# A Role for ECOWAS in Addressing the Challenges of Ineffective Regulation of Transnational Oil Corporations in Nigeria

RAHINA ZARMA*

**ABSTRACT**

The article explores the potential of a regulatory oversight role for the *Economic Community of West African States* ("ECOWAS") aimed at driving further effectiveness of regulatory framework for transnational corporations ("TNCs") in Nigeria. It reviews institutional and regulatory challenges that hinder effective protection of victims of environmental pollution and reviews specific regulatory concerns within the Nigerian regulatory framework which require reform. It argues that regulatory failures in Nigeria as well as the government's attitude towards enforcing existing regulation justify the need for a regulatory oversight framework.

The article is specifically concerned with problems relating to persisting oil pollution in the Niger Delta region of Nigeria. It examines the implication of oil pollution on the environment, the Nigerian economy, and the Nigerian government's responsibilities towards preventing or remediating oil pollution. The article identifies ineffective regulation as being primarily responsible for persisting oil pollution and transnational corporations as the major perpetuators of oil pollution in the Niger Delta region of Nigeria. The article thus interrogates the existing framework for regulation of Oil Companies in Nigeria, and reasons why such existing regulations are not effectively enforced, including the Nigerian government's involvement in oil extraction and potential conflict of interest for enforcing existing regulation.

* Rahina Zarma is a Ph. D Candidate at Osgoode Hall Law School, York University. This article is based largely on research carried out while pursuing an LLM Degree at the University of Saskatchewan.

The research provides scholarly insight into challenges and consequences of ineffective regulation of TNCs in Nigeria while exploring the potential of a novel approach to addressing seemingly intractable challenges. It provides a useful contribution to identifying concerns relating to regulatory ineffectiveness in Nigeria, argues for regulatory reform of the existing framework for regulation, and proposes a framework under the ECOWAS to address challenges to regulatory effectiveness identified.

## I. SETTING THE CONTEXT

In 2001, following an inquiry by the African Commission on Human and Peoples' Rights, the degree of environmental oil pollution in the Niger Delta region of Nigeria was described as "nightmarish" and "humanly unacceptable".[1] Several years after the Communication of the African Commission, the environmental pollution in the Niger Delta seemed unchanged and if changed at all, seemed to have only deteriorated. Environmental pollution and perhaps the activities of militant protesters of oil activities in the Niger Delta forced the Nigerian government in 2011 to request the United Nations Environment Program ("UNEP") to investigate oil pollution in Ogoniland (one of the local communities in the Niger Delta) and make recommendations for the remediation of the effects of oil pollution on the region.[2] UNEP's Report was quite damning, providing details of pollution that had gone on for over 50 years, and recommended several measures for environmental restoration and alleviation of suffering on local communities.[3]

---

1 The Niger Delta region is made up of 8 oil producing states in Nigeria. It consists of a total land mass of approximately 70,000 square kilometers, with a population of approximately 20 million people. See Damilola S. Olawuyi, *The Principles of Nigerian Environmental Law* (Ado Ekiti, Nigeria: Afe Babalola University 2015) at 173 [Olawuyi]; *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96) African Commission on Human and Peoples Rights, 27 October 2001, online: ACHPR http://www.achpr.org/communication/decisions/155.96/ [SERAC Case]; Ibironke T. Odumosu-Ayanu, "Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment" (2014) 65, UNBLJ 269 at 285 [Odumosu-Ayanu, "Multi-Actor Contracts"].

2 See Foreword of the *Environmental Assessment of Ogoniland Report* (Nairobi, Kenya: United Nations Environment Programme, 2011) at 6 [UNEP Report], online:http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/Environmental AssessmentofOgonilandreport/tabid/54419/Default.aspx.

3 *Ibid.*

Since the Report however, rights groups have alleged that little or "no progress" has been made regarding implementing the recommendations of the UNEP and insisting that environmental pollution infringes rights of local communities.[4]

The paper is thus concerned with the persisting oil pollution in the Niger Delta region, its effects on the environment, and rights of local communities and the Nigerian government's responsibilities towards preventing or remediating oil pollution. It thus interrogates existing mechanisms under the Nigerian judicial and regulatory system for responding to oil pollution in local communities. The paper also concerned with with what is described by one scholar as state complicity in acquiescing to continued environmental pollution by Transnational Corporations ("TNCs").[5] The paper is specifically interested in investigating the regulation of TNCs because 95 percent of oil production in the Niger Delta is carried out by TNCs such as; Shell, Chevron, ExxonMobil amoung others.[6] As one might expect, indigenous oil companies in Nigeria do exist, however TNCs make the largest contribution to pollution given their domination of the oil extracting industry. As such, the paper is interested in investigating legal and regulatory framework in Nigeria for the regulation of oil companies, with a view to proposing a framework that addresses ineffective regulation of oil companies.

In setting the context, it is necessary to give a brief history of oil and gas exploration in Nigeria. Oil extraction can be traced to 1908 when a German entity, the Nigerian Bitumen Corporation, commenced exploration activities in the Araromi area around what is now known as Ondo State.[7] These pioneering efforts ended abruptly with the outbreak of the First World War in 1914. Oil prospecting efforts resumed in 1937, when Shell D'Arcy (the

---

4 Amnesty International, *Nigeria: No Progress: An Evaluation of the Implementation of UNEP's Environmental Assessment of Ogoniland, Three Years On* 4 August 2014, AFR 44/013/2014 [Amnesty International],

online: <https://www.amnesty.org/en/documents/afr44/013/2014/en/>.

5 See generally: Larisa Wick, "Human Rights Violations in Nigeria: Corporate Malpractice and State Acquiescence in the Oil Producing Deltas of Nigeria" (2003-2004) 12 Mich. St. U. J. Int'l L. 63.

6 The Climate Justice Programme, *Gas Flaring in Nigeria: A Human Rights, Environmental and Economic Monstrosity*, June 2005 at 8 [*Gas Flaring in Nigeria*], online: <https://www.foe.co.uk/sites/default/files/downloads/gas_flaring_nigeria.pdf>.

7 Yinka Omorogbe, *Oil and Gas Law in Nigeria,* (Lagos, Nig.: Malthouse Press, 2003) at 16 [Omorogbe].

forerunner of Shell Petroleum Development Company of Nigeria) was awarded sole concessionary rights covering the entire territory of Nigeria.[8] In 1959, the sole concessionary rights were reviewed and extended to companies of various nationalities such as Mobil and Gulf (now Chevron). However due to its previous monopolistic role, Shell remains the largest producer of oil in Nigeria.[9]

After Nigeria's independence in 1960, the government mandated all foreign oil companies to re-register as Nigerian entities in a bid to secure local control of the industry.[10] In 1971, when Nigeria joined the Organization of Petroleum Exporting Countries ("OPEC"), the organization encouraged its members to undertake more prominent roles in oil mining, incorporate national oil companies ("NOCs") and acquire equity shares in TNCs operating within their regions.[11] Nigeria then acquired 34 percent equity shares but later increased it to 60 percent in 1974, making the government the principal player in the oil industry.[12]

As early as 1970, local communities had begun vocalizing their concerns against TNCs for "seriously threatening the well-being, and even the very lives" [13] of the Ogoni, a local community in the Niger Delta. That year there had been a major blow-out at the Bomu oilfield in Ogoni. It had continued for three weeks, causing widespread pollution and outrage.[14]

In 1990, the Movement for the Survival of the Ogoni People ("MOSOP") was created by the Ogoni people, seeking:

---

8 *Ibid* at 17.

9 *Ibid.*

10 Rhuks Ako, "Resource Extraction and Environmental Justice" in Francis N Botchway, *Natural Resource Investment and Africa's Development,* (Cheltenham, UK, Northampton, MA: Edward Elgar Pub, 2011) at 73.

11 *Ibid.*

12 *Ibid.*

13 See "All for Shell: A Brief History of the Struggle for justice in the Niger Delta", published in 1997 by Project Underground, and written and researched by Andy Rowell, Steve Kretzmann, and the Lowenstein Human Rights Clinic at Yale University. Online: http://priceofoil.org/content/uploads/2006/05/ALL_FOR_SHELL_2005_.pdf. It was updated in 2005 and published under the name "The Life and Death of Ken Saro-Wiwa" by the Remember Saro-Wiwa Project in London.

14 *Ibid.*

> [P]olitical control of Ogoni affairs by Ogoni people, control and use of Ogoni economic resources for Ogoni development, adequate and direct representation as of right for Ogoni people in all Nigerian national institutions and the right to protect the Ogoni environment and ecology from further degradation.[15]

These agitations attracted international attention as the leader of MOSOP addressed the United Nations Working Group on Indigenous Peoples in Geneva in July 1992, asking for international intervention in what he termed "Genocide in Nigeria: The Ogoni Tragedy".[16] He accused the government of Nigeria of genocide and the TNC, Shell, of complicity in ecological destruction and abuse of the Ogoni people.[17]

Perhaps the most significant of the far-reaching negative consequences of local resistance to oil extraction in the Niger Delta region, was the trial and execution of Ken Saro-Wiwa, the leader of MOSOP, and eight others on charges of murder.[18] At the trial, there was evidence that and the Military Government of Nigeria were bribing the chief prosecution witnesses to testify against the accused persons.[19] The trial and executions remain the most profound manifestation of the negative consequences of local resistance to environmental pollution, TNC complicity, and state oppression of local communities in the Niger Delta region of Nigeria.

These events can perhaps be explained away as having occurred when military dictators who are infamous for abuse of power and violation of human rights were running Nigeria. With Nigeria's return to democracy in 1999, it was expected that the rights of long oppressed ethnic minorities would receive much greater protection from incidences of oil pollution and oppression as a result of oil exploration activities. However, incidences such as the "Odi Massacres," which happened in November 1999 under the Obasanjo civilian administration provide justifiable cause for concern even in light of Nigeria's

---

15 Movement for the Survival of the Ogoni People, The Ogoni Bill of Rights (1991) (Proposed Bill of Rights), online: <www.mosop.org/Ogoni_Bill_of_Rights_1990.pdf/>.

16 Ken Saro-Wiwa, *Genocide in Nigeria – The Ogoni Tragedy*, (Nigeria: Saros International Publishers, 1992).

17 Ibid at 82-83.

18 See: ARTICLE 19 in Association with the Bar Human Rights Committee of England and Wales and the Law Society of England and Wales, *Nigeria: Fundamental Rights Denied: Report of the Trial of Ken Saro-Wiwa and Others*, by Michael Birnbaum QC (June 1995) online: <https://www.article19.org/data/files/pdfs/publications/nigeria-fundamental-rights-denied.pdf>.

19 Andrew Rowell, *Green Backlash: Global Subversion of Environmental Movement*, (Great Britain: Routledge, 1996) at 309 [Rowell].

newfound democracy. [20] It had been alleged that in November 2009, shortly after the Nigeria's civilian President, Olusegun Obasanjo, took office, that restive youth in the oil-rich local community of Odi in the Niger Delta region had killed some police officers while agitating against TNCs in the area.[21] Human rights organizations allege that in response to that incident, the Nigerian government sent in Military troops to retaliate against the community and quell any opposition to the government, which resulted in the destruction of the village.[22] While unfortunate, scholars such as Bacher argue that such incidences of blatant assaults on local communities "will be difficult to repeat as Nigeria's democratic institutions mature".[23]

Demonstrably, a number of regulatory agencies were indeed created by the National Assembly to ensure the compliance of TNCs with international best practices.[24] Nevertheless, the problem of oil spills as a result of the activities of certain TNCs remains a great source of concern to many academics, experts, foreign and domestic observers, and more importantly to the affected local communities. As such, international organizations such as the United Nations Environment Programme, and Amnesty International, among several others have undertaken and published reports on the persistence of oil pollution, its negative impact on local communities in Niger Delta and, the need for

---

20 Abdul Oroh, "Genocide in Odi" (Address delivered at the Press Conference by Leaders of Human Rights and Civil Society Groups Who Visited Odi, Baylelsa State, 8 December 1999) Nigeria: Odi Massacre Statements, University of Pennsylvania – Africa Studies Centre, online: https://www.africa.upenn.edu/Urgent_Action/apic_122399.html

21 John Backer, *Petrotyranny,* (Toronto: Dundurn Press, 2000) at 89 [Backer].

22 *Ibid;* See also: "Nigerian Army Accused of Excessive Force, Rape in Niger Delta." *Human Rights Watch* (22 December 1999), online: https://www.hrw.org/news/1999/12/22/nigerian-army-accused-excessive-force-rape-niger-delta and "The Destruction and Rape of Odi and Choba" *Human Rights Watch* (22 December 1999),

online: https://www.hrw.org/report/1999/12/22/destruction-odi-and-rape-choba/december-22-1999

23 Backer, *supra* note 21 at 91.

24 The National Environmental Standards and Regulations Enforcement Agency (NESREA), established under the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act of No. 25 of 2007 empowered to enforce environmental standards, regulations, policies and The National Oil Spill Response and Detection Agency (Establishment) Act No. 15 of 2006 established the National Oil Spill Detention Response Agency to ensure compliance with existing environmental legislation.

remediation.[25] The working hypothesis for this paper therefore is that better regulation of oil mining corporations, through regulatory oversight by the ECOWAS will remediate the challenge of oil pollution and drive further effectiveness of the regulatory framework for TNCs in Nigeria.

In interrogating more effective regulation in Nigeria, it is significant to note that oil mining in Nigeria is carried out partly through the state-owned oil corporation, the Nigerian National Petroleum Corporation (the "NNPC"), which holds 55-60 percent interests in the oil mining leases of TNCs through joint venture agreements ("JVA").[26] Although the TNCs hold minority interests in the JVAs with the NNPC, these TNCs are designated as operators under the JVA and so, undertake the actual oil prospecting, exploration and mining. Being the ones with the technical knowledge, the more significant capital, and the foreign investment, these TNCs wield immense power which tilts the balance of power in their favour. By implication, the Nigerian government, while in business with these TNCs through the state-owned corporation, is then placed in a precarious position of regulating the activities of its more powerful partners in production. Some scholars argue that the framework for regulation is plagued by a conflict of interest for the regulator (government) as they are stakeholders in oil extraction.[27]

In addition, the character and structure of the NNPC contributes to the imbalance of power between TNCs and the government. While some NOCs in the other OPEC countries in the Middle East have succeeded in maintaining their autonomy,[28] the NNPC is described as:

> [n]either a real commercial entity nor a meaningful oil operator. It lacks control over the revenue it generates and thus is unable to set its own strategy. It relies on other firms to perform essentially all of the most complex functions that are the hallmarks of operating oil companies. Yet unlike some NOCs it also fails to fit the profile of a government agency: its portfolio of activities is too diverse, incoherent, and beyond

---

25 UNEP Report, *supra* note 2; Amnesty International Nigeria, *Petroleum, Pollution and Poverty in the Niger Delta*, June 2009,Index: AFR 44/017/2009, at 42 [Amnesty Report], online: Amnesty International

26 Ibironke T. Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2006-2007) 44 Alta. L. Rev. 863 at 876 [Odumosu, "Transferring Alberta's Gas Flaring Regulations"].

27 *Ibid* at 877; Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes*, (Toronto: University of Toronto Press, 2009) page 74-76 [Oshionebo].

28 Marc-Antoine Perouse De Montclos, "The Politics and Crisis of the Petroleum Industry Bill in Nigeria" (2014) 52 J. of Modern African Studies pp. 403-424 at 407 [Monclos].

> the reach of government control for it to function as a government policy making instrument.[29]

These challenges make the NNPC "structurally insolvent" as its crude oil sales pass directly into the Federation account and loses money because it subsidizes the sale of refined oil products.[30] It is therefore constantly indebted to its partners, in addition to being plagued by problems of accountability, fraud and mismanagement.[31] Given that the NNPC, the government's primary agent for oil mining, is bedevilled by these problems, effective government regulation of the industry presents a formidable challenge.

Other concerns, which are also closely related to the allegation of a conflict of interest, include a high percentage of the Nigerian government's earnings coming from the oil industry, suggesting that it would be difficult to enforce sanctions against the highest earning industry.[32] There is also the very important issue of allegations of sabotage, animosity and distrust between local communities, TNCs, and the government. As seen earlier, agitations against oil extraction and the resultant oil pollution has characterized relations between local communities, governments and TNCs from the early days of oil extraction. Local communities tend to regard governments and TNCs with distrust and resentment, and the government being a party interested in oil extraction, which often results in pollution, has persistently failed to maintain credibility as one that can adequately respond to the concerns of its people. This atmosphere of animosity and distrust, as well as government involvement in oil extraction, colours relations between the parties and perhaps contributes to the challenge of effective regulation. An ideal regulatory regime ought to inspire confidence from all the parties involved in oil extraction, however the animosity that colours relations between the government, TNCs, and local communities taints the credibility of any existing regulatory regime and makes the optimal functioning of such a regime almost impossible. While there are several factors that contribute to ineffective regulation in Nigeria, the bottom line remains that oil pollution persists and there is a need for better implementation of the regulatory framework.

---

29 Mark C. Thurber, Ifeyinwa M. Emelife, & Patrick R.P. Heller, "NNPC and Nigeria's Oil Patronage Ecosystem" (2010) Freeman Spogli Institute for International Studies at Stanford University, Working Paper No.95 at 5.

30 Montclos, *supra* note 28 at 407.

31 *Ibid.*

32 Oshionebo, *supra* note 27 at 76.

Scholars such as Odumosu and Oshionebo, acknowledging the problem of ineffective regulation, have suggested that the Nigerian situation possibly requires a shift in its style of regulation and advocate for a more democratic solution to some of the problems of the industry.[33] Others have suggested closing the loop holes in existing legislative framework in Nigeria and empowering national institutions to enforce sanctions.[34] However, the recommendations made in this paper are inspired in part by the recommendations of Amnesty International in its report on the Niger Delta, in which it recommended an independent and coordinated oversight of the oil industry in Nigeria including its impact on human rights.[35] The recommendations are also inspired by the work of Odumosu-Ayanu, which proposes a potential role for regional supranational organizations such as the *Economic Community of West African States* (ECOWAS) to facilitate multi-actor contracts to regulate relations between governments, TNCs and local communities in oil extraction. [36]

In investigating problems of oil pollution in Nigeria and ineffective regulation of oil extracting TNCs, this paper hypothesizes that ineffective regulation is born out of a number of concerns including government involvement in oil and gas extraction. The paper thus interrogates the potential role of a regional supranational organization such as the ECOWAS (in which Nigeria is a member) in contributing to more effective regulation.[37] To interrogate this hypothesis, the paper is divided into five parts. It commences with a brief review of existing literature on ineffective regulation in Nigeria, identifying the need for reform and the significance of political will to the successful implementation of any reform. It then proceeds to examine the impacts of dumping of waste, oil spills and gas flaring on the wellbeing, health and livelihood of local communities and the environment. Next, the

---

33 Odumosu-Ayanu, "Multi-Actor Contracts", *supra* note 1 at 286, 290; *Ibid* at 210.

34 Lisa Stevens, "The Illusion of Sustainable Development: How Nigeria's Environmental Laws Are Failing the Niger Delta" (2011 - 2012) 36 Vt L Rev 387 2011-2012 at 407 [Stevens].

35 Amnesty Report, *supra* note 25 at 86.

36 Odumosu-Ayanu, "Multi-Actor Contracts", *supra* note 1 at 308.

37 This paper adopts a rational system approach definition of regulatory effectiveness, understanding regulatory effectivenesss as, "an action is effective if it accomplishes its specific objective aim" See Chester I Barnard, The functions of the executive (Cambridge: Harvard University Press, 1968); Amitai Etzioni et al, Modern organizations (Englewood Cliffs: Prentice-Hall, 1964).

paper reviews the existing regulatory framework in Nigeria, and argues the need for oversight of this framework. It then explores a framework under the ECOWAS for oversight of the Nigerian regulatory framework, potential problems and the promise of such a framework under the ECOWAS. It concludes that regional oversight has great potentials for helping not only Nigeria, but other states to overcome regulatory challenges.

## II. EXISTING SCHOLARLY DEBATES ON INEFFECTIVE REGULATION IN NIGERIA

A number of issues have been identified within scholarly literature as contributing to the seemingly intractable situation that is regulatory effectiveness in the Nigerian oil industry. The literature suggests that a number of challenges bedevil effective regulation of TNCs in Nigeria which require legislative and institutional reform. However, this paper contends that such reforms require some measure of political will if the reforms are to be undertaken. Specifically, the literature suggests a need for reform in the following areas:

1. Constitutional reforms in order to recognize the right to a healthy environment;[38]
2. Amendments to legislative framework for regulation;[39]
3. Reforms within regulatory agencies;[40].

This paper focuses on the third item identified in the literature.[41] A significant challenge to regulatory efficiency identified in the literature relates to the existing legislative framework in Nigeria that addresses oil extraction. Research into legislative framework for regulation of oil mining in Nigeria reveals that there are numerous statutes in Nigeria that regulate petroleum exploration. The Department of Petroleum Resources' ("DPR") website lists

---

38 See Kaniye S.A. Ebeku, "Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v Shell* Revisited" (2007) 16:3 Review of European, Comparative & International Environmental Law 317 [Ebeku on Gbemre].

39 See Oshionebo *supra* note 27 at 51-60.

40 *Ibid* at 72-77.

41 A detailed discussion on the other two subjects is discussed in the LLM thesis, Rahina Zarma, *The Role of the ECOWAS in Addressing the Challenges of Ineffective Regulation of Transnational Oil Corporations in Nigeria* (LLM thesis, University of Saskatchewan, 2017) [unpublished] [Zarma].

27 Acts and Regulations that purport to regulate the oil and gas industry.[42] Evidently, the challenge of regulation of oil pollution in Nigeria is not a result of a lack of regulatory legislation.

The question then becomes, what are the challenges to effective regulation? A review of the literature finds scholars such as Odumosu and Oshionebo, for example, arguing that the existing legislation in Nigeria on natural gas flaring makes it more economically prudent for TNCs to flare gas into the atmosphere rather than re-inject the gas.[43] The *Associated Gas Re-Injection Act* ("AGRA") regulates natural gas flaring, and seeks to compel TNCs to re-inject natural gas derived from oil extraction.[44] However, the legislation provides an option of fines in negligible sums to TNCs for non-compliance with the requirement for reinjection of natural gas. Because these fines cost significantly less than it costs to re-inject natural gas, TNCs flare natural gas and pay these fines. Gas flaring has severe implications for the health of local communities and the environment. It produces heat that "kills vegetation, suppresses the growth and flowering of some plants, and diminishes agricultural production," which are all detrimental to local communities as they are essentially agrarian.[45] Other adverse effects include respiratory problems in children, acid rain and contaminations of drinking water.[46] Scholars agree that the option of fines for non-compliance with provisions of the AGRA on re-injection of gas, coupled with the negligible sums to be imposed as fines for non-compliance prescribed by the Act hinder the likelihood of reducing gas flaring in Nigeria.[47]

Other legislation that attempts to regulate environmental pollution in Nigeria includes the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act*, 2007 ("NESREA") which has also

---

42 Department of Petroleum Resources, The Petroleum Regulatory Agency of Nigeria, Acts & Regulations [Department of Petroleum Resources], online: <https://dpr.gov.ng/index/acts-and-regulations/>.

43 Odumosu, Transferring Alberta's Gas Flaring Regulation, *supra* note 26 at 888; Oshionebo *supra* note 27 at 54.

44 CAP. A25, Laws of the Federations of Nigeria, 2004.

45 *Niger Delta Human Development Report* (Abuja, Nigeria: United Nations Development Programme, 2006), cited in Oshionebo *supra* note 27 at 23-24.

46 *Oil for Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in The Niger Delta*, (US NGO Delegation Trip Report, 6-20 September 1999) at 5, online: <http://www.essentialaction.org/shell/Final_Report.pdf>.

47 Oshionebo *supra* note 27 at 54.

received criticism for its prohibition of discharge of hazardous substances only if they are in "harmful quantities".[48] The prohibition is also not absolute but rather subject to "any law in force in Nigeria".[49] Oshionebo writes that the prohibition will be inoperative if any law in Nigeria permits such discharge.[50] Additionally, the requirement for the NESREA to determine whether or not the discharge was in "harmful quantities" further undermines the efficacy of the Act as the burden of proof is shifted to the agency to first make a determination as to the whether or not the discharge was harmful.

Another significant piece of legislation regarding oil pollution in Nigeria relates to oil spills. The *Petroleum Act,* is one of the numerous statute in Nigeria that regulate oil spills. [51] Regulation 25 of the *Petroleum (Drilling and Production) Regulations of 1969* (implementing the *Petroleum Act*) requires that companies adopt all practicable precautions including the provision of up-to-date equipment in order to prevent pollution, and if pollution does occur, they must take prompt steps to control and, if possible end it.[52] Further, in 1991, the Department of Petroleum Resources expanded regulations for oil spill prevention with the introduction of *Environmental Guidelines and Standards for the Petroleum Industry* ("EGASPIN") (revised in 2002) which provides that "clean up shall commence within 24 hours of the occurrence of the spill".[53] While these are laudable provisions, legislation requires TNCs to undertake self-monitoring of compliance with the provisions. This requirement for industry self-regulation is perhaps not unrelated to the challenges relating to technical capacity within agencies responsible for enforcement of regulations, and ultimately the need for institutional reforms in Nigeria.[54]

The consensus within the literature suggests that regulatory ineffectiveness in Nigeria subsists for reasons other than the lack of regulatory legislation. Olawuyi like Steiner, argues that environmental pollution in Nigeria subsists not for lack of environmental laws and institutions but rather "lack of effective

---

48 *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act,* Cap N164 Laws of the Federation of Nigeria 2007 [NESREA], at s 27.

49 Oshionebo, *supra* note 27 at 57.

50 *Ibid.*

51 Cap. 350, Laws of the Federation of Nigeria 1990.

52 *Petroleum (Drilling and Productions) Regulations,* LN 69 of 1969.

53 Department of Petroleum Resources, *Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN)*, 2002, 2.6.3 at 158

54 Oshionebo, *supra* note 27 at 73.

implementation of the series of environmental laws that have been put in place".[55] Steiner further argues that regulations regarding oil spills in Nigeria are sufficient to curb the menace if relevant TNCs would comply.[56]

This paper, following the literature, studies this existing legislation on regulation of the oil industry with a view to identifying if in fact these laws are sufficient to regulate oil exploration and if not, what their failings are and how they can be remedied. The paper also interrogates the institutional framework for regulation with a view to identifying the challenges inherent to the institutional framework which further hamper regulatory effectiveness. In that light, we look at, for example, the DPR, which is responsible for ensuring that health, safety and environment regulations conform with national and international best oil field practice.[57] However, the history of the DPR can be traced to the Nigerian National Petroleum Corporation ("NNPC"), which is the state-owned oil company through which the state participates in oil mining and exploration. The DPR (initially called the "Petroleum Inspectorate") was originally created as a part of the NNPC, and even in 1985, when the Ministry of Petroleum Resources was re-established, the Petroleum Inspectorate (now the DPR) remained within the NNPC until March 1988 when the NNPC was reorganized.[58] It was as a result of the reorganization of the NNPC in 1988, that the Petroleum Inspectorate was excised from the NNPC, and transferred to the Ministry of Petroleum Resources as the technical arm of the Ministry in charge of regulating oil mining and renamed the DPR. While Omorogbe argues that no law directly empowers the DPR to undertake regulatory functions because the NNPC Act empowers the Petroleum Inspectorate (the precursor of the DPR), Oshionebo argues that the DPR, as presently constituted, creates room for intimidation and interference in regulation from government officials or powerful individuals.[59]

---

55 Olawuyi, *supra* note **Error! Bookmark not defined.** at 207; *Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent And Control Pipeline Spills And the Deep Water Horizon Oil Spill*, by Richard Steiner (Milieudefensie – Friends of the Earth Netherlands, 2010) at 4 [Steiner] online: <https://milieudefensie.nl/publicaties/rapporten/double-standard.>

56 *Ibid*.

57 Department of Petroleum Resources, *supra* note 3.

58 It had been merged with the Nigerian National Oil Corporation (NNOC) in 1977 to create the NNPC; Omorogbe, *supra* note 7 at 141.

59 *Ibid*; Oshionebo *supra* note 27 at 75.

The significance of tracing the history of the DPR is that it speaks to a number of issues relating to regulatory effectiveness in Nigeria. Firstly, it demonstrates the attitude of the Nigerian state as regards regulation of oil production given that it expected the state-owned oil corporation (the NNPC) to also enforce regulation. Secondly, the close relationship between the regulator (the DPR) and the extractive companies (the NNPC and the TNCs) presents a considerable challenge for regulatory efficiency and a number of writers identify such closeness as possibly responsible for state ineffectiveness in enforcing regulation.[60] According to the World Bank, "this situation has resulted in the government inadequately regulating oil pollution while at the same time, being party to much of the oil-related environmental problems of the Niger Delta."[61]

Other challenges regarding the institutional framework for regulation of oil mining in Nigeria relates to multiplicity of regulatory agencies, challenges relating to capacity, funding, duplication of efforts, and sometimes inter-agency rivalry which hampers regulatory effectiveness. In the third section of this paper, we examine in detail existing regulation as well as the institutional framework for regulation of the oil industry. In its examination, the paper seeks to identify some of the challenges to regulatory effectiveness and proposes solutions to those challenges. Having surveyed the literature, this research proceeds with the hypothesis that the extensive legislation and regulatory institutions in Nigeria would benefit from consolidation and oversight respectively. It interrogates the potential of the ECOWAS to provide such oversight.

Central to this paper is the hypothesis that the most potent challenge to regulatory effectiveness in the Nigerian oil industry relates to the apparent conflict of interest of the Nigerian government. The state's involvement in oil exploration, the precarious nature of its relationship with TNCs (being the operators they have the technical knowledge, capital and experience) as well as the state having its highest amount of earnings coming from oil has led to allegations that the state is not adequately positioned to effectively enforce existing regulation. The said conflict of interest is identified as the most potent challenge to regulatory effectiveness in Nigeria's oil mining industry as it

---

60 See Odumosu, "Transferring Alberta's Gas Flaring Regulations", *supra* note 26 at 877; Oshionebo, *supra* note 27 at 74-76; Amnesty Report, *supra* note 25 at 42.

61 *Defining an Environmental Development Strategy for the Niger Delta Volume 2*, by Jasdip Singh et al (World Bank, Industry and Energy Operations Division West Central Africa, 1995) at 45 [World Bank Report].

informs the political will to not only enforce existing legislation, but to undertake reforms such as the ones being suggested in this paper.

One illustration of this conflict of interest is the existence of Joint Venture Agreements ("JVAs") for oil exploration between the NNPC and several TNCs operating in Nigeria, as sanctions enforced against TNCs ultimately affect the bottom line of the state-owned NNPC.[62] Additionally, the NNPC is not an operator under the agreements and therefore is not directly involved in oil extraction.[63] The effect of such an arrangement is that the NNPC has limited technical knowledge of the process of oil production, thereby increasing government's dependence on TNCs.[64] Also related to the limited technical skill of the NNPC are problems of endemic corruption linked to the NNPC.[65] In relation to its JVAs with TNCs, the NNPC has often fallen short of financing its equity holdings, often borrowing from its TNC partners to fund the ventures.[66] This heavy indebtedness of the government (through the NNPC) to the TNCs, often creates a conflict of interest where the government appears to be reluctant to empower its regulatory agencies to enforce regulations against corporations it is heavily indebted to.[67]

Other allegations relating to the government's conflict of interest and its seeming inability to enforce regulations involves allegations of political ambivalence on the part of civil servants who head ministries or agencies of

---

62 Amnesty Report, *supra* note 25 at 45.

63 See NNPC Joint Venture Agreements online: http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx. TNCs are usually termed operators as they participate in the oil extraction activities. According the NNPC website, "The operator is the one to prepare proposals for programme of work and budget of expenditure joint on an annual basis, which shall be shared on shareholding basis."

64 Julia Pitkin, *Oil, Oil, Everywhere: Environmental and Human Impacts of Oil Extraction in the Niger Delta*, (Senior Thesis, Pomona College, 2013) [unpublished] at 18, online: <http://scholarship.claremont.edu/pomona_theses/88>.

65 See generally: , by Aaron Sayne, Alexandra Gilies & Christina Katsouris (Natural Resource Governance Institute, 2015), online: http://www.resourcegovernance.org/sites/default/files/documents/nrgi_insidennpcoilsales_completereport.pdf

66 *Ibid*, at 23.

67 Some governance systems set out clearly defined lines of authority, separating policy maker, regulator, and operator responsibilities See David R. Hults, "Hybrid Governance: State Management of National Oil Companies" in David G. Victor, David R. Hults & Mark Thurber, eds. *Oil and Governance: State-Owned Enterprises and the World Energy Supply* (United Kingdom: Cambridge University Press 2012) at 62.

regulation. Because governments are part of oil mining activities, heads of agencies may be wary of enforcing negative sanctions in order not to offend government interests.[68] Odumosu-Ayanu, in discussing government's interest in oil revenue without commiserate focus on local communities, writes that Nigeria's problem is not a lack of capacity to make regulations, but calculations based on interests that powerful stakeholders deem "more important".[69] However, she argues that the passage of the *Nigerian Oil and Gas Industry Content Development Act* enacted in 2010 to increase local participation in the industry, demonstrates that the government is capable of adopting regulatory changes in the oil industry.[70] The third part of this paper undertakes a detailed review of the existing regulatory framework in Nigeria but before then, the next section examines the impacts of dumping of waste, oil spills and gas flaring on the wellbeing, health and livelihood of local communities and the environment.

## III. OIL POLLUTION IN THE NIGER DELTA

There are three main sources of oil pollution in Nigeria: the dumping of waste generated during oil exploration in waterbodies, oil spills, and the flaring of natural gas. This section discusses the implications of each type of oil pollution on the environment, local communities, and the economy of Nigeria.

### A. Disposal of Waste

Oil exploration and production activities produce wastes of varying chemical compositions.[71] The disposal of this waste into rivers and the sea pollutes land, water, and affects agriculture and damages fisheries.[72] According to a senior official from the Rivers State Ministry of Environment, "effluent and waste from the oil industry which should be treated is dumped and finds its way into the surface water of the Delta."[73]

---

68 Oshionebo, *supra* note 27 at 75.

69 Odumosu-Ayanu, "Multi-Actor Contracts", *supra* note 1 at 286.

70 *Ibid,* at 289.

71 Amnesty Report, *supra* note 25 at 17.

72 *Ibid.*

73 *Ibid.*

When oil is pumped out of the ground, a mixture of oil, gas, and water emerges alongside the oil.[74] Treatment is supposed to follow the water that emerges with oil (known as "produced water" or "formation water") before it is returned into the sea.[75] Experts have questioned the amount of treatment such water receives before it is returned into the sea.[76] Some argue that only some of the oil can be removed from the water before it is discharged into the sea and such water may contain heavy metals and other dangerous substances.[77] While this paper was not able to uncover any specific studies carried out in the Niger Delta to measure the effects of dumping on the environment, oil companies themselves concede that dumping of waste is not good practice.[78]

Another source of waste from oil exploration involves seismic surveys by oil companies, drill cuttings, drilling mud, and fluid used for stimulating production as well as chemicals used during seismic activities.[79] Olawuyi writes that when major constituents of drill cuttings such as baryotes and bentonitic clays are dumped on the ground, they prevent local plant growth and can potentially kill aquatic life if dumped in the water.[80]

Waste is also generated when oil fields are decommissioned or abandoned as a result of the oil in that field becoming depleted. Decommissioning involves plugging, flushing or cementing oil wells to make them safe for rig removal and shutting down operations.[81] Because decommissioning is inevitable in oil exploration, the process of decommissioning, particularly of offshore oil exploration facilities, has raised significant questions regarding its impact on the environment. Studies have shown that deep sea disposal of oil facilities have potentially hazardous effects on the marine environment with

---

74 *Ibid.*

75 *Ibid.*

76 World Bank Report, *supra* note 1 at 35, which states that "concentrations of dissolved petroleum hydrocarbons have been found to be elevated near refineries in the region (10-50 mg/l), which supports the inference that little or no wastewater treatment, is performed."

77 O. Obire & F. O. Amusan, "The Environmental Impact of Oilfield Formation Water on a Freshwater Stream in Nigeria", (2003) 7 J of Applied Sci & Enviro Management 61.

78 See Amnesty Report, *supra* note 25 at 18.

79 Olawuyi, *supra* note 1 at 189.

80 *Ibid.*

81 *Ibid*, at 190.

uncertain long-term impacts.[82] Human exposure to residual wastes through fishing or water consumption could have serious health consequences including effects on reproduction, immune systems, neurobehavioral disorders and cancers.[83]

Evidently, disposal of waste generated as a result of oil exploration produces a number of risks to local communities as well as the environment. The next subsection discusses oil spills, which is a form of environmental pollution that has generated significant concern within the literature.

## B. Oil Spills

Oil spills occur when there is an unsafe discharge or release of oil into the human environment, including waterbodies like oceans, rivers, and seas.[84] Such spills are often a result of oil exploration and production, mainly due to accidental or negligent rupture or blow out from wellheads, flow stations, drilling rigs, pipelines, and offshore platforms and facilities.[85] Oil facilities and pipelines often rupture due to poor maintenance, corrosion, age, and in some cases vandalism, sabotage, and poor installation.[86] They have also been known to occur as a result of transportation and or loading leakages.[87] The immediate effect of oil spills is the release of dangerous hydrocarbons such as benzene and polynuclear aromatic hydrocarbons into the soil and water sources.[88] Prolonged exposure to these dangerous hydrocarbons has adverse effects on the environment, health of local communities, drinking water, aquatic life, soil fertility, and natural growth of plants and crops, which can last for decades.[89]

Since oil exploration began in Nigeria around 1908, incidences of oil spills have achieved increasing regularity. Between 1993 and 2007, there were 35

---

82 D. G. Gorman & June Nielson, *Decommissioning Offshore Structures* (London: Springer-Verlag, 1997) cited in Olawuyi, *supra* note 1 at 189.

83 The International Programme on Chemical Safety, *Persistent Organic Pollutants*, by L. Ritter et al (United Nations Environmental Programme, 1995), online:<http://www.pops.int/documents/background/assessreport/en/ritteren.pdf>.

84 Olawuyi, *supra* note 1 at 177.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid.*

reported incidences of oil spills in Nigeria.[90] There are also speculations that some incidences of spills are unreported and perhaps unnoticed.[91] As a result of these alarming degrees of spills, the health and livelihood of local communities have often been severely compromised. Studies show that a year's supply of food can be destroyed by even a minor leak of oil, thereby frustrating food supply as well as the livelihood of farmers who depend on such produce.[92] Other effects include contamination of drinking water as access to pipe-borne water in these local communities is often unavailable and they are forced to drink from wells, rivers, and creeks that have been contaminated by oil pollution.[93] It is estimated that over 3000 inhabitants of the Niger Delta have died from drinking contaminated water since oil exploration began.[94] Incidentally, health risks associated with oil spills also occur as a result of chemicals used in cleaning up spills. It appears that many years after the clean-up of spills, water contamination from spills still persist in the form of residual oil, or the effects of chemicals used during clean up.[95] Olawuyi writes:

> Offshore spills, which are usually much greater in scale, taint coastal environments in the Niger Delta, causing decline in local fishing production. The rainforest, which previously occupied 7,400 $km^2$, has disappeared. Similarly, oil spillage in the Niger delta has destroyed its mangrove forests. Estimates suggest that 5-10% of Nigerian mangrove ecosystems have been wiped out by oil, which acidifies the soils, thus halting cellular respiration and starving plant roots of oxygen.[96]

In December 2011, Shell Nigeria (one of the leading TNCs in Nigeria) admitted to what it described as the worst spill in a decade.[97] Over 40,000 barrels of oil were spilled, contaminating waterbodies and coastal communities.[98] This event occurred shortly after the UNEP Report had

---

90 *Ibid.*

91 *Ibid.*

92 *Ibid,* at 178.

93 *Ibid,* at 178-179.

94 *Ibid.*

95 See Deborah Zabarenko, "Oil Clean-Up Chemicals Worry Environment Watchdogs" *Reuters* (4 May 2010), online: Reuters http://www.reuters.com/article/idUSN04110283. See also Olawuyi, *supra* note 1 at 183.

96 Olawuyi, *supra* note 1 at 179.

97 John Vidal, "Nigeria on Alert as Shell Announces Worst Spill in a Decade" *The Guardian* (22 December 2011), ["Shell's worst spill"] online: The Guardian http://www.theguardian.com/environment/2011/dec/22/nigerian-shell-oil-spill.

98 Olawuyi, *supra* note 1 at 179.

described the effects of previous oil spills as "widespread and severely impacting many components of the environment" and made several recommendations for the Nigerian government and TNCs to remediate the effects of oil pollution.[99] Specifically, the report identified the nature of the environment in the Niger Delta and the effects of oil spills in the region. An excerpt from the report reads:

> As Ogoniland [one of the local communities in the Niger Delta] has high rainfall, any delay in cleaning up an oil spill leads to oil being washed away, traversing farmland and almost always ending up in the creeks. When oil reaches the root zone, crops and other plants begin to experience stress and can die, and this is a routine observation in Ogoniland. At one site, Ejama-Ebubu in Eleme local government area (LGA), the study found heavy contamination present 40 years after an oil spill occurred, despite repeated clean-up attempts.[100]

What can be gleaned from the above set of facts is that in spite of the devastating effect of oil spills on the environment and health of local communities, oil spills still seem to occur in alarming degrees. The UNEP Report cited above was conducted at the behest of the Nigerian government in an attempt to pervade the "seemingly intractable" situation that described the relationship between the state and local communities.[101] Particularly, the study was intended to provide reliable information which could serve as a baseline for government and local communities to remediate the tensions between them, given the long, bitter history of repression of local anxieties and remedy the effects of oil pollution.[102] The foreword of the UNEP report reads:

> The history of oil exploration and production in Ogoniland is a long, complex and often painful one that to date has become seemingly intractable in terms of its resolution and future direction.
> It is also a history that has put people and politics and the oil industry at loggerheads rendering a landscape characterized by a lack of trust, paralysis and blame, set against a worsening situation for the communities concerned. The reality is that decades of negotiations, initiatives and protests have ultimately failed to deliver a solution that meets the expectations and responsibilities of all sides. In an attempt to navigate from stalemate to action, the Government of Nigeria, in consultation with many of the

---

99 UNEP Report, *supra* note 2 at 9.

100 *Ibid.*

101 Foreword of UNEP Report, *supra* note 2 at 6.

102 See for example the execution of Ken Saro-Wiwa where the Nigerian government executed activists fighting for the rights of one of the Niger Delta communities in "The Life & Death of Ken Saro-Wiwa", *supra* note 13.

> relevant actors, invited UNEP to consider undertaking an assessment of oil pollution in Ogoniland.[103]

The report was intended to serve as a catalyst to spur government into action. It was expected that a report from a credible and independent observer such as the UNEP would allay any concerns the government might have had regarding the degree of environmental pollution in the Niger Delta being exaggerated by local communities. It was further expected that educated recommendations made by UNEP would aid the government in identifying ways and means to remediate the degree of pollution in the Niger Delta.

However, not only did the worst spill of the decade occur shortly after the report was published, rights groups allege that even years later, no progress has been made regarding implementing the recommendations of the report.[104] This paper therefore seeks to examine how the existing legislative and institutional frameworks potentially contribute to the persisting phenomenon of regulatory ineffectiveness evidenced by oil pollution. Before Proceeding to examine the regulatory and institutional framework in Nigeria, it is important to examine the effects of other forms of oil pollution such as the flaring of natural gas.

## C. Natural Gas Flaring

The discussion on natural gas flaring in Nigeria is particularly significant to this paper because unlike oil spills, which occur by accident or from neglect, gas flaring is a *deliberate* burning or release of natural gas into the atmosphere. The effects of gas flaring on the environment and the health of local communities is not difficult to discern as natural gas contains hydrogen sulfide ($H_2S$) and carbon dioxide ($CO_2$) which is harmful with prolonged exposure. The discussions in this subsection examine the effects of gas flaring on the health and wellbeing of local communities, climate change, and the economic growth of the country.

It is often the case that TNCs in Nigeria do not like finding natural gas alongside oil when mining.[105] Such gas is referred to as associated gas, and presents a challenge to TNCs as it becomes necessary to then dispose of such associated gas in order to profit from the oil, which is the primary motivation

---

103 UNEP Report, *supra* note 2 at 6.

104 "Shell's worst spill", *supra* note 97; see generally, Amnesty International, *supra* note 4.

105 *Gas Flaring in Nigeria*, *supra* note 6 at 10.

for their exploration.[106] The existence of large deposits of natural gas within Nigeria's oil fields has led a number of TNCs to resort to flaring natural gas in an attempt to dispose of this gas and preserve the oil.[107]

Gas flaring emits a number of toxic substances into the atmosphere and has been likened to "setting a match to an enormous container of lighter fluid".[108] It is said that flares are so hot that nothing can grow next to them.[109] Combustion of associated gas produces a mixture of smoke (more precisely referred to as particulate matter); combustion by-products such as sulfur dioxide, nitrogen dioxides and carcinogenic substances such as benz[a]pryne and dioxin; and unburned fuel components including benzene, toluene, xylene and hydrogen sulfide.[110] The Canadian Public Health Association identified over 250 toxins released into the atmosphere as a result of gas flaring:[111]

> There have been over 250 identified toxins released from flaring including carcinogens such as benzopyrene, benzene, carbon di-sulphide (CS2), carbonyl sulphide (COS) and toluene; metals such as mercury, arsenic and chromium; sour gas with H2S and SO2; nitrogen oxides (NOx); carbon dioxide (CO2); and methane (CH4) which contributes to the greenhouse gases. Improper combustion of natural gas, as witnessed by visible smoke from a flare stack, contributes to increased hazardous chemicals being released into the environment including volatile organic compounds.112

The effects of gas flaring on local communities is also captured in reports by environmental and health agencies. The United States Environmental Protection Agency ("US EPA"), discussing carcinogenic substances emitted during gas flaring, reports that "exposure to these substances has been demonstrated to cause adverse health effects such as irritation to the lung, skin, and mucus membranes, effects on the central nervous system, kidney damage, and cancer."[113] In another report, the US EPA having studied the effects of

---

106 *Ibid.*

107 *Ibid.*

108 *Ibid* at 24.

109 *Ibid.*

110 *Ibid.*

111 Canada, Canadian Public Health Association Annual General Meeting, *Resolutions and Motions*, CPHA 2000 Resolutions and Motions at 2, online: http://www.cpha.ca/uploads/resolutions/2000_e.pdf.

112 *Ibid.*

113 United States, Environmental Protection Agency, *National Emission Standards for Hazardous*

prolonged exposure to benzene writes that "it has long been clearly established and accepted that exposure to benzene and its metabolites causes' acute nonlymphoctic leukemia and a variety of other blood-related disorders in humans"[114]

Reports indicate that local communities in the Niger Delta having been exposed to gas flaring over several decades have been victims of premature death, respiratory problems among children, asthma attacks and cancer.[115] Evidently, oil pollution in Nigeria has gravely affected the life expectancy of the residents of its local communities.

Equally disturbing is the effect that continued flaring portends for the environment and climate change. The production of sulfur oxides as a result of natural gas flaring creates what is known as acidic precipitation.[116] The result of the combination of such toxins with atmospheric compounds such as oxygen and water produces acid rain, which is detrimental to aquatic life, forests and vegetation, robs soils of essential nutrients and releases aluminium into the soil.[117] Gas flares also produce "soot" which often rests at the roofs of houses in local communities as well as on other structures found within the communities.[118] This soot is often washed into drinking water, wells, and the soil in local communities during rainfall, further affecting their health, the virility of the soil, and the growth of crops and vegetation.[119]

In reference to climate change, the burning of fossil fuel; mainly coal, and oil and gas has led to the creation of greenhouse gases.[120] Greenhouse gases

---

*Air Pollutants for Industrial, Commercial, Institutional Boilers and Process Heaters,* prepared by Riyaz Paper, Anthony Wright & Daryl Cox (Published July 2012), online: https://www3.epa.gov/ttn/atw/boiler/fr13ja03.pdf.

114 United States, Environmental Protection Agency, *Carcinogenic Effects of Benzene: An Update,* (Washington D.C.: Environmental Protection, 1997) at 4 online: <http://nepis.epa.gov/Exe/ZyPDF.cgi/3000293X.PDF?Dockey=3000293X.PDF>.

115 *Gas Flaring in Nigeria*, *supra* note 6 at 25.

116 Olawuyi, *supra* note 1 at 188.

117 National Geographic, Acid Rain http://environment.nationalgeographic.com/environment/global-warming/acid-rain-overview/

118 Olawuyi, *supra* note 1 at 188.

119 *Ibid.*

120 A greenhouse gas is any gaseous compound in the atmosphere that is capable of absorbing infrared radiation, thereby trapping and holding heat in the atmosphere. Online: http://www.livescience.com/37821-greenhouse-gases.html.

increase heat in the atmosphere and lead to global warming and climate change.[121] The significance of gas flaring to global warming is that gas flaring releases a considerable amount of carbon dioxide, which is the most potent greenhouse gas, as well as another greenhouse gas, methane.[122] According to the Nigerian government, temperatures in West Africa, and particularly the Sahel, have increased more sharply than the global trend, and the average predicted rise in temperature between 1980/1999 and 2008/2009 is between 3°C and 4°C, which is more than 1.5 times the average global trend.[123] While there is no evidence that gas flaring alone is responsible for this increased temperature in West Africa, reports indicate that gas flaring has contributed to more emissions of greenhouse gases than all other sources in sub-Saharan Africa combined.[124]

Climate change is particularly significant to developing countries, and the African continent is regarded as highly vulnerable with a limited ability to adapt.[125] According to the United Nations Intergovernmental Panel on Climate Change ("IPCC"), there are six main areas which provide the most risk to Africa in the face of climate change.[126] First, water resources, especially in international shared basins where there is potential for conflict and a need for regional coordination of water management. Second, food security is at risk from declines in agricultural production and uncertain climate. Third, natural resource productivity is at risk, as well as fourth, biodiversity that might be irreversibly lost. Fifth, vector and water-borne diseases, especially in areas with inadequate health infrastructure. Lastly, coastal zones that are vulnerable to sea-level rise; particularly roads, bridges, buildings, and other infrastructure that is exposed to flooding and other extreme events and exacerbation of desertification by changes in rainfall and intensified land use.[127]

---

121 *Ibid.*

122 *Gas Flaring in Nigeria*, *supra* note 6 at 20.

123 Nigeria, Federal Ministry of Environmental, *Nigeria's Second National Communication Under the United Nations Framework Convention on Climate Change*, (Abuja, Nigeria, February 2014), online: http://unfccc.int/resource/docs/natc/nganc2.pdf

124 *Gas Flaring in Nigeria*, *supra* note 6 at 21.

125 *Ibid* at 19.

126 Susan Solomon, Intergovernmental Panel on Climate Change & Intergovernmental Panel on Climate Change, eds, *Climate change 2007: the physical science basis: contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge ; New York: Cambridge University Press, 2007)..

127 *Ibid.*

In the recently concluded 2015 United Nations Climate Change Conference, commonly referred to as the Paris conference, the Nigerian President said:

> Like many countries, Nigeria continues to witness the adverse effects of climate change in all its ramifications. Presently, we are reeling under the challenges of climate change as the frequency and intensity of extreme events like floods and drought are on the increase. These challenges have resulted in the destruction of many economic and social structures and more worryingly, threatening our national food production and security.[128]

Evidently, the threat of climate change is real, and the Nigerian President admits it. However, Nigeria alone is responsible for flaring 10.7 billion cubic meters of gas per year, equivalent to 11%, of the total volume of gas flared in 2012.[129] The country flares more natural gas than any other country in the world except Russia (Figure3.1), proving that Nigeria is complicit in contributing to global warming. [130]

---

[128] His Excellency Muhammadu Buhari, Address (made at the Leaders Event of The Paris Climate Change Conference30 November 2015), online: http://unfccc.int/meetings/paris_nov_2015/items/9331.php.

[129] OPEC Annual Statistical Bulletin, 50th Edition (2015) Online: Organization of the Petroleum Exporting Countries (OPEC), Vienna, Austria: http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2015.pdf.

[130] World Bank, The Global Gas Flaring Reduction Partnership, February 2012 online: World Bank http://www.worldbank.org/en/programs/gasflaringreduction.

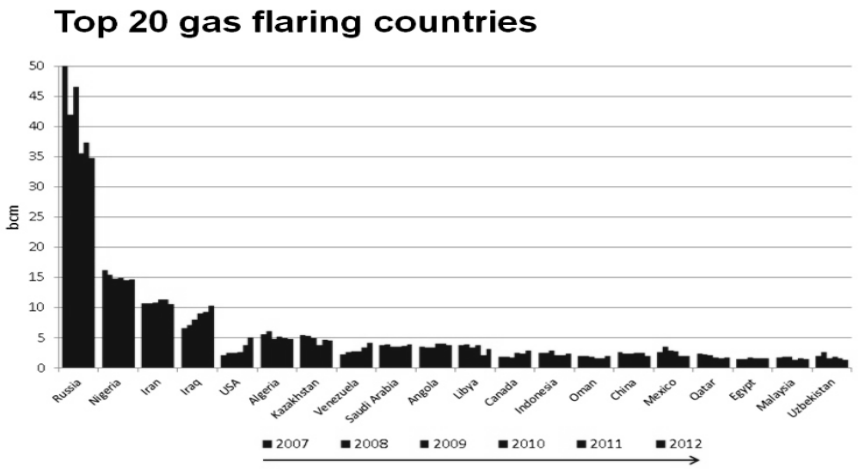


Figure 3.1: Top 20 gas flaring countries in the World (source: World Bank)

Continued gas flaring has implications not only for the health of local communities in Nigeria, but also the rest of the world. Another argument for the elimination of gas flaring in Nigeria is its huge potential for energy generation. It is estimated that Nigeria has lost an estimated 575,563 Giga Watt hour (GWh) of electricity within the period between 2005 and 2015 through flared gas alone (Figure 3.2). Increased energy generation in a country like Nigeria holds potential for all aspects of the Nigerian economy. It is estimated that Nigeria lost revenues exceeding $2.5 billion per year from the year 1970 to 2006 as a result of natural gas flaring.[131] Another implication for the utilization of natural gas in generating electricity is its huge potential to drive industrialization and economic growth in the country. Bazilian et al note:

> If developing economies are to follow the historical pattern of development through a path of industrialization, then the adequate provision of access to electricity is crucial. After all, it was electricity that enabled the transition from small-scale batch production to continuous processing during the US 'Second Industrial Revolution'; today, continuous processing technologies represent the standard technologies for bulk material manufacturing in a large number of industries. In this sense, energy – more specifically electricity – is one of the key

[131] Morgan Bazilian et al, "Oil, Energy, Poverty and Resource Dependence in West Africa" (2013) 31 J. Energy & Nat Resources L 33 at 36 at 44 [Bazilian et al].

channels through which oil wealth can fuel industrialization in small, hydrocarbon-rich, least-developed economies.[132]

Given that only 47 percent of the Nigerian population has access to electricity, which is often inconstant and unreliable, utilization of Nigeria's natural gas is greatly advantageous to remedying the lack of power.[133]

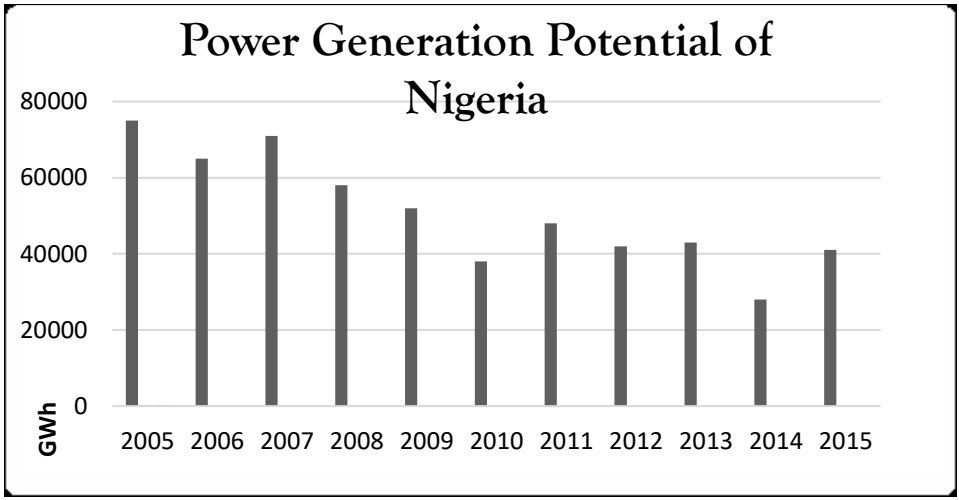


Figure 3.2 Analysis of Estimated Loss of Electricity through Flared Gas (Source NNPC 2016)[134]

Oil pollution in Nigeria has grave impacts on human rights of local communities, on the health and well-being of local communities, on the environment, on climate change and on the economy of Nigeria. One has to wonder why such pollution continues to persist. The next subsection undertakes an analysis of regulatory framework for oil and gas production in Nigeria, identifying the abundance of regulation for oil extraction and the problems associated with the enforcement of these regulations.

---

132 *Ibid* at 43.

133 *Ibid.*

134 Nigerian National Petroleum Corporation, Oil and Gas Statistics – Monthly Petroleum Information, 2016 online:

http://www.nnpcgroup.com/PublicRelations/OilandGasStatistics/MPIFigures.aspx.

## IV. REGULATORY FRAMEWORK FOR ENVIRONMENTAL PROTECTION IN NIGERIA

The regulatory framework being examined in this section places particular focus on the regulation of oil production and its effects on the environment and local communities. We examine regulation that relates to pollution arising from gas flaring, oil spills, and oil pipeline related spills as well as institutions responsible for enforcing existing regulation. The significanceof such analysis is to demonstrate that there is an abundance of regulation for oil pollution in Nigeria. This subsection explores the possible reasons for the ineffectiveness of regulatory framework in the oil and gas industry, identifying challenges and making recommendations for reform.

### A. Regulation Applicable to Oil Production in Nigeria

Regulation, in the sense that it is used in this subsection includes legislation, subsidiary legislation (regulations), as well as guidelines provided by environmental protection agencies aimed at regulating oil production and incidental oil pollution Nigeria. We commence our inquiry with the Nigerian Petroleum Act.

#### *1. The Petroleum Act of 1969*

The Petroleum Act is the primary regulation for oil exploration and production in Nigeria. The Act vests ownership of petroleum resources in the Federal Government and provides for matters incidental to oil production.[135] Incidental to oil production is the issue of oil pollution. Section 9(1) of the Act empowers the Minister of Petroleum Resources to make regulations for safe working of petroleum operations; prevention of pollution of water courses and the atmosphere, the conservation of petroleum resources, among others.[136]

Pursuant to the powers of the Minister of Petroleum Resources under the Act to make regulations, the Department of Petroleum Resources (DPR) undertakes regulation of oil extraction as it relates to environmental pollution, as well as other aspects of petroleum exploration, production, and processing.[137] Further to regulating oil extraction under the Petroleum Act,

---

135 *The Petroleum Act 1969*, (as amended) Cap. P10 Laws of the Federation of Nigeria 2004.

136 *Ibid.*

137 Olawuyi, *supra* note 1 at 31.

other subsidiary legislation including the Petroleum Refining Regulation, the Mineral Oil (Safety) Regulations, and the Petroleum (Drilling and Production) Regulations were enacted under the Act specifically targeted at regulating oil pollution.

### *2. The Mineral Oil (Safety) Regulations 1997 (MOSR)*

The MOSR was made pursuant to the powers of the Minister under Section 9 of the Petroleum Act.[138] The Regulation was designed to ensure safe handling of mineral oil. It contains provisions aimed to ensure safety in all facets of oil extraction, ranging from loading to transfer to storage of petroleum products. It specifically contains provisions relating to the maintenance of oil pipelines, storage tanks, and other apparatus used in oil exploration which can lead to oil spills and contaminate the environment.

Olawuyi has criticised Regulation 6 of the MOSR, arguing that tying environmental best practices in Nigeria to international standards without adaptation to local environmental concerns is a key weakness of the regulation that has often resulted in ambiguities and difficulties in proper implementation. The regulation provides that every drilling, production, and other operation which is necessary for the production and subsequent handling of crude oil and natural gas shall conform with good oil field practice. It provides that good oil field practice will be considered adequate if it conforms with the appropriate current Institute of Petroleum Safety Codes, or the American Petroleum Institute Codes, or the American Society of Mechanical Engineers Codes, or any other internationally recognized and accepted systems.[139]

However, the argument being made here respectfully disagrees with Olawuyi's position. A failure to adapt regulations to local environmental concerns is not a sufficient reason for TNCs to fail to uphold standards, because TNCs by their nature have interests in other countries where they recognize and uphold international standards. Professor Steiner, in carrying out research into what he terms "double standards" by Shell, argues that internationally recognized "good oil field practice" globally, has followed the those developed in the United States.[140] Proof of this is perhaps seen in the fact that Regulation 6 of the MOSR cites two American institutions as being

---

138 *Mineral Oil (Safety) Regulations to the Petroleum Act 1969 of 1997,* Laws of the Federation of Nigeria 2004, cap P10.

139 *Ibid*, s 6.

140 Steiner, *supra* note 5 at 4.

competent in providing standards for good oil field practice. Steiner writes that "the US system called Integrity Management ("IM), is required by law and is used around the world as international "best practice" standard to meet."[141] He writes that an example of such a double standard was seen during the oil spill in the Gulf of Mexico. He argues that while there was prompt action by Shell to clean up the spill in the Gulf of Mexico in the summer of 2010, "most spills in the Delta are left unattended".[142] Steiner's report concluded that "Shell has conducted its petroleum operations far below commonly accepted international standards used elsewhere in the world".[143] The argument therefore is that the challenge of regulatory effectiveness of the MOSR in Nigeria is not that it is tied to international best practices, but that it is hardly enforced.

### *3. The Petroleum (Drilling Production) Regulations*

The Petroleum Drilling and Production Regulations were also made pursuant to the powers of the Minister under Section 9 of the Petroleum Act.[144] The Regulations contain provisions relating to applications for oil prospecting licences, obligations, fees, as well as regulatory restrictions to oil companies as it relates to the drilling and production of oil. The most instructive regulation of the Drilling and Production Regulation in the context of environmental pollution is Regulation 25 which provides:

> The licensee or lessee [of the oil prospecting license] shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.[145]

Other relevant regulatory provisions contained in the Drilling and Production Regulations relate to preventing oil companies from interfering with fishing rights and obligating them to pay compensation in the event that

---

141 *Ibid,* at 4-5.

142 *Ibid,* at 4.

143 *Ibid.*

144 The Petroleum (Drilling and Production) Regulations to the Petroleum Act 1969, Cap. P10 Laws of the Federation of Nigeria 2004 [PDPR].

145 *Ibid.*

their activities affect fishing rights.[146] Another regulation seeks to protect "productive" and "protected" trees from being cut or taken by oil companies in the course of their oil exploration.[147]

One of the criticisms of the Regulations within academic literature is that they fail to define what constitutes "all practicable precautions" or "prompt steps" required under the regulations to uphold environmental standards.[148] Coming to the defense of the Regulations, Oshionebo argues that their open-ended language creates room for evolution of regulatory practices as regulations created in 1969 may have allowed certain practices which today are deemed undesirable.[149] He does however express some concern regarding the discretionary power the Regulations vest in the Director of Petroleum Resources. He argues that such vast power may be influenced by bribes, and he suggests that such power should be subject to scrutiny by an independent body, like a legislative committee.[150]

It can be gleaned from the provisions of the Petroleum Drilling and Productions Regulations that they are designed not only to protect the environment from oil pollution but to hold oil companies accountable for interfering with fishing rights and productive trees, which oil pollution ultimately affects.

### *4. The Oil in Navigable Waters Act of 1968*

The Oil in Navigable Waters Act domesticates the *International Convention for the Prevention of Pollution of the Sea by Oil 1954 – 1962*.[151] Section 1 of the Act prohibits the discharge of crude oil, fuel, lubricating oil, and heavy diesel from ships into Nigeria's territorial waters or shorelines. Section 3 of the Act makes it an offence for a shipmaster, occupier of land, or operator transferring

---

146 *Ibid*, Reg. 23.

147 Productive trees are defined in the regulation as trees having commercial value. See PDPR, Ibid, Reg. 21.

148 See Emeka A. Duruigbo, *Multinational Corporations and International Law: Accountability and Compliance Issues in the Petroleum Industry* (Ardsley, New York: Transnational Publishers, 2003) at 170; Ambrose O.O. Ekpu, "Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria" (1995) 24 Denv J Int'l L & Pol'y 55 at 79.

149 Oshionebo, supra note 27 at 52.

150 *Ibid*, at 52-53.

151 Oil in Navigable Waters Act, Cap. O6 Laws of the Federation of Nigeria 2004; Opened for signature May 12, 1954, (1961) 1 U.S.T. 2987, T.I.A.S. No. 4900, 324 UNTS 3.

oil to discharge it into Nigerian waters. It also requires the installation of anti-pollution equipment on such ships. Section 6 of the Act stipulates punishment for contravention, while section 7 requires that details of all occasions of oil discharge be kept.[152]

The *Oil in Navigable Waters Regulations of 1968* implements the provisions of the Act and requires ships to install oily water separator equipment capable of preventing pollution of the navigable waters by oil.[153] These Regulations also require that precautions be taken when loading, discharging or bunkering oil to prevent spills, and also that regular inspections of ships be carried out to prevent oil leakages.

Evidently, the Act and its implementing Regulations contain provisions that are designed to protect the marine environment from pollution as a result of oil spills. Proper enforcement of these provisions would greatly reduce incidences of oil spills into the sea.

### *5. The Oil Pipelines Act of 1956*

The purpose of the *Oil Pipelines Act* is "to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines."[154] The Act contains provisions for applying for grants to survey routes for oil pipelines and obtaining licenses to construct oil pipelines. Section 11(5) (c) of the Act obligates holders of oil pipeline licenses to pay compensation "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 leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good." The Act further provides that "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."[155] Research has shown that access to justice for local communities provides a significant challenge to effectively litigating and obtaining justice for concerns relating to environmental justice.[156] Section

---

152 *Ibid*, s 6.

153 *Oil in Navigable Waters Regulations*, [LN 101 of 1968]

154 *Oil Pipelines Act*, c 07 Laws of the Federation of Nigeria 2004[OPA].

155 *Ibid*.

156 For a more robust discussion on the challenges to effectively litigating concerns relating to environmental justice in Nigeria, See Zarma, *supra* note 41 at 35 - 43.

17(4) of the Act however, requires that holders of oil pipeline licenses avoid interference with works of public utility and prevent pollution of land and water.

The *Oil Pipelines Regulations* made pursuant to the *Oil Pipelines Act* requires that environmental emergency plans be put in place by oil pipeline operators and makes any contravention of the Regulations punishable with a fine and/or imprisonment.[157]

### *6. Environmental Impact Assessment Act, 1992*

The *Environmental Impact Assessment Act* ("EIAA"), enacted in 1992 provides a significant contribution to environmental protection in Nigeria.[158] It requires oil and gas operators as well as project developers in other sectors, to consider the environmental impact of their activities at the early stages of project development except exempted by law.[159] TNCs or other project developers are required to undertake an environmental impact assessment ("EIA") of the likely or potential environmental impact of their activities as well as measures available to mitigate its adverse environmental impacts.[160] The Act prohibits undertaking or embarking on projects which may significantly affect the environment without prior consideration of their environmental effects.[161] The schedule to the EIAA designates mining and petroleum industries as requiring Mandatory Study Activities and the implication of such designation is that the Federal Ministry of Environment ("FME") is required to vet and approve the environmental audit undertaken by the corporation or other project developer.[162]

The EIAA punishes non-compliance with fines or imprisonment.[163] It has, however, been applauded for adopting a "pluralist approach" to regulation.[164] The Act enjoins the FME to receive comments from government agencies, members of the public, experts, and interest groups who wish to make an

---

157 *Zarma, Ibid; Oil Pipelines Regulation* [OPR], at 9(1), 25.

158 *Environmental Impact Assessment Act*, Cap. E12Laws of the Federation of Nigeria 2004 [EIAA].

159 *Ibid,* s 2(1),(4) .

160 *Ibid,* s 4 (d),(e).

161 *Ibid*, s 2(1)-(3) of the EIAA.

162 *Ibid*, Schedule to the EIAA

163 *Ibid,* s 62.

164 Oshionebo, supra note 27 at 58.

intervention on any EIA submitted for approval.[165] Although it is unclear what weight the FME attaches to such interventions, it ought to take them into consideration at various stages, including the screening or mandatory study stage.[166] Concerns regarding the environmental effects of a project may prompt the FME to refer it to mediation or to the review panel.[167] Where it is found that the project is likely to result in unjustifiable, immitigable and significant adverse environmental effects, the agency will not permit the project to be carried out.[168]

While the contributions of the EIAA to curbing causes and effects of environmental pollution and degradation in Nigeria are commendable, one of the challenges of the Act is the exceptions that it creates. One exception is that EIAs are not required where (i) the President of Nigeria or the President of the Federal Environmental Protection Council determines that the environmental effects of a project are likely to be minimal; (ii) the project is to be carried out during a national emergency for which temporary measures have been taken by the government; and (iii) the FME is of the opinion that, given the circumstances, the project is in the interest of public health or safety.[169] Oshionebo writes that the first exception is particularly troubling because it can be used by persons with political connections to the President or Council to bypass the requirement for an EIA.[170] He argues further that the exception granted to the president seems to be intended to afford the president discretion over matters which he considers to be in the overall interest of Nigeria, although the discretion must be exercised reasonably where the project poses "minimal" adverse effects to health and the environment.[171]

Evidently, vast discretionary powers of the president of Nigeria and the president of the Council afforded by the EIAA would perhaps benefit from some regulatory oversight. When discussing the Drilling and Productions

---

165 *Ibid.*

166 *Ibid.*

167 *Ibid* at 59.

168 Olawuyi, supra note 1 at 196.

169 EIAA, supra note 158 at s. 15(1). The Federal Environmental Protection Council (the Council) was established under the now repealed the Federal Environmental Agency Act. Since being repealed, the Council is now established under section 3 of NESREA, supra note 48.

170 Oshionebo, *supra* note 27 at 59.

171 *Ibid.*

Regulations, we had earlier discussed Oshionebo's suggestion of reviewing a legislative body in order to curtail the vast discretionary powers of the Director of the DPR under those regulations. Clearly, independent oversight in relation to the discretionary powers of the president of Nigeria and the president of the Council would potentially allay some of the concerns regarding the effectiveness of the EIAA.

### *7. Associated Gas Re-Injection Act 1984 (AGRA)*

In principle, gas flaring has been prohibited in Nigeria since 1984 with limited exceptions. The *Associated Gas Re-Injection Act* and the regulations enacted pursuant to the Act, prohibit the flaring of natural gas unless the Minister of Petroleum resources is satisfied that it is not feasible or appropriate to re-inject or utilize produced gas.[172] Upon satisfaction of the above requirement, the Minister may then issue a certificate to the oil company granting it permission to flare gas, "specifying such terms and conditions as he may at his discretion choose to impose, for the continued flaring of gas in the particular field or fields."[173] A certificate may also be issued "permitting the company to continue to flare gas in the particular field or fields if the company pays such sum as the Minister may from time to time prescribe for every 28.317 Standard cubic metre ("SCM") of gas flared."[174]

The *Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1984* requires however that the issuance of the certificate by the Minister for continued gas flaring shall be subject to one or more of the following conditions:

> (a) Where more than seventy-five percent of the produced gas is effectively utilized or conserved;
> (b) Where the produced gas contains more than fifteen percent impurities, such as $N_2$, $H_2S$, $CO_2$, etc. which render the gas unsuitable for industrial purposes;
> (c) Where the on-going utilization programme is interrupted by equipment failure: provided that such failures are not considered too frequent by the Minister and that the period of any one interruption is not more than three months;
> (d) Where the ratio of the volume of gas produced per day to the distance of the field from the nearest gas line or possible utilization point is less than

---

172 Associated Gas Re-Injection Act, Cap. A25 Laws of the Federation of Nigeria, 2004, at s 3(2).

173 *Ibid*, s 3(2)(a).

174 *Ibid*, s 3(1)(b).

50,000 SCF/KM: Provided that the gas to oil ratio of the field is less than 3,500 SCF/bbl, and that it is not technically advisable to re-inject gas in that field;

(e) Where the Minister, in appropriate cases as he may deem fit, orders the production of oil from a field that does not satisfy any of the conditions specified in these Regulations.[175]

It is also significant to note that Regulation 2 of the *Associated Gas Re-Injection Regulations* provides that: "the Minister may from time to time, review, amend, alter, add to or delete any provision of these Regulations as he may deem fit."[176] The implication of this provision is that the Minister can decide to 'delete' the provisions of the regulation that provide conditions for issuance of the ministerial certificate that permit continued flaring. It would seem that Regulation 2 undermines the effectiveness of the regulations by granting purely discretionary powers to the Minister to override the provisions.

Evidently, the *AGRA* and its supporting regulations are intended to promote the re-injection and utilization of natural gas in Nigeria and prevent gas flaring. The Ministerial certificates are usually issued for a period of six months after which the DPR reviews the performance of the oil fields in order to determine whether they qualify for continued flaring or ought to be penalized for violation of the Act.[177] Regardless of these regulations, however, gas flaring in Nigeria seems to be unabated for over two decades since regulation was put in place. Statistics show that in the first half of 2005, 116 oilfields were penalized for gas flaring while 75 others were given permission to flare.[178] Statistics from previous years showed what is described as a "blatant disregard for the Act by oil TNCs in Nigeria."[179]

A number of concerns arise from the disregard of the AGRA by oil TNCs. These concerns relate to the criteria for the granting of permits, compliance with the AGRA and consequences of non-compliance. Oshionebo argues that the criteria for the grant of the permit are skewed in favour of oil TNCs, showing that the criteria for issuing the certificate are easy to meet. Another concern relates to the penalty for gas flaring without the Minister's permission

---

175 Regulation 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations of 1984.

176 Ibid, Regulation 2.

177 Oshionebo, *supra* note 27 at 54.

178 *Ibid.*

179 *Ibid.*

which is fixed at 10 Naira (about $0.05 USD) per 1000scf of gas flared.[180] Some scholars have argued that the amount is so meagre that it is more economically prudent to pay the fines than to re-inject or utilize the gas.[181] A concern raised by environmental and human rights groups regarding the Ministerial certificates permitting flaring is that TNCs have often failed to disclose whether ministerial certificates have been issued to them, which would legalize their continued flaring.[182] These groups also argue that such failure to disclose the existence (or lack) of these ministerial certificates makes it impossible to verify the legality of the issuance of the certificates.[183]

The problems relating to continued gas flaring in Nigeria are quite significant. While there is a need to review the *AGRA* in order to make the penalty for flaring without a permit more stringent, there is an equally important need to review the procedure for the granting of permits for continued flaring. The attitude to be adopted regarding gas flaring ought to be a zero-tolerance attitude. As seen in the previous subsections, continued flaring has grave consequences on the health, human rights, the environment and the economy of Nigeria. It is therefore unwise to continue to allow state institutions or officials to grant oil companies permission to destroy the environment and a potential source of wealth for the country. With regard to gas flaring, a review of existing regulation is required in order to make consequences of non-compliance more stringent.

Odumosu writes that gas flaring persists because of challenges to utilizing associated gas in Nigeria, such as inaccessibility of the markets, lack of infrastructure for utilization and the oil industry's unwillingness to invest in gas utilization.[184] Evidently, however, the harm that results from natural gas flaring present cogent need for finding alternatives to gas flaring.

Even though the Federal High Court of Benin has declared the provisions of the AGRA allowing continued flaring unconstitutional, the decision has been appealed, and the AGRA remains in force in Nigeria.[185] In a similar vein,

---

180 *Ibid* at 53, 54.

181 *Ibid*; Ibironke T. Odumosu, "Transferring Alberta's Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations" (2006-2007) 44 Alta. L. Rev. 863 at 888 [Odumosu, Transfering Alberta's Gas Flaring Regulations].

182 See, *Gas Flaring in Nigeria*, *supra* note 6 at 31.

183 *Ibid.*

184 Odumosu, "Transferring Alberta's Gas Flaring Regulations", *supra* note 26 at 890.

185 See Suit No: FHC/B/CS/53/05, Federal High Court of Nigeria (Benin Judicial Division)

the *Petroleum Industry Bill of Nigeria* was promoted as the Bill that would revolutionize the petroleum industry in Nigeria and eliminate gas flaring and other problems in the Nigerian oil industry.[186] The Bill has since suffered significant setbacks since it was introduced to the National Assembly in September 2008 and re-introduced in 2012.[187] It has been plagued by allegations of tampering by government officials in a bid to remove contributions of trade unions and NGO's to the Bill.[188] Perhaps unsurprisingly, the Bill as is currently worded speaks of enforcing environmental and air quality standards only "to the extent practicable."[189] Evidently, the reform the Bill sought to initiate in relation to gas flaring has been negated by the language of the Bill.

As the regulatory framework in Nigeria currently exists, independent oversight over the power of the Minister to grant permits for continued flaring of natural gas will greatly reduce incidences of blatant disregard of existing regulation.

### *8. The Environmental Guidelines for the Petroleum Industry in Nigeria (EGASPIN)*

The Environmental Guidelines for the Petroleum Industry in Nigeria were issued by the DPR in an attempt to control pollution as a result of oil extraction and address the environmental concerns relating to petroleum operations.[190] Originally issued in 1981 and reviewed in 2002, the EGASPIN sets out detailed guidelines and standards for the exploration, production, storage, refining, transportation, and marketing of petroleum products in

---

*Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR

151 (NgHC 2005) [Gbemre], online: http://www1.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahrlr-151-nghc-2005.htmlwww.climatelaw.org/media/media/gas.laring.suit.nov2005/ni.shell.nov05.judgment.pdf; Odumosu, "Transferring Alberta's Gas Flaring Regulations", *supra* note 26.

186 See Montclos, *supra* note 28, at 403-424.

187 *Ibid,* at 408.

188 *Ibid.*

189 Section 6(1) of the Petroleum Industry Bill, See Petroleum Industry Bill NNPC, Online: http://www.nnpcgroup.com/PetroleumIndustryBill.aspx.

190 *The Environmental Guidelines for the Petroleum Industry in Nigeria (EGASPIN)* rev. ed. 2002 (Lagos: Department of Petroleum Resources, 2002) [EGASPIN].

Nigeria.[191] Specifically, it establishes industry-wide standards for pollution prevention, abatement and remediation; management, treatment, and control of oil related wastes; compliance monitoring; and sustainable decommissioning of oil and gas facilities.[192] The EGASPIN also restates the various obligations placed on oil corporations by law, including prohibition of discharges of oil related wastes such as drilling muds, produced water and produced sand and sludge into inland, coastal, or offshore waters, swamp, and pits.[193]

Although the primary responsibility for enforcing the EGASPIN lies with the DPR, the EGASPIN also encourages self-enforcement within the industry.[194] It requires that oil companies perform certain acts at every stage of their operations. The overarching aim of EGASPIN is to ensure that "unforeseen, identified and unidentified environmental issues are contained and brought to an acceptable minimum."[195] It requires that oil companies undertake audits to assess their compliance with environmental management systems and other regulatory requirements. These audits must be conducted by professionally competent auditors, independent of the activities being audited and registered with the DPR. In addition to the self-audits, oil companies are also required to undertake self-monitoring of discharge of oil related wastes, monitoring of gaseous point source emissions and monitoring of radioactive substances. Records and results of such monitoring activities are to be submitted to the Director of Petroleum Resources at prescribed intervals.

Markedly, the EGASPIN lays out a very elaborate scheme for prevention and control of environmental pollution in the oil industry. However, the requirement for industry self-monitoring and compliance with the standards potentially sabotages the process as it is susceptible to manipulation as TNCs may fail to report incidences of violations. More specifically, Steiner argues that the requirement of for an oil spill contingency plan contained in EGASPIN is not being complied with by Shell as several requests to obtain a copy of such plans were ignored by the TNC and "their actual performance in responding to some large spills leaves no doubt that they are not in compliance

---

191 Oshionebo, *supra* note 27 at 55.

192 EGASPIN, *supra* note 189 at 286–288; *ibid.*

193 *EGASPIN*, *ibid*, at 11.

194 Oshionebo *supra* note 27 at 55.

195 *Ibid*, EGASPIN *supra* note 9 at 10, Article 1.1; at 64, Article 1.1; at 78, Article 5.1(i); at 92, article 5.1(i); at 102, Article 5.1(i); at 114, Article 1.1; at 121, Article 4.1(i).

with these EGASPIN requirements."[196] Oshionebo identifies however that perhaps the reason for the requirement of industry self-monitoring and compliance by the EGASPIN is due to the technical nature of enforcing such standards, experience which is lacking at the DPR.[197] Following that line of argument, he writes that "indeed, it is unlikely that TNCs will take these duties [duties of self-regulation under EGASPIN] seriously because the of the lack of credible threat of enforcement by regulatory agencies."[198]

### *9. National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act 2007*

The NESREA is regarded as Nigeria's principal legislation on environmental protection.[199] It establishes an agency entrusted with the regulation and enforcement of environmental standards, regulations, laws, policies, and guidelines.[200] The provisions of the Act, however, are not aimed at regulation of activities in the oil industry but at general environmental protection in Nigeria. The Act prohibits the discharge of "harmful quantities" of any hazardous substances into the air or upon the land and waters of Nigeria or at adjoining shorelines, except when permitted under any law.[201] Oil related wastes qualify as hazardous substances under the Act as they are defined in broad terms as "any chemical, physical or biological and radioactive material that poses a threat to human health and the environment."[202]

One of the greatest criticisms of the Act is that it is accused of undermining itself. Specifically, the Act prohibits wastes only in "harmful quantities." It is argued that such provision presents difficulties in implementation as institutions will have to determine what constitutes "harmful quantities."[203] Deficiencies relating to institutional capacity, expertise and equipment at the NESREA, further undermine the effectiveness of this Act, and the concern is

---

196 *Ibid,* at 154, Article 2.3.1; Steiner, *supra* note 55 at 38.

197 Oshionebo, *supra* note 27 at 56.

198 *Ibid,* at 95.

199 *NESREA Act* 2007, published in the Official Gazette No 92 Vol. 94, 31 July 2007; Olawuyi, *supra* note 1 at 195.

200 *Ibid,* s 1.

201 *Ibid,* s 7.

202 *Ibid,* s 37.

203 Oshionebo, *supra* note 27 at 57.

that public health may be compromised as a result of these deficiencies.[204] Additionally, the prohibition of discharge of hazardous materials is not absolute but subject to "any law in force in Nigeria" that permits such discharge.[205] This undermines the sincerity of the state's commitment to curb discharge of hazardous waste into the environment. The Act, however, empowers the Agency to impose fines on violators of the Act and the Minister of environment may impose certain obligations on violators of the NESREA Act.[206] It is important to note that the Act excludes the Agency from investigating environmental audits relating to the oil and gas sector.[207] This exclusion is perhaps designed to avoid duplication of roles with the National Oil Spill Detection Agency, which has the responsibility of detection and response to oil spillages in Nigeria.[208]

In spite of the express exclusion of the NESREA from undertaking environmental audit as it regards oil and gas related concerns, oil pollutants meet the definitions of hazardous waste as contained in the Act. Secondly, the Agency is responsible for setting standards for the protection and enhancement of Nigeria's air; the provisions of the Act are however "subject to any law in Nigeria."[209] It is the argument of this paper that the proviso subjecting the provisions of the NESREA Act to any law in Nigeria, was created to further excuse continued flaring of natural gas which compromises air quality. These circumstances further demonstrate the unwillingness of the Nigerian government to adopt a zero-tolerance approach to environmental pollution.

### *10. National Oil Spill Detection and Response Agency (Establishment) Act 2006*

The NOSDRA Act establishes an agency for detecting and responding to oil spills in Nigeria.[210] Section 5 of the Act sets out the objectives of the Agency to include coordinating and implementing the National Oil Spill Contingency Plan, ensuring a safe, timely, effective and appropriate response to major or

---

204 *Ibid.*

205 NESREA, *supra* note 198 s. 27.

206 *Ibid,* s 27(3) and Oshionebo, *supra* note 27 at 57.

207 NESREA, *ibid,* s 2 & s. 27(1).

208 Oshionebo, *supra* note 27 at 58.

209 See: NESREA, *supra* note 198 s 27.

210 *National Oil Spill Detection and Response Agency (Establishment Act) 2006* [NOSDRA].

disastrous oil pollution.[211] The agency is responsible for identifying high-risk areas as well as priority areas for protection and clean up, establishing the mechanism to monitor and assist, or where expedient, direct the response.[212] The agency also has the capability to mobilize the necessary resources to save lives, protect threatened environment, and clean up to the best practical extent of the impacted site.[213] Lastly, the agency must ensure funding and appropriate and sufficient pre-positioned pollution combating equipment and materials, as well as a functional communication network system which is required for effective response to major oil pollution.[214]

The functions of the Agency include surveillance and ensuring compliance with existing environmental legislation. Section 6(2) of the Act prescribes a penalty for failure to report oil spill in writing, no later than 24 hours after the spill occurred.[215] Section 18 of the Act establishes a National Control and Response Center responsible for receiving and processing reports of all spills within Nigeria and serves as the command and control center for monitoring all existing legislation on environmental control, surveillance for oil spill detection and monitoring and coordinating responses.[216]

The responsibilities of the NOSDRA, while clearly designed to detect and responds to spills in Nigeria, seem to be a duplication of effort the EGASPIN and the role of the DPR in upholding regulatory standards. The function of the Agency regarding surveillance and ensuring compliance with regulatory standards is already being carried out by the DPR. The other functions outlined in the Act refer to receiving reports of oil spillages and coordinating oil spill response activities throughout Nigeria; coordinating the implementation of the Plan (oil spill contingency plan) as may be formulated, from time to time, by the Federal Government; and coordinating the implementation of the Plan for the removal of hazardous substances as may be issued by the Federal Government.[217] While these functions are laudable, their existence duplicates the efforts of the EGASPIN in achieving industry-wide regulation and therefore presents TNCs with two sets of regulation with no

---

211 *Ibid*, s 5(a).

212 *Ibid*, s 5(b).

213 *Ibid*, s 5(c).

214 *Ibid*, s 5(e).

215 *Ibid*, s 6(2) of the Act

216 *Ibid*, s 18(1)(c).

217 *Ibid*, s 6(b-d).

clear precedence of one over the other. While the EGASPIN is enforced through the DPR, NOSDRA also seeks to enforce the same standards through its own agency. This situation creates a lack of coherence in the regulation of the industry and also creates an opportunity for TNCs to play government agencies against each other and avoid meeting standards.

## V. BARRIERS TO EFFICIENT REGULATION: INTRODUCING A CASE FOR REGULATORY OVERSIGHT

Discussions in the previous subsection outlined a number of pieces of legislation and regulations aimed at curbing oil pollution in Nigeria. We identified some criticisms of the regulations and legislation as it is presently constituted and briefly highlighted the institutions responsible for enforcement of such regulation. This subsection summarizes some of the challenges of regulatory effectiveness in Nigeria, identifying the specific challenges of regulatory institutions, and other external factors such as the government's involvement in the oil industry that further hinder regulatory effectiveness in Nigeria. Ultimately, the subsection argues the merits of employing an oversight mechanism for regulatory institutions which would serve to further regulatory effectiveness.

A recurring concern that pervades the literature on regulation and legislation in the oil industry is the vast discretionary power given to specific office holders which tend to undermine the effectiveness of regulation. This was seen in specific relation to the Drilling and Production Regulations, the Environmental Impact Assessment Act, the Petroleum Act and the Associated Gas Re-Injection Regulation. The lack of provision for audits of these vast discretionary powers further undermines the effectiveness of regulation. The adoption of a mechanism that can review and audit decisions of office holders in specific reference to oil and gas regulation would have great implications for increased effectiveness.

From the previous subsection, it can be gleaned that there are a number of institutions responsible for enforcing regulatory standards in Nigeria. We have seen the functions of the Minister of Petroleum Resources who acts through the DPR, the FME, NESREA and the NOSDRA and their role under the various enabling legislation. The DPR exercises the powers of regulation granted to the Minister of Petroleum under section 9 of the Petroleum Act.[218]

[218] Omorogbe has criticized the role of the DPR in regulation of the industry arguing that no law specifically empowers the DPR to perform that function as the Nigerian National

The research indicates that a number of concerns further stifle the effectiveness of these institutions in carrying out their mandates.

Firstly, there are concerns relating to lack of capacity, resources and expertise within regulatory agencies in Nigeria. A report states that "most states and local government institutions involved in environmental resource management lack funding, trained staff, technical expertise, adequate information, analytical capability and other pre-requisites for implementing comprehensive policies and programs."[219] The World Bank also reports that regulatory agencies in Nigeria are constrained by limited funding, lack of monitoring equipment, lack of expertise and inadequacy of properly trained staff.[220] In the face of these significant deficiencies, it is not surprising that regulatory effectiveness is such a challenge in the oil industry. Other challenges to regulatory effectiveness relate to allegations of corruption. Officials of regulatory institutions have been accused of being compromised in effectively carrying out their duties. For example, the director of Nigeria's DPR was reportedly dismissed on allegations of corruption, following allegations that the director allocated an oil prospecting license to an undeserving company.[221]

Another concern regarding regulatory effectiveness is the multiplicity and lack of cooperation among regulatory institutions. As seen above, the DPR and the NOSDRA have similar mandates when it comes to enforcing regulatory standards, and the NESREA is frustrated by its inability to enforce environmental standards in the area of oil and gas or if any other law in Nigeria permits the activity it seeks to regulate. The existence of a number of these agencies with similar mandates is quite significant because it dissipates already scarce funds amongst a number of regulatory agencies as opposed to simply strengthening just one or two institutions to carry out regulation. Another challenge is that it has a tendency to create conflict or inaction on the part of these agencies and sends confusing signals to the oil companies which these agencies seek to regulate.

Given these significant challenges to effective regulation in Nigeria, there is clearly a need for an intervention that would boost regulatory effectiveness.

---

Petroleum Corporation Act empowers the Petroleum Inspectorate (which was the precursor to the DPR) to perform such function. See Omorogbe, *supra* note 7 at 141.

219 Environmental Resource Managers Ltd., *Niger Delta Environmental Survey Final Report Phase 1*, Vol. 1 at 263 in Oshionebo, *supra* note 27 at 72.

220 World Bank Report, *supra* note 1.

221 Oshionebo, *supra* note 27 at 73.

This paper proposes the adoption of an independent regulatory oversight framework that provides a system for coordination within existing regulatory institutions and also provides much needed resources to boost capacity for regulatory effectiveness. The proposed framework will be discussed in greater detail in the fourth section of this paper. The proposed framework is designed in part to be able to review decisions of office holders who are given vast discretionary powers under legislation. It is also designed to provide technical support as well as build capacity within staff of regulatory institutions in Nigeria. The existence of the proposed regulatory oversight potentially curbs problems of corruption as oversight subjects all decisions of regulatory institutions to review.

## A. Other Barriers to Effective Regulation in Nigeria

The paper suggests that the most significant challenge to regulatory effectiveness in Nigeria is the country's heavy reliance on the proceeds of the oil industry to sustain its economy, and its involvement in oil extraction.[222] The government operates joint venture agreements ("JVAs") with TNCs through the state-owned oil company, the NNPC. The two issues identified, though separate, are related because they are tied to Nigeria's political will to enforce regulations against TNCs and the NNPC. An imposition of fines or other sanctions in pursuance of regulation affects not only TNCs but also the government's bottom line as government earnings from the oil sector are affected.[223]

The significance of the government's reliance on the oil industry can be explained through the theory of the resource curse. Studies of the resource curse suggest that positive wealth shock from natural resource sectors drives up exchange rates and higher wages in that sector than in other sectors, which in turn reduces profits in manufacturing and other non-primary export sectors.[224] The subsequent decline of manufacturing and other sectors in turn slows down economic growth, leading to what is termed "the Dutch

---

222 In 2015, Nigeria's total export were valued at $83,897million, petroleum exports accounted for $76,925million of the total value of export. See Organization of Petroleum Exporting Countries (OPEC), Nigeria Facts and Figures online: OPEC http://www.opec.org/opec_web/en/about_us/167.htm.

223 Unless the NNPC is able to establish that the fines were imposed due to an act of negligence on the part of the operator (the TNC).

224 *Fuelling the World - Failing the Region? Oil Governance and Development in Africa's Gulf of Guinea* (Abuja, Nigeria: Friedrich-Ebert-Stiftung, 2011) cited in Bazilian et al *supra* note 131 at 36.

Disease".[225] The term is derived from the Dutch experience following the discovery of large fields of natural gas in the Netherlands in the late 1950s. When the country witnessed a huge inflow of revenues due to the rapid development when it became a gas exporter, the initial result was an increase in overall welfare, but soon the manufacturing sector declined as a result of a large inflow of foreign currency that made manufacturing exports less competitive on international markets and increased production costs internally.[226]

The phenomenon of the resource curse suggests that large and newfound resource endowments can both directly and indirectly result in poor forms of governance that incite violent conflict, political instability and graft and weak institutions.[227] Other studies of the resource curse suggest that large windfalls from natural resources contribute to rising income gaps between the rich and the poor, institutionalize corruption and enable oppressive regimes to maintain political power.[228]

In the case of Nigeria, the country is described in many texts as one beset by the resource curse.[229] Other studies into the resource curse show that resource abundance has been linked to rent seeking behaviour and political corruption which weakens political institutions.[230] While there is not much empirical certainty surrounding the process of the resource curse, the existing findings are suggestive that resource abundance has contributed to crippling

---

225 *Ibid,* at 37.

226 *Ibid.*

227 *Ibid.*

228 Terry Lyn Karl, "State Building and Petro Revenues", in Marc Garcelon, Edward W Walker, Alexander Patten-Wood and Alexsandra Radovich (eds), *The Geopolitics of Oil, Gas, and Ecology in the Caucasus and Caspian Sea Basin (Berkeley: Berkeley Institute of Slavic, East European and Eurasian Studies*, 1998), 3-14.

229 Annegret Mahler "Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil Violence Link in the Niger Delta" (2010) 120 German Institute of Global Area Studies Working Paper No.120 at 5 [Mahler]. See also Richard Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge 1993); Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War* (Washington DC: World Bank 2001); Phillipe Le Billon, "The Political Ecology of War: Natural Resources and Armed Conflict" (2010) 20 Political Geography 561-584; Jeffery D. Sachs and Andrew M. Warner, "The Curse of Natural Resources" (2001) 45 European Economic Review, Elsevier 827-838.

230 James A. Robinson, Ragner Torvik & Theirry Verdier, "Political Foundations of the Resource Curse" (2006) 79 Journal of Developmental Economics 447 at 448 [Robinson et al].

state institutions in Nigeria, and perpetuated corruption and rent seeking behaviour that weaken regulatory effectiveness. Oil is the country's only major export and accounts for a significant amount of the country's GDP, and oil exports have dwarfed all other sectors of the economy.[231] The significance of the resource curse to this discourse reveals the precarious nature of the Nigerian state; it reveals the significance of oil to its economy and exposes some of the motives behind its relations with the oil industry and local communities. The oil industry can be described as the country's "cash cow" and the government is perhaps unwilling to enforce any sanctions that may be detrimental to its primary source of income.

This subsection has shown that Nigeria suffers two challenges: the resource curse and regulatory ineffectiveness. It has been suggested that diversifying the economy could potentially reverse the effects of the resource curse in Nigeria. However, there is no proof that diversifying the economy will address concerns relating to regulatory ineffectiveness in the oil industry. The literature on the resource curse emphasizes the significance of strong political institutions in order to effectively undertake economic reforms in a resource-rich country.[232] In agreement with the literature, this paper suggests strengthening state institutions in order to undertake economic, legislative, and institutional reforms in the Nigerian oil industry. The paper therefore suggests the adoption of a framework that will strengthen regulatory institutions in Nigeria and ultimately drive reforms. Recently, Michael Ross opined that "perhaps the problem is not that oil states have exceptionally weak institutions and need normal ones; perhaps they already have normal institutions but need exceptionally strong ones."[233] Evidently, the government's involvement in oil extraction, the inherent challenges within the regulatory framework, and the resource curse hinder the development of strong regulatory institutions and effective regulation of oil pollution in Nigeria. Regulatory oversight over the regulatory institutions in Nigeria, has the potential to strengthen these institutions, drive better regulatory effectiveness and garner political will towards enforcing regulation and perhaps diversifying the economy.

---

231 The oil and gas sector accounts for about 35% of gross domestic product, and petroleum exports revenue represents over 90% of total exports revenue. See OPEC, *supra* note129.

232 See Halvor Mehlum, Karl Moene and Ragnar Torvik, "Institutions and the Resource Curse" (2006) 116 The Economic Journal at 1 [Mehlum et al].

233 Michael L. Ross, *The Oil Curse: How Petroleum Shapes the Development of Nations*, (USA: Princeton University Press 2012) at 215.

The pith of the arguments being made in this section can be summarized as follows: terrible oil pollution persists in the Niger Delta, and there is a need for better enforcement of existing regulations to curb it. To quote Oshionebo on this point, "the crisis of environmental protection in Nigeria's oil and gas industry lies not so much with the defects in Nigerian laws as with their non-enforcement."[234] The case for better regulation of the oil industry has implications for health of local communities, the environment, climate change, and the Nigerian economy. As discussed above, the existing regulatory framework in Nigeria will benefit from regulatory oversight, the next section of the paper discusses the justification for the choice of the ECOWAS to provide such oversight, as well as the form, nature and potential challenges to such oversight.

## VI. JUSTIFYING REGIONAL OVERSIGHT OVER THE NIGERIAN REGULATORY FRAMEWORK

As demonstrated in the section on scholarly debates in the literature, a number of scholars such as Odumosu-Ayanu and Oshionebo, have identified the problem of ineffective regulation in Nigeria and have advanced potential solutions to the problem. [235] While acknowledging the merits of previously proposed solutions, this paper charts a new course in proposing a regulatory oversight framework. Although the recommendation for ECOWAS oversight is (to the author's knowledge) new, the selection of the ECOWAS to provide such oversight is inspired in part by existing research and jurisprudence.

To better contextualize the justification for the use of the ECOWAS for regulatory oversight in Nigeria, it is prudent to provide a brief introduction the organization. The ECOWAS is a regional community comprising 15 West African states including Nigeria. It was established in 1975 under the

---

234 Oshionebo, *supra* note 27 at 60.

235 *Ibid*; Odumosu-Ayanu, "Multi-Actor Contracts", *supra* note 1 at 286. See also Ibironke T. Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework", (2014), 15 Melb. J. Int'l L. 473 [Odumosu-Ayanu, Governments, "Investors and Local Communities"]. Her work on Multi-Actor contracts, proposes a quasi-regulatory framework involving local communities, government and TNCs to assist the regulation of oil extraction; Oshionebo, *supra* note 27 at 210 – 226, proposes the use of more persuasive regulatory strategies (responsive regulation) the form of incentives or reward schemes and resort to punitive sanctions only in the face of egregious breaches of regulation by TNCs.

ECOWAS Treaty to garner regional and economic integration in member states.[236] In 1993, the Treaty was revised and the organization gained supranational status.[237] It is significant to note that as a supranational organization and not an inter-governmental organization, the ECOWAS represents an organization to which member states (Nigeria included) have surrendered their sovereignties with respect to the mandate of the organization.[238] One of the implications of the supranationality of the ECOWAS is that it can make binding decisions on behalf of member states which are immediately binding and not subject to ratification by member states.[239]

An organization such as the ECOWAS therefore, if presented with the task of overseeing the affairs of the regulatory framework in Nigeria has the advantage of being a potentially neutral party as it is not as involved as the Nigerian government in oil mining. It has the potential to avoid concerns regarding the Nigerian government's conflict of interest and as a supranational organization, avoids infringing on state sovereignty as the Nigerian state has already surrendered part of its sovereignty to the organization. Ultimately, the paper explores the potential of the ECOWAS to undertake regulatory oversight over the Nigerian oil industry.

Pointedly, Odumosu-Ayanu's research into *Local Communities and Oil and Gas Contracts* suggests the use of a regional framework such as the ECOWAS for the effective delivery of multijurisdictional large projects, suggesting that

---

236 Treaty of the Economic Community of West Africa States (ECOWAS), 28 May 1975, UNTS No. 14843 (Registered by Nigeria on 28 June 1976) para. 1200-09 [The 1975 Treaty]; Eghosa O. Ekhator, "Improving Access to Environmental Justice Under the African Charter on Human and Peoples' Rights: The Roles of NGO's in Nigeria" (2014) 22 Afr J Int'l & Comp L 63 at 70.

237 See Revised Treaty of the Economic Community of West African States, 24 July 1993 [Revised Treaty of ECOWAS].

238 See Jadesola O. Lokulo-Sodipe & Abiodun J. Osuntogun, "The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?" (2013) 16:3 Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regbald 255 at 271 [Lokulo-Sodipe & Osuntogun].

239 The new legal regime of the ECOWAS annexes all conventions or regulations passed by the Authority of the Heads of State (which is the decision-making body of the ECOWAS) to the ECOWAS Treaty of 1993. The regime thus makes ECOWAS conventions and regulations enforceable in member states thus eliminating the need for lengthy domestication processes within member states which often frustrates progress. See ECOWAS New Regime for Community Acts Online: http://www.ecowas.int/ecowas-law/find-legislation/

they are more robust since such frameworks are designed for states of similar, but not identical, socio-economic status.[240] Her research advances a quasi-regulatory framework to run in tandem with existing frameworks to regulate large projects acknowledging that states are often constrained by "lack of capacity, lack of interest or even conflict of interest."[241] The problem of ineffective regulation identified in this paper, shares some of the concerns identified in Odumosu-Ayanu's work, such as lack of capacity, lack of interest and a conflict of interest on the part of the state. Perhaps the Nigerian state can also benefit from regulatory oversight from the ECOWAS.

Also, jurisprudence from the ECOWAS Court further informs the choice of the ECOWAS to perform such regulatory oversight. In *SERAP v Nigeria*, the ECOWAS Court found the Nigerian government responsible for failing to effectively regulate TNCs.[242] The court then ordered Nigeria to "take all measures" to restore the environment, prevent future damage, and hold the perpetrators accountable.[243] However the Court failed to specify how the Nigerian state should implement the judgment.[244] The significance of the judgment which is further discussed in the fourth section of this work, is that ECOWAS has in the recent past interceded in concerns relating to ineffectiveness of regulation in Nigeria's oil industry. A second concern is that even though the ECOWAS Court reprimanded the Nigerian state for failing to effectively enforce its existing laws and directed it to remedy its failings, the Court failed to identify a means for Nigeria to implement its decision.[245] This paper therefore proposes a framework which advocates regulatory oversight that anticipates the involvement of other organs of the ECOWAS, not just the Court, in getting Nigeria to enforce her existing regulation. The framework proposed anticipates the involvement of the ECOWAS and Nigerian state institutions to implement a decisive approach to regulation aimed at increasing

---

240 Odumosu-Ayanu, "Governments, Investors and Local Communities", *supra* note 235 at 476.

241 *Ibid,* at 478.

242 *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v President*, Federal Republic of Nigeria ECW/CCJ/APP/08/09 Ruling of 10th December, 2010 [SERAP Niger Delta Judgment].

243 *Ibid,* at paras 121.

244 See Karen J. Alter, Lawrence R. Hefler and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107 Am J Int'l L 737 at 767 [Alter, Hefler and McAllister].

245 *Ibid.*

regulatory effectiveness of the oil industry in Nigeria. The scope of the proposed oversight framework is discussed in detail in fourth section of this paper.

The employment of the ECOWAS framework presents as an educated choice for oversight function in Nigeria given the discussions in this paper. The ECOWAS also has some experience in extractive industries, and its membership is smaller when compared to the membership of the African Union which inspires confidence that the framework being proposed would be easier to manage. [246] In addition, the new legal regime of the ECOWAS translates all conventions or regulations by the Authority of the Heads of State, the decision making body of the ECOWAS, into immediately binding law on member states, eliminating the need for lengthy domestication processes within member states which often frustrates progress.[247]

## A. The Proposed Role of the ECOWAS

The choice of the ECOWAS to provide regulatory oversight is inspired in part by its supranational nature.[248] Given that the ECOWAS is a supranational organization whose decisions are immediately binding on member states, the adoption of the framework being proposed will not be subjected to ratification or domestication by Nigeria and will in fact be immediately binding on Nigeria. This paper proposes a framework for oversight over regulation of the

---

246 See generally, Kabele-Camara, Abdoul Karim. "Achieving Energy Security in ECOWAS through the West African Gas Pipeline and Power Pool Projects: Illusion or Reality?" (2013) 16 CEPMLP Annual Review CAR; There are fifteen member states in the ECOWAS, Online: http://www.ecowas.int/member-states/

247 ECOWAS New Regime for Community Acts Online: http://www.ecowas.int/ecowas-law/find-legislation/

248 The term supranationality has been difficult to define in literature, however, scholars suggest that the nature of supranationality is revealed in context. One context of suprantionality proposes the existence of a system which involves institutionalization of a mode of problem-solving that is unavailable to nation-states acting on their own. A second context involves a system of "taming" nation-states to a "new discipline of solidarity", mitigating tensions between state actors and between state actors and the Community. Essentially, supranationality exists to solve problems related to decision making and tackles concerns which states cannot handle when acting alone. See Alexander Somek, "On Supranationality" (2001) 5 European Integration Online Papers (EIoP) at 3 -5 [Somek]; Joseph Weiler, "Federalism and Constitutionalism: Europe's Sonderweg" (2000) 10 jean Monnet Working Paper; Kufuor, Institutional Transformation, supra note 28 at 55.

Nigerian oil and gas industry that delineates not only the scope of oversight but also the mode of such oversight.

Another factor supporting the proposal of a framework for oversight under the ECOWAS is the decision of the ECOWAS Court in the case of *SERAP v Nigeria*, delivered in December 2012.[249] In that case, the ECOWAS Court found the Nigerian government responsible for failing to effectively regulate TNCs. The court then ordered Nigeria to "take all measures" to restore the environment, prevent future damage, and hold the perpetrators accountable.[250] However, the Court failed to specify a means of implementation for the said judgment.[251] This paper seeks to help bridge such gaps. Given the arguments demonstrating a clear need for oversight in the regulation of the Nigerian oil industry, and a judgment of the ECOWAS Court finding the Nigerian state responsible for ineffective regulation of TNCs, this paper proposes a more definitive role for the ECOWAS in effecting change in the regulation of the Nigerian oil industry.

## B. The Proposed Framework Under the ECOWAS

The framework proposed in this paper is inspired in part by Penelope Simons and Audrey Macklin's work in *The Governance Gap*.[252] However, while Simons and Macklin focus on home state regulation, this paper focuses on regulation by strengthening host state regulatory capacity. Lessons drawn from the work include what is described by the authors as the concept of "Carrots, Nudges, and Sticks".[253] They describe the "carrots" as the public incentives which home states would offer to TNCs (considered citizens of the home states) in order to encourage TNCs to respect human rights of local communities.[254] The "nudges" refer to mechanisms that allow and encourage private actors and individuals to comply with best practices and respect human

---

249 *Socio-Economic Rights and Accountability Project v. Nigeria*, Case No. ECW/CCJ/APP/08/09, Judgment (14 December 2012) [SERAP Niger Delta Judgment].

250 *Ibid* at para 121.

251 See Alter, Hefler & McAllister, *supra* note 243 at 767.

252 Penelope Simons and Audrey Macklin, *The Governance Gap* (New York: Routledge 2014) [*The Governance Gap*].

253 *Ibid.*

254 *Ibid.*

rights.[255] The "sticks" then refer to sanctions which home states can resort to in the event that TNCs fail to comply.[256]

Adopting a similar concept for the ECOWAS in the context of providing oversight to host states, the paper anticipates a framework that will offer "carrots" in the form of incentives to states that avail themselves of regulatory oversight. These proposed incentives will come in the form of priority placement for compliant states when it comes to situating developmental projects in states in order to grow amenities such as energy, transport, water and telecommunications in states. The consequences of such regional integration development projects are that they provide amenities which serve to encourage economic growth and development.

Given the background of the ECOWAS, this paper is more confident in its gaining compliance in Nigeria through the use of redress mechanisms conceptualized by Simons and Macklin as "nudges." While the authors saw the use of "nudges" as criminal responsibilities for TNCs, this paper advances the argument that the nudges can take the form of a regulatory oversight framework.

The ECOWAS has a number of specialized agencies focused on relevant areas of development such as the ECOWAS Regional Electricity Regulatory Authority ("ERERA"), the ECOWAS Centre for Renewable Energy and Energy Efficiency ("ECREEE") and the West African Power Pool ("WAPP").[257] The paper proposes that the framework be implemented through a specialized agency such as the ones identified. [258] It is proposed that the agency will be responsible for receiving complaints from local communities or persons acting on behalf of local communities and will be empowered to review decisions and activities of existing regulatory agencies in Nigeria in order to ensure that such

---

255 *Ibid.*

256 *Ibid.*

257 ECOWAS Institutions, online: ECOWAS http://www.ecowas.int/institutions/

258 While this paper proposes the implementation of the proposed framework through a specialized agency, given the wide scope of responsibilities it would assume towards regulatory agencies in Nigeria, TNCs and local communities, the author also acknowledges that other methods of implementing potentially similar frameworks are perhaps through specialized ad hoc committees and I am grateful to Professor Evaristus Oshionebo for directing me towards the work of specialized ad hoc committees. This paper adopts the use of a specialized agency to implement the proposed framework given the number of actors (regulatory agencies, TNCs, local communities) and range of responsibilities it is designed to cater to.

decisions and activities are in the best interest of local communities and the environment.

Funding for the agency will be derived from the treasury of the ECOWAS. However, an internal fund could be created within this agency to receive funding from NGOs, other ECOWAS institutions, donor institutions, and foreign governments. The funds can be directed towards operational costs of the agency as well as specific projects aimed at environmental remediation which may be carried out in collaboration with Nigeria's regulatory agencies. Brown, for example suggests that regulatory agencies derive funding through two major approaches; the regulator may receive funding through formal allocation from the government's budget or collect monies from the industry through fees, penalties or contributions or the regulator may elect to combine both approaches.[259] Given that the proposed agency is designed for regulatory oversight, this paper proposes the agency receive funding through formal allocation from the ECOWAS and receive funds from NGOs, CSOs, donor institutions and even foreign governments.[260] Further, the agency will be empowered to perform on-site inspections of local communities and areas of alleged oil pollution. It will be able to direct relevant regulatory agencies to enforce necessary sanctions against relevant TNCs in event of oil pollution. In order to be able to prove oil pollution or responsibility of TNCs, there is a need for the agency to have the technical knowledge regarding the oil industry and its activities. The paper therefore anticipates that the agency will be assisted by a body made up of civil society organizations ("CSOs") and non-governmental organizations ("NGOs"). A coalition of CSOs and NGOs provides a pool from which the framework can draw in order to provide

---

259 Public Utilities Commission of Anguilla, "The Funding of Independent Regulatory Agencies" by Ashley C Brown (2008), at 1, online: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.696.7010&rep=rep1&type=pdf.

260 Currently, the ECOWAS accepts funding from donor agencies and foreign governments "to procure goods and services, studies, technical assistance and training as well as consultancy, conference and publicity services." See online: https://www.ecowas.int/doing-business-in-ecowas/ecowas-procurement/ also, https://www.ecowas.int/doing-business-in-ecowas/ecowas-procurement/donors-funded-projects/. The providers of these services are usually selected through calls for tender on behalf of Departments, Directorates, Agencies and units across the Region. The specialized agency, proposed under this framework, can adopt a similar method for accessing funding from donors who demonstrate a commitment to similar values with the agency.

financial, technical and capacity building resources to the framework for regulatory oversight. In the event that CSOs and NGOs are not able to provide technical expertise to the agency, their combined resources enable them hire consultants that will be able to provide technical knowledge. Although executed through an agency under the ECOWAS, the framework proposes that civil society form an integral part of the agency. This *hybrid* nature of the framework is advantageous because the agency through which the framework is implemented might be perceived as an agency of the state by local communities and CSOs and NGOs can provide valuable credibility to the process as they mostly enjoy neutrality and independence from relevant actors.[261] The proposed role of CSOs and NGOs is particularly significant as it provides resources which address concerns regarding resources (financial and technical) which might threaten the implementation of the framework. Another factor that supports this coalition of civil society is its reach. Several civil society organizations have coalitions with other organizations in the West, where they have great reach as regards shaming TNCs into compliance and affecting investments. The evidence is seen in a number of campaigns against TNCs by CSOs attempting to shame TNCs into compliance and discourage investors from investing in particular TNCs who have a poor record of human rights protection.[262] Civil society can also shame states into compliance by campaigning against them within the international community.

The proposed agency can also provide technical advice to both local communities and government agencies in the event of negotiations regarding siting of oil wells or relocating persons in the community that need relocation as a result of oil extraction. The agency will be responsible for providing technical advice to local communities in the event of negotiations with the Nigerian government or TNCs and will accept mandatory reports from regulatory agencies in order to ensure best practices. It is expected that this

---

261 See Cecelia Albin, "Can NGOs Enhance the Effectiveness of International Negotiations" (1999) 4 International Negotiation 371-387; Sheila Jasanoff, "NGOs and the Environment: From Knowledge to Action" (1997) 18 Third World Quarterly at para. 579-594.

262 An example is the recent Amnesty International Campaign called "Shell: Clean up the Niger Delta" encouraging the TNC Shell Development Corporation to clean up oil spills in the Niger Delta. It also has a similar campaign discouraging investors from investing in the TNC as a result of its poor human rights record. See online: https://www.amnesty.org/en/latest/campaigns/2015/11/shell-clean-up-oil-pollution-niger-delta/ and http://www.amnesty.ca/our-work/issues/business-and-human-rights/invest-your-values.

hands-on approach of regulatory oversight and directing state institutions to perform their duties ought to "nudge" states into better regulating extractive industries and also provide a buffer between states and local communities

It is significant to note that certain initiatives such as the *African Commission Working Group on Extractive Industries and Natural Resource Governance* ("WGEI") exist under the African Union to make recommendations on issues relating to resource extraction.[263] The WGEI was established by the African Commission on Human and Peoples' Rights, under the African Union, in November 2009. The mandate of the Commission includes examining the impact of extractive industries in Africa within the context of the African Charter on Human and Peoples' Rights, undertaking research into violations of human and peoples' rights by non-state actors in Africa, and formulating recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples' rights by extractive industries.[264] The work of the WGEI is instructive in advising relevant African states as well as the African Union on human rights based approaches to resource governance.[265] The recommendations of the WGEI seek to inform policy and may become an incentive for states to address their behaviour. Evidently regional groupings such as the African Union have also recognized the need to address challenges relating to resource extraction in African states.

In the event that these "carrots" and "nudges" fail, the paper proposes the use of "sticks". There are various mechanisms through which the ECOWAS has expressed its displeasure with member states. An example is the suspension of Niger Republic, Cote d'Ivoire, and Guinea from the ECOWAS for engaging in military coups contrary to the *Protocol on Democracy and Good Governance*.[266] The ECOWAS Court can be utilized as a tool in seeking reform in extractive

---

263 African Commission Working Group on Extractive Industries, Environment and Human Rights Violations and Natural Resource Governance Online: http://www.achpr.org/mechanisms/extractive-industries/.

264 *Ibid.*

265 *Ibid.*

266 Guinea has been reintegrated following elections in 2010. See African Development Bank, *Annual Report 2010*, by the Statistics Department of the Chief Economist Complex (Lisbon, Portugal: African Development Bank 46th Annual Meeting & African Development Fund 37th Annual Meeting, June 2011), African Development Bank & African Development Fund, "Regional Integration Strategy Paper for West Africa 2011 -2015" (March 2011) at 11 [AFDB RISP].

industries. Article 15 of the Revised Treaty establishes the ECOWAS Court, and by virtue of Article 15(4), the "judgments of the Court are binding on all [ECOWAS] member states, Community institutions, and on individuals and corporate bodies." [267] Article 15 establishes the Court and sets out its functions:

> (1) There is hereby established a Court of Justice of the Community. (2) The status, composition, powers, procedure and other issues concerning the Court of Justice shall be as set out in a Protocol relating thereto. (3) The Court of Justice shall carry out the functions assigned to it independently of the Member States and the institutions of the Community. (4) Judgments of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.[268]

The ECOWAS Court Protocol requires that member states shall, in accordance with their constitutional processes, "take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary" for the implementation of the provisions of the revised ECOWAS Treaty.[269] However, despite the existence of this Protocol from 1991, an actual court was not established until November 1996 when supplementary Protocol entered into force establishing the ECOWAS Court.[270]

The new court was created by the ECOWAS to settle disputes between member states inter-se, or between member states and the Community, or between ECOWAS nationals and either an ECOWAS Member State or an institution of the Community. Article 9(4) of the supplementary Protocol authorizes the ECOWAS Court to hear and determine "cases of violation of human rights that occur in any Member State," and Article 10(d) allows access to the court to "individuals on application for relief for violation of their

---

267 The Community Court of Justice was created pursuant to the provisions of Articles 6 and 15 of the 1993 Treaty of the ECOWAS. See the Protocol on the Community Court of Justice, 19 *Official Journal of the Economic Community of West African States* (July 1991).

268 *Ibid.*

269 Art. 5(2) of the Revised Treaty of the ECOWAS, *supra* note 261 cited in Kofi Oteng Kufuor, "Law, Power, Politics and Economics: Critical Issues Arising Out of the New ECOWAS Treaty" (1994) 6 Afr. J. Int'l & Comp. L. 429 [Kufuor, "New ECOWAS Treaty"].

270 Alter, Hefler & McAllister, *supra* note 243 at 747-748.

human rights." The fact that the court possesses this competence has now been affirmed in a long line of cases, and is not at all controversial. [271]

Admittedly, the Court has already decided on the culpability of the Nigerian state as regards ineffective regulation of TNCs in its oil industry.[272] However, the argument of this paper is that the failure of the ECOWAS Court to prescribe sanctions for failure to implement its decisions or prescribe a means for the Nigerian state to remediate ineffective regulation hampers the effectiveness of the judgment. The framework being proposed remedies the failings of the decisions as it prescribes a means for the Nigerian state to better regulate TNCs.

There is a great deal of optimism within scholarly circles regarding the potential of the ECOWAS Court.[273] Its emergence as a reputable human rights court within the ECOWAS has been a source of inspiration for most observers.[274] Given the political climate, civil unrest and weak legal and other domestic institutions within member states, it was expected that a Court under the ECOWAS would be restricted by national governments in the exercise of jurisdiction over human rights and if at all it was given a human rights jurisdiction, political checks would be put in place to restrict such.[275] However, contrary to popular opinion the Court was given a broad human rights jurisdiction by member states which has not been restricted despite several opportunities to do so.[276] Scholars note that major challenges to the Court's jurisdiction have left the Court "largely unscathed and arguably strengthened."[277] However, a significant challenge facing the Court lies in

---

271 See Hadijatou Mani Koraou v. Republic of Niger ECW/CCJ/APP/08/08, Amouzou Henri v. Republic of Cote D'Ivoire ECW/CCJ/JUD/04/09 and Serap v. Nigeria, *supra* note 242.

272 SERAP Niger Delta Judgment, *supra* note 242.

273 Alter, Hefler and McAllister, *supra* note 243 at 738.

274 *Ibid.*

275 *Ibid.*

276 Article 3(4) of the Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol; Challenges to the Court's jurisdiction were seen when the Court intervened in a contested election in Nigeria triggering a backlash from Nigerian politicians, jurists and lawyers and also when the Gambian President proposed that the human rights jurisdiction of the Court be curtailed. For detailed discussion see Alter, Hefler and McAllister, *supra* note 243 at 758-765.

277 Alter, Hefler and McAllister, *ibid*, at 758.

improving member states' compliance with decisions of the Court. While there is some promise as regards state implementation of decisions of the Court, there remains considerable challenge regarding the lack of implementation of ECOWAS Court decisions.[278] The Court is, however, aware of this challenge of implementation and responds by adopting strategies that promote compliance. It appeals to public sentiments through public statements and engages civil society as well as tailors remedies provided to litigants in a way that encourages state actors to comply with the said judgments.[279] The Registrar of the Court remarked that, "although the record of enforcement of the decisions of the Court is not impressive, we have never been told by any Member State that it will not enforce the judgment of the Court."[280] In further expression of its great potential, scholars note that "the ECOWAS Court's status as a human rights court is far more settled than that of sub-regional community courts elsewhere in Africa."[281]

In summary, the Court does have some potential to serve as a stick. However, this paper does not ignore the limitations of the Court in strictly enforcing decisions. It is expected that a combination of the "carrots", the "nudges" and the threat of the "stick" would encourage states to adopt the proposed framework in order to respond to challenges regarding regulation of TNCs and resource extraction in a way that protects local communities from oil pollution. This approach finds support in recommendations of the CEP when advising on the revision of the ECOWAS Treaty and expanding the powers of the AHSG to compel compliance of member states. It notes:

> Legal proceedings against member states should however be a weapon of last resort for obvious reasons. As a rule, the Community should seek accountability from Member states through subtle means as regular submission of reports by Member states on implementation of Community decisions and regulations…The Executive Secretariat [now a Commission] may also be authorized to invite status reports on implementation from Member states on a regular basis and also bring to the attention of Council or the Authority breaches of Community laws by Member states.[282]

---

278 See Tony Anene-Maidoh, "The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice", (Paper presented at the Regional Colloquium on the SADC Tribunal, Johannesburg, 12-13 March 2013) [Anene-Maidoh].

279 Alter, Hefler and McAllister, *supra* note 243 at 765-768.

280 Anene-Maidoh, *supra* note 277 at 40.

281 *Ibid*, at 768.

282 Findings of the Committee of Eminent Persons of the ECOWAS Treaty, located in the Draft Report of the CEP, ECW/CEP/TREV/VI/2, Lagos, 1992 [CEP Report] cited in

Having outlined the scope and framework of the proposed regulatory oversight, this paper undertakes an analysis of the prospects and challenges of implementing the said framework under the ECOWAS.

## C. Prospects and Challenges of Adopting the Proposed Framework Under the ECOWAS

The ECOWAS has been described as "strong developers and weak implementers of governance standards."[283] While some of its protocols have received a greater measure of adoption and implementation, other protocols of the ECOWAS have not received the desired level of implementation.[284]

Scholars have attributed the poor performance of the ECOWAS regarding the implementation of its protocols to the structure of the organization.[285] In 1993, when the current Treaty was adopted, the AHSG which is the supreme decision-making body had no supranational organization to implement its decisions. However, the conversion of the Secretariat to a Commission has now remedied this failing. Another criticism of the ECOWAS is that the ECOWAS Parliament also has no power to make decisions and is only an avenue for debating issues.[286] Another significant challenge to the ECOWAS process is the duplication of similar Regional Economic Communities ("RECs") in West Africa and the commitment of several member states (particularly the Francophone countries) to other similar RECs.[287] This

---

Kufuor, "New ECOWAS Treaty", *supra* note268.

283 Christoff Hartmann, "Governance Transfer by the Economic Community of West African States (ECOWAS): A B2 Case Study Report" (2013) Collaborative Research Center Working Paper No. 47 at 7 [Hartman].

284 For example, the Democracy and Good Governance protocol has received far wider implementation under the ECOWAS than the ECOWAS Energy Protocol, See Hartmann *ibid.*

285 Lokulo-Sodipe and Osuntogun, *supra* note 238 at 257.

286 *Ibid.*

287 A particularly significant REC providing a strong competition to the ECOWAS for loyalty of member states is the West African Economic and Monetary Union (WAEMU). The WAEMU is comprised of Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo, seven of the 15 member states of the ECOWAS. All WAEMU states (with the exception of Guinea Bissau) share a common French heritage in their legal and administrative systems as well as a common currency, also a result of their colonial heritage. WAEMU states have a common monetary policy, implemented through the *Banque centrale des Etats de l'Afrique de l'Ouest* (BCEAO). The French Treasury guarantees the convertibility of the common currency. As a result of a number of these commonalities, the WAEMU

situation creates a duplication of commitments on the part of member states to the ECOWAS, as well as duplication of financial commitments member states make to these RECs. This lack of commitment often undermines the functioning of the ECOWAS as uncommitted member states only pay lip service to decisions taken with little intention to commit to implementation.[288] The duplication of commitment from member states who are members of other RECs within Africa poses the biggest challenge to the realization of a number of the ECOWAS' ambitions. Achieving compliance within member states will require some leverage on the part of the ECOWAS and this can be achieved through the creation of a strong economic union between compliant member states that will not only attract compliance but will incentivise already compliant states. A major failing of the 1975 Treaty was the lack of actualization of the Trade Liberalization Scheme ("TLS") which would have opened up borders, increased intra-regional trade and empowered the ECOWAS Economic Fund responsible for compensating states that lost revenue as a result of tariff reduction.[289] A number of factors, some not unrelated to ideological differences between Anglophone and Francophone countries, contributed to the failure of the TLS.[290] However given present day trends of globalization, and as evidenced in the European Union, intra-regional trade as well and the creation of a strong central economic union lends credibility to a supranational entity. There is a need for the ECOWAS to dedicate itself to creating a strong economic union if it is to overcome many of its challenges going forward.

There is, however, some indication that the ECOWAS is learning from its experiences. This can be seen from the move to redefine the TLS in 1992 which removed restrictive conditions relating to origins of firms (particularly foreign firms) that could take advantage of the scheme.[291] Further indications are seen in the ECOWAS restructuring of 2007 which transformed the Secretariat into a Commission and adopted a new legal regime addressing a

---

REC has achieved greater integration than ECOWAS as a whole and has often led to a duplication of commitment to the ECOWAS particularly among WAEMU states. See AFDB RISP, *supra* note 265 at 2.

288 For further discussions on multiple commitment of Member states see Lokulo-Sodipe and Osuntogun, *supra* note 238.

289 Kufuor, *Institutional Transformation*, *supra* note 28 at 26-28.

290 For detailed discussions regarding the reasons for the failure of the TLS, see Kufuor, *Institutional Transformation* supra note 28.

291 Kufuour, *Institutional Transformation*, *ibid* at 36.

number of concerns surrounding the organization.[292] The transformation of the Secretariat to a Commission created an implementing organ for decisions of the AHSG as well as monitoring framework of member state compliance and the new legal regime translated all protocols adopted by the AHSG to Supplementary Acts, thereby adhering such Acts to the ECOWAS treaty.[293] This eliminated the challenges that faced ECOWAS as regards waiting for states to ratify protocols adopted by the AHSG, thereby rendering a number of its decisions redundant. These circumstances create optimism that the ECOWAS has the potential to overcome its internal challenges and therefore help states strengthen their political institutions. Kufuor writes:

> The evidence supports this presumption of gradualism as an explanation for ECOWAS' institutional change. The ECOWAS system as a whole has undergone gradual changes and elaborations…the essence of this perspective on ECOWAS is that it will most probably continue to evolve gradually.[294]

The discussions above have identified a number of criticisms of the ECOWAS as well as the reasons why the paper is optimistic that the organization is poised to overcome its challenges and able to adopt and implement the framework being proposed by the paper. The next section discusses in greater detail the promise of the ECOWAS. It analyzes the successes of the organization while making a case for why it is well suited to provide regulatory oversight to Nigeria's oil industry.

## D. The Promise of the ECOWAS

As seen in the previous section, the ECOWAS faces significant challenges regarding implementation of its decisions. There is a tendency in scholarly work to focus on the challenges of a process and not the promise. One scholar writes that "the scholarly tendency toward criticism can be a matter of habit as much as an appropriate intellectual stance."[295] Without dismissing the scholarly criticism that has trailed the ECOWAS as simply habit, this section attempts to chart a distinct course, focusing on the promise of the ECOWAS. This section highlights a number of policies and projects of the ECOWAS that

---

[292] ECOWAS New Legal Regime *supra* note246.

[293] Kufuor, *Institutional Transformation*, supra note 28 at 36.

[294] *Ibid.*

[295] Adrienne Stone, "A Comment on Professor Finnis' Praise of Australia High Court" (16 November 2015) Opinions on High (blog) online: http://blogs.unimelb.edu.au/opinionsonhigh/2015/11/16/stone-finnis/?utm_source=twitterfeed&utm_medium=twitter.

have enjoyed compliance and support among member states, and then identifies successes of the ECOWAS in affecting political action, institutional action and economic integration initiatives, arguing that these successes of ECOWAS are great indicators of the immense potential the ECOWAS has to implement the proposed framework.

At a political level, the ECOWAS Protocol Relating to Free Movement of Persons, Residence, and Establishment of 1979 demonstrates the success of an ECOWAS policy. One scholar writes in relation to the Protocol that "if one asked ordinary ECOWAS citizens which ECOWAS policy has mattered most in their lives, they would probably answer by naming the 1979 Protocol Relating to Free Movement."[296] The significance of the success of this protocol lies in the fact that national legislation within member states had to be amended in order to allow citizens of member states free movement within the ECOWAS pursuant to the protocol. Further to that, eight member states of the ECOWAS, in demonstration of their political will to respect and promote this policy, adopted a regional passport enhancing free movement of citizens across national borders.[297] Interstate roads have also been constructed in order to aid free movement of persons.[298]

Another initiative that speaks to the promise of the ECOWAS is the African Peer Review Mechanism ("APRM") launched under the New Partnership for Africa's Development ("NEPAD") which the ECOWAS coordinates. The APRM has gained some traction since its launch as eight ECOWAS countries have acceded to become parties to it. Acceding to the APRM entails "undertaking to submit to periodic peer reviews, as well as to facilitate such reviews, and be guided by agreed parameters for good political governance and good economic and corporate governance."[299] The APRM review covers four areas: democracy and political governance, economic governance and management, corporate governance, and socio-economic development. The review seeks to oblige participating states to "provide what

---

296 Hartman, *supra* note 283 at 103.

297 The eight countries are Benin, Burkina Faso, Cote d'Ivoire, Ghana, Liberia, Nigeria, Senegal and Togo. See AFDB RISP, *supra* note 265 at 11.

298 Lokulo-Sodipe & Osuntogun, *supra* note 237 at 264.

299 See African Peer Review Mechanism (base document) [www.nepad.org/documents/49.pdf]. See also the African Union, Assembly of Heads of State and Government, AHG/235 (XXXVIII), Annex II in Ravi Kanbor, "The African Peer Review Mechanism: An Assessment of Concept and Design" (2004) 31:2, Politikon: South African Journal of Political Studies 157 at 158.

assistance they can, as well as to urge donor governments and agencies also to come to the assistance of the country reviewed" provided that the "Government of the country in question shows a demonstrable will to rectify the shortcomings".[300] The significance of the APRM to this paper is that it demonstrates the willingness of African states to submit themselves to scrutiny and review, in order to overcome some of their challenges.[301] The willingness of states to submit to periodic review under the APRM being coordinated by the ECOWAS inspires confidence that member states would be willing to adopt the oversight framework proposed in this paper.

In responding to challenges regarding governance standards of member states, the ECOWAS takes very seriously its role in resolving conflicts and preventing conflicts capable of destabilizing member states. The ECOWAS Protocols on conflict prevention, and democracy and good governance led to its suspension of Guinea, Niger and Cote d'Ivoire following coups and repression of dissent in the countries.[302] Democratic elections held in Guinea in 2010 led to the reintegration of the country into both the ECOWAS and the African Union.[303] The ECOWAS used sanctions to force President Faure Gnassingbe to step down as the President of Togo and allow elections to hold as he was installed by the military after the death of his father.[304] Although President Faure Gnassingbe was still re-elected following the elections, the sanctions the forced elections in Togo, after which the country was readmitted into the ECOWAS.

A further indicator of the immense potential of the ECOWAS is the ECOWAS Monitoring Group ("ECOMOG"). Though contentious, the work of the ECOMOG has contributed to peace within the region.[305] A military

---

300 *Ibid.*

301 As of 2010, 29 Countries have acceded to the APRM, See Partnership Africa Canada, *Reviewing African Peer Review Mechanism: A Seven Country Survey*, by Adotey Big-Pappoe (Ottawa: March 2010),

online: http://www.pacweb.org/Documents/APRM/APRM_Seven_countries_March2010-E.pdf.

302 AFDB RISP, *supra* note 265 at 3.

303 *Ibid.*

304 Lokulo-Sodipe & Osuntogun, *supra* note 237 at 264.

305 Scholars, observers and rights groups have debated the legitimacy of humanitarian interventions such as those carried out by the ECOMOG. See for example "Liberia, Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights" (1993)

force from five countries was constituted by the ECOWAS Mediation Committee in 1990 pursuant to the Protocols on Non-aggression and Mutual Assistance with a view to intervening in the Liberian civil war.[306] The ECOMOG not only fought to end the war in Liberia but also monitored the resulting cease-fire.[307] The ECOMOG was instrumental in overthrowing a military government that had dispossessed a democratically elected government in Sierra Leone and reinstating the previously overthrown government.[308] Before intervening in Liberia in 1990, ECOMOG sought and received endorsements from the Organization of African Unity (now the African Union) and the United Nations often using the theme "an African solution to an African problem."[309] One scholar notes that the ECOMOG:

> Became the first sub-regional military force in the third world since the end of the cold war with whom the United Nations agreed to work as a secondary partner. Liberia was one of the first conflicts where both the United Nations and the major regional organization the OAU, redefined traditional concepts of sovereignty in order to permit external intervention.[310]

Military interventions were undertaken by the ECOMOG in Guinea-Bissau in 1998-1999, in Cote d'Ivoire in 2003-2004 and again in Liberia in 2003.[311] With each attempt, the ECOWAS seemed to have learned from mistakes made in the past and it was observed that its intervention in Liberia along with UN supervision "laid a better foundation for peace making."[312]

The significance of highlighting the achievements of the ECOMOG serves to demonstrate and perhaps exemplify that in the past ECOWAS has superimposed on the sovereignty of member states in order to "restore law and order" which ultimately served to protect human lives. [313] The framework

---

5:6 Africa Watch, online: https://www.hrw.org/reports/1993/liberia/

306 Herbert Howe, "Lessons from Liberia: ECOMOG and Regional Peace Keeping" (1996-1997) 21 International Security 145 at 151 [Howe].

307 Thomas V. Greer, "The Economic Community of West African State: Status, Problems and Prospects for Change", (1992) 9 International Marketing Review 25 at 35 [Greer].

308 See generally Andrew McGregor, "Quagmire in West Africa: Nigerian Peacekeeping in Sierra Leone" (1998-1999) 54 Int'l J 482.

309 Greer, *supra* note 306 at 35.

310 Howe, *supra* note 305 at 146.

311 Hartmann, *supra* note 268 at 33.

312 *Ibid.*

313 "ECOWAS Standing Mediation Committee," Decision A/DEC, August 1, 1990, on the Cease- fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia,

proposed in this paper is debatably less controversial than a military intervention on states. The proposed framework is nuanced and comprises actions and incentives that are designed to encourage compliance as opposed to brazen impositions on national sovereignty, further inspiring confidence that member states will consider the merits of such a framework.

At an institutional level, the reform of the ECOWAS Secretariat into a Commission demonstrates the evolution of the ECOWAS. Decisions of the AHSG will now have a vehicle for implementation as well as one for monitoring implementation within states. Indicators of progress are seen in regional trade facilitation through the establishment of joint border posts, the creation of an observatory for bad practices in order to monitor, report and shame practices that are contrary to the spirit of integration in regional trade facilitation.[314] The emergence of such implementation strategies at an institutional level inspires confidence in the process of the ECOWAS. Further indicators are seen in the response of the international community to this change in the ECOWAS as a number of countries are now establishing permanent missions with the ECOWAS in order to facilitate trade and economic cooperation between their countries and the ECOWAS.[315]

A further indicator is seen in the confidence reposed in the ECOWAS Court by the international community. The Court has undergone a transformation with the amendment of its enabling protocol now including human rights in its jurisdiction and allowing individuals to access the Court.[316] The ECOWAS is also in the process of transforming the ECOWAS Parliament from an advisory body to one with power to be able to fulfil the objectives of the Parliament as set out in its Supplementary Protocol.[317] The "new legal regime" of the ECOWAS is another extremely significant indicator

---

Banjul, Republic of the Gambia, August 7, 1990 in Howe, *supra* note 327 at 152. See also, Mark Weller, ed., *Regional Peace-Keeping and International Enforcement: The Liberian Crisis, Cambridge International Document Series, Vol. 6* (Cambridge: Cambridge University Press, 1994) at 68.

314 AFDB RISP, *supra* note 265 at 13.

315 See ECOWAS, Press Release, No. 32/2013 "ECOWAS President Accredits Eight Envoys" (17 February 2013) online: ECOWAS http://news.ecowas.int/presseshow.php?nb=032&lang=en&annee=2013, Lokulo-Sodipe & Osuntogun, *supra* note 237 at 270.

316 Lokulo-Sodipe and Osuntogun, *Ibid*, at237.

317 *Ibid.*

of the promise of the ECOWAS.[318] That protocols and conventions will no longer be subject to inordinate delay and lengthy ratification process in member states and will immediately apply to states indicates that the ECOWAS is demonstrating a serious commitment to better implementing its decisions.[319]

Finally, the long list of programs and initiatives aimed at advancing regional integration encourages faith in the ECOWAS. The range of integration initiatives involves infrastructure development, private sector development, education, health, information, and communication technology among others, all at various levels of implementation.[320] However, the most significant in the context of extractive industries is perhaps the West African Gas Pipeline Project (WAGP). It involves a Public Private Partnership where Chevron and Shell partnered with government-owned entities in Nigeria, Benin, Togo and Ghana to construct a pipeline to supply natural gas from Nigeria to the other three countries.[321] The WAGP, being an initiative of the ECOWAS, indicates that ECOWAS recognizes the immense potential of integration in resource extraction. Evidently, a case can then be made for the regulatory oversight being proposed in this paper.

## E. Potential Challenges to the Proposed Framework

Having discussed both the failures and the promise of the ECOWAS, this section anticipates challenges that the framework, as it is currently proposed might encounter in adoption and in practice. In identifying such potential challenges, it remains confident that such challenges are not intractable.

The first issue relates to state sovereignty. When a state surrenders part of its sovereignty to an international organization for oversight or control, it offends the Westphalian concept of sovereignty which professes that a state should not take orders from outside it or from another authority.[322] In the context of potential challenges to the proposed framework, state sovereignty

---

318 ECOWAS New Legal Regime, *supra* note 246.

319 *Ibid.*

320 AFDB RISP, *supra* note 265 at 13.

321 *Ibid,* See also West African Gas Pipeline,
online:
http://www.wagpco.com/index.php?option=com_content&view=article&id=46&Itemid=78&lang=en.

322 Lokulo-Sodipe and Osuntogun, *supra* note 237 at 272.

presents a challenge both in the case of states *submitting* to oversight of regional institutions, as well as in the context of the West African leaders *conceding* to adopt such a policy. Even given the supranational status of the ECOWAS, it would prove both ambitious and naïve to expect states to be eager to further concede some part of their sovereignty to an international organization. As Lokulo-Sodipe and Osuntogun write:

> It is difficult to see why a country would consent to surrender even a part of its sovereignty, particularly in the case of West African States, most of which fought bloody wars for years to gain their independence – their sovereignty.[323]

However, the same scholars argue that perhaps the concept of state sovereignty is outdated. While making a case for supranationality, they argue that "a supranational institution is in a position to strengthen national governments by helping them to solve their problems".[324] Further buttressing their argument, they cite Fukuyama, who states that, "weak nations can be helped by strong nations, that is philanthropic but it is the responsibility of supranational institutions to do that as *a matter of duty*" (emphasis added).[325]

Given the example of the APRM, there is some indication that states are able to look beyond what one writer when speaking of the concept of sovereignty, described as "rules and commands issued by distant strangers".[326] This paper is confident that states would be willing to further concede part of their national sovereignties in order to adopt the proposed framework.

Perhaps, however, the best way to incentivize the adoption of the framework being proposed by this paper under the ECOWAS is to deliver an appealing "carrot." As presently constituted, the ECOWAS faces great challenges in the area of financial resources. The duplicity of commitment of member states discussed earlier takes its toll on the organization as member states are often reluctant to pay membership fees.[327] While the organization has adopted a strategy aimed at financial independence by placing a levy on import taxes into ECOWAS Countries, this strategy has not earned it the

---

323 *Ibid* at 274.

324 *Ibid.*

325 Francis Fukuyama, State Building: Governance and World Order in the 21st Century (Ithaca: Cornell University Press, 2004) [Fukuyama, State Building] cited in Lokulo-Sodipe and Osuntogun, *supra* note237.

326 Jay Lawrence Westbrook, "Legal Integration of NAFTA Through Supranational Adjudication" (2008) 43 Tex Int'l LJ 349 at 7 [Westbrook, "Supranational Adjudication"].

327 Hartman, *supra* note 283 at 11.

financial weight it had hoped.[328] The international community is therefore often responsible for funding a number of its initiatives.[329] This challenge affects both the "carrot" being the incentive that will be given to member states for cooperating with the process as well as the process of implementing the framework.

Having anticipated this challenge, however, the proposed framework is designed to receive both financial and technical resources from donor agencies, CSOs and other governments and NGOs willing to invest in the process. The creation of a Fund within the agency that is designed to receive contributions from NGOs, the ECOWAS and other institutions, which can be directed towards operational costs of the agency, as well as remediating environmental pollution within local communities in collaboration with Nigeria's regulatory agencies, also alleviates potential funding challenges. The overarching goal of the proposed framework impacts local communities, state institutions, and the environment. The paper is confident therefore that donor agencies, CSOs, NGOs and foreign governments will be interested in investing in a framework that has such far-reaching ramifications.

There also exists the potential challenge of implementation and the challenge of compelling compliance. While they are separate challenges, both challenges are related and so will be addressed together. The proposed framework anticipates member state cooperation through state institutions. It is quite possible that state officials might resent the process of oversight and resist changes which might frustrate the process. This concern is the reason why implementation is paired with compelling compliance as a related challenge. Given that the framework proposes encouraging compliance and only proposes the use of sanctions as a last resort, a situation where state officials deliberately frustrate the process of oversight might severely slow down the process and frustrate all parties. In this instance, public shaming of uncooperative agencies through the civil society coalition and public support from ECOWAS institutions might compel uncooperative agencies to cooperate, thereby restricting the use of sanctions to the last resort.

---

328 *Ibid.*

329 *Ibid.*

## VII. CONCLUSION

Two important conclusions can be drawn from the discussions in the paper. The first main one is that there is an urgent need for regulatory reform to the framework that addresses the activities of TNCs in the extractive industry. The discussions have illustrated that political, institutional, and regulatory failures, justify the need for a regulatory oversight framework. The second conclusion would be essentially that the ECOWAS system can be deployed as an external oversight mechanism to guarantee environmental protection in Nigeria and promote a right to a healthy environment.

Further, the paper demonstrates the failures of the Nigerian framework for regulation of TNCs. It identifies the numerous legislation and regulations which provide for regulation of the Nigerian oil and gas industry, arguing that if effectively enforced, these regulations could greatly reduce oil pollution in Nigeria. The paper however identifies inherent weaknesses of these statutes and regulations and other challenges to the institutional framework for enforcement of regulation. It concludes that the framework for regulation of TNCs in Nigeria can achieve greater effectiveness if reformed and proposes the use of a regulatory oversight mechanism to drive further effectiveness.

Most instructively, the paper proposes a framework for oversight which the ECOWAS can adopt in performing regulatory oversight over resource extraction in member states. However, this paper does not define a specific institutional mechanism for the implementation of such framework under the ECOWAS. The lack of a suggestion is deliberate as it is informed by the methodology adopted for the research. Given that the research is library and internet-based, it would prove speculative to suggest an institutional mechanism for the implementation of the ECOWAS framework as access to information regarding the ECOWAS is limited when conducting library and internet-based research. Further research with an expanded methodology that includes visits to the ECOWAS and interviews with ECOWAS officials as well as CSOs and NGOs (given their integral role in the proposed framework) is necessary in order to develop an institutional mechanism for the proposed framework. Such work is however beyond the scope of the present research.

It is important to acknowledge that if the framework being proposed by the paper is adopted by the ECOWAS, issues regarding ownership of resources, free prior and informed consent (FPIC) and rights of local communities to self-determination are likely to be encountered when dealing with natural resources and local communities. While this paper does not

anticipate the use of the proposed framework to address such issues, it is confident that the reprieve that the proposed framework avails local communities and governments will assuage tensions between both parties and perhaps encourage the evolution of a framework that will address those concerns.

In summary, this paper provides scholarly insight into challenges and consequences of ineffective regulation of TNCs in Nigeria while exploring the potential of a novel approach to addressing such challenges. It provides a useful contribution to identifying concerns relating to protection and promotion of human rights of local communities, regulatory framework for regulation of the oil and gas industry, and protection of the environment as well as suggestions regarding reforms in the problem areas identified.

The interrogation of the ECOWAS as a supranational organization, capable of affecting attitudes of sovereign state lends its voice to the growing discourse surrounding modern day redefinitions of the concept of state sovereignty.[330] The paper demonstrates the advantages of a shift from non-interference as regards international relations between states to pooling of sovereignties under supranational organizations and the potentials of such a shift for states and ultimately local communities. The European Union (EU) is an example of one of such supranational organizations. The EU first started to evolve as a supranational organization with the establishment of the European Coal and Steel Community (the ECSC), whose mandate was to establish a common market without trade barriers.[331] Given the successes of the common market, European governments decided to consolidate their gains and extended their delegation of power by signing the *Maastricht Treaty* and creating the European Union.[332] Recent events surrounding the United Kingdom's referendum to leave the EU have demonstrated the advantages and perhaps disadvantages of economic integration and shared sovereignty under a supranational organization.[333] Nevertheless, it remains the contention of this paper that the benefits of economic integration and shared sovereignties, far

---

[330] See Francis Fukuyama, *State Building, supra* note 346; Horacio A. Grigera Naon, "Sovereignty and Regionalism" (1995-1996) 27 Law & Pol'y Int'l Bus. 1073, Westbrook, "Supranational Adjudication".

[331] Lokulo-Sodipe and Osuntogun, *supra* note 237 at 274.

[332] Treaty on European Union, 7 February 1992 (entered into force 1 November 1993); Lokulo-Sodipe and Osuntogun, *supra* note 237 at 274.

[333] "EU Referendum: What are the Pros and Cons of Brexit" *The Week* (June 27, 2016) online: http://www.theweek.co.uk/brexit-0.

outweigh the disadvantages of integration and that the Nigerian state will benefit greatly from regulatory oversight from the ECOWAS.

The paper also lends its voice to the growing body of literature that propose a new governance model for the regulation of TNCs in extractive industries. The works of Penelope Simons and Audrey Macklin and Larry Cata Backer are instructive in this regard as they advocate governance models for the regulation of TNCs that go beyond the host states or home states of the TNCs. [334] Scholars such as Nupur Chowdury and Ramses A. Wessel studying the concept of regulation at the EU, acknowledge that certain aspects of regulatory processes are no longer located in one single governmental actor. [335] Although their work does not contemplate TNCs in extractive industries, their research provides insight into the potential for regulation beyond states. [336]

---

[334] *The Governance Gap*, *supra* note 251; Larry Cata Backer, "Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board and the Global Governance Order" (2011) 17 Indiana Journal of Global Legal Studies.

[335] Nupur Chowdury, Ramses A. Wessel, "Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?" (2012) 18 European Law Journal p. 335-357.

[336] See also Colin Scott,"Regulation in the Age of Governance: The Rise of the Post-Regulatory State", in Jacint Jordana and David Levi-Faur ed , *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing, 2004), at 145–176. See generally, Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996).