enforcement Agency (NESREA). See also M Odubela and O Isaac Compliance Monitoring in Nigeria's Industries paper delivered at the Fourth International Conference on Environmental Enforcement held in Bangkok, Thailand available at <http://www.inece.org/3rdvol2/odubela.pdf> last visited on 14-01-2012.

⁷⁶⁶S 24(1).

⁷⁶⁷ See National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations, 2009.

⁷⁶⁸Regulations 2011.

⁷⁶⁹S 24(2).

⁷⁷⁰S 24(3).

⁷⁷¹See previous comments on the Department of Petroleum Resources in chapter 4.

Environmental (Domestic and Industries Plastic, Rubber and Foam Sector) Regulations, 2011, National Environmental (Food, Beverages and Tobacco Sector) Regulations, 2011, National Environmental (Textile, Wearing Apparel, Leather and Footwear Industries) Regulations, 2009, National Environmental (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations, 2009, National Environmental (Electrical/Electronic Sector) Regulations, 2011 and National Environmental (Surface and Groundwater Quality Control) Regulations, 2011 amongst others.

The above Regulations are consistent with the objectives of the Federal Government which as we noted earlier is to set up a regulatory Agency to enforce standards in accordance with its goals for a pollution free environment.⁷⁷² However, setting standards is not enough. There is a need to translate the standards through a broad set of enforcement mechanism which will include consistent policy objectives in line with the objectives of the National Policy on the Environment and the translation of these objectives through intra-sectoral co-operation as enunciated in the country's Agenda 21⁷⁷³ programme. The Federal Government set up the National Council on the Environment in 1990 and a National Advisory Committee in 1993 to advise on the implementation of Agenda 21. Some of the gains of these advisory bodies are the setting up of sectoral committees in the State Advisory Environmental Protection Agencies (SEPA) and the creation of several environmental protection agencies.

The National Advisory Committee is made up of professionals from relevant private sector and government organizations, the academic community, Non-Governmental Organizations (NGOs), and Community Based Organizations (CBOs). The Committee advises the Federal Government of Nigeria on sustainable development issues and advises strategies for implementing the provision of the aforesaid Agenda 21. One outcome of these is the creation of various environmental agencies and regulatory authorities to enforce standards. However, as far as enforcement action is concerned, these regulatory agencies carryout out duplicitous functions as we observed. Therefore the era of creating multiple Agencies which duplicate functions should be over.

⁷⁷²See s 7 of the NESREA Act.

⁷⁷³ See the objectives as contained in *Draft Objectives and Strategies for Nigeria's Agenda 21* published by the Federal Ministry of Environment available <http://www.nesrea.org/images/NIGERIA'S%20AGENDA%202021.pdf> Accessed 25-1-2012.

One other negative feature of the NESREA Act is that it does not have specific provision for removal and clean-up of sites affected by pollutants from substances caused by oil exploration activities. The relevant section states:

The Agency shall co-operate with other Government agencies for the removal of any pollutant excluding oil and gas related ones discharged into the Nigerian environment and shall enforce the application of best clean-up technology currently available and implementation of best management practices as appropriate.⁷⁷⁴

The Agency is relying on appropriate technology which it calls ‘best-clean up technology’ and ‘best management practices’ which are not available locally in Nigeria. The reliance on this foreign technology and technical know-how and manpower from abroad seriously hampers efforts at removal of pollutants and clean-up of affected sites.

The other constraint is money to carry out the necessary tasks given to the Agency.⁷⁷⁵

(b) Non-Point source pollution

There are not specific origins for non-point source pollution. It may arise from run-offs of rain water over the ground picking up pollutants and depositing them in water bodies or in underground bodies of water. Non- point pollutants include fertilizers and other agricultural products; pollutants from oil and chemicals from urban run-offs and energy production, sediments from construction sites, forestland; salt from irrigation; acid from abandoned mines and bacteria and nutrients from livestock, pet wastes and faulty septic system.⁷⁷⁶ All these substances may find their way to connect to inland water bodies and become another source of pollution to the inland waters.

The causes of oil pollution arising from non- point sources are diverse and is outside the scope of this thesis. However as it is evident from the oil spill statistics, the issues of oil pollution arising from point sources i.e. oil pollution from ships and spillages from oil pipelines constitute a greater percentage of oil pollution incidents. Compensation issues arising as a result of oil spillage from pipelines shall now be discussed further in this thesis.

⁷⁷⁴S 29 NESREA Act.

⁷⁷⁵See country report on Agenda 21 (n717) ibid.

⁷⁷⁶ Amokaye, ibid.

5.3 Payment of compensation for oil pollution of inland waters

The examination of cases decided by Nigerian courts reveal that a majority of these cases has to do with litigations involving pollution of inland waters by oil companies prospecting for oil. Where oil spillages occur as a result of this oil exploration activities, the victims have suffered without compensation notwithstanding the fact that there are provisions in relevant legislation dealing with compensation for oil pollution where oil spillage has occurred. The discussion shall commence by examining the provision of the Oil Pipelines Act.⁷⁷⁷

Section 11(5) of the Oil Pipelines Act (hereinafter called the Act) provides:

The holder of a licence shall pay compensation-

to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and

to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and

to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or a leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good. If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act.

Under Part IV of the aforesaid Act, the power to determine the quantum of compensation for any such damage is given to a Magistrate in the first instance. The jurisdiction of a Chief magistrate is not more than N25, 000 (about USD \$ 160) which is a paltry sum to pay by an oil company by today's standards. Be that as it may, when it comes to determining the owner of a title to land, a magistrate lacks jurisdiction. This much is contained in the proviso to section 19 of the Act:

Provided that nothing in this Act shall be deemed to confer power upon a magistrate to exercise jurisdiction in a matter raising any issue to the title to land or as to the title to any interest in land.

Furthermore, under and by virtue of Section 20(3) of the Act:

⁷⁷⁷Cap 06 LFN 2004.

In determining the loss in value of the land or interests in land of a claimant the court shall assess the value of the land or the interests injuriously affected at the date immediately before the grant of the licence and shall assess the residual value to the claimant of the same land or interests consequent upon and at the date of the grant of the licence and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum.

(4) No compensation shall be paid in respect of unoccupied land as defined in the Land Use Act, except to the extent and in the circumstances specified in that Act.

(5) 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 a public purpose.

As can be seen from the above provisions the court is given wide discretion to determine the quantum of damages to be paid for compensation under the Act.⁷⁷⁸ The courts in carrying out this task have resorted to the provisions of the Act and the principles of Common Law and Equity in determining the quantum of damages to be paid, although this is by no means an easy task. It should be noted here that the thesis will only be concerned with the criteria used by the court to assess damages under the Act, the issue of determining fault or *culpa* which is a feature of virtually all the cases, will not be dealt with here.

In a case that arose in the Niger Delta area of Nigeria involving some plaintiffs who are farmers, *Shell Petroleum Development Company (Nig.) Ltd. v High Chief Tiebo V11 & 4 ors*,⁷⁷⁹ the court was faced with the problem of determining the liability of the defendants for the extensive oil spillages on the plaintiff's land. Briefly the facts are as follows: the respondents sued the appellants claiming the sum of N64, 146, 000 as special and general damages for *negligence* as well as under the rule in *Rylands v Fletcher*.⁷⁸⁰ The claim was based on the fact that the appellants being an oil company constructed a network of oil pipelines over their land which it was contended was a *non-natural* use of the land.⁷⁸¹ There were extensive oil spillages which polluted plaintiffs/respondents' source of drinking water and killed all the fishes in the swamps and the forty ponds of the community. The spillage also paralysed the fishing life and occupation of members of the community.

⁷⁷⁸See the dictum of Ovie-Whiskey, J, in *Sam Ikpede v The Shell-BP Petroleum Development company Ltd.* (1973) M.W.S.J 61 at 88-89, where the Judge declared 'all companies who have been granted to prospect for crude oil in this country under the Petroleum Decree 1969 No.51 can only lay pipes carrying crude oil on or under the land by virtue of a licence granted to them under the provisions of the Oil Pipelines Act. See section 11(1), (2), (3) and (4) of the Oil Pipelines Act. The Act also made it abundantly clear that the holder of such a licence shall pay compensation to any person suffering damage as a consequence of any leakage from pipeline'.

⁷⁷⁹(1996) 4 NWLR (part 445) 657. (CA).

⁷⁸⁰(1868) LR 3 H L, 330.

⁷⁸¹See previous discussions in chapter 2.

The defendant oil company did not deny the oil spillage but claimed that the sum of N5, 500 (\$35) was adequate as compensation to the respondents. This compensation was calculated based on section 11 of the Oil Pipelines Act. The section provided the basis for calculating damages to be awarded through the costing of palm trees and raffia palms that were polluted by oil. That section merely awarded compensation based on the damage resulting from the right of way of the oil pipelines over the land. The trial court awarded to the plaintiffs the sum of N5, 000, 000 (\$ 31, 250) as damages. The defendants being dissatisfied appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal of the defendants/ appellants and upheld the judgment of the trial court which held that the damages suffered by the plaintiff / respondents were in the nature of general and special damages which do not only arise from the wrongful act itself, but depend on circumstances peculiar to the infliction of the injury. These damages in the nature of special damages to be recoverable must flow directly and must be reasonably proximate and foreseeable.⁷⁸² Thus the amount awarded by the trial court was upheld.

The court of Appeal also held that the fact that damages are difficult to assess does not disentitle a plaintiff from compensation for loss resulting from a defendant's breach. Similarly, the fact that the amount of such loss cannot be precisely ascertained does not also deprive a plaintiff of all remedy.⁷⁸³This amount is grossly inadequate as regards compensation to the paid for the crops of the plaintiffs, the pollution of the sources of their drinking water and the paralysis of their source of livelihood which is fishing.

This is a case that one can say reached a right conclusion based on wrong premises. The court, (Onalaja JCA as he then was), held that the plaintiffs were entitled to damages but based its premises on negligence. The requirement of negligence are that the defendants must owe to the plaintiff a duty of care a breach of which will entitle the plaintiff to claim damages. The ingredients of this case are purely based on the provisions of the Oil Pipelines Act which is based on a claim for injurious affection.

Furthermore, the court of Appeal based its affirmation of the judgment of the trial court on the rule in *Rylands v Fletcher*.⁷⁸⁴This, it is respectfully submitted, is a wrong holding as the rule in *Rylands* is based on strict liability which is the direct opposite of the principles of

⁷⁸²This rule of foreseeability was held to be applicable to nuisance actions and is here also being applied to actions that border on negligence.

⁷⁸³Supra at page 687 of the judgment.

⁷⁸⁴See previous discussion in chapter 2.

negligence. The court must have been led to this decision because of the attitude of lawyers who file a claim and include an alternative claim. If the court holds that the main claim fails, the alternative claim may succeed. In this case the plaintiffs claimed in negligence and in the alternative the rule in *Rylands v Fletcher*. These claims are mutually exclusive.

In Sam *Ikpede v The Shell-BP Petroleum Development Company Ltd.*⁷⁸⁵ the plaintiff who was a farmer brought a claim against the defendants for damages to his farmland and destruction of his crops as a result of the escape of crude oil from oil pipes belonging to the defendants. The plaintiffs relied on negligence and in the alternative relied on the rule in *Rylands v Fletcher*. At the end of the case both parties agreed that negligence had not been proved against the defendants. However the claim under the rule in *Rylands v Fletcher* succeeded. It is appropriate here to mention that the head of claim of negligence presupposes fault on the part of the wrongdoer which is in direct conflict with the rule of strict liability which was laid down in the case of *Rylands v Fletcher* where liability is irrespective of fault.

On the assessment of damages, it was held that whether or not the plaintiff refers to the particulars of damages as reasonable and adequate compensation or by any other name; they still remained special damages which must be strictly proved.⁷⁸⁶ The court therefore awarded the plaintiff less than the amount he asked for on the ground that the special damages were not strictly proved.

Omotola applauded the judgment and could not fault it on the ground that the judge decided the case on the facts as pleaded, and based on the relevant law.⁷⁸⁷ The learned author explained further; “It is obvious that the items of loss of raffia palms and fishing rights would have included specifically injurious affection which was not pleaded, though disturbance compensation is included in the award”.⁷⁸⁸

The learned author therefore concluded that the various claims brought before the court failed to specify that they were brought under injurious affection and it was wrong for the court to have decided the cases based on the principles of Common Law.⁷⁸⁹ This reasoning is sound and cannot be faulted especially as the case was brought pursuant to section 11(5) of the Oil Pipelines Act. The remedy provided is under statute and not under Common Law.

⁷⁸⁵ (1973) M.W.S.J 61.

⁷⁸⁶ See the report of the case in (1973) M.W.S.J 61 particularly at pp 90-92.

⁷⁸⁷ See J Omotola *Environmental laws in Nigeria including compensation* (J Omotola ed.) Faculty of Law, University of Lagos, Chapter 17, 285 at 298.

⁷⁸⁸ Ibid.

⁷⁸⁹ At 306.

In another case involving Shell B P Company as a defendant – *Amos & others v Shell B P Nigeria Ltd.*,⁷⁹⁰ the plaintiff in his representative capacity⁷⁹¹ claimed that the defendant made a large earth dam across their creek during mining operation which resulted in flooding the upstream and drying the downstream of the creek. It also hampered the movement of canoes and negatively affected economic and agricultural activities within the area. The trial judge ruled that the blocking of the stream was a representative action which could not be maintained because of the interest of, and losses suffered by, the victims whose interests were separate in character and not communal. In other words, the plaintiffs were denied relief on the ground that their claims and the damages suffered were not similar. Furthermore, in another similar case⁷⁹² the court dismissed the action of the plaintiffs on the ground that the act complained of was a public nuisance that necessitated the joining of the Attorney-General as a necessary party to the suit.⁷⁹³ The first claim was based on personal action while the second case was based on public nuisance. Yet both claims were denied.

The position of the law concerning representative action is that the consent of the Attorney-General is no longer required to maintain personal actions involving individuals who have common interest. With the coming of the 1999 Constitution, section 6(6)(b) has also been retained. This section is hereby quoted for the sake of clarity.

- S(6) The judicial powers vested in accordance with the foregoing provisions of this section-
- (a)....
 - (b) shall extend to all matters between persons, or between government and authority and to any person in Nigeria, and to all actions and proceedings relating to, for the determination of any question as to the civil rights and obligations of that person;

What is involved in this case bothers on the civil rights and obligation of the citizen of Nigeria which the Constitution guarantees and gives access to court as provided in section 6 of the 1979 (the former Constitution). Karibi-Whyte JSC declared:

⁷⁹⁰ (1974) 4 ECSLR 486.

⁷⁹¹ A suit brought in a representative capacity means one or more of the claimants have similar interests and the reliefs claimed are also similar. Various High Court Rules make provisions for bringing representative actions. See Order 14 Rule 15 of the High Court of Lagos State Civil Procedure Rules 1994.

⁷⁹² *Lawani v West Africa Portland Cement Co. Ltd.* (1973) 3 UILR (Part 214) 459.

⁷⁹³ It is no longer the requirement of the law that a person bringing a personal action in public nuisance needs obtain the consent of the Attorney General as a party. See the case of *Adediran & anor v Interland Transport Ltd.* (1991) 9 NWLR (pt. 214) 155. Here the appellants who were residents of an Estate brought an action in public nuisance concerning vibrations and noise coming from a construction company causing nuisance to the plaintiffs/appellants. The Supreme Court held that they have the right to sue by virtue of s. 6(6)(b) of the then 1979 Constitution and granted their reliefs.

Civil rights and obligation are in issue the judicial powers of the Constitution for the determination of such civil rights and obligations have been vested in our courts. To observe the common law distinction in instituting actions in tort or nuisance is to invoke and impose a common law provision inconsistent with the Constitution. It is to deprive a citizen of the right of action conferred on him by the Constitution.⁷⁹⁴

One of the issues canvassed in the *Adediran* case is whether plaintiffs whose cause of action may be similar but who did not suffer the same type of damage can be brought together as joint plaintiffs in a representative action to claim similar reliefs. This is usually called sueing in a representative capacity. In the case under review, the plaintiffs are residents of Ire Akari Estate in a suburb of Lagos and they brought the action for themselves and on behalf of the Estate. The design behind the provision of representative actions in the Rules of the High Court is to ensure expeditious disposal of cases, especially where the plaintiffs represent a class of interest and they seek similar reliefs. In the *Adediran* case, the Supreme Court held that the trial court cannot award damages in an unidentified class of persons in reliefs not specifically made and established before it.⁷⁹⁵ The court therefore upheld the order of the lower court which ordered that the parties could not sue in a representative capacity and ordered that their suit be tried separately.

Furthermore, where the suit is brought in a representative capacity, there must be authorization;⁷⁹⁶ by this it is meant that the persons who are to be represented and those representing them should have same interest in the matter.⁷⁹⁷ This is usually done by way of an application to the court *ex parte* where the party seeking authorisation applies to the court and exhibits by way of affidavit evidence documents showing that he has the authority of the co-applicants to sue in a representative capacity. The court having been satisfied by the materials placed before it may grant the application.⁷⁹⁸

The case of *Jonah Gbemre v Shell Petroleum Development Co. Ltd. & ors*⁷⁹⁹ illustrated the requirement of authorisation in representative actions. The facts of this case run as follows: The plaintiffs instituted this action for themselves and in a representative capacity for each and every member of Iweherukan community in Delta State of Nigeria praying for an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by sections 33(1) and 33(4) of the Constitution of Nigeria, 1999, (hereinafter 1999 Constitution) and reinforced by Articles 4, 16 and 24 of the African Charter

⁷⁹⁴ At page 181 papr C-F of the judgment.

⁷⁹⁵ As per Karibi-Whyte JSC at p. 183 para F-H.

⁷⁹⁶ MT Ladan, *Access to Environmental Justice in Oil Pollution and Gas Flaring cases as a Human Right Issue in Nigeria*, being a paper presented at a training Workshop for Federal Ministry of Justice Lawyers held on November 28-30, 2011.

⁷⁹⁷ See *Ndule v Ibezim* (2002) 12 M.J.S.C. 150.

⁷⁹⁸ See *Shell Petroleum Development Company Nig. Ltd. v Chief Otoko & ors* (1990) 6. NWLR (pt 159) 693.

⁷⁹⁹ Suit No. FHC/PH/B/C/153/05 of the Federal High Court, Benin Division which delivered judgment on 14 November, 2005.

⁷⁹⁹ Cap A 9 Vol. 1 LFN 2004.

on Human and People's Right. The defendants challenged the action on the ground that the plaintiffs are individual farmers whose interests vary and are not communal. The defendants also contended that the plaintiffs lack the *locus standi*⁸⁰⁰ (the capacity) to represent the interests of the other plaintiffs and that the representatives have not suffered damage over and above other members of the public to maintain an action in public nuisance. The plaintiffs claimed that the continual gas flaring of the defendants in their community have violated their rights to a clean, poison and pollution-free environment. Gas flaring releases large amounts of methane into the atmosphere which has a global warming potential. The High Court held that the plaintiffs have *locus standi* to institute the action in a representative capacity for themselves and on behalf of other members of their community who are affected by the gas flaring and so granted the leave being sought.

It is to be noted that the contention in this suit is the right of the representatives of the Iweherekan community to a healthy and pollution free environment. Before the advent of the 1999 Constitution, this right was not in the previous constitutions as the 1999 Constitution was the first to make provision regarding the environment.⁸⁰¹ However, with the coming of the 1999 Constitution and the enactment of the Fundamental Rights (Enforcement Procedure Rules), 2009,⁸⁰² environmental rights are now justiciable and can be invoked by individuals who wish to enforce their right to a clean and healthy environment. This is the important contribution made by Gbemre's case i.e. it recognises the right of the applicants to a clean and healthy environment which it held is in clear violation of the Constitution and some other international Treaties entered into by Nigeria. The question of whether a person has a right to a healthy environment is more controversial, although it has been recognised that a threat to a person's health satisfies the *locus standi* requirement.⁸⁰³ It will however be an interesting point to see what the Supreme Court of Nigeria's position will be on this case since it is the judgment of a court of first instance (the Federal High Court).

⁸⁰⁰ Latin word meaning 'standing to sue'. Locus standi is a threshold issue in law and where it is raised and successfully invoked; the suit may be terminated for lack of capacity of the plaintiffs without going into the merits of the case. In the case of *Senator Abraham Adesanya v President of Nigeria and ors* (1981) 2 NCLR 388, Bello CJN, defined *locus standi* as the right of a party to appear and be heard on the question before the court. Being a threshold issue, the party seeking the relief from the court must disclose in his statement of claim sufficient interest that he has in the matter before the court can invoke its jurisdiction to determine the matter. See further S Ojutalayo Locus Standi – Its meaning and its Resolution in Our Courts – *Owodunni v Registered Trustees Celestial Church of Christ* in Landmark Cases and Essays in honour of Kehinde Sofola SAN, CON (2007) (Yerokun, Fagbohun and Oyende) (eds.). at p. 47.

⁸⁰¹ S. 20 of the 1999 Constitution. See also further discussion on environmental rights in Chapter 4. (s. 4.2.3).

⁸⁰² See Federal Republic of Nigeria Official Gazette No. 74, Vol. 96 of 17 November, 2009.

⁸⁰³ Kidd, Environmental Law (2011) 223.

In summary therefore, the 1999 Constitution has widened access to court when it concerns the redress which a plaintiff can obtain for harm done against him or her either in private actions or whether it is a representative action on behalf of a class or category of persons. The requirement for *locus standi* as a precondition for entertaining the suit has also been whittled down with the coming of the 1999 Constitution and the enactment of the Fundamental Rights Enforcement Procedure Rules.

Another major limitation to redress is the proof of the damage. It must be noted that no nuisance⁸⁰⁴ exists until damage is caused⁸⁰⁵ unlike trespass for instance which is actionable *in itself*, causation in nuisance does not lend itself to easy proof. How for instance is it easy, without access to the best available technology, to prove that a particular noxious fume emanated from a particular factory in an industrial area having several factories? In *Chief Ejowhomu v Edok-Eter Mandilas*,⁸⁰⁶ the defendant was an independent contractor engaged in road construction. In the course of its construction, the defendant caused a road blockage by barring access to the appellants' poultry farm. The appellants claimed that during the blockage their layers had died of starvation and other birds had been sold at a loss for being underweight. They also claimed for medical expenses for the birds, extra cost for transportation and general damages. The court held that the defendants committed public nuisance and that the plaintiffs (now appellants) had suffered particular injuries over and above that suffered by the public at large as a result of the respondents' acts. The court however held that there was not sufficient evidence of the value of the birds before and after the losses sustained by the appellant and held that damages were not thereby proved. The question of assessment of damages will arise where the court finds that there is liability for public nuisance.⁸⁰⁷ In the lower court the court made specific findings on liability in public nuisance. This finding was not specifically appealed against by the appellant. The respondents contended that the appellate court cannot disturb a finding of fact made by the trial court. The court of Appeal did not determine the issue but relied on another ground to find liability against the respondents. The respondents now appealed to the Supreme Court. Although the Supreme Court found liability for public nuisance, it could find no basis for the award of damages because the actions of blocking the road could not be successfully proved by the plaintiffs to be the cause of the loss of weight of the birds or even the death of some of

⁸⁰⁴ Nuisance is the unreasonable interference with the enjoyment of one's property by another. It may be a private nuisance or a public one.

⁸⁰⁵ Taylor C J in *Smith v Okorodudu* (1971) All NLR 392, 394.

⁸⁰⁶ (1986) 17 NSCC (Part 11) 1184. Copies of the judgment of these cases are on file with the author.

⁸⁰⁷ Per Karibi-Whyte JSC in Chief Ejowhomu's case above 1196-1197 (paragraphs 5-10).

the birds in this case. This ended the plaintiffs bid to access justice for harm inflicted on them by the defendants/respondents.

With regard to the protection of the environment as a result of the spillage of large volumes of oil in the Niger-Delta, the courts in Nigeria have invoked the principles enshrined in the case of *Rylands v Fletcher* and also invoked the adjectival plea of *res ipsa loquitor*⁸⁰⁸. In another case involving Shell Petroleum Development Company, *S. P. D. C. v Adamkue*,⁸⁰⁹ the appellant Shell Petroleum Company Nigeria Limited, a major multi-national crude hydro-carbon oil and gas producer, was granted a concession by the Federal Government over many oil mining leases in the area spanning all over Ogoni area and in the present day Rivers State. The appellant in the course of his operations constructed a network of pipelines and flow stations over the concessioned area. There was an oil spillage at one of the flow stations which led to the contamination of the ponds and rivers belonging to the respondents who are communities of fisher men in the area. The respondents brought an action under the principles enunciated in the case of *Rylands v Fletcher* and also under the plea of *res ipsa loquitor*. The appellant denied that it was negligent and asked that the claim be dismissed. The Court of Appeal held that the principles of *Rylands v Fletcher* applied to this case because if the defendant/ appellant had not been negligent, the oil spillage would not have occurred. In fact the court would have decided this case purely on the plea of *res ipsa loquitor*. This literally means the thing speaks for itself. Where this plea is invoked, it shifts the evidential burden on to the defendant to prove that they were not negligent and have exercised due care. Thus it was unnecessary for the court to invoke the principles in the rule of *Rylands v Fletcher*⁸¹⁰.

The rule in *Rylands* is considered to be a species of private nuisance that imposes strict liability on a defendant for the damage caused by non-natural user of land. In effect, it created a strict liability rule for the foreseeable consequences of bringing on to land, collecting and keeping anything likely to do mischief if it escapes. Nigerian courts have followed this rule in environmental cases. The rule has clear limitations however. Whereas liability under *Rylands* is *strict*, in private nuisance, the claimant must prove unreasonableness, which is akin to fault.

Whereas in public nuisance, and in cases bordering on negligence, the principle in *Rylands* have *often* been applied whereas fault is not a requirement since *Rylands* laid down the

⁸⁰⁸ It is a Latin word which means the thing speaks for itself.

⁸⁰⁹ (2003)11 NWLR (Pt 832) 533.

⁸¹⁰ (1868) LR 3 H L, 330. See s 5.3 for the facts of this case.

principle of strict liability which is irrespective of fault. If the kind of damage to the environment is not reasonably foreseeable, for instance where oil leaks to the environment from underground storage tanks, the damage that is recoverable will depend on whether the plaintiff sues in tort and not under any other type of heads of damages.

In Nigeria, the principles of *Rylands* have been applied to protect the environment and even extended to cover the damage to the environment occasioned by oil operations.⁸¹¹ By extension, the rule in *Rylands* has also been applied to the damage caused by gas flaring which has been held to be a human rights issue and also that the citizens of Nigeria deserves to live in an environment that is healthy and that is not injurious to their health and wellbeing.⁸¹²

In summary therefore, one may conclude that in the cases examined above, the courts have used principles of common law to apportion liability using the principles laid down in *Rylands* and other tort cases which touch on the environment. In *Gbemre*'s case, the facts are as follows: Justice C.V. Nwokorie of the Federal High Court, Benin division granted leave to the applicant to institute proceedings in a representative capacity for himself and for each and every member of the Iweherenan Community in Delta State of Nigeria, and to apply for an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by sections 33(1) and 33(4) of the Constitution of Nigeria, 1999 (hereinafter 1999 Constitution) and reinforced by Articles 4, 16 and 24 of the African Charter on Human and People's Right.⁸¹³ The applicants had contended that the respondents failed to carry out an EIA in the aforesaid community before embarking on the exploration of oil and gas in their community in violation of the EIA Act. The applicants also contended that the indiscriminate flaring of gas by the oil companies in violation of the existing statutes constitute a violation of their fundamental rights and sought for an injunction to restrain the respondents from further flaring of gas in the community. The judge granted their application for injunction but made no award of damages, costs or compensation whatsoever. This is a welcome development in the application of the provisions of an International Multilateral Treaty like the African Charter on Human and People's Right to protect the environment. It is however regrettable that the honourable court declined to award damages against the oil

⁸¹¹ See the cases of *Lawani v West Africa Portland Cement Co. Ltd.*, supra., *Sam Ikpede v Shell Petroleum Devt Company Ltd.*, supra.

⁸¹² See *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd., & NNPC & A. G. Federation* delivered by the Federal High Court Benin Division in Suit No. FHC/PH/B/C/153/05 on 14 November, 2005.

⁸¹³ Cap A 9 Vol. 1 LFN 2004.

company and the government. This paternalistic judicial attitude which tended to protect the oil companies being the ‘cash cow’ of the economy was first mentioned in the unreported case of *Allan Irou v Shell BP*⁸¹⁴. This attitude has been described as using the legal rules ‘on occasion (to) benefit the ruling elite and the oil companies at the expense of economic development in Nigerian society as a whole’.⁸¹⁵ The author declared:

By implication, it could be expected that legal rules were on occasion beneficial to the ruling elite and the oil companies at the expense of economic development in Nigerian society as a whole. Second, the Common Law was generally biased in favour of corporate interests.⁸¹⁶

Happily, with the decision in *Gbemre*’s case and the enactment of the Fundamental Rights Enforcement Procedure Rules, 2009, the court has since moved from this position.

5.4.2.4 *The inadequacy of the provisions of Common Law*

An examination of the cases discussed above and principles of Common Law applied by the Nigerian courts reveal another shortcoming on the part of the Common Law in redressing harm to the environment. This shortcoming is that the Common Law cannot *prevent* harm being done to the environment. This is a serious limitation. The Common Law doctrines proved largely insufficient to curb environmental pollution by oil companies; hence the establishment of intervention agencies like FEPA and NESREA, amongst others.

This assertion is borne out by the protracted litigation in the courts being pursued by aggrieved litigants without success. The Niger Delta area, like many of the oil producing areas of the world, has suffered from a prolonged degradation of the environment due to the activities of oil exploration companies. The effect of this can be seen in a variety of newspaper publications containing news report emanating from the region. But in many of the cases reported, the efforts of the plaintiffs to seek redress have been rebuffed by the courts through the application of the principles of Common Law enunciated above. In a recent report involving Chevron Nigeria Limited, an Oil company, the Delta State government has asked Chevron Nigeria Limited to pay compensation to affected communities for an oil spill that allegedly devastated fish farms at Ekpan in Uvwie Local Council Area of the state.

The state government’s position was articulated by the Deputy Governor, Prof. Amos

⁸¹⁴ Suit No. W/89/91 decided in the Warri High Court, now Delta state on 26 November, 1973.

⁸¹⁵ See J Frynas *ibid.*

⁸¹⁶ *Ibid.*

Utuama, when he visited the fish farm allegedly damaged by the oil spill, he was reported to have said that contrary to the claim by Chevron Nigeria Limited, the spillage was massive. He observed that the Ekpan fish farm, which the state government owned and had used as a reference point in its human capital development agenda, was being threatened by the oil spillage. Chevron had in the wake of the spill claimed that only eight litres of oil was spilled. But the Deputy Governor lamented that from what he had seen; the spillage was a massive one and not just eight litres as claimed by the oil company.⁸¹⁷ The state government, *a priori* the poor community, would have to go court for the court to award compensation for damages against a multinational oil company like Chevron with all the resources at its disposal. The oil companies are also in a position to employ the best lawyers who are able to use the knowledge of the law and the technicalities of the case to keep the case in court for several years. The hapless community members whose livelihood is being threatened would have had to look for money to keep the case going on court with no certain assurance of success. This is clearly a limitation to their ability to pursue justice and the environment is worse for it.

The conclusion which can be drawn that is inescapable is that the Common Law principles as applied in Nigerian courts are inadequate in catching up with the deleterious effect of oil spillage. The claims under Common Law which have been discussed above were obtained through many years of protracted expensive litigation. The incidence of litigation is such that no one knows where it will end. These uncertainties make it unattractive for the Common Law to effectively address the degradation to the environment arising from oil spillages.

The judgments that have been given after protracted litigation have also been criticised by a learned author as being restrictive because of the requirement of the rule of foreseeability in nuisance and the uncertainty of the application of this rule as regards liability to the environment.⁸¹⁸

The legislative arm has also endeavoured to redress the harm on the environment allegedly being perpetrated by multi-national oil companies. The chairman of the Senate Committee on the environment, in a two-day consultative forum for select members of the National Assembly Committees on Environment and Ecology, Climate Change and Civil Society Organisations, noted that the laws in the oil and gas sector had become too obsolete to ensure strict compliance by the oil companies. The Committee Chairman also noted that the oil spills have become too frequent in the Niger Delta resulting in environmental pollution and

⁸¹⁷See report at ThisDay online 10 March 2010.

⁸¹⁸ See S. Wolf & W Stamley, *Principles of Environmental Law* (2002), 3rd edition, 377.

degradation.⁸¹⁹ The Chairman observed rightly that only the Oil in Navigable Waters Act (ONWA) addresses the pollution of the sea and navigable waters. He lamented the inadequacy of the national laws to deal with oil pollution of the coastal regions and creeks, pollution of the waters as a result of oil spills from burst pipelines and leakages from fixed and floating oil producing platforms as well as ballast and other pollutants from ships.⁸²⁰

The Chairman may not be totally wrong to say that there is a dearth of the nation's laws on offshore oil spills. What is far from the truth is that the laws that are in existence are being observed more in their breach by the oil operators and the institutions that have been established to enforce the laws are weak or lack proper enforcement mechanisms. An example will suffice. On the 20 December, 2011, oil spilled was reported to have occurred on one of the oil fields operated by Shell. The Bonga Oil spill was from a production platform operated by Shell which produces around 200, 000 barrels per day, about 10% of Nigeria daily production. The incident occurred when oil was being transferred from one storage platform to another. Satellite images of the spill area indicated that it covered about 923 square kilometres.

Shell, as in previous incidents, attributed the disaster to vandalism by oil thieves, an ever present menace, but the community disputed this. Shell officials said some oil has been recovered but fishing and farming activities have been grounded.

In an editorial opinion by the *Daily Trust*, the paper opined that over the years, cases of oil spillage in the Delta region have not been treated with the urgency they demanded, as oil companies, particularly multinationals continued their activities without much scrutiny by the authorities. This serious environmental damage caused by frequent oil spills and their impact on human and marine lives has made living in the Niger Delta region a harrowing experience.⁸²¹

The attitudes of multinational companies who operate in other countries of the world are different when it comes to oil spillage as compared to that of Nigeria. In the *Deepwater Horizon Oil* spill which occurred in the Gulf of Mexico in April 2010, BP engineers worked round the clock to ensure the capping of the oil spill pouring out from the oil well deep inside the Gulf of Mexico. The facts were that an explosion occurred at the BP Macondo well in the Gulf of Mexico which killed 11 people and unleashed the worst oil spill in US history.

⁸¹⁹ See full report at Nigeria: Oil Spill- Senate Warns Oil Firms,
<http://allafrica.com/stories/printable/201203200290.html> accessed 19-04-2012.

⁸²⁰Ibid.

⁸²¹ See Daily Trust Editorial Opinion 17 January, 2012 available at <http://allafrica.com/stories/201201170885.html> accessed 23/04/2012.

Following the Gulf of Mexico disaster, The United States President imposed a six-month moratorium on all deep-water drilling in US coastal waters. In reaction to the disaster, BP joined forces with three other oil majors- ExxonMobil, Chevron and ConocoPhilips to form a \$1bn Gulf of Mexico spill response and containment unit.⁸²²

Shell is not the only company whose conduct is blameworthy when it comes to oil spill incidents. In 2010, a French Oil company, Total was involved in a spill incident that occurred in the Akpo offshore oil field off the coast of Nigeria. The drillship, GSF Jack Ryan, which belonged to Houston- based Transocean, was working on the Akpo field when an accident occurred and three men were reportedly thrown overboard. Two were rescued and one was missing. The Akpo field which commenced operation in 2009 is located in OML 130 about 200 Kilometres offshore Port Harcourt in water depths ranging from 1, 100 to 1, 700 metres. At peak production, the field is expected to quickly reach a production level of 225, 000 barrels of oil per day, of which nearly 80% is condensate. Total quickly shut the well after the incident as a precautionary measure.⁸²³ However there were issues that arose from this incident which related to the tortious claim on board the drill ship. For instance the worker that was declared missing which law will govern claims for compensation by his next of kin? Under and by virtue of s 352(1) (a) and (f) of the Merchant Shipping Act,⁸²⁴ the ‘shipowner’ will be entitled to limit his liability to an amount equal to 4,510,000 units of account assuming that the weight of the ship or floating platform is less than 5000 tonnes. This amount calculated at the current rate of exchange of the Naira to the US dollars is approximately \$28,715.99 which is a paltry amount payable as compensation for the loss of a life. This may be the reason why claimants against multinational oil corporations have resorted to suing outside the country in order to be entitled to a higher compensation.⁸²⁵

In another example contained in a newspaper publication,⁸²⁶ Lawyers representing more than 11,000 Nigerians initiated formal legal proceedings against oil giant Shell in London after the breakdown of negotiations on compensation following two oil spills. The oil spills related to an incident which happened in 2008 in a rural Bodo community in Rivers State of Nigeria. The community consists of 49, 000 peoples who live in 35 villages. Shell Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC), admitted liability for the two spills of about 4,000 barrels. But in a publication by Amnesty International (AI), the

⁸²² See www.independent.co.uk report by Sarah Arnott in the Independent Newspaper UK report 3-07- 2010.

⁸²³ See www.thisdayonline.com report of 03-08- 2010.

⁸²⁴ See previous discussion in chapter 3 on limitation of liability.

⁸²⁵ See chapter 4 for more on this issue.

⁸²⁶ See *The Citizen* Shell sued in Britain over Nigerian oil spills online publication dated 23 March 2012.

amount of oil actually spilled by Shell is 60 times the volume that Shell admitted.⁸²⁷ An independent United States Oil Spill consultancy firm in a report suggests that a total of between 103,000 barrels and 311, 000 barrels of oil flooded the Bodo creeks over the period of the leak. The disagreement over the actual volume of oil spilled is hampering the process of assessing compensation for the oil spillage. Oil spill compensation in Nigerian courts is a matter of evidence. The evidence of experts is not easy to come by and they are certainly not the prerogatives of rural farmers and villagers. The hurdles are many on the way of a successful litigation in Nigerian courts as we observed earlier on in this thesis. In this present suit, the courts will have to determine the volume of oil spilled before arriving at an amount that is compensable. Meanwhile four years after the spill, the whole community impacted by the spill is yet to be cleaned up. In the words of the Shell official the legal dispute is hampering its efforts to clean- up the oil pollution and claims that the suit should never have been brought up in Britain because there is an established practice under Nigerian law to settle such claims. The report failed to mention the established practice under Nigerian law. However it is a common practice by the Nigerian government and the oil companies that compensation is denied to any claimant where the government or the oil companies attribute the cause to sabotage.

5.4.2.2 *Denial of compensation on the ground of sabotage*

Under the Oil Pipelines Act, a penalty of N50 (five US cents) or imprisonment for three months is imposed on any person for obstructing any activities relating to the possession or installation of oil pipelines⁸²⁸on farmlands. This provision was considered to be mild on any person involved in sabotage activities.⁸²⁹

The thesis also identified sabotage activities as one of the significant causes of oil pollution in Nigeria.⁸³⁰

In attempt to deal with this the Federal Government enacted the Miscellaneous Offences (Anti- Sabotage Decree).⁸³¹ The Act created various classes of offences including sabotage of oil installations and pipelines and provided stiff penalties ranging from a minimum

⁸²⁷ See Guardian 24 April, 2012 available <http://www.guardian.co.uk/environment/2012/apr/23/shell-nigeria-oil-spill-bigger> accessed 24 April, 2012.

⁸²⁸ S 25 of the Oil Pipelines Act.

⁸²⁹ Flynas op cit 82.

⁸³⁰ See discussion in chapter 1.

⁸³¹ See Miscellaneous Offences Act Cap M17 Laws of the Federation of Nigeria 2004.

punishment of 21 years to death by firing squad (later amended to imprisonment for life). Section 7 of the Act which deals with tampering with oil pipeline provides:

Any person who wilfully or maliciously

- (a) breaks, damages, disconnects or otherwise tampers with any pipe or pipeline for the transportation of crude oil or refined oil or gas; or
- (b) obstructs, damages, destroys or otherwise tampers with the free flow of any crude oil or refined petroleum product through any pipeline shall be guilty of an offence and liable on conviction to be sentenced to life imprisonment.⁸³²

The Decree does not have provisions for compensation for victims of acts of sabotage like for instance where oil spills on the ground and it destroys farmlands or where in the course of siphoning oil from a broken pipeline and a fire is ignited as a result of accident, leading to the death of several people.⁸³³ As if this was not enough, the offences were to be tried by a Special Military Tribunal. The provision has been criticised as draconian and it has not achieved its objectives partly because the law is heavily biased in favour of the oil companies and oil operations without offering adequate legal safeguards to those suspected of tampering with oil pipelines and installations.⁸³⁴ In reality, the anti-sabotage legislation has never been applied in practice.⁸³⁵ The government has preferred to apply a political solution to the problem. Part of the political solution adopted by the government of the late President Yar'dua was to grant amnesty to the so-called militants that were implicated in the acts of sabotage.⁸³⁶ The underlying rationale for this is that the land upon which mineral is found

⁸³² See also s. 1(1)(a) of Petroleum Production and Distribution (Anti-Sabotage) Act Cap P.12 LFN 2004, which describes sabotage as a wilful act or attempt to disrupt or interrupt the production and distribution of oil. It is an act of vandalism on oil installation by third parties.

⁸³³This is a common occurrence in communities criss-crossed by oil pipelines. See for example the incident of Jesse town (Idjerhe Village fire disaster on October 17, 1998.) in Sapele, near Warri . This incident was allegedly caused by an unknown saboteur who caused oil spill to pour out of a ruptured pipeline. The inhabitants of a nearby village of Jesse (Idjerhe Village) of about 1000 people went to scoop petrol from the leaking pipeline with their buckets. A fire started and over a thousand people were roasted to death. The Federal Government refused to pay compensation to the victims of the disaster on the ground that this will be compensating sabotage. See the report of the incident at www.waado.org/environment/Photogallery/IdjerheFire.html accessed 12 March 2012.

⁸³⁴Frynas op cit 83.

⁸³⁵ Ibid.

⁸³⁶See chapter 4. The other political solution that has been reported but not confirmed is the award of contracts to the leaders of the so-called militant groups which has been criticised as a solution that looks like 'settlement' and does not have any legal base whatsoever. In the Sahara Reporter's report of 17 August 2012, the Federal Government was reported to awarded to Global West Vessel Specialist Limited, GWVSL, a firm widely believed to be owned by Tompolo, (known militant) with a contract worth \$103.4 million (over N15 billion) to supply 20 vessels for the use of the nation's military authorities to secure the waterways. Director-General of the Nigerian Maritime Administration and Safety Agency, NIMASA, Ziadeke Akpobolokemi, had last year sent a memo titled, "Award of Contract for the Strategic Concessioning Partnership with NIMASA to Provide Platforms for Tracking Ships and Cargoes, Enforce Regulatory Compliance and Surveillance Of The Entire Nigerian Maritime Domain," to President Goodluck Jonathan.

belongs to the Federal Government but the government is expected to use the land as a trustee for the benefit of the people. If these communities therefore took up arms against the Federal Government and destroyed pipelines and oil installations, it was a clear act of rebellion against the Federal Government and the thinking in government circles was to placate them rather than wield the big stick.

Under the 1999 Constitution, no movable property or any interest in an immovable property belonging to a Nigerian citizen shall be taken possession of compulsorily without payment of compensation.⁸³⁷ An exception is however made with respect to land upon which minerals are found and which is compulsorily acquired.⁸³⁸ This is because land upon which oil minerals are found is owned by the Federal Government and the government is only obliged to pay compensation for economic trees and crops cultivated by the farmers on the land. If the land was appropriated for public use, the compensation is nominal and meagre.⁸³⁹

Furthermore, the Constitution provides:

Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, 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.⁸⁴⁰

In *National Electric Power Authority (NEPA) v Amusa*⁸⁴¹ the plaintiffs brought a claim for N200, 000 as compensation for loss of use of land owned by the plaintiffs and on which the defendants had erected high voltage power transmission lines. The defendants who were a

In considering the memo, President Goodluck Jonathan and Akpobolokemi chose GWVSL as the preferred company for the 10-year concession agreement. The concession is renewable for two terms of five years each. Jonathan, in a memo dated 9 November 2011, with reference number PRES/99/MT/61, approved Akpobolokemi's memo, which the Federal Executive Council rubber-stamped on 5 January 2012. According to Akpobolokemi, GWVSL "will provide platforms for effective policing of Nigeria's maritime domain and ensure compliance with international maritime conventions on vessels and ships voyaging the country's waters". NIMASA maintains that the concessionaire would help the federal government to enforce the sabotage law and collect levies on its behalf. NIMASA's projection shows that about N124bn is expected to be generated in revenue to the federal government by GWVSL. Akpobolokemi underlines the public-private partnership with Tompolo's company as necessary because the federal government could not bear the cost of the project. Jonathan has sent the new memo to the National Assembly, urging it to disown an earlier one submitted by the late President Umaru Yar'Adua. Yar'Adua's memo sought to create a coastal guard, comprising all security agencies, to man the country's maritime domain. This is a political decision that borders on security matters and the resolution of it one way or the other will reveal to what extent the state can use oil revenues to guarantee the security of oil pipelines and installations and thereby curb acts of sabotage.

⁸³⁷S 44(1) of the 1999 Constitution.

⁸³⁸s 1 of the Land Use Act Cap L5 , LFN 2004.

⁸³⁹S 28 ibid. See also s 29 - If a right of occupancy is revoked for the cause set out in paragraph (b) of subsection (2) of section 28 or (c) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements.

⁸⁴⁰See s 44(3) 1999 Constitution.

⁸⁴¹(1976) 12 SC 99, (1976) NSCC 735.

public corporation statutorily empowered to expropriate land and acquire for the purpose of construction of a powers transmission line contended that under section 33 (1) of the NEPA Act, they had the power to compulsorily acquire the plaintiffs land. The court held that the plaintiffs claim for injurious affection succeeded and awarded the sum of N100, 000 for the destruction of the plaintiffs' crops and for loss of use of land owned by the plaintiffs. The monetary compensation paid to the plaintiffs was meagre as the court only awarded compensation for the farms and crops planted on the land which were on the right of way of the transmission lines.

5.4.2.3 *Claims under foreign law*

Following claimants increasing difficulty in obtaining redress in Nigerian courts for the reasons adumbrated above, there is now a resort to suing in foreign courts. In the United States of America, the Alien Torts Statute Act⁸⁴² is the most used by foreign litigants. The Act provides that District Courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The Alien Tort Act (herein after referred to as ATS), was adopted in 1789 as part of the original Judiciary Act. In its original form, it made no assertion about legal rights; it simply asserted the district court shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States. For almost two centuries, the statute laid dormant, supporting jurisdiction in only a handful of cases.⁸⁴³ As a result of increasing international concern with human rights violation issues, litigants have recently begun to seek redress more frequently under the ATS.⁸⁴⁴

Nigerian litigants have also taken advantage of the ATS to sue in US courts. In *Kiobel v Royal Dutch Petroleum*,⁸⁴⁵ the plaintiffs were citizens of Nigeria who claimed that Dutch, British and Nigerian oil-exploration corporations aided and abetted the Nigerian government during the 1990s in committing violations of customary international law. The plaintiffs

⁸⁴² 28 U.S.C§1330.

⁸⁴³ See *Filartiga v Pena-Irala* 630 F.2d 876 (C.A. N.Y. 1980). The Plaintiffs were citizens of Paraguay who had applied for permanent political asylum in the United States. They as parents of the deceased brought an action against the defendant, another Paraguayan citizen on visitor's visa to the US, for wrongfully causing the death of their son allegedly by the use of torture. The action was dismissed by the District Court. On appeal it was contended that the action violated international norms of international law regardless of the nationalities of the parties more so when the alleged wrongdoer was within the borders of the United States. The court of Appeal held that the ATS applied and reversed the judgment of the District Court.

⁸⁴⁴ See also *Abebe -Jira v Negewo* 72 F.3d 844 (11th Cir. 1996).

⁸⁴⁵ 621 F.3d 111 (2d Cir. 2010).

sought damages under the ATS. The defendants moved to dismiss the suit based on a two-pronged argument. First, they argued that customary international law itself provides the rules by which to decide whether the conduct violates the law of nations where non-state actors are alleged to have committed the wrong in question.

Second, the defendants contended that no norm has ever existed between nations that impose liability upon corporate actors. On September 29, 2006, the District Court dismissed the plaintiffs' claims for aiding and abetting property destruction; forced exile, extra-judicial killing, and violations of the rights to life, liberty, security, and association. It reasoned that customary international laws did not define the violations with sufficient particularity. The court denied the defendant's motion to dismiss with respect to the remaining claims of aiding and abetting arbitrary arrest and detention; crimes against humanity; torture or cruel inhuman and degrading treatment, etc. The district court then certified its entire order for interlocutory appeal to the 2nd Circuit based on the serious nature of the questions at issue.

In a 2-1 decision issued on September 17, 2010, the US Court of Appeals for the 2nd Circuit held that Corporations cannot be held liable for violations of customary international law, finding that;

- (1) Under both US Supreme Court and 2nd Circuit precedents over the previous 30 years that address ATS suits alleging violations of customary international law, the scope of liability is determined by customary international law itself.
- (2) Under Supreme Court precedent, the ATS requires courts to apply norms of international law- and not domestic law- to the scope of defendants' liabilities. Such norms, must be "specific, universal and obligatory" and
- (3) Under international law, the corporate liability is not a discernible- much less a universally recognised norm- of customary international law that the court could apply to the ATS and the plaintiffs ATS claims should indeed be dismissed for lack of subject matter jurisdiction.

Kiobel petitioned the Supreme Court for review of the 2nd Circuit's decision, which was granted on October 17, 2011. Oral arguments were held on February 28, 2012. The interesting arguments of the parties received considerable attention in the legal community. Unexpectedly the Supreme court announced on March 5, 2012 that it would hold additional argument on the case during the October 2012 term, and directed the parties to file new briefs

on the question whether and under what circumstances the ATS allow courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.⁸⁴⁶

However, in *Bowoto v Chevron Corporation*⁸⁴⁷ the liability of Corporations for acts that border on claims for wrongful death, torture, assault, battery and negligence in US Courts for acts committed by their agents abroad was denied. Briefly the facts are that Nigerian villagers brought claims against Chevron Corporation regarding events that occurred on a Chevron offshore drilling platform in 1998, when Nigerian soldiers suppressed a protest against Chevron's environmental and business practices. The protesters, with the help of non-profit organisations including the Centre for Constitutional Rights, the Public Interest Lawyers Group, and the EarthRights International, brought claims alleging that the company had paid soldiers that landed on the platform of the Oil Corporation and beat up protesters and were therefore liable for the actions that they carried out against the protesters. In December 2008, a jury found that Chevron was not liable.⁸⁴⁸

5.4.2.4 Conclusion

In summary, this thesis posits that there is no dearth of the law (statutory and case law) and regulation for preventing oil pollution in the inland territory of Nigeria. The laws only lack bite and this has been exploited by the oil operators namely the national and multinational oil concerns. Unfortunately these oil companies enforce a different standard in their home countries.

The approach to using the provisions of common law as a means of compensating victims of oil pollution activities should also be reviewed. There is also a need to review the provisions of the Oil Pipelines Act which was enacted over forty years ago and its provisions on injurious affection⁸⁴⁹ and the quantum of damages payable to victims of oil pollution have become hopelessly outdated. The pipelines that were laid over forty years ago need to be reconstructed or out rightly removed or replaced. Farmlands that have been affected by oil

⁸⁴⁶We await the position of the US Supreme court on this.

⁸⁴⁷312 F. Supp. 2d 1229 (N.D. Cal. 2004).

⁸⁴⁸ See also *Wiwa v Royal Dutch Petroleum Co.* F 3d (2nd Cir. 2000).

⁸⁴⁹The term injurious affection was not defined in the Oil Pipelines Act but it is a common law term which refers 'to any reduction in the value of any other land held by a person in fee simple at the date of the acquisition which adjoins (or is severed) from the acquired fee simple land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.' See section 241(7) of the Land Administration Act, 1997 (Western Australia). See also the report of the Law Reform Commission of Western Australia *Compensation for Injurious Affection* Project No.98 at 12.

spills should be urgently reclaimed and their oil spills cleaned up. The government should also as a matter of urgency empower the necessary agencies of government to carry out clean-up activities and pay adequate compensation to victims where necessary before resorting to recover compensation from the oil operators. On the issue of sabotage, there is a need to repeal the obnoxious law on anti-sabotage which we have seen is not working. This is borne out of the fact that the Federal Government continues to lose vast amounts of money to the destruction of pipelines. In a report titled ‘Nigeria loses N105 billion to pipeline vandalism’,⁸⁵⁰ the presidency has expressed worries over what it says ‘is the annual loss of about N105 billion worth of crude oil and petroleum products to pipeline vandalism which it fears may unleash fuel scarcity on the country.’ Government is apprehensive that in spite of its efforts to protect the over 5,000 kilometres of petrol pipelines across the country, thieves have continued to break in to steal products and damage equipment. The constant damage to the equipment for pumping crude oil has affected the pumping of refined petroleum to all parts of the country and this has seriously caused shortages and fuel scarcity. The economic loss of about N105 billion (about USD \$500 million) yearly is enormous in terms of what the money can be used to improve ageing facilities and improve the lives of the average Nigerian.

In the next two chapters the thesis shall look at how two countries, the United States of America and the Republic of South Africa have dealt with the issues that have been identified in the previous chapters as far as liability and compensation for oil pollution is concerned. The two chapters will examine, in a comparative study with Nigeria, the laws being applied by the institutions of government to determine liability and compensation for oil pollution in order to elicit a bench mark for the Nigerian state. The United States has been chosen being an oil producing and consuming country while the Republic of South Africa, though not an oil producing country, is an oil consuming country that is involved in large scale importation of crude and refining of crude oil. Both countries also have at their borders the Atlantic and Pacific Oceans and being maritime nations are affected by the effects of oil pollution on their oceans and coastal territories just like Nigeria.

⁸⁵⁰Nigerian Tribune Monday 26 November, 2012.

Chapter 6: Comparative studies- United States of America

6.1 Rationale for the studies

The United States is a federation consisting of 50 states with Washington District of Columbia (DC) as its capital. The US as it is commonly called became a legal entity in 1781 after 13 non-federal states adopted a constitution which was at best a loose arrangement.⁸⁵¹ Since then the country, which can be better described as a sub-continent, because of its huge landmass which stretched from the Atlantic Ocean on its eastern and southern coasts to the Pacific Ocean on its western coast, has evolved into a federation of states having a multiplicity of culture and laws. The US has also become a major player in the maritime arena and its laws on oil pollution in a federal arrangement like Nigeria informed this comparative study. Another basis for the comparison is that the US has a written constitution like Nigeria, and the operation of its constituent's elements, like the States and the Counties, is federal in nature and similar to the states and local governments of Nigeria.

Nigeria on the other hand consists of 36 states with Abuja as its federal capital. The Nigerian states did not evolve like that of the United States but were creations of parliament backed up by military decrees or edicts during the time of military rule.⁸⁵² Federal laws have binding force throughout the federation and are therefore binding on the whole country, while state laws apply only within the state that makes the laws. Depending on the subject matter also, there are some matters that fall within the exclusive competence of the National Assembly (Parliament) to make laws, while the State Houses of Assembly have concurrent powers to make laws jointly with the National Assembly. There is a third tier of government in Nigeria called the local government which has residual powers to make laws that are outside the competence of both the Federal and State Houses of Assembly.⁸⁵³

Similarly in the US, there are federal laws that are binding on the whole country and then each of the 50 states can make laws. The federal law making body is Congress. Federal and State laws are codified, often just a restatement of the common law. Some states have subject specific codes; others have a single code divided into titles. Federal laws are also commonly

⁸⁵¹See <http://www.usahistory.info/timeline/revolution.html> accessed 30 June 2010.

⁸⁵²Federal laws made during the time of military rule are called decrees while state laws are styled edicts. These laws are regarded as laws made by the National Assembly after the return to constitutional rule and they are restyled as Acts (federal) and Laws (state).

⁸⁵³See sections 4, 5, 6 and 7 of the 1999 Constitution.

referred to by their aliases e.g. the federal law on water pollution: the Federal Water Pollution Control Act (FWPCA) is popularly called the Clean Water Act (CWA).

6.2 Regulation of oil pollution in the US - Marine

Four federal statutes address oil spill liability and compensation in America. They are the Federal Water Pollution Control Act (FWPCA),⁸⁵⁴the Outer Continental Shelf Lands Act (OCSLA),⁸⁵⁵the Deepwater Port Act⁸⁵⁶and the Trans-Alaska Pipeline Authorization Act (TAPAA).⁸⁵⁷The FWPCA popularly called the Clean Water Act (henceforth called the CWA) prohibits the discharge of oil or hazardous substance into or upon the navigable waters of the US and the adjoining shorelines.⁸⁵⁸

The OCSLA is an Act which regulates the Agency charged with providing regulatory oversight over deepwater oil drilling and offshore wind energy sources in the US federal waters that extend beyond the state jurisdiction. The OCSLA has been amended by the Outer Continental Shelf Lands Amendments Act of 1978⁸⁵⁹ which established a liability and compensation system for oil pollution in offshore waters. The OCSA provides that owners of responsible vessels will be liable to injured parties for up to a maximum of \$300 per gross registered ton of the vessel.⁸⁶⁰The amendment made the “owner” or “operator” of a vessel or offshore facility “jointly and severally” strictly liable for “removal costs” and certain economic damages that were proximately caused by oil pollution to which the statute applied.

The Deep Water Port Act (DPA) hasbeen amended by the Maritime Transportation Security Act, 2002. It establishes a licensing system of ownership, construction, operation and decommissioning of deepwater structures located beyond the US territorial sea,⁸⁶¹while the Trans-Alaska Pipeline Authorization Act (TAPAA) is a US federal law that authorises

⁸⁵⁴33 U.S.C §1251-1376.

⁸⁵⁵43 U.S.C.A § 1331 et seq. s 1 provides that the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control and power of disposition as provided in this sub-chapter.

⁸⁵⁶Pub.L. No. 93-627, 88 Stat. 2126 (1974). An act to regulate commerce, promote efficiency in transportation, and protect the environment, by establishing procedures for the location, construction, and operation of deepwater ports off the coasts of the United States, and for other purposes.

⁸⁵⁷43 U.S.C §1651-1655 (1982). The TAPAA provides strict liability for injuries resulting from accidents associated with the construction or laying of the Trans-Alaskan Pipeline or the transportation of oil after it has been conveyed through the pipeline.

⁸⁵⁸In 1970 the Congress of the United States after the incident of the *Torrey Canyon*enacted the Water Quality Improvement Act (WQIA) with the express purpose of ‘preventing the discharge of oil ...into the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.’ See Pub. L. 91-224, 84 Stat. 91 (1970).

⁸⁵⁹Pub. Law No. 95-372, 92 Stat. 629.

⁸⁶⁰43 U.S.C. § 1814.

⁸⁶¹See http://www.marad.dot.gov/ports_landing_page_deepwater accessed 02-05- 2012.

the building of an oil pipeline connecting the North Slope of Alaska to Port Valdez. The Act mandated the use of the state-of-the-art technology to protect and preserve the environment while still upholding economic practicalities during the construction, operation, and maintenance of the pipeline. The pipelines were built between 1974 and 1977 and extended approximately 800 miles across the State of Alaska upon completion.⁸⁶²

Gallagher⁸⁶³ submits that from the angle of liability and compensation for oil pollution, the TAPAA provides for two sections. The first liability section, the Right of Way section, includes provisions designed to cover oil spills caused by parties owning one of the right-of-ways given to those laying the pipeline.⁸⁶⁴ The second liability section, the Transport section, covers spills caused by parties transporting oil from a terminal facility of the pipeline to another point source facility.⁸⁶⁵

We shall however be concentrating more on the CWA and other similar legislation like the Oil Pollution Act⁸⁶⁶ for the purpose of our comparative study. This is because as one of the parameters for the comparative study between the United States and Nigeria, is the investigation of the causes of oil spills and the issues of liability and compensation that arise for consideration in the Acts. The Pipeline Safety Improvement Act for instance has novel provisions dealing with the spillage of oil in the course of transportation through inland water ways and on land. It has as its objectives the assessment of pipeline integrity in high consequence areas; it recognises the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation.⁸⁶⁷

The Oil Pollution Act also has provisions, whichas this thesis shall show, are great improvements over the provisions of the Clean Water Act.

⁸⁶²See I Kubiszewski, Encyclopediad of earth, available at http://www.oearth.org/article/Trans-AlaskaPipeline_Authaccessed 02-05-2012.

⁸⁶³See J Gallagher In the wake of the Exxon Valdez: Murky Legal Waters of Liability and Compensation *New England Law Review* (1990) 25 page 1 at 3., fn 52.

⁸⁶⁴43 U.S.C. §1653 (a) (1). A holder of a right-of-way would be engaged in constructing the pipeline across the thousands of miles of land separating the North Slope from the navigable waterways leading to the lower 48 states.

⁸⁶⁵Ibid. 43 U.S.C § 1653 (c) (1988) . The writer submits that this was the case with the Exxon Valdez spill.

⁸⁶⁶33 U.S.C. § 2701.

⁸⁶⁷See s 2 of the Act.

6.2.1 *Liability for oil pollution under the FWCPA- Inland waters*

In the numerous cases of severe damage to the environment that have affected the territories of countries all over the world, as well as the global commons, human activities have played a major role. Examples of such activities are the incidents of the *Torrey Canyon* mentioned earlier on, the spilling of large volumes of oil by a ship carrying oil which later foundered off the coasts of Alaska and caused wide spread damage to the coasts- the Exxon Valdez, and the Erika,⁸⁶⁸ which was carrying a cargo of 31,000 tonnes of heavy fuel oil of which some 19,800 tonnes were spilled at the time of the incident. Some 400 kilometres of shoreline were affected by oil. The removal of the oil cost the French government about €46 million.⁸⁶⁹

Apart from the environmental damage caused by these incidents, several issues arise specifically concerning who should pay for the costs involved in the clean-up of the oil pollution arising from these incidents. The issues concerning this also entails a discussion of who is the responsible party, what standards should be set for clean-ups and how is the environment to be restored to its previous position from the damage. Legal liability is one way of forcing major polluters to pay, for those repairs or to compensate someone for the damages if the damage cannot be repaired.

While environmental legislation and international instruments lay down norms and procedures aimed at preserving the environment, liability is a necessary complement to ensure that persons responsible for non-compliance resulting in environmental damage face the prospect of having to pay for restoration of the affected environment or compensating for the damage caused.

In the US, the national law that was enacted to deal with the twin issues of liability and compensation for water pollution by any substances including oil is the Clean Water Act.

Section 311 of the Clean Water Act (CWA) amended the Water Quality Improvement Act. It provides under the title – Oil and Hazardous Substance Liability that:

Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974 et seq., or which may affect the natural resources belonging to, appertaining to,

⁸⁶⁸On 12 December 1999 the Maltese -registered tanker *Erika*broke in two in the Bay of Biscay, some 60 nautical miles off the coasts of Brittany, France. All members of the crew were rescued by the French marine rescue services.

⁸⁶⁹See previous discussions about the incident of the *Erika*in chapter 1.

under the exclusive management authority of the United States (including resources under the Magnusson Stevens Fisheries Conservation and Management Act (16.U.S.C. 1801 et seq.).⁸⁷⁰

Under section 311 of the Federal Water Pollution Control Act (FWPCA),⁸⁷¹ liability for the discharge of oil or hazardous material is placed squarely on the owner of the source of the discharge.⁸⁷² Owner or operator means a person in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and in the case of an offshore facility vessel, any person owning, operating, or chartering by demise, such vessel.⁸⁷³ To establish a violation of the FCWPCA, the United States must prove that the defendant is a person who discharged a pollutant from a point source, into navigable waters, without authorisation.⁸⁷⁴ Under this section a “person” includes an individual, firm, corporation, association, and a partnership;⁸⁷⁵ this has been held to refer to an individual, corporation, partnership, association, State, municipality, commission, or a political subdivision of a State, or any interstate body.⁸⁷⁶ Under this section also, the maximum liability for a person operating a vessel was \$100 per gross ton, which has been raised to \$125 per gross ton or \$125, 000.⁸⁷⁷

The goal of the drafters of the FWCPA was to achieve the result of clean water as well as to deter conduct causing spills. This was done by providing civil penalties in form of fines against any person whose conduct is attributable to the oil spill. The law also provides for an administrator whose job is to collect the civil penalties and deposit the money in a revolving fund that is used to finance a National Contingency Plan (NCP). The administrator, strengthened by the fund and the NCP, plans for the containment, disbursal, and removal of spills. The administrator also conducts a clean –up of the oil spill discharges, undertakes the

⁸⁷⁰33 USC §1321 available at <http://www.law.cornell.edu/uscode/text/33/1321> accessed 20-12-2012.

⁸⁷¹33 USC § 1321. The FWCPA was enacted in 1948 but significantly amended in 1972. It was passed significantly to control any point source discharges into the “waters of the United States”. The Act states as a national goal the attainment of fishable and swimmable waters by 1983 and the elimination of pollutant discharge by 1985. This goal has not been achieved.

⁸⁷²33 USC § 1321 (a) 6 (B).

⁸⁷³33 USC § 1321 (a) 6 (A).

⁸⁷⁴§§ 301, 304.

⁸⁷⁵33 USC § 1321(a) (7).

⁸⁷⁶ See *United States v Massachusetts Bay Transp. Authority* (1980), CA 1 Massa 614 F2d 27. This is a case which decided that the Massachusetts Bay Authority is a person under the FWCPA which can be proceeded against for the purpose of recovering cost incurred by the removal authority.

⁸⁷⁷ Pub. L. 95-217, 91 Stat. 1566, 1593-1596 (1977). This ceiling was also found to be inadequate and this further necessitated an increase in the ceiling under the Clean Water Act. See further B Guss Interaction of the Federal Water Pollution Control Act with the Limitation of Liability Act and the General Maritime Law (1981) 6 Mar Law 199 .

reimbursement of clean-up costs incurred by owners and operators who are able to establish one of the four defences, and for the administration of the Act.

Any person who is the owner, or person in charge of a vessel, or onshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) shall be subject to a civil penalty up to \$25, 000 per day of violation or to an amount up to \$1,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.⁸⁷⁸

As can be seen from this provision and as was also observed under the Civil Liability Convention, 1969, liability for the discharge of oil from ships which has caused damage is placed squarely on the owner of the ship.⁸⁷⁹ This standard of liability is strict and this standard is also observed in the relevant provision of the FWCBA under consideration.

Under the FWCBA, The United States may bring an action against a vessel owner or operator in any court of competent jurisdiction to recover actual costs incurred by the government under 33 USCA § 1321 in responding to a discharge of oil or hazardous substances.⁸⁸⁰ The United States may also recover the same types of costs from owners or operators of onshore facilities and from owners or operators of offshore facilities, with different limitations of the amount recoverable, by bringing actions against these persons in any court of competent jurisdiction.⁸⁸¹ In *United States v Texas Pipeline Co.*,⁸⁸² the court stated that the fact that a third party may have been the sole cause of an oil discharge is no defence to the imposition of a civil penalty under S 311 (b) (6).

Similarly, in the *United States v General Motors Corp.*,⁸⁸³ an action by the United States to enforce collection of a \$1, 200 civil penalty assessed by the Coast Guard pursuant to Section 311(b)(6) against the owner of fuel oil storage tanks from which oil was discharged and a portion of which ultimately reached navigable waters, although finding that the owner was

⁸⁷⁸S 311 (b) (7). This section contains the civil liability provision of the FWCBA.

⁸⁷⁹See Art (1)(1) of the CLC 1969.

⁸⁸⁰33 USCA § 1321 (f) (1).

⁸⁸¹33 USCA § 1321 (f) (2)- (3).

⁸⁸²1978, DC Okla, 11ERC 1465. In this case the US brought an action to collect penalty assessed against a pipeline company for discharging harmful quantity of oil into an unnamed tributary of a creek in violation of Federal Water Pollution Control (Amendment) Act, 1972. The District Court held that (1) A statute which prohibited discharge of oil into navigable waters of the US in harmful quantities was applicable to the un named territory, which was part of overall tributary of navigable river, regardless of whether there was continuous flow of water. The court held further that the fact that a third party may have been sole cause of discharge of oil from broken pipeline and into tributary was not a defence to imposition of civil penalty against company; and the decision to assess \$2,500 penalty was supported by substantial evidence, and Court had no authority to reduce or eliminate the penalty.

⁸⁸³1975, DC Conn., 403 F. Supp 1151.

completely free from material negligence or fault in connection with the acts of vandalism that resulted in the discharge of oil, the court held that the action of a third party was no absolute defence to the owner or operator of a facility to the imposition of a civil penalty under S 311(b) (6). Although such a rule might appear to be a just and wise public policy, said the court, it was not contained in the statute, which is based on a concept of “strict liability,” providing that a penalty “shall be assessed” whenever oil is discharged in harmful quantities as established by regulation.

The Federal Water Pollution Control Act (FWPCA) was amended in 1972 and 1978 to remove this ambiguity regarding the role of a third party involved in the discharge of oil or hazardous substances, and whether the discharge has to be in harmful quantities to establish liability under the FWPCA. These amendments by way of section 311 introduced subsections (f), (g), (h), and (i) of the FWPCA.⁸⁸⁴ Prior to the amendment, liability might arise even if no actual harm results from a discharge. This regime provided varying and inconsistent liability limits and scope of coverage for oil pollution costs according to the geographical and functional application of each individual law.⁸⁸⁵

After the amendment however, the courts have held that actual harm to the environment is irrelevant when determining whether the prohibition of discharges in Section 311 were violated. In *Chevron U.S.A. v Yost*,⁸⁸⁶ the court held that the 1978 amendment authorized the EPA to prohibit spills that “may be harmful” regardless of whether they caused actual damage.⁸⁸⁷

There were other reasons for the amendment. Sump⁸⁸⁸ submitted that an oil spill response and liability system was lacking. An effective oil response and liability act must contain the following elements: (1) Clear delineation of who is responsible to report and respond to a spill; (2) clear guidelines for who will be in charge of oil spill containment and cleanup; (3) details of the types of costs, expenses, and damages for which the responsible party or other entity will be liable; (4) finite circumstances under which the responsible party may avoid liability, limit liability, or shift liability to a third party; and (5) the means of financing not

⁸⁸⁴ 33 U.S.C. 1321.

⁸⁸⁵ I Kim, A Comparison Between the International and US regimes regulating oil pollution liability and Compensation, *Marine Policy* 27 (2003) 269. The author is of the view that liability for a discharge of oil will still be applicable irrespective of whether the discharge caused damage to a third party.

⁸⁸⁶ 919 F.2d 27 (5th Cir. 1990).

⁸⁸⁷ *Ibid* at 30.

⁸⁸⁸ D Sump The Oil Pollution Act of 1990: A glance in the rearview mirror *Tulane Law Review* Vol. 85 No. 4 (2011) 1101 at 1102.

only the containment and removal of pollution and threats of pollution, but also finance compensation for those persons damaged by the effects of an oil spill.⁸⁸⁹

Furthermore, the federal government was authorised to respond to oil spills but not required to do so.⁸⁹⁰ Federal On-Scene Coordinators funded cleanups from a small pool of appropriated funds (\$35 million) pursuant to section 311(k) of the FWPCA- funds that were often inadequate to support remediation of even a moderate-sized spill.⁸⁹¹

6.2.2 Liability for oil spill under the Clean Water Act

As stated earlier section 1321 of the CWA specifically addresses the discharge of oil and hazardous substances into or upon the waters of the United States. It prohibits the discharge by any person of oil or hazardous substances into or upon the waters of the US in such quantities as “may be harmful”, as determined by regulations made hereunder.⁸⁹² However, certain discharges may be permitted, namely those that permit the discharge of oil into the contiguous zone under MARPOL 73/78, and those permitting in circumstances or conditions that are stipulated under certain regulations.⁸⁹³

Section 1321(b)(4) directs the President of the US to promulgate regulations specifying the quantities of oil and hazardous substances that “may be harmful to the health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shoreline and beaches.”⁸⁹⁴ The President has delegated this function to the Environmental Protection Agency (EPA), which has promulgated a set of regulations that states, in part, that the amount of oil that is harmful is the amount that can “[c]ause a film or sheen upon or discolouration of the surface of water or adjoining shorelines or cause sludge or emulsion to be deposited beneath the surface of the water or adjoining shorelines.”⁸⁹⁵

⁸⁸⁹Sump op cit at 1103.

⁸⁹⁰Sump ibid.

⁸⁹¹Id. Footnotes omitted.

⁸⁹²33 USC § 1321(b)(3).

⁸⁹³ 33 U.S.C. §§ 1901- 1915 (2006) . An Act to Prevent Pollution from Ships as Amended Through the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 and for other purposes titled, adopted on December 29, 2000. This Act implemented the International Convention for the Prevention of Pollution from Ships (MARPOL) which provided a regulatory regime that is ultimately enforced through criminal sanctions. See further the discussion in this thesis on MARPOL 73/78 in chapter 3.

⁸⁹⁴ Id.33 USC § 1321(b)(4).

⁸⁹⁵40 C.F.R. § 110.3 (2010). A little oil spilled on water is enough to cause a sheen.

It is important to note that not all point source discharges attract liability under the CWA since certain discharges may be permitted as we noted above. The CWA establishes the National Pollutant Discharge Elimination System (NPDES) for permitting point source discharges from industrial sources, with limitations set on the amount and characteristics of pollutants that can be discharged under the NPDES permit. However, EPA has promulgated regulations forbidding the discharge of any pollutants into surface waters from onshore oil and gas facilities.⁸⁹⁶

Under the CWA, the owner or operator of a facility or vessel from which the harmful quantities of oil are discharged, either onto surface waters or on land from which the oil is likely to reach surface water, is primarily liable to arrange for the removal of the oil.⁸⁹⁷ This provision contains the civil penalties that may be imposed by the courts as set out in § 1321(b)(7)(A) of the Act which provides that any person who is the owner, operator, or person in charge of any vessel or onshore or offshore facility from which oil or a hazardous substance is discharged “shall be subject to a civil penalty in an amount up to \$40, 000(\$37, 500) per day of violation or an amount up to \$1,100 per barrel of oil or unit of reportable quantity of hazardous substances discharged.”⁸⁹⁸

A person who fails to carry out removal of a discharge properly or fails to comply with an order under § 1321 “shall be subject to a civil penalty in an amount up to \$40, 000 (USD \$37, 500) per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund (OSLTF) as a result of such failure.⁸⁹⁹ Failure to comply with established regulations subjects a person to a civil penalty of an amount up to \$40, 000 (USD \$37, 500) per day of violation.⁹⁰⁰

⁸⁹⁶See 40 C.F.R §435.32 which provides: through 125.32, any existing point source subject to this subpart shall achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available (BPT): there shall be no discharge of waste water pollutants into navigable waters from any source associated with production, field exploration, drilling, well completion, or well treatment (*i.e.*, produced water, drilling muds, drill cuttings, and produced sand).

⁸⁹⁷ 33 USC § 1321(b)(7).

⁸⁹⁸1321(b) (7) (A) . See also *United States v BP Exploration & Prod. Inc. No. 2. : 10-CV-04536 CJB-SS* (E. D. La. Dec. 15 2010) where the US government has filed nine claims against defendants to recover civil penalties under the Deepwater Horizon incident.

⁸⁹⁹33 USC § 1321(b) (7)(B).

⁹⁰⁰33 USC § 1321(b)(7)(C).

The Federal Government also has authority to remove oil spills or threats of oil spills and impose a civil violation on a person who is in default.⁹⁰¹ Where the Federal Government acts pursuant to this authority, it is entitled to recover the removal costs from the responsible party⁹⁰² subject to certain prescribed limits.⁹⁰³ For onshore and offshore facilities, owners or operators are liable up to the statutory limit of \$50 million. Under regulations made pursuant to section 1321(f) (2), the EPA has set lower limits for small onshore storage facilities with capacity of 1,000 barrels or less.⁹⁰⁴ The limit is \$200,000 for above ground storage facilities and \$260,000 for underground storage facilities. However these regulations appear to have been superseded by later amendments to section 1321 which limited the agency's discretion by stipulating a minimum of \$8 million in any case.⁹⁰⁵

In the case of an inland oil barge, the statutory limit is \$125 per gross ton of such barge or \$125,000 whichever is greater. For any other vessel, the amount recoverable is up to \$150 per gross ton or \$250,000, whichever is greater.⁹⁰⁶ These limits do not apply where the Federal Government can show that the discharge was the result of "wilful negligence or wilful misconduct" within the privity and knowledge of the owner.⁹⁰⁷ If a violation is found, the owner or operator is liable for the full amount of the removal costs, whether through negligence or as a result of wilful misconduct.⁹⁰⁸ It is important to note that the limits apply only to cleanup costs sought by the federal government, they do not in any way modify or affect the rights of the federal government, state government, and other governmental or

⁹⁰¹ 33 USC § 1321(b)(7)(D). The penalty is \$130,000 (\$140,000) and not more than \$4,000 (\$4,300) per barrel of oil or unit of reportable quantity of hazardous substance discharged. See § 1321 (b) (7) (D).

⁹⁰² For the purpose of this section, the term "responsible party" has the following meaning given the term under s 1001 of the Oil Pollution Act of 1990. § 3321 (a) (6). See further below the discussion of responsible parties under the OPA 90.

⁹⁰³ Idem at § 1321(f).

⁹⁰⁴ 40 C.F.R. § 113.

⁹⁰⁵ A Ekpu, Environmental Impact of oil on water: A comparative review of the law and policy in the United States and Nigeria, *Denv J. Int'l L. & Policy* (1995)24 55:1 at 8.

⁹⁰⁶ 33 USC § 1321(f).

⁹⁰⁷ 33 USC § 1321(c) 2 (1982). R Force, M Davies and J Force Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, And State Remedies in Oil Spill Cases(2011)85 *Tulane Law Review* (TLLNLR) 1 at 32 submits that under the US criminal law, conduct that qualifies as negligence to support an ordinary action for damages in tort usually does not satisfy the *mes re* requirement necessary to support a criminal conviction. At common law, the negligence had to be "criminal negligence", sometimes described as "willful and wanton" negligence or "gross" negligence. The Model Penal Code retains this distinction between the civil and criminal negligence by defining negligence as requiring proof of "gross deviation from the standard of care that a reasonable person would observe in the actor's situation. See fn 292. *ibid.* Accessed by Westlaw search on 20 December, 2012.

⁹⁰⁸ *Id.*

private parties to seek compensation under any law for damages to any public or private property resulting from the discharge or removal of oil or hazardous substances.⁹⁰⁹

Finally the CWA permits certain defences to liability. They are (1) Act of God, (2) an act of war, (3) negligence on the part of the United States Government, (4) an act or omission of a third party.⁹¹⁰ Where any of these defences avail the owner or operator, an operator or owner who has incurred costs in the course of removing the oil spill is entitled to recover such costs from the federal government.⁹¹¹

There are other federal statutes that protect underground sources of water in the US. The Safe Drinking Water Act,⁹¹² the Hazardous and Solid Wastes Amendment Act⁹¹³ and the Resource Conservation and Recovery Act, (RCRA) 1976.⁹¹⁴ The RCRA provides a cradle- to- grave regulation of the management of hazardous waste, including providing incentives for the reduction of the production of hazardous waste and the promotion of the most environmentally safe disposal methods.

6.2.3 Incidence of oil spills in the US

The US like any other oil producing country is not free from the incidence of oil spills. The way and manner in which it has managed this challenge is what distinguished the US from any other country. The nature of the oil spills can be categorized into two. Vessel oil spill and non-vessel oil spill. Despite the best effort put forward by the US government to prevent non-vessel oil spills, oil spills do occur. This is an inevitable consequence of oil exploration activities.

⁹⁰⁹ § 1321(o).

⁹¹⁰ Id note 582 above.

⁹¹¹ § 1321(i).

⁹¹² 42 USC 300 h -2(c) passed in 1974 and amended in 1986. It protects the underground sources of water and prescribes safe standards for drinking underground water. It also forbids injection of substances which may contaminate underground water. Section 300h 2(d) provides that injection endangers drinking water sources if it may result in the presence of any “contaminant” in underground water “which supplies or can reasonably be expected to supply” public water systems, if the presence of such contaminants results in a system’s not complying with any national primary drinking water regulation or if it “may otherwise adversely affect the health of persons.”

⁹¹³ 49 USC § 6907. The Act as amended established a regulatory system for underground storage tanks which contains regulations covering, amongst other things, technical standards and correlative action, investigation and reporting requirements for underground storage tanks.

⁹¹⁴ 42 USC § 6991 et seq. This Act contains regulations dealing with the disposal of hazardous substances and chemical waste.

It is estimated that about 14, 000 oil spills are reported annually in the US.⁹¹⁵ On the 10 February, 1970, a blowout fire occurred on offshore platform 2 in Main Pass Block 41 field, 11 miles East of the Mississippi River Delta. The fire burned until March 10 when it was extinguished by explosives. For more than three weeks, crude oil spilled and escaped at an estimated rate or 1000 barrels per day (bbl/day) before the last well was capped.⁹¹⁶ On February 5, 2000 another spill occurred involving the spilling of 77,280 gallons of crude oil from a pipeline in the Gulf of Mexico. The damage was caused by an anchor from the mobile offshore drilling unit TRANSOCEAN 96 which was being repositioned.⁹¹⁷

Oil spill incidents may also occur due to natural disasters. Between August and September 2005, it was estimated that more than 7 million gallons of oil were spilled during Hurricane Katrina disaster. The sources of the spill were pipelines and storage tanks.

The *Deep Water Horizon* oil spill which has been described as the largest oil spill incident, not only in the United States, but in the world occurred when crude oil escaped from a leaked well in the Gulf of Mexico between April and mid-July 2010, when the oil was finally capped.⁹¹⁸ Billah submitted that this oil spill incident cannot strictly be called vessel-source oil pollution because almost all the oil spilled from the leaked well.⁹¹⁹ An estimated 4.9 million barrels (over 671, 000 tons; 7.3 barrels = 1 ton) of crude oil spilled from the leaked well into the Gulf of Mexico. However, some of the oil may have spilled from the *Deepwater Horizon*, a mobile offshore drilling unit (MODU). This unit may be termed a “vessel” under the Oil Pollution Act, 1990 because the Act defines a vessel very broadly to include any “watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”⁹²⁰

With reference to oil spills occurring in the US navigable waters, including bays, harbours, rivers, lakes, sounds and oceans up to 200 miles from the shore, (offshore oil spills), a study carried out covering the years 1996-2004 reported that between 2001-2004, an average of 2.3 million gallons of oil were spilled each year, compared with 1.5 million gallons of spills originating from vessels and 90 per cent of the total volume of spills came from facilities. The year 2004 witnessed the greatest number of spills with facilities accounting for 5, 390

⁹¹⁵ See <http://www.eia.gov/totalenergy/data/annual/index.cfm> accessed 06-05-2012.

⁹¹⁶ O Fagbohun (n 60) op cit 451.

⁹¹⁷ Ibid.

⁹¹⁸ See M Billah The Role of Insurance in providing adequate compensation and in reducing pollution incidents: The case of the International Oil Pollution Regime (2011) 29 *Pace Environmental Law Review* 42 fn 27.

⁹¹⁹ Id. This is technically referred to as a blowout.

⁹²⁰ Id. I shall discuss more on the provisions of the Oil Pollution Act, 1990 later on in this chapter.

thousand spills. Most of the spills were from onshore facilities which accounted for 5, 382 spills.⁹²¹

In 2009, the M/T ATHOS sailed from Venezuela for the Citgo Refinery in Paulsboro, New Jersey. The ATHOS was a single bottom, double sided vessel, carrying a cargo of thirteen million gallons of Buchaquero Crude. As the vessel was being docked at the refinery, it struck several submerged objects and spilled its contents of approximately 263,371 gallons of oil into the Delaware River. Over the following months, the oil spread downriver, threatening natural resources over 115 river miles and 289 miles of shorelines and affecting three states, New Jersey, Pennsylvania, and Delaware.⁹²²

With regard to the management of the spills, the location of the oil spills determines which authority will respond to the disaster. If the oil spills occur in the coastal waters, it is the responsibility of the United States Coast Guard (USCG). If the oil spills occur inland, it is the Environmental Protection Agency (EPA) that takes responsibility. The USEPA regulations provide that any discharge of oil that creates a film or sheen on the water surface is to be reported to the National Response Centre (NRC).⁹²³ The NRC dissipates the information to the USCG who acts as the federal onshore coordinator. The National Oceanic and Atmospheric Administration (NOAA) works closely with the Coast Guard in providing assistance on technical areas such as oil displacement tracking and risk assessments.

This thesis shall now turn to compensation issues arising from the oil spill incidents, whether from point source or from non-point sources.

In the case of the *Exxon Valdez*, a Vessel owned by an oil company ExxonMobil was transporting oil loaded from a terminal facility situated at a place called Valdez in the pristine coast of Alaska. After loading the vessel moved through the rough terrain clogged with reefs and icebergs; the vessel eventually collided with a reef called Bligh Reef and spilled 37,000 tons of crude oil into the pristine water of Prince William Sound, Alaska. Three days after the vessel was grounded, a storm pushed large quantities of fresh oil onto the rock shores of many of the beaches and caused widespread environmental damage to wild life, fishes and

⁹²¹See History of Energy in the United States 1635 – 2000 in Fagbohun op cit fn 2.

⁹²²See the full report of the incident at <http://www.darrp.noaa.gov/northeast/athos/index.html> (last visited 21-12-2012).

⁹²³40 C.F.R. § 110.3.

the beaches. The damages caused by the spillage led to litigations against Exxon by several environmental groups.⁹²⁴

6.2.3.1 Compensation issues arising from the Exxon Valdez

In general, concepts of liability and compensation stem from principles of tort law in which a wrongful act causing injury permits the injured party to obtain compensation, usually in the form of money damages, through a private civil action against the person who causes the injury.⁹²⁵ In a sense, “civil liability” differs from what is commonly referred to as “state responsibility”.⁹²⁶ Civil liability operates on the level of national law, and creates a relationship between the person liable and the person injured by conduct by which he or she is held responsible.⁹²⁷ State responsibility, on the other hand, operates on the plane of public international law. It creates a relationship not between two or more individuals but between two or more states: the state where the harmful activities have taken place and the state or states where the harm has occurred.⁹²⁸ In other words, in the case of state responsibility it is the state, rather than a private individual, which must provide a remedy for damage that occurs as a consequence of a breach it commits of an international legal obligation established by treaty or a rule of customary international law.⁹²⁹

Liability in this context is seen as a mechanism for implementing the “Polluter Pays Principle” (PPP) which contemplates the internalisation of pollution-control costs.⁹³⁰ This, as submitted by McCaffrey and Zucca, is in line with principle 16 of the Rio Declaration which enjoins national authorities as follows:

National authorities should endeavor to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

⁹²⁴For a full account of the incident see the United States Environmental Protection Agency (USEPA) website at <http://www.epa.gov/osweroe1/content/learning/exxon.htm> accessed 20-10-2012.

⁹²⁵See earlier discussion in chapter 2.

⁹²⁶See S C McCaffrey and M Zucca, *Liability and Compensation Regimes Related to Environmental Damage* Training Manual on International Environmental Law Chapter 5 at 52.

⁹²⁷Ibid.

⁹²⁸Id.

⁹²⁹Id.

⁹³⁰ Id. at page 51. See previous discussion of the Polluter Pays Principle in chapter 2.

The United States has developed its own laws and rules to govern compensation for oil pollution.⁹³¹

Gallagher⁹³² submits that in cases like the *Exxon Valdez* where the oil spill occurred after the oil was transported through the pipeline and loaded by the responsible vessel at the terminal facilities, the liability and compensation provisions under the Transport section of the TAPAA would apply.⁹³³ Under this section both the owners and operators of the vessel and the Trans-Alaska Pipeline Fund (TAPAA Fund) were strictly liable for all damages, including clean-up costs, sustained by any person as a result of the discharge.⁹³⁴

The TAPAA Fund was established by the Transport section⁹³⁵ to provide supplementary compensation to parties damaged by ship owners and operators who were liable under the Transport section. The Fund may hold up to \$100 million which is accumulated by a five percent per barrel surcharge paid by the owner of the oil to the owner of the pipeline.⁹³⁶ The TAPAA Fund was a non-profit organization which can sue or be sued in its own name.⁹³⁷ The Transport section of TAPAA has been repealed and replaced by the Oil Pollution Act, 1990.⁹³⁸

The TAPAA Fund however had a liability cap.⁹³⁹ This liability is divided between the owner and operator of the vessel (jointly and severally liable for the first \$14 million damages) and the TAPAA Fund (liable for the remaining claims up to a maximum of \$86 million).⁹⁴⁰ The dichotomy in the nature of damages that can be claimed under the Fund and the liability cap

⁹³¹We should recall that the US refused to ratify the CLC 1969 and the Protocol to the 1992 CLC convention because these were found not to be in the national interest of the US. See further Billah op cit n 849 above, M White Marine Pollution from Ships: The Australian Legal Regime(2000) *Current International Trade Law Journal* 1 where the author declares that the major difference between the US and the Australian situation in relation to the source and structure of the legal framework for marine pollution from ships is that the US does not follow international conventions. The author declared” it is one of the hallmarks of the US politics that while the US is represented in major international conventions by experienced and well-qualified maritime and international lawyers, who seem to agree and consent to the international regime, when their recommendations come to be dealt with by the US political machine what comes out bears little relationship to what went in.

⁹³² Gallagher (n 863).

⁹³³ Gallagher op cit at 4.

⁹³⁴ 43 U.S.C § 1653(c) (1).

⁹³⁵ Id.43 U.S.C § 1653(c) (4).

⁹³⁶ Id.43 U.S.C § 1653(c) (5).

⁹³⁷ Id.43 U.S.C § 1653(c) (4).

⁹³⁸ 1d. Pub. L. No. 101-380, 104 Stat. 484 (1990) [hereinafter OPA 90 Act].

⁹³⁹ 43 U.S.C § 1653(c) (3). This section provided that in part [S]trict Liability for all claims arising out of any one incident shall not exceed \$ 100, 000,000 .” This section did not provide for unlimited liability in instances of gross negligence or wilful misconduct. Gallagher op cit n 863.

⁹⁴⁰ Id. The unpaid portion of any claim may be asserted and adjudicated under other applicable Federal or state law.’ This is the doctrine of pre-emption of laws operating between the federal government and state governments underscore by the nature of the federal system of government in America. See *Askew v American Waterway Operators, Inc.* 411 U.S. 325 (1975). See further discussion on the provisions of OPA 90 below.

imposed resulted in litigation under federal and state law. This scenario led to the litigation in the important case of *Askew v American Waterway Operators, Inc.*⁹⁴¹ In Askew's case an action was brought by merchant shipowners and operators, world shipping association and members of the Florida coastal barge and towing industry, owners of oil terminal facilities amongst others, to enforce the application of Florida Oil Spill Prevention and Pollution Control Act. The Florida Oil Spill Prevention and Pollution Control Act (hereafter the Act) provides for the state's recovery of clean-up costs and imposes strict, no-fault liability on waterfront oil-handling facilities and ships destined for or leaving such facilities for any oil spill damage to the state or private persons, does not, per se, invade a regulatory area preempted by the federal Water Quality Improvement Act, which is concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which presupposes a coordinated federal-state effort to deal with coastal oil pollution. It was held by the Supreme Court that the Florida Act, providing for the state's recovery of cleanup costs and imposing strict, no-fault liability is not pre-empted by the Federal Water Quality Improvement Act which is concerned with the recovery of actual cleanup costs incurred by the Federal Government which pre-supposes a federal-state effort to deal with coastal oil pollution.

Narrowing all this down to the claim against the oil spill damage that occurred via the *Exxon Valdez*, the TAPAAand the FWPCA established maximum liability cap which also provided that this liability cap would be lifted upon proof of gross negligence or wilful misconduct on the part of the owner or operator of the vessel.⁹⁴²Gallagher commented further that “ [t]he FWPCA is devoted entirely to the clean-up of spills and thus not authorised compensation to private parties for further environmental restoration efforts beyond such clean-up expenditures. Such claims would have to be brought under other federal laws not preempted by the FWPCA or under the maritime common law if such causes of action remain after the application of the FWPCA.”⁹⁴³The interaction of these statutes will therefore produce the unsatisfactory effect of inadequate compensation for victims of oil pollution of the magnitude of the *Exxon Valdez*under statutory provision and litigants would have had to resort to the

⁹⁴¹h 861 above.

⁹⁴²Gallagher op cit 8 fn 154. 33 U.S.C. § 1321(f) (1) provides that responsible parties (shipowners and operators) are liable for up to \$150 gross ton of the vessel” except that where the United States can show that such discharge was the result of wilful negligence or wilful misconduct within the privity of knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.”

⁹⁴³*Id.* See Askew's case supra.

common law for redress.⁹⁴⁴ The common law remedies of negligence and nuisance as we have seen are not easily obtained because of difficulties associated with proof and causation.⁹⁴⁵ This scenario played out in the case of *Ayelka Pipeline Service Co. v United States*⁹⁴⁶ the facts of which are as follows: The plaintiff a pipeline company sued the defendant, the United States Government to recover its clean-up costs after oil had leaked through the pipeline laid by the defendants. The plaintiffs brought the suit under the provisions of the FWPCA since the Act allowed re-imbursement to the owner of a facility for clean-up cost costs if the pollution was caused by a third party without any fault on the part of the owner.⁹⁴⁷ The court held that the TAPAA would govern since it was specific legislation enacted in time. The court found support for its position by examining the legislative history behind the TAPAA and an examination of the FWPCA itself.⁹⁴⁸

6.2.3.2 The legislative history behind the enactment of the FWPCA and the TAPAA⁹⁴⁹

As this thesis posited earlier, before the incident of the *Torrey Canyon*, in 1967, there was no international regime of liability for oil pollution damage.⁹⁵⁰ Parties who suffered damage due to oil spills sought compensation under the common law principles of negligence, nuisance, a trespass and strict liability. Shipowners could limit their liability under the general maritime liability principles of limitation of liability. There were exceptions to this where the shipowner had been faulted in the course of events in which case he loses the shield to limit liability. After the *Torrey Canyon* incident, the international community realised the inadequacy of the existing legal regime to cover expenses of devastating oil pollution damage.⁹⁵¹

The deliberations after the *Torrey Canyon* incident resulted in the CLC 1969 Convention and the Fund Convention of 1971.⁹⁵² The CLC deals with shipowner's liability which is strict but limited in amount while the Fund Convention provided a second tier of compensation for claimants who were not able to be compensated by the shipowner, either because of insufficiency of funds or where the shipowner was simply unavailable. The IOPC Fund's

⁹⁴⁴The inference is mine.

⁹⁴⁵See section 2.4.4 above.

⁹⁴⁶649 F.2d 831 (Ct. Cl 1981).

⁹⁴⁷See 33 U.S.C. § 1321(f) (2).

⁹⁴⁸See at page 836 of the judgment.

⁹⁴⁹For a full discussion on this topic see M Billah op cit (n 850) above. See also Edgar GoldMarine Pollution Liability after "Exxon Valdez": The U.S. "All or Nothing Lottery? 22 Mar. L. & Commerce 423, 432-33 (1991).

⁹⁵⁰See discussions in chapter 3.

⁹⁵¹M Billah op cit n 850.

⁹⁵²See earlier discussions on these in chapter 3.

compensation is limited as well, albeit at a higher ceiling.⁹⁵³ In 2003, a new Protocol to the Fund Convention created a supplementary Fund, a third tier of compensation with a SDR of 750 million (approximately USD 1.18 billion) as its ceiling.⁹⁵⁴

The US is not a party to any of these international conventions although it played prominent roles in the deliberations leading to the making of these conventions.⁹⁵⁵ The objection of the US was based on the low liability limits and the preemption of U.S. state laws.⁹⁵⁶ To deal with the domestic situation, the US enacted numerous federal acts with both general and specific provisions for oil pollution damage.⁹⁵⁷

The debate by the US Congress went on for fifteen years until the incident of the Exxon Valdez which finally brought an abrupt end to these debates and Congress finally passed the Oil Pollution Act, 1990.

6.3.1 Preventive measures for combating vessel source oil spill under the OPA 90⁹⁵⁸

As a result of the inadequacy of damages and partly because the CWA did not make clear cut provisions for the contribution of responsible parties to clean-ups, added to this is the unresolved issue of who bears the cost of removal of the spills and even compensation to claimants by responsible parties, the US Congress decided to enact into law the Oil Pollution Act, buoyed by the event of the Exxon Valdez.

The OPA 90 created a freestanding and comprehensive liability regime⁹⁵⁹ for the first time. It created strong criminal sanctions and steep civil penalties for spills, stringent licencing standards, required detailed spill prevention plans, and granted greater authority to the federal government to conduct or control removal efforts.⁹⁶⁰

⁹⁵³ Billah op cit.

⁹⁵⁴Id. See Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, Art. 2 para. 4, May 16, 2003. See also IMO /LEG/CONF. 14/20, available at http://www.iopcfund.org/npdf/Supp_Fund_e.pdf accessed 10 -01-2010.

⁹⁵⁵ See the status of countries who ratified these conventions at the IMO website at www.imo.org.

⁹⁵⁶ E Gold op cit.

⁹⁵⁷ Billah op cit fn 25 These acts are Federal Water Pollution Control Act (Clean Water Act) § 311, 33 U.S.C. 1321 (2006), (liability for discharge of oil or hazardous substance into any navigable water); Deepwater Port Act of 1974 (2006), (regulating oil pollution in deep-water ports); Outer Continental Shelf Lands Act § 2, 43 U.S.C. § 1331 (2006) (controlling oil pollution in the Continental Shelf); and Trans- Alaska Pipeline (regulating oil pollution from Trans-Alaska pipeline) 43 U.S.C. § 1651 et seq.

⁹⁵⁸ 33 U.S.C. § 2701.

⁹⁵⁹ J Guajardo Deepwater Horizon: Rethinking OPA'S Liability Limitation in the wake of environmental disaster 48 *Houston Law Review* 625.

⁹⁶⁰ 33 U.S.C. § 2702 (a) (2006). It provides that a ‘responsible party’ (or responsible third party) for a vessel or facility from which oil is discharged is liable for removal costs and damages resulting from such a discharge.

The OPA 90 defined “discharge” of oil as “any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;”⁹⁶¹

The OPA 1990 provides that each responsible party⁹⁶² for a vessel or facility from which oil is discharged, or which poses a substantial threat of an oil discharge, into navigable waters of the United States, the adjoining shorelines, or the exclusive economic zone claimed by the United States by Presidential Proclamation and treaties is liable for removal costs and damages. The liability is joint and several. Responsible parties are liable for all oil spill cleanup costs and damages resulting from any discharge of oil or hazardous material within the navigable waters, shorelines, or exclusive economic zones of the United States.⁹⁶³

The liability is also imposed notwithstanding any other provision or rule of law.⁹⁶⁴ The OPA defines a ‘vessel’ to include every description of watercraft other than a public vessel. Thus, its application goes beyond large tanker vessels to include the working vessels of private businesses and recreational vessels owned by private citizens. This provision as we can see enables private citizens to benefit from any damages paid for compensation for oil pollution. The OPA also defines a ‘facility’ extremely broadly to include even motor vehicles.⁹⁶⁵

It has been contended that by broadly defining “responsible party” and restricting available defences, the statute effectively imposes strict liability.⁹⁶⁶ This requires responsible parties to reimburse claimants for all oil spill cleanup costs (removal costs) that are incurred, regardless of whether the costs are incurred by the government or by private parties.⁹⁶⁷ This broadly covers all actions “necessary to minimise or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public entities and agencies for the

⁹⁶¹S 1001 (7) of the Oil Pollution Act of 1990.

⁹⁶²In the context of an offshore facility, OPA defines a “responsible party” as “the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement. See 33 U.S.C. § 2701(32) (2006).

⁹⁶³33 U.S.C. § 2701(a) (6).

⁹⁶⁴E Shea, *Introduction to U. S. Environmental Laws*, (2005).

⁹⁶⁵Ibid.

⁹⁶⁶Guajardo op cit 3. Three legally available defences are (1) an act of God, or negligence of a non-contractually related third-party; See further P Martin The BP Spill and the meaning of Gross Negligence and Wilful Misconduct *Louisiana L. Rev.*(2011) 71 957, 960 (describing the Oil Pollution Act as “strict liability...on a responsible party for certain injuries caused by the acts leading to an incident”).

⁹⁶⁷See 33 U.S.C. 2701 (4) (2006) which defines “claimant” as “any person or government who presents a claim for compensation).

cost of “monitoring” the removal effort, even when private parties themselves are conducting the cleanup.⁹⁶⁸

The OPA 90 requires new tank vessels operating in the US waters to be constructed with double hulls and the existing single-hull or double-bottom or double-side vessels to be phased out under a time-table based on the tank vessel’s age and tonnage that began in 1995 and runs through 2015.⁹⁶⁹ Vessels carrying less than 5000 gross tons of oil are exempted but they are required to comply with the date for the phasing out of the single hull vessels. The OPA also introduced new measures like ensuring that the vessel’s crew is well qualified (for example by strengthening licensing requirements for merchant marines), alert (for example, by mandating maximum hours of work within a specified period or testing for alcohol or drug abuse, etc. OPA 90 also brought innovations like providing for damages for loss to natural resources (the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged resources / the diminution in value of those natural resources pending restoration/ the reasonable cost of assessing those damages. Injury including economic losses from destruction of real or personal property is recoverable.⁹⁷⁰ The OPA 90 also provided that the sum of \$1 billion maximum limit shall be payable per incident (\$ 500 million as damages to injury to natural resources). There is also a right of direct access to the Fund in the case of delayed or denial of liability.⁹⁷¹

6.3.2 The application of the polluter pays principle under the OPA 90

Under the OPA, a lessee of the drilling area is responsible for removal and government response costs, property and natural resources damages, and economic losses for the oil spills.⁹⁷² Recoverable damages under the OPA 90 include injury to natural resources, loss of personal property for instance a hotel or holiday resort destroyed by an oil spill because of nearness to the vicinity of a spill. Loss of revenues as a result of property destruction or injury to natural resources and loss of profits from either property damage or injury to natural

⁹⁶⁸Guajardo op cit 3 fn 26. See also *United States v Conoco Inc.* 916 F.Supp. 581, 585 (E.D. La. 1996).

⁹⁶⁹46 U.S.C. § 3703a.

⁹⁷⁰I Kim, op. cit. above.

⁹⁷¹Kim , ibid.

⁹⁷²J Boyd, Compensation for Oil Pollution Damages: The American Oil Pollution Act as an Example of Global Solutions? 137-163, 157-169, in Faure, M.G., Hu, J (eds.), Prevention and Compensation of Marine Pollution Damage: Recent Developments in Europe, China and the U.S.A., *Kluwer Law International*, 2006, The Netherlands.

resources. This also includes the costs of providing extra public services during and after the spill response.⁹⁷³

However, economic damages could potentially include losses by any entity whose operations are halted or impaired by the oil spill, even though the entity does not suffer any special damage from the spill.⁹⁷⁴ An example is hoteliers who suffer from loss of patronage by tourists who avoid a coast polluted by an oil spill. The buildings may not have been physically contaminated by oil.

Although liable for all removal costs, current law limits an offshore facility's liability for economic and natural resources damage to 75 million US dollars per incident.⁹⁷⁵ Damages in excess of the cap could be paid by the Oil Spill Liability Trust Fund, which is financed primarily through a fee on domestic and imported crude oil. Lease holders of a "Covered offshore Facility (COF) must demonstrate a minimum amount of "Oil Spill Financial Responsibility" (OSFR) of 35 million US dollars per 35, 000 barrels of "worst case oil – spill discharge" up to a maximum of 150 million US dollars for COF located in the "Outer Continental Shelf" (OCS) and 10 million US dollars in state waters. OSFR can be demonstrated in various ways, including surety bonds, guarantees, letters of credit, and, in some cases, self-insurance, but the most common method is by means of an insurance

⁹⁷³33 U.S.C. 2702(b) (2) (2006). Many of these damages are considered "economic" damages because they relate to interruptions of business activity caused by the spill. See Guajardo op cit fn 27.

⁹⁷⁴Guajardo op cit. See also David Segal, Should the Money Go Where the Oil Didn't? N.Y. Times, Oct. 24, 2010 in Guajardo op cit fn 30. This article relates to the claim by victims of oil pollution arising from the Deepwater Horizon spill whereby hotels and other tourism-related and other businesses sought to recover lost earnings based on the theory of indirect harm. Under the Civil Liability Convention (1969) and Fund Convention (1971) they cannot recover because the loss must be direct and proximate to the oil spill. These types of claims may be brought by the parties themselves under the OPA 90.

⁹⁷⁵K Noussia, , The BP Oil Spill- Environmental Pollution Liability and other Legal Ramifications,*European Energy and Environmental Law Review*(2011) vol. 20:3 98 at 101 at 102. See also section 1004(a) of OPA 1990 which provides the following:

Section 1004(a) provides that the responsible party is liable for the full cost of clean-up and removal of spilled oil plus damages incurred up to the following limits:

- (1) for tank vessels
 - (a) the greater of \$3, 000 per gross ton or \$22 million for single hull tank vessels greater than 3,000 gross tons (including a single hull vessel fitted with double sides or double bottom only), or \$6million for vessels less than 3, 000 gross tons;
 - (b) the greater of \$1, 900 per gross ton or \$16 million for any other tank vessels greater than 3, 000 gross tons, or \$4 million for vessels less than 3, 000 gross tons;
- (2) for any other vessel, the greater of \$950 per gross ton or \$800, 000
- (3) \$75 million plus the total of all removal costs, for offshore facilities (except deepwater ports); and
- (4) \$350 million for onshore facilities and deepwater ports.

This act also contains special provisions applicable to mobile offshore drilling units (MODUS).

certificate.⁹⁷⁶ A Certificate of Financial Responsibility (COFR) must be obtained from the National Pollution Funds Centre.⁹⁷⁷

The United States Environmental Protection Agency, (USEPA), the Coast Guard and other federal government agencies have also adopted numerous Regulations relating to oil pollution before and after the OPA 90 was enacted. These regulations include the Coast Guard Regulations at 33 C.F.R. Parts 151-158 and the USEPA Regulations at 40 C.F.R. Parts 110 – 112. These regulations are important in that they co-ordinate the requirements of the OPA and related laws with the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78).⁹⁷⁸

Regardless of the source, the polluter pays principle is a common thread among these liability provisions. Responsible parties are liable for immediate cleanup response, oil removal, compensation for any financial losses resulting from the spill, and restoring the natural resources affected by the spill, including any ongoing restoration programs and financial payments.⁹⁷⁹

The implementation of the OPA and its strict regulations on liability and implementation of financial responsibility has led to a considerable reduction in the volume of oil spills and tanker accidents.⁹⁸⁰ Further its provision for costs for the restoration of the environment has begun to have effect on the international liability regime. The recommendation of the US representatives to the IMO on the worldwide adoption of a double- hull requirement for tankers found favour and was adopted in MARPOL 73/78.⁹⁸¹ Thus the success of OPA 90 has led to increased cooperation by members' countries of the IMO in combating oil pollution

⁹⁷⁶M Cessna, Insurance Implications of the Deepwater Horizon Disaster <http://www.insurancelawanddisputesblog.com/2010/05/insurance-implications-of-the-deepwater-horizon-disaster/> accessed on 10 September, 2010 in K Noussia, op cit fn 32.

⁹⁷⁷Before any vessel larger than 300 gross tons can operate in US waters, the owner/operator must obtain a Certificate of Financial Responsibility (COFR) from the National Pollution Funds Centre (NPFC).

⁹⁷⁸See chapter 3 above. The US has ratified this Convention on December 29, 2000. "Ship" is defined under the Protocol to MARPOL 73/78 as "any vessel of any type whatsoever , including hydrofoils, air- cushion vehicles, submersibles, floating craft whether self –propelled or not, and fixed and floating platforms;" See definition (10) of the Protocol of 1978 supra. This definition appears to be in conflict with the definition of ships under the OPA 90 discussed above.

⁹⁷⁹Guajardo op cit 5.

⁹⁸⁰Kim supra at 203.

⁹⁸¹This regulation effective in July 1993 is to apply to the oil tankers of all countries by 2026.

incidents such as the *Erika*, the *Exxon Valdez*, the *Braer*⁹⁸², and concerted efforts at containing its effect.

6.3.3 *Summary of the benefits under the OPA 90*

The first benefit derivable is the liability limits which have been increased. As demonstrated under the CLC and Fund Conventions, the liability limit is \$14 million US dollars but under the OPA it is \$75 million dollars.

The second benefit is the clear-cut incidence of liability which has led to a reduction in the number of litigations. The fact that OPA 90 made liability to be strict has also tightened the loopholes that were exploited under the CWA.

Thirdly the OPA extended the scope of liability to cover not only the inland water of the United States meaning the waters of the US lying inside the baseline from which the breadth of the territorial sea is measured (the inland waters) but to also include the territorial waters, the coastal waters and the Exclusive Economic Zone (EEZ).⁹⁸³

Fourthly the OPA 90 provided a very extensive definition of pollution damage. The definition of pollution damage covers the cost of damage to natural resources and thereinstatement of the environment to its pre-damage status. OPA also made it clear that the person responsible will have to reimburse the State of the removal costs and the costs of reinstating the environment. Such claims can be filed by the US government, State governments and Indian tribes and every person who bore such cost if his action was performed according to the National Contingency Plan.

Fifthly, OPA 90 created the concept of trust where the government is a trustee of the environment and is supposed to take care of the environment for the benefit of the whole society, akin to the Public trust doctrine. Claims may be filed by the US government, an Indian tribe, and a foreign government for damage to the natural environment and for the recovery of cost expended to restore the environment to its pre-damage status. Also claims for loss of subsistence use of natural resources can be filed by anyone who regularly uses the environment and whose existence is related to it. (E.g. Eskimos in Alaska can claim for

⁹⁸²On January 5 1993, the Liberian tanker *Braer* (44, 989 grt) laden with approx. 84, 000 tons of North Sea crude Oil, grounded at Garths Ness, south of the Shetlands Islands and broke up, spilling oil into the sea.

⁹⁸³The obvious advantage of this is that it has increased the ability of the US Coast Guard to enforce the provisions of MARPOL beyond the limits of 50 nautical miles and thereby enforce pollution control measures against visiting ships and ships plying the internal waters of the US.

damages for loss of use of natural resources as the Alaskan environment has a high existence value for them).⁹⁸⁴

6.3.4 The demerits under the OPA 90

However, it is not totally correct to say that the OPA 90 is a complete success. The OPA 90 did not pre-empt state laws on oil pollution.⁹⁸⁵ Non pre-emption of state laws under multiple oil spill statutes bring about inconsistency in the determination of the law that governs liability in a given situation. For instance before OPA 90 was enacted, states could impose removal liabilities against the spiller but any state law governing collection of damages was pre-empted by federal law.⁹⁸⁶ During the negotiation that went on between the Federal and state governments before the enactment of the OPA 90, it was also seriously contended that states should continue to have the ability to impose unlimited liability on those responsible for spilling oil in state waters.⁹⁸⁷ The state laws have not been pre-empted by the enactment of the OPA 90, meaning they can co-exist along with the OPA 90. This state of affairs has not made it easy for parties to determine what the scope of liability would be in respect of an oil spill, where the oil spill occurs in the US territorial waters and then spills into waters of a state. This state of affairs also breeds uncertainty in ascertaining liability for oil spillage to foreign ship owners sailing into the waters of the United States.

Thirdly another demerit of the OPA 90 is that there are financial limitations payable to victims of oil pollution damage. In the case of an extensive damage to natural resources like the Deepwater Horizon case discussed earlier, the shipowner's liability for oil pollution arising from offshore drilling facilities is limited to \$ USD 75million. Specifically, OPA

⁹⁸⁴M Nesterowicz, Civil Liability for Oil Pollution Conventions 1969 and 1992 and the Oil Pollution Act of the United States 1990- the comparison of the definition of oil pollution damage, seminar presentation at the Institute of Maritime Transportation Law, (2000).

⁹⁸⁵The doctrine of pre-emption in the US constitution enables Federal and State laws to exist side by side.

⁹⁸⁶Sump op cit 1113.

⁹⁸⁷State's rights advocate like Senator George Mitchel of Maine rigorously defended this position. This position was contested by the President and the US Coast Guard, both advocating adoption of the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) along with the 1984 Protocols to the Fund Convention. See further Sump , ibid.

90limits liability to “the total of all removal cost up to \$USD 75 million.⁹⁸⁸ This has led to recent calls that the financial cap on the limitation of liability should be removed.⁹⁸⁹

6.3.4. 1 Conclusion

Nigeria stands to benefit greatly by following the model of the US Oil Pollution Act, 1990 and other US legislation. For instance its provision on responsible parties makes it clear who is responsible with regard to an oil spill. This is contrary to Nigerian law which creates vague notions with regard to the duties of an oil spiller. This is one lesson that the Nigerian state can learn from the US system.

It was pointed out earlier about the difficulties put on the way of litigants who wish to seek judicial remedies for environmental wrongs in Nigeria. The compensation stipulated under the Oil Pipelines Act is out of tune with modern realities.⁹⁹⁰ The doctrine of public law in the nature of *locus standi* which limits access to court in Nigeria is also a case in point. Under the OPA 90 however, the provision of Citizen suits, which is a feature of the Resource Control and Recovery Act (RCRA),⁹⁹¹ a feature of the OPA 90, has widened the scope of *locus standi* to enable private individuals to seek judicial remedies for actual or threatened damage to the environment, even by government or their agencies. This is another lesson that can be learned by Nigeria as far as dealing with the issues of access to court is concerned.

On the issue of low liability limit, it is submitted that in view of the incident of the Deepwater Horizon, the OPA 90 should also be amended by increasing its liability limit. Given the tremendous damage oil spills cause to the environment, public and private property, businesses and local economies, environmental groups and concerned citizens are calling on government to amend this particular provision of the US statute.⁹⁹² However removing the cap

⁹⁸⁸See 33 U.S.C. § 2704 (2006). This type of cap does not fit into the Deepwater Horizon case which as we observed is a Mobile Offshore Drilling Unit (MODUS) and is treated as a vessel under the OPA. The total cost payable for the oil spillage would not exceed \$75million dollars, after removal cost. This amount is grossly insufficient when the extent of damage to the environment and natural resources are concerned.

⁹⁸⁹ Sump advocates that the US should accept the limits of liability provided under the international scheme (regime) . To do this the US will need to repeal its limit of liability under the OPA 90. This seem to be a contradiction of the benefits under the OPA 90 as far as its novel provisions are concerned on the definition of ships, provision for a responsible party and recovery of cost expended on behalf of the state. Other benefits too like provisions for natural resources damage and the doctrine of public trust are novel features under the OPA 90. For further discussion on this see Sump (n797) 1114.

⁹⁹⁰See chapter 5.

⁹⁹¹42 USCA § 6901. The amendment of section 25 of the Clean Water Act introduced the provision of the Citizens Suit into the United States. This suit allows for class action and provides access to court to any citizen to enforce violations under the Act. See further Collin de la Rue and C Anderson, *Shipping and the Environment* (2nd edition) 525.

⁹⁹²Guajardo op cit 5.

totally on liability for damages would primarily affect small operators as a result of increased insurance costs, small operators could be precluded from participating in the oil market because they would neither be able to compete with the larger market players or would be unable to obtain insurance coverage at all.⁹⁹³ Small operators by purchasing insurance will notice a reduction in the profitability of oil leases as insurance costs go up.⁹⁹⁴ These are considerations that should be taken into account not only by the US Congress but also the National Assembly of Nigeria which is in the process of amending the Petroleum Act to boost the operation of the petroleum industry and combat the scourge of oil pollution.

Finally, although the US did not ratify the CLC 1992 and the Fund Conventions, it has gone a step ahead by the provision for the recovery of natural resources damaged by an oil spill. The provision of the NRT fund ensures that the funds for ecological damages are recoverable. Furthermore by providing for the establishment of Trustees for the environment, the two concepts of ownership and control are vested in one body (the NRT) which uses the funds for the recovery of damage to the environment. This is another lesson for Nigeria where ownership of natural resources is vested in the Nigerian State without corresponding control by the communities who in most cases are the victims of oil pollution and environmental degradation perpetrated by the powerful oil prospecting companies.

The thesis shall now proceed to the study of the Republic of South Africa as another arm of the comparative study where the study hopes to examine South African laws on oil pollution and draw lessons for the Nigerian state.

⁹⁹³Ibid.

⁹⁹⁴Id.

Chapter 7: Comparative Studies- Republic of South Africa

7.1 Introduction

The Republic of South Africa is located at the interface of two of the world's great oceans- the Atlantic and the Pacific oceans- and at a major maritime navigation route.⁹⁹⁵ We have observed that although South Africa does not produce oil in large commercial quantity, it is nevertheless a major oil consuming nation.⁹⁹⁶ The study of its laws on marine pollution is thus of importance in that being a major navigational route, a lot of ships pass through its territorial waters and accidents do happen, causing large scale spillage of oil into its territories.⁹⁹⁷

Another attraction for this comparative study is that being an African country like Nigeria and having the largest economy in Africa, it would be an interesting exercise to see how it has structured its laws on oil pollution both in the freshwater and the marine to achieve this status. We will look into these laws to observe their strength and advantages, *vis a vis* the international conventions on marine oil pollution and as a benchmark for Nigeria. Any observed weakness shall also be highlighted.

7.2 South Africa's oil reserve

According to the Oil and Gas Journal, South Africa has proven oil reserves of 15 million barrels in January 2011.⁹⁹⁸ All of the proven reserves are located offshore southern South Africa in the Bredasdorp basin and off the west coast of the country near the border with Namibia. South Africa has no significant crude oil production but the country did produce slightly over 180,000 barrels per day (bbl/d) of non-conventional, synthetic liquids processed from coal and natural gas.

However, South African oil consumption is estimated to be slightly over 550,000 bb/d, of which approximately 370, 000 bb/d is imported (67 percent of consumption). The majority of South African oil import is from the Organisation of Petroleum Exporting Countries (OPEC), namely Iran (29 %), Saudi Arabia (24%), Nigeria (19%), and Angola (18%). The

⁹⁹⁵Glazewski at 635.

⁹⁹⁶See the basis of the comparison with Nigeria in the conclusion to chapter 5.

⁹⁹⁷For instance in 1994 a large tanker the *Apollo Sea* floundered and spilled large volumes of crude oil into the coast of the Cape Peninsula, a popular tourist destination, causing the pollution of the sea and the death of a large quantity of fishes and sea birds. Heavy clean-up costs were incurred by the Regional Services Council and the City Council of Cape Town in the clean- up of the oil spill.

⁹⁹⁸See South Africa, *Country Analysis Briefs*, available at www.eia.doe.gov/ last visited on 15-04 -2012.

country also imports refined fuels but is planning to increase domestic refining capacity. South Africa is promoting further exploration and development in the petroleum sector but there has been little investment in exploration and there have been no recent commercial discoveries.⁹⁹⁹

7.3.1 South Africa's marine pollution laws

South Africa marine pollution laws are largely based on international conventions.¹⁰⁰⁰ It is therefore useful to begin a consideration of these laws by examining these international conventions to which South African legislation derive from. I shall begin by looking at the MARPOL Convention domesticated by the Marine Pollution (Prevention of Pollution from Ships) Act.¹⁰⁰¹ The technique used by the drafters of this Act, i.e. the MARPOL Convention, submits Couzens is to incorporate the Convention by reference.¹⁰⁰²

The Act consists of seven short chapters but it includes a very lengthy and technical schedule- including the MARPOL Convention along with its Annexures 1 and 2 by reference.¹⁰⁰³ In our earlier discussion on the MARPOL 73/78,¹⁰⁰⁴ we stated that Annexures 1 (prevention of pollution by oil) and 2 (the prevention of pollution by noxious liquid substances carried in bulk) are compulsory for members. These provisions have been given effect to by the South African Act domesticating MARPOL.¹⁰⁰⁵ Section 3(1) provides that the principal Act shall be substituted by the addition of a new section 3 which provides under a heading titled:

Regulations

The Minister may make regulations-

- (a) Relating to the carrying out of, and giving effect to, the provision of the Conventions;
- (b) Whereby exemption is granted, with or without conditions, in respect of particular ships or ships of a particular type or type, from all or any of the provisions of the Convention;¹⁰⁰⁶

⁹⁹⁹Ibid.

¹⁰⁰⁰Kidd op cit 154.

¹⁰⁰¹No. 2 1986. This Act gave effects to amendments to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (The MARPOL Convention).

¹⁰⁰² See s 4.3.4 above and E Couzens op cit 129, 132 and 133.

¹⁰⁰³S (2) (1).

¹⁰⁰⁴ See s 3.2.8 above.

¹⁰⁰⁵S 3(1) (a) of the Act.

¹⁰⁰⁶See s 3(1) of the International Convention for the Prevention of Pollution from Ships Amendment Act (66 of 1996).

The Annexure 2 lays down regulations for the control of noxious liquid substances in bulk. It comprises of fourteen regulations and five appendices. It defines and categorises and includes regulations relating to discharge of residues, unloading arrangements etc. These regulations have been giving effect to and incorporated into domestic law by regulations made under the Merchant Shipping Act¹⁰⁰⁷ as well as under the Act. Two sets of regulations were passed. The first set gives statutory effect to the IMO International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (the IBC Code).¹⁰⁰⁸ The second set of regulations gives statutory effect to the IMO Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (the BCH Code).¹⁰⁰⁹ Furthermore, specific regulations have been passed to give effect to Annexure 5 of MARPOL which deals with garbage generated on board ships. These are Regulations on the prevention of pollution by garbage from ships¹⁰¹⁰ and Regulations on reception facilities for garbage from ships.¹⁰¹¹ This Act is administered by the Department of Transport under the guidance of the Minister. (Annex V1 which deals with the prevention of Air Pollution from Ships is yet to come into force).¹⁰¹²

Article 4 of the Convention provides that any violation of the requirement of the Convention shall be prohibited and sanctions shall be established therefore under the law of the administration of the ship concerned wherever the violation occurs.¹⁰¹³ The Convention shall have effect in relation to-

- (a) any South African ship, wherever it may be; and
- (b) any other ship while it is in the Republic or its territorial waters or exclusive economic zone¹⁰¹⁴

As can be seen from the above, South Africa is obviously a step ahead of Nigeria as far as giving effect to the provisions of MARPOL 73/78 and enacting detailed regulations for the

¹⁰⁰⁷57 1951. This Act has been amended by the Shipping Laws Amendment Act No 57 1998.

¹⁰⁰⁸S 4 Merchant Shipping/Marine Pollution (IBC Code) Regulations 1998. This set of regulations has been made jointly under the MARPOL Act and the Merchant Shipping Act, See fn 159 Glazewski op cit. 656.

¹⁰⁰⁹Glazewski op cit. fn 160. See also R 134 Marine Pollution (BCH Code) Regulations 1998 *Government Gazette*No. 18631 dated 23 January 1998.

¹⁰¹⁰GN R1490 of 29 May 1992.

¹⁰¹¹GN R1491 of 29 May 1992.

¹⁰¹²See the text of the Convention at http://www.imo.org/blast/mainframe.asp?topic_id=233 accessed 17-05-2012.

¹⁰¹³Kidd op cit 156.

¹⁰¹⁴S 2(1) (a) and (b) of the amended Act.

enforcement of the MARPOL Annexes are concerned. We have noted earlier that Nigeria is yet to domesticate some aspects of the provisions of MARPOL, notwithstanding its incorporation by reference. There are no Nigerian regulations in force yet to give effect to the Annexes. There is also an obvious lack of understanding of the duties of the Nigerian Ministry of Transport, who is expected to formulate the regulations and drive its enactment through the National Assembly and the Nigerian Maritime Administration and Safety Agency (NIMASA) whose duty is to enforce the regulations that have been made.¹⁰¹⁵

7.4.1 *Marine Pollution (Intervention) Act 64 of 1987*

The Marine Pollution (Intervention) Act¹⁰¹⁶ sets out in its schedule the provisions of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (The Intervention Convention). This Convention itself came out of the incident of the *Torrey Canyon*. The Protocol to the Intervention Convention which extends the provisions of the Convention to cover substances other than oil, 1973 is also covered by this Act. This Act allows South Africa to take measures outside her territorial waters to prevent or otherwise address danger to her coastline from oil pollution. The Act simply stated that the Convention and the Protocol shall have the force of law in the Republic.¹⁰¹⁷ The Act also empowers the Minister¹⁰¹⁸ to make regulations to give effect to the Convention. To this effect the Minister of Transport has amended schedule 2 of the Intervention Act to give effect to the Protocol to the Intervention Convention in the Republic of South Africa. This schedule contained a list of substances other than oil which are prohibited by the Republic of South Africa.¹⁰¹⁹ It substituted an Annex titled list of substances which replaced the substances contained in the Protocol to the Intervention Convention.¹⁰²⁰

7.4.2 *Marine Pollution (Control and Civil Liability) Act 6 of 1981*

The Marine Pollution (Control and Civil Liability) Act 61, 1981¹⁰²¹ is partly modelled on the Civil Liability Convention, 1969 and some of the provisions of MARPOL 73/78 discussed above. There are civil and criminal aspects of the Act. The civil aspect has to do with the prevention of pollution by owners and masters of ships as laid down in the CLC 1969, and

¹⁰¹⁵This inference is borne out of my conversation with the Personal Assistant to the Director General of NIMASA.

¹⁰¹⁶ 64 of 1987.

¹⁰¹⁷S 2(1).

¹⁰¹⁸i.e the Minister of Transport.

¹⁰¹⁹See Government Gazette No 18667 of 6 February 1998.

¹⁰²⁰Ibid.

¹⁰²¹This Act has been amended by the Shipping General Amendment Act 23 of 1997.

the liabilities which their actions will occasion on them if they do. The long title to the Act provides for its purpose:

(An Act) to provide for the protection of the marine environment from pollution by oil and 10 other harmful substances, and for that purpose to provide for the prevention and combating of the pollution of the sea by oil and other harmful substances; to determine liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and offshore installations; and to provide for matters connected therewith.¹⁰²²

The Act gives effect to the CLC not by reference but by incorporating various provisions and adaptations of the CLC in the Act itself. It also refers to the MARPOL Convention and incorporates some of the provisions as well. For instance it specifically refers to MARPOL 73/78 in its definition sections.¹⁰²³ The Act contains an important provision with regard to enforcement action. It grants to the South African Maritime Safety Authority (SAMSA), established under the South African Maritime Safety Authority Act 5 1998, extensive powers to take a variety of steps to prevent pollution of the sea where a harmful substance is likely to, or is being discharged.¹⁰²⁴

As I discussed under the OILPOL,¹⁰²⁵ the Act by incorporating some of the provisions of the OILPOL seeks to prevent and combat the pollution of the South African territorial waters by oil discharged from ships, tankers or off-shore installations situated within a distance of 50 nautical miles from the low-water mark, including the high and low-water marks as well as any tidal lagoon or tidal river or internal waters.¹⁰²⁶

The definition of ‘discharge’ is one that is worthy of mention under this Act. The Act defines

discharge in relation to a harmful substance as “... any release, howsoever caused, from a ship, a tanker or an offshore installation into a part of the sea which is a prohibited area, and includes any escape, disposal, spilling, leaking, pumping, emitting, or emptying,” and “discharge,” when used as a verb has a corresponding meaning.¹⁰²⁷

¹⁰²²Long title substituted by s 47 of Act 23 of 1997.

¹⁰²³See s 1(1) which states that MARPOL 73/78 means the convention contained in the Schedule to the Marine Pollution (Prevention of Pollution from Ships) Act, 1986 (Act No 2 of 1986), including any instrument made thereunder, and in this Act.

¹⁰²⁴ See s 4 of the South African Maritime Safety Authority (SAMSA) Act no 5 of 1998 and s 2 of the schedule to the Act.

¹⁰²⁵See the International Convention for the Prevention of Pollution of the Sea by Oil, 1954 discussed in chapter 3 above.

¹⁰²⁶See M Rabie & J Lusher, South African Marine Pollution Legislation, *Acta Juridica* (1986) 171.

¹⁰²⁷S 1(1) substituted by s 27 of Act 23 1997. This definition of discharge is sufficiently wide to include discharge from a point source facility like oil pipelines and sewage disposal outlines.

A new section was added to the Act by the amendment to section 1 above. The section is section 2(3). This section contains the criminal aspects of the Act which provides for strict liability. If any oil is discharged from a ship, tanker or offshore installation the master of such a ship, tanker or off-shore installation and, if he is not the owner of such a ship shall be guilty of an offence unless any three of the following defences stipulated in the Act are invoked:

- The oil was discharged to secure the safety of the vessel,
- The oil escaped from the ship as a result of the damage to the ship despite reasonable measures to prevent the escape,
- The oil escaped because of leakage and as soon as practicable after discovery, all reasonable steps were taken for stopping or reducing it¹⁰²⁸ and the subsection 2(3) provides:

If in any prosecution for an offence under subsection (1) of this section it is proved that a mixture containing oil was discharged from a ship, tanker or offshore installation in the part of the prohibited area which adjoins the territorial waters to the seaward end thereof, it shall be deemed, unless the contrary is proved, that such mixture contained one hundred parts of more of oil in a million parts of the mixture.

The above section came by way of an amendment to the 1971 Act as a result of the case of *S v Peppas*.¹⁰²⁹ The case arose in 1977 when a Greek Master of the *Pearl Merchant* within the prohibited area discharged oil into the coast of East London. A dark brown substance was found to have been emitted from the ship's side through a discharge pipe. Samples were taken by officials of the patrol vessel and sent to a laboratory for testing and it was found to be greatly in excess of the 100 parts per million which was the criteria for the definition of oil mixture under the Act.

It was argued by the defence that the method for sampling was inadequate, because the sample which had been taken from the sea was not necessarily representative of the discharge of a mixture from the pipe. It was pointed out that sea water has certain properties which may have affected the concentration of the mixture. On appeal, the court held that in the absence of any presumption or other special provisions relieving the state of that burden, the State must necessarily prove, beyond reasonable doubt, the occurrences of the event which constitutes the offence namely that where a mixture containing oil is discharged into the sea, the event occurs only if such mixture contains not less than 100 parts of mineral oil in one million parts of the mixture. The state had not therefore discharged the onus upon it and the conviction was quashed on that ground. With the amendment however, the state is discharged

¹⁰²⁸S 2(1) (a) – (c).

¹⁰²⁹1977 (2) SA 643 (A).

of this onus although this brings the section into direct conflict with the Bill of Rights.¹⁰³⁰ This is because the onus is on the state to prove that there was a discharge beyond all reasonable doubt and this onus does not shift in criminal matters. The amendment also remedied the shortcomings of the 1971 Act and was designed to implement the provisions of the International Convention on Civil Liability for Oil Pollution Damage, 1969 to which South Africa had acceded after 1971.¹⁰³¹

7.4.3 Civil liability provisions

The Act also provides for civil liability by providing for liability for loss, damage or costs caused by discharge of oil into the sea. Such liability is also strict and applies not only to vessels but also to offshore installations.¹⁰³² It provides that the owner of the ship shall be liable for (a) any loss or damage caused elsewhere than on the ship, tanker, or offshore installation in the area of the Republic by pollution resulting from the discharge of oil from the ship¹⁰³³ and (b) ...the costs of any measures taken or caused to be taken by the Minister in terms of this Act after the incident has occurred in respect of such ship, tanker or offshore installation,¹⁰³⁴ for the purpose of reducing loss or damage caused as contemplated in paragraph (a) through the discharge of any oil, or for the purpose of preventing such loss or damage being caused, whether or not a discharge is contemplated in paragraph (a) has occurred or whether or not such discharge in fact subsequently occurs.

The above provision will cover for instance the costs of various preventive measures taken after a spill occurs. This has been used to cover the cost of the cleaning of the spill of the *Apollo Sea* discussed above and it is also suggested would cover rehabilitative measures.

The Department of Environmental Affairs is responsible for the cleaning-up operations when an oil spill has taken place.¹⁰³⁵

The main criticism levelled against this Act is that it overlaps with the International Convention for the Prevention of Pollution from Ships (MARPOL) Act in so far as the regulation of operational discharge is concerned.¹⁰³⁶ It has been argued by the learned author

¹⁰³⁰See Glazewski op cit 658 fn 175.

¹⁰³¹Rabie & Lusher op cit 171.

¹⁰³²Glazewski *ibid*.

¹⁰³³S 9(1) (a).

¹⁰³⁴S 9(1) (b).

¹⁰³⁵See Fugle & Rabie op cit at 477.

¹⁰³⁶Kidd op cit 157.

that the treatment of the issue of civil liability under the Act¹⁰³⁷ corresponds with liability under the CLC 1969 context, yet makes liability applicable in cases of discharge as defined in the MARPOL context.¹⁰³⁸ Thus liability under the MARPOL and the CLC 1969 are two different things. Liability issues under the CLC 1969 also connote compensation payable to the person injured through oil pollution related activities. South Africa has ratified the CLC, but the limitation figures of that regime are based on the 1957 Limitation of Liability Convention.¹⁰³⁹

Henderson also submits that within the context of the Polluter Pays Principle (PPP) under South African Law, the PPP ‘calls for a variation and extension of conventional and traditional forms of liability and compensation, based on considerations other than delictual or other common law causes of action’.¹⁰⁴⁰ The Polluter Pays Principle ensures the channelling of liability appropriately to those who by their conduct cause the pollution.

Perhaps a separation of these two issues of prevention of oil pollution damage and liability for oil damage will make for a more tidy enactment.

7.4.4 National Environmental Management (NEM) Integrated Coastal Management Act¹⁰⁴¹

Marine pollution arising from dumping of oil and other substances was also a problem which confronted the international community. The response of the international community was the passing of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other matter 1972 (the London Convention).¹⁰⁴² South Africa followed suit with the passing of the Dumping at Sea Control Act 73 of 1980.¹⁰⁴³ This Act, which is more or less modelled after the London Convention, was also administered by the Department of Environmental Affairs under the guidance of the Minister. This Dumping Convention distinguished between different categories of substances which were considered as hazardous and capable of causing harm to the marine environment and therefore prohibited

¹⁰³⁷i.e the Marine Pollution (Control and Civil Liability Act) 6 of 1981.

¹⁰³⁸Ibid.

¹⁰³⁹See Hare Limitation of Liability Part 11, op cit 1.

¹⁰⁴⁰See P Henderson Distinctive Principles of South African Environmental Law (2001) 8 SAJELP 139 at 174.

¹⁰⁴¹No 24 of 2008 which came into effect through GG No. 31884 of 11 February 2009.

¹⁰⁴²Signed in November 1972 and entered into force on August 30 1975.

¹⁰⁴³This Act has however been repealed and is no longer in force.

them.¹⁰⁴⁴ There were amendments to the dumping convention in 1978 and 1980. A Protocol was added to the London Convention in 1996 which is yet to come into force.

The Dumping of Sea Control Act has been repealed.¹⁰⁴⁵ The Act which replaced it is the National Environmental Management (NEM) Integrated Coastal Management Act¹⁰⁴⁶ which defines dumping at sea as:

- (a) any deliberate disposal into the sea of any waste or material other than operational waste from a vessel, aircraft, platform or other man-made structure at sea;
- (b) any deliberate disposal into the sea of a vessel, aircraft, platform or other man-made structure at sea;
- (c) any storage of any waste or other material on or in the seabed, its subsoil or substrata; or
- (d) any abandonment or toppling at site of a platform or other structure at sea, for the sole purpose of deliberate disposal, but “dumping at sea” does not include—
 - (i) the lawful disposal at sea through sea out-fall pipelines of any waste or other material generated on land;
 - (ii) the lawful depositing of any substance or placing or abandoning of anything in the sea for a purpose other than mere disposal of it; or
 - (iii) disposing of or storing in the sea any tailings or other material from the bed or subsoil of coastal waters generated by the lawful exploration, exploitation and associated off-shore processing of mineral resources from the bed, subsoil or substrata of the sea;¹⁰⁴⁷

The Act creates three categories of offences. Under category one offence a person is guilty of the following: - (a) where a person discharges effluent originating from land into coastal waters in contravention of section 69 of the Act,¹⁰⁴⁸ incinerates at sea any wastes or material in contravention of section 70¹⁰⁴⁹ or dumps any waste or material at sea without any dumping permit.¹⁰⁵⁰ A person is guilty of category two offence if he fails to repair or comply with a removal notice¹⁰⁵¹ and a person is guilty of a category three offence if the person fails to

¹⁰⁴⁴ Annex 1 contains the list of such hazardous materials while the dumping of others materials, though permitted in specified areas, is controlled by the grants of permits by the coastal state.

¹⁰⁴⁵ The Dumping At Sea Act, 1980 has been replaced by the National Environmental Management (NEM) Integrated Coastal Management Act which now deals with dumping at sea matters.

¹⁰⁴⁶ See n 1041.

¹⁰⁴⁷S. 1.

¹⁰⁴⁸S 79 (1) (a)

¹⁰⁴⁹S 79 (1) (b)

¹⁰⁵⁰S 79 (1) (e)

¹⁰⁵¹S 79 (2)

comply with a condition subject to which authorisation has been issued¹⁰⁵² or fails to comply with a coastal protection notice or access notice issued in terms of section 59.¹⁰⁵³

- (1) A person who is guilty of a category one offence referred to in section 79 (1) may be sentenced to a fine of up to R5 000 000 or to imprisonment for a period of up to ten years, or to both such fine and imprisonment.
- (2) A person who is guilty of a category two offence referred to in section 79 (2) may be sentenced on a first conviction for that offence to a fine of up to R500 000 or to imprisonment or community service for a period of up to five years, or to both such fine, imprisonment or community service.
- (3) A person who is guilty of a category three offence referred to in section 79 (3) may be sentenced on a first conviction for that offence to a fine of up to R50 000 or community service for a period of up to six months or to both such fine and community service.
- (4) A person who is guilty of a category two or three offence may be sentenced on a second conviction for that offence as if he or she has committed a category one or two offence.

There is a proposed regulation under the Act for the screening of dredged materials for marine disposal which is yet to come into force.¹⁰⁵⁴

South Africa has ratified the Protocol to the London Dumping Convention.¹⁰⁵⁵

The Protocol to the London Convention contains a ‘reverse list’. The Protocol is much more restrictive in that it provides that contracting parties “...shall prohibit the dumping of any wastes, or other matter with the exception of those listed in annexure 1”. These include: dredged material; sewage sludge; fish waste (or material resulting from industrial fish processing operations); vessels and platforms or other man-made structures at sea; and inert, inorganic geological material. There are certain limited exceptions which permit dumping to be carried out, for instance “... in cases of *force majeure* caused by stress of weather, or in any case which constitutes a danger to human life or real threat to vessels.”¹⁰⁵⁶

It should also be noted that in the Protocol to the London Dumping Convention, 1996, the definition of ‘sea’ includes internal waters, territorial sea and exclusive economic zone. The

¹⁰⁵²S 79(3) (a)

¹⁰⁵³S 79(3) (b)

¹⁰⁵⁴ See Draft National Action List for the screening of dredged material proposal for Marine Disposal, GN 867 of 9 December 2011.

¹⁰⁵⁵South Africa signed the original Convention in 1972 and acceded to it in 1978. It also signed and ratified the Protocol on 23 December 1998.

¹⁰⁵⁶Art 5.

Schedule to the Act¹⁰⁵⁷ follows this definition of sea given above.¹⁰⁵⁸ The Act does not however apply in internal waters, which would include any harbours, fishing harbours, Walvis Bay, Saldanha Bay, Hout Bay, False Bay, the Knysna Lagoon, the Bay of Natal and Richards Bay.¹⁰⁵⁹

There appears to be a conflict here between the Protocol to the London Dumping Convention and the new Act¹⁰⁶⁰. Under the new Act, the definition of internal waters is not given. However under the Marine Pollution (Control and Civil Liability) Act,¹⁰⁶¹ internal waters mean the definition given in section 1 of the Marine Traffic Act.¹⁰⁶² This section has been amended by section 3(1) of the Maritime Zones Act¹⁰⁶³ which defined internal waters as:

The internal waters of the Republic shall comprise-

- (a) all waters landward of the baselines; and
- (b) all harbours

The inference to be drawn from this is that since dumping of oil may occur in the harbours which are part of the internal waters of the Republic, the NEM Integrated Coastal Management Act as it is will not apply unless the Act is amended to bring it in line with the Protocol to the London Convention. As a corollary, the Protocol to the London Convention, 1996 is inapplicable in South Africa because there is no enabling law yet to give it effect. Clearly the Republic of South Africa needs to do more to fulfil its obligation under the London Dumping Convention and its Protocol.

Marine pollution of the environment also occurs in inland waters as a result of land based activities. Waste generated on land is often deliberately pumped into the sea.¹⁰⁶⁴ There are over 60 licensed pipelines discharging effluent along the South African coast: one-third discharge domestic sewage- about 66 million litres per day (66ML/d), half discharge

¹⁰⁵⁷ The Shipping General Amendment Act No. 23, 1997.

¹⁰⁵⁸ See s 1.

¹⁰⁵⁹ Dugard in Kidd op cit 155.

¹⁰⁶⁰ Act No. 23 of 1997 (n 1021 above) which came into effect through Government Gazette No. 18130 of 18 July, 1997.

¹⁰⁶¹ No. 6 1981 as amended by s 27 of the Shipping General Amendment Act No. 23, 1997.

¹⁰⁶² No. 2 1981.

¹⁰⁶³ No. 15 1994.

¹⁰⁶⁴ C Bosman & M Kidd in Strydom, & King (eds.) *Environmental Management in South Africa* (2nd edition) 692.

industrial wastes (230 ML/d), and the remainder discharge mixed effluent.¹⁰⁶⁵ There are other South African laws which deal with this. For instance, the National Water Act¹⁰⁶⁶ deals with freshwater pollution. The Health Act¹⁰⁶⁷ which has as its objective the promotion of a healthy and safe environment¹⁰⁶⁸ also has certain provisions which relate to ‘waste’, of which solid waste would be an example. Our attention shall now turn to this aspect of pollution of freshwater by pollution especially arising from oil related substances and perhaps mining activities.

7.4.5 Statutes dealing with pollution from land- based activities- inland pollution of freshwaters

7.4.5.1 The National Water Act

The Water Act contains a number of provisions relating to the taking of steps in order to prevent marine pollution emanating from substances on land.¹⁰⁶⁹ The Act has as one of its objectives the reduction and prevention of pollution and degradation of water resources.¹⁰⁷⁰ The strategies adopted by the drafters of the Act to achieve this end is to ensure that any person who has control over land on which anything is being done, or was done which involved or involves the use of substances (whether solid, liquid, vapour or gas or combination thereof) capable of causing water pollution must take steps to ensure that such act does not cause pollution to water resource and must also take reasonable steps to prevent pollution or degradation of the environment from occurring. This purpose is in furtherance of the objectives of the National Environmental Management Act (NEMA)¹⁰⁷¹ which provides that the nation’s resources are to be managed in the way and manner that is in accordance with the objectives of the Act. The National Water Act (henceforth NWA) provides for the establishment of a catchment management agency (CMA) which may direct a person who fails to take such measures to take the measures within a specified time.¹⁰⁷² The measures referred to in section 19(1) may include measures to (a) cease, modify or control an act or process causing the pollution; (b) comply with any prescribed waste standard or management practice; (c) contain or prevent the movement of pollutants; (d) eliminate any source of the

¹⁰⁶⁵Glazewski *op cit* 638.

¹⁰⁶⁶36 1998.

¹⁰⁶⁷63 of 1977. This Act has been repealed and provincial authorities have enacted its equivalent in their provinces.

¹⁰⁶⁸S 14(1) (c).

¹⁰⁶⁹Rabie & Lusher *op cit* 176.

¹⁰⁷⁰S 2(h)

¹⁰⁷¹Act 107 of 1998. See also discussion in chapter 2 on precautionary principle.

¹⁰⁷²S 19(3) of the National Water Act (NWA).

pollution; (e) remedy the effects of the pollution; and (f) remedy the effects of any disturbance to the bed and banks of a watercourse.¹⁰⁷³

By far one of the most useful provisions in the determination of the incidents of liability is that contained in section 20 the NWA which gives it an edge over the complex provisions of the NEMA. Section 20 provides for the control of emergency incidents. An incident is defined in the NWA as an accident in which a substance (a) pollutes or has the potential to pollute a water resource or (b) has or is likely to have a detrimental effect on a water resource¹⁰⁷⁴. This definition of an incident is all embracing and it would include incidents arising from substances that are not oil related, for instance the pollution from a disused mine.¹⁰⁷⁵ Furthermore and in relation to oil substances, an incident is defined in section 1 of the Marine Pollution (Control and Civil Liability) Act¹⁰⁷⁶ as:

...any occurrence, or series of occurrences having the same origin, which causes a discharge of oil from any ship, tanker or offshore installation or which creates the likelihood of such a discharge;

The same section 20 also provides for the definition of a responsible person which includes (a) a person who is responsible for the incident: (b) owns the substance involved in the incident: or (c) was in control of the substance involved in the incident at the time of the incident.¹⁰⁷⁷ This definition is wide enough to cover persons who are in control of the substance causing the pollution and those who own the substance causing the pollution. For instance in the case of a petrol service station, it would cover the owner of the filling station from which petroleum spilled from an underground tank, the lessee, if he is different from the owner, and a contractor working on the site if he was responsible for the spill incident. The section imposes strict liability on these categories of persons and they are deemed to be responsible persons. The catchment agency discussed above may recover "...all reasonable costs incurred from every person jointly and severally liable".¹⁰⁷⁸

The obvious advantage of this provision is that it enables the incidents of liability to be clear on whom it falls. While the incident is still fresh and the environment is in danger of being

¹⁰⁷³S 19(2) ibid.

¹⁰⁷⁴S 20(1) (a) and (b).

¹⁰⁷⁵See *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry*(2006) SCA 65 (RSA).

¹⁰⁷⁶No 6 of 1981 as amended.

¹⁰⁷⁷S 20(2).

¹⁰⁷⁸S 20(7).

degraded, the “relevant authority”¹⁰⁷⁹ moves in quickly to contain and minimise the effects of the emergency incident, undertake clean-up procedures, and remedy the effects of the incident.¹⁰⁸⁰ A relevant authority may claim reimbursement of all reasonable costs incurred in terms of subsection 8 from every responsible person jointly and severally.¹⁰⁸¹

The Act also contains criminal provisions relating to freshwater pollution. The Act makes it an offence to unlawfully and intentionally or negligently commit an act or omission which pollutes or is likely to pollute a water resource;¹⁰⁸² and intentionally or negligently to commit an act or omission which detrimentally affects or is likely to affect a water resource.¹⁰⁸³ The penalty for contravention of section 151 is a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or both a fine and such imprisonment.¹⁰⁸⁴

The rationale for this was clearly stated by Kotze and Bosman as the need to preserve and conserve water in water stressed country like South Africa. The authors declared:

The sustainability of water provision, and the costs associated with the prevention and remediation of pollution of South African water resources by individuals and industry alike, is an ever-continuing concern in a country with an average rainfall is far below international norms.¹⁰⁸⁵

This is in accordance with the South African Constitution which guarantees a constitutional right of access to water for every citizen.¹⁰⁸⁶

¹⁰⁷⁹S 20 of the NWA is in *pari materia* with section 30 of NEMA.

¹⁰⁸⁰S 30 (8) of NEMA.

¹⁰⁸¹S 30(9).

¹⁰⁸²S 151(1) (i).

¹⁰⁸³S 151(1) (j).

¹⁰⁸⁴S.151(2).

¹⁰⁸⁵L Kotze and C Bosman *A Legal Analysis of the Proposed Waste Discharge System in Terms of the South African Environmental and Water Law Framework* *Obiter* (2006) vol.27 1 128 at 136.

¹⁰⁸⁶S 27 of the South African Constitution states, amongst others that:

“S 27 (1) Everyone has the right to have access to –

- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.”

7.4.5.2 The Water Services Act¹⁰⁸⁷

The Water Services Act contains provisions which deal with the provision of water services including sanitation by municipal and local authorities. The specific objectives of the Act include:

- (a) The right of access to basic water supply and the right to basic sanitation services necessary to secure sufficient water and an environment not harmful to human health and wellbeing;
- (b) ...
- (c) The preparation and adoption of water services development plans by water services authorities¹⁰⁸⁸

The Act defines “water services” as water supply services and sanitation services” and this includes

...the collection, removal, disposal, or purification of human excreta, domestic waste- water, sewage, and effluent resulting from the use of water for commercial purposes.¹⁰⁸⁹

The Water Services Act provides in section 7 that no person may dispose of industrial effluent in any manner other than that provided by the water services provider nominated by the water services authority having jurisdiction in the area in question.¹⁰⁹⁰ Section 9(1) provides that the Minister may, from time to time, prescribe compulsory national standards relating to, *inter alia*, the quality of water taken from or discharged into any water services which (a) provides for water for industrial use; or (b) controls a system through which industrial effluent is disposed of, must make by-laws providing for service standards, technical conditions, the determination of tariff structures, payment and collection of money due, and circumstances when such provision or disposal can be limited and prohibited.¹⁰⁹¹

Section 32 (e) of the WSA provides that every Water Board must obtain a permit, authorisation or licences from the relevant authority for abstracting water or discharging effluent.

Regulations were passed in 2001 prescribing the minimum standard¹⁰⁹² as –

- (a) the provision of appropriate education in respect of effective water use; and

¹⁰⁸⁷Act 108 of 1997 as amended by Act 30 of 2004. See GG 18522 of 19 December 1997.

¹⁰⁸⁸S 1(xix).

¹⁰⁸⁹S 7(1).

¹⁰⁹⁰S 7(2).

¹⁰⁹¹S 21(3).

¹⁰⁹²See Regulation 3 in Notice No. 509 in Government Gazette No. 7079 dated 8 June 2001.

- (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-¹⁰⁹³
 - (i) at a minimum flow rate of not less than 10 litres per minute;
 - (ii) within 200 metres of a household; and
 - (iii) with effectiveness such that no consumer is without supply for more than seven full days in any year.¹⁰⁹⁴

7.4.5.3 *Other Acts*

- (1) Petroleum Pipelines Act¹⁰⁹⁵

The objects of the Petroleum Pipelines Act (PPA) are:

- (a) [to] promote competition in the construction and operation of petroleum pipelines, loading and operation of petroleum pipelines, loading facilities and storage facilities;
- (b) promote the efficient, sustainable and orderly development, operation and use of petroleum pipelines and storage facilities;
- (c) ensure safe, efficient, economic and environmentally responsible transport, loading and storage of petroleum;¹⁰⁹⁶

Section 15 (1) provides that a person may not without a licence issued by the Authority:-

- (a) construct a petroleum pipeline, a loading facility or a storage facility or
- (b) operate a petroleum pipeline, a loading facility or a storage facility or

Section 16 contains important provisions which an applicant must be comply with to obtain a petroleum licence. The section provides:

¹⁰⁹³This regulation became the subject of challenge in a case involving *Lindiwe Mazibuko & ors v City of Johannesburg & ors* (2010) 4 SA 1 (CC). In this case it was contended that the Municipality of Johannesburg denied the applicants access to water by switching off free water supply and installing prepaid meters in the premises of the applicant. The case concerns two major issues: the first is whether the City's policy in relation to the supply of free basic water, and particularly, its decision to supply 6 kilolitres of free water per month to every accountholder in the city (the Free Basic Water policy) is in conflict with section 27 of the Constitution or section 11 of the Water Services Act. The second major issue is whether the installation of pre-paid water meters by the first and second respondents in Phiri was lawful. After careful consideration of the issues, this judgment finds that the City's Free Basic Water policy falls within the bounds of reasonableness and therefore is not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri is found to be lawful. Accordingly, the orders made by the Supreme Court of Appeal and the High Court were set aside.

¹⁰⁹⁴Ibid.

¹⁰⁹⁵Act 60 2003 came into effect vide GG No 26434 of June 7 2004.

¹⁰⁹⁶S 2 (1) – (c) of the Act.

(1) Any person who has to apply for a licence in terms of section 15 must be the owner of the pipeline or facility in question and must do so in the form and in accordance with the procedure prescribed by rule, and an application must be accompanied by the application fee prescribed by rule.

(2) Any application contemplated in subsection (1) must include -

- (a) the name, company number of any) and principal place of business of the applicant;
- (b) particulars of the owners or shareholders of the applicant if the applicant is not a natural person;
- (c) documents demonstrating the administrative, financial and technical abilities of the applicant;
- (d) a description of the proposed pipeline, loading facility or storage facility to be constructed or operated, including maps and diagrams where appropriate,
- (e) a description of the tariff policies to be applied;
- (f) the plans and the ability of the applicant to comply with applicable labour, health, safety, security and environmental legislation;
- (g) the identity and particulars of the individual who will be responsible for the control, management and operation of the pipeline or facility in question; and
- (h) such other particulars as may be prescribed by rule.¹⁰⁹⁷

(2) The National Environmental Management: Waste Act¹⁰⁹⁸ is dedicated to the control of environmental pollution generally.¹⁰⁹⁹ The Act makes provision for the prevention of contamination of underground water resources by waste landfill sites.¹¹⁰⁰ It provides that no person may establish, provide, or operate a waste disposal site without permit.¹¹⁰¹ Section 20 is administered by the Department of Water Affairs and Forestry, while the Act as a whole is administered by the Department of

¹⁰⁹⁷ S 16 (1), (2) (a) – (h) of the Act.

¹⁰⁹⁸ 59 of 2008.

¹⁰⁹⁹Glazewski op cit 627.

¹¹⁰⁰S. 20.

¹¹⁰¹S 20(1).

Environmental Affairs.¹¹⁰² Liability for environmental damage is dealt with in section 31A of the Environmental Conservation Act,¹¹⁰³ which directs a polluter to take steps to prevent or minimise damage to the environment. Such a polluter may also be directed to rehabilitate damage, caused to the environment. This ‘duty’ is the “[d]uty of care and remediation of the environment” imposed on a polluter for the purpose of protecting the environment from environmental harm and where damage results from the harm, the polluter is to remediate the damage.¹¹⁰⁴ Section 28 provides that:

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

The issue that has generated controversy in the above quoted section is whether the section applies retrospectively. This is indicated in the phrase “...causes, has *caused* or may cause...” (own italics). Any of the above persons who has caused pollution in the past is obliged to ensure that reasonable measures are taken to prevent “...such pollution or degradation from occurring, continuing or recurring...” Glazewski submits that the section is retrospective.¹¹⁰⁵ However, in the case of *Bareki No & ors v Gencor & ors*, it was held that the section is not retrospective.¹¹⁰⁶

Du Plessis and Kotze submit that in order to establish accountability and liability, it is essential that polluters be held liable for past, present and future polluting activities. The learned authors posit will be in accordance with the objectives of NEMA and the polluter pays principle.¹¹⁰⁷

(3) The Minerals and Petroleum Resources Development Act¹¹⁰⁸ (MPRDA) repealed the Minerals Act¹¹⁰⁹ and provided for a set of regulations on water management and pollution control.¹¹¹⁰

Reg 68(1)

¹¹⁰²Glazewski, at 628.

¹¹⁰³ This section has not been repealed by the NEM: Waste Act, 2008. The section empowers the Minister of Environmental Affairs and Tourism to order any person to cease any activity which in his or her opinion may seriously damage, endanger or detrimentally affect the environment.

¹¹⁰⁴ S 28 of NEMA. See further discussions below.

¹¹⁰⁵ Glazewski at 150.

¹¹⁰⁶ (2006) 1 SA 432 (T) See further discussion on this point below. See also W du Plessis & L Kotze Absolving historical polluters from liability through restrictive judicial interpretation: some thoughts on *Bareki NO v Gencor Ltd.*, L Feris Risk Management and Liability for Environmental Harm Caused by GMOS- The South African Regulatory Framework (2006) PER 1.

¹¹⁰⁷ Du Plessis and Kotze at 190.

¹¹⁰⁸28 of 2002.

¹¹⁰⁹No 50 1991 but the regulations made under the Act have not been repealed.

¹¹¹⁰ See Reg 68 of the MPRDA R 527 GG no. 26275 dated 23 April 2004.

The provisions of the National Water Act 1998 (Act 36 of 1998) shall apply to the water management and pollution control at all proposed or existing prospecting or mining operations.

Reg 68(2)

An assessment of impacts relating to water management and pollution control at proposed prospecting or mining operations, where appropriate, must form part of the environmental impact assessment report and environmental management programme or environmental management plan, as the case may be.

One of the regulations provide that ‘... in no case may water containing any injurious matter in suspension or solution be permitted to escape without having been previously rendered innocuous’.¹¹¹¹

(4) MPRDA Regulations Dealing with Petroleum Resources Regulations

The coming into force of the MPRDA Act (the Act) is accompanied by a comprehensive set of regulations which include extensive environmental provisions. The regulations of 2004 now provide for various details to implement the new Act and include extensive provisions relating to the environment. Some of the provisions relating to petroleum exploration and productions are contained in chapter 6 of the Act titled: “PETROLEUM EXPLORATION AND PRODUCTION” Section 45(1) provides for remedial measures to be taken by the Minister.

(1) If any prospecting, mining, reconnaissance or production operations cause or results in ecological degradation, pollution or environmental damage which may be harmful to health or well-being of anyone and requires urgent remedial measures, the Minister may direct the holder of the relevant right, permit or permission to-

- (a) investigate, evaluate, assess and report on the impact of any pollution or ecological degradation;
- (b) take such measures as may be specified in such directive; and
- (c) complete such measures as may be specified in the directive¹¹¹²

(2) (a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the health and well-being of any affected person or to remedy ecological degradation and to stop pollution of the environment.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

¹¹¹¹ Reg 5.9.2, see also the case of *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd and anor* (1997) (4) SA 578 (W).

¹¹¹² Note that this section has been substituted by s 36(a) of the MPRDA Amendment Act 49 of 2008 which is to come into operation by 7 December 2014.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an *ex parte* application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.¹¹¹³

(5) The National Environmental Management Act (NEMA)¹¹¹⁴

(6) The National Environmental Management: Waste Act¹¹¹⁵

7.5.5.1 *The National Environmental Management Act*

(NEMA) is a national Act which contains provisions that are useful for the management and the protection of the environment from harm or degradation. With regard to the duty of care and remediation of environmental damage section 28 (1) provides as follows:

(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continue occurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

(1)(A) Subsection (1) also applies to a significant pollution or degradation that-

(a) occurred before the commencement of this Act;

(b) arises or is likely to arise at a different time from the actual activity that caused the contamination; or

(c) arises through an act or activity of a person that results in a change to pre-existing contamination.¹¹¹⁶

From the forgoing, it can be deduced that the NEMA Act (henceforth the Act) generally imposes a duty on every person to prevent pollution which may cause harm to the environment, if it is possible. In fact the Act uses the phrase ‘significant pollution’ which presupposes that some form of pollution may not be significant and so will not constitute

¹¹¹³ Other powers of the Minister are power to remedy environmental damage in certain instances (s 46 (1), power to grant permit and duration of exploration right (s 80), a permit granted under this section is valid for a period not exceeding 30 years.

¹¹¹⁴ Act 107 of 1998. See previous discussion in s 2.3.1 above. See also J Nel and W du Plessis An Evaluation of NEMA based on a generic framework for environmental framework legislation (2001) 8 SAJELP 1.

¹¹¹⁵ 59 of 2008. See further discussion below.

¹¹¹⁶ Kidd op cit 149.

harm to the environment. How high is the threshold set by ‘significant pollution or degradation’? Soltau¹¹¹⁷ submits that this will vary according to whether ‘significant’ is interpreted to mean pollution or degradation which entails harm to humans or damage to property, or whether what is required is interference with ecosystems which is more than negligible or superficial. The author continues ...[h]uman activities inevitably have some impact on the environment. Impacts that are irreversible, or that affect scarce or non-renewable resources ought to be characterised as ‘significant’. Furthermore, the cumulative effect of pollution, not necessarily the individual emission, may be decisive for the question of significance.¹¹¹⁸

7.5.5.2 *Liability provisions under NEMA*

This thesis has earlier considered the use of strict liability as a tool in the determination of liability to the environment.¹¹¹⁹ The shortcomings of the common law as a means of preventing harm to the environment have also been discussed.¹¹²⁰ Bearing this in mind I now turn to consider the provisions of strict liability as a means for the recovery of environmental damage under NEMA.¹¹²¹

The duty to take reasonable corrective measures in terms of s 28(1) of NEMA is what came for determination in the *Bareki*¹¹²² case. The facts of the case are as follows. The first plaintiff, a traditional leader brought the action in his own interest and the in the interest of the Bareki tribe and the inhabitants of the Heuninglevei community of the North West Province of South Africa. The first defendant, Gencor Ltd., is a majority shareholder in Gefco (the holding company under which mining operations were carried out in the North West Province between 1976 and 1981. The first defendant was involved in the mining of asbestos within the period and between 1981 and 1985, mining activities had been discontinued. The plaintiffs alleged that between the period specified, mining activities carried on by the defendants had caused significant pollution in the area through the distribution of asbestos fibres. The plaintiffs claim that this pollution constitutes a serious health risk to residents and occupiers of the area concerned, and a significant threat to the

¹¹¹⁷F Soltau The National Environmental Management Act and Liability for Environmental Damage (1999) 6 SAJELP 33 at 44.

¹¹¹⁸Soltau op cit 45.

¹¹¹⁹See discussion in chapter 2.

¹¹²⁰See chapter 5.

¹¹²¹This section will also discuss the problem associated with the recovery of cost and remediation of polluted land by historical polluters.

¹¹²² See s 7.4 .3.2 for the citation of the case.

environmental integrity of the region. The plaintiffs therefore ask for monetary cost as compensation and the rehabilitatin of the affected areas through the Director-General of the Department of Environmental Affairs and Tourism. The plaintiffs accordingly sought for an order against the defendants and the government directing the D-G to determine, commence and continue with reasonable measures to rehabilitate the area concerned.

One of the issues that came for determination at the hearing was whether s 28 of NEMA was retrospective in operation and if so whether it applies to pollution that occurred prior to 29 January 1999 (the day NEMA commenced). The plaintiffs also sought to know if the obligations that were imposed under the Minerals and Works Act, 1967, which had been repealed by the MPRDA Act 28 of 2002, (although the regulations were still in force) are still continuing and binding on the defendants, notwithstanding that they are no longer involved in mining activities on the plaintiffs' land.

The court decided, amongst other things, that the obligation to take reasonable corrective measures in relation to pollution was strict (i.e. fault in the form of negligence or intention was not a requirement to establish liability). For this reason, the court held that the legislature could not have intended the obligations to apply retrospectively. Furthermore, the court held that section 28 (12) of NEMA which obligates the D-G of the Department of Environmental Affairs and Tourism to carry out remediation of the polluted land and later reclaim the costs from the denfendants, could not apply to the defendants before the commencement of the Act.

The learned authors Nel and du Plessis on the issue of the requirement of fault under s 28 of NEMA argued that s 28 of NEMA does not introduce strict liability (absence of fault) in the real sense of the word, although it does provide for the introduction of the polluter pays principle.¹¹²³ Section 28 (8) introduces the polluter pays principle as a tool of recovering costs expended in the remediation of the environment. It provides that:

Subject to subsection (9), the Director-General or provincial head of departmentmay recover costs for reasonable remedial measures to be undertaken under subsection (7), before such measures are taken and all costs incurred as a result of acting under subsection (7) from any or all of the following persons—

- (a) any person who is or was responsible for, or who directly or indirectly contributed to , the pollution or degradation or the potential pollution or degradation;

¹¹²³Nel and du Plessis (n 1114) fn 132.

(b) the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title;

(c) the person in control of the land or any person who has or had a right to use the land at the time when—

(i) the activity or the process is or was performed or undertaken; or

(ii) the situation came about; or

(d) any person who negligently failed to prevent—

(i) the activity or the process being performed or undertaken; or

(ii) the situation from coming about:

Provided that such person failed to take the measures required of him or her under subsection (1).¹¹²⁴

The measures being contemplated under subsection 1 of section 28 of NEMA are referred to as 'reasonable measures' taken to prevent the pollution and if prevention is not possible to 'minimise' and 'rectify' such pollution or degradation of the environment. In determining what is considered to be 'reasonable measures' the concept of negligence will play a central role.¹¹²⁵ As we submitted earlier under the common law, especially with regard to the tort of negligence and nuisance, reasonable foreseeability is a requisite.¹¹²⁶ Under the common law, the test for negligence has two aspects: the foreseeability of the harm and the question of whether the defendant took reasonable steps to avert it.¹¹²⁷ Applying this to pollution cases, the reasonable foreseeability of the harm will be a crucial factor.¹¹²⁸ Once it is established that the harm was reasonably foreseeable the question to be asked is whether the defendant took reasonable steps to avoid the harm.¹¹²⁹ In a case the Supreme Court of Appeal outlined the following four considerations in deciding whether reasonable steps had been taken to prevent harm:

- the degree or extent of the risk created by the actor's conduct;
- the gravity of the possible consequences if the risk of harm materialises;
- the utility of the actor's conduct; and

¹¹²⁴NEMA has been amended by Act 14 of 2009.

¹¹²⁵Soltau at 45.

¹¹²⁶See discussions in chapter 5 on the requirement for reasonable foreseeability in negligence.

¹¹²⁷Soltau ,ibid.

¹¹²⁸Ibid. See further *Cambridge Water Company v Eastern Counties Leather* supra, although it is doubtful if this case will be applied under South African legal system.

¹¹²⁹Soltau, id.

- the burden of eliminating the risk or harm.¹¹³⁰

Such reasonable measures might include for instance the purchase of Booms and the installation of such equipment in the event of an oil spill without even waiting to ascertain who is liable for negligence because the need to eliminate the risk or harm to the environment is paramount. Such cost can later be recovered from the liable party by the person who expended the cost of the purchase. The relevant authority may itself carry out such remediation and recover costs thereof.¹¹³¹

Section 2 (4) (p) of NEMA addresses the allocation of cost through the polluter pays principle. It provides:

The cost of remedying pollution, environmental degradation and consequent health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.

According to section 28(8) the costs incurred can be recovered from, *inter alia*, the following persons: any person who was responsible for the pollution, the owner of the land at the time when the pollution or potential for pollution occurred or that owner's successor-in-title, or any person who negligently failed to prevent the activity or process being performed or undertaken or the situation from coming about. Clearly fault on the part of the latter category of persons would have to be proved but what about the others, such as successors-in-title, on whose part liability would appear to be strict? Soltau further submits that on a proper construction of section 28 (8), and with the exception of the class of persons referred to in subsection 8(d), liability for clean-up costs is strict.¹¹³²

Kidd however disagrees with this position.¹¹³³ He argues that section 28(8) does provide for a list of persons who are potentially liable for the recovery of costs expended by the competent authority who carries out remedial measures to remediate the pollution but that section is "fraught with potential pitfalls"¹¹³⁴ The class of persons as provided in subsection 8 of section 28 (in a paraphrase) are:

- The person responsible or was responsible for or who directly or indirectly contributed to the pollution or degradation

¹¹³⁰See *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) per Scott JA.

¹¹³¹Soltau at 47.

¹¹³²Soltau at 48.

¹¹³³See M Kidd Some Thoughts on Statutory Directives Addressing Environmental Damage in South Africa (2003) 10 SAJELP 201.

¹¹³⁴Kidd op cit 205.

- The owner of the land at the time when the pollution occurred or his successors-in-title
- Any person who negligently failed to prevent the activity or the process being performed or undertaken or the situation from coming about¹¹³⁵

Provided that the person responsible is able to provide a defence that he has taken ‘reasonable measures’ to prevent the pollution and even after the pollution has taken remedial measures he considers to be reasonable. He poses a question that where the competent authority takes measures to remediate a polluted land and chooses to recover the costs of remediation from the person responsible, how does the competent authority or department recover the costs? He submits that the defence of the responsible party that it has taken ‘reasonable measures’ as required by section 28(1) and are therefore not liable for clean-up costs or other costs incurred by the authorities, cannot be a defence but an integral part of the identification of the defendant.¹¹³⁶ He further submits that the onus is for the plaintiff (now the competent authority) to show that the defendant failed to take reasonable measures, and this will be a difficult burden to discharge.

The learned author then compares section 28(8) of NEMA to section 34(7) of NEMA dealing with criminal liability of directors. In that subsection, the director is provided the defence of ‘taking all reasonable steps in the circumstances’, but the subsection provides that proof of the offence constitutes *prima facie* evidence of the director’s guilt, meaning that the director must raise evidence to rebut this. Section 28 is not drafted in this way.¹¹³⁷ Consequently he submits that it would be foolish of the competent authority to spend money in remediating pollution if it were apparent that the party primarily responsible for the pollution is unable to pay its share of the costs.¹¹³⁸ Thus in the case of historical polluters and the decision of the court in the *Bareki* case, the D-G would be unable to recover remedial cost under the provision of the Act.

Finally, as a result of the series of criticisms against the convoluted provisions of section 28 of NEMA, the section has been amended.¹¹³⁹

¹¹³⁵Ibid.

¹¹³⁶At 206.

¹¹³⁷Ibid.

¹¹³⁸Id.

¹¹³⁹See Act 14 of 2009.

7.5.5.3 *The National Environmental Management: Waste Act 59 of 2008*

The National Environmental Management: Waste Act is an Act enacted to deal with waste management and pollution issues arising from this. In the preamble to the Act, the internationally recognised hierarchy of waste management is explicitly recognised in the context of sustainable development: ‘sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of’.¹¹⁴⁰ Of particular significance to oil pollution is Part 8 of Chapter 4 of the Act which deals with contaminated land.¹¹⁴¹ The word ‘contaminated’ is defined in section 1 as:

[t]he presence in or under any land, site, buildings or structures of a substance or micro-organism above the concentration which is normally present in or under that land which substance or micro-organism directly or indirectly affects or may affect the quality of soil or the environment adversely’.

One would have thought that the use of the word ‘contaminated’ of which the dictionary meaning of ‘contaminate’ is [t]o make a substance or place dirty or no longer pure by adding to it a substance that is dangerous or carries disease’.¹¹⁴² This will ordinarily connote contamination with chemicals as in the case of the National Waste Act or contamination by hazardous substances like oil and chemical products. However the definition of contaminated land quoted above defined contamination with reference to the presence of substance or micro-organism above the concentration which is normally present in or under that land which may affect the quality of the soil or environment adversely. Clearly then the inference is that contamination becomes pollution when ‘the elevated concentrations begin to have an adverse effect on organisms’¹¹⁴³

The Act envisages the identification of so-called ‘investigation areas’ by the Minister or MEC. Land so identified is either land on which high-risk activities take place, or have taken place, and that may result in land contamination; or specified land that the Minister or MEC believes to be contaminated.¹¹⁴⁴ A ‘high-risk activity’ is an undertaking, including involving processes or substances which present a likelihood of harm to health or the

¹¹⁴⁰Kidd op cit 178.

¹¹⁴¹Section 35.

¹¹⁴²Oxford Advanced Learner’s Dictionary (2010) 313.

¹¹⁴³M R Ashman & Geeta Puri Essential Soil Science: A Clear and Concise Introduction to Soil Science (2002) at 152-3 in Kidd Should Bad Law be remediated?The Contaminated Land Provisions in the National Environmental Management: Waste Act (2009) 16 SAJELP 1 at 8.

¹¹⁴⁴S 36(1).

environment.¹¹⁴⁵ The Act places a responsibility on either the owner of land that is significantly contaminated, or a person who undertakes an activity which caused the land to be significantly contaminated, to notify the Minister of that contamination when that person becomes aware, or ought to have become aware, of that contamination.¹¹⁴⁶ The Act also provides: ‘Despite the provision of section [36(1)] , that the Minister or MEC may issue a written notice to a particular person identifying specific land as an investigation area if the Minister or MEC reasonably believes that the land is or is likely to be contaminated.¹¹⁴⁷

A report of such contaminated site shall also be prepared by an independent person, at own cost, which is called site assessment report which must be submitted to the Minister or MEC within a period specified in the notice.¹¹⁴⁸ The overall objective of this site assessment is to ascertain whether the site is contaminated and to assess the risk such contamination presents to health or the environment.¹¹⁴⁹

The Minister or MEC then considers the site assessment, and decides whether-

- a. the investigation area is contaminated, presents a risk to health or the environment, and must be remediated urgently;
- b. the investigation area is contaminated, presents a risk to health or the environment, and must be remediated within a specified period;
- c. the investigation area is contaminated and does not present an immediate risk but that measures are required to address the monitoring of that risk; or
- d. the investigation area is not contaminated.¹¹⁵⁰

If there is contamination and remediation is required, then the Minister or MEC must declare the site to be a remediation site, and the Minister or MEC may make such remediation order as is necessary to ‘neutralise that risk’.¹¹⁵¹ If remediation is not required, but there is risk that requires monitoring or management, then the Minister or MEC may make an order regarding the measures to be taken.¹¹⁵² Unless otherwise directed, such orders must be complied with at

¹¹⁴⁵S 1 .

¹¹⁴⁶S 36(5).

¹¹⁴⁷S 36(6).

¹¹⁴⁸S 37(1).

¹¹⁴⁹S 37(2).

¹¹⁵⁰S 38(1).

¹¹⁵¹S 38(2).

¹¹⁵²S 38(3).

the cost of the person to whom the order is issued.¹¹⁵³ The remediation order must describe, *inter alia*, ‘the person who is responsible for undertaking the remediation’.¹¹⁵⁴ However the Act does not specify the criteria for determining who this person is.¹¹⁵⁵ Kidd submits that requiring the owner to remediate land contaminated where the owner is not the person who caused the contamination would not only undermine the polluter pays principle but will raise considerations of fairness.¹¹⁵⁶

There are further difficulties that arise in respect of potential liability which requires a reformation of the Act. This is in respect of a situation where ‘the responsible parties’ (the owner and the occupier or lessee for example) were served with remediation order, would the owner or lessee have a right of recourse against other parties, such as the polluter? Kidd suggests that the Act should make provision either for apportionment in the case of multiple responsible parties or provide for the right of recourse (called the action in contribution in the United States) against the other parties.¹¹⁵⁷

7.5.5.6 Conclusion

From the foregoing, we can draw a set of inferences and a general conclusion. First, like Nigeria, the laws that govern oil pollution control of the marine and freshwaters of South Africa and Nigeria are scattered in many statutes and regulations of administrative agencies. Second, in the case of marine oil pollution, the laws take their source from the international conventions. We have seen that South Africa has fared better than Nigeria in the domestication of the most important of these Conventions on marine pollution, though as I have pointed out in certain cases, the shortcomings in the South African domestic Acts. The Nigerian authorities need to domesticate the major Conventions as fast as possible.

Third in the area of liability for pollution, both countries are deficient in the provision of their laws. On the part of South Africa, we have noted an irrational overlap in the way it addressed the issue of liability under the CLC 1969 in the domesticated version of the South African

¹¹⁵³S 38(4).

¹¹⁵⁴S 39(1) (a).

¹¹⁵⁵See the three scenarios described by Kidd on what will guide the authorities to decide whom to issue the remediation order. In the first scenario, A, the person who caused the contamination (the polluter), as well as the current owner have been identified by the authorities. In scenario B the polluter no longer exists or cannot be located, but the current owner is identified. In scenario C, there are several polluters, most or all of which have been identified as well as the owner. See further M Kidd, *Should Bad Law be Remediated?* op cit 1 at 15.

¹¹⁵⁶See further the discussion on this aspect in regard to the lack of appropriate provision for remediation under s 21 of the FEPA Act of Nigeria in chapter 4.

¹¹⁵⁷CERCLA §107 (a). See further Kidd op cit at 16.

Act,¹¹⁵⁸ while lumping this together with liability under the MARPOL.¹¹⁵⁹ The two Conventions are different. The Acts that domesticate them ought also to address the issues separately for ease of clarity.

With reference to oil pollution of freshwater, both countries adopt different approaches. In the case of Nigeria, much of the activities in this area relates to the pollution of inland water by oil operators and the leakage of oil during transportation by pipelines. In the case of South Africa, the pollution is traceable to the contamination of water through mining activities and others including oil related and chemical activities. The laws regulating this are scattered in a variety of Acts and Regulations. Some of the important parts of these laws are contained in regulations which the Department of Petroleum Resources in the case of Nigeria are supposed to enforce. In the case of South Africa the Department of Water Affairs and Agriculture or the Department of Environmental Affairs and Tourism are the departments responsible for enforcement. The thesis noted in the case of Nigeria, the vagueness of these regulations and the weakness of the DPR in the area of enforcement. The thesis recommends that important regulations should be brought together in an Act with a clear mandate to the Minister responsible for the enforcement.

In the case of South Africa, the laws are specific and not vague. The provisions are also contained in major Acts like the National Water Act, The Water Services Act, the Petroleum Pipelines Act, the MPRDA Act and its Regulations, the National Environmental Management Act, (NEMA) and National Environmental Management: (NEM Waste Act) . Furthermore, where the Acts provide for specific legislation to deal with issues like effluent discharge, oil discharge, etc, there are specific regulations (with clear dates for commencement) provided in most cases.

Furthermore in the case of South Africa there are institutional frameworks like NEMA, the Department of Tourism and Environmental Affairs, the Department of Agriculture and Water Affairs, etc, established for the purpose of enforcing the laws and the regulations, although some of the functions of the institutions sometime overlap as in the case of Nigeria. However where the laws provide for the establishment of authorities to carry out specific functions, like the establishment of a Water Catchment Agency (CWA) in the National Water Act for

¹¹⁵⁸Namely the Marine Pollution (Control and Civil Liability Act) 6 of 1981.

¹¹⁵⁹Namely the Marine Pollution (Prevention of Pollution from Ships) Act, No 2 of 1986.

example, this has been done with clear specifications as to its duties and responsibilities. Nigeria may borrow a leaf from this.

There are also clear cut provisions in the South African legislation on the remediation of the environment from the effects of pollution. Section 28 of NEMA which this thesis had discussed and the provisions of the NEM: Waste Act for instance, contain provisions for the steps to be taken to recover contaminated land and the cost or remediation will also be borne by the polluter. Although as was observed under the NEM: Waste Act, the provisions are not without loopholes but this can be plugged through relevant amendment. Under Nigerian law, there is a lacuna in the provision for remediation as contained in the defunct FEPA Act and the NESREA Act. The provisions on remediation also under the DPR are out of tune with modern realities.

Finally in the area of articulation of policy and the thrust of relevant laws on the environment, South Africa fares better. We have discussed the enactment of the framework law on the environment, NEMA, and the articulation of the policy on sustainable development. Nigerian laws are not deficient in terms of policy thrust but what is lacking is the framework for the articulation of these policies and the will to enforce them by the various institutions and agencies of government. There is a need for a framework law in the nature of the NEMA of South Africa, in spite of its shortcomings, to drive the operators of Nigerian laws on the control of oil pollution in the inland, territorial and maritime waters of Nigeria.

Chapter 8 Summary of Recommendations and Conclusion

8.1 Introduction

This study commenced by looking at the problem posed by oil pollution and its effects on plants, fishes, birds, the earth, the seas, the air and humans. The central research question is: what are the positive and negative aspects of the Nigerian law on oil pollution with a view to making recommendation for reform? The thesis worked through the central research question by posing series of sub- questions centred on the issues of liability and compensation for oil pollution in Nigeria. Chapter one discusses the effects of oil pollution on living things, the pollution of freshwater and marine waters, and the effects on the fishes in the oceans, how oil pollution of the seas affects recreation and tourism, the effects on humans and the food chain etc. Chapter two discusses the theoretical underpinnings which underscore Nigerian law on oil pollution *vis a vis* the concept of sustainable development, the polluter pays principle, the preventive principle, the precautionary principle and the tool of strict liability which were found to have been well articulated in the National Policy on the Environment and enacted into law using the instrumentality of legislation. Chapter three discusses the international marine pollution Conventions and their relevance to Nigeria. Some of the Conventions, especially those that have liability and compensation issues as their subject matter when examined revealed some gaps which needed to be addressed. The Nigerian domesticated versions were found to have included in their provisions these gaps which needed to be ameliorated. The OILPOL Convention, for instance which the Nigerian Parliament domesticated, has been superseded by the MARPOL which Nigeria has happily domesticated. Chapter four discusses the domestic laws of Nigeria on oil pollution and examines the institutional frameworks created for enforcing the laws and found some latent defects which have been affecting the enforcement and effectiveness of the laws and regulations. Chapter five discusses the oil pollution of the inland waters and compensation issues arising from the use of the common law to compensate victims of oil pollution. The aspect of seeking compensation under foreign laws was also examined. Chapter six examines the laws of the United States of America on the twin issues of liability and compensation for oil pollution and made appropriate recommendations for the Nigerian system. Chapter seven examines the laws of South Africa on marine pollution and inland pollution of freshwater and considered the strategies adopted by the South African legislature to deal with the pollution issues identified and made recommendations where appropriate. Chapter eight contains a summary of the finding and recommendations as outlined in the thesis.

This chapter will summarise my findings on all the items discussed in the foregoing chapters and make recommendations for the improvement of Nigerian law on oil pollution both of the marine pollution and freshwater oil pollution.

8.2 *Summary of findings*

I have classified my findings into three. This classification flows from the weakness observed in the laws and the institutions of government created to enforce them. They are (a) lack of effective institutional frameworks, (b) vague and imprecise duties of the operators of the oil industry, and (c) lack of proper enforcement of the laws and regulations due to fragmentation of the regulatory agencies and overlapping functions.

(a) *Lack of effective institutional frameworks*

I refer here to the pre-Koko and post Koko era. The thesis observed that the pre-Koko era was characterised by the enactment of the laws on *ad hoc* basis which depicted a lack of environmental awareness. It was also observed that the laws and regulations focused more on the operations of the oil companies, the protection and conservation of the economically important resources- oil- and the avoidance of wastes and less on pollution and preservation of the environment. This created a gap which was exploited by the Koko toxic dump incident. After this incident, the federal government enacted series of legislation that focused on pollution of the environment from oil and other hazardous substances.

The post-Koko era witnessed many activities from the legislative and executive arms directed at the process of remedying the harm brought about by the Koko incident and preparing against similar incidents in the future. The laws that were enacted became consistent in terms of the National Policy on the Environment which was published in 1999. The National Policy on the Environment employed the theories formulated by the agencies of the United Nations like the concept of sustainable development, the Polluter Pays Principle, the Preventive Principle, the cradle to grave principle etc., to formulate national policies that guided the enactment of the laws on oil pollution.

Even after these laws were enacted, there was also found some duplication in the functions of the regulatory agencies. We noted the similarity in the functions of the defunct FEPA and the

new NESREA, the DPR and the NOSDRA. This leads to avoidable waste of manpower and resources.¹¹⁶⁰

(b) *Vague and imprecise duties of the operators of the oil industry*

The Director of the Department of Petroleum Resources is saddled with the responsibility of monitoring the oil operators and enforcing standards set by the DPR. To assist the Director a series of Regulations were made by the Minister of Petroleum Resources under the Petroleum Act. This thesis noted that these regulations were couched in vague terms like Regulation 25 which enjoin holders of petroleum licences or lessees to take all ‘practical precautions’, including the provision of ‘up to date equipment’ approved by the Director of the DPR to prevent pollution of inland waters, streams and rivers. There was no definition of what practicable precaution means and what is up to date equipment.¹¹⁶¹

(c) *Lack of proper enforcement of the law due to fragmentation of the regulatory agencies*

This observation stems from (a) above. For instance section 5 of the FEPA Act contains similar provision in section 7 of the NESREA Act.¹¹⁶² The functions of the DPR are similar to that of the NOSDRA.¹¹⁶³ The likely effect of this is that when there is an oil spill, different agencies of government respond to the emergencies, causing duplications of functions and sometimes confusion of roles.

Before turning to the recommendations, I shall try to reiterate the central research questions as set out in chapter one of the thesis and also set out in outline the positive and negative features of Nigerian law on oil pollution order to establish a nexus between my findings and the recommendations.

In summary, one positive aspect of Nigerian law on oil pollution is that it seeks to prevent harm to the environment.¹¹⁶⁴ The negative aspects of the law on oil pollution far outweigh the positive aspect(s). The negative aspects are outlined below and discussed in the thesis where appropriate.

¹¹⁶⁰See s 4.1.6 of the thesis.

¹¹⁶¹See pages 126-27 of the thesis.

¹¹⁶² See s 2.4.2 of the thesis.

¹¹⁶³ See s 4.2.1 of the thesis.

¹¹⁶⁴See pages 33-34 of the thesis.

Negative aspects

(a) Lack of specific provision for liability for oil pollution.

Liability for oil pollution was not specifically provided for and not defined in the Oil in Navigable Waters Act. Before the enactment of this Act, it is correct to say that there was no provision for liability for oil pollution of Nigeria's territorial waters.¹¹⁶⁵

(b) Limits of liability

The limit of liability provided under the Act¹¹⁶⁶ affects compensation for oil pollution damage and is low compared with what obtains in jurisdictions outside Nigeria. The lack of domestication of the major international oil pollution Conventions also affects the quantum of compensation payable for oil pollution incidences. In chapter three, the thesis examines the major marine oil pollution conventions and noticed gaps in the international conventions in the area of definitions of ships, definition of oil and the insufficiency of the definition of pollution damage which militated against their application in the domestic sphere. These problems have worked against the application of some of these Conventions, in the area of liability for oil pollution damage. For instance, the OILPOL did not have provision for accidental damage. This Convention is the one in operation in Nigeria currently having been domesticated by the National Assembly. The MARPOL 73/78 that replaced the OILPOL suffers for lack of enforcement. . There are some other observed lapses or gaps especially in the area of liability limits and of low compensation for pollution damage resulting from oil that is making their enforcement difficult under national jurisdictions. The liability limit under Nigerian law still follows the limits under the Limitation of Liability Convention of 1976. This is so despite the provision for limitation of liability through the domestication of the CLC 1992 Convention. This thesis is recommending amendment where necessary.

(c) Fault liability

Furthermore, the Nigerian laws also need to be improved especially where this thesis identified inadequacy as far as standards are concerned. The thesis noticed a

¹¹⁶⁵See page 84 of the thesis.

¹¹⁶⁶ See the discussion on the regulations amending the relevant sections of the Merchant Shipping Act of Nigeria in chapter 3.

progression of international law from the era of liability based on fault to the regime of strict liability.¹¹⁶⁷ The Nigerian law on harmful wastes for instance still follows the fault liability system.¹¹⁶⁸ There is a need for the Nigerian legislature to follow this international trend specially directed at the amelioration of the discrepancy noted in the international regime. Furthermore there is also a need to increase the amount of statutory compensation payable under the present law.

(d) Inadequate compensation as a result of low statutory stipulation

The compensation for damage suffered by victims of oil pollution is low under the existing statutory enactments.¹¹⁶⁹ The Oil Pipelines Act for instance, needs to be amended to cure this defect. There is also a need to repeal the provisions of the Oil Pipelines Act which was enacted over forty years ago and its provisions on injurious affection and the quantum of damages payable to victims of oil pollution have become hopelessly out-dated.¹¹⁷⁰

(e) Inadequate provisions for compensation (damages) under common law

Prior to the enactment of the Oil in Navigable Waters Act, liability for oil pollution and the remedy provided for victims of oil pollution from ships laid at common law in Nuisance, Trespass and Negligence.¹¹⁷¹ These remedies are however limited by the various conditions which a litigant must fulfil before the remedies (damages) can be invoked. This approach of using the provisions of common law as a means of compensating victims of oil pollution activities have been proved to be unsatisfactory and in need of review. The thesis discussed the problem of ascertaining the quantum of damages that is obtainable under common law.¹¹⁷²

(f) Provision on the punishment for sabotage is draconian and not workable

¹¹⁶⁷ See s.3.2.8.6 of the thesis.

¹¹⁶⁸ See page 131 of the thesis.

¹¹⁶⁹ See chapter 4 of the thesis.

¹¹⁷⁰ See the conclusion to chapter 5. The common law is described as reactive because it does not contain provisions to prevent damage to the environment. The damage to be proactive should be such as would have been anticipated and provided for.

¹¹⁷¹ See s. 3.2.5 of the thesis.

¹¹⁷² See s 5.3 of the thesis.

The thesis preferred a legal rather than a political solution to the issue of sabotage of oil infrastructures. The current punishment for acts of sabotageoil installations under the Oil Pipelines Act¹¹⁷³and the Miscellaneous Offences Anti-Sabotage Act is draconian.¹¹⁷⁴

The reported award of contract to an indigenous company owned by former militants to secure oil installations also lacks any basis in law.¹¹⁷⁵ To secure the oil installations and its infrastructures, it is suggested that the Oil Pipelines Act and the Land Use Act be amended to make the communities where oil is found to be vested with the title to the land upon which the oil is found. Any appropriation of the land belonging to the communities will therefore attract due compensation to the communities.¹¹⁷⁶ In addition to this, the concept of ownership of land should also be coupled with the control of such land. When this is done, the communities will feel a sense of belonging and this will predispose them to protect oil installations that are constructed on their land. This perhaps will put an end to sabotage of oil installations and pipelines.

8.3 Shortcomings of the law on oil pollution

On the shortcomings of Nigeria's laws on oil pollution, the thesis identified systemic problems like the lack of provision of responsible party in the Nigerian oil pollution laws and a fatal absence of provisions of the law on remediation of the environment to deal with the effect of an oil spill.¹¹⁷⁷ It is recommended that the Nigerian legislation should borrow a leaf from the model of the US Oil Pollution Act, 1990 of the United States. For instance its provision on responsible parties makes it clear who is liable with regard to an oil spill. This is contrary to Nigerian law which creates vague notions with regard to the duties of an oil spiller.¹¹⁷⁸ This is one lesson that the Nigerian state can learn from the US system.¹¹⁷⁹

The provision of an Oil Spill Liability Trust Fund (OSLTF) and the establishment of a National Resources Trustees (NRT)¹¹⁸⁰ are two unique features under the OPA 90 that ensure that the cost of clean-up is borne by the people who perpetrate the pollution. Where this fund is made available to the parties responsible for cleanup in the event of an oil spill, it ensures

¹¹⁷³See s 25 of the Oil Pipelines Act supra.

¹¹⁷⁴See s 5.4.2.2 of the thesis.

¹¹⁷⁵ See s 5.4.2.2 of the thesis.

¹¹⁷⁶See pages 176- 77 of the thesis.

¹¹⁷⁷ See s 4.2.1 of the thesis for the detailed discussion on this.

¹¹⁷⁸See pages 126 – 27 of the thesis.

¹¹⁷⁹See page 209 of the thesis.

¹¹⁸⁰Established under Executive Order 12777. See publication of the US Coast Guard Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills, NPFC PUB 16465.2 of January 2006.

that prompt measures are taken to curtail the spill including the cost of preventive measures, which feature is not clearly defined under the Nigerian laws.

Nigerian laws on oil pollution were also found to suffer a shortcoming in that they followed the definition of pollution damage contained under the relevant international Conventions.¹¹⁸¹ This thesis has noted that the international regime lacks a clear cut definition of pollution damage and the recovery of costs for preventive measures taken in the event of an oil spill. The Nigerian state ought not to replicate this defect.¹¹⁸²

It is also recommended that the Nigerian law on the definition of pollution damage should be tailored along the line of an interpretation that will make the cost of pollution to be internalised and borne by the polluter. For instance, there is no reason why the owner of a hotel, who suffers from loss of income as a result of low patronage of tourists, due to an oil spill incident, should not recover from the polluter provided that the pollution damage which resulted in the loss of income is reasonably foreseeable from the oil contamination. Where the government through its agencies undertake cleanup measures, there is no reason why the cost of preventive measures, including the cost of reasonable measures, should also not be borne by the polluter. Consequential economic loss should also be recoverable from the responsible party under the economic theory of law.

To be more specific, damages recoverable under the Oil Pollution Act include compensation for injury to natural resources, loss of personal property destroyed by an oil spill, etc. This is recoverable under the OPA 90.¹¹⁸³ Nigerian legislators and policy makers should borrow a leaf from the example provided by the US system.

Furthermore, sections 35 and 36 of the defunct FEPA Act which provided for the remediation and restoration of polluted land have been repealed and there is no equivalent enactment in the NESREA Act.¹¹⁸⁴ It is suggested that this should be re-enacted. If this is not done, the effect of this is that there are no specific duties imposed on oil companies with regard to the restoration and cleanup of polluted land.¹¹⁸⁵ The provisions contained in the EGASPIN guidelines do not have the same effect as those contained in enacted statutes. The thesis

¹¹⁸¹See section 3.2.8.9 of the thesis.

¹¹⁸²See the conclusion to chapter 3 of the thesis.

¹¹⁸³See pages 200- 01 of the thesis.

¹¹⁸⁴See page 140 of the thesis.

¹¹⁸⁵See page 155 of the thesis.

considered the provision contained in South African enactments as possible guides to cure this defect.¹¹⁸⁶

Finally it is recommended that a body should be set up by the federal government of Nigeria to study all the various institutions and agencies involved in the protection of the environment in order to remove any vagueness and duplication of functions and fragmentation of regulatory agencies as suggested in this thesis.¹¹⁸⁷ Clear-cut laws that impose definite duties will more readily be enforced and will leave little room for manoeuvre and loopholes by the operators.

8.4 Recommendations

I shall now turn to the recommendations. The recommendations being made here are not all-embracing. They only provide a starting point for the amelioration of the problems of oil pollution which I have identified. I shall categorise the recommendations into three types for convenience sake.

(1) The role of government which is further classified into the legislature, the executive and the judiciary. (2) The role of the oil operators i.e. the multinational and national oil companies and (3) the international agencies.

(1) The role of the government

(i) The legislature

The starting point is the legislature. We have seen that although Nigeria is a party to a large number of Multilateral Environmental Agreements and Conventions, only a small fraction of these instruments have been domesticated by the Nigerian National Assembly.¹¹⁸⁸ The non-domestication of these instruments makes them to be ineffective in Nigeria for the purpose of enforcement by the appropriate agencies and institutions of government. The legislature must therefore urgently domesticate these Multilateral Environmental Agreements and Conventions if the country is to be taken seriously by the international community.¹¹⁸⁹ The country's legislature may also consider the direct incorporation approach of these conventions into the nation's Constitution unless they are inconsistent with the provisions of

¹¹⁸⁶ This is with regard to the provisions under the remediation of polluted land as contained in s 28 of NEMA. See pages 218 - 22 of the thesis.

¹¹⁸⁷ See pages 126 – 27 of the thesis.

¹¹⁸⁸ See discussions on chapter four above.

¹¹⁸⁹ See s 4.3.4 above.

the Constitution. This approach will make the process of their incorporation faster and make it similar to the tacit acceptance approach adopted by the IMO. This approach is also in use by some European Union (EU) countries, for example Belgium.¹¹⁹⁰

Environmental rights are now justiciable under the 1999 Constitution by virtue of an amendment to the Fundamental Rights (Enforcement Procedure Rules) 2009¹¹⁹¹. However, it is recommended that section 20 of the said Constitution be deleted and re-enacted under the Fundamental Rights Enforcement provisions in order to give bite to the enforcement of the aforesaid environmental rights which is the trend in most countries of the world of today¹¹⁹².

(ii) Delegated legislation: Whenever the Enabling Act of an enactment makes provision for the provision of rules for the enforcement of certain sections of the Act; most times there is no specified time frame within which such provisions should be laid before the National Assembly. The result is that important enactments are without regulations to enforce them. It is recommended that the National Assembly should specify the period within which the regulations are to be brought to the National Assembly. One example is the domestication of the MARPOL 73/78 and its Annexes.¹¹⁹³

. The government should also fast-track the process of enacting the criminal provisions, with the penalties for violations substantially more severe than is presently obtainable under the ONWA Act and its Regulations.

The legislature should also repeal outdated laws like the Oil in Navigable Waters Act, the Oil Pipelines Act and the Land Use Act which allowed for numerous defences to the discharge of oil in the territorial waters, provided for inadequate compensation for appropriated land,

¹¹⁹⁰ See Belgium review of implementation of the convention and 1997 recommendation available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/2385130.pdf> accessed 25-01-2013.

¹¹⁹¹ See now The Federal Republic of Nigeria Official Gazette NO. 74 Vol. 96 G N no. 293 2009, which provides in its Preamble that the Court shall constantly and conscientiously seek to give effect to the overriding objectives of these Rules at every stage of human rights action, especially whenever it exercises any power given it by these Rules or any other law and whenever it applies and interprets any rule.

¹¹⁹² See the cases of J Gbemre v Shell Petroleum Dev. Co. Ltd. & ors Suit No. FHC/PH/C/153/05 delivered on 14 November 2005, Adediran v Interland Transport (1991) 9 NWLR (pt 214) 155 (right of access to court), Shell SPDC v Chief Tiebo VII & ors (1996) 4 NWLR (part 445) 657. (CA). (application of Rylands v Fletcher to determine liability for oil pollution in Nigeria and determination of quantum of damages), and statutory instruments like the Fundamental Rights (Enforcement Procedure Rules) 2009 and the domestication of MARPOL 73/78 through the enactment of the International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol, (Ratification and Enforcement) Act No. 15 2007.

¹¹⁹³ MARPOL 73/78 has already been domesticated by the Nigerian Parliament. See International Convention for the Prevention of Pollution From Ships, 1973 And 1978 Protocol Ratification and Enforcement Act no. 15 of 2007.

divested ownership of land from the communities where oil installations and facilities are situatedand enact new laws in line with the suggestions adumbrated above.

(2) **The Executive**

The Executive arm should also as a matter of urgency streamlinethe Agencies of government involved in the environment and ensure that there is no overlap in their duties and functions. Some Agencies that are performing similar functions should be scrapped or merged with existing Agencies. For example the Department of Petroleum Resources should be merged under the present NESREA Agency. This will reduce the cost of running these Agencies and also ensure optimal use of manpower and resources. There should also be a monitoring mechanism to constantly monitor these Agencies to ensure that they are acting within their mandates. Adequate training and equipment should also be provided for the staff of these Agencies for optimum performance. The DPR for instance lacks expertise and facilities to fulfil its mandate.¹¹⁹⁴

The executive arm should also ensure that the Agencies are insulated from politics and ensure that they are given the necessary independence to carry out their functions. Where the Agencies make recommendation, for instance for the withdrawal of an oil operator's licence for persistent refusal to carry out regulations, there should be no lack of political will to enforce the recommendation.

The executive should also ensure that the cost of pollution is borne by the parties responsible for the pollution. The government, in other words, should internalise the cost of pollution through economic instruments in accordance with the National Policy on the Environment. One way through which this may be done is to enact a new Oil Pollution Act incorporating the use of economic instruments to internalise the cost of pollution using economic instruments.

(3) **The Judiciary**

The judiciary should use a more proactive approach in the interpretation of the law on environmental protection. The conservative approach of relying on the provisions of the common law, as we have seen, is counter - productive.¹¹⁹⁵ The court should also not be eager to protect the 'cash cow' of the economy namely the oil companies to the detriment of the

¹¹⁹⁴See s 4.1. 5 above.

¹¹⁹⁵See s 5.3 above.

environment. The court should adopt a liberal and purposive interpretation of the rules and regulations on the environment. The strict interpretation of statutes and laws have now given way to a liberal and purposive interpretation which means that the courts would prefer a liberal interpretation that carries out the intention of the makers of the law or the constitution.¹¹⁹⁶

(4) *The oil companies*

The oil companies should also appraise their methods of production and exploration under the present dispensation and bring them in line with the latest available technology. The oil companies should also provide up to date statistics to the regulatory agencies about the actual volume of oil spills that occur in the course of their exploration activities. It is also my recommendation that the oil companies follow the practice obtainable in their home countries which require strict enforcement of environmental regulations. Perhaps one way the oil companies may do this is to grant tax reliefs by the government to oil companies which comply with pollution abatement methods of production.

The oil companies should also urgently pay compensation for oil spills to the indigenes of the Niger Delta as recommended by the UNEP report¹¹⁹⁷ and also take measures to restore the environment to its pre- impact status. One way by which this may be done is to introduce a bill to the Nigerian Parliament based on the UNEP findings in the Niger Delta and enact the said bill into law. The purpose of the bill is to enforce the payment of monetary compensation to the parties affected by prolonged oil spills in the Niger Delta as recommended by the UNEP report against the defaulting oil company (SHELL). This is similar to the approach used by the United States in the case of *Exxon Shipping Corporation v Baker*.¹¹⁹⁸ In the Exxon's case, the sum of USD \$5 billion(later reduced to USD\$2 billion) was awarded by the court against Exxon Shipping Corporation as punitive damages for the pollution of the pristine coasts of Alaska as a result of the negligence of the defendant and its servants. A Bill was subsequently passed into law by the US Congress specifically banning the Exxon Valdez super tanker from plying the coast of Alaska.

¹¹⁹⁶See Ifezue v Mbaduga (1984) N.S.C.C. 314, Oil Palm Co. v A. G. Bendel State (1985) 6 N. C.L. R. 344 at 351, A. G. Lagos State v A. G. Federation & anr (2003) 12 N. W. L. R. (Pt 833) 1, and M T. Ladan Review of NESREA Act 2007 and Regulations 2009- 2011: A new Dawn in Environmental Compliance and Enforcement in Nigeria 8/1 Law, Environment and Development Journal (2012) , p. 116 available at <http://www.lead-journal.org/content/12116.pdf> accessed 20-07-2013.

¹¹⁹⁷See footnote 89.

¹¹⁹⁸554 U.S. 471 (2008).

(5) The International Agencies

The agencies of the United Nations like UNEP, the IMO etc have been playing a great role in protecting the environment from the scourges of oil pollution. The pollution of the marine environment by oil or other substances affects the global commons.¹¹⁹⁹ In so far as the international community is confronting the effects of global warming and is involved in protracted negotiation to come to a consensus, the actions of the international community should equally be directed at the role of the international multinational oil companies in degrading the environment, especially in developing countries. The international community, through the agencies of the United Nations, should also apply pressure on government and their institutions to comply with the laws and regulations on oil pollution which are geared towards the preservation of the environment. One suggestion is to further strengthen national institutions involved in the protection of the environment through capacity building and training and retraining of manpower. Any ‘investment’ in this regard is merely investing in our common humanity and the preservation of the environment for future generations of humans and other living creatures.

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¹¹⁹⁹This refers to damage to the *res omnium communes*. See J D Van der Vyver *State sovereignty and the environment in international law* (1992) 109 *SALJ* 472 at 485.

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¹²⁰⁰72 F.3d 844 (11th Cir. 1996)

¹²⁰¹312 F. Supp. 2d 1229 (N.D. Cal. 2004).

¹²⁰²70 F.3d 232 (2nd Cir 1995)

List of Acronyms

AU	African Union
CWA	Clean Water Act
DEAT	Department of Environmental Affairs and Tourism
DPR	Department of Petroleum Resources
EGASPIN	Environmental Guidelines and Standards for the Petroleum Industry
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
EU	European Union
FCWPA	Federal Water Pollution Act
FEPA	Federal Environmental Protection Agency
FME	Federal Ministry of Environment
ICJ	International Court of Justice
IMCO	Intergovernmental Consultative Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
ISPS	International Ships and Ports Facility Code
LFN	Laws of the Federation of Nigeria
NESREA	National Environmental Standards and Regulation Enforcement Agency
NNPC	Nigerian National Petroleum Corporation
NSCC	Nigeria Supreme Court Cases
NOSCP	National Oil Spill Contingency Plan
NOSDRA	National Oil Spill Detection and Response Agency
ONWA	Oil in Navigable Waters Act
OPA	United States Oil Pollution Act
OPEC	Organisation of Petroleum Exporting Countries
OPRC	International Convention on Oil Preparedness, Response and Cooperation
OSLTF	Oil Spill Liability Trust Fund
OSPAR	Oslo and Paris Conventions
P & I	Protection and Indemnity Club

PPMC	Pipelines and Products Marketing Company
SAJELP	South African Journal of Environmental Law and Policy
SEPA	State Environmental Protection Agency
SPDC	Shell Petroleum Development Company
TPH	Total Petroleum Hydrocarbons(TPH)
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on the Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNO	United Nations Organisation
US	United States
USCG	United States Coast Guard
USEPA	United States Environmental Protection Act
WSSD	World Summit on Sustainable Development

ANNEX 1

Annex 1- Oil Pollution Act 1990¹²⁰³

OIL POLLUTION ACT OF 1990

Q:\COMP\WATER2\OPA90 December 29, 2000 Q:\COMP\WATER2\OPA90 December 29, 2000 **235**

OIL POLLUTION ACT OF 1990

[As Amended Through P.L. 106–580, Dec. 29, 2000]

AN ACT To establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Oil Pollution Act of 1990”.

(33 U.S.C. 2701 note)

SEC. 2. TABLE OF CONTENTS.

The contents of this Act are as follows:

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

Sec. 1001. Definitions.

Sec. 1002. Elements of liability.

Sec. 1003. Defenses to liability.

Sec. 1004. Limits on liability.

Sec. 1005. Interest.

Sec. 1006. Natural resources.

¹²⁰³P. L. As amended through P.L. 106- 580, Dec. 29, 2000.

Sec. 1007. Recovery by foreign claimants.

Sec. 1008. Recovery by responsible party.

Sec. 1009. Contribution.

Sec. 1010. Indemnification agreements.

Sec. 1011. Consultation on removal actions.

Sec. 1012. Uses of the Fund.

Sec. 1013. Claims procedure.

Sec. 1014. Designation of source and advertisement.

Sec. 1015. Subrogation.

Sec. 1016. Financial responsibility.

Sec. 1017. Litigation, jurisdiction, and venue.

Sec. 1018. Relationship to other law.

Sec. 1019. State financial responsibility.

Sec. 1020. Application.

TITLE II—CONFORMING AMENDMENTS

Sec. 2001. Intervention on the High Seas Act.

Sec. 2002. Federal Water Pollution Control Act.

Sec. 2003. Deepwater Port Act.

Sec. 2004. Outer Continental Shelf Lands Act Amendments of 1978.

TITLE III—INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

Sec. 3001. Sense of Congress regarding participation in international regime.

Sec. 3002. United States-Canada Great Lakes oil spill cooperation.

Sec. 3003. United States-Canada Lake Champlain oil spill cooperation.

Sec. 3004. International inventory of removal equipment and personnel.

Sec. 3005. Negotiations with Canada concerning tug escorts in Puget Sound.

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Sec. 2 OIL POLLUTION ACT OF 1990 236

TITLE IV—PREVENTION AND REMOVAL

Subtitle A—Prevention

Sec. 4101. Review of alcohol and drug abuse and other matters in issuing licenses, certificates of registry, and merchant mariners' documents.

Sec. 4102. Term of licenses, certificates of registry, and merchant mariners' documents; criminal record reviews in renewals.

Sec. 4103. Suspension and revocation of licenses, certificates of registry, and merchant mariners' documents for alcohol and drug abuse.

Sec. 4104. Removal of master or individual in charge.

Sec. 4105. Access to National Driver Register.

Sec. 4106. Manning standards for foreign tank vessels.

Sec. 4107. Vessel traffic service systems.

Sec. 4108. Great Lakes pilotage.

Sec. 4109. Periodic gauging of plating thickness of commercial vessels.

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Subtitle B—Removal

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TITLE VI—MISCELLANEOUS

Sec. 6001. Savings provisions.

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Sec. 6003. Outer Banks protection.

Sec. 6004. Cooperative development of common hydrocarbon-bearing areas.

TITLE VII—OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

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TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

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Subtitle A—Improvements to Trans-Alaska Pipeline System

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Sec. 8102. Trans-Alaska Pipeline Liability Fund.

Sec. 8103. Presidential task force.

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Sec. 8301. Land conveyances.

Sec. 8302. Impact of potential spills in the Arctic Ocean on Alaska Natives.

TITLE IX—AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND, ETC

Sec. 9001. Amendments to Oil Spill Liability Trust Fund.

Sec. 9002. Changes relating to other funds.

TITLE I—OIL POLLUTION LIABILITY

AND COMPENSATION

SEC. 1001. DEFINITIONS.

For the purposes of this Act, the term—

(1) “act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) “barrel” means 42 United States gallons at 60 degrees fahrenheit;

(3) “claim” means a request, made in writing for a sum certain,

for compensation for damages or removal costs resulting from an incident;

(4) “claimant” means any person or government who presents a claim for compensation under this title;

(5) “damages” means damages specified in section 1002(b) of this Act, and includes the cost of assessing these damages;

(6) “deepwater port” is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501–1524);

(7) “discharge” means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) “exclusive economic zone” means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as “eastern special areas” in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

(9) “facility” means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

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(10) “foreign offshore unit” means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country’s territorial sea or from the foreign country’s continental shelf;

(11) “Fund” means the Oil Spill Liability Trust Fund, established

by section 9509 of the Internal Revenue Code of 1986

(26 U.S.C. 9509);

(12) “gross ton” has the meaning given that term by the Secretary under part J of title 46, United States Code;

(13) “guarantor” means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) “incident” means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

- (15) “Indian tribe” means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;
- (16) “lessee” means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);
- (17) “liable” or “liability” shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321);
- (18) “mobile offshore drilling unit” means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility;
- (19) “National Contingency Plan” means the National Contingency Plan prepared and published under section 311(d) of the Federal Water Pollution Control Act, as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);
- (20) “natural resources” includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

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- (21) “navigable waters” means the waters of the United States, including the territorial sea;
- (22) “offshore facility” means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(23) “oil” means oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act;

(24) “onshore facility” means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(25) the term “Outer Continental Shelf facility” means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) “owner or operator” means (A) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(27) “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) “permittee” means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law;

(29) “public vessel” means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce;

(30) “remove” or “removal” means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) “removal costs” means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

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(32) “responsible party” means the following:

(A) VESSELS.—In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(B) ONSHORE FACILITIES.—In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) OFFSHORE FACILITIES.—In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301–1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) DEEPWATER PORTS.—In the case of a deepwater port

licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501–1524), the licensee.

(E) PIPELINES.—In the case of a pipeline, any person owning or operating the pipeline.

(F) ABANDONMENT.—In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

(33) “Secretary” means the Secretary of the department in which the Coast Guard is operating;

(34) “tank vessel” means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—

- (A) is a vessel of the United States;
- (B) operates on the navigable waters; or
- (C) transfers oil or hazardous material in a place subject

to the jurisdiction of the United States;

(35) “territorial seas” means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles;

(36) “United States” and “State” mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States; and

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(37) “vessel” means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel. (33 U.S.C. 2701)

SEC. 1002. ELEMENTS OF LIABILITY

(a) IN GENERAL.—Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) COVERED REMOVAL COSTS AND DAMAGES.—

(1) REMOVAL COSTS.—The removal costs referred to in subsection

(a) are—

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) DAMAGES.—The damages referred to in subsection (a) are the following:

(A) NATURAL RESOURCES.—Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) REAL OR PERSONAL PROPERTY.—Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) SUBSISTENCE USE.—Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) REVENUES.—Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) PROFITS AND EARNING CAPACITY.—Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) PUBLIC SERVICES.—Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

(c) EXCLUDED DISCHARGES.—This title does not apply to any

discharge—

- (1) permitted by a permit issued under Federal, State, or local law;
- (2) from a public vessel; or
- (3) from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.).

(d) **LIABILITY OF THIRD PARTIES.**—

(1) **IN GENERAL.**—

(A) **THIRD PARTY TREATED AS RESPONSIBLE PARTY.**—Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 1003(a)(3) (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this title.

(B) **SUBROGATION OF RESPONSIBLE PARTY.**—If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party—

- (i) in accordance with section 1013, shall pay removal costs and damages to any claimant; and
- (ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

(2) **LIMITATION APPLIED.**—

(A) **OWNER OR OPERATOR OF VESSEL OR FACILITY.**—If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 1004 as applied with respect to the vessel or facility.

(B) OTHER CASES.—In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

(33 U.S.C. 2702)

SEC. 1003. DEFENSES TO LIABILITY

(a) COMPLETE DEFENSES.—A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or

(4) any combination of paragraphs (1), (2), and (3).

(b) DEFENSES AS TO PARTICULAR CLAIMANTS.—A responsible party is not liable under section 1002 to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.

(c) LIMITATION ON COMPLETE DEFENSE.—Subsection (a) does not

apply with respect to a responsible party who fails or refuses—

- (1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;
- (2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
- (3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(33 U.S.C. 2702)

SEC. 1004. LIMITS ON LIABILITY

(a) **GENERAL RULE.**—Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—

(1) for a tank vessel, the greater of—

(A) \$1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, \$10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, \$2,000,000;

(2) for any other vessel, \$600 per gross ton or \$500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus \$75,000,000; and

(4) for any onshore facility and a deepwater port, \$350,000,000.

(b) **DIVISION OF LIABILITY FOR MOBILE OFFSHORE DRILLING UNITS.**—

(1) **TREATED FIRST AS TANK VESSEL.**—For purposes of determining

the responsible party and applying this Act and except as provided in paragraph (2), a mobile offshore drilling unit which is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge, or the substantial threat of a discharge, of oil on or above the surface of the water.

(2) TREATED AS FACILITY FOR EXCESS LIABILITY.—To the extent that removal costs and damages from any incident described in paragraph (1) exceed the amount for which a responsible party is liable (as that amount may be limited under subsection (a) (1), the mobile offshore drilling unit is deemed to be an offshore facility. For purposes of applying subsection (a)(3), the amount specified in that subsection shall be reduced by the amount for which the responsible party is liable under paragraph

(1).

(c) EXCEPTIONS.—

(1) ACTS OF RESPONSIBLE PARTY.—Subsection (a) does not apply if the incident was proximately caused by—

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) FAILURE OR REFUSAL OF RESPONSIBLE PARTY.—Subsection

(a) does not apply if the responsible party fails or refuses—

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS FACILITY OR VESSEL.—Notwithstanding the limitations established under subsection (a) and the defenses of section 1003, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel

carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(4) CERTAIN TANK VESSELS.—Subsection (a)(1) shall not

apply to—

(A) a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in section 2 of the Edible Oil Regulatory Reform Act; and

(B) a tank vessel that is designated in its certificate of inspection as an oil spill response vessel (as that term is defined in section 2101 of title 46, United States Code) and that is used solely for removal.

(d) ADJUSTING LIMITS OF LIABILITY.—

(1) ONSHORE FACILITIES.—Subject to paragraph (2), the President may establish by regulation, with respect to any class or category of onshore facility, a limit of liability under this section of less than \$350,000,000, but not less than \$8,000,000, taking into account size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(2) DEEPWATER PORTS AND ASSOCIATED VESSELS.—

(A) STUDY.—The Secretary shall conduct a study of the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports (as defined in section 3 of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) versus the transportation of oil by vessel to other ports. The study shall include a review and analysis of offshore lightering practices used in connection with that transportation, an analysis of the volume of oil transported by vessel using those practices, and an analysis of the frequency and volume of oil discharges which occur in connection with the use of those practices.

(B) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under subparagraph (A).

(C) RULEMAKING PROCEEDING.—If the Secretary determines, based on the results of the study conducted under this subparagraph (A), that the use of deepwater ports in connection with the transportation of oil by vessel results in a lower operational or environmental risk

than the use of other ports, the Secretary shall initiate, not later than the 180th day following the date of submission of the report to the Congress under subparagraph (B), a rulemaking proceeding to lower the limits of liability under this section for deepwater ports as the Secretary determines appropriate. The Secretary may establish a limit of liability of less than \$350,000,000, but not less than \$50,000,000, in accordance with paragraph (1).

(3) PERIODIC REPORTS.—The President shall, within 6 months after the date of the enactment of this Act, and from time to time thereafter, report to the Congress on the desirability of adjusting the limits of liability specified in subsection (a).

(4) ADJUSTMENT TO REFLECT CONSUMER PRICE INDEX.—The President shall, by regulations issued not less often than every 3 years, adjust the limits of liability specified in subsection (a) to reflect significant increases in the Consumer Price Index.

(33 U.S.C. 2704)

SEC. 1005. INTEREST; PARTIAL PAYMENT OF CLAIMS

(a) GENERAL RULE.—The responsible party or the responsible party's guarantor is liable to a claimant for interest on the amount paid in satisfaction of a claim under this Act for the period described in subsection (b). The responsible party shall establish a procedure for the payment or settlement of claims for interim, short-term damages. Payment or settlement of a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled shall not preclude recovery by the claimant for damages not reflected in the paid or settled partial claim.

(b) PERIOD.—

(1) IN GENERAL.—Except as provided in paragraph (2), the period for which interest shall be paid is the period beginning on the 30th day following the date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.

(2) EXCLUSION OF PERIOD DUE TO OFFER BY GUARANTOR.—If

the guarantor offers to the claimant an amount equal to or greater than that finally paid in satisfaction of the claim, the period described in paragraph (1) does not include the period

beginning on the date the offer is made and ending on the date the offer is accepted. If the offer is made within 60 days after the date on which the claim is presented under section 1013(a), the period described in paragraph (1) does not include any period before the offer is accepted.

(3) EXCLUSION OF PERIODS IN INTERESTS OF JUSTICE.—If in any period a claimant is not paid due to reasons beyond the control of the responsible party or because it would not serve the interests of justice, no interest shall accrue under this section during that period.

(4) CALCULATION OF INTEREST.—The interest paid under this section shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

(5) INTEREST NOT SUBJECT TO LIABILITY LIMITS.—

(A) IN GENERAL.—Interest (including prejudgment interest) under this paragraph is in addition to damages and removal costs for which claims may be asserted under section 1002 and shall be paid without regard to any limitation of liability under section 1004.

(B) PAYMENT BY GUARANTOR.—The payment of interest under this subsection by a guarantor is subject to section 1016(g).

(33 U.S.C. 2705)

SEC. 1006. NATURAL RESOURCES

(a) LIABILITY.—In the case of natural resource damages under section 1002(b)(2)(A), liability shall be—

(1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;

(2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 1007 applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) DESIGNATION OF TRUSTEES.—

(1) IN GENERAL.—The President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources. (2) FEDERAL TRUSTEES.—The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act.

(3) STATE TRUSTEES.—The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of the designation.

(4) INDIAN TRIBE TRUSTEES.—The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as trustee for natural resources under this Act and shall notify the President of the designation.

(5) FOREIGN TRUSTEES.—The head of any foreign government may designate the trustee who shall act on behalf of that government as trustee for natural resources under this Act.

(c) FUNCTIONS OF TRUSTEES.—

(1) FEDERAL TRUSTEES.—The Federal officials designated under subsection (b)(2)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the natural resources under their trusteeship;

(B) may, upon request of and reimbursement from a State or Indian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(2) STATE TRUSTEES.—The State and local officials designated

under subsection (b)(3)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(3) INDIAN TRIBE TRUSTEES.—The tribal officials designated under subsection (b)(4)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(4) FOREIGN TRUSTEES.—The trustees designated under subsection

(b)(5)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(5) NOTICE AND OPPORTUNITY TO BE HEARD.—Plans shall be developed and implemented under this section only after adequate public notice, opportunity for a hearing, and consideration of all public comment.

(d) MEASURE OF DAMAGES.—

(1) IN GENERAL.—The measure of natural resource damages under section 1002(b)(2)(A) is—

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) DETERMINE COSTS WITH RESPECT TO PLANS.—Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c).

(3) NO DOUBLE RECOVERY.—There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

(e) DAMAGE ASSESSMENT REGULATIONS.—

(1) REGULATIONS.—The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after the date of the enactment of this Act, shall promulgate regulations for the assessment of natural resource damages under section 1002(b)(2)(A) resulting from a discharge of oil for the purpose of this Act.

(2) REBUTTABLE PRESUMPTION.—Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

(f) USE OF RECOVERED SUMS.—Sums recovered under this Act by a Federal, State, Indian, or foreign trustee for natural resource damages under section 1002(b)(2)(A) shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) COMPLIANCE.—Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any

right which any person may have to seek relief under any other provision of law.

(33 U.S.C. 2706)

SEC. 1007. RECOVERY BY FOREIGN CLAIMANTS

(a) REQUIRED SHOWING BY FOREIGN CLAIMANTS.—

(1) IN GENERAL.—In addition to satisfying the other requirements of this Act, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate

that—

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney-General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) EXCEPTIONS.—Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4).

(b) DISCHARGES IN FOREIGN COUNTRIES.—A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from—

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline

constructed under the Trans-Alaska Pipeline Authorization

Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) FOREIGN CLAIMANT DEFINED.—In this section, the term “foreignclaimant” means—

- (1) a person residing in a foreign country;
- (2) the government of a foreign country; and
- (3) an agency or political subdivision of a foreign country.

(33 U.S.C. 2707)

SEC. 1008. RECOVERY BY RESPONSIBLE PARTY

(a) IN GENERAL.—The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that—

(1) the responsible party is entitled to a defense to liability

under section 1003; or

(2) the responsible party is entitled to a limitation of liability under section 1004.

(b) EXTENT OF RECOVERY.—A responsible party who is entitled to a limitation of liability may assert a claim under section 1013 only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 1013 exceeds the amount to which the total of the liability under section 1002 and removal costs and damages incurred by, or on behalf of, the responsible party is limited under section 1004.

(33 U.S.C. 2708)

SEC. 1009. CONTRIBUTION

A person may bring a civil action for contribution against another person who is liable or potentially liable under this Act or anotherlaw. The action shall be brought in accordance with section1017.

(33 U.S.C. 2709)

SEC. 1010. INDEMNIFICATION AGREEMENTS

- (a) AGREEMENTS NOT PROHIBITED.—Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.
- (b) LIABILITY NOT TRANSFERRED.—No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.
- (c) RELATIONSHIP TO OTHER CAUSES OF ACTION.—Nothing in this Act, including the provisions of subsection (b), bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

(33 U.S.C. 2710)

SEC. 1011. CONSULTATION ON REMOVAL ACTIONS

The President shall consult with the affected trustees designated under section 1006 on the appropriate removal action to be taken in connection with any discharge of oil. For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President in consultation with the Governor or Governors of the affected States. However, this determination shall not preclude additional removal actions under applicable State law.

(33 U.S.C. 2711)

SEC. 1012. USES OF THE FUND

- (a) USES GENERALLY.—The Fund shall be available to the President for—
 - (1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan—
 - (A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d);

(2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 1006 for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 1013 for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act (including, but not limited to, sections 1004(d)(2), 1006(e), 4107, 4110, 4111, 4112, 4117, 5006, 8103, and title VII) and subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, with respect to prevention, removal, and enforcement related to oil discharges, provided

that—

(A) not more than \$25,000,000 in each fiscal year shall be available to the Secretary for operating expenses incurred by the Coast Guard;

(B) not more than \$30,000,000 each year through the end of fiscal year 1992 shall be available to establish the National Response System under section 311(j) of the Federal Water Pollution Control Act, as amended by this Act, including the purchase and prepositioning of oil spill removal equipment; and

(C) not more than \$27,250,000 in each fiscal year shall

be available to carry out title VII of this Act.

(b) DEFENSE TO LIABILITY FOR FUND.—The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident,

removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant.

(c) OBLIGATION OF FUND BY FEDERAL OFFICIALS.—The President may promulgate regulations designating one or more Federal officials who may obligate money in accordance with subsection (a).

(d) ACCESS TO FUND BY STATE OFFICIALS.—

(1) IMMEDIATE REMOVAL.—In accordance with regulations promulgated under this section, the President, upon the request of the Governor of a State or pursuant to an agreement with a State under paragraph (2), may obligate the Fund for payment in an amount not to exceed \$250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

(2) AGREEMENTS.—

(A) IN GENERAL.—The President shall enter into an agreement with the Governor of any interested State to establish procedures under which the Governor or a designated State official may receive payments from the Fund for removal costs pursuant to paragraph (1).

(B) TERMS.—Agreements under this paragraph— (i) may include such terms and conditions as may be agreed upon by the President and the Governor of a State;

(ii) shall provide for political subdivisions of the State to receive payments for reasonable removal costs; and

(iii) may authorize advance payments from the Fund to facilitate removal efforts.

(e) REGULATIONS.—The President shall—

(1) not later than 6 months after the date of the enactment of this Act, publish proposed regulations detailing the manner in which the authority to obligate the Fund and to enter into agreements under this subsection shall be exercised; and

(2) not later than 3 months after the close of the comment

period for such proposed regulations, promulgate final regulations for that purpose.

(f) RIGHTS OF SUBROGATION.—Payment of any claim or obligation by the Fund under this Act shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

(g) AUDITS.—The Comptroller General shall audit all payments, obligations, reimbursements, and other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the Congress an interim report one year after the date of the enactment of this Act. The Comptroller General shall thereafter audit the Fund as is appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.

(h) PERIOD OF LIMITATIONS FOR CLAIMS.—

(1) REMOVAL COSTS.—No claim may be presented under this title for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) DAMAGES.—No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 1002(b)(2)(A), if later, the date of completion of the natural resources damage assessment under section 1006(e).

(3) MINORS AND INCOMPETENTS.—The time limitations contained in this subsection shall not begin to run—

(A) against a minor until the earlier of the date whensuch minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for the incompetent.

(i) LIMITATION ON PAYMENT FOR SAME COSTS.—In any case inwhich the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no otherclaim may be paid from the Fund for the same removal costs ordamages.

(j) OBLIGATION IN ACCORDANCE WITH PLAN.—

(1) **IN GENERAL.**—Except as provided in paragraph (2), amounts may be obligated from the Fund for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a plan adopted under section 1006(c).

(2) **EXCEPTION.**—Paragraph (1) shall not apply in a situation requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action.

(k) PREFERENCE FOR PRIVATE PERSONS IN AREA AFFECTED BY DISCHARGE.—

(1) **IN GENERAL.**—In the expenditure of Federal funds for removal of oil, including for distribution of supplies, construction, and other reasonable and appropriate activities, under a contract or agreement with a private person, preference shall be given, to the extent feasible and practicable, to private persons residing or doing business primarily in the area affected by the discharge of oil.

(2) **LIMITATION.**—This subsection shall not be considered to restrict the use of Department of Defense resources.

(33 U.S.C. 2712)

SEC. 1013. CLAIMS PROCEDURE

(a) **PRESENTATION.**—Except as provided in subsection (b), all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 1014(a).

(b) PRESENTATION TO FUND.—

(1) **IN GENERAL.**—Claims for removal costs or damages may

be presented first to the Fund—

(A) if the President has advertised or otherwise notified

claimants in accordance with section 1014(c);

(B) by a responsible party who may assert a claim under section 1008;

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a).

(2) **LIMITATION ON PRESENTING CLAIM.**—No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

(c) **ELECTION.**—If a claim is presented in accordance with subsection

(a) and—

(1) each person to whom the claim is presented denies all liability

for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 1014(b), whichever is later, the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) **UNCOMPENSATED DAMAGES.**—If a claim is presented in accordance with this section, including a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

(d) **PROCEDURE FOR CLAIMS AGAINST FUND.**—The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund.

(e)

SEC. 1014. DESIGNATION OF SOURCE AND ADVERTISEMENT

(a) DESIGNATION OF SOURCE AND NOTIFICATION.—When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge or threat. If a designated source is a vessel or a facility, the President shall immediately notify the responsible party and the guarantor, if known, of that designation.

(b) ADVERTISEMENT BY RESPONSIBLE PARTY OR GUARANTOR.—(1)

If a responsible party or guarantor fails to inform the President, within 5 days after receiving notification of a designation under subsection (a), of the party's or the guarantor's denial of the designation, such party or guarantor shall advertise the designation and the procedures by which claims may be presented, in accordance with regulations promulgated by the President. Advertisement under the preceding sentence shall begin no later than 15 days after the date of the designation made under subsection (a).

(2) An advertisement under paragraph (1) shall state that a claimant may present a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled and that payment of such a claim shall not preclude recovery for damages not reflected in the paid or settled partial claim.

(c) ADVERTISEMENT BY PRESIDENT.—If—

(1) the responsible party and the guarantor both deny a designation within 5 days after receiving notification of a designation under subsection (a),

(2) the source of the discharge or threat was a public vessel,

or

(3) the President is unable to designate the source or sources of the discharge or threat under subsection (a), the President shall advertise or otherwise notify potential claimants of the procedures by which claims may be presented to the Fund.

(33 U.S.C. 2714)

SEC. 1015. SUBROGATION. 1¹²⁰⁴

(a) IN GENERAL.—Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(b) INTERIM DAMAGES.—

(1) IN GENERAL.—If a responsible party, a guarantor, or the Fund has made payment to a claimant for interim, short term damages representing less than the full amount of damages to which the claimant ultimately may be entitled, subrogation under subsection (a) shall apply only with respect to the portion of the claim reflected in the paid interim claim.

(2) FINAL DAMAGES.—Payment of such a claim shall not foreclose a claimant's right to recovery of all damages to which the claimant otherwise is entitled under this Act or under any other law.

(c) ACTIONS ON BEHALF OF FUND.—At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 1016) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any

removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

¹²⁰⁴If advertisement is not otherwise made in accordance with this subsection, the President shall promptly and at the expense of the responsible party or the guarantor involved, advertise the designation and the procedures by which claims may be presented to the responsible party or guarantor. Any advertisement under this subsection shall continue for a period of no less than 30 days.

¹ Section 1142(d) of Public Law 104–324 (110 Stat. 3991) stated that “[s]ection 1015(a) of the Oil Pollution Act of 1990 (33 U.S.C. 2715(a)) is amended” by redesignating subsection (b) as subsection (c) and by inserting after subsection (a) a new subsection (b). The amendments were executed as amendments to section 1015.

(33 U.S.C. 2716)

SEC. 1016. FINANCIAL RESPONSIBILITY

(a) REQUIREMENT.—The responsible party for—

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or

(2) any vessel using the waters of the exclusive economic zone to tranship or lighter oil destined for a place subject to the jurisdiction of the United States; shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) or (d) of this Act, in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

(b) SANCTIONS.—

(1) WITHHOLDING CLEARANCE.—The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to this section that does not have the evidence of financial responsibility required for the vessel under this section.

(2) DENYING ENTRY TO OR DETAINING VESSELS.—The Secretary

may—

(A) deny entry to any vessel to any place in the United States, or to the navigable waters, or

(B) detain at the place, any vessel that, upon request, does not produce the evidence

of financial responsibility required for the vessel under this section.

(3) SEIZURE OF VESSEL.—Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States.

(c) OFFSHORE FACILITIES.—

(1) IN GENERAL.—

(A) EVIDENCE OF FINANCIAL RESPONSIBILITY REQUIRED.—

Except as provided in paragraph (2), a responsible party with respect to an offshore facility that—

(i)(I) is located seaward of the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters; or

(II) is located in coastal inland waters, such as bays or estuaries, seaward of the line of ordinary low water along that portion of the coast that is not in direct contact with the open sea;

(ii) is used for exploring for, drilling for, producing, or transporting oil from facilities engaged in oil exploration, drilling, or production; and

(iii) has a worst-case oil spill discharge potential of more than 1,000 barrels of oil (or a lesser amount if the President determines that the risks posed by such facility justify it), shall establish and maintain evidence of financial responsibility in the amount required under subparagraph (B) or

(C), as applicable.

(B) AMOUNT REQUIRED GENERALLY.—Except as provided in subparagraph (C), the amount of financial responsibility for offshore facilities that meet the criteria of subparagraph

(A) is—

(i) \$35,000,000 for an offshore facility located seaward of the seaward boundary of a State; or

(ii) \$10,000,000 for an offshore facility located landward of the seaward boundary of a State.

(C) GREATER AMOUNT.—If the President determines that an amount of financial responsibility for a responsible party greater than the amount required by subparagraph

(B) is justified based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party, the evidence of financial responsibility required shall be for an amount determined by the President not exceeding \$150,000,000.

(D) MULTIPLE FACILITIES.—In a case in which a person is a responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the amount applicable to the facility having the greatest financial responsibility requirement under this subsection.

(E) DEFINITION.—For the purpose of this paragraph, the seaward boundary of a State shall be determined in accordance with section 2(b) of the Submerged Lands Act (43 U.S.C. 1301(b)).

(2) DEEPWATER PORTS.—Each responsible party with respect to a deepwater port shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) of this Act in a case where the responsible party would be entitled to limit liability under that section. If the Secretary exercises the authority under section 1004(d)(2) to lower the limit of liability for deepwater ports, the responsible party shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability so established. In a case in which a person is the responsible party for more than one deepwater port, evidence of financial responsibility need be established only to meet the maximum liability applicable to the deepwater port having the greatest maximum liability.

(e) METHODS OF FINANCIAL RESPONSIBILITY.—Financial responsibility under this section may be established by any one, or by any combination, of the following methods which the Secretary (in the case of a vessel) or the President (in the case of a facility) determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

In promulgating requirements under this section, the Secretary or the President, as appropriate, may specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

(f) CLAIMS AGAINST GUARANTOR.—

(1) IN GENERAL.—Subject to paragraph (2), a claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke—

- (A) all rights and defenses which would be available to the responsible party under this Act;
- (B) any defense authorized under subsection (e); and
- (C) the defense that the incident was caused by the willful misconduct of the responsible party.

The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(2) FURTHER REQUIREMENT.—A claim may be asserted pursuant to paragraph (1) directly against a guarantor providing evidence of financial responsibility under subsection (c)(1) with respect to an offshore facility only if—

- (A) the responsible party for whom evidence of financial responsibility has been provided has denied or failed to pay a claim under this Act on the basis of being insolvent, as defined under section 101(32) of title 11, United States Code, and applying generally accepted accounting principles;
- (B) the responsible party for whom evidence of financial responsibility has been provided has filed a petition for bankruptcy under title 11, United States Code; or
- (C) the claim is asserted by the United States for removal costs and damages or for compensation paid by the Fund under this Act, including costs incurred by the Fund for processing compensation claims.

(3) RULEMAKING AUTHORITY.—Not later than 1 year after the date of enactment of this paragraph, the President shall promulgate regulations to establish a process for implementing paragraph (2) in a manner that will allow for the orderly and expeditious presentation and resolution of claims and effectuate the purposes of this Act.

(g) LIMITATION ON GUARANTOR'S LIABILITY.—Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility which that guarantor has provided for a responsible party pursuant to this section. The total liability of the guarantor on direct action for claims brought under this Act with respect to an incident shall be limited to that amount.

(h) CONTINUATION OF REGULATIONS.—Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) UNIFIED CERTIFICATE.—The Secretary may issue a single unified certificate of financial responsibility for purposes of this Act and any other law.

(33 U.S.C. 2717)

SEC. 1017. LITIGATION, JURISDICTION, AND VENUE

(a) REVIEW OF REGULATIONS.—Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) JURISDICTION.—Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) STATE COURT JURISDICTION.—A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

(d) ASSESSMENT AND COLLECTION OF TAX.—The provisions of subsections (a), (b), and (c) shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, or to the review of any regulation promulgated under the Internal Revenue Code of 1986.

(e) SAVINGS PROVISION.—Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to the date of enactment of this title. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) PERIOD OF LIMITATIONS.—

(1) DAMAGES.—Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after—

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section

1002(b)(2)(A), the date of completion of the natural resources damage assessment under section 1006(c).

(2) REMOVAL COSTS.—An action for recovery of removal costs referred to in section 1002(b)(1) must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery of removal costs at any time after such costs have been incurred.

(3) CONTRIBUTION.—No action for contribution for any removal costs or damages may be commenced more than 3 years

after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) SUBROGATION.—No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim.

(5) COMMENCEMENT.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

(33 U.S.C. 2717)

SEC. 1018. RELATIONSHIP TO OTHER LAW

(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL

ACT.—Nothing in this Act or the Act of March 3, 1851

shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect

to—

(A) the discharge of oil or other pollution by oil within

such State; or

(B) any removal activities in connection with such a discharge;

or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

(b) **PRESERVATION OF STATE FUNDS.**—Nothing in this Act or in section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall in any way affect, or be construed to affect, the authority of

any State—

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) **ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.**—

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision

thereof—

(1) to impose additional liability or additional requirements;

or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

(d) FEDERAL EMPLOYEE LIABILITY.—For purposes of section 2679(b)(2)(B) of title 28, United States Code, nothing in this Act shall be construed to authorize or create a cause of action against a Federal officer or employee in the officer's or employee's personal or individual capacity for any act or omission while acting within the scope of the officer's or employee's office or employment.

(33 U.S.C. 2718)

SEC. 1019. STATE FINANCIAL RESPONSIBILITY

A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1016.

(33 U.S.C. 2719)

SEC. 1020. APPLICATION.

This Act shall apply to an incident occurring after the date of the enactment of this Act.

(33 U.S.C. 2701 note)

TITLE II—CONFORMING AMENDMENTS

* * * * *

SEC. 2002. FEDERAL WATER POLLUTION CONTROL ACT

(a) APPLICATION.—Subsections (f), (g), (h), and (i) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) shall not apply with respect to any incident for which liability is established under section 1002 of this Act.

(b) * * *

(33 U.S.C. 1321 note)

SEC. 2003. DEEPWATER PORT ACT

(a) * * *

(b) AMOUNTS REMAINING IN DEEPWATER PORT FUND.—Any amounts remaining in the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974 (33 U.S.C. 1517(f)) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Deepwater Port Liability Fund.

(26 U.S.C. 9509 note)

SEC. 2004. OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS

OF 1978

Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1811–1824) is repealed. Any amounts remaining in the Offshore Oil Pollution Compensation Fund established under section 302 of that title (43 U.S.C. 1812) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Offshore Oil Pollution Compensation Fund.

(26 U.S.C. 9509 note)

TITLE III—INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

SEC. 3001. SENSE OF CONGRESS REGARDING PARTICIPATION IN

INTERNATIONAL REGIME

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

SEC. 3002. UNITED STATES-CANADA GREAT LAKES OIL SPILL COOPERATION

(a) REVIEW.—The Secretary of State shall review relevant international agreements and treaties with the Government of Canada, including the Great Lakes Water Quality Agreement, to determine whether amendments or additional international agreements are

necessary to—

(1) prevent discharges of oil on the Great Lakes;

(2) ensure an immediate and effective removal of oil on the

Great Lakes; and

(3) fully compensate those who are injured by a discharge of oil on the Great Lakes.

(b) CONSULTATION.—In carrying out this section, the Secretary of

State shall consult with the Department of Transportation, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the Great Lakes States, the International

Joint Commission, and other appropriate agencies.

(c) REPORT.—The Secretary of State shall submit a report to the Congress on the results of the review under this section within 6 months after the date of the enactment of this Act.

SEC. 3003. UNITED STATES-CANADA LAKE CHAMPLAIN OIL SPILL COOPERATION

(a) REVIEW.—The Secretary of State shall review relevant international agreements and treaties with the Government of Canada, to determine whether amendments or additional international agreements are necessary to—

(1) prevent discharges of oil on Lake Champlain;

(2) ensure an immediate and effective removal of oil on Lake Champlain; and

(3) fully compensate those who are injured by a discharge of oil on Lake Champlain.

(b) CONSULTATION.—In carrying out this section, the Secretary of

State shall consult with the Department of Transportation, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the States of Vermont and New York, the International Joint Commission, and other appropriate agencies.

(c) REPORT.—The Secretary of State shall submit a report to the Congress on the results of the review under this section within 6 months after the date of the enactment of this Act.

SEC. 3004. INTERNATIONAL INVENTORY OF REMOVAL EQUIPMENT AND PERSONNEL

The President shall encourage appropriate international organizations to establish an international inventory of spill removal equipment and personnel.

SEC. 3005. NEGOTIATIONS WITH CANADA CONCERNING TUG ESCORTS IN PUGET SOUND

Congress urges the Secretary of State to enter into negotiations with the Government of Canada to ensure that tugboat escorts are required for all tank vessels with a capacity over 40,000 deadweight tons in the Strait of Juan de Fuca and in Haro Strait.

TITLE IV—PREVENTION AND REMOVAL

Subtitle A—Prevention

* * * * *

SEC. 4102. TERM OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS; CRIMINAL RECORD REVIEWS IN RENEWALS

(a) * * *

* * * * *

(d) TERMINATION OF EXISTING LICENSES, CERTIFICATES, AND DOCUMENTS.—

A license, certificate of registry, or merchant mariner's document issued before the date of the enactment of this section terminates on the day it would have expired if—

- (1) subsections (a), (b), and (c) were in effect on the date it was issued; and
- (2) it was renewed at the end of each 5-year period under section 7106, 7107, or 7302 of title 46, United States Code.

(46 U.S.C. 7106 note)

* * * * *

SEC. 4107. VESSEL TRAFFIC SERVICE SYSTEMS

(a) * * *

(b) DIRECTION OF VESSEL MOVEMENT.—

(1) STUDY.—The Secretary shall conduct a study—

(A) of whether the Secretary should be given additional authority to direct the movement of vessels on navigable waters and should exercise such authority; and

(B) to determine and prioritize the United States ports and channels that are in need of new, expanded, or improved vessel traffic service systems, by evaluating—

(i) the nature, volume, and frequency of vessel traffic;

(ii) the risks of collisions, spills, and damages associated with that traffic;

(iii) the impact of installation, expansion, or improvement of a vessel traffic service system; and

(iv) all other relevant costs and data.

(2) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under paragraph

(1) and recommendations for implementing the results of that study.

* * * * *

SEC. 4109. PERIODIC GAUGING OF PLATING THICKNESS OF COMMERCIAL VESSELS

Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations for vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue—

(1) establishing minimum standards for plating thickness;

and

(2) requiring, consistent with generally recognized principles of international law, periodic gauging of the plating thickness of all such vessels over 30 years old operating on the navigablewaters or the waters of the exclusive economic zone.

(46 U.S.C. 3703 note)

SEC. 4110. OVERFILL AND TANK LEVEL OR PRESSURE MONITORING

DEVICES

(a) STANDARDS.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall establish, by regulation, minimum standards for devices for warning persons of overfills and tank levels of oil in cargo tanks and devices for monitoring the pressure of oil cargo tanks.

(b) USE.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations establishing, consistent with generally recognized principles of international law, requirements concerning the use of—

(1) overfill devices, and

(2) tank level or pressure monitoring devices, which are referred to in subsection (a) and which meet the standards established by the Secretary under subsection (a), on vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue on the navigable waters and the waters of the exclusive economic zone.

(46 U.S.C. 3703 note)

SEC. 4111. STUDY ON TANKER NAVIGATION SAFETY STANDARDS

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Secretary shall initiate a study to determine whether existing laws and regulations are adequate to ensure the safe navigation of vessels transporting oil or hazardous substances in bulk on the navigable waters and the waters of the exclusive economic zone.

(b) CONTENT.—In conducting the study required under subsection

(a), the Secretary shall—

(1) determine appropriate crew sizes on tankers;

(2) evaluate the adequacy of qualifications and training of

crewmembers on tankers;

(3) evaluate the ability of crewmembers on tankers to take emergency actions to prevent or remove a discharge of oil or a hazardous substance from their tankers;

(4) evaluate the adequacy of navigation equipment and systems on tankers (including sonar, electronic chart display, and satellite technology);

(5) evaluate and test electronic means of position-reporting and identification on tankers, consider the minimum standards suitable for equipment for that purpose, and determine whether to require that equipment on tankers;

(6) evaluate the adequacy of navigation procedures under different operating conditions, including such variables as speed, daylight, ice, tides, weather, and other conditions;

(7) evaluate whether areas of navigable waters and the exclusive economic zone should be designated as zones where the movement of tankers should be limited or prohibited;

(8) evaluate whether inspection standards are adequate;

(9) review and incorporate the results of past studies, including studies conducted by the Coast Guard and the Office of Technology Assessment;

(10) evaluate the use of computer simulator courses for training bridge officers and pilots of vessels transporting oil or hazardous substances on the navigable waters and waters of the

exclusive economic zone, and determine the feasibility and practicality of mandating such training;

(11) evaluate the size, cargo capacity, and flag nation of tankers transporting oil or hazardous substances on the navigable waters and the waters of the exclusive economic zone—

(A) identifying changes occurring over the past 20 years in such size and cargo capacity and in vessel navigation and technology; and

(B) evaluating the extent to which the risks or difficulties associated with tanker navigation, vessel traffic control, accidents, oil spills, and the containment and cleanup of such spills are influenced by or related to an increase in tanker size and cargo capacity; and

(12) evaluate and test a program of remote alcohol testing for masters and pilots aboard tankers carrying significant quantities of oil.

(c) REPORT.—Not later than 2 years after the date of enactment of this Act, the Secretary shall transmit to the Congress a report on the results of the study conducted under subsection (a), including recommendations for implementing the results of that study.

(46 U.S.C. 3703 note)

SEC. 4112. DREDGE MODIFICATION STUDY

(a) STUDY.—The Secretary of the Army shall conduct a study and demonstration to determine the feasibility of modifying dredges to make them usable in removing discharges of oil and hazardous substances.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary of the Army shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations for implementing the results of that study.

SEC. 4113. USE OF LINERS

(a) STUDY.—The President shall conduct a study to determine whether liners or other secondary means of containment should be used to prevent leaking or to aid in leak detection at onshore facilities used for the bulk storage of oil and located near navigable waters.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the President shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations to implement the results of the study.

(c) IMPLEMENTATION.—Not later than 6 months after the date the report required under subsection (b) is submitted to the Congress, the President shall implement the recommendations contained in the report.

SEC. 4114. TANK VESSEL MANNING

(a) RULEMAKING.—In order to protect life, property, and the environment, the Secretary shall initiate a rulemaking proceeding within 180 days after the date of the enactment of this Act to define the conditions under, and designate the waters upon, which tank vessels subject to section 3703 of title 46, United States Code, may operate in the navigable waters with the auto-pilot engaged or with an unattended engine room.

(b) * * *

* * * * *

(46 U.S.C. 3703 note)

SEC. 4115. ESTABLISHMENT OF DOUBLE HULL REQUIREMENT FOR TANK VESSELS

(a) * * *

(b) RULEMAKING.—The Secretary shall, within 12 months after the date of the enactment of this Act, complete a rulemaking proceeding and issue a final rule to require that tank vessels over 5,000 gross tons affected by section 3703a of title 46, United States Code, as added by this section, comply until January 1, 2015, with structural and operational requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible.

(46 U.S.C. 3703a note)

* * * * *

(e) SECRETARIAL STUDIES.—

(1) OTHER REQUIREMENTS.—Not later than 6 months after the date of enactment of this Act, the Secretary shall determine, based on recommendations from the National Academy of Sciences or other qualified organizations, whether other structural and operational tank vessel requirements will provide protection to the marine environment equal to or greater than that provided by double hulls, and shall report to the Congress that determination and recommendations for legislative action.

(2) REVIEW AND ASSESSMENT.—The Secretary shall—

(A) periodically review recommendations from the National Academy of Sciences and other qualified organizations on methods for further increasing the environmental and operational safety of tank vessels;

(B) not later than 5 years after the date of enactment of this Act, assess the impact of this section on the safety of the marine environment and the economic viability and operational makeup of the maritime oil transportation industry;

and

(C) report the results of the review and assessment to the Congress with recommendations for legislative or other action.

(3)(A) The Secretary of Transportation shall coordinate with the Marine Board of the National Research Council to conduct the necessary research and development of a rationally based equivalency assessment approach, which accounts for the overall environmental performance of alternative tank vessel designs. Notwithstanding the Coast Guard opinion of the application of sections 101 and 311 of the Clean Water Act (33 U.S.C. 1251 and 1321), the intent of this study is to establish an equivalency evaluation procedure that maintains a high standard of environmental protection, while encouraging innovative ship design. The study shall include:

(i) development of a generalized cost spill data base, which includes all relevant costs such as clean-up costs and environmental impact costs as a function of spill size;

- (ii) refinement of the probability density functions used to establish the extent of vessel damage, based on the latest available historical damage statistics, and current research on the crash worthiness of tank vessel structures;
- (iii) development of a rationally based approach for calculating an environmental index, to assess overall outflow performance due to collisions and groundings; and
- (iv) application of the proposed index to double hull tank vessels and alternative designs currently under consideration.

(B) A Marine Board committee shall be established not later than 2 months after the date of the enactment of the Coast Guard Authorization Act of 1998. The Secretary of Transportation shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure in the House of Representatives a report on the results of the study not later than 12 months after the date of the enactment of the Coast Guard Authorization Act of 1998.

(C) Of the amounts authorized by section 1012(a)(5)(A) of this Act, \$500,000 is authorized to carry out the activities under subparagraphs (A) and (B) of this paragraph.

(46 U.S.C. 3703a note)

* * * * *

SEC. 4116. PILOTAGE

(a) * * *

* * * * *

(c) ESCORTS FOR CERTAIN TANKERS.—Not later than 6 months after the date of the enactment of this Act, the Secretary shall initiate issuance of regulations under section 3703(a)(3) of title 46, United States Code, to define those areas, including Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington (including those portions of the Strait of Juan de Fuca east of Port Angeles, Haro Strait, and the Strait of Georgia subject to United States jurisdiction), on which single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels (as defined under section 2101 of title 46, United States Code) or other vessels considered appropriate by the Secretary.

(d) TANKER DEFINED.—In this section the term “tanker” has the same meaning the term has in section 2101 of title 46, United States Code.

(46 U.S.C. 3703 note)

SEC. 4117. MARITIME POLLUTION PREVENTION TRAINING PROGRAM

STUDY

The Secretary shall conduct a study to determine the feasibility of a Maritime Oil Pollution Prevention Training program to be carried out in cooperation with approved maritime training institutions. The study shall assess the costs and benefits of transferring suitable vessels to selected maritime training institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills. The study shall be completed and transmitted to the Congress no later than one year after the date of the enactment of this Act.

(46 U.S.C. app. 1295 note)

SEC. 4118. VESSEL COMMUNICATION EQUIPMENT REGULATIONS

The Secretary shall, not later than one year after the date of the enactment of this Act, issue regulations necessary to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203) are also equipped as necessary to—

(1) receive radio marine navigation safety warnings; and

(2) engage in radio communications on designated frequencies with the Coast Guard, and such other vessels and stations as may be specified by the Secretary.

(33 U.S.C. 1203 note)

Subtitle B—Removal

SEC. 4201. FEDERAL REMOVAL AUTHORITY

(a) * * *

* * * * *

(c) ^{1²⁰⁵}REVISION OF NATIONAL CONTINGENCY PLAN.—Not later than one year after the date of the enactment of this Act, the President shall revise and republish the National Contingency Plan prepared under section 311(c)(2) of the Federal Water Pollution Control Act (as in effect immediately before the date of the enactment of this Act) to implement the amendments made by this section and section 4202.

(33 U.S.C. 1321 note)

SEC. 4202. NATIONAL PLANNING AND RESPONSE SYSTEM

(a) * * *

(b) **IMPLEMENTATION.**—

(1) **AREA COMMITTEES AND CONTINGENCY PLANS.**—(A) Not later than 6 months after the date of the enactment of this Act, the President shall designate the areas for which Area Committees are established under section 311(j)(4) of the Federal Water Pollution Control Act, as amended by this Act. In designatingsuch areas, the President shall ensure that all navigablewaters, adjoining shorelines, and waters of the exclusiveeconomic zone are subject to an Area Contingency Plan under that section.

(B) Not later than 18 months after the date of the enactment of this Act, each Area Committee established under that section shall submit to the President the Area Contingency Plan required under that section.

(C) Not later than 24 months after the date of the enactment of this Act, the President shall—

(i) promptly review each plan;

(ii) require amendments to any plan that does not meet the requirements of section 311(j)(4) of the Federal Water Pollution Control Act; and

(iii) approve each plan that meets the requirements of that section.

(2) **NATIONAL RESPONSE UNIT.**—Not later than one year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall

^{1²⁰⁵}1 So in law. Probably should be redesignated as subsection (d).

establish a National Response Unit in accordance with section 311(j)(2) of the Federal Water Pollution Control Act, as amended by this Act.

(3) COAST GUARD DISTRICT RESPONSE GROUPS.—Not later than 1 year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall establish Coast Guard District Response Groups in accordance with section 311(j)(3) of the Federal Water Pollution Control Act, as amended by this Act.

(4) TANK VESSEL AND FACILITY RESPONSE PLANS; TRANSITION

PROVISION; EFFECTIVE DATE OF PROHIBITION.—(A) Not later than 24 months after the date of the enactment of this Act, the President shall issue regulations for tank vessel and facility response plans under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act.

(B) During the period beginning 30 months after the date of the enactment of this paragraph and ending 36 months after that date of enactment, a tank vessel or facility for which a response plan is required to be prepared under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, may not handle, store, or transport oil unless the owner or operator thereof has submitted such a plan to the President.

(C) Subparagraph (E) of section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, shall take effect 36 months after the date of the enactment of this Act.

(33 U.S.C. 1321 note)

* * * * *

SEC. 4203. COAST GUARD VESSEL DESIGN

The Secretary shall ensure that vessels designed and constructed to replace Coast Guard buoy tenders are equipped with oil skimming systems that are readily available and operable, and that complement the primary mission of servicing aids to navigation.

* * * * *

Subtitle C—Penalties and Miscellaneous

* * * * *

SEC. 4303. FINANCIAL RESPONSIBILITY CIVIL PENALTIES

(a) ADMINISTRATIVE.—Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 1016 or the regulations issued under that section, or with a denial or detention order issued under subsection (c)(2) of that section, shall be liable to the United States for a civil penalty, not to exceed \$25,000 per day of violation. The amount of the civil penalty shall be assessed by the President by written notice.

In determining the amount of the penalty, the President shall take into account the nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior violation, ability to pay, and such other matters as justice may require.

The President may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this paragraph. If any person fails to pay an assessed civil penalty after it has become final, the President may refer the matter to the Attorney General for collection.

(b) JUDICIAL.—In addition to, or in lieu of, assessing a penalty under subsection (a), the President may request the Attorney General to secure such relief as necessary to compel compliance with this section 1016, including a judicial order terminating operations. The district courts of the United States shall have jurisdiction to grant any relief as the public interest and the equities of the case may require.

(33 U.S.C. 2716a)

SEC. 4304. DEPOSIT OF CERTAIN PENALTIES INTO OIL SPILL LIABILITY

TRUST FUND

Penalties paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of that Act, as a result of violations of section 311 of that Act, and the Deepwater Port Act of 1974, shall be deposited in the Oil Spill Liability Trust Fund created under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

(26 U.S.C. 9509 note)

* * * * *

TITLE V—PRINCE WILLIAM SOUNDPROVISIONS

SEC. 5001. OIL SPILL RECOVERY INSTITUTE

(a) ESTABLISHMENT OF INSTITUTE.—The Secretary of Commerce shall provide for the establishment of a Prince William Sound Oil Spill Recovery Institute (hereinafter in this section referred to as the “Institute”) through the Prince William Sound Science and Technology Institute located in Cordova, Alaska.

(b) FUNCTIONS.—The Institute shall conduct research and carry out educational and demonstration projects designed to—

(1) identify and develop the best available techniques, equipment, and materials for dealing with oil spills in the arctic and subarctic marine environment; and

(2) complement Federal and State damage assessment efforts and determine, document, assess, and understand the long-range effects of Arctic or Subarctic oil spills on the natural resources of Prince William Sound and its adjacent waters (as generally depicted on the map entitled “EXXON VALDEZ oil spill dated March 1990”), and the environment, the economy, and the lifestyle and well-being of the people who are dependent on them, except that the Institute shall not conduct studies or make recommendations on any matter which is not directly related to Arctic or Subarctic oil spills or the effects thereof.

(c) ADVISORY BOARD.—

(1) IN GENERAL.—The policies of the Institute shall be determined by an advisory board, composed of 16 members appointed as follows:

(A) One representative appointed by each of the Commissioners of Fish and Game, Environmental Conservation, and Natural Resources of the State of Alaska, all of whom shall be State employees.

(B) One representative appointed by each of the Secretaries of Commerce, the Interior, and Transportation, who shall be Federal employees.

(C) Two representatives from the fishing industry appointed by the Governor of the State of Alaska from among residents of communities in Alaska that were affected by the EXXON VALDEZ oil spill, who shall serve terms of 2 years each. Interested organizations from within the fishing industry may submit the names of qualified individuals for consideration by the Governor.

(D) Two Alaska Natives who represent Native entities affected by the EXXON VALDEZ oil spill, at least one of

whom represents an entity located in Prince William Sound, appointed by the Governor of Alaska from a list of 4 qualified individuals submitted by the Alaska Federation of Natives, who shall serve terms of 2 years each.

(E) Two representatives from the oil and gas industry to be appointed by the Governor of the State of Alaska who shall serve terms of 2 years each. Interested organizations from within the oil and gas industry may submit the names of qualified individuals for consideration by the Governor.

(F) Two at-large representatives from among residents of communities in Alaska that were affected by the EXXON VALDEZ oil spill who are knowledgeable about the marine environment and wildlife within Prince William Sound, and who shall serve terms of 2 years each, appointed by the remaining members of the Advisory Board.

Interested parties may submit the names of qualified individuals for consideration by the Advisory Board.

(G) One nonvoting representative of the Institute of Marine Science.

(H) One nonvoting representative appointed by the Prince William Sound Science and Technology Institute.

(2) CHAIRMAN.—The representative of the Secretary of Commerce shall serve as Chairman of the Advisory Board.

(3) POLICIES.—Policies determined by the Advisory Board under this subsection shall include policies for the conduct and support, through contracts and grants awarded on a nationally competitive basis, of research, projects, and studies to be supported by the Institute in accordance with the purposes of this section.

(4) SCIENTIFIC REVIEW.—The Advisory Board may request a scientific review of the research program every five years by the National Academy of Sciences which shall perform the review, if requested, as part of its responsibilities under section 7001(b)(2).

(d) SCIENTIFIC AND TECHNICAL COMMITTEE.—

(1) IN GENERAL.—The Advisory Board shall establish a scientific and technical committee, composed of specialists in matters relating to oil spill containment and cleanup technology, arctic and subarctic marine ecology, and the living resources and socioeconomics of Prince William Sound and its adjacent waters, from the University of Alaska, the Institute of MarineScience, the Prince William Sound Science and Technology Institute, and elsewhere in the academic community.

(2) FUNCTIONS.—The Scientific and Technical Committee shall provide such advice to the Advisory Board as the Advisory Board shall request, including recommendations regarding the conduct and support of research, projects, and studies in accordance with the purposes of this section. The Advisory Board shall not request, and the Committee shall not provide, any advice which is not directly related to Arctic or Subarctic oil spills or the effects thereof.

(e) DIRECTOR.—The Institute shall be administered by a Director appointed by the Advisory Board. The Prince William SoundScience and Technology Institute and the Scientific and TechnicalCommittee may each submit independent recommendations for the Advisory Board's consideration for appointment as Director. The Director may hire such staff and incur such expenses on behalf of the Institute as are authorized by the Advisory Board.

(f) EVALUATION.—The Secretary of Commerce may conduct an on-going evaluation of the activities of the Institute to ensure that funds received by the Institute are used in a manner consistent with this section.

(g) AUDIT.—The Comptroller General of the United States, and any of his or her duly authorized representatives, shall have access, for purposes of audit and examination, to any books, documents, papers, and records of the Institute and its administering agency that are pertinent to the funds received and expended by the Institute and its administering agency.

(h) STATUS OF EMPLOYEES.—Employees of the Institute shall not, by reason of such employment, be considered to be employees of the Federal Government for any purpose.

(i) TERMINATION.—The authorization in section 5006(b) providing funding for the Institute shall terminate 10 years after the date of the enactment of the Coast Guard Authorization Act of 1996.

(j) USE OF FUNDS.—No funds made available to carry out this section may be used to initiate litigation. No funds made available to carry out this section may be used for the acquisition of real property (including buildings) or construction of any building. No more than 20 percent of funds made available to carry out this section may be used to lease necessary facilities and to administer the Institute. The Advisory Board may compensate its Federal representatives for their reasonable travel costs. None of the funds authorized by this section shall be used for any purpose other than the functions specified in subsection (b).

(k) RESEARCH.—The Institute shall publish and make available to any person upon request the results of all research, educational, and demonstration projects conducted by the Institute. The Administrator shall provide a copy of all research, educational, and demonstration projects conducted by the Institute to the National Oceanic and Atmospheric Administration.

(l) DEFINITIONS.—In this section, the term “Prince William Sound and its adjacent waters” means such sound and waters as generally depicted on the map entitled “EXXON VALDEZ oil spill dated March 1990”.

(33 U.S.C. 2731)

SEC. 5002. TERMINAL AND TANKER OVERSIGHT AND MONITORING

(a) SHORT TITLE AND FINDINGS.—

(1) SHORT TITLE.—This section may be cited as the “Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990”.

(2) FINDINGS.—The Congress finds that—

(A) the March 24, 1989, grounding and rupture of the fully loaded oil tanker, the EXXON VALDEZ, spilled 11 million gallons of crude oil in Prince William Sound, an environmentally sensitive area;

- (B) many people believe that complacency on the part of the industry and government personnel responsible for monitoring the operation of the Valdez terminal and vessel traffic in Prince William Sound was one of the contributing factors to the EXXON VALDEZ oil spill;
- (C) one way to combat this complacency is to involve local citizens in the process of preparing, adopting, and revising oil spill contingency plans;
- (D) a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals;
- (E) such a mechanism presently exists at the Sullom Voe terminal in the Shetland Islands and this terminal should serve as a model for others;
- (F) because of the effective partnership that has developed at Sullom Voe, Sullom Voe is considered the safest terminal in Europe;
- (G) the present system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation;
- (H) only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus;
- (I) a pilot program patterned after Sullom Voe should be established in Alaska to further refine the concepts and relationships involved; and
- (J) similar programs should eventually be established in other major crude oil terminals in the United States because the recent oil spills in Texas, Delaware, and Rhode Island indicate that the safe transportation of crude oil is a national problem.

(b) DEMONSTRATION PROGRAMS.—

- (1) ESTABLISHMENT.—There are established 2 Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Programs (hereinafter referred to as “Programs”) to be carried out in the State of Alaska.
- (2) ADVISORY FUNCTION.—The function of these Programs shall be advisory only.

(3) PURPOSE.—The Prince William Sound Program shall be responsible for environmental monitoring of the terminal facilities in Prince William Sound and the crude oil tankers operating in Prince William Sound. The Cook Inlet Program shall be responsible for environmental monitoring of the terminal facilities and crude oil tankers operating in Cook Inlet located South of the latitude at Point Possession and North of the latitude at Amatuli Island, including offshore facilities in Cook Inlet.

(4) SUITS BARRED.—No program, association, council, committee or other organization created by this section may sue any person or entity, public or private, concerning any matter arising under this section except for the performance of contracts.

(c) OIL TERMINAL FACILITIES AND OIL TANKER OPERATIONS ASSOCIATION.—

(1) ESTABLISHMENT.—There is established an Oil Terminal Facilities and Oil Tanker Operations Association (hereinafter in this section referred to as the “Association”) for each of the Programs established under subsection (b).

(2) MEMBERSHIP.—Each Association shall be comprised of 4 individuals as follows:

(A) One individual shall be designated by the owners and operators of the terminal facilities and shall represent those owners and operators.

(B) One individual shall be designated by the owners and operators of the crude oil tankers calling at the terminal facilities and shall represent those owners and operators.

(C) One individual shall be an employee of the State of Alaska, shall be designated by the Governor of the State of Alaska, and shall represent the State government.

(D) One individual shall be an employee of the Federal Government, shall be designated by the President, and shall represent the Federal Government.

(3) RESPONSIBILITIES.—Each Association shall be responsible for reviewing policies relating to the operation and maintenance of the oil terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of their respective terminals. Each Association shall provide a forum among the owners and operators of the terminal facilities, the owners and operators of crude oil tankers calling at those facilities,

the United States, and the State of Alaska to discuss and to make recommendations concerning all permits, plans, and site-specific regulations governing the activities and

actions of the terminal facilities which affect or may affect the environment in the vicinity of the terminal facilities and of crude oil tankers calling at those facilities.

(4) DESIGNATION OF EXISTING ORGANIZATION.—The Secretary may designate an existing non-profit organization as an Association under this subsection if the organization is organized to meet the purposes of this section and consists of at least the individuals listed in paragraph (2).

(d) REGIONAL CITIZENS' ADVISORY COUNCILS.—

(1) MEMBERSHIP.—There is established a Regional Citizens' Advisory Council (hereinafter in this section referred to as the "Council") for each of the programs established by subsection

(b).

(2) MEMBERSHIP.—Each Council shall be composed of voting members and nonvoting members, as follows:

(A) VOTING MEMBERS.—Voting members shall be Alaska residents and, except as provided in clause (vii) of this paragraph, shall be appointed by the Governor of the State of Alaska from a list of nominees provided by each of the following interests, with one representative appointed to represent each of the following interests, taking into consideration

the need for regional balance on the Council:

(i) Local commercial fishing industry organizations, the members of which depend on the fisheries resources of the waters in the vicinity of the terminal facilities.

(ii) Aquaculture associations in the vicinity of the terminal facilities.

(iii) Alaska Native Corporations and other Alaska Native organizations the members of which reside in the vicinity of the terminal facilities.

(iv) Environmental organizations the members of which reside in the vicinity of the terminal facilities.

(v) Recreational organizations the members of which reside in or use the vicinity of the terminal facilities.

- (vi) The Alaska State Chamber of Commerce, to represent the locally based tourist industry.
- (vii)(I) For the Prince William Sound Terminal Facilities Council, one representative selected by each of the following municipalities: Cordova, Whittier, Seward, Valdez, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.
- (II) For the Cook Inlet Terminal Facilities Council, one representative selected by each of the following municipalities: Homer, Seldovia, Anchorage, Kenai, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.

(B) NONVOTING MEMBERS.—One ex-officio, nonvoting representative shall be designated by, and represent, each of the following:

- (i) The Environmental Protection Agency.
- (ii) The Coast Guard.
- (iii) The National Oceanic and Atmospheric Administration.
- (iv) The United States Forest Service.
- (v) The Bureau of Land Management.
- (vi) The Alaska Department of Environmental Conservation.
- (vii) The Alaska Department of Fish and Game.
- (viii) The Alaska Department of Natural Resources.
- (ix) The Division of Emergency Services, Alaska Department of Military and Veterans Affairs.

(3) TERMS.—

(A) DURATION OF COUNCILS.—The term of the Councils shall continue throughout the life of the operation of the Trans-Alaska Pipeline System and so long as oil is transported to or from Cook Inlet.

(B) THREE YEARS.—The voting members of each Council shall be appointed for a term of 3 years except as provided for in subparagraph (C).

(C) INITIAL APPOINTMENTS.—The terms of the first appointments shall be as follows: (i) For the appointments by the Governor of the State of Alaska, one-third shall serve for 3 years, one-third shall serve for 2 years, and one-third shall serve for one year.

(ii) For the representatives of municipalities required by subsection (d)(2)(A)(vii), a drawing of lots among the appointees shall determine that one-third of that group serves for 3 years, one-third serves for 2 years, and the remainder serves for 1 year.

(4) SELF-GOVERNING.—Each Council shall elect its own chairperson, select its own staff, and make policies with regard to its internal operating procedures. After the initial organizational meeting called by the Secretary under subsection (i), each Council shall be self-governing.

(5) DUAL MEMBERSHIP AND CONFLICTS OF INTEREST PROHIBITED.—(

A) No individual selected as a member of the Council shall serve on the Association.

(B) No individual selected as a voting member of the Council shall be engaged in any activity which might conflict with such individual carrying out his functions as a member thereof.

(6) DUTIES.—Each Council shall—

(A) provide advice and recommendations to the Association on policies, permits, and site-specific regulations relating to the operation and maintenance of terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of the terminal facilities;

(B) monitor through the committee established under subsection (e), the environmental impacts of the operation of the terminal facilities and crude oil tankers;

(C) monitor those aspects of terminal facilities' and crude oil tankers' operations and maintenance which affect or may affect the environment in the vicinity of the terminal facilities;

(D) review through the committee established under subsection (f), the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill

prevention and contingency plans for crude oil tankers, operating in Prince William Sound or in Cook Inlet;

(E) provide advice and recommendations to the Association on port operations, policies and practices;

(F) recommend to the Association—

(i) standards and stipulations for permits and site-specific regulations intended to minimize the impact of the terminal facilities' and crude oil tankers' operations in the vicinity of the terminal facilities;

(ii) modifications of terminal facility operations and maintenance intended to minimize the risk and mitigate the impact of terminal facilities, operations in the vicinity of the terminal facilities and to minimize the risk of oil spills;

(iii) modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills; and

(iv) modifications to the oil spill prevention and contingency plans for terminal facilities and for crude oil tankers in Prince William Sound and Cook Inlet intended to enhance the ability to prevent and respond to an oil spill; and

(G) create additional committees of the Council as necessary to carry out the above functions, including a scientific and technical advisory committee to the Prince William Sound Council.

(7) NO ESTOPPEL.—No Council shall be held liable under State or Federal law for costs or damages as a result of rendering advice under this section. Nor shall any advice given by a voting member of a Council, or program representative or agent, be grounds for estopping the interests represented by the voting Council members from seeking damages or other appropriate relief.

(8) SCIENTIFIC WORK.—In carrying out its research, development and monitoring functions, each Council is authorized to conduct its own scientific research and shall review the scientific work undertaken by or on behalf of the terminal operators or crude oil tanker operators as a result of a legal requirement to undertake that work. Each Council shall also

review the relevant scientific work undertaken by or on behalf of any government entity relating to the terminal facilities or crude oil tankers. To the extent possible, to avoid unnecessary duplication, each Council shall coordinate its independent scientific

work with the scientific work performed by or on behalf of the terminal operators and with the scientific work performed by or on behalf of the operators of the crude oil tankers.

(e) COMMITTEE FOR TERMINAL AND OIL TANKER OPERATIONS AND ENVIRONMENTAL MONITORING.—

(1) MONITORING COMMITTEE.—Each Council shall establish a standing Terminal and Oil Tanker Operations and Environmental Monitoring Committee (hereinafter in this section referred to as the “Monitoring Committee”) to devise and manage a comprehensive program of monitoring the environmental impacts of the operations of terminal facilities and of crude oil tankers while operating in Prince William Sound and Cook Inlet. The membership of the Monitoring Committee shall be made up of members of the Council, citizens, and recognized scientific experts selected by the Council.

(2) DUTIES.—In fulfilling its responsibilities, the Monitoring Committee shall—

(A) advise the Council on a monitoring strategy that will permit early detection of environmental impacts of terminal facility operations and crude oil tanker operations

while in Prince William Sound and Cook Inlet;

(B) develop monitoring programs and make recommendations to the Council on the implementation of those programs;

(C) at its discretion, select and contract with universities and other scientific institutions to carry out specific monitoring projects authorized by the Council pursuant to an approved monitoring strategy;

(D) complete any other tasks assigned by the Council; and

(E) provide written reports to the Council which interpret and assess the results of all monitoring programs.

(f) COMMITTEE FOR OIL SPILL PREVENTION, SAFETY, AND EMERGENCY

RESPONSE.—

(1) TECHNICAL OIL SPILL COMMITTEE.—Each Council shall establish a standing technical committee (hereinafter referred to as “Oil Spill Committee”) to review and assess measures designed to prevent oil spills and the planning and preparedness for responding to, containing, cleaning up, and mitigating impacts of oil spills. The membership of the Oil Spill Committee shall be made up of members of the Council, citizens, and recognized technical experts selected by the Council.

(2) DUTIES.—In fulfilling its responsibilities, the Oil Spill Committee shall—

(A) periodically review the respective oil spill prevention and contingency plans for the terminal facilities and for the crude oil tankers while in Prince William Sound or Cook Inlet, in light of new technological developments and changed circumstances;

(B) monitor periodic drills and testing of the oil spill contingency plans for the terminal facilities and for crude oil tankers while in Prince William Sound and Cook Inlet;

(C) study wind and water currents and other environmental factors in the vicinity of the terminal facilities which may affect the ability to prevent, respond to, contain, and clean up an oil spill;

(D) identify highly sensitive areas which may require specific protective measures in the event of a spill in Prince William Sound or Cook Inlet;

(E) monitor developments in oil spill prevention, containment, response, and cleanup technology;

(F) periodically review port organization, operations, incidents, and the adequacy and maintenance of vessel traffic service systems designed to assure safe transit of crude oil tankers pertinent to terminal operations;

(G) periodically review the standards for tankers bound for, loading at, exiting from, or otherwise using the terminal facilities;

(H) complete any other tasks assigned by the Council; and

(I) provide written reports to the Council outlining its findings and recommendations.

(g) AGENCY COOPERATION.—On and after the expiration of the 180-day period following the date of the enactment of this section, each Federal department, agency, or other instrumentality shall, with respect to all permits, site-specific regulations, and other matters governing the activities and actions of the terminal facilities which affect or may affect the vicinity of the terminal facilities, consult with the appropriate Council prior to taking substantive action with respect to the permit, site-specific regulation, or other matter. This consultation shall be carried out with a view to enabling the appropriate Association and Council to review the permit, site-specific regulation, or other matters and make appropriate recommendations regarding operations, policy or agency actions. Prior

consultation shall not be required if an authorized Federal agency representative reasonably believes that an emergency exists requiring action without delay.

(h) RECOMMENDATIONS OF THE COUNCIL.—In the event that the Association does not adopt, or significantly modifies before adoption, any recommendation of the Council made pursuant to the authority granted to the Council in subsection (d), the Association shall provide to the Council, in writing, within 5 days of its decision, notice of its decision and a written statement of reasons for its rejection or significant modification of the recommendation.

(i) ADMINISTRATIVE ACTIONS.—Appointments, designations, and selections of individuals to serve as members of the Associations and Councils under this section shall be submitted to the Secretary prior to the expiration of the 120-day period following the date of the enactment of this section. On or before the expiration of the 180-day period following that date of enactment of this section, the Secretary shall call an initial meeting of each Association and Council for organizational purposes.

(j) LOCATION AND COMPENSATION.—

(1) LOCATION.—Each Association and Council established by this section shall be located in the State of Alaska.

(2) COMPENSATION.—No member of an Association or Council shall be compensated for the member's services as a member of the Association or Council, but shall be allowed travel expenses, including per diem in lieu of subsistence, at a rate established by the Association or

Council not to exceed the rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code. However, each Council may enter into contracts to provide compensation and expenses to members of the committees created under subsections (d), (e), and (f).

(k) FUNDING.—

(1) REQUIREMENT.—Approval of the contingency plans required of owners and operators of the Cook Inlet and Prince William Sound terminal facilities and crude oil tankers while operating in Alaskan waters in commerce with those terminal facilities shall be effective only so long as the respective Association and Council for a facility are funded pursuant to paragraph (2).

(2) PRINCE WILLIAM SOUND PROGRAM.—The owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound shall provide, on an annual basis, an aggregate amount of not more than \$2,000,000, as determined by the Secretary. Such amount—

(A) shall provide for the establishment and operation on the environmental oversight and monitoring program in Prince William Sound;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound and the Prince William Sound terminal facilities Council.

(3) COOK INLET PROGRAM.—The owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet shall provide, on an annual basis, an aggregate amount of not more than \$1,000,000, as determined by the Secretary. Such amount—

(A) shall provide for the establishment and operation of the environmental oversight and monitoring program in Cook Inlet;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet and the Cook Inlet Council.

(l) REPORTS.—

(1) ASSOCIATIONS AND COUNCILS.—Prior to the expiration of the 36-month period following the date of the enactment of this section, each Association and Council established by this section shall report to the President and the Congress concerning its activities under this section, together with its recommendations.

(2) GAO.—Prior to the expiration of the 36-month period following the date of the enactment of this section, the General Accounting Office shall report to the President and the Congress as to the handling of funds, including donated funds, by the entities carrying out the programs under this section, and the effectiveness of the demonstration programs carried out under this section, together with its recommendations.

(m) DEFINITIONS.—As used in this section, the term—

(1) “terminal facilities” means—

(A) in the case of the Prince William Sound Program, the entire oil terminal complex located in Valdez, Alaska, consisting of approximately 1,000 acres including all buildings, docks (except docks owned by the City of Valdez if those docks are not used for loading of crude oil), pipes, piping, roads, ponds, tanks, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, vehicles, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex; and

(B) in the case of the Cook Inlet Program, the entire oil terminal complex including all buildings, docks, pipes, piping, roads, ponds, tanks, vessels, vehicles, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, emergency spill response vessels owned or operated by the operator of the terminal, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex;

(2) “crude oil tanker” means a tanker (as that term is defined under section 2101 of title 46, United States Code)—

(A) in the case of the Prince William Sound Program, calling at the terminal facilities for the purpose of receiving and transporting oil to refineries, operating north of Middleston Island and bound for or exiting from Prince William Sound; and

(B) in the case of the Cook Inlet Program, calling at the terminal facilities for the purpose of receiving and transporting oil to refineries and operating in Cook Inlet and the Gulf of Alaska north of Amatuli Island, including tankers transiting to Cook Inlet from Prince William Sound;

(3) “vicinity of the terminal facilities” means that geographical area surrounding the environment of terminal facilities which is directly affected or may be directly affected by the operation of the terminal facilities; and

(4) “Secretary” means the Secretary of Transportation.

(n) SAVINGS CLAUSE.—

(1) REGULATORY AUTHORITY.—Nothing in this section shall be construed as modifying, repealing, superseding, or pre-empting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development. The monitoring provided for by this section shall be designed to help assure compliance with applicable laws and regulations and shall only extend to activities—

(A) that would affect or have the potential to affect the vicinity of the terminal facilities and the area of crude oil tanker operations included in the Programs; and

(B) are subject to the United States or State of Alaska,

or municipality thereof, law, regulation, or other legal requirement.

(2) RECOMMENDATIONS.—This subsection is not intended to prevent the Association or Council from recommending to appropriate authorities that existing legal requirements should be modified or that new legal requirements should be adopted.

(o) ALTERNATIVE VOLUNTARY ADVISORY GROUP IN LIEU OF COUNCIL.—

The requirements of subsections (c) through (l), as such subsections apply respectively to the Prince William Sound Program and the Cook Inlet Program, are deemed to have been satisfied so long as the following conditions are met:

(1) PRINCE WILLIAM SOUND.—With respect to the Prince William Sound Program, the Alyeska Pipeline Service Company or any of its owner companies enters into a contract for the duration of the operation of the Trans-Alaska Pipeline System with the Alyeska Citizens Advisory Committee in existence on the date of enactment of this section, or a successor organization, to fund that Committee or organization on an annual basis in the amount provided for by subsection (k)(2)(A) and the President annually certifies that the Committee or organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Prince William Sound.

(2) COOK INLET.—With respect to the Cook Inlet Program, the terminal facilities, offshore facilities, or crude oil tanker owners and operators enter into a contract with a voluntary advisory organization to fund that organization on an annual basis and the President annually certifies that the organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Cook Inlet.

(33 U.S.C. 2732)

SEC. 5003. BLIGH REEF LIGHT

The Secretary of Transportation shall within one year after the date of the enactment of this title install and ensure operation of an automated navigation light on or adjacent to Bligh Reef in Prince William Sound, Alaska, of sufficient power and height to provide long-range warning of the location of Bligh Reef.

(33 U.S.C. 2733)

SEC. 5004. VESSEL TRAFFIC SERVICE SYSTEM

The Secretary of Transportation shall within one year after the date of the enactment of this title—

(1) acquire, install, and operate such additional equipment (which may consist of radar, closed circuit television, satellite tracking systems, or other shipboard dependent surveillance), train and locate such personnel, and issue such final regulations as are necessary to increase the range of the existing VTS system in the Port of Valdez, Alaska, sufficiently to track the locations and movements of tank vessels carrying oil from the Trans-Alaska Pipeline when such vessels are transiting Prince William Sound, Alaska, and to sound an audible alarm when such tankers depart from designated navigation routes;

and

(2) submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the feasibility and desirability of instituting positive control of tank vessel movements in Prince William Sound by Coast Guard personnel using the Port of Valdez, Alaska, VTS system, as modified pursuant to paragraph (1).

(33 U.S.C. 2734)

SEC. 5005. EQUIPMENT AND PERSONNEL REQUIREMENTS UNDER TANK VESSEL AND FACILITY RESPONSE PLANS

(a) IN GENERAL.—In addition to the requirements for response plans for vessels established by section 311(j) of the Federal Water Pollution Control Act, as amended by this Act, a response plan for a tanker loading cargo at a facility permitted under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.),¹¹²⁰⁶ shall

provide for—

(1) prepositioned oil spill containment and removal equipment in communities and other strategic locations within the geographic boundaries of Prince William Sound, including escort vessels with skimming capability; barges to receive recovered oil; heavy duty sea boom, pumping, transferring, and lightering equipment; and other appropriate removal equipment for the protection of the environment, including fish hatcheries;

¹²⁰⁶¹ Section 354(2) of P.L. 102-388 attempted to amend section 5005(a) by inserting “and a response plan for such a facility,” after “(43 U.S.C. 1651 et seq.).”. The amendment probably should have made the insertion after “(43 U.S.C. 1651 et seq.),”.

- (2) the establishment of an oil spill removal organization at appropriate locations in Prince William Sound, consisting of trained personnel in sufficient numbers to immediately remove, to the maximum extent practicable, a worst case discharge or a discharge of 200,000 barrels of oil, whichever is greater;
- (3) training in oil removal techniques for local residents and individuals engaged in the cultivation or production of fish or fish products in Prince William Sound;
- (4) practice exercises not less than 2 times per year which test the capacity of the equipment and personnel required under this paragraph; and
- (5) periodic testing and certification of equipment required under this paragraph, as required by the Secretary.

(b) **DEFINITIONS.**—In this section—

- (1) the term “Prince William Sound” means all State and Federal waters within Prince William Sound, Alaska, including the approach to Hinchenbrook Entrance out to and encompassing

Seal Rocks; and

(2) the term “worst case discharge” means—

- (A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and
- (B) in the case of a facility, the largest foreseeable discharge in adverse weather conditions.

(33 U.S.C. 2735)

SEC. 5006. FUNDING

(a) **SECTIONS 5001, 5003 AND 5004.**—Amounts in the Fund shall be available, without further appropriations and without fiscal year limitation, to carry out section 5001 in the amount as determined in section 5006(b), and to carry out sections 5003 and 5004, in an amount not to exceed \$5,000,000.

(b) **USE OF INTEREST ONLY.**—The amount of funding to be made available annually to carry out section 5001 shall be the interest produced by the Fund’s investment of the

\$22,500,000 remaining funding authorized for the Prince William Sound Oil Spill Recovery Institute and currently deposited in the Fund and invested by the Secretary of the Treasury in income producing securities along with other funds comprising the Fund. The National Pollution Funds Center shall transfer all such accrued interest, including the interest earned from the date funds in the Trans-Alaska Li-

1 First subsection (c) added by sec. 1102(b)(4) of P.L. 104–324, 110 Stat. 3965, Oct. 19, 1996.

For second subsection (c), see note 5006–2.

2 Second subsection (c) added by sec. 2204(2) of P.L. 106–246, 114 Stat. 547, July 13, 2000.

For first subsection (c), see note 5006–1. ability Pipeline Fund were transferred into the Oil Spill Liability Trust Fund pursuant to section 8102(a)(2)(B)(ii), to the Prince William Sound Oil Spill Recovery Institute annually, beginning 60 days after the date of enactment of the Coast Guard Authorization Act of 1996.

(c) 1 USE FOR SECTION 1012.—Beginning with the eleventh year following the date of enactment of the Coast Guard Authorization Act of 1996, the funding authorized for the Prince William Sound Oil Spill Recovery Institute and deposited in the Fund shall thereafter be made available for purposes of section 1012 in Alaska.

(c) 2 SECTION 5008.—Amounts in the Fund shall be available, without further appropriation and without fiscal year limitation, to carry out section 5008(b), in an amount not to exceed \$5,000,000 of which up to \$3,000,000 may be used for the lease payment to the Alaska SeaLife Center under section 5008(b)(2): *Provided*, That the entire amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended: *Provided*

further, That the entire amount shall be available only to the extent an official budget request that includes designation of the entire amount of the request as an emergency requirement as defined in the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, is transmitted by the President to the Congress.

(33 U.S.C. 2736)

SEC. 5007. LIMITATION

Notwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska.

(33 U.S.C. 2737)

SEC. 5008. NORTH PACIFIC MARINE RESEARCH INSTITUTE

(a) **INSTITUTE ESTABLISHED.**—The Secretary of Commerce shall establish a North Pacific Marine Research Institute (hereafter in this section referred to as the “Institute”) to be administered at the Alaska SeaLife Center by the North Pacific Research Board.

(b) **FUNCTIONS.**—The Institute shall—

(1) conduct research and carry out education and demonstration projects on or relating to the North Pacific marine ecosystem with particular emphasis on marine mammal, sea bird, fish, and shellfish populations in the Bering Sea and Gulf of Alaska including populations located in or near Kenai Fjords National Park and the Alaska Maritime National Wildlife Refuge;

and

(2) lease, maintain, operate, and upgrade the necessary research equipment and related facilities necessary to conduct such research at the Alaska SeaLife Center.

(c) **EVALUATION AND AUDIT.**—The Secretary of Commerce may periodically evaluate the activities of the Institute to ensure that funds received by the Institute are used in a manner consistent with this section. The Federal Advisory Committee Act (5 U.S.C.

App. 2) shall not apply to the Institute.

(d) **STATUS OF EMPLOYEES.**—Employees of the Institute shall not, by reason of such employment, be considered to be employees of the Federal Government for any purpose.

(e) **USE OF FUNDS.**—No funds made available to carry out this section may be used to initiate litigation, or for the acquisition of real property (other than facilities leased at the Alaska SeaLife Center). No more than 10 percent of the funds made available to carry out subsection (b)(1) may be used to administer the Institute.

The administrative funds of the Institute and the administrative funds of the North Pacific Research Board created under Public Law 105–83 may be used to jointly administer such programs at the discretion of the North Pacific Research Board.

(f) AVAILABILITY OF RESEARCH.—The Institute shall publish and make available to any person on request the results of all research, educational, and demonstration projects conducted by the Institute. The Institute shall provide a copy of all research, educational, and demonstration projects conducted by the Institute to the National Park Service, the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration.

(33 U.S.C. 2738)

TITLE VI—MISCELLANEOUS

SEC. 6001. SAVINGS PROVISIONS

(a) CROSS-REFERENCES.—A reference to a law replaced by this Act, including a reference in a regulation, order, or other law, is deemed to refer to the corresponding provision of this Act.

(b) CONTINUATION OF REGULATIONS.—An order, rule, or regulation in effect under a law replaced by this Act continues in effect under the corresponding provision of this Act until repealed, amended, or superseded.

(c) RULE OF CONSTRUCTION.—An inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act.

(d) ACTIONS AND RIGHTS.—Nothing in this Act shall apply to any rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date of enactment of this Act, except as provided by this section, and shall be adjudicated pursuant to the law applicable on the date prior to the date of the enactment of this Act.

(e) ADMIRALTY AND MARITIME LAW.—Except as otherwise provided in this Act, this Act does not affect—

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

SEC. 6002. ANNUAL APPROPRIATIONS

(a) REQUIRED.—Except as provided in subsection (b), amounts in the Fund shall be available only as provided in annual appropriation Acts.

(b) EXCEPTIONS.—Subsection (a) shall not apply to sections 1006(f), 1012(a)(4), or 5006, and shall not apply to an amount not to exceed \$50,000,000 in any fiscal year which the President may make available from the Fund to carry out section 311(c) of the Federal Water Pollution Control Act, as amended by this Act, and to initiate the assessment of natural resources damages required under section 1006. Sums to which this subsection applies shall remain available until expended.

(33 U.S.C. 2752)

Section 6003—Repealed by section 109 of P.L. 104–134

SEC. 6004. COOPERATIVE DEVELOPMENT OF COMMON HYDROCARBON-BEARING AREAS

(a) * * *

(b) EXCEPTION FOR WEST DELTA FIELD.—Section 5(j) of the Outer Continental Shelf Lands Act, as added by this section, shall not be applicable with respect to Blocks 17 and 18 of the West Delta Field offshore Louisiana.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated such sums as may be necessary to provide compensation, including interest, to the State of Louisiana and its lessees, for net drainage of oil and gas resources as determined in the Third Party Factfinder Louisiana Boundary Study dated March 21, 1989. For purposes of this section, such lessees shall include those persons with an ownership interest in State of Louisiana leases SL10087, SL10088 or SL10187, or ownership interests in the production or proceeds therefrom, as established by assignment, contract or otherwise. Interest shall be computed for the period March 21, 1989 until the date of payment.

TITLE VII—OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

SEC. 7001. OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

(a) INTERAGENCY COORDINATING COMMITTEE ON OIL POLLUTION

RESEARCH.—

(1) **ESTABLISHMENT.**—There is established an Interagency Coordinating Committee on Oil Pollution Research (hereinafter in this section referred to as the “Interagency Committee”).

(2) **PURPOSES.**—The Interagency Committee shall coordinate a comprehensive program of oil pollution research, technology development, and demonstration among the Federal agencies, in cooperation and coordination with industry, universities, research institutions, State governments, and other nations, as appropriate, and shall foster cost-effective research mechanisms, including the joint funding of research.

(3) **MEMBERSHIP.**—The Interagency Committee shall include representatives from the Department of Commerce (including the National Oceanic and Atmospheric Administration and the

National Institute of Standards and Technology), the Department of Energy, the Department of the Interior (including the Minerals Management Service and the United States Fish and

Wildlife Service), the Department of Transportation (including the United States Coast Guard, the Maritime Administration, and the Research and Special Projects Administration), the Department of Defense (including the Army Corps of Engineers and the Navy), the Environmental Protection Agency, the National Aeronautics and Space Administration, and the United States Fire Administration in the Federal Emergency Management

Agency, as well as such other Federal agencies as the President may designate.

A representative of the Department of Transportation shall serve as Chairman.

(b) OIL POLLUTION RESEARCH AND TECHNOLOGY PLAN.—

(1) **IMPLEMENTATION PLAN.**—Within 180 days after the date of enactment of this Act, the Interagency Committee shall submit to Congress a plan for the implementation of the oil

pollution research, development, and demonstration program established pursuant to subsection (c). The research plan shall—

- (A) identify agency roles and responsibilities;
- (B) assess the current status of knowledge on oil pollution prevention, response, and mitigation technologies and effects of oil pollution on the environment;
- (C) identify significant oil pollution research gaps including an assessment of major technological deficiencies in responses to past oil discharges;
- (D) establish research priorities and goals for oil pollution technology development related to prevention, response, mitigation, and environmental effects;
- (E) estimate the resources needed to conduct the oil pollution research and development program established pursuant to subsection (c), and timetables for completing research tasks; and
- (F) identify, in consultation with the States, regional oil pollution research needs and priorities for a coordinated, multidisciplinary program of research at the regional level.

(2) ADVICE AND GUIDANCE.—The Chairman, through the Department of Transportation, shall contract with the National Academy of Sciences to—

- (A) provide advice and guidance in the preparation and development of the research plan; and
- (B) assess the adequacy of the plan as submitted, and submit a report to Congress on the conclusions of such assessment.

The National Institute of Standards and Technology shall provide the Interagency Committee with advice and guidance on issues relating to quality assurance and standards measurements relating to its activities under this section.

(c) OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM.—

(1) ESTABLISHMENT.—The Interagency Committee shall coordinate the establishment, by the agencies represented on the Interagency Committee, of a program for conducting oil pollution research and development, as provided in this subsection.

- (2) INNOVATIVE OIL POLLUTION TECHNOLOGY.—The program established under this subsection shall provide for research, development, and demonstration of new or improved technologies which are effective in preventing or mitigating oil discharges and which protect the environment, including— (A) development of improved designs for vessels and facilities, and improved operational practices;
- (B) research, development, and demonstration of improved technologies to measure the ullage of a vessel tank, prevent discharges from tank vents, prevent discharges during lightering and bunkering operations, contain discharges on the deck of a vessel, prevent discharges through the use of vacuums in tanks, and otherwise contain discharges of oil from vessels and facilities;
- (C) research, development, and demonstration of new or improved systems of mechanical, chemical, biological, and other methods (including the use of dispersants, solvents, and bioremediation) for the recovery, removal, and disposal of oil, including evaluation of the environmental effects of the use of such systems;
- (D) research and training, in consultation with the National Response Team, to improve industry's and Government's ability to quickly and effectively remove an oil discharge, including the long-term use, as appropriate, of the National Spill Control School in Corpus Christi, Texas, and the Center for Marine Training and Safety in Galveston, Texas;
- (E) research to improve information systems for decision making, including the use of data from coastal mapping, baseline data, and other data related to the environmental effects of oil discharges, and cleanup technologies;
- (F) development of technologies and methods to protect public health and safety from oil discharges, including the population directly exposed to an oil discharge;
- (G) development of technologies, methods, and standards for protecting removal personnel, including training, adequate supervision, protective equipment, maximum exposure limits, and decontamination procedures;
- (H) research and development of methods to restore and rehabilitate natural resources damaged by oil discharges;

(I) research to evaluate the relative effectiveness and environmental impacts of bioremediation technologies; and

(J) the demonstration of a satellite-based, dependent surveillance vessel traffic system in Narragansett Bay to evaluate the utility of such system in reducing the risk of oil discharges from vessel collisions and groundings in confined waters.

(3) OIL POLLUTION TECHNOLOGY EVALUATION.—The program established under this subsection shall provide for oil pollution prevention and mitigation technology evaluation including—

- (A) the evaluation and testing of technologies developed independently of the research and development program established under this subsection;
- (B) the establishment, where appropriate, of standards and testing protocols traceable to national standards to measure the performance of oil pollution prevention or mitigation technologies; and
- (C) the use, where appropriate, of controlled field testing to evaluate real-world application of oil discharge prevention or mitigation technologies.

(4) OIL POLLUTION EFFECTS RESEARCH.—(A) The Committee shall establish a research program to monitor and evaluate the environmental effects of oil discharges. Such program shall include the following elements:

- (i) The development of improved models and capabilities for predicting the environmental fate, transport, and effects of oil discharges.
- (ii) The development of methods, including economic methods, to assess damages to natural resources resulting from oil discharges.
- (iii) The identification of types of ecologically sensitive areas at particular risk to oil discharges and the preparation of scientific monitoring and evaluation plans, one for each of several types of ecological conditions, to be implemented in the event of major oil discharges in such areas.

(iv) The collection of environmental baseline data in ecologically sensitive areas at particular risk to oil discharges where such data are insufficient.

(B) The Department of Commerce in consultation with the Environmental Protection Agency shall monitor and scientifically evaluate the long-term environmental effects of oil discharges if—

(i) the amount of oil discharged exceeds 250,000 gallons;

(ii) the oil discharge has occurred on or after January 1, 1989; and

(iii) the Interagency Committee determines that a study of the long-term environmental effects of the discharge would be of significant scientific value, especially for preventing or responding to future oil discharges.

Areas for study may include the following sites where oil discharges

have occurred: the New York/New Jersey Harbor area, where oil was discharged by an Exxon underwater pipeline, the

T/B CIBRO SAVANNAH, and the M/V BT NAUTILUS; Narragansett Bay where oil was discharged by the WORLD PRODIGY; the Houston Ship Channel where oil was discharged by the RACHEL B; the Delaware River, where oil was discharged by the PRESIDENTE RIVERA, and Huntington Beach, California, where oil was discharged by the AMERICAN TRADER.

(C) Research conducted under this paragraph by, or through, the United States Fish and Wildlife Service shall be directed and coordinated by the National Wetland Research Center.

(5) MARINE SIMULATION RESEARCH.—The program established under this subsection shall include research on the greater use and application of geographic and vessel response simulation models, including the development of additional data bases and updating of existing data bases using, among others, the resources of the National Maritime Research Center.

It shall include research and vessel simulations for—

- (A) contingency plan evaluation and amendment;
- (B) removal and strike team training;
- (C) tank vessel personnel training; and
- (D) those geographic areas where there is a significant likelihood of a major oil discharge.

(6) DEMONSTRATION PROJECTS.—The United States Coast Guard, in conjunction with other such agencies in the Department of Transportation as the Secretary of Transportation may designate, shall conduct 4¹²⁰⁷ port oil pollution minimization demonstration projects, one each with (A) the Port Authority of New York and New Jersey, (B) the Ports of Los Angeles and Long Beach, California, 1 (C) the Port of New Orleans, Louisiana, and (D) a port on the Great Lakes 1 for the purpose of developing and demonstrating integrated port oil pollution prevention and cleanup systems which utilize the information and implement the improved practices and technologies developed from the research, development, and demonstration program established in this section. Such systems shall utilize improved technologies and management practices for reducing the risk of oil discharges, including, as appropriate, improved data access, computerized tracking of oil shipments, improved vessel tracking and navigation systems, advanced technology to monitor pipeline and tank conditions, improved oil spill response capability, improved capability to predict the flow and effects of oil discharges in both the inner and outer harbor areas for the purposes of making infrastructure decisions, and such other activities necessary to achieve the purposes of this section.

(7) SIMULATED ENVIRONMENTAL TESTING.—Agencies represented on the Interagency Committee shall ensure the long term use and operation of the Oil and Hazardous Materials Simulated Environmental Test Tank (OHMSETT) Research Center in New Jersey for oil pollution technology testing and evaluations.

(8) REGIONAL RESEARCH PROGRAM.—(A) Consistent with the research plan in subsection (b), the Interagency Committee shall coordinate a program of competitive grants

¹²⁰⁷ 1 Section 2002(1) of P.L. 101–537 and section 4002(1) of P.L. 101–646 made almost identical amendments to section 7001(c)(6). The amendments made by P.L. 101–537 have been executed.

to universities or other research institutions, or groups of universities or research institutions, for the purposes of conducting a coordinated research program related to the regional aspects of oil pollution, such as prevention, removal, mitigation, and the effects of discharged oil on regional environments. For the purposes of this paragraph, a region means a Coast Guard district as set out in part 3 of title 33, Code of Federal Regulations (1989).

(B) The Interagency Committee shall coordinate the publication by the agencies represented on the Interagency Committee of a solicitation for grants under this subsection. The application shall be in such form and contain such information as may be required in the published solicitation. The applications shall be reviewed by the Interagency Committee, which shall make recommendations to the appropriate granting agency represented on the Interagency Committee for awarding the grant. The granting agency shall award the grants recommended by the Interagency Committee unless the agency decides not to award the grant due to budgetary or other compelling considerations and publishes its reasons for such a determination in the Federal Register. No grants may be made by any agency from any funds authorized for this paragraph unless such grant award has first been recommended by the Interagency Committee.

(C) Any university or other research institution, or group of universities or research institutions, may apply for a grant for the regional research program established by this paragraph.

The applicant must be located in the region, or in a State a part of which is in the region, for which the project is proposed as part of the regional research program. With respect to a group application, the entity or entities which will carry out the substantial portion of the proposed research must be located in the region, or in a State a part of which is in the region, for which the project is proposed as part of the regional research program.

(D) The Interagency Committee shall make recommendations on grants in such a manner as to ensure an appropriate balance within a region among the various aspects of oil pollution research, including prevention, removal, mitigation, and the effects of discharged oil on regional environments. In addition, the Interagency Committee shall make recommendations for grants based on the following criteria:

(i) There is available to the applicant for carrying out this paragraph demonstrated research resources.

(ii) The applicant demonstrates the capability of making a significant contribution to regional research needs.

(iii) The projects which the applicant proposes to carry out under the grant are consistent with the research plan under subsection (b)(1)(F) and would further the objectives of the research and development program established in this section.

(E) Grants provided under this paragraph shall be for a period up to 3 years, subject to annual review by the granting agency, and provide not more than 80 percent of the costs of the research activities carried out in connection with the grant.

(F) No funds made available to carry out this subsection may be used for the acquisition of real property (including buildings) or construction of any building.

(G) Nothing in this paragraph is intended to alter or abridge the authority under existing law of any Federal agency to make grants, or enter into contracts or cooperative agreements, using funds other than those authorized in this Act for the purposes of carrying out this paragraph.

(9) FUNDING.—For each of the fiscal years 1991, 1992, 1993, 1994, and 1995, \$6,000,000 of amounts in the Fund shall be available to carry out the regional research program in paragraph (8), such amounts to be available in equal amounts for the regional research program in each region; except that if the agencies represented on the Interagency Committee determine that regional research needs exist which cannot be addressed within such funding limits, such agencies may use their authority under paragraph (10) to make additional grants to meet such needs. For the purposes of this paragraph, the research program carried out by the Prince William Sound Oil Spill Recovery Institute established under section 5001, shall not be eligible to receive grants under this paragraph until the authorization for funding under section 5006(b) expires.

(10) GRANTS.—In carrying out the research and development program established under this subsection, the agencies represented on the Interagency Committee may enter into contracts and cooperative agreements and make grants to universities, research institutions, and other persons. Such contracts, cooperative agreements, and grants shall address research and technology priorities set forth in the oil pollution research plan under subsection (b).

(11) In carrying out research under this section, the Department of Transportation shall continue to utilize the resources of the Research and Special Programs Administration of the Department of Transportation, to the maximum extent practicable.

(d) INTERNATIONAL COOPERATION.—In accordance with the research plan submitted under subsection (b), the Interagency Committee shall coordinate and cooperate with other nations and foreign research entities in conducting oil pollution research, development, and demonstration activities, including controlled field tests of oil discharges.

(e) BIENNIAL REPORTS.—The Chairman of the Interagency Committee shall submit to Congress every 2 years on October 30 a report on the activities carried out under this section in the preceding 2 fiscal years, and on activities proposed to be carried out under this section in the current 2 fiscal year period.

(f) FUNDING.—Not to exceed \$22,000,000¹²⁰⁸ of amounts in the Fund shall be available annually to carry out this section except for subsection (c)(8). Of such sums—

(1) funds authorized to be appropriated to carry out the activities under subsection (c)(4) shall not exceed \$5,000,000 for fiscal year 1991 or \$3,500,000 for any subsequent fiscal year;

and

(2) not less than \$3,000,000¹ shall be available for carrying out the activities in subsection (c)(6) for fiscal years 1992, 1993, 1994, and 1995.

All activities authorized in this section, including subsection (c)(8), are subject to appropriations.

TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

SEC. 8001. SHORT TITLE

This title may be cited as the “Trans-Alaska Pipeline System ReformAct of 1990”.

Subtitle A—Improvements to Trans-Alaska Pipeline System

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¹²⁰⁸1 Section 2002(2) of P.L. 101–537 and section 4002(2) of P.L. 101–646 made almost identical amendments to section 7001(f). The amendments made by P.L. 101–537 have been executed.

SEC. 8102. TRANS-ALASKA PIPELINE LIABILITY FUND

(a) TERMINATION OF CERTAIN PROVISIONS.—

(1) * * *

(2) DISPOSITION OF FUND BALANCE.—

(A) RESERVATION OF AMOUNTS.—The trustees of the Trans-Alaska Pipeline Liability Fund (hereafter in this subsection referred to as the “TAPS Fund”) shall reserve the following amounts in the TAPS Fund—

(i) necessary to pay claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)); and

(ii) administrative expenses reasonably necessary

for and incidental to the implementation of section 204(c) of that Act.

(B) DISPOSITION OF THE BALANCE.—After the Comptroller General of the United States certifies that the requirements of subparagraph (A) have been met, the trustees of the TAPS Fund shall dispose of the balance in the TAPS Fund after the reservation of amounts are made under subparagraph (A) by—

(i) rebating the pro rata share of the balance to the State of Alaska for its contributions as an owner of oil, which, except as otherwise provided under article IX, section 15, of the Alaska Constitution, shall be used for the remediation of above-ground storage tanks; and

then

(ii) transferring and depositing the remainder of the balance into the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

(C) DISPOSITION OF THE RESERVED AMOUNTS.—After payment of all claims arising from an incident for which funds are reserved under subparagraph (A) and certification by the Comptroller General of the United States that the claims arising from that incident have been paid, the excess amounts, if any, for that incident shall be disposed of as set forth under subparagraphs (A) and (B).

(D) AUTHORIZATION.—The amounts transferred and deposited in the Fund shall be available for the purposes of section 1012 of the Oil Pollution Act of 1990 after funding sections 5001 and 8103 to the extent that funds have not otherwise been provided for the purposes of such sections.

(3) SAVINGS CLAUSE.—The repeal made by paragraph (1) shall have no effect on any right to recover or responsibility that arises from incidents subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) occurring prior to the date of enactment of this Act.

(4) * * *

(5) EFFECTIVE DATE.—(A) The repeal by paragraph (1) shall be effective 60 days after the date on which the Comptroller General of the United States certifies to the Congress that—

(i) all claims arising under section 204(c) of the Trans- Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) have been resolved,

(ii) all actions for the recovery of amounts subject to section

204(c) of the Trans-Alaska Pipeline Authorization Act have been resolved, and

(iii) all administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of the Trans-Alaska Pipeline Authorization Act have been paid.

(B) Upon the effective date of the repeal pursuant to subparagraph

(A), the trustees of the TAPS Fund shall be relieved of all responsibilities under section 204(c) of the Trans-Alaska Pipeline Authorization Act, but not any existing legal liability.

(6) TUCKER ACT.—This subsection is intended expressly to preserve any and all rights and remedies of contributors to the TAPS Fund under section 1491 of title 28, United States Code (commonly referred to as the “Tucker Act”).

* * * * *

SEC. 8103. PRESIDENTIAL TASK FORCE

(a) ESTABLISHMENT OF TASK FORCE.—

(1) ESTABLISHMENT AND MEMBERS.—(A) There is hereby established a Presidential Task Force on the Trans-Alaska Pipeline System (hereinafter referred to as the “Task Force”) composed of the following members appointed by the President:

(i) Three members, one of whom shall be nominated by the Secretary of the Interior, one by the Administrator of the Environmental Protection Agency, and one by the Secretary of Transportation.

(ii) Three members nominated by the Governor of the State of Alaska, one of whom shall be an employee of the Alaska Department of Natural Resources and one of whom shall be an employee of the Alaska Department of Environmental Conservation.

(iii) One member nominated by the Office of Technology Assessment.

(B) Any member appointed to fill a vacancy occurring before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his or her term until a successor, if applicable, has taken office.

(2) COCHAIRMEN.—The President shall appoint a Federal co-chairman from among the Federal members of the Task Force appointed pursuant to paragraph (1)(A) and the Governor shall designate a State co-chairman from among the State members of the Task Force appointed pursuant to paragraph (1)(B).

(3) COMPENSATION.—Members shall, to the extent approved in appropriations Acts, receive the daily equivalent of the minimum annual rate of basic pay in effect for grade GS-15 of the General Schedule for each day (including travel time) during which they are engaged in the actual performance of duties vested in the Task Force, except that members who are State, Federal, or other governmental employees shall receive no compensation under this paragraph in addition to the salaries they receive as such employees.

(4) STAFF.—The cochairman of the Task Force shall appoint a Director to carry out administrative duties. The Director may

hire such staff and incur such expenses on behalf of the Task Force for which funds are available.

(5) RULE.—Employees of the Task Force shall not, by reason of such employment, be considered to be employees of the Federal Government for any purpose.

(b) DUTIES OF THE TASK FORCE.—

(1) AUDIT.—The Task Force shall conduct an audit of the Trans-Alaska Pipeline System (hereinafter referred to as “TAPS”) including the terminal at Valdez, Alaska, and other related onshore facilities, make recommendations to the President, the Congress, and the Governor of Alaska.

(2) COMPREHENSIVE REVIEW.—As part of such audit, the Task Force shall conduct a comprehensive review of the TAPS in order to specifically advise the President, the Congress, and the Governor of Alaska concerning whether—

(A) the holder of the Federal and State right-of-way is, and has been, in full compliance with applicable laws, regulations,

and agreements;

(B) the laws, regulations, and agreements are sufficient to prevent the release of oil from TAPS and prevent other damage or degradation to the environment and public health;

(C) improvements are necessary to TAPS to prevent release of oil from TAPS and to prevent other damage or degradation to the environment and public health;

(D) improvements are necessary in the onshore oil spill response capabilities for the TAPS; and

(E) improvements are necessary in security for TAPS.

(3) CONSULTANTS.—(A) The Task Force shall retain at least one independent consulting firm with technical expertise in engineering, transportation, safety, the environment, and other applicable areas to assist the Task Force in carrying out this subsection.

(B) Contracts with any such firm shall be entered into on a nationally competitive basis, and the Task Force shall not select any firm with respect to which there may be a conflict of

interest in assisting the Task Force in carrying out the audit and review. All work performed by such firm shall be under the direct and immediate supervision of a registered engineer.

(4) PUBLIC COMMENT.—The Task Force shall provide an opportunity for public comment on its activities including at a minimum the following:

(A) Before it begins its audit and review, the Task Force shall review reports prepared by other Government entities conducting reviews of TAPS and shall consult with those Government entities that are conducting ongoing investigations including the General Accounting Office. It shall also hold at least 2 public hearings, at least 1 of which shall be held in a community affected by the Exxon Valdez oil spill. Members of the public shall be given an opportunity to present both oral and written testimony.

(B) The Task Force shall provide a mechanism for the confidential receipt of information concerning TAPS, which may include a designated telephone hotline.

(5) TASK FORCE REPORT.—The Task Force shall publish a draft report which it shall make available to the public. The public will have at least 30 days to provide comments on the draft report. Based on its draft report and the public comments thereon, the Task Force shall prepare a final report which shall include its findings, conclusions, and recommendations made as a result of carrying out such audit. The Task Force shall transmit (and make available to the public), no later than 2 years after the date on which funding is made available under paragraph (7), its final report to the President, the Congress, and the Governor of Alaska.

(6) PRESIDENTIAL REPORT.—The President shall, within 90 days after receiving the Task Force's report, transmit a report to the Congress and the Governor of Alaska outlining what measures have been taken or will be taken to implement the Task Force's recommendations. The President's report shall include recommended changes, if any, in Federal and State law to enhance the safety and operation of TAPS.

(7) EARMARK.—Of amounts in the Fund, \$5,000,000 shall be available, subject to appropriations, annually without fiscal year limitation to carry out the requirements of this section.

(c) GENERAL ADMINISTRATION AND POWERS OF THE TASKFORCE.—

(1) AUDIT ACCESS.—The Comptroller General of the United States, and any of his or her duly appointed representatives, shall have access, for purposes of audit and examination, to any books, documents, papers, and records of the Task Force that are pertinent to the funds received and expended by the Task Force.

(2) TERMINATION.—The Task Force shall cease to exist on the date on which the final report is provided pursuant to subsection

(b)(5).

(3) FUNCTIONS LIMITATION.—With respect to safety, operations, and other matters related to the pipeline facilities (as such term is defined in section 202(4) of the Hazardous Liquid Pipeline Safety Act of 1979) of the TAPS, the Task Force shall not perform any functions which are the responsibility of the Secretary of Transportation under the Hazardous Liquid Pipeline Safety Act of 1979, as amended. The Secretary may use the information gathered by and reports issued by the Task Force in carrying out the Secretary's responsibilities under that Act.

(4) POWERS.—The Task Force may, to the extent necessary to carry out its responsibilities, conduct investigations, make reports, issue subpoenas, require the production of relevant documents and records, take depositions, and conduct directly or, by contract, or otherwise, research, testing, and demonstration activities.

(5) EXAMINATION OF RECORDS AND PROPERTIES.—The Task Force, and the employees and agents it so designates, are authorized, upon presenting appropriate credentials to the person in charge, to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties are relevant to determining whether such persons have acted or are acting in compliance with applicable laws and agreements.

(6) FOIA.—The information gathered by the Task Force pursuant to subsection (b) shall not be subject to section 552 of title 5, United States Code (commonly referred to as the "Freedom of Information Act"), until its final report is issued pursuant to subsection (b)(6). (33 U.S.C. 1651 note) December 29, 2000.