# PETROLEUM OPERATIONS, ENVIRONMENTAL REGULATIONS AND PROTECTION OF RIGHTS AND INTERESTS OF INDIGENOUS COMMUNITIES IN ANGOLA AND NIGERIA

**BY**

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**Declaration**

I declare that this thesis represents my own work, except where due acknowledgment is made, and that it has not been previously included in a thesis, dissertation or report submitted to this university or nay other institution for a degree, diploma or other qualification.

Signed----------

**Michael Sukubo**

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**Abstract**

There are many layers to the debate on the environmental impacts of petroleum operations and the economic, political, and social consequences of poor administrative (and financial) management, and the lack of transparency in the petroleum sectors of many developing countries today. This research delves deeper into the regulatory aspect of the debate, and the recent international and governmental efforts towards minimising (or avoiding) the impacts of petroleum activities on the economic, social, and cultural existence of indigenous communities in Angola and Nigeria—through international instruments, national legislations, and corporate regulations, respectively. It determines the sufficiency of the petroleum regimes of both states under the provisions of international law for protection of rights and interests of indigenous peoples/communities. The research intends to establish practicable government-corporate-indigenous partnerships towards efficient sustainable development initiatives that acknowledge the correlation between economic development and environmental protection, and take account of the impacts of petroleum operations on the environment and the effects of petroleum operations on the economic, social, and cultural existence of the indigenous communities of Angola and Nigeria who own the native lands upon which the operations were carried out in accordance with their traditional ways of land ownership before the first European contacts.

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# CHAPTER 1

## 1.1 Introduction

New discoveries of petroleum resources in developing countries continue to emerge and present unique economic opportunities. However, the exploration and exploitation of these resources are yet to benefit the populations.[1] In Africa, poor management of natural resources has been a recurring theme in recent debates. While there is ample evidence of countries that have managed their natural resources (gold and diamonds, for example) in ways that have benefited their populations (Botswana, Namibia, South Africa), the continent has yet to see success stories in the case of oil and natural gas.[2] In 2010, Africa accounted for 13% of global oil production, with sub-Saharan Africa contributing 7.25%. Most of the sub-Saharan production takes place in Angola and Nigeria, while other African countries produce on a smaller scale, or are still in the exploratory phase. In the same year, the European Union relied on sub-Saharan Africa for around 7% of its oil imports, amounting to 314 million barrels worth $65 billion. Around 500 oil companies are estimated to operate in the African upstream oil and gas industry, with a recent and growing importance of Asian oil companies, including from China (the world's second largest importer), India, Malaysia, South Korea, and the Gulf states.[3]

However, oil production also has significant environmental and social impacts. Oil spills notably pose major direct risks to the environment and human health while also undermining fishing and farming livelihoods of the indigenous communities of developing host states. Data

[1] Baumüller Heike, Donnelly Elizabeth, Vines Alex, and Weimer Markus, 'The Effects of Oil Companies' Activities on the Environment, Health and Development in Sub-Saharan Africa', A Paper Presented to the European Parliament's Committee on Committee on Development (2011) 7, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433768/EXPO-DEVE_ET(2011)433768_EN accessed on 22/03/2017.

[2] African Development Bank and the African Union (ADBAU), 'Oil and Gas in Africa' (Oxford University Press: 2009), available at https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Oil%20and%20Gas%20in%20Africa.pdf accessed on 05/04/2018.

[3] Baumüller, Donnelly, Vines and Weimer (n 1).

on the quantity of oil spilled is either highly contested or missing. In Nigeria, worst-case figures put the daily average loss of oil at 712 barrels per day, while the lowest official figures put the loss at 93.9 barrels per day. Although major oil spills have often been reported over the years, it is the minor oil spills that are collectively a greater danger to the environment and indigenous communities of the Nigerian Niger Delta. Meanwhile, the issue of money and compensation has come to dominate the oil spills agenda in developing countries like Nigeria, which means that clean-up has become less of a priority than establishing who is responsible for the spill and how compensation could be maximized. Yet, in other developing countries, including Angola, there seem to be lack of adequate data on oil spills. Moreover, compensation is highly politicized, and payments from international oil companies, where they are made, are transferred to the government.[4]

From the inception of the international petroleum industry, the two major interests which are commonly identified are that of the host state to develop its petroleum resources primarily on grounds of public interest; and the private interest of the oil companies which engage in petroleum transactions with the host state purely on economic grounds. However, recent increase in petroleum operations and environmental pollution is introducing more stakeholder interests to what some publications would rather view as strictly public-private relations. This research identifies 'indigenous interests' (otherwise the interests of indigenous peoples/communities living in the vicinity of petroleum operations in Africa) as the third major interest in petroleum operations today: with particular reference to Nigeria and Angola. The environmental impacts of the oil industry have economic ramifications: environmental degradation eliminates sources of income (e.g. fishing and farming), which displaces local populations, which in turn causes the collapse of local economies.[5] The negative impacts on

[4] Ibid.
[5] Baumüller, Donnelly, Vines and Weimer (n 1) 20.

livelihoods are particularly problematic in underdeveloped areas where indigenous communities in Angola and Nigeria rely heavily on natural resources for their economic, social and cultural existence.

Cabinda is a province of Angola situated in the north of the country. It is an exclave, separated from the rest of Angola by the Democratic Republic of the Congo (DRC), which borders the province in the south and the east. In the north, Cabinda borders the Republic of Congo. Oil production, which began in the late 1960s, is the most important economic activity in Cabinda. Other natural resources include timber, coffee, cacao, and palm oil. Information on oil spills is generally difficult to obtain in Angola; and there do not appear to be any estimates or compilations. The government and oil companies do not necessarily report all spills and there are examples where spillages were only reported by chance a month later. This is in part due to the policy of the Ministry of Environment, of only discussing spills over a certain volume (4000 bbl) with the international oil companies (commonly refer to as the oil majors). Spills below this threshold are at risk of being hushed up. The sources of the oil spills are also at times unclear. Chevron in Cabinda often claims that the spills reaching Cabindan waters originate in the Republic of Congo, but accept that the company is likely to be blamed in any case.[6] Most fishing in Angola's northern province Cabinda is artisanal and has been going on for three generations or more, without any commercial value chains attached. The fishermen complain that the bay of Cabinda no longer yields fish. While in the 1950s up until the 1990s a nightly trip using about 500m of nets would have filled a fishing boat, now trips of up to five nights' duration and much more netting is required to fill the same boat. The fishing excursions take the boats as far afield as Soyo—the mouth of the Congo River and further south (up to latitude of 7°, which is 2° south of Cabinda)—and up to Gabon towards the equator. Moving

[6] Ibid, (n 1) 18.

permanently to Soyo to avoid the long transit is not an option because it would mean leaving behind support networks of fellow fishermen and extended family. The fishermen blame oil production for the lack of fish closer to Cabinda. They point to the destruction of underwater habitats and spawning grounds as one of the main reasons. They claim that these underwater reefs and rock structures, which are essential for breeding fish, are destroyed by the use of dispersants that make (spilled) oil that floats on the surface of the sea, sink to the sea floor. Fishermen also claim that seismic surveys have a negative impact on fish stocks and are pushing them away. Apart from impacting underwater habitats, oil spills, which they say occur at least once and up to four times a year, also affect fishermen by destroying their nets.[7]

Of all sub-Saharan African states, Nigeria is probably the most infamous for oil production- and oil company-related difficulties. The Nigerian Niger Delta region officially comprises nine states: Delta State, Rivers State, Bayelsa State, Cross River, Akwa Ibom, Edo, Imo, Abia, and Ondo, with a total of 185 local government areas. The region hosts a population of approximately 30 million, settled in around 13,000 small communities. The delta of the Niger River covers a land area of approximately 75,000 $km^2$, making up 12% of Nigeria's landmass. There are around 600 oil fields producing from around 5,000 wells, and although production is focused in limited areas, the region is crisscrossed by approximately 10,000 km of pipelines. The environmental and human rights problems, and related protests of the early 1990s, which culminated in the death of author and activist Ken Saro-Wiwa in 1995, brought Nigeria and the international oil companies that operate there into international disrepute. Since Nigeria's return to democracy in 1999, the situation in its oil-producing region of the Niger Delta has rapidly evolved and altered, with social protest turning to violent protest, with militancy and criminality being on the rise. In addition to the interplay of ethnic identity, land tenure issues

[7] Baumüller, Donnelly, Vines and Weimer (n 1) 20-21.

and competition for resources are further concerns at the community levels. Data and research done in the Delta are often therefore treated with suspicion, as actors involved in the region are perceived to have bias or agenda. There is also a lack of statistics regarding health impacts of petroleum operations. Epidemiological studies have not been conducted because of lack of funding and because the research environment in the Delta is so difficult.[8]

This research also offers critical examinations of three of the recent transnational Nigerian environmental litigations instituted by some of the indigenous communities of the Niger Delta against Shell Petroleum in the Netherlands and in the United Kingdom.[9] All three cases were tried in accordance with the applicable Nigerian laws, and in all three of them the courts held, *inter alia*, that parent companies were not liable for environmental tort committed by their subsidiaries in Nigeria. Recently, the case of *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell (RDS) and Shell Petroleum Development Company Nigeria (SPDC)*[10] which involved indigenous communities of the Nigerian Niger Delta and was instituted in England. Although the environmental tort was directly committed against the indigenous communities by SPDC, the claimant believed that SPDC (a subsidiary company of RDS) was unable to provide them with adequate compensation, and thus sought redress from RDS in the English court in the form of both injunctive relief and damages. Their arguments were based, *inter alia*, on statements made by RDS and the Shell Group in public statements and corporate documents (such as the 2014 Sustainability Report and Stock Exchange announcements) that emphasise the ultimate responsibility of the RDS board and the degree and extent of control exerted by RDS over SPDC as well as the Shell Group's commitment to

[8] Baumüller, Donnelly, Vines and Weimer (n 1) 19.
[9] *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell (RDS) and Shell Petroleum Development Company Nigeria (SPDC)* [2017] EWHC 89 (TCC).; *Bodo Community v Shell Petroleum Development Company Nigeria* [2014] EWHC 1973 (TCC).; *Akpan and Others v RDS and SPDC* Case Number/Docket Number: C/09/337050/HA ZA 09 – 1580.
[10] [2017] EWHC 89 (TCC).

environmental issues. Such statements deal with matters such as the global policy of the Shell Group concerning the environment and health. However, the English court dismissed this argument on grounds that common-law does not impose liabilities on companies simply by reason of their common membership of the same group.

The case of *Bodo Community v Shell Petroleum Development Company Nigeria (SPDC)*[11] also involved members of indigenous communities of the Nigerian Niger Delta. Their claim related to two crude oil spills from oil pipelines in the Bodo area of the delta region said to have occurred between 28 August and 7 December 2008 and 19 February 2009. The full extent of the spillages and their timing was in dispute subject to which SPDC admitted liability under Nigeria Oil Pipelines Act[12] (OPA) for these spillages. By an agreement between the parties but subject to some jurisdictional reservations, the claim was brought in an English court and the court held that Royal Shell Dutch (RSD), the parent company of SPDC, was not liable under Nigerian law for the tort committed by its subsidiary in Nigeria.

*Akpan and Others v RDS and SPDC*[13] further concerns oil pollution in the Nigerian Niger Delta affecting some indigenous Ijaw communities. In 1958, RSD drilled an oil well called Ibibio 1—situated near Ikot Ada Udo, Akwa Ibom State of Nigeria Niger Delta—and sealed it with a wellhead. From 1996, a quantity of oil leaked from the wellhead from time to time, with the leakages becoming more serious from August 2006. The most serious leakage took place at the end of July 2007 which continued until 7 November 2007. As a consequence of this leakage, Akpan suffered damage, both material and immaterial. His fishponds and agricultural land have since become unusable, as have the fishponds of his family members. He also suffered potential damage to his health as a result of the pollution of the soil and the drinking water. The oil

[11] *Bodo Community v Shell Petroleum Development Company Nigeria (SPDC)* [2014] EWHC 1973 (TCC).
[12] Oil Pipeline Act Cap 07 LFN 2010.
[13] *Akpan and Others v RDS and SPDC*, Case Number/Docket Number: C/09/337050/HA ZA 09 – 1580.

leakages have affected the environment in a large area around Ikot Ada Udo. The case was instituted in The Netherlands which is the home country of RDS based on Section 7 of the Dutch Code of Civil Procedure (DCCP), which provides:

> If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.

The plaintiffs contended that as the owners and/or licence holders and/or 'operators' of the wellhead, RDS and SPDC have jointly acted unlawfully in the breach of their duty of care towards Akpan and the affected indigenous communities in the vicinity of the spillage. First, they failed to ensure that the wellhead meets current standards and to secure it against leakages and sabotage, as a result of which the oil leakages came about. Secondly, they breached their duty of due care in failing to react promptly and adequately to the leakages and to clean up the oil in a timely or comprehensive manner. RSD argued that the legal rule under Nigerian law is that parent companies have no obligation to prevent their subsidiaries from inflicting damage on others through their business operations. The plaintiffs, on the other hand, contended that RDS is aware of the problematic situation of oil spill in the Nigerian Niger Delta and that in many respects RDS interfered with and exercised influence on SPDC activities in the region. As a parent company, RDS is in charge of making policy decisions regarding environmental damage and preventive measures that may result from its international operations—including SPDC's key operational objectives and environmental policy in Nigeria. This was taken to mean that RSD assumed a duty of care in common law regarding the manner in which SPDC's oil operations in Nigeria are conducted. However, the Dutch court dismissed the plaintiffs' argument stating that the businesses of RDS and SPDC are not essentially the same, because RDS formulates general policy lines form The Hague and is involved in worldwide strategy and risk management, whereas SPDC is involved in the production of oil in Nigeria. The court

held that under applicable Nigerian law, RDS in The Hague did not commit any tort of negligence against the plaintiffs and accordingly dismissed all claims initiated against RDS.[14]

Generally, the laws and regulations relating to petroleum operations are known as 'petroleum regimes.' International law, municipal legislations, petroleum contracts and industry driven self-regulations or 'soft laws' are all elements of a given petroleum regime. Soft laws in this context reflects general codes and guidelines of the petroleum industry which are often perceived as part of the regulatory element of the industry today. Soft law in the context of this research also includes international guidelines for best oil and gas practices and recommendations for corporate responsibilities towards protection of human rights and interests of indigenous communities against impacts of petroleum operations. This research seeks to determine the sufficiency of the petroleum regimes of Angola and Nigeria in protecting the rights and interests of indigenous communities against environmental degradation caused by petroleum operation under the auspices of international law: with particular references to the international standards for protection of rights and interests of indigenous peoples/communities under the Indigenous and Tribal Peoples Convention, adopted on 26 June 1989; and the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007.

The influence of international law could be noticed at national levels where governments take cognisance of international recommendations and suggestions for aligning public, private and indigenous interests in petroleum operations. Generally, international law recommends for governments take sufficient account of the impacts of economic activities on the environment in national developmental policies in order to achieve viable and sustainable development.[15]

[14] Para 4.34.

[15]UNGA World Summit Outcome (2005) A/RES/60/1, para. 48; MCW Pinto 'Reflections on the Term Sustainable Development and its Institutional Implications' in Konrad Ginther, Erik Denters and JIM Paul (eds.), *Sustainable Development and Good Governance* (MartinusNijhoff 1995) 72-73

The first international instrument to address the challenges of preserving and enhancing the environment is the United Nations Stockholm Declaration adopted at Stockholm on 16 June 1972 (Stockholm Declaration), which emphasises the relationship between environmental well-being and economic development. The Stockholm Declaration constitutes a basic framework for international legal regimes establishing obligations, powers, and responsibilities of states with respect to the environment. Subsequently, the United Nations met again at Rio de Janeiro from 3 to 14 June 1992 (Rio Declaration), to reaffirm the Stockholm Declaration and seek to build upon it, with the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among states, key sectors of societies, and peoples. The Rio Declaration acknowledged human beings at the centre of concerns for sustainable development. Human beings are entitled to healthy and productive life in harmony with nature.[16]

Agenda 21 of the Rio Declaration specifically reflects international consensus and political commitment at the highest level on development and environment co-operation.[17] Agenda 21 represents the partnership commits of all states towards sustainable development, recognising the importance of overcoming confrontation and fostering a climate of genuine cooperation and solidarity amongst Member States of the international community. It calls for efforts to strengthen national and international policies and multinational cooperation to adapt to the new environment and development realities.[18] Principle 11 of the Stockholm Declaration states thus:

[16] United Nations General Assembly Declaration on the Environment and Development (Rio Declaration), June 1992, preamble and Principle 1.
[17] Rio Declaration Agenda 21, 1.3.
[18] Rio Declaration Agenda 21, 2.1.

> The environmental policies of all States should enhance and not adversely affect the present or future development . . . nor should they hamper the attainment of better living conditions for all.

Nevertheless, attaining a sustainable development requires efficient environmental preservative and protection measures, though international trade is a means to economic growth and sustainable development. Economic policies have great relevance to sustainable development. The reactivation and acceleration of development requires both a dynamic and a supportive international economic environment and determined policies at national levels. International development process will not gather momentum if the global economy lacks dynamism and stability and is beset with uncertainties. The policies and measures needed to create an international environment that is strongly supportive of national development efforts are thus vital.[19]

Although an open international system could lead to growth and sustainability,[20] development programmes should also consider environmental needs.[21] In order to achieve sustainable development, environmental protection should constitute an integral part of the development process and cannot be considered in isolation from it.[22] Prevailing systems for states decision-making should not separate economic, social, and environmental factors at the policy, planning, and management levels.[23] Environment and economic policies should be mutually supportive. For example, an open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development.[24] Principle 13 of Stockholm Declaration states that:

> In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their

[19] Rio Declaration, Agenda 21, 2.2.
[20] Rio Declaration, principle 12.
[21] Rio Declaration, principle 3.
[22] Rio Declaration, principle 4.
[23] Rio Declaration, Agenda 21, 8.2.
[24] Rio Declaration, Agenda 21, 2.19.

> development planning so as *to ensure that development is compatible with the need to protect and improve environment for the benefit of their population* [emphasis added].

Integration of environment and development policies would lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems, and a safer, more prosperous future.[25] However, this could also have a negative effect on a country's economy. Governmental policies which prioritise environmental needs over economic needs may be seen as too harsh on investment and thus drive foreign investments from one country to another with less strict environmental policies. It is thus significant to strike equitable balance between environmental and developmental needs, [26] which could be attained through government, business, and community collaboration in national developmental and environmental schemes.

Efforts to strengthen national development policies that incorporate economic and environmental interests seeking to encourage government, business, and indigenous partnership would also require international co-operation, municipal legislative mechanism, public-private economic instruments and industry-driven-self- regulatory mechanisms. Principle 7 of the Rio Declaration states thus:

> States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Whereas the implementation of the environmental provisions is mostly left to the legal systems of states and their co-operations with each other at the international level, political will plays

[25] Rio Declaration, Agenda 21, 1.1.
[26] Stockholm Declaration, principle 10.

important role in diplomatic relations and implementation of international treaties.[27] Not all states strictly abide by the treaties they have signed and ratified. There are legal requirements in many jurisdictions that a treaty should be incorporated into municipal law by the parliament before it could have binding force in the country.[28] In the Nigeria case of *General Sani Abacha* v *Chief Gani Fawehinmi*[29]Justice Ejiwunmi observed:

> It is common ground that this law (the African Charter on Human and Peoples' Right(s) is indeed an International Treaty as it was the product of the Organisation of African Unity of which Nigeria is a member. It is also common ground that Nigeria in accordance with the protocols enshrined in the Charter, caused through the National Assembly of the then Government of Nigeria to enact as part of our municipal law, all the provisions of the African Charter on Human and Peoples' Rights. This was done in accordance with the provisions of section 12 (1) of the 1999 Constitution which provides ''no treaty between the Federal Government and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly''. It is therefore manifested that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, and if it is not enacted into the law of the country by the National Assembly . . . its provisions cannot therefore have any effect upon citizens' right and duties.[30]

To effectively integrate environment and development in national policies and practices, it is also essential to develop and implement integrated, enforceable, and effective laws and regulations that are based upon sound social, environmental, and economic principles.[31] Principle 13 of Rio Declaration thus states that:

> States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

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[27] Edgar Gold and Christopher Petrie, 'Pollution from Offshore Activities: An Overview of the Operational, Legal and Environmental Aspects' in De La Rue Colin (ed.), *Liability for Damage to the Marine Environment* (Loyd's of London Press Ltd. 1993) 219.
[28] 1999 Constitution of the Federal Republic of Nigeria sec 12 (1).
[29] [2000] 6 NWLR 228
[30] *Supra* 356-357; *Onuoah Kalu*v *The State* [1998] 13 NWLR 531.
[31] Rio Declaration Agenda 21, 8.14.

Economic instruments such as environmental impact assessments and environmental agreements between state, oil companies, and indigenous communities is another vital mechanism of collaborating economic, social and environmental factors at developmental policy, and environmental planning and management levels. Such instruments should also take into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[32] Oil companies should undertake environmental impact assessment, as a national instrument, for proposed petroleum operations that are likely to have a significant adverse impact on the environment and indigenous ways of lives and existence.[33] Chapter 30 of Agenda 21 provides, *inter alai*:

> Business and industry should increase self-regulation, guided by appropriate codes, charters and initiatives integrated into all elements of business planning and decision-making, and fostering openness and dialogue with employees and the public.

Although developmental goals and environmental goals are not mutually exclusive, they are interdependent.[34] Economic development is essential to any society. Nevertheless, the benefits should not outweigh the impact on the environment.[35] Some authors argue that sustainable development can be attained in environmentally friendly ways, insofar as the damages caused to the environment by economic activities could be repaired at acceptable costs.[36] However, community participation and corporate transparency are vital aspects of achieving an environmentally friendly policy. Principle 22 of the Rio Declaration recognises that:

[32] United Nations Rio Declaration on Environment and Development 1992, Principle 16.
[33] United Nations Rio Declaration on Environment and Development 1992, Principle 17.
[34] Michael Redclift, *Sustainable Development* (Methuen 1987) 15 -17.
[35] Rajendra Ramlogan, *Sustainable Development: towards a Judicial Interpretation* (MartinusNijhoff 2011) 29.
[36] Elizabeth Dowdeswell, 'Sustainable Development: The Contribution of International Law' in Winfried Lang (ed.), *Sustainable Development and International Law* (Graham and Trotman 1995) 5-6.

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices.[37]

Development goals can hardly be achieved without public participations in developmental schemes.[38] Transparent collaboration with indigenous communities could assist governmental and corporate representatives in having clearer visions on ways, how and the sphere of societal living that requires development at the time of making decisions.[39] Furthermore, economic development can hardly be sustained in isolation of environmental preservations and protection.[40] This research intends to judge the adequacy of a country's petroleum regime – legislation, petroleum contracts and industry driven soft-laws – based on these international criteria.

The constitution of the host state is a significant element of the petroleum regime at national level. It usually establishes the authority of the government to make and enforce laws concerning petroleum operations in its jurisdiction. It may also address the ownership of the state's petroleum resources. The constitution is followed by the petroleum law of the host state, which contains specific rules relating to the rights and responsibilities granted to oil companies seeking to invest in the petroleum industry. The host state's environmental laws, health and safety laws, tax laws, and labour laws could all form part of its petroleum law. Next, there may be petroleum regulations, which may be made in accordance with the petroleum law of the country and some forms of industry-driven soft laws. Last of the list is the contractual regime

[37] United Nations Declaration on the Environment and Development (Rio Declaration), June 1992, principle 22. This international instrument and other are discussed in detailed in the subsequent Chapter where this research examines the international approach to economic development, environmental pollution and protection of indigenous interests.
[38] James Currey in W Beinart and J McGregor (eds), *Social History and African Environments* (Ohio University Press 2003) 2.

[39] A. Obiora, 'Symbolic episodes in the quest for environmental justice' 21 (2) Human Rights Quarterly [1991] 477. The issue of accountability and transparency in the petroleum industry of developing countries and the effect on environmental regulation and decision-making is discussed in subsequent Chapters.
[40] Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman 1994) 217.

through which the particularities and rights that are essential to any company wanting to explore and produce petroleum within the country are usually defined.[41]

There is increasing industry self-regulation in the petroleum sector at national levels of developing countries. Some of these regulations take the form of Corporate Social Responsibility (CSR) in developing countries. In Nigeria, these include efforts by oil companies to engage with indigenous communities through development projects. These initiatives are, however, undermined by the lack of public trust and transparency of the oil sector. There also have been instances where oil companies' 'developmental programmes' rather resulted in inter-community conflicts in the Nigerian Niger Delta between indigenous communities participating in such projects and those that do not. In addition, there is insufficient environmental data and public restrictions to vital operational information and documents affecting their general interests.

This research seeks to examine the extent to which international standards for protection of rights and interests of indigenous people/communities are attain in Angola and Nigeria, under the auspices of international law. In particular, the research evaluates the sufficiency of the petroleum regimes – petroleum legislations/regulations, petroleum contracts, petroleum industry-driven self-regulations- of Angola and Nigeria in dealing with the recent environmental challenges and protection of rights and interests of indigenous communities living at the vicinity of petroleum operations in both states. For example, in the Nigerian cases cited above, the English court and the Hague court both held that under applicable Nigerian law, parent oil companies are not liable for environmental tort committed against indigenous communities by their subsidiaries in Nigeria. However, do oil companies and their affiliates

[41] Tim Boykett, Marta Peirano, Simon Boria, Heather Kelley, Elisabeth Schimana, Andreas Dekrout, and Rachel O'Reilly, 'Oil Contracts: How to Read and Understand Them' (Times Up Press 2012) 22-24, available at http://openoil.net/2012/11/06/oil-contracts-how-to-read-and-understand-them-out-now/ accessed on 24 April 2017

and subsidiaries have regulatory responsibilities in developing countries? If the answer is affirmative, which element of petroleum regime – legislation/regulation, contract, industry driven soft-law – is the best legal mechanism of ensuring sufficient corporate regulatory responsibilities in developing countries like Angola and Nigeria? If there are no sufficient protection of indigenous interests against petroleum operations in African petroleum producing states like Angola and Nigeria, what modifications should be made at each or any of the levels of the petroleum regime in both countries to cure the insufficiencies? It is the desire of this research that the conclusions reached and recommendations made would be of pivotal contribution to resolving the issues it addresses.

The research is divided into seven further Chapters. Chapter 2 presents an overview of oil and gas operations and the legal structure of the petroleum industry. The essence is to give the reader a general understanding of how the petroleum industry operates. The introduction presents a 2040 experts' forecasts for the use of petroleum (including natural gas and shale gas) as the world's major source of energy. This emphasises the fact that the issues raised in this research are current and still relevant to improving policies in the areas petroleum operations, environmental regulations and protection of indigenous interests in developing countries today. Chapter 2 further enumerates and explains the various stages of oil and gas operations, the legal nature of a petroleum licence/lease, and the process involved in bidding for licence/lease. It also explains the concepts of ownership of petroleum, exposing the reader to the different forms of petroleum ownership today. Although over 100 contracts are associated with the building, operating, and financial aspects of a single petroleum project, Chapter 2 intends also for the reader to concentrate on the petroleum contract signed between the governments and oil companies, which is one of the main subjects of this research. Theoretically, the two parties to a typical petroleum contract are the government of the oil producing state and the international oil companies seeking to explore and exploit the petroleum resources of the state. However,

Chapter 2 exposes the reader to the fact that neither of these two parties is usually mentioned in the contract. While the government usually establishes a national oil company to contract on its behalf with the international oil company, the oil company usually creates a subsidiary company (in accordance with the national law of the host state) in the host state as the business vehicle through which it contracts with the government and carries out its operations in the state.

Chapter 3 lays the prima facie foundation upon which the research is based. Its explores the required minimum standards for national protection of the rights and interests of indigenous peoples in international law: with particular reference to the Indigenous and Tribal Peoples Convention, by the International Labour Organization, adopted on 26 June 1989; and the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007. Both the C169 and the Declaration represent international commitments to protection of rights of indigenous peoples/communities to self-determination, conservation, environment, native title to land, access of natural resources; and international commitment to instigate environmental national policies that ensuring protection of the economic, social and cultural interests of indigenous peoples/communities against impacts of petroleum operations.

Chapter 4 examines regulation as a form of legislative element of petroleum regime in developing countries. Legal regulation can be defined as ‘a principle or law designed to control or govern conducts. The legislative framework for petroleum development provides the basic context and rules government petroleum activities in a state. It further regulates the companies conducting petroleum operations, whether they are foreign, international or municipal oil companies. In addition, it defines the principal economic and fiscal guidelines for investment activity in the petroleum sector of the state as a whole. However, Chapter 4 evaluates the sufficiency of petroleum regulations as form of legislation in Angola and Nigeria. This Chapter does not, however, intend to investigate the best regulatory regime for the petroleum industries

of developing countries. Rather, it delves into the regulatory element of the petroleum regimes of Angola and Nigeria compare to developed countries like Australia and Norway, with the view of accessing the reasons why recent regulatory frameworks of developing countries are not enough in dealing the contemporary environmental challenges. Acknowledging the fact that the four states of study fall under different jurisdictions - civil law jurisdiction and common law jurisdiction, there are general concerns when comparing laws of both jurisdictions. Nevertheless, this does not apply in all areas of law. Some areas of law, including petroleum law, transcend municipal legal systems, making them areas of 'transnational law'. Furthermore, some of the principles of tort of common law continue to play significant roles in transnational environmental litigations today. Accordingly, Chapter 4 examines the common law principles of negligence and strict liability, and their roles in enhancing municipal petroleum regulations in the area of oil and gas operations, environmental regulations and protection of indigenous rights and interests in developing countries.

Chapter 5 further analyses the issues of native title to land, environmental protection and environmental justice in developing countries. Native title rights may include rights of indigenous people/communities to: (a) live on the area; (b) access the area for traditional purposes, like camping or to do ceremonies; (c) visit and protect important places and sites; (d) hunt, fish and gather food or traditional resources like water and wood without the need for a licence or permit; (e) teach law and custom on country. In some cases, native title includes the right to possess and occupy an area to the exclusion of all others (often called 'exclusive possession'). Exclusive possession includes the right to control access to, and use of the area concerned. While the source of land rights is a grant of title from government, the source of native title rights and interests is generally the system of traditional laws and customs of the native title holders themselves. Native Title may be able to be possessed by a community and individual and is indisputable other by surrender to the state. In instances where indigenous

communities are legally disposed of the land they acquired from their ancestors through native laws and customs, what interest, if any, do they have in such lands, when they are used for petroleum operations? In addressing this question, Chapter 5 also examines the similarities and differences in the legal frameworks of native title of three common law countries with similar colonial history– Australia, Canada and Nigeria - in order to determine the adequacy of national legal systems in addressing native title to land in African oil producing states, today.

Chapter 6 evaluates the contractual element of petroleum regime and protection of indigenous interests in African petroleum states. Petroleum contracts are forms of economic instruments that could be used at national levels to promote internalisation of environmental costs with due regard to the public interest and without distorting international trade and investment. But, how sufficient are petroleum contracts (as elements of petroleum regimes) in dealing with issues of petroleum operations and protection of third parties' rights and interests, including environmental damages arising from petroleum operations (subject to the provisions of a petroleum contracts) and their impacts on economic, cultural and social existence of indigenous communities in developing countries, today? This Chapter offers an overview of some of the contract forms commonly used in the African petroleum states, but, concentrates of the provisions for protection of third parties' (including indigenous communities') rights and interests in some of the recent oil and gas contracts executed across Africa: with view of evaluating how indigenous rights and interests are protected in these agreements mainly between governments of host states and oil companies.

Chapter 7 examines the regulatory responsibilities of oil companies in relation to petroleum operations and protection of indigenous interests in developing countries. Do oil companies have regulatory responsibilities? If the answer is affirmative, what is the scope of their regulatory responsibility in the area of petroleum operations, environmental regulations and protection of indigenous rights and interests? In addressing these questions, Chapter 5 evaluates

some of the approaches employed in the international oil industry through industry-driven voluntary codes and procedures of best oil and gas practices in addressing the impacts of petroleum operations on indigenous rights and interests in developing countries. This Chapter further examines international approach to the situation through the United Nations Guiding Principles on Business and Human Rights, 2011; and the OECD Guidelines for Multinational Enterprises, 2011.

## CHAPTER 2

# OVERVIEW OF PETROLEUM OPERATIONS AND THE LEGAL STRUCTURE OF THE PETROLEUM INDUSTRY

## 2.1 Introduction

Petroleum (oil and natural gas[42]) belongs to a class of chemical compound called 'hydrocarbon'.[43] There are significant universal disagreements over the formation of oil.[44] Like other natural minerals, petroleum is a naturally occurring homogeneous substance with highly ordered atomic arrangements.[45] Oil and natural gas have potential economic value and could provide for the sustenance of lives and serve a country's wellbeing.[46] Recent researches indicate that since the end of the Second World War, people have used more raw materials like petroleum than during the whole time of human history beforehand.[47] The 2017 world energy outlook by the International Energy Agency detected thus:

> Oil demand continues to grow to 2040, albeit at a steadily decreasing pace. Natural gas use rises by 45% to 2040; with more limited room to expand in the power sector, industrial demand becomes the largest area for growth.[48]

Increasing environmental and political campaigns of global warming and pollution have led to scientific discoveries of new forms of energies (including renewable non-conventional forms of energy supplies) reshaping the world's view of the use of petroleum as sources of energy

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[42] C Selley Richard (eds.), *Encyclopaedia of Geology,* Vol. 4 (Elsevier Academic Press 2005**)** 248.
[43] Smil Vaclav, *Oil: A Beginner's Guide* (Oneworld Publication) 49.
[44] Eugene Kuntz, *Treaties on Law of Oil and Gas,* vol. 1 (W.H. Anderson 1962) 21-22.
[45] Kearey Philip (ed.), *Encyclopaedia of Solid Earth Sciences, Oxford* (Blackwell Scientific Publications 1993) 400.
[46] Bryan Garner, *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 1127.
[47] Koensler Winfried, 'Environmental Mineralogy and Sustainable Development' in Rammlmair D et al (eds.), *Applied Mineralogy: in Research, Economy, Technology, Ecology and Culture* (Balkema Publishers 2000) Vol. 1, 41-42.
[48] International Energy Agency, 'World Energy Outlook 2017'available at https://www.eia.gov/outlooks/ieo/pdf/0484(2017).pdf, accesses on 17/12/2017.

today. However, with particular reference to oil and gas, these trends rather demonstrate changes in policies from decreasing the use of one form of petroleum (oil) towards an increase in the use of another (natural gas). Bob Dudley, chief executive of British Petroleum (BP), explained that:

> The energy mix is shifting, driven by technological improvements and environmental concerns. More than ever, our industry [the petroleum industry] needs to adapt to meet those changing energy needs. In the near term, much of our focus will remain on the continuing adjustment of the oil market. Considerable progress has been made but there is still a long way to go. Oil inventories are at record-high levels and the impact on supply of the significant cutbacks in investment spending on new energy projects over the past two years has not yet been fully felt. But our response to those near-term challenges has to be informed by our understanding of the longer-term energy transition that is taking place to ensure we are able to continue to meet the energy needs of a changing world . . . Oil demand continues to increase, although the pace of growth is likely to slow as vehicles become more efficient and technological improvements, such as electric vehicles, autonomous driving and car sharing, potentially herald a mobility revolution. The overall demand for energy looks set to continue to expand. . .[49]

Even legal definitions of petroleum today have been broadened to include other types of solid and liquid forms of petroleum that could be discovered in the future. For example, Section 2 of the Canada Indian Oil and Gas Act 1985 defines oil as crude oil as 'all other hydrocarbons, regardless of gravity, that are or can be produced from a well in liquid form including crude bitumen but excluding condensate'. It further defines gas as 'natural gas that is or can be produced from a well, both before and after it has been subjected to any processing, and includes marketable gas and all fluid components not defined as oil'.[50]

Another unconventional source of coal seam gas today is shale gas.[51] As a form of natural gas, shale gas is increasingly becoming a popular source of energy. As of 2016, only four

[49] Bob Dudley Group chief executive of British Petroleum, 'BP Energy Outlook 2017' available at https://www.bp.com/content/dam/bp/pdf/energy-economics/energy-outlook-2017/bp-energy-outlook-2017.pdf accessed 17/12/2017.

[50] Indian Oil and Gas Act, 1985 sec. 2.

[51] There are some other forms of ('unconventional') natural gas which are trapped in deep underground shale rocks and were hard to reach. Recent technological advance has made it possible to get these new sources of energy out of the ground. Shale gas is extracted from shale rock using fracking or hydraulic fracking of the rock.

countries—Argentina, Canada, China, and the United States—have commercial shale gas production. Technological improvements by 2040 are expected to encourage development of shale resources in other countries, primarily in Mexico and Algeria. Natural gas production worldwide is projected to increase from 342 billion cubic feet per day (Bcf/d) in 2015 to 554 Bcf/d by 2040. The largest component of this growth is natural gas production from shale resources, which would grow from 42 Bcf/d in 2015 to 168 Bcf/d by 2040. Shale gas is expected to account for 30% of world natural gas production by the end of the forecast period. Shale gas production in Canada is projected to continue increasing and to account for almost 30% of Canada's total natural gas production by 2040. In the past five years, China has drilled more than 600 shale gas wells and produced 0.5 Bcf/d of shale gas, as of 2015. Shale gas is projected to account for more than 40% of the country's total natural gas production by 2040, which would make China the second-largest shale gas producer in the world after the United States. Shale gas production accounted for more than half of the United States natural gas production in 2015, and is projected to more than double from 37 Bcf/d in 2015 to 79 Bcf/d by 2040, which would amount to 70% of total United States natural gas production by 2040.[52] In developing countries, Argentina's commercial shale gas production was just 0.07 Bcf/d at the end of 2015. However, shale gas production is projected to account for almost 75% of Argentina's total natural gas production by 2040. Algerian shale production is projected to account for one-third of the country's total natural gas production by 2040. Mexico is expected to gradually develop its shale resource basins after the recent opening of the upstream sector to foreign investors. At present, Mexico is expanding its pipeline capacity to import low-priced

A British Geological Survey estimated that shale gas makes up 35% of the world's surface rock; and there are 1,300 trillion cubic feet of shale gas in the north of England alone. https://www.bgs.ac.uk/research/energy/shaleGas/howMuch.html.

[52] U.S Energy Information Administration, 'Shale Gas Production Derives World Natural Gas Production Growth', EIA Energy Conference, 2017, available at https://www.eia.gov/todayinenergy/detail.php?id=27512, accessed on 15/05/2017.

natural gas from the United States. Mexico is expected to begin producing shale gas commercially after 2030, with shale volumes contributing more than 75% of the total natural gas production by 2040.[53]

Shale gas could boost the world's recoverable natural gas, cut greenhouse gas emission, create new revenue and jobs, and raise national energy supplies. However, like oil, extracting natural gas and tight oil from shale poses environmental risks, especially when it comes to water. Hydraulic fracturing requires up to 25 million litres of fresh water per well, meaning shale resources can be hard to develop where fresh water is hard to find—including in some of the world's fastest-growing economies and populations.[54] This chapter seeks to give the reader an overview of oil and gas operations and an understanding of the legal structure of the petroleum industry.

## 2.2 An Overview of Petroleum Operations

Oil and natural gas operations are activities involving the prospecting, exploration, appraisal, development, and production of petroleum.[55] Petroleum operations can either take place onshore or offshore. While onshore operations take place on land, offshore operations take place in shallow waters and deep waters.[56] Oil prospecting involves operations carried out onshore or offshore, through the use of geological, geochemical, or geophysical methods, with a view of locating petroleum deposits.[57] Offshore operations are, generally, more expensive to conduct than onshore operations. This is because of the facilities and structures required. Deep

[53] Ibid.
[54] World Resources Institute, '40 Percent of Countries with Largest Shale Energy Resources Face Water Stress', available at http://www.wri.org/blog/2014/09/40-percent-countries-largest-shale-energy-resources-face-water-stress , accessed on 15/05/2017.
[55] Article 2 (12) Petroleum Activities Law, Law No. 10/04 November 2004, Angola; Article 1 (36) Model Production Sharing Agreement of Angola, 2004.
[56] Shallow waters operations is where the drilling or deep is less than 500 feet. Deep waters operations involve drillings from 500 feet and above.
[57] Article 2 (19) Petroleum Activities Law No. 10/04 November 2004, Angola.

water drilling is much more expensive than shallow water drilling because the platforms used are technically more difficult to construct. These considerations are addressed in petroleum contracts by providing financial incentives for those operations and the stages of production.[58] Recent offshore petroleum regimes include international laws and instruments (such as the United Nations Convention of the Law of The Sea, 1982, and the International Maritime Organization Resolution on Guidelines and Standards for Removal of Offshore Installation and Structures on the Continental Shelf and in the Exclusive Economic Zone, adopted on 19 October 1989) municipal legislations and regulations of host states and industry-driven self-regulatory mechanisms pioneered by the petroleum industry in response to actual industrial and commercial requirements.[59]

Although offshore petroleum exploration activities began around 1891 when the first submerged oil wells were built on piles in the fresh waters of the Grand Lake St. Marys in Ohio in the United States, there is still no clear definition of what constitutes a 'drilling unit'.[60] Though independent ship-owners have historically been the major owners of tanker tonnage, oil companies have been owning significant amount of tonnage in recent times. At the end of the 1970s, international oil companies were the predominant charterers of tankers and they engaged in a mix of bareboat and voyage charters, which in particular, accounts for more than 25 per cent of ocean-born oil movement today.[61] Not only are there different types of mobile offshore drilling units, but within each classification, oil and gas rigs may be treated differently according to their operational mode. As a result, the legal regime may vary depending on the

[58] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41).
[59] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41).
[60] Gold and Petrie (n 27) 203.
[61] Robert Phillips, 'Charterer's Point of View' in De La Rue Colin (ed.), *Liability for Damage to the Marine Environment* (Lloyd's of London Press Ltd. 1993) 155.

stage of a petroleum operations. Besides, a larger and more diverse number of ocean structures are used in the petroleum industry compared to the other marine sectors.

In 1976, the Executive Council of the Comité Maritime International (CMI) held a conference in Rio de Janeiro and drafted a Convention on Offshore Mobil Craft which had the potential of becoming an international agreement. The intention was to establish a legal regime for the offshore petroleum sector, including environmental liability. However, the Comité could not decide whether to treat 'offshore mobile craft' as ship *per se* or to create and apply a distinct legal regime. The majority felt that in certain areas such as limitation of liability, pollution liability, and maritime liens, special legal treatment for these crafts are required. The CMI observed:

> The particular features of drilling rigs and other offshore craft . . . are their floating and mobile capacities. In that they can move through the sea from one location to another, they have the typical characteristics of vessels and they are in fact, considered to be vessels in some countries. Thus, it is the maritime aspects which these installations share with vessels that it is felt desirable and necessary to regulate in the contemplated convention. It follows that the industrial aspects of offshore activities, such as drilling operations and the oil production processes, should not be dealt with by the CIM, nor should the liabilities or rights of the drilling operator or concessionaire. Only the problems confronting the rig owner, demise charterer or other maritime manager responsible for the maritime and nautical running of the craft should be covered by the convention. Furthermore, stationary and permanent installations such as the production platforms fall outside the scope of the work.[62]

The above definition, on its own, is limited in scope because the types of offshore installations it enumerated are insignificant compared to the fact that some categories of offshore units are more mobile than others. The matter is further removed from reality when it is argued that because mobile offshore drilling units are capable of movements, they must have traditional international maritime law applied to them. While the CIM Draft attempts to apply international maritime conventions to mobile offshore drilling units, it concedes special

[62] CMI Draft Convention on Offshore Mobile Craft, XXXI International Conference of the Comité Maritime International, Rio de Janeiro (1977), *CMI Yearbook*, 1977, p. 30.

treatment for some of the most important aspects of petroleum operations that are associated with environmental regulations of the industry.[63] The following are stages of petroleum operations:

### 2.2.1 Exploration Operations

Petroleum exploration is the search for oil and gas by geological, geophysical, and other methods and the drilling of oil well(s). It includes activities in connection with initial search for petroleum and appraisal works. The search for petroleum involves technical and economic feasibility studies that may be carried out to determine whether a discovery of oil constitutes a commercial discovery.[64] Exploration operation also includes prospecting activities and the drilling and testing of oil wells leading to the discovery of petroleum deposits.[65] Seeps were probably one of the best ways of discovering oil in the early years of oil discovery. Although oil still does seep to the surface of the earth in many locations across the world, a seep does not imply an oil boom today. More scientific and data-intensive means are currently used to find petroleum beneath the surface of the earth. For example, geological surveying methods known as 'seismic studies' are the starting point of oil discovery today. Seismic studies involve the using of sound waves, shot down into the earth, to investigate what is underground. This process helps to increase oil companies' confidence that drilling in a particular location is worthwhile. If the seismic study produces promising results, the next phase of discovery will be drilling exploration wells. While there is no standard amount of time to conduct seismic studies and drilling exploration well, the process could take months at the very least and more often around 2-4 years.[66]

[63] Gold and Petrie (n 27) 223.
[64] Article 1 (42) Model Production Sharing Agreement of Angola, 2004; Article 1.28 Model Petroleum Agreement of Ghana, 17/08/2000.
[65] Article 2 (14) Petroleum Activities Law No. 10/04 November 2004, Angola.
[66] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 13-16.

Subject to the provisions of the licence granted by a host government to explore a specific area of the country for the petroleum, exploration activities could be terminated if no commercial discovery is made by the end of the initial exploration period. The initial period could, however, be extended by the government.[67]

### 2.2.2 Appraisal operations and Commercial Discovery

Appraisal of oil and gas is the activity carried out following the discovery of a petroleum deposit. It is aimed at better defining the parameters of the reservoir in order to assess its commerciality, including, but not limited, to:

(a) drilling of appraisal wells and running deep tests;
(b) collecting special geological samples and reservoir fluids;
(c) Running supplementary studies and acquisition of geophysical and other data, as well as the processing of the same data.[68]

Discovery of oil means 'finding during the exploration operation which could amount to measurable value of oil in accordance with conventional petroleum testing methods.'[69] Article 2 (7) of the Petroleum Activities Law of Angola, 2004[70] defines commercial discovery of oil as 'the discovery of a petroleum deposit deemed able to justify development' of oil and gas. Commercial discovery occurs when sufficient quantity of oil is discovered in an area to constitute economically viable extraction. To determine the economic viability of the discovered oil, an appraisal shall be conducted. The length of time an appraisal takes will likely depend on such considerations as the business considerations of the oil company that found the

[67] Article 6 (2) Model Production Sharing Agreement of Angola, 2004.
[68] Article 2 (4) Law No. 10/04 of 12 November 2004, Republic of Angola.
[69] Article 1.25 Model Petroleum Agreement of Ghana, 17/08/2000.
[70] Law No. 10/04 of 12 November 2004, Republic of Angola.

oil and the municipal laws and regulations of the host country, which determine the process of developing the oil.[71]

### 2.2.3 Development Stage

Development of petroleum is the stage of oil and gas operations after commercial discovery has been made.[72] This is the stage where petroleum facilities are installed and infrastructures are developed to extract the oil discovered. This stage of petroleum project is rarely less than several years and it is influenced by factors including engineering, community relations, and business considerations.[73] It also involves activities relating to planning and administrative works.[74] Generally, development operations involve activities such as:

(a) geological, geophysical, and reservoir studies and surveys;
(b) drilling of production and injection wells; and
(c) designing, construction, installation, connection, and initial testing of equipment, pipelines, systems, facilities, machinery, and related activities necessary to produce and operate said wells, to take, save, treat, handle, store, re-inject, transport, and deliver petroleum, and to undertake recycling, and other secondary and tertiary recovery projects.[75]

### 2.2.4 Production Stage

The production stage of oil and gas involves all activities related to planning, scheduling, controlling, measuring, testing, and carrying out of the flow, gathering, treating, storing, and dispatching of petroleum from the underground petroleum reservoir, to the designated

[71] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 17.
[72] Article 1.22 Model Petroleum Agreement of Ghana, 17/08/2000.
[73] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 18.
[74] Article 1.19 Model Petroleum Agreement of Ghana, 17/08/2000.
[75] Article 2 (9) Law No. 10/04 of 12 November 2004, Republic of Angola.

exporting or lifting location, and furthermore, the operations of abandonment of the facilities and petroleum deposits and related activities. These activities are intended to extract the discovered petroleum in a particular area. It further includes the running, servicing, maintenance, and repair of compelled wells, as well as of the equipment, pipelines, systems, facilities, and plants completed during development.[76] Once most of the first major development has been completed, tested, and refined for any bugs in the system, there will be 'commercial production' of oil. This happens when the petroleum is finally flowing at the expected rate over a period of a month or so. The duration of production depends on a number of factors including the size of the oil deposit discovered.[77]

### 2.2.5 Abandonment Stage

After anywhere from seven years of production from smaller areas to fitty years or more from the giants, it is time to take all the steel and metal down, plug the production wells and restore the environment to its original state. A common alternative to this is where the oil company turns the assets over to the host country so that it can then continue operations and eventually abandon themselves at a later time. These processes are generally referred to as Abandonment or Decommissioning.[78] Article 28 (1) of the Model Production Sharing Agreement of Angola, 2004 provides:

> Within sixty (60) days of termination of the Agreement or the date of abandonment of any part of the Contract Area, the Contractor Group must hand over to Sonangol (the national oil company), in a good state of repair and operation, and in accordance with a plan approved by Sonangol, all of the infrastructures, equipment and all Wells which, within the area to which the expiry, cancellation or relinquishment refers, are in production or are capable of producing, or are being used, or may be used, in injection, together with all casing, piping, surface or sub-surface equipment and facilities acquired by the Contractor Group for the conduct of Petroleum Operations, except those as are being used for Petroleum Operations elsewhere in the Contract Area.

[76] Article 2 (18) Law No. 10/04 of 12 November 2004, Republic of Angola.
[77] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 18.
[78] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 19.

After having carried out abandonment, the oil company will have no further liability in relation to the operation area, except in cases of gross negligence, wilful misconduct, or serious fault.[79] However, this depends on the petroleum regulation of the host state and the terms of the contract government executes with the oil company in question.

### 2.3 Legal Nature of Petroleum Licence

The process of awarding exploration and production rights is considered very important, more so for developing countries facing challenges due to flawed or less regulated process of awarding such rights. In order to ensure that oil companies are in line with the requirements of the host state, there is need to have viable legal and regulatory structures in place that will lead to selection of the most suitable companies.[80]

Subject to the petroleum regime of a host state, the life span of petroleum projects or operations could either commences with contractual arrangements between the state and oil companies seeking to explore, develop, and produce the oil and gas primarily on pure economic grounds or through an administrative authorisation by the host state, rather than contractual arrangements. Either ways, the contractual arrangement and the administrative authorisation both represent the rights granted by the host state to the private oil company to explore, prospect, and/or search for petroleum within a stipulated area. Guyana. Nigeria and Papua New Guinea are example of states where petroleum projects or operations usually commence with contractual arrangements between the host state and oil companies seeking to explore, develop,

[79] Article 28 of the Model Production Sharing Agreement of Angola, 2004.

[80] Kenneth K. Joe, 'The Awarding of Petroleum Exploration and Production Rights and Incorporation of Environmental Rules in Kenya: Lessons from United Kingdom and Norway', Department of Law University of Eastern Finland 12 December 2016 available at http://epublications.uef.fi/pub/urn_nbn_fi_uef-20170284/urn_nbn_fi_uef-20170284.pdf access on 14/07/2018.

and produce the oil and gas primarily on pure economic grounds.[81] In Papua New Guinea, petroleum exploration and development licensing system are primarily a two-tier system. A Petroleum Prospecting Licence (PPL) is an exploration licence issued to an oil company pursuant to which the oil company undertakes petroleum exploration.[82] The Petroleum Development Licence (PDL) is a production licence[83] issued to the holder of a PPL upon commercial discovery of petroleum, to produce and deal with the petroleum produced within the acreage. The process of granting a PPL commences on application for or upon invitation by the Minister, for a PPL.[84] An application for a PPL would be made in respect of not more than 60 blocks[85]and in special circumstances the minimum acreage could be increased to 200 blocks.[86] The conditions under which petroleum exploration and production will be undertaken are prescribed by legislation.[87] A PPL is granted for a term not exceeding 6 years[88]and renewable for a further term of 5 years but for a reduced area,[89] and is also subject to work and expenditure requirements.[90] PPL confers on the licensee the exclusive right to explore for petroleum, to carry out appraisal work in respect of the petroleum discovery, and to undertake such task as are necessary to otherwise explore for, produce and sell or otherwise disposed of petroleum produced.[91] The Oil and Gas Act. 1998 provides the scope of a PPL as follows:

> A petroleum prospecting licence, while it remains in force, confers on the licensee, subject to this Act, and to the conditions specified in the licence, the exclusive right to explore for petroleum, and to carry out appraisal of a petroleum discovery, and to carry on such operations and execute such works as are necessary for those purposes, in the

[81] Nigerian Petroleum Act, 1990, sec., 2; the Nigerian licensing process and administrative forms of contract is discussed in detail under Chapter 6.
[82] S. 23 of the Oil and Gas Act 1998.
[83] S. 57 of the Oil and Gas Act 1998.
[84] S. 21 of the Oil and Gas Act 1998.
[85] S. 22(1) (c) of the Oil and Gas Act 1998.
[86] Effectively, a PPL can be issued over 16,200 square kilometres, indeed a relatively wide area.
[87] Part III (Ss 17-36) of the Oil and Gas Act 1998.
[88] S. 26(a) of the Oil and Gas Act 1998.
[89] S. 26(b) of the Oil and Gas Act 1998 set out requirements for relinquishment of part of a PPL area.
[90] S. 22 of the Oil and Gas Act 1998. In practice, the applicant submits a work program to the Petroleum Advisory Board (PAB), which assesses the work and expenditure program and advises the Minister whether to grant or not to grant a PPL. The Minister upon advice from the PAB grants the PDL under S. 29 of the Act.7.
[91] Melvin Yalapan, 'Legal Nature of the Papua New Guinea Petroleum. Arrangement', 14-17, available at <www.paclii.org/journals/MLJ/2003/6.rtf> accessed on 29/07/2018.

> licence area, including the construction and operations of water lines, tests for appraisal of a petroleum pool (including the construction in accordance with the authorization and disposal), and the recovery and sale or other disposal of all petroleum so produced.[92]

The application of an exploration licence is restricted to the area specified in the agreement. It authorises the holder (investor or operator) to undertake exploration for petroleum within the specified area. However, it does not usually confer any exclusive rights over that area.[93] The holder of an oil prospecting licence has the exclusive right to explore and prospect for petroleum with the area specified in the licence. He may carry away and dispose of petroleum won during prospecting operations, subject to the fulfilment of obligations imposed upon him by the licence and under the petroleum legislation of the jurisdiction in question. A petroleum lease is usually only granted to the holder of the prospecting licence who has satisfied all conditions imposed on him by the prospecting licence and municipal petroleum legislations.[94] For instance, the terms for the granting of petroleum exploration and production licences in Papua New Guinea are set out in the legislation[95] and these are supplemented by details set out in the petroleum licence. Petroleum exploration and development in Papua New Guinea are carried out under a policy regime that fixes in advance, conditions under which rights to explore for and produce petroleum are granted. The legal regime is set out primarily in the legislation[96] and complemented by petroleum agreements that are entered into in respect of each exploration licence.[97] The country's natural resources laws adopted the practice of reserving title to

[92] S. 25 of the Oil and Gas Act 1998.
[93] Petroleum Prospecting Licence executed between the Republic of Guyana and Esso Exploration and Production Guyana Limited, 14 of June 1999.
[94] First Schedule [Section 2 (3)] Nigerian Petroleum Law.
[95] Oil and Gas Act 1998.
[96] Oil and Gas Act 1998. Prior to the enactment of the Oil and Gas Act 1998, petroleum exploration and production were undertaken under the Petroleum Act, Chapter 198 (repealed). The fiscal provisions are contained in the Income Tax Act 1959.
[97] Countries with such regime include Australia, United States, Canada and most of the EEC countries. Kamal Hassain, Law and Policy in Petroleum Development, (France Printer (Publishers) 1979) 100.

petroleum *in situ* exclusively to the State.[98] Ownership in resources *in situ* therefore rests with the State. The vesting of ownership of petroleum resources *in situ* together with the vesting of the prerogative to licence the exploration and production of these resources, and the prerogative to manage the exploration and development of same, provides the foundation of resources law. It underpins the legal arrangement under which the resources are developed. The prerogative to manage the exploitation of these resources is a significant factor that one would need to examine in the quest to identify the contractual arrangement of the PNG's petroleum regime. This is underlined by the fact that despite State ownership of the petroleum naturally occurring, the resources will be developed by private enterprise and hence the petroleum policy regime is geared towards encouraging private sector investment in petroleum development.[99]

There are three main systems for awarding or wining exploration licences/leases: through competitive bidding, *ad hoc* negotiations, and first-come-first-served award mechanism. In the competitive bidding system, investors compete against each other by offering the best terms with regards to one or more defined variable(s) to win the licence/lease. In the *ad hoc* negotiation, an investor comes unsolicited and asks for a particular parcel of land from the owner and then negotiates a contract directly with the landlord; or where ownership of land is separated from ownership of the natural resources underneath the land, the investor negotiates with the owner of the petroleum. Alternatively, there might be an application system and the first company that applies and passes whatever regulatory hurdles of the jurisdiction where the resources are discovered may have, is then awarded the licence to explore the area specified in the agreement for petroleum.[100] In general, the application shall be reviewed by the owner of the petroleum in accordance with the municipal laws and regulations of the country where the

[98] S. 5 of the Mining Act 1992 and S. 6 of the Oil & Gas Act 1998.
[99] Yalapan (n 91) 14-15.
[100] Article 37 Petroleum Activities Law No. 10/04 November 2004, Angola; Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 24.

oil is discovered. It is likely for the government (acting through its national oil company) to request the applicant to provide further information in the application regarding the proposed exploration activities and manners in which the applicant seeks to conduct its operations. This is mostly in jurisdictions where the state regulates petroleum activities through its national oil company. On hearing the applicant, the supervising minister would then decide on the application. When the minister issues his consent order, the petroleum owner shall issue the licence and the relevant fee shall be paid under the applicable law.[101] An exploration licence or petroleum lease could be extinguished for the following reasons:

1. Termination, waiver, and expiration. The host government, through the relevant supervising minister, could terminate the licence if the licensee fails to perform his obligation under the licence or under an applicable municipal law; or in cases where force majeure of a definitive nature occurs which may cause it impossible for the licensee to fulfil its obligation.[102]
2. The licence may lapse on waiver by the licensee that he has performed his legal duties and the duties imposed by the licence in full by the date on which such waiver becomes effective.[103]
3. The licence may be terminated in accordance with the terms of the licence, extinction of the licensee, or by an accomplishment of an expiration condition provided for in the licence.[104]

### 2.4 Legal Structure of Petroleum Contract

Petroleum agreements usually contain the following information:

[101] Article 38 Petroleum Activities Law No. 10/04 November 2004, Angola.
[102] Article 41 Petroleum Activities Law No. 10/04 November 2004, Angola.
[103] Article 42 Petroleum Activities Law No. 10/04 November 2004, Angola.
[104] Article 43 Petroleum Activities Law No. 10/04 November 2004, Angola.

1. full identification of the licensee;
2. area and duration of license;
3. rights and duties of the licensee;
4. description of the operations to be undertaken, and the respective schedule and budget; and
5. definition of the regime governing ownership of the data obtained from the prospecting.[105]

Over 100 contracts could be associated with the building, operating, and financial aspects of one petroleum project. All of these come under the umbrella of 'petroleum contract'. This could be:

1. Agreement between the oil producing country and the oil companies to explore and produce the country's petroleum resources.
2. Statutory agreements between the government of the oil producing country and its national oil company (NOC),
3. Contractual agreements between two or more international oil companies to engaged in a particular petroleum project in the oil producing country.
4. Financial agreements between private banks and public lenders to finance the project.
5. Financial agreements between private/public banks and the oil companies/host government towards financing the project.
6. Agreements between engineering companies, drilling companies, rig operators, and the oil companies.
7. Agreements between transportation, refining and trading companies, and the oil companies.

[105] Petroleum Activities Law No. 10/04 November 2004, Angola, art. 39.

These agreements appear in countries throughout the world under the names: petroleum contract, exploration and production agreement, exploration and exploitation contract, concession, license agreement, petroleum sharing agreement, or production sharing contract.[106] Petroleum legislations and contracts are part a petroleum regime. The ways and manners of carrying out petroleum operations are regulated by legislation while petroleum contract regulates the mutual rights and obligations of parties to petroleum agreements.[107] However, liabilities, obligations, rights, interests, and benefits of parties to petroleum contracts are subject to national legislations of the petroleum producing country.[108] Article 3 of the Model Production Sharing Agreement of Angola, 2004 states that:

> The objective of this Agreement is the definition . . . of the contractual relationship in form of the Production Sharing Agreement between Sonangol (the national oil company) and the Contract Group for carrying out the petroleum operations [emphasis added].

With particular reference to jurisdictions where natural resources belong to the state, the parties to petroleum agreements are the host government and the oil companies seeking to invest in the petroleum industry of the country. Although ownership of the country's petroleum is vested on the host government, it usually creates a national oil company (NOC) through municipal statutes to represent its interests and act on its behalf in contractual and regulatory matters relating to the country's petroleum resources. Normally, the NOC is the statutory titleholder of the mining right to prospect, explore, develop and produce the petroleum resources of the host country.[109] In like manners, the international oil companies (IOCs) mostly contracts with the host country through their affiliate companies and subsidiaries. In some cases, the subsidiary

[106] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 21.
[107] Recital of the Model Production Sharing Agreement of Angola, 2004, 5.
[108] Model Production Sharing Contract of the Democratic Republic of Timor-Leste, paragraph D.
[109] Article 1 (12) Model Production Sharing Agreement of Angola, 2004.

is a separate legal entity from its parent company.[110] Section 54 of Nigeria Company and Allied Matters Act, 1990 (CAMA) provides thus:

> Every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carryon business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

In some jurisdictions, the NOC also acts as regulatory authority and advisor to the government on petroleum affairs.[111] For example, Sociedade Nacional de Combustivel de Angola, Empresa Pública (Sonangol), which is the NOC of Angola, holds the mining rights of the country.[112] The recital of the 2004 Model Production Sharing Agreement of Angola states that:

> The Government of the Republic of Angola, in accordance with the Petroleum Activities Law (Law No. 10/04) of 12 November 2004, has granted Sonangol (the NOC) an exclusive concession for the exercise of the mining rights for prospecting, exploring, development and production of liquid and gaseous hydrocarbons in the Concession Area. . . The Government has authorized Sonangol to enter into a Production Sharing Agreement . . . with the view to carry out the petroleum operations necessary to duly exercise such rights in compliance with law.[113]

In the event that Sonangol does not wish to associate itself with any other entity in order to carry out petroleum operations in a given area of Angola, the government may, at the request of Sonangol, award it directly to private oil companies.[114] In such capacity, Sonangol would assume an advisory role to the government in the area of awarding contract and to whom petroleum contracts could be awarded. Sonangol could also decide to participate in joint venture operations with other private oil companies in carrying out petroleum operations in

[110] While the NOC contracts on behalf of the host government, the subsidiaries is a local oil company owned by an international oil company (the parent company), created to contract with the NOC.

[111] Boykett, Peirano, Borria, Kelley, Schimana, Dekrout, and O'Reilly (n 41) 39.
[112] Article 4 Angola Petroleum Activities Law No. 10/04 of 12 November 2004.
[113] Recital of the Model Production Sharing Agreement of Angola, 2004, 5.
[114] Article 44 (1) Angola Petroleum Activities Law No. 10/04 of 12 November 2004.

Angola.[115] Where Sonangal wishes to grant exploration rights to an oil company without its participation in the project, it has to apply to the supervising ministry for due authorisation to carry out an open tender to define the private oil company to be granted the right. In such instances, the opportunity would be made opened to all oil companies to bid. Application for the right shall be accompanied with draft terms of reference for the tendering process.[116]

The NOC of Nigeria also assumes multiple petroleum functions. The preamble of the Nigerian National Corporation Act[117] states that the Act establishes:

> The Nigerian National Petroleum Corporation empowered to engage in all *commercial activities relating to the petroleum industry*, and to *enforce all regulatory measures relating to the general control of the petroleum sector* through its Petroleum Inspectorate department [emphases added].

The Nigerian National Petroleum Corporation (NNPC) has power to do anything which in its opinion is calculated to facilitate the carrying out of its duties under the Act. Such power includes the right to enter into contract or partnerships with any company, firm, or person which in its opinion will facilitate the discharge of its duties under the Act. In so doing, it could establish and maintain subsidiaries.[118] Section 5 of the Act enumerates further duties of the NNPC thus:

1. exploring and prospecting for, working, wining or otherwise acquiring, possessing and disposing of petroleum;
2. refining, treating, processing, and generally engaging in the handling of petroleum for the manufacture and production of petroleum products and its derivatives;
3. purchasing and marketing petroleum, its products, and by-products;

[115] Article 44 (2) Angola Petroleum Activities Law No. 10/04 of 12 November 2004.
[116] Article 44 (3) Angola Petroleum Activities Law No. 10/04 of 12 November 2004.
[117] Decree No. 35 of 2007.
[118] Section 6 NNPC Act.

4. providing and operating pipelines, tanker-ship, or other facilities for the carriage or conveyance of crude oil, natural gas, and their products and derivatives, water and any other liquids or other commodities relating to the corporation's operations;
5. constructing, equipping, and maintaining tank farm and other facilities for the handling and treatment of petroleum and its product and derivatives;
6. carrying out research in connection with petroleum or anything derived from it and promoting activities for the purpose of turning to account the results of such research;
7. doing anything required for the purpose of giving effect to agreements entered into by the federal government with a view to securing participation by the federal government or the corporation in activities connected with petroleum;
8. engaging in activities that would enhance the petroleum industry in the overall interest of Nigeria; and
9. undertaking such other activities as are necessary or expedient for giving full effect to the provisions of the Act.

One major difference between the national oil corporation and the subsidiary oil company (an investment vehicle owned by the IOC and incorporated in the host country) is that while the later comes into existence through corporate registration, the former is a statutory establishment. Furthermore, while the subsidiary is a business vehicle primarily incorporated to maximise profits for the IOC; and to minimise economic, political, and regulatory risks associated with foreign investments in the host country, on behalf of the IOC the NOC is a statutory entity which is the titleholder of the mining rights of the host country. Article 8 (4) of the 2004 Model Production Sharing Contract of Angola provides:

> The Operator will be subject to all of the specific obligations provided for in this Agreement, the Concession Decree and other applicable legislation.

The oil company is responsible to the host country through the NOC for the execution of the specified operations in the petroleum agreement. In some cases, the petroleum agreement obliges the oil company to provide all the financial and technical assistance required for the petroleum operations. In this regard, the oil company usually bears the risks of operating cost and therefore has an economic interest in developing the petroleum deposits in the contract area.[119] At all times and in regards to all things, the oil company must acknowledge the rights and privileges of the host government over the country's oil and gas.[120]

## 2.5 Conclusions

The petroleum industry is understandably complex: it comprises of various operational stages, involving the government of the host country where the operations are taking place and the NOC established in accordance with the municipal law of the host country to regulate the country's oil and gas resources and enter into petroleum agreements on behalf of the government and the IOC which contracts with the host government to develop the country's petroleum resources—through their subsidiaries established in the host country in accordance with the corporate law of the host country—primarily on economic grounds. Ordinarily, petroleum transactions could have been confined within the legal structure of the host country which owns the oil and gas, and within which jurisdiction the operations are carried out. However, the international status of the parties to petroleum agreement and the complexity of their legal structures grant petroleum transactions some form of international qualifications. This is so because of the host country's undisputed permanent sovereign over its natural resources in international law and the status of the IOC dealing with the host country as a company incorporated in a foreign jurisdiction. Their contractual relations are determined by

[119] Article 2.2 of the Production Sharing Contract between Myanmar Oil and Gas Enterprise and Total Myanmar Exploration and Production, July 1992.
[120] Model Production Sharing Contract of the Republic of Timor-Leste, paragraph D.

private law, but the nature of their transaction is determined and regulated in accordance with the national law of the host country. There are, however, other parties who may not be directly involved in the transaction, but whose interests might be affected by the operations of the oil and gas. These interests and how they could be affected by the operations would be extensively examined in subsequent chapters.

## CHAPTER 3

# INTERNATIONAL COMMITMENT TO PROTECTION OF RIGHTS AND INTERESTS OF INDIGENOUS PEOPLES/COMMUNITIES

### 3.1 Introduction

The debate concerning petroleum operations and environmental degradation has led to recent changes in environment policies and petroleum investments. These changes have caused more stakeholder interests (including environmental rights campaign organisations and indigenous communities living in the vicinity of petroleum operations) to be introduced in the petroleum industry today.[121] Nevertheless, opinions remained divided on the issue of petroleum operations, sustainable development, and environmental protection. Some of the governmental and managerial philosophies presented in the political realms and corporate board meetings are mostly based on economic theories that place emphasis on national development and the future of industrialisation. Although they do not completely ignore the correlation between economic development and climate change, they place less emphases on the impact of economic activities on the environment.[122] In so doing, they apply the theory of 'opportunity cost'[123] in determining environmental challenges. Considering the economic costs of not developing a country's natural resources due to environmental consequences, the theory of opportunity cost rather focuses on the strategies of minimising the environmental impacts through possible scientific and technological means, [124]though there is a limit to which technological could resolve the

[121] Gao (n 40) 43.
[122] Jason Scorse, *What Environmentalists need to know about Economists* (Macmillan, 2010) 8.
[123] Opportunity cost (otherwise 'alternative cost') is a microeconomic theory which considers the values of all the alternatives presented on the table above their benefits. In making decisions concerning which alternative is the best in a given situation, recourse should be taken to ensure that the final decision is based on the best value (not the benefit) of the chosen alternative. Thus, the chosen alternative is the 'cost' incurred for not enjoying the benefit associated with the second-best alternative.
[124] Scorse (n 122) 80.

on-going conflict between the needs for economic developments and the necessity to protect the environment in the interests of present and future generations.[125] This chapter seeks to establish the required minimum standards for national protection of the rights and interests of indigenous peoples in international law: with particular reference to the Indigenous and Tribal Peoples Convention, by the International Labour Organization, adopted on 26 June 1989; and the United Nations Declaration on the Rights of Indigenous Peoples, adopted on 13 September 2007.

### 3.2 Protection of Rights and Interests of Indigenous Peoples/Communities in International Law

Efforts to draft specific instruments dealing with the protection of indigenous peoples officially began in the early 1950s prior to the Indigenous and Tribal Peoples Convention (hereafter 'C169'), which was adopted on 26 June 1989. C169 was established by the International Labour Organization, in line with the international standards contained in the 1957 International and Tribal Populations; the Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and other international instruments on prevention of discrimination.[126] In 1982 the Economic and Social Council (ECOSOC) established a working group on indigenous populations with the mandate to develop a set of minimum standards that would protect indigenous peoples.[127] The working group submitted a first draft declaration on the rights of indigenous peoples to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was later approved in

[125] Einaudi Marco 'Mineral Resources: Assets and Liabilities' in WG Ernst (Ed.), *Earth Systems: processes and issues* (Cambridge University Press 2000**)** 371-372.
[126] C169 Indigenous and Tribal Peoples Convention 1989, preamble.

[127] United Nations – Indigenous Peoples, Department of Economic and Social Affairs <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

1994.[128] The final draft - which became the United Nations Declaration on the Rights of Indigenous Peoples (hereafter 'the Declaration')[129] - was adopted by the United Nations General Assembly on Thursday, 13 September 2007. [130] The Declaration establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.[131] It elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples; and provides for respects of human rights and fundamental freedom of all including indigenous peoples.[132] The Declaration, generally, seeks to protect rights of indigenous peoples of the world, subject to the provisions of the Charter of the United Nations on the protection of territorial integrity, political unity of sovereign , and states' independence.[133]

Both the C169 and the Declaration represent international commitments to protection of rights of indigenous peoples/communities to self-determination, conservation, environment, native title to land, access of natural resources; and international commitment to instigate environmental national policies that ensuring protection of the economic, social and cultural interests of indigenous peoples/communities against impacts of petroleum operations.

### 3.3 Meaning of Indigenous People and Indigenous Communities in International Law

Indigenous peoples are group of people within an independent state who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a

[128] United Nations – Indigenous Peoples, Department of Economic and Social Affairs, ibid.

[129] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007.
[130] United Nations – Indigenous Peoples, Department of Economic and Social Affairs, ibid.

[131] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 43.
[132] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 46 (2).
[133] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 46 (1).

geographical region to which the country belongs, before conquest or colonisation or establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[134] The United Nations Permanent Forum on Indigenous Issues (UNPFII) estimates Indigenous Peoples to number 370 million individuals living in approximately 90 countries around the world. They represent 5% of the world's total population yet comprise about 15% of the global poor.[135]Article 1 of the Declaration states thus:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Although indigenous peoples represent a segment of the overall public of some states,[136] there is no accepted legal definition of 'peoples' in international law.[137] Indigenous peoples are sometimes referred to as aboriginals, first nations, natives, ethnic minorities, tribes, highland peoples, forest peoples, hunters and gatherers, pastoralists, native or coastal communities. This reflects the difficulty in attempting to capture in one single term the diversity and unique characteristics of indigenous peoples around the world.[138] The United Nations Educational, Scientific and Cultural Organization rather describe indigenous peoples as:

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[134] C169 Indigenous and Tribal Peoples Convention 1989, art. 1(1)(b); Majri Robinson and George Davidson, ed., *Chambers 21st Century Dictionary* (Chambers: 1997), 1024-1025.
[135] UN Permanent Forum on Indigenous Issues (Statement on the occasion of the IASG meeting held in Paris, UNESCO, in September 2008): http://www.un.org/esa/socdev/unpfii/documents/Message_unpfiichair_07.doc, accessed on 28/01/2018.
[136] Garner (n 46) 1316.

[137] PFII/2004/WS.1/3: http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc
[137] United Nations Environment Programme and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance, 2012, 3, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/11202/UNEP_Indigenous_Peoples_Policy_Guidance_endorsed_by_SMT_26_11_12.pdf?sequence=1&isAllowed=y accessed on 28/01/2018; Duncan French, *Statehood and Self-Determination Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 97.
[138] United Nations Environment Programme and Indigenous Peoples: A Partnership in Caring for the Environment Policy Guidance, 2012, 3, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/11202/UNEP_Indigenous_Peoples_Policy_Guidance_endorsed_by_SMT_26_11_12.pdf?sequence=1&isAllowed=y accessed on 28/01/2018.

A group of individual human beings who enjoy some or all the following features:

1. a common historical tradition;
2. a racial or ethnic identity;
3. cultural homogeneity;
4. linguistic unity;
5. religious or ideological affinity;
6. territorial connection; and
7. Common economic life.[139]

The UNPFII further provides the following approach on how Indigenous Peoples can be identified:[140]

1. They have historical continuity or association with a given region or part of a given region prior to colonization or annexation;
2. They identify themselves as Indigenous Peoples and are, at the individual level, accepted as members by their community;
3. They have strong links to territories, surrounding natural resources and ecosystems;
4. They maintain at least in part, distinct social, economic and political systems;
5. They maintain, at least in part, distinct languages, cultures, beliefs and knowledge systems;
6. They are resolved to maintain and further develop their identity and distinct social, economic, cultural and political institutions as distinct peoples and communities; and
7. They often form non-dominant sectors of society.

Furthermore, the degree of indigenous experiences differs from country to country and from one continent to another. For example, African indigenous peoples cut across various economic systems and embrace hunter-gatherers, pastoralists as well as some small-scale farmers and

[139] United Nations Educational, Scientific and Cultural Organisation, 'International Meeting on Experts on Further Study of the Concept of the Rights of Peoples', UNESCO, Paris 27-30 November 1989 available at http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops/WorkshopDataCollection.aspx (accessed on 19/03/2017).
[140] Resource Kit on Indigenous Peoples' issues, DESA, UN 2008, page 7-8. http://www.un.org/esa/socdev/unpfii/documents/resource_kit_indigenous_2008.pdf , accessed on 28/01/2018.

fishermen who have similar cultures, social institutions and religious systems. Those identified as indigenous peoples in Africa are also tied to very differing geographical locations and find themselves with specific realities that have to be evoked for a comprehensive appreciation of their situation and issues.[141] The words 'natives' and 'villagers' both have contextual meaning, with indigenous peoples in Africa: applying to some peoples and not the others groups. [142] For example, the costal or local communities of the Nigeria Niger Delta include the Ijaws, the Iteskiris, the Ogonis, and the Urohobos.[143] The Ijaw people are estimated to be over 14 million (10% of the Nigerian population) and are broken into a number of subgroups, including Ibani, Okrika, Kalabari, Nembe, and Akassa. Eight characteristics define indigenous peoples in international law—common traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people, and common suffering[144]—and the Ijaw peoples of the Nigerian Niger Delta are within the scope of international description for indigenous people because:

1. They are the oldest population living in the Nigeria Niger Delta for over 7,000 years now;

[141] African Commission on Human and Peoples' Rights (ACHPR), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (ACHPR: 2005) 15.

[142] African Commission on Human and Peoples' Rights (ACHPR), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (ACHPR: 2005) 14.

[143] **Rhuke Ako*, 'Nigeria's Land Use Act: An Anti -Thesis to Environmental Justice',* Vol. 30 (2) Journal of African Law [2009]** 289-304.

[144] United Nations Educational, Scientific and Cultural Organisation, 'International Meeting on Experts on Further Study of the Concept of the Rights of Peoples', UNESCO, Paris 27-30 November 1989 available at http://social.un.org/index/IndigenousPeoples/MeetingsandWorkshops/WorkshopDataCollection.aspx (accessed on 19/03/2017).

2. Their ways of life, cultures, traditions, religion are distinct from the rest of Nigerians. This was the case before the Portuguese navigators[145] arrived and established contact with them in 1471 and before the British colony was established in Nigeria;[146]
3. They have lived in the Delta region before the fifth millennium BCE, and they are able to keep a separate identity because they lived where the agriculturally dependent Bune-Kwa groups were unable to penetrate;
4. They have common ways of culture and economic sustainability as fishermen;
5. They have a common founding ancestor (Ujo) and migrated in camps as far west as Sierra Leone and as far east as Gabon;[147]
6. They speak a unique (and distinct) language called Izon. Although the language is classified as one of the Ijoid of the Niger-Congo phylum, it has no immediate cognates;[148]
7. Although around 90% of them are Christians today, 10% of the Ijaw population still follow their traditional religion which involved both ancestor worship and water spirit, who do not share forms or emotions with human.[149] Their native religion is link with land and the natural existence of their environment: the mangrove forest, the rivers, the seas, and the Atlantic Ocean; and

[145] The Portuguese were the first Europeans to arrive the Nigeria Niger Delta in the 15 Century. But, stopped at the region and did not proceed to the inner regions of Nigeria. They did not establish their colony over the people, but rather created a mutual trade relationship with them, which saw the people offer peppers, ivory and slaves to the Portuguese in exchange for coral beads, textiles and other products from a more developed European market. The economic and social inflows into the region saw an emergence of new cities and states, built as internal and external markets developed. Interestingly, even before the Slavery Abolition Act of 1833, the region's reliance on the Slave Trade dwindled due to an even more lucrative opportunity in the palm oil trade. Demand for the native palm oil ran in parallel to the Industrial Revolution in Europe as the demand for factory machine lubricant increased exponentially. In addition, as the European population and wealth grew, secondary demands for palm oil-based products e.g. soaps and margarine grew increasing the demand for the natural oil. It was the later trends that attracted British interests to the region.
[146] Stakeholder Democracy Network (SDN), 'A History of the Niger Delta http://www.stakeholderdemocracy.org/about-the-niger-delta/niger-delta-history/ (accessed on 23 March 2017).
[147] John A. Shoup, *Ethnic Groups of Africa and the Middle East* (ABE-CLIO, LLC 2011) 129.
[148] In linguistics, cognates are words that have common etymological origin, it means related by descent from the same ancestral language.

[149] Shoup, ibid. 130.

8. They prefer to keep their original political, economic, social and cultural identities

Like the aboriginal people of Austria and the native Indians of Canada, it could be argued that the Ijaw tribe and the fishing communities of the Cabinda province of Angola are indigenous and tribal peoples and in accordance with the description of international law.[150] Article 1(1)(b) of C169 defines indigenous people as:

> Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

Australia, Canada and Nigeria were former British colonies; and Angola a former Portuguese colony. However, while Britain and Portugal completely handed over the leadership of Nigerians and Angolans after independence, British influence and presence remain in both Australia and Canada today. Furthermore, the landscapes known as Angola and Nigeria today were inhabited by various indigenous people (otherwise tribes and natives) before European contacts. Like the Ijaws and the Cabindans, some other tribes and natives still share the common traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship which differ from other tribes and the overall public of Angola and Nigeria. In this context, both Angola and Nigeria are modern African states of diverse natives and tribe. Classifying one tribe as 'indigenous' could be misleading. Thus, this research rather addresses the Ijaw peoples of Nigeria and coastal communities of Cabinda province of Angola as 'indigenous communities' living at vicinity of petroleum operations.

[150] United Nations General Assembly Resolution on the Rights of Indigenous People, 2007, art. 29.

### 3.4 Indigenous Rights and Interests in International Law

From the inception of the international petroleum industry, the two major interests which are commonly identified are that of the oil exporting country (otherwise the host State) to develop its petroleum resources primarily on grounds of public interest; and the private interest of the oil companies which engage in petroleum transactions with in the host State purely on economic grounds. However, recent increase in concerns for petroleum operations and environmental pollution have led to more stakeholder interests, including those of indigenous peoples/communities. Article 7 (2) of the Declaration provides that:

> Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

The word 'interest' represents an advantage or benefit or a common concern of a group which share a right or stake in something.[151] Private interests in petroleum operations are, *prima facie*, profit oriented. Foreign investments and the earnings on them are mostly governed by the terms of the investment contract between the host government and the investor, the relevant national law in force, and by international law.[152] Nevertheless, the affairs of legislation and the authority to make petroleum decisions are strictly within the jurisdiction of the host state.[153] Petroleum operations are risky transactions. There are speculations of uncertain investment outcomes regarding the degree of confidence in realising commercial value of oil within a licenced area, and the feasibility of realising adequate profits from petroleum projects. To justify petroleum investments, the expected revenue must exceed the expected costs. Usually, oil companies look for a rate of return that commensurate with risks associated with petroleum

[151] Catherine Soanes and Sara Hawker (ed), Compact Oxford English Dictionary of Current English (3th edt.) (Oxford University Press 2008) 529
[152] United Nations General Assembly Resolution 1803 (XVII) adopted on 14 December 1962, Declaration 3.
[153] *Parkerings Compagniet AS* v *Lithuania* [2007] ICSID Case No. ARB/05/8 IIC 302.

investments. The principal benefit of a petroleum project is the value of the oil discovered, while the expenses are those incurred in carrying out operations. To ensure that risks do not outweigh profits, oil companies tend to determine the Expected-Monetary Value (EMV) of a petroleum project before making investment commitments.[154] In addition to investment risks, other kinds of risks are also associated with petroleum transactions. With particular reference to developing countries, a survey by the Multilateral Investment Guarantee Agency (a World Bank Group) in 2013 indicates that investors are greatly concerned about adverse regulatory changes and breach of contract when engaging in mineral agreements with governments.[155] Although recent investment policies of many developing countries are geared predominantly towards investment liberalisation, promotion and facilitation, in reality, most governments are still protective about their national industries.[156] Investors could calculate and possibly avoid economic risks. When states make treaties with each other, the principle of *pacta sunt servanda*[157] usually requires that they follow through with their commitments. However, there are instances where states have pass new regulations to invalidate its previous contractual commitments with the private party or distort the terms and conditions of previous agreements on the grounds of public interest.[158]

What constitutes public interest differs from one country to another. [159] The word 'public' generally refers to something relating to or available to the overall public of a state.[160] Public

[154] Richard (n 42) 82.

[155] Multilateral Investment Guarantee Agency, 'World Investment and Political Risk' [2013] International Bank for Reconstruction and Development. <https://www.miga.org/documents/WIPR13.pdf> accessed 18/09/2015; UNCTAD, 'Word Investment Report: Transnational Corporations and the Infrastructure Challenge'[2008] United Nations <http://unctad.org/en/Docs/wir2008_en.pdf> accessed 18 October 2015. .

[156] UNCTAD, 'World Investment Report' [2015] United Nations <http://unctad.org/en/PublicationsLibrary/wir2015_overview_en.pdf> accessed 1 December 2015.

[157] Hans Wehberg, '*Pacta Sunt Servanda*' [1959] 53 American Journal of International Law 775, 775; FA Mann, 'The Proper Law of Contracts Concluded by International Persons' [1959] 35 British Year Book of International Law 34, 47.

[158] *Texaco* v *Libya* [1979] 53 ILR 389; *BP* v *Libya* [1979 ]53 ILR 297; *Liamco* v *Libya* [1981] 20 ILM 1.

[159] Catherine Soanes and Sara Hawker (ed), Compact Oxford English Dictionary of Current English (3th edt.) (Oxford University Press 2008) 529

[160] Ibid 823.

interest, in this context, connotes shared interests of concerns involving the welfare or common good of the society as a whole, which might warrant some forms of regulations or justify legal protection.[161] The application of a public interest criterion may require a balancing of competing interests and 'be very much a question of fact and degree'.[162]

Asserting that an action is in the public interest could imply that it will be of benefit to the public overall—far greater to the people who reside in the country as opposed to the minority of the people. However, justifying an action on grounds of public interest could pose significant challenge if the concept of public interest is broadly used without guidance to what should constitute public interest in specific cases. Alternative means of justification may be preferable, where much of the public is scoped out, or can opt out. Other factors to consider might include: the purpose of seeking to invoke the public interest; whether the matter is really intended to be for the benefit of society, as represented by the relevant public, this will involve a wide section of the public, or a sub-set of the general public which severally benefits from a particular action. In this context, public interest encompasses the interests of private individuals (both real and legal persons), residents of a country (both nationals and foreigners), both interests of the major groups and minor group of the state's population, governmental organisations, non-governmental organisations, and representative bodies, and others with a mandate to speak on behalf of people who are affected by a particular issue. However, the interest of the majority will be termed as the public interest over the interest of the minority if the meaning of public interest is construed in this manner.[163]

[161] Garner (n 46) 1425.
[162] Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia (1987) 61 ALJR 393 at 395 per Mason CJ, Wilson and Dawson JJ.
[163] ICAEW, 'Acting in the Public Interest: a Framework for Analysis' 2-3, available at < https://www.icaew.com/-/media/corporate/files/technical/ethics/public-interest-summ-web.ashx?la=en>, access on 21/09/2017.

Public interest is a phrase commonly used in national legislations today. It is a broad concept that is flexible enough to respond to the facts and circumstances of any particular case. Public interest in this sense should not be defined, but rather be described to encompass a non-exhaustive list of matters as guidance for what should constitute public interest in a particular jurisdiction, including: (a) the proper administration of government; (b) open justice; (c) public health and safety; (d) national security; (e) the prevention and detection of crime and fraud; and (f) the economic wellbeing of the country.[164]

However, the overall public of some states is made up of various groups- some of which are described as 'minorities/minor group' within the overall public. The interest of the minor group on certain matters could be far different from those of the overall public. Even in situations where interests could be aligned, common economic, social, pollical and environmental issues could have different degree of impact on a specific group of the overall public. Indigenous interest in petroleum operations refers to the economic, social and cultural rights of indigenous peoples/communities living at the vicinity of petroleum operations; and the impacts of petroleum actives on native lands. Article 5 (a) of C169 provides that:

> The social, cultural, religious and spiritual values and practices of these peoples [indigenous peoples/communities) shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals [emphasis added].

An implied fiduciary relationship exists between the host state and its citizen for governments to prioritize the interest of the overall public above other interests in determining manners and policies on petroleum operations. [165] Nevertheless, indigenous peoples/communities living at

[164] Australian Law Review Commission, 'Balancing Privacy with Other Interests: Meaning of Public Interest' available at <https://www.alrc.gov.au/publications/8-balancing-privacy-other-interests/meaning-public-interest> accessed on 21/09/2017.

[165] Section 14 Federal Constitution of Nigeria, 1999; Paul Finn 'The Forgotten ''Trust'': The People and the State' in Malcom Cope (ed.), *Equity: Issues and Trends* (Federation Press 1995) 131-132; Peter Hutchins and David Schulze, 'When do Fiduciary Obligations to Aboriginal People Arise?' 59 *Saskatchewan Law Review*

the vicinity of oil and gas operations are prone to suffer higher magnitude of environmental damage from petroleum activities compare to the overall public. The vulnerability of the indigenous economic, social and cultural existence to the impacts of petroleum activities, ordinarily, creates a distinct fiduciary duty on governments of the host state[166] to recognition and protection of rights and interests of the concerned indigenous peoples/communities. A breach of this duty could undermine the legitimacy of the state's legal order.[167]

There are two general categories of indigenous rights: 'generic rights' and 'specific rights'. [168] While generic rights are standardised and available to all the indigenous peoples of a country in accordance with the country's constitution, specific rights are those distinctive to a particular indigenous group, determined by historical practices, customs, and traditions integrated to the culture of the group in question. Examples of generic rights include indigenous title and indigenous language rights.[169] There also two main approaches in determining the existence of indigenous rights, in common law: frozen right approach and dynamic right approach. Frozen right approach recognises practices, customs and traditions that existed from time immemorial.[170] This approach, however, overstates the impact of European influence on indigenous communities, crystallises customary practice as of an arbitrary date, and imposes a heavy burden on persons claiming indigenous rights even if evidentiary standards are relaxed.[171] In addition, it embodies inappropriate and unprovable assumptions about indigenous culture and indigenous societies.[172] Underlying the dynamic right approach is the

[1995] 67; Sandi Zellmer B., 'Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First', 43 *South Dakota Law Review* [1998] 388.

[166] This fiduciary relation differs from that between the host state and the overall public due to the particularity of indigenous rights and interests and by reasons of their unique economic, social and cultural ways of survival.

[167] Evan Fox-Decent, *Sovereignty's Promise* (Oxford University Press 2011) 2- 6.

[168] Brian Slattery, 'Varieties of Aboriginal Rights', 6 *Canada Watch* [1998] 71.

[169] Ibid 71.

[170] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 511.

[171] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 511.

[172] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 511.

premise that existing indigenous rights must be interpreted flexibly so as to permit their evolution over time. [173]

Generally, extractive policies are designed in ways that could encourage/boost private investments in their petroleum sector. In so doing, the host state usually takes precautions to protect the rights and interests of the overall public against impacts of petroleum operations. Equal measures should be taken in protecting rights and interest of the indigenous peoples/communities living at the vicinity of petroleum operations. In particular, international law requires host states to ensure the promotion of full realisation of the social, economic and cultural rights of the indigenous peoples/communities with respect for their respect social and cultural identity, their customs and traditions and their institutions.[174] Indigenous rights should be allowed to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. practices, customs, and traditions need not have existed prior to European contact.[175] States should consider indigenous rights and interests separately from those of the overall public and respect such rights interests as matter of diversity and richness of civilisations and cultures, which constitute the common heritage of humankind. [176]

[173] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 512.

[174] C169 Indigenous and Tribal Peoples Convention, 1989, art. 2(2)(b).
[175] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 512.

[176] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, preambles.

### 3.5 Rights of Indigenous Peoples to Self-Determination

International law recognises rights of indigenous peoples to self-identification[177] and self-determination.[178] By reason of the right to self-determination, indigenous peoples can freely determine their political status and freely purse their economic, social and cultural development.[179] Article 4 of the Declaration provides thus:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Historically, the notion of self-determination served the assertion of statehood and national identity at the expense of large multinational empires, like Hungarian, Ottoman, and czarist Russian.[180] It contributed to the dissolution of colonial empires; and, more recently, fuelled the unification of Germany, the disintegration of Yugoslavia, the collapse of the Soviet Union and its empire, and the breakup of Czechoslovakia. Struggles for autonomy and secession continue to be a source of conflict in Africa, Asia, and Europe. For example, there are ongoing self-determination conflicts in places as diverse as Chechnya, Kosovo, Sri Lanka, and Darfur, today.[181]

As a political principle, the idea of self-determination evolved at first as a by-product of the doctrine of nationalism, to which early expression was given by the French and American revolutions.[182] This political idea was initially articulated as a tool for maintaining order and

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[177] C169 Indigenous and Tribal Peoples Convention, 1989, art. 1(2).
[178] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 3.
[179] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 3.
[180] Wolfgang Danspeckgruber and Anne-Marie Garden, 'Self-Determination' in Encyclopaedia Princetoniensis < https://pesd.princeton.edu/?q=node/266>.

[181] Ibid.

[182] Encyclopaedia Britannica < https://www.britannica.com/topic/self-determination>.

spreading democratic principles in the early twentieth century.[183] As a twentieth century political ideology, self-determination could be closely identified with the United States President Woodrow Wilson, who first used the term publicly in 1918.[184] At the end of World War I, Wilson urged the principle of self-determination upon the remnants of the European Concert. The principle was purported to be the basis of the subsequent Versailles Peace Settlement of 1919.[185] Nonetheless, the search for self-determination and autonomy, today, need not necessarily or automatically cause the breakup of sovereign states or change external boundaries. Other solutions may satisfy the aspirations of the communities within the state looking for greater independence while enabling the state to continue existence within its current boundaries. [186]

There are two concepts of self-determination today: external self-determinations and internal-self-determination. Both external self-determination and internal self-determination have their basis under the auspices of the Charter of the United Nations to develop friendly relations among the Members of the international community on respect for the principles of equal rights, taking account of other appropriate measures to strengthen international peace;[187] and with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.[188]Article 1 (1)(2) of the Charter of the United Nations provides that:

[183] Danspeckgruber and Garden, ibid.

[184] Whelan, "Wilsonian Self-Determination and the Versailles Settlement" 43 ICLQ 99.
[185] Marija Batistich. 'The Right to Self-Determination and International Law' vol. 7 (4) Auckland University Law Review, 1995, 1016.

[186] Danspeckgruber and Garden (n 180).

[187] The Charter of the United Nations, art. 1 (2).
[188] The Charter of the United Nations, art. 55.

> The purpose of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and *to bring about by peaceful means, and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; to develop friendly relations among nations based on *respect for the principle of equal rights and self-determination of peoples,* and to take other appropriate measures to strengthen universal peace [emphasis added].

External self-determination refers to the right of secession of a group within a state. It is virtually as old as the concept of statehood itself.[189]Article 73 (b) of the Charter of the United Nations provides thus:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying i stages of advancement

External self-determination represents international commitment to acknowledge the progressive development of a group of people within a state towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.[190] Self-determination in this context means the right of a people to constitute itself in a state or otherwise freely determine the form of its association with an existing state. [191]

[189] Batistich (n 185) 1995, 1013.

[190] The Charter of the United Nations, art. 76 (b).
[191] The Charter of the United Nations, art. 76 (b).

Internal self-determination, on the other hand, is the right of peoples within a state to freely choose their political, economic, social, and cultural systems. The United Nations General Assembly Resolution 1514 (1960) – Declaration on Granting of Independence to Colonial Countries and Peoples thus provides:

> All peoples have the right to self-determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development.

Internal self-determination connotes commitments of the international community to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world;[192] and to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals. It also encompasses equal treatment for all peoples of a state in the administration of justice.[193] Article 1(1) of the United Nations General Assembly Resolution on International Covenant on Civil and Political Rights, adopted on 19 December 1966 provides that:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The rights of indigenous peoples to self-determinations is a claim for their internal self-determination. Particularly, internal self-determination is the right of the indigenous peoples/communities of a state to choose their economic, social and cultural destiny and take part in measures that advance their development interests, in accordance with the provisions Article 1 of the United Nations General Assembly Resolution (2200A (XXI)) on International

[192] The Charter of the United Nations, art. 76 (c).
[193] The Charter of the United Nations, art. 76 (d).

Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966[194] which provides, *inter alia*:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . . In no case may a people be deprived of its own means of subsistence . . . The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Although an exercise of the right to self-determination (in the general sense) could result to other outcomes, including the secession of a people of a state, the distinction between external self-determination and internal self-determination means that while external self-determination refers to the right of secession of a group within a state, internal self-determination refers to the right of indigenous peoples/communities to ensure their unique economic, social and cultural existence, as to have free say (and to participate) in choosing their developmental process.[195] Indigenous peoples and individuals, in contemporary international law, have rights to belong to an indigenous community, in accordance with the traditions and customs of the concerned community without discrimination.[196] The African Charter of Human and Peoples Rights, 19981 also requires governments of African states to ensure that they indigenous peoples within their jurisdictions achieve economic, social and cultural developments; to resolve problems of humanitarian character (with regards to indigenous issues); and to promoting and encouraging respect for human rights, including those of indigenous peoples of their states.[197]

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[194] Resolution 2200A (XXI) came into force on 3 January 1976 in accordance with article 27.
[195] Unrepresented Nations and Peoples Organization (UNPO), 'Self-Determination', 21 September, 2017, available at https://unpo.org/article/4957, accessed on 13/06/2019.

[196] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 9.
[197] The African Charter of Human and Peoples' Rights of 1981, art. 4; The Charter of the United Nations, art 1 (3); The Vienna Declaration and Programme of Action of 1993, art. 6; The Charter of Paris for a new Europe adopted in 1990, art. 5.

### 3.6 Right of Indigenous Peoples/Communities to Natural Resources

The right of indigenous peoples/communities to the natural resources underneath their native lands should not be confused with the right of ownership over the natural resources. Article 15 (1) of C169 provides thus:

> The rights of the peoples concerned [indigenous peoples/communities] to the natural resources pertaining to their lands . . . include the right of these peoples [indigenous peoples/communities] to participate in the use, management and conservation of these resources [emphasis added].

Ownership is of great functional and symbolic significance in the extractive industry. It entails a bundle of rights allowing someone ('the owner') to use, manage, and enjoy a property, including the right to convey it to others.[198] The owner of a property may grant some part of his right of ownership to some other person for a stipulated period of time and still retain the ownership,[199] particularly when he has perfect or unconditional ownership over the property.[200] However, ownership does not always mean absolute dominion.[201] Someone could have an imperfect right on a property[202] or even a right to possess it regardless of any actual or constructive control.[203] There are also instances where the owner of a property actually holds it in trust for a beneficiary of the property who has an equitable interest it.[204] Usually, during the exploration process, the legal owner retains ownership and control over the oil and gas.[205] This sub-section explores the concept of petroleum ownership in international law, and state

[198] GC Christie, 'What Constitutes a Taking of Property under International Law?*'* [1962] 38 British Year Book of International Law 307, 337.
[199] Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Malthouse Press 2003) 30-31.
[200] A person has perfect/complete bundle of rights to use, enjoy, and dispose of a property without limitation when his right over the property is unconditional.

[201] *Marsh v Alabama*, 326 U.S. 501, 506, 66 S.Ct. 278 (1946).
[202] One could have an imperfect or incorporeal in a property when his right of ownership is subject to a usufruct interest held by another.

[203] Garner (n 46) 1280.
[204] Garner (n 46) 1280.
[205] Samuel Asante, 'Restructuring Transnational Mineral Agreements' [1979] 73 American Journal of International Law 335, 339; Subhash Jain, *Nationalization of Foreign Property* (Deep & Deep 1983) 117.

and indigenous interests in a country's petroleum resources. Article 26 (1) of the Declaration provides that:

> Indigenous peoples have the *right to* the lands, territories and (natural) *resources* which they have traditionally owned, occupied or otherwise used or acquired [emphasis added].

International law recognises states ownership and control over their natural resources[206] as an important component of the modern right of sovereignty and right of self-determination[207] which originated as part of medieval natural law.[208] Article 7 of the United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962 states that:

> Violation of the rights of peoples and nations to sovereignty over their national wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of International Corporation and maintenance of peace.

A state could have complete ownership of the petroleum where there are national legislative measures to ensure that the petroleum rights remain or revert to state ownership.[209]Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States provides for four elements of a state: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states (including the ability to contract with legal or natural persons).[210] The definition of a state connotes each and every one of these elements. A state is an association of human beings established for the attainment of civilisation, peace, and order; or a community of peoples living within certain limits of a territory, under a permanent organisation which aims to secure the prevalence of justice by self-imposed law.[211] Therefore,

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[206] United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962.
[207] The right to self-determination, in this context, connotes external self-determination.
[208] Subrata Chowdhury, 'Permanent Sovereignty over Natural Resources' in Kamal Hossain Kamal (eds.), *Permanent Sovereignty over Natural Resources in International Law* (Frances Pinter 1984) 3; Nico Schrijver, *Sovereignty over Natural Resources* (Cambridge University Press 1997) 4-6; Jorri Duursma, *Fragmentation and the International Relations of Micro-States* (Cambridge University Press 1996) 7.

[209] Terrence Daintith, Discretion in the Administration of Offshore Oil and Gas (AMPLA: 2005) 305, 306.
[210] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933); James Brierly (5thed, Clarendon Press 1955) 118.
[211] John Salmond, *Jurisprudence* (10thedn. Sweet & Maxwell 1947) 129.

a state is made up of community of peoples living within a boundary defined in international law. While the community of peoples are the permanent population (or citizens) that make up the state, the government is an institution composing of some individuals who, in a democratic society, are elected into power by the citizens, or who in a non-democratic society, assumed power through any other means but election, and has the mandates to determine the laws and rules that govern the state's domestic affairs, to represent the interests of the state at home and abroad, and with the capacity of entering into a relationship with other states or private individuals on behalf of the people. It is possible for a state have a mineral system that could be perceived as a 'mixture of private and state ownership of natural resources.' Australia is an example of such jurisdictions.[212]

But, in whose benefit should the state exercise sovereignty over its petroleum resources? And on what terms should the state organise its petroleum ownership? In jurisdictions that practice state ownership of petroleum, the country's constitution usually makes provisions for how the state organise its petroleum ownership and on what terms. [213] The sovereignty of a state is that of the individuals who make up the state. Article 1 of Resolution 1803 (XVII) also provides that:

> The *right of the peoples* and nations to Permanent Sovereignty over t*heir* National Wealth and Resources *must be exercised in the interest of their national development and of the well-being of the people* of the State concerned [emphasis added].

Article 16 of Angola Constitution, 2010 provides that:

[212] In general, mineral rights in Australia are reserved to the Crown. Notwithstanding, in some cases the minerals may continue to be owned by the land owner. The acquisition of rights to minerals stems from separate legislative frameworks in each state of Australia. These frameworks provide initially for exploration of the resource and consist of the grant by the Crown in the form of minerals production leases or licences. The legislation also provides for the payment of royalties to the state and to compensate the owners or occupiers of the surface land. Austrade (Australian Trade and Investment Commission) [AU] https://www.austrade.gov.au/land-tenure/Land-tenure/mining-and-mineral-exploration-leases, accessed on 12/06/2019.

[213] NNPC v Famfa Oil Nigeria Limited [2012] 17 NWLR 149.

> The solid, liquid and gaseous natural resources existing in the soil and subsoil, in territorial waters, in the exclusive economic zone and in the continental shelf under the jurisdiction of Angola shall be the *property of the state*, which shall determine the conditions for concessions, surveys and exploitation, under the terms of the Constitution, the law and international law [emphasis added].

The Angolan state exercises jurisdiction and rights of sovereignty over the conservation, development and use of natural, biological and non-biological resources in the contiguous zone, the exclusive economic area and on the continental shelf, under the terms of the law and international law.[214] Exploitation of petroleum remains a priority for governments, as the revenue that comes from subsurface resource exploitation is a major source of foreign income for their economies. The oil industry is also a source of taxation revenue and employment, and offers the opportunity for the transfer of technology from developed to developing countries.[215] These are some of the essences for initiating the international principle of permanent sovereignty.

However, when international law refers to protection of the sovereign interest of a state, it also implies protection of the constitutional rights and interests of the public.[216] Accordingly, the constitution of Angola provides that sovereignty lies with the people. Sovereignty should be exercised in interest of the people.[217] It suffice to state that, although petroleum resources belongs to the state, they should be developed in the interest of the people. Section 44 (3) of the 1999 Constitution of Nigeria provides that:

> The entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive

[214] Angola Constitution, 2010, art. 3 (3).

[215] Alexandra S Wawryk, 'International Environmental Standards in the Oil Industry: Improving the Operations of Transnational Oil Companies in Emerging Economies', 1, available at http://ugandaoilandgas.com/linked/international_environmental_standards_in_the_oil_industry.pdf , accessed on 28/01/2018.

[216] Ernst-Ulrich Petersmann, 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Law?' in Wenhua Shan et al (eds.), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) 30-31.

[217] Angola Constitution, 2010, arts. 1 (1), 3 (1).

> Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.

Section 14 of the 1999 Constitution of Nigeria provides thus:

> Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority.[218]

When read in conjunction the preamble of the 1999 constitution of Nigeria, it is clear that the constitution requires the government of the federation to develop and manage the natural resources (including oil and gas) of Nigeria in the interest and welfare of the overall public. Thus, petroleum resources underneath land surfaces belong to the state; to be developed and managed in the benefit of the overall public, in accordance with the principle of permanent sovereignty over natural resources. However, this does not necessarily grant the state sovereign right of owner over the surface right, though ownership of surface right is, *prima facie*, determine by the constitution and municipal laws of the oil producing state. Generally, the owner of a land is entitled to all that is located above and below the land in accordance with the principle of *cujus est solum ejus est usque ad colum et usque ad inferos*. However, it is legally possible to separate ownership of mineral naturally occurring below the land from ownership of the surface right. This principle is recognised in common law by which ownership of the mineral below the land could be passed to the crown (otherwise the state). But this does not automatically imply that the crown also has ownership of the surface right.[219] The Declaration does not contradict the principle of permanent sovereignty over natural resources. It rather seeks to protect surface rights of indigenous peoples and impacts of petroleum operations on native lands. Thus, Article 15 (2) of C169 provides:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining

[218] Section 14 (2) (a).
[219] R v Earl of Northumberland (1865) 75 ER 473.

> whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

### 3.7 Rights of Indigenous Peoples/Communities over Native Lands

Hundreds of years ago, the English law recognised the rights of indigenous people to manage and own their lands.[220] This law is based on the fundamental principle of common law which provides that the inhabitants of a territory, with prior possession of land, had native title in the lands they acquired through their ancestors; and to retain that land against newcomers.[221] Nevertheless, in the eighteenth and nineteenth centuries, the economic and political requirements of the British Empire justified settlement in the form of radicalised nation-building (based on the principle of 'terra nullius'[222]) which ignored native title to land.[223] Britain was not the only country which acquired colonial territories with the principle of terra nullius. France, The Netherlands, Portugal, and Spain all used the same principle to take over the Indigenous lands in Africa, America, Australia, and other parts of the world which they colonised and built their empires. The principle of terra nullius became essential for Western countries to avoid conflict among themselves and agree on a set of rules to determine which of

[220] Paul Havemann, ed., *Indigenous Peoples' Rights* (Oxford University Press, 1999) 6.

[221] It is important to recognise the distinction between sovereignty of a country and ownership of the land in this context. For example, the parliament has the sovereign power to enact laws regulating the affairs of a country, but indigenous communities retain their rights of ownership over their communal lands and until such time as the parliament passes a valid law to the contrary, they are entitled under the law of their customs to possession communal lands to the exclusion of everyone else including the government.

[222] The term 'terra nullius' is Latin and literally means 'land of no one' (meaning nobody's land or land without an owner). This was an important concept in the system of International Law which was in force in the late Eighteenth Century; and by which European powers occupied the lands they colonised. By the doctrine of terra nullius, the European powers were entitled to claim the new uninhabited lands they discovered as part of their empires. Sometimes, newly discovered lands were not literally uninhabited, but were occupied by people whom the Europeans called 'savages' or 'primitive' people. This proved no barrier to European expansion.

[223] Havemann (n 220) 6-7.

them had authority over newly discovered territories, to establish their sovereign powers over the newly discovered lands.[224]

Land is commonly considered as the property of the original settlers and belonging to the past, the present, and the future generations in Africa.[225] European arrival and their influences on indigenous cultures should not be used to deprive indigenous people of otherwise valid claim to native titles. History is an important factor in determining the existence of indigenous rights. The question of historical existence of indigenous rights prior to a specific date and length of time are necessary for an indigenous activity to be recognised as a right. However, a practice, custom, or tradition will not meet the standard for recognition as indigenous right where it arose solely as a response to European influences.[226] Nevertheless, customary use of land need not be traceable to pre-contact times for the land to be qualified as native title.[227]

International law recognises rights of indigenous peoples/communities to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[228] This right includes rights of indigenous peoples/communities to own, use, develop and control the lands that they possess by reason of traditional ownership or other traditional occupation or use.[229] Article 14 (1) of C169 provides:

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[224] Jeff Kildea, ' Native Title: A Simple Guide Paper for those who wish to understand Mabo, the Native Title Act, Wik and the Ten Point Plan', Human Right Council of Australia November 1997, revised July 1998, available at < http://www.hrca.org.au/wp-content/uploads/2008/05/native-title-a-simple-guide.pdf> accessed on the 28 August 2016.

[225] Taslim Olawala Elias, Nigeria Land Law (4th ed.), (Sweet and Maxwell 1971) 147.
[226] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 508.

[227] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 509.

[228] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art.25; C189 Indigenous and Tribal Peoples Convention, 1989, art. 13(1).
[229] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 26.

> The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Indigenous right of ownership over native land should not be confused with native title. Native title is a sub-category of indigenous rights which deals solely with land claims. [230] First, while right of ownership by indigenous peoples over native land usually arise from prior occupation of lands by indigenous peoples before European arrival,[231] native title entails rights of indigenous peoples to: (a) live on the area; (b) access the area for traditional purposes, like camping or to do ceremonies; (c) visit and protect important places and sites; (d) hunt, fish and gather food or traditional resources like water and wood without the need for a licence or permit; (e) teach law and custom on country. Native title does not confer right of ownership over native lands. Secondly, native title derives legal existence from government grants of titles over lands. However, the existence of rights of ownership by indigenous peoples over native lands are generally determined by historical occupations, traditional systems of land ownership, and customary laws. [232] Thus, native title could be revoked by the authority that granted them and/or be surrender to the state in accordance with relevant provisions of the state's legislations. In addition, there are instances where native title grants indigenous peoples rights of possession and occupation of certain lands, to the exclusion of other parties. However, the existence of such rights and their scopes and limits are *prima facie* determined by municipal legislations. Furthermore, exclusive possession does not imply native ownership of the land in question. Exclusive possession simply confers rights on indigenous peoples to control access to particular native lands in their possession and/or certain area of the native lands they occupy.

[230] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 513.

[231] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 513.

[232] Ibid.

Exclusive rights are, usually, granted on native lands used for certain sacred traditional ceremonies.[233] It does not constitute rights of ownership by indigenous peoples over lands with status of exclusive possessions.

Article 26 (3) of the Declaration obliges states implement their commitments to the Declaration by giving legal recognition and protection to rights of ownership by indigenous peoples/communities over native lands in their jurisdictions. National legislative mechanisms[234] which aim to implement states international commitments to the recognition of rights ownership by indigenous peoples/communities over native lands should also acknowledge and take into account the existing correlation between effective implementation of the right and the customs, traditions and land tenure systems of the concerned indigenous peoples/communities.[235] Article 10 of the Declaration provides that:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Dispossession of native lands is an infringement of the right of ownership by the concerned indigenous peoples/communities over their native lands in international law. Article 8 (2) of the Declaration thus provides:

> Any action which has the aim or effect of dispossessing them of their lands, territories or resources.[236] Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.[237]

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[233] Deane Fergie 'Native Title Act 1993' available at https://www.adelaide.edu.au/legalandrisk/docs/resources/Native_Title_101.pdf accessed on 09/09/2018.

[234] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 8 (2).

[235] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art.26 (3).

[236] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 8 (2)(b).

[237] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, art. 8 (2)(c).

Legislations and/or policies designed to dispossess native lands ownership could result to denial of significant participation of indigenous communities in their own development leading further to impoverishment of the concerned indigenous peoples/communities.[238] Article 27 of the Declaration thus:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

With particular reference to rights of ownership of indigenous peoples/communities of Africa, Article 22 (1) of the African Charter on Human and Peoples' Rights provides that:

> All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Land is the essence of living for the indigenous peoples of Africa, and is perceived as the right to pursue their economic and social development according to the policy they have freely chosen.[239] It includes their right to a general satisfactory environment that is favourable to their development.[240] Thus, the dispossession of native lands threatens the economic, social, and cultural survival of the indigenous peoples/communities of African states and contradicts the recognition of their right to development under the African Charter on Human and Peoples Rights.[241] However, municipal enactments with effects of dispossessing native lands do not breach rights of ownership by indigenous peoples/communities over their native lands in

[238] African Commission on Human and Peoples' Rights (ACHPR), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (ACHPR: 2005) 14.

[239] Article 20 African Charter on Human and Peoples Rights.
[240] Article 24 African Charter on Human and Peoples Rights.
[241] African Commission on Human and Peoples' Rights (ACHPR), Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (ACHPR: 2005) 20-21.

international law if: (a) the enactment has compelling requirements; (b) the provisions of the same enactment applies to rights of ownership by the overall public over lands in the state; (c) the enactment does not discriminate against a set of group of the overall public;[242](d) the enactment also provides for rights to redress; and (e) the enactment provides mechanisms for just, fair and equitable compensation for individuals dispossessed of their lands.[243] Where dispossession of native lands are considered necessary as an exceptional measure, the concerned indigenous peoples/communities shall be relocated if necessary. However, such relocation shall take place only with their free and informed consent of the concerned indigenous peoples/communities Where their consent cannot be obtained, the relocation shall only be taking place under appropriate procedures established by national laws and regulations, including:[244]

1. public inquiries where appropriate, which provide the opportunity for effective representation of the peoples/communities concerned.

2. Whenever possible, the peoples/communities shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

3. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples

[242] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 46 (1).
[243] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 28.
[244] C169 Indigenous and Tribal Peoples Convention, 1989, ar. 16.

concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

4. Persons thus relocated shall be fully compensated for any resulting loss or injury.

### 3.8 Right of Indigenous Peoples to Conservation and Protection of the Environment

The Declaration recognises the right of indigenous peoples/communities to the conservation and environmental protection. [245] There is an existing correlation between environmental protection and the productivity of native lands. [246] Oil producing states have obligation in international law to ensure that the rights of indigenous peoples/communities (living at the vicinity of petroleum operations) to conservation and environment are protected from impacts of petroleum activities within their jurisdictions.[247]

Generally, what constitutes environmental indigenous right depends on the petroleum regime of the host state. Judicial precedence and interpretations by the courts of what constitutes breach of rights to conservation and protection of environment further play pivotal roles, particularly in common law jurisdictions.[248] For example, in *R v Pamajewon*,[249] where an aboriginal community of Canada alleged breach of their rights to manage the use of their reserve lands, the Supreme Court characterised the alleged environmental right as 'the right to participate, and regulate, high stakes gambling activities', rather than right to manage use of reserved lands. In *R v Smokehouse*,[250] one of the judges characterised the claimed

[245] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 29 (1).
[246] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 29 (1).
[247] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 29.
[248] McClenaghan (n 261) 5.
[249] *R v Pamajewon* [1990] 2 S.C.R. 821; [1990] S.C.J. N0. 20 (Q.L.).
[250] *R v Smokehouse* [1996] 2 S.C.R. 672.

environmental right as 'trading fish for livelihood, support and sustenance' rather than characterising it as commercial fishing as the majority did.

In March 2016, the Republic of Colombia requested the Inter-American Court of Human Rights to clarify the scope of state responsibility for environmental harm under the American Convention on Human Rights,[251] particularly in light of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and customary international law.[252] Article 1 of the Convention provides thus:

> The states parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedom, without any discrimination for reasons of race, color, sex, language, region, political or other opinion, national or social origin, economic status, birth, or social condition. For the purposes of this Convention, 'persons' means every human being.

Article 2 provides that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not ensured by legislative or other provisions, the state parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Article 4 of the Convention covers rights to life. It provides, inter alia, that every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrary deprive of his life.[253] Article 5 provides further that 'every person has the right to have his physical, mental and moral integrity respected.' The Colombian request to the Inter-American Court of Human Rights was on state obligations in relation to the environment in the context of the protection and guarantee of the

[251] Request for Advisory Opinion CC-23, Inter-Am. Ct. H.R. (Mar. 14, 2018), available at http://www.corteidh.or.cr/cf/Jurisprudencia2/solicitud_opiniones_consultivas.cfm?lang=en .
[252] The Colombian Request, ibid, 2-3.
[253] American Convention on Human Rights, art, 4 (1).

rights to life and to personal integrity recognised in Article 4 and 5 of the Convention, in relation to Article 1 (1) and 2 of the Convention. In its request, Colombia posed the following questions, that pursuant to Article 1 (1) of the Convention, should it be considered that a person, even if he or she is hot within the territory of a state party, is subject to the jurisdiction of that state in the specific case in which the following four conditions are met cumulatively?

1. that the person resides or is inside an area delimited and protected by a treaty-based environmental protection regime to which that state is party;
2. that said treaty-based regime establishes an area of functional jurisdiction, such as the one established by the Convention for the protection and development of the marine environment in the wider Caribbean region;
3. that, in this area of functional jurisdiction, state parties have the obligation to prevent, reduce and control pollution as the result of a series of general and /or specific obligations, and
4. that, as a result of damage to the environment or the risk of environmental damage in the area protected by the given convention and to the American Convention of Human Rights -, the human rights of the person in question have been violated or are threatened.

The issues to be determined also include: whether conducts and measures or actions and/or omissions of one of the state parties, which may cause serious damage to the marine environment – that constitutes the living environment and an essential source of livelihood for the inhabitants of the cost and/or islands of another party – compatible with the obligations set out in the Articles 4 (1) and 5 (1) of the Convention or any other permanent provisions. The Court recognised the existence of an irrefutable relationship between the protection of the environment and the realisation of other human rights, due to the fact that environmental degradation affects the effective enjoyment of other human rights. In addition, the Court emphasised the interdependence and indivisibility between human rights, the environment and

sustainable development, since the full enjoyment of all human rights depends on a favourable environment. Based on this close connection, the Court noted that currently: (a) numerous human rights protection systems recognise the right to a healthy environment as a right itself, and at the same time, there can be no doubt that (b) numerous other human rights are vulnerable to environmental degradation, all of which results in a series of environmental obligations for states to ensure that they comply with their duties to respect and ensure those rights.

Accordingly, the Court observed that environmental right is a fundamental human right. Everyone should have the right to live in a healthy environment. States have responsibility to promote. preserve, and improve the environment.[254] Many central elements of the Court's Opinion, including the nature of the requisite causal nexus, the level of due diligence, and the scope of exterritorial duties, remain to be clarified in future litigation. Howbeit, the Opinion is likely to have significant implications in face of recent impact of climate change on human rights.[255]

Host states have international obligation to establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.[256] In implementing their international commitment to protect conservation and environmental rights of the indigenous peoples/communities living in the vicinity of petroleum operations within their jurisdictions, governments should take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples

[254] Request for Advisory Opinion CC-23, Inter-Am. Ct. H.R. (Mar. 14, 2018), available at http://www.corteidh.or.cr/cf/Jurisprudencia2/solicitud_opiniones_consultivas.cfm?lang=en
[255] Maria L. Banda, 'Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights', Vol. 22 (6) *American Society of International Law* [2018] available at https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human .
[256] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 29 (1).

without their free, prior and informed consent.[257] Article 29 (3) of the Declaration further provides:

> States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Thus, special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the indigenous peoples/communities concerned, at national level. Such measures should not be contrary to the freely-expressed wishes of the indigenous peoples/communities concerned.[258]

### 3.9 Rights of Indigenous Peoples to Free, Prior and Informed Consent

The quest for rights to free, prior and informed consent - with particular reference to petroleum operations, environment degradation and rights of indigenous peoples/communities- relate to the concept of environmental justice which concerns issues of environment and social injustice.[259] The concept of environmental justice emanated from the United States in order to tackle the perceived inequities in distribution of environmental hazardous waste sites.[260] Since then, the notion of environmental justice has become very broad and is now applied to a widening spectrum of serious social concerns, particularly those related to communities that

[257] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 29 (2).
[258] C169 Indigenous and Tribal Peoples Convention, 1989, ar. 4.
[259] Carolyn Stephens, Simon Bullock and Alister Scott, 'Environmental justice Rights and Means to a Healthy Environment', E S R C G l o b a l E n v iron n m e n t a l C h a n g e P or g r a m me, Special Briefing No 7 November 2001, 1 available at https://friendsoftheearth.uk/sites/default/files/downloads/environmental_justice.pdf accessed on 10/09/2018.

[260] C Lee 'Developing the vision of environmental justice: A paradigm for achieving healthy and sustainable communities' 14 Virginia Environmental Law Journal [1995] 573 at 573–75; R Bullard 'Solid wastes sites and the black Houston community' 53/2–3 Sociological Inquiry [1983] 273 at 273–88; United Church of Christ (UCC) Toxic Wastes And Race in the United States: A National Report on The Racial and Socio-Economic Characteristics with Hazardous Waste Sites (1987, UCC, Commission for Racial Justice); and US General Accounting Office Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities (1983, US General Accounting Office).

suffer from social inequity attributed to by environmental inequalities.[261] Environmental justice is defined by the United States Environmental Protection Agency (EPA) as the fair treatment and meaningful involvement of all people, regardless of race, colour, national origin, culture, education, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.[262] No group of the overall public of a state should bear a disproportionate share of the negative environmental consequences resulting from petroleum operations within its jurisdiction.[263] The contextual ascription of the concept of environmental justice in the United Kingdom seems slightly different from the United States connotation., though The United Kingdom context of environmental justice has two dimensions.[264] The first is that deprived communities, which may be more vulnerable to the pressures of poor environmental conditions, should not bear a disproportionate burden of negative environmental impacts. Secondly, all communities should have access to information and to means of participating in decisions which affect the quality of their local environment.[265] While the EPA definition of environmental justice takes cognisance of and emphasises the different categories of ethnic and racial groups, the United Kingdom definition is substantive in nature, concentrating on the protection of 'deprived communities'. [266] However, both perspectives capture the core essence of environmental justice which recognises that:

[261] Ako (n 143).

[262] United States EPA, http://www.epa.gov/compliance/resources/faqs/ej/index.html#faq1 (accessed on 22 March 2017).

[263] Ibid.

[264] Carolyn Stephens, Simon Bullock and Alister Scott, 'Environmental justice Rights and Means to a Healthy Environment', E S R C G l o b a l E n v iron n m e n t a l C h a n g e P or g r a m me, Special Briefing No 7 November 2001, 1 available at https://friendsoftheearth.uk/sites/default/files/downloads/environmental_justice.pdf accessed on 10/09/2018.

[265] National Environmental Justice Advisory Council: Indigenous Peoples Subcommittee, 'Meaningful Involvement and Fair Treatment by Tribal Environmental Regulatory Programs' (NEJAC 2004) 5.

[266] Stephens, Bullock and Scott, ibid.

1. potentially affected communities should have appropriate opportunity to participate in decisions about proposed economic activities (such as petroleum operations) that will affect their environment, health and economic, social and cultural existence.
2. the public's contribution (particularly the contribution of the potentially affected communities) should assist in influencing decisions of public/private environmental regulatory agencies.
3. the concerns of all participants involved (with particular reference to potentially affected indigenous peoples/communities) should be considered in the decision-making process.
4. Environment decision-makers seek out and facilitate the involvement of those potentially affected.[267]

The essence of the concept of environmental justice relates with right of indigenous peoples/communities to free, prior and informed consent within the text of the Declaration. Indigenous peoples/communities living at the vicinity of petroleum operations have the to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision- making institutions.[268] Article 19 of the Declaration provides:

> States shall *consult and cooperate in good faith* with the indigenous peoples concerned through their own representative institutions *in order to obtain their free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them [emphasis added].

Indigenous peoples/communities, living the vicinities of petroleum operations and whom rights and interests could be affected by proposed petroleum operations, have rights in international

[267] http://www.epa.gov/compliance/resources/faqs/ej/index.html#faq1 (accessed on 22 March 2017).
[268] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 18.

law to determine and develop priorities and strategies for exercising their right to development. This right includes their right to be actively involved in developing environmental policies and determining ways to ensure that the proposed petroleum operations would not affect their native land or ways of protecting their economic, social and cultural existence from impacts of proposed petroleum operations on their native lands.[269] Article 32 (1) of the Declaration provides that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Consultation with the concerned indigenous peoples/communities should be done in good faith. Indigenous peoples/communities should be enlightened on the nature of proposed petroleum projects on their native lands and potential impacts of the operational activities on the economic, social and cultural existence. The host state should advise the national oil company and private oil companies in charge of the project to consult with and obtain free consent of the concerned indigenous peoples/communities before the project is approved.[270] The host state should further provide effective legal mechanism for just and fair redress any such petroleum operations. Appropriate measures should be taken to mitigate adverse environmental impacts on the economic, social and cultural existence of the concerned indigenous peoples/communities as result of the petroleum operation on their native land.[271] The international community shall cooperate with host states to promote respect for and full

[269] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 23.
[270] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 32 (2). United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 32 (2).
[271] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 32 (3).

application of the provisions of the Declaration and follow up its effectiveness at national levels.[272] The Declaration provides thus:

> States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.[273]

There should established ways and means of ensuring participation of indigenous peoples/communities on issues affecting them.[274] The host state should make sure that its indigenous peoples/communities benefit on equal footings from rights and opportunities which national laws and regulations grant to other members of the population.[275] Article 2 (1) of C169 provides further that:

> Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

However, effectiveness of the Declaration at national levels is subject to the host state's legal approach towards recognition of indigenous rights and interests within its jurisdiction, insofar any form of limitation is non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.[276] The Declaration's shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.[277]

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[272] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 42.
[273] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September, 2007, art. 38.
[274] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 41.
[275] C169 Indigenous and Tribal Peoples Convention, 1989, ar. 2(2).
[276] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 46 (1).
[277] United Nations General Assembly Declaration on the Rights of Indigenous Peoples, Resolution 61/295, adopted on 13 September 2007, art. 46 (3).

## 3.10 Conclusions

International law acknowledges rights of indigenous peoples/communities to: (a) economic, social, and cultural existence; (b) self-determination; (c) ownership over native lands; (d) access to natural resources; (e) conservation and environmental protection; and (f) free prior and informed consent. Indigenous right to self-determination in international law is the right of indigenous peoples/communities to internal self-determination. Unlike the right to external self-determination in international law, the right to internal self-determination does not relate to a right of secession from an existing state. It is the right of indigenous peoples/communities to identify themselves as group of individuals (within their existing state) with common historical tradition; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and economic existence, a common historical tradition.

There are two general categories of indigenous interests: 'generic interests' and 'specific interests.' While generic interests are standardised and common to all communities of a state, specific interests are those distinctive to a group of peoples/communities, usually determined by direct or indirect impact of environmental degradation on their specific economic, social and cultural existence. Indigenous interest in petroleum operations refers to the specific interests of indigenous peoples/communities living at the vicinity of petroleum operations. International law acknowledges states' ownership and control over the petroleum resources within their jurisdictions. But, subject to the municipal legislations of the host state, the state's recognised right over the petroleum resources in international law does not include surface ownership of native lands whereunder the petroleum is discovered and upon which petroleum operations are conducted. International law further recognises the rights of the concerned indigenous peoples/communities to be duly consulted and requires governments and oil companies to ensure that their consent is obtained prior to commencement of petroleum

operations on their native lands. However, the international standards for protection of rights and interests of indigenous peoples/communities at national levels require municipal legislations modelled in accordance with the provisions of international law in this area.

## CHAPTER 4

# LEGISLATIVE ELEMENT OF PETROLEUM REGIMES, ENVIRONMENTAL REGULATIONS AND PETROLUEM OPERATIONS IN ANGOLA AND NIGERIA

## 4.1 Introduction

Legal regulation is a principle or law designed to control or govern conducts.[278] This Chapter assesses regulation as an aspect the legislative element of petroleum regime, with reference to petroleum operations and environmental regulations. The legislative framework for petroleum development provides the basic context and rules for governing petroleum activities in host states. Legislative framework also regulates the companies conducting petroleum operations, whether they are foreign, international or municipal oil companies. In addition, it defines the principal economic and fiscal guidelines for investment activity in the petroleum sector of the state as a whole.[279] Many factors led to the growth of environmental regulation in the 1960s and 1970s, including the perceived failure of pre-existing institutions to provide adequate levels of environmental protection. In the decades following World War II, state governments began enacting broad regulatory schemes to control the environmental effects of private industrial activity.[280] Recent environmental regulations are perceived as solutions for many of society's ills and means of protecting people from inherent risks of daily life, including petroleum operations involving physical damages to health and property, and economic losses. Perhaps

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[278] Tina Hunter, 'Offshore Petroleum Regulatory Frameworks of Australia and Norway', Oil, Gas & Energy Law Intelligence (2010), available at < https://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1351&context=law_pubs >, 48, accessed on 14/07/2018.

[279] Ibid 59.

[280] Jonathan H. Adler and Andrew P. Morriss, 'Symposium: Common Law Environmental Protection – Introduction', Case Western Reserve Law Review, Vol. 58, Issue 3 [2008], 575.

the most fundamental forces behind the recent growth in regulation are increasing changes in societal needs and expectations.[281] In its comments about what constitutes best practice regulation of a state's petroleum industry, the Australia Productivity Commission Research on the Upstream Petroleum (Oil and Gas) Sector, 2009 said that:

> The overarching objectives of regulation should be to achieve *desired outcomes* more efficiently than would be achieved by alternatives, including no regulation. . . Best practice regulations imposes the least burden necessary to achieve the underlying policy goals, bringing the *greatest possible net benefit to the community* [emphasis added].[282]

A *World Bank Policy Research Paper* demonstrates that, in order to foster the development of petroleum resources in a state, the state's elements of petroleum legislative framework should be, *inter alia*, complemented by enabling regulations and a model contract that states a clear legal and contractual context to develop the petroleum resources of the state.[283] The outcome of a best practice regulation should, *prima facia*, focus on attaining greatest possible net benefit to the community (otherwise the public). In addition to the test of greatest net benefit to the community, the Austrian Regulatory Taskforce in its 2006 report, *Rethinking Regulation*, enumerated five other tests for determining the quality of a regulation, including the necessity of the regulation and consultation on its design and administration.[284] Lack of expertise and poor enforcement and administration could impair the effectiveness of an ordinarily well-

[281] Regulation Taskforce 2006, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Report to the Prime Minister and the Treasurer, Canberra, January, available at http://www.pc.gov.au/research/supporting/regulation-taskforce/report/regulation-taskforce2.pdf accessed on 28/08/2018.

[282] Productivity Commission 2009, Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector, Research Report, Melbourne, 34 available at https://www.pc.gov.au/inquiries/completed/upstream-petroleum/report/upstream-petroleum.pdf accessed on 28/08/2018.

[283] William Onorato, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (1995) *World Bank Policy Research Working Paper*, 2.

[284] Regulation Taskforce 2006, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Report to the Prime Minister and the Treasurer, Canberra, January, available at http://www.pc.gov.au/research/supporting/regulation-taskforce/report/regulation-taskforce2.pdf accessed on 28/08/2018.

designed regulation.[285] To achieve necessity, fairness, effectiveness, and enjoyment of a broad degree of public confidence, the United Kingdom Better Regulation Task Force in its 2003 Draft on *Principles of Good Regulation*, explained that a regulation should have: (1) proportionality; (2) accountability; (3) consistency; (4) transparency; and (5) targeting.

This Chapter focuses on the petroleum legislative frameworks of Angola and Nigeria. Angola and Nigeria are Sub-Saharan Africa petroleum producing states while Australia and Norway are developed petroleum producing states. Angola is a civil law jurisdiction; Norway is neither civil or common law jurisdiction, and Australia and Nigeria are states of the common law jurisdiction. This Chapter uses the functional approach in comparative analysis, to examine the similarities and differences in the regulatory frameworks of the petroleum elements of the four states. The aim is to determine the adequacy of petroleum regulation, as an aspect of the legislative element of petroleum regime, in addressing the issues of petroleum operations, environmental regulation and protection of rights and interests of indigenous communities in African oil producing states. It should be emphasis from this onset that this Chapter does not intend to investigate the best regulatory regime for the petroleum industries of host states. Rather, it delves into the legislative element of the petroleum regimes of developing countries (like Angola and Nigeria) compared to developed countries like Australia and Norway, with the view of accessing the reasons why recent regulatory frameworks of developing countries are not sufficient in dealing with the contemporary environmental challenges. Acknowledging the fact that the states of study fall under three categories of jurisdictions – Angola a civil law jurisdiction, Australia and Nigeria both common law jurisdictions and Norway which is neither a civil law jurisdiction nor a common law jurisdiction - there are general concerns when comparing laws of these different category of jurisdiction. However, this does not apply in all

[285] Productivity Commission 2009, Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector, Research Report, Melbourne, 33.

areas of law. Some areas of law, including petroleum law, transcend municipal legal systems, making them areas of 'transnational law'.[286] The common law also plays significant roles in environmental litigations today. Accordingly, this Chapter further examines the role of the common law as a legal instrument with ability to repair the effects of environmental harm, particularly in common law jurisdictions that lack sufficient environmental legislations to this effect.[287]

## 4.2 Legislative Regime of Petroleum Operations and Environmental Regulations in Angola

The Angolan state determines the conditions for concessions, surveys and exploitation, under the terms of the Constitution, the law and international law.[288] Law No. 13/78, of 26 August 1978 of Angola constituted a landmark in the country's petroleum legislation, setting forth the fundamental principles regulating exploitation of the country's petroleum potential in the post-independence years. Although it is still considered up-to-date in its general outline, the state decided to revise the Law in order to enrich and update the content of its petroleum industry. The current petroleum legislation is Law No. 10/04, of 12 November 2004, which maintains the fundamental principle of state ownership of petroleum resources enshrined in the Constitution of Angola, and the country's concessionaire regimes. Law No. 10/04 retains a number of other principles contained in Law No. 13/78, which are still valid in the Angolan legal system. In this context, Law No. 10/04 envisages to safeguard, *inter alia*, the following principles of economic and social policy for the country's petroleum sector, namely: the

[286] Hunter (n 278) 43.

[287] For example, the case of *Akpan and Others v RDS and SPDC*, Case Number/Docket Number: C/09/337050/HA ZA 09 – 1580, involved parties from two jurisdictions (Nigeria – common law jurisdiction and The Netherlands – civil law jurisdiction). The alleged tort took place in Nigeria, but the action was instituted in The Netherlands. The Dutch court significantly relied on the common law principles of torts in arriving at its decision.

[288] Constitution of the Republic of Angola, 2010, art. 16.

protection of the national interest, the promotion and development of the employment market and the valorisation of mineral resources, the protection of the environment and the rational usage of petroleum resources and the increase of Angola competitiveness on the international market. The parliament further included a number of other issues of recognised importance for the Angolan oil industry in Law No. 10/04 in order to bring it into line with the most recent changes in Angolan petroleum law and in international law.[289] The main objective of Law No. 10/04 is to establish the rules of access to and the exercise of petroleum operations in the available areas of the surface and subsurface areas of the Angolan national territory, inland waters, territorial waters, exclusive economic zone and the continental shelf, and other petroleum activities, including the refining of crude oil and the storage, transportation, distribution, and marketing of petroleum shall be regulated by separate law.[290]

### 4.2.1 Rights to Conservation and Environmental Protection in Angola

When conducting petroleum operations in Angola, oil companies and petroleum operators are required to comply with relevant municipal environmental laws and regulations and to ensure that oil and gas operations are conducted in accordance with good oil industry techniques and practices. Article 7 of the Angolan Petroleum Activities Law provides thus:

> The licensees, the National Concessionaire and its associates shall conduct and execute, or cause to be executed, the petroleum operations, in a regular and continuous manner and in compliance with applicable laws, regulations and administrative decisions and the good oil industry techniques and practices.

Petroleum operations in Angola are to be conducted in prudent manners considering the safety of persons and facilities, as well as the protection of the environment and the conservation of nature.[291] Oil companies are required to execute petroleum operations in diligent manners using

[289] Angola Petroleum Activities Law, preamble.
[290] Angola Petroleum Activities Law, art. 1.
[291] Angola Petroleum Activities Law, art. 7 (2).

the most appropriate human and technical resources in compliance with the law, the prospecting license, and the concession decree.[292] Thus Article 21 of the Petroleum Activities Law provides that:

> The mining rights granted hereunder carry the obligation to explore and produce petroleum in a rational manner, in accordance with the most appropriate technical and scientific practices used in the international petroleum industry and in accordance with the national interest. The National Concessionaire and its associates shall be subject to the specific obligations described in the preceding paragraph, together with the general obligations to preserve petroleum deposits or reserves; the breach of such obligations shall be subject to the penalties established by law and regulations.

Both private oil companies and the NOC are required to take necessary precautions to protect and preserve the environment, with particular reference to health, water, soil and subsoil, air, the preservation of biodiversity, flora and fauna, ecosystems, landscape, atmosphere and cultural, archaeological and artistic heritage. They are obliged to submit to the supervising ministry the plans required by applicable law, specifying the practical measures which should be taken in order to prevent harm to the environment, including environmental impact studies and audits, plans for rehabilitation of the landscape and structures or contractual mechanisms and permanent management and environmental auditing plans.[293] The environmental impact study which is usually required to be conducted prior to commencement of petroleum projects, one of the mechanisms of ensuring protection of the rights and interests of the indigenous communities living at the vicinity of the proposed project. In addition, the NOC and licensees who are engaged in the project are required to repair any damage they might cause to third parties (including the indigenous communities) during the execution of the petroleum project.[294]

[292] Angola Petroleum Activities Law, art. 7 (3).
[293] Angola Petroleum Activities Law, art. 24.
[294] Angola Petroleum Activities Law, art. 25.

Although Law No. 10/04 provides that petroleum operations are to be conducted in accordance with the most appropriate technical and scientific practices used in the international petroleum industry and in accordance with the national interest, it, however, does not specify the international petroleum standard to be applied in Angola. Furthermore, the law does not make detailed provision regarding the rights of third parties (including indigenous communities) who might be directly affected by the petroleum operations, although it states that petroleum operators should be liable to harm caused to third parties by their activities. Nevertheless, environmental rights are fundamental human rights in Angola. Article 39 of the Angolan 2010 Constitution provides that 'everyone has the right to live in a healthy and unpolluted environment and the duty to defend and preserve it'.

The Constitution further professes the existing correlation between sustainable development and environmental protection, and, thus requires the state to ensure that the use of Angolan natural resources (including the country's oil and gas) is within the context of sustainable development and respect of the environmental rights of present and future generations. Petroleum operations that endanger conservation of the environment would be punished in accordance with relevant Angolan legislations.[295] Although the state is not liable for losses or damage of any type or nature, including, but not limited to, losses and damage to property or compensation payable to persons for death or accident, caused by or resulting from any petroleum operation,[296] it could be constitutionally liable where the alleged losses or damage resulted from direct act of government or actions taken be governmental establishments and representatives. Article 75 of the Constitution provides thus:

> The State and other public corporate bodies shall be jointly and civilly liable for any actions and omissions committed by their organs, their respective officeholders, agents and staff in the exercise of their legislative, judicial and administrative duties or as a

[295] Angola Constitution 2010, art. 39.
[296] Angola Petroleum Activities Law, art. 25.

> result of the said duties which result in the violation of rights, freedoms and guarantees or in losses to those entitled to them or third parties.

### 4.2.2 Rights of Indigenous Communities to Conservation and Environment in Angola

The state's obligation to protect the environment and national interests includes the protection of rights and interests of indigenous communities against the impacts of petroleum operations that could potentially endanger their cultural and historic identities in Angola. Thus, Article 87 of the Constitution provides thus:

> Citizens and communities shall have the right to the respect, appreciation and preservation of their cultural, linguistic and artistic identity. The state shall promote and encourage the conservation and appreciation of the historic, cultural and artistic heritage of the Angolan people.

Furthermore, the state has exclusive constitutional responsible to regulate the economic activities of Angola, in addition to the conditions for accessing the various economic activities.[297] The role of the state as the regulator of the economy is to coordinate a balanced national economic development under the terms of the Constitution and the law of Angola. The state has sovereign right to intervene in economic activities in Angola. However, in encouraging economic and business initiatives, it has to ensure a market economy based on the principles of, *inter alia*, morality, ethics, respect, and protection for private property, and environmental protection.[298] In this context, the Angola Constitution creates flexibility for environmental justice by guaranteeing and encouraging public-private collaboration with possibility of community participations in formation and implementation economic, developmental, and environmental policies.

[297] Angola Constitution 2010, art. 93 (2).
[298] Angola Constitution 2010, art. 89.

## 4.3 Legislative Regime of Petroleum Operations and Environmental Regulation in Nigeria

The legislative element of Nigeria petroleum regime includes, the Constitution, the Oil Pipelines Act 1965, the Deep Offshore and Inland Basin Production Sharing Contracts Act 1999 and the Nigerian Extractive Industries Transparency Initiative Act 2007. The Nigerian Constitution vests ownership of mineral resources, including oil and gas, exclusively in the federal government and further confers on the federal government exclusive powers to make laws and regulations for the governance of the country's petroleum industry.[299] Section 1 of the Nigerian Petroleum Act, 1969 provides that:

> The entire ownership and control of all petroleum in, under or upon any lands to which this section applies shall be vested in the State. This section applies to all land (including land covered by water) which- (*a)* is in Nigeria; or *(b)* is under the territorial waters of Nigeria; or forms part of the continental shelfs; or *(d)* forms part of the Exclusive Economic Zone of Nigeria.

In addition to the multiple petroleum legislations and regulations, the Nigerian petroleum industry is also regulated by several governmental bodies and agencies. The Federal Ministry of Petroleum Resources has primary responsibility for policy direction and exercises supervisory oversight over the industry. The Minister of Petroleum Resources (the Minister) issues regulations, guidelines and directives pursuant to the Petroleum Act and other enabling laws.[300] The Department of Petroleum Resources (DPR) is responsible for the day-to-day monitoring of the petroleum industry and for supervising all petroleum industry operations. Other regulatory authorities include, The Federal Ministry of the Environment (FME), The Nigeria National Petroleum Corporation (NNPC), Nigerian Content Development and

[299] Constitution of the Federal Republic of Nigeria, sec. 44 (3); Item 39, Second Schedule, Part 1.
[300] Petroleum Act, Sections 8 and 9.

Monitoring Board (NCDMB) and the National Oil Spill Detection and Response Agency (NOSDRA).

### 4.3.1 The Nigerian Petroleum Industry Bill, 2007

The Nigerian Petroleum Industry Bill (PIB)[301] pending before the National Assembly aims to harmonise all the legislation and significantly restructure the industry. The objectives of the Bill are to- (a) create efficient and effective governing institutions with clear and separate roles for the petroleum industry; (b) establish a framework for the creation of commercially oriented and profit driven petroleum entities to ensure value addition and internationalization of the petroleum industry; (c) promote transparency and accountability in the administration of petroleum resources of Nigeria; and (d) foster a conducive business environment for petroleum industry operations.[302] The Bill reiterates the provisions of the Constitution regarding the state ownership and control of the petroleum resources of Nigeria.[303] In performing their functions and achieving their objectives under the PIB, NOCs and private petroleum companies are obliged to comply with the Extractive Industry Transparency Initiative Act.[304] Section 200 of the PIB further provides for environmental quality management plan to be submitted to the Minister's approval by oil companies before commencing petroleum operations.

The PIB is a multifaceted legislation that makes a bold attempt to address integral aspects of Nigeria's petroleum sector. It combines sixteen different Nigerian petroleum laws into a single and comprehensible document to provide for the establishment of the legal and regulatory frameworks, institutions and regulatory authorities for the Nigerian oil and gas sector as well

[301] First proposed in 2007 and has undergone several iterations. The current iterations resulted in the development of four bills, which are at different stages in the legislative process.
[302] Nigeria Petroleum Industry Bill, sec, 1.
[303] Nigeria Petroleum Industry Bill, sec. 2.
[304] Nigeria Petroleum Industry Bill, sec, 4. The Nigeria Extractive Industry Initiatives is discussed in detailed in the last Chapter of this research.

as to establish guidelines for the operation of the upstream and downstream oil sectors.[305] The Bill comprised of regulations dealing with the core business operations attributable to the primary actors within the industry (National Oil Company, oil and gas Companies and regulatory agencies).[306] It is explicit on the importance of certain issues touching on corporate governance and by extension human resource management, as evidenced by some matters captured in the opening parts and under the primary objective section of the PIB. Firstly, it stipulates the need to create a conducive business environment for petroleum operations. It thus suffices to say that, the internal and external contexts of the production activity are crucial to the effective performance of the actors within the upstream downstream and midstream sectors, be it at the board level, managerial or employee cadres.[307]

### 4.3.2 Rights to Conservation and Environmental Protection in Nigeria

In addition to existing mining legislations, explorations of natural resources in Nigeria is regulated by the Mineral and Mining Act of 29 March 2007 (MMA 2007)[308] which obliges mineral operators to conduct exploration activities in a safe, friendly, skilful, efficient, and workable manner and in accordance with prescribed environmentally and socially responsible manner.[309] The MMA 2007 requires all reasonable steps to avoid unnecessary damage to any land, building, crops or profitable trees during exploration activities.[310]Before commencing activities in the contract area, the operator shall assure the government that he has adequate emergency and contingency plans in place for protecting the environment. The emergency plan

[305] Olabode Oyewunmi1 A. and Olusola Olujobi J., 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-engineering the Way Out?' 6 (6) International Journal of Energy Economics and Policy [2016], 633.

[306] Ibid, 630-633.

[307] Ibid, 630-636.

[308]The MMA 2007 repealed the former Mineral and Mining Act No. 34

[309] MMA 2007 sec 61-7

[310] Nigeria Oil Pipeline Act sec 6 (3) Cap 07 LFN

shall include procedures for prompt and expedient remedial action for the protection of property and the environment; procedures to control of accidental discharge from oil pipelines; and procedures to ensure adequate training of personnel on how to handle emergencies.[311]

Where an operator contravenes environmental provisions, he shall be guilty of an offence and liable on conviction to a fine of up to NGN500, 000 (£1,779.50).[312] Every director who took part in the management of the operation shall also be guilty of that offence, So also any person who at the time of the commission of the offence was an officer thereof or was purporting to act in such capacity shall be severally guilty of that offence and liable to be prosecuted against and punished for the offence in like manner as if he had himself committed the offence, unless they could prove that the act or omission constituting the offence took place without their knowledge, consent or connivance. In determining whether or not the mineral operator is guilty of negligence, courts generally rely on the common law principles of strict liability and negligence in tort.[313] If found guilty by the court, the operator shall compensate the owners of property or occupiers of land in the vicinity where it operates for any damage done which has not been made good during the operations. Compensation shall be paid to:

1. any person whose land or interest in land is injuriously affected by the exercise of the right conferred by their licences, for any such injurious affection not otherwise made good;
2. any person suffering damaged by reason of any neglect on the part of the operator or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under his licence, for any such damage not otherwise made good; and

[311] Nigeria Oil and Gas Pipeline Regulations, Reg. 8-9 Cap 07 LFN
[312]MMA 2007 sec 111, 118; Oil and Gas Pipeline Regulations, Reg. 26
[313] MMA 2007 sec 139-140

3. 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.[314]

The financial amount of the compensation could be negotiated between the operator and the affected person(s) or communities. Where the parties could not settle the matter between them or fail to reach an agreement on the amount of compensation for the damage caused, they shall take the matter to court. In determining the dispute, the court shall consider:

1. Whether the damage results from the operator's failure to protect the environment. If that is the case, the court shall award compensation as it considers just in respect of any damage done to any buildings, crops or profitable trees by the operator. In addition, the court may award such sum in respect of disturbance (if any) as it may consider just.
2. If a claim is made by person(s) who suffers injurious damage to property or land as result of the operator's activities, the court shall award such compensation as it considers just, having regard to –

i. any damage done to any buildings, crops or profitable trees by the operator; any disturbance caused by the operator;
ii. any damage suffered by the person by reason of any neglect on the part of the operator or his agents, servants or workman to protect, maintain or repair any work, structure or thing used for the operator's business;
iii. any damage suffered by the person(s), other than damages resulting from sabotage by another party; and
iv. loss (if any) in value of the land or interests in land by reason of the operator's activities.

[314]Oil Pipeline Act sec 11 (5)

In cases of accidental discharge, unless where an operator of an onshore or an offshore vessel can prove that the discharge was caused solely by a natural disaster or an act of war or by sabotage, the operator shall be liable for:

i. the cost of removal thereof, including any costs which may be incurred by any government body or agency in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge; and
ii. the costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by the authority from time to time.[315]

The MMA 2007 created an Environmental Protection and Rehabilitation Fund (EPRF) for the purposes of guaranteeing the environmental obligations of explorers and operators of mineral resources. The Fund is to be administered and managed by an independent and reputable institution customary engaged in business as Trustee or Fund Manager. Mineral explorers and operators are obliged to commence contributions to the EPRF in accordance with the amounts specified in the approved EPR Program not later than one year from the approval of the mining titles. Failure to pay or contribute to the EPRF shall lead to a court proceeding to recover the amount by the Trustee of the Fund and/or suspension of the mining lease.[316] However, there are no funds for compensation for mineral pollution and community development. The law rather creates avenues for such matters to be settled among mineral operators and the communities located at the vicinities of their operations. The issue has led to several individual sustainable community development agreements signed between mineral operators and local communities of the Nigeria Niger Delta.

[315]MMA 2007 sec 98-125; Federal Environmental Protection Agency Act 1988 sec 22 (1);*Shell Petroleum Development Company* v *Abel Isaiah and Omuoda Community* [2005] 44 WRN 65, 69-70
[316] MMA 2007 sec 121

### 4.3.3 Rights of Indigenous Communities to Conservation and Environment in Nigeria

Section 5 of Nigerian Federal Environmental Protection Agency Act, 1988 established the Federal Environmental Agency (the Agency) as a body responsible for environmental regulations in Nigeria. However, the Environmental Impact Assessment Degree No.8 of 1992 is the major environmental regulation of the country. The objectives of the Degree are, *inter alia*:

1. To promote the implantation of appropriate policy in all government land in manners consistent with all laws and decision-making processes through which goal and objective environmental impact assessment may be realised; and
2. To encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental affects on boundary or trans-state or on the environment of bordering towns and villages.[317] Oil companies are required to consider the environmental effects proposed petroleum operations before their commencements.[318]

Like the Angolan petroleum regime, the Nigerian Environmental Impact Assessment Degree provides for assessment of the impacts of proposed petroleum projects on rights and interests of indigenous communities. Where the extent, nature or location of a proposed petroleum operation is such that is likely to significantly affect the environment, oil companies operating in Nigeria are required to conduct environmental impact assessment before embarking on the project. A written application must first be made to the Agency, explaining the subject activities and identifying the environmental assessment of the planned activity.[319] Where appropriate, all

[317] Degree No.8 of 1992, sec. 1.
[318] Degree No.8 of 1992, sec. 2.
[319] Degree No.8 of 1992, sec. 2.

efforts should be made to identify all environmental issues at an early step in the process.[320] The environmental impact assessment should include at least the following matters:

1. a description of the proposed activities;
2. a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
3. a description of the practical activities, as appropriate;
4. an assessment of the likely or potential environmental impacts on the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and tong-term effects:
5. an identification and description of measures available to mitigate adverse environmental impacts of proposed activity and assessment of those measures;
6. an indication of gaps in knowledge and uncertainly which may be encountered in computing the required information:
7. an indication of whether the environment of any other state, local government area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives; and
8. a brief and non-technical summary of the information provided under paragraph (1) to (7) of this section.[321]

In addition, Section 21 of the Environmental Protection Agency Act criminalises the discharge of harmful quantities of any hazardous substance into the air or upon the land and the waters of Nigeria or at the adjoining shorelines, except where such discharge is permitted or authorised. Where an offence of harmful hazardous discharge is committed by an oil company, it shall on conviction be liable to a fine not exceeding N500, 000 and an additional fine of N 1,

[320] Degree No.8 of 1992, sec. 3.
[321] Degree No.8 of 1992, sec. 4.

000 for every day the offence subsists. Also, senior managers of the company who at the time the offence was committed was in charge of, or was responsible for the alleged petroleum operations shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, except where the accused senior manager could prove that the offence was committed without his/her knowledge or that he/she exercised all due diligence to prevent the commission of such offence.[322]

Although the above provisions seek to protect the environmental rights and interests of the general public, the extent of their applicability to specific groups (otherwise minorities or indigenous communities) who could be directly affected by the impacts of the petroleum operations is not clear. Another regulatory body is the Department of Petroleum Resources (DPR) which derives its regulatory authority from Section 8 of the Petroleum Act, 1969.[323] DPR's regulatory functions include ensuring that petroleum operators in Nigeria do not degrade the environment in the course of their economic activities. Its legal authority is provided for by the Petroleum (Drilling and Production) Regulation 1969. Section 25 Petroleum (Drilling and Production) Regulation requires petroleum license holder to:

> Adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, 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.

In 1981, DPR began to develop Environmental Guidelines and Standards (EGAS) in order effectively regulate the petroleum industry. The EGAS covers the control of the pollutants from the various petroleum exploration, production and processing operations, considering the

[322] Environmental Protection Agency Act, sec. 21.
[323] EGAS 1991, pt. B 1.1.

advancements in recent treatment and pollution control technology. They also cover environmental control of various petroleum activities in Nigeria, including exploration, production, terminal operations, hydrocarbon processing plants, oil and gas transportation and marketing.[324] They seek to establish an effective uniform monitoring and control programme for the discharges arising from oil exploration and development and to ensure compliance with sound and efficient environmental management by petroleum operators. Part B of the EGAS requires petroleum operators to have oil Spill contingency plan for prevention, control and combating of oil and hazardous substances spills. The aim is to organise and predetermine course of actions to be pursued in the event of an oil spill. An oil spill contingency plan has basically three functions:

1. To ensure that the environment is protected;
2. To ensure that manpower, equipment and funds are available to effectively contain and clean up oil spills and;
3. To ensure that good record-keeping is maintained and accurate information concerning the Spill is disseminated to the public and government.

Petroleum license holders in Nigeria are also required to maintain all apparatus and appliances in use in their petroleum operations. Boreholes and wells capable of producing petroleum should be in good repair and condition. A license holder is required to conduct petroleum operations in proper and workmanlike manners in accordance with relevant Nigerian regulations and methods and practices accepted by the Director of Petroleum Resources as good oilfield practice. Without prejudice, petroleum operators are expected to conduct their activities in accordance with good practices of the international petroleum industry and take all steps practicable-

[324] EGAS 1991, Part II.

1. to control the flow and to prevent the escape or avoidable waste of petroleum discovered in or obtained from the relevant area;
2. to prevent damage to adjoining petroleum-bearing strata;
3. except for the purpose of secondary recovery as authorised by the Director of Petroleum Resources, to prevent the entrance of water through boreholes and wells to petroleum-bearing strata;
4. to prevent the escape of petroleum into any water, well, spring, stream, river, lake, reservoir, estuary or harbour; and
5. to cause as little damage as possible to the surface of the relevant area and to the trees, crops, buildings, structures and other property thereon.[325]

In general, petroleum operators in Nigeria have legislative responsibility to take/adapt practical precautions and/or all steps practicable to prevent pollution that could occur as result of their petroleum activities.[326] Their corporate policies for petroleum operations should clearly state their organisational plans and strategies on environmental conservation and prevention and management of consequential damages of petroleum operations.[327] Prior to commencing a petroleum project, oil companies and petroleum operators should describe the nature of the proposed operations and identify all sensitive areas that may require protection in the event of environmental damage. The process further requires development and presentation of an Environmental Sensitivity Index (ESI) Map of the operational areas.[328] The objectives of an ESI are as follows:

1. Identification and mapping of the areas sensitive to oil pollution, (relative to) the operational areas; Onshore operational areas are defined as an entire OML covering

[325] Petroleum (Drilling and Production) Regulation, 1969, sec. 37.
[326] EGAS 1991, pt. B 1.1.1.
[327] EGAS 1991, pt. B 2.
[328] EGAS 1991, pt. B 2.3.

operations of an oil and gas company. Offshore operational areas shall be the outer coastline defined as having a greater than 10% chance of oiling in the event of an oil spill from the specific offshore OML block, based on the results of oil spill simulations. The operational areas to be mapped for offshore operations shall also include the coast belt region and all the river mouths up to 10km landward of the outer coastline.

2. Prioritisation of the sensitive areas in the operational areas to effect a quick oil spill response strategy;
3. Description of the ecosystem and other facilities of special socio-economic importance in the identified sensitive areas; and
4. Integration of physical, ecological, operational and socio-economic concerns into a comprehensive spill response document.[329]

Except where an oil company or petroleum operator could prove that an alleged damage resulting from petroleum operations was caused solely by a natural disaster or an act of war or by sabotage, it shall be in violation of the Federal Environmental Protection Act and in addition to the penalty specified for discharge of harmful hazardous substances into the environment, the company shall be responsible for:

1. the cost of removal of the oil spill, including any costs which may be incurred by government body or agency in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge; and
2. costs of third parties in the form of reparation, restoration, restitution or compensation.

The concerned oil company or petroleum operator is required, to the fullest extent possible, to act to mitigate the damage by:

[329] EGAS 1991, pt. B 2.3.2.

1. giving immediate notice of the discharge to the Agency and any other relevant agencies;
2. beginning immediate clean-up operations following the best available clean-up practice and removal methods as may be prescribed by regulations made under the Act; and
3. promptly complying with such other directions as the Agency may, from time to time, prescribe.[330]

The sufficiency of the legislative element of Nigerian petroleum regime is, to a lager degree, undermined by the fact that Nigerian legal system does not acknowledge native title to land.[331] This is in addition to other factors, including lack of enforceability and transparency as discussed in detail under subsequent headings of this Chapter. Nevertheless, the comparative examination of the administration and regulation of the petroleum industries of Angola and Nigeria indicates the followings:

1. While the Angolan petroleum industry is regulated under the auspices of two main laws (The Constitution and the Petroleum Activities Law), Nigeria has 34 pieces of legislation, excluding regulations and directives, regulating various aspects of its petroleum industry[332]
2. The state, acting through the Minister of Petroleum, is the major regulatory authority in Angola, while there are too many regulators with similar and identical responsibilities in the Nigerian petroleum sector. For example, the Federal Environmental Protection Agency (FEPA) is charged with the regulatory responsibility to protection and development the environment and to prepare a comprehensive national policy,

[330] Federal Environmental Protection Agency Act, 1988, sec. 22.
[331] See general discussions and conclusions of the subsequent Chapter.
[332] Israel Aye, Laura Alakija and Esther Wingate 'Business-focused legal analysis and insight in the most significant jurisdictions worldwide' 5 Oil and Gas Law Review [2017] available at https://thelawreviews.co.uk/edition/the-oil-and-gas-law-review-edition-5/1151505/nigeria accessed on 23/08/2018.

including procedures for environmental impact assessment for, *inter alia*, all development projects. Enforcement powers were also prescribed. In the National Policy on the Environment (NPE), FEPA adopted a strategy that guarantees an integrated holistic and systemic view of environmental issues that leads to prior environmental assessment of proposed activities. On the other hand, the Department of Petroleum Resources (DPR) has regulatory functions to ensure that petroleum operators in Nigeria do not degrade the environment in the course of their economic activities. It is relevant to note that the DPR regulatory functions exclude and do not override the powers of the FEPA in relation to petroleum regulations in Nigeria. In addition, The Ministry of Petroleum also plays active regulatory roles in the petroleum sector. Thus, harmonization and clear allocation of responsibilities has become necessary in the Nigerian oil and gas sector.

3. Petroleum operations and protection of public environmental rights and interests are increasingly becoming constitutional issues today. Although the Nigerian Constitution obliges the state to protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria,[333] there is yet no constitutional requirements upholding environmental rights as part of fundamental human rights in Nigeria. On the contrary, environmental rights are accorded constitutional protection in Angola.[334] The Angolan Constitution further professes correlation between petroleum operations, sustainable development and environmental protection.
4. Although the state, in Angola, is not accountable for losses or damage of any type or nature which is caused by oil companies and petroleum operators, it is constitutionally accountable for alleged losses or damage resulted from direct act of government or

[333] Federal Constitution of Nigeria 1999, sec. 20.
[334] Angola Constitution 2010, art. 39.

actions taken be governmental establishments and representatives,[335] The current situation in the Nigeria Niger Delta requires express constitutional protection of environmental rights in Nigeria. However, the disadvantages and advantages of multiple/single regulatory structure to the advancement of the petroleum industries of developing states would requires further investigations.

### 4.4 Legislative Regime of Petroleum Operations and Environmental Regulation in Australia

There are six states and two territories in Australia. Queensland, Western Australia, Victoria, South Australia and the Northern Territory are the key jurisdictions for petroleum. Each of these states and the Northern Territory have well-established petroleum industries. Australian petroleum regime operates on three levels, Federal, State/Territory and local council, as follows:

1. Exploration and extraction activities are primarily regulated at the state or Territory level and at the Commonwealth or Federal level for offshore petroleum activities in Commonwealth waters;
2. Commonwealth laws affect petroleum activities in all states, including those relating to taxation, native title rights, environmental protection and occupational health and safety; and
3. Certain local council laws apply such as by requiring development and planning approvals.[336]

[335] Nerry Echefu and .E Akpofure, 'Environmental impact assessment in Nigeria: regulatory background and procedural framework' UNEP EIA Training Resource Manual: Case studies from developing countries, Series 7, 71-73 < https://www.iaia.org/pdf/case-studies/EIANigeria.pdf> accessed on 20/08/2018.

[336] Baker McKenzie 'Guide to Investing in the Oil and Gas Industry in Australia'[2017] 7, available at https://www.bakermckenzie.com/-

Ownership of hydrocarbon reserves in Australia is vested in the Crown (i.e Commonwealth, state or territory governments). The right to explore or produce petroleum is granted pursuant to a petroleum title or permit issued by the relevant Commonwealth, state or territory authority.[337] Petroleum operations are subject to significant Commonwealth and state environmental laws and regulations governing environmental protection. Governmental authorities have the power to enforce compliance with their laws, regulations and permits, and violations may result in the issuance of injunctions limiting or prohibiting operations, as well as administrative, civil and even criminal proceedings being brought against operators who are in breach.[338]

The Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (OPGGSA) regulates petroleum activities offshore in Commonwealth waters. However, this is limited to the area that is outside the coastal waters of the states and the Northern Territory; and for this purpose, the outer limits of state and Northern Territory coastal waters start 3 nautical miles from the baseline of the territorial sea.[339]

The OPGGSA is a rewritten and renamed version of the Petroleum (Submerged Land) Act of 1967 (PSLA). It was a 'conspicuous changes in structure and style of the PSLA, but with implementation in limited modest number of minor policy changes.[340] The purpose of the rewrite of the PSLA was to provide a more user-friendly enactment of the PSLA, reducing compliance costs for the upstream energy industry and the governments that administer it.[341]

/media/files/insight/publications/2017/australia/bk_australia_petroleumindustry_apr17.pdf?la=en accessed on 25/08/2018.

[337] McKenzie (n 336).

[338] Ibid.

[339] Preamble of the Offshore Petroleum and Greenhouse Gas Storage Act 2010 (Vic).

[340] Hunter (n 278) 44.

[341] Ibid, 34.

The Victoria Offshore Petroleum and Greenhous Gas Storage Act 2010 is a typical offshore environmental regulation which is based on the state OPGGSA (Cth).[342] Section 794 of the OPGGSA 2010 (Vic) authorised the Offshore Petroleum and Greenhouse Gas Storage Regulation 2011(OPGGSR) which came into effect in January 2012. An objective of the OPGGSR 2010 (Vic) is to provide for the elimination and minimisation, so far as is practicable, of the environmental, health and safety hazards and risks involved in undertaking petroleum and greenhouse gas activities and, in particular, to make provision in relation to—

(a) the manner in which certain petroleum activities, greenhouse gas activities or greenhouse gas injection and storage activities are carried out in the offshore area; and
(b) the manner in which certain facilities are designed, constructed, installed, operated, modified and decommissioned in the offshore area; and
(c) to ensure that operations in the offshore area are carried out in accordance with good oilfield practice and are compatible with optimum long-term recovery of petroleum; and
(d) to prescribe requirements for various administrative activities, fees and other matters.[343]

### 4.4.1 Rights to Conservation and Environmental Protection in Australia

Section 794 OPGGSA (Vic) 2010 which provides thus:

> The Governor-General may make regulations prescribing matters— (a) required or permitted by this Act to be prescribed; or (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act. . . the regulations may make provision for or with respect to the matters or things specified in Schedule 4. Regulations made under this Act— (a) may be of general or limited application; (b) may differ according to differences in time, place or circumstances; (c) may incorporate, adopt or apply wholly or partially or as amended by the regulations, the provisions of any document, standard, rule, specification or method formulated, issued, prescribed or published by any authority or body whether— (i) as formulated, issued, prescribed or published at the

[342] See preamble of the OPGGSA 2010 (Vic).
[343] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Regulation 5.

time the regulation is made or at any time before the regulation is made; or (ii) as published or amended from time to time; (d) may confer a discretionary authority or impose a duty on a specified person or a specified class of person.

The subject matters of regulation under Schedule 4 of the OPGGSA (Vic) include:

1. The exploration for petroleum and the carrying on of operations, and the execution of works, for that purpose.
2. The recovery of petroleum and the carrying on of operations, and the execution of works, for that purpose.
3. The exploration for potential greenhouse gas storage formations, potential greenhouse gas injection sites, and the carrying on of operations, and the execution of works, for any of those purposes.
4. The injection of a greenhouse gas substance into a part of a geological formation, the storage of a greenhouse gas substance in a part of a geological formation; and the carrying on of operations, and the execution of works, for any of those purposes.
5. The conservation of, and the prevention of the waste of the natural resources (whether petroleum or otherwise) of the offshore area.
6. The restoration or maintenance of the suitability of a part of a geological formation for the permanent storage of greenhouse gas substances.
7. The restoration or maintenance of the suitability of a part of a geological formation for the recovery of petroleum.
8. The construction and operation of pipelines, water lines, secondary lines, greenhouse gas facility lines, greenhouse gas infrastructure lines, greenhouse gas injection lines, pumping stations, tank stations or valve stations, and the carrying on of operations, and the execution of works, for any of those purposes.
9. The construction, erection, maintenance, operation or use of installations, structures, equipment or facilities.

10. The control of the flow or discharge, and the prevention of the escape, of— (a) petroleum, a greenhouse gas substance, water or drilling fluid; or (b) a mixture of water or drilling fluid with petroleum, a greenhouse gas substance or any other matter.
11. The clean-up or other remediation of the effects of the escape of petroleum or a greenhouse gas substance.
12. The prevention of damage to petroleum-bearing strata in an area (whether in the offshore area or not) over which a petroleum exploration permit, petroleum retention lease, petroleum production licence, greenhouse gas assessment permit, greenhouse gas holding lease or greenhouse gas injection licence is not in force.

The objectives of OPGGSR 2010 (Vic), with regards to the environment, are to ensure that petroleum operations or greenhouse gas activity carried out in the offshore area are:

1. carried out in a manner consistent with the principles of ecologically sustainable development;
2. carried out in a manner by which the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and
3. carried out in a manner by which the environmental impacts and risks of the activity will be of an acceptable level.[344]

Regulation 6 description of what constitutes 'environment' includes:

1. ecosystems and their constituent parts, including people and communities;
2. natural and physical resources;
3. the qualities and characteristics of locations, places and areas;

[344] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 5.

4. the heritage value of places, including their social, economic and cultural features. environmental impact refers to any change to the environment, whether adverse or beneficial, that wholly or partially results from petroleum activities.

Regulation 6 further defines 'environmental management system' as the system used by petroleum titleholders to establish and implement their environmental policy and manage the environmental aspects of petroleum activities, including their organisational structures, planning activities, responsibilities, practices, procedures, processes and resources. 'Environmental performance' is define as the performance of oil companies and petroleum operators in relation to the environmental performance outcomes and standards mentioned in their environment plans.[345]Environmental performance outcome is a measurable level of performance required for the management of environmental aspects of an activity to ensure that environmental impacts and risks will be of an acceptable level. Environmental performance standard is a statement of the performance required of a control measure; and an environment plan is a document to be submitted to the Minister.[346] Commencement of petroleum operations without an environmental plan could result to a penalty.[347] Petroleum titleholders are required not undertake an activity after the occurrence of any significant new environmental impact or risk, or any significant increase in an existing environmental impact or risk, arising from the activity if the environment plan in force for the activity does not provide for the new impact or risk; or the increase in the impact or risk.[348]The criteria for acceptance of an environment plan are that the plan:

1. is appropriate for the nature and scale of the activity; and

[345] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 6.

[346] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 6.
[347] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 8.
[348] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 10.

2. demonstrates that the environmental impacts and risks of the activity will be reduced to as low as reasonably practicable; and
3. demonstrates that the environmental impacts and risks of the activity will be of an acceptable level; and
4. provides for appropriate environmental performance outcomes, environmental performance standards and measurement criteria; and
5. includes an appropriate implementation strategy and monitoring, recording and reporting arrangements.[349]

### 4.4.2 Rights to Consultation and Environmental Protection in Australia

In the course of preparing an environment plan, or a variation of an environment plan, a titleholder must consult each of the following—

1. any authority or entity of the State to which the activities to be carried out under the environment plan, or the variation of the environment plan, may be relevant;
2. a person or organisation whose functions, interests or activities may be affected by the activities to be carried out under the environment plan, or the variation of the environment plan;
3. any other person or organisation that the titleholder considers relevant.[350]

For the purpose of the consultation, the titleholder must give each of those consulted sufficient information to allow them to make an informed assessment of the possible consequences of the activity on their functions, interests or activities. and allow a reasonable period for the consultation.[351] The environment plan must contain a comprehensive description of the activity

[349] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 13D.
[350] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 13F.
[351] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 13F.

including the following, (a) the location or locations of the activity; (b) general details of the construction and layout of any facility or other structure; (c) an outline of the operational details of the activity (for example, seismic surveys, exploration drilling or production) and proposed timetables; and (d) any additional information relevant to consideration of environmental impacts and risks of the activity.[352] It must describe the environment that may be affected by the activity; and (details of the particular relevant values and sensitivities, if any) of that environment. The environmental plan should also include legislative requirements that apply to the activity and which are relevant to the environmental management of the activity. It has to further demonstrate how those requirements include, details of the environmental impacts and risks for the activity and evaluation of all the impacts and risks appropriate to the nature and scale of each impact or risk are to be met; and specify details of the control measures that will be used to reduce the impacts and risks of the activity to as low as reasonably practicable and an acceptable level.[353] In addition, the environment plan must contain an implementation strategy for the activity[354]and a statement of the petroleum operator's corporate environmental policy.[355]

## 4.5 Legislative Regime of Petroleum Operations and Environmental Regulation in Norway

Like Australia, offshore mineral and petroleum resources in Norway are owned by the state and exploited by the state on behalf of the community, with the government administering these rights. Also, the Norwegian state assigns property rights to the private sector for exploration, development and production activities.[356] In Norway, petroleum operations are carried out in

[352] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Vic), Reg. 15.
[353] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Cth), Reg. 15.
[354] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Cth), Reg. 16.
[355] Offshore Petroleum and Greenhouse Gas Storage Regulations 2011 (Cth), Reg. 19.
[356] Norwegian Petroleum Activities Act, 1996, sec. 1-1, sec. 11-1.

accordance with prudent technical and sound economic principles and in such a manner that waste of petroleum or reservoir energy is avoided. The Petroleum Activities Act 1996 is major petroleum legislation of Norway. The Act requires petroleum companies and operators to carry out continuous evaluation of production strategy and technical solutions and take the necessary measures when engaged in petroleum operations. Oil companies operating in Norway should ensure that petroleum activities are conducted in manners that enable high levels of safety.[357] At all times, petroleum operators and license holders should maintain efficient emergency preparedness with a view to dealing with accidents and emergencies which may lead to loss of lives or personal injuries, pollution or major damage to property.

### 4.5.1 Rights to Conservation and Environmental Protection in Norway

Necessary measures should be taken to prevent or reduce harmful effects, including the measures required in order to return the environment to the condition it had before the accident occurred.[358]In the event of accidents and emergencies, the licensee or anyone else responsible for the operation and use of a petroleum facility shall, to the extent necessary, suspend the petroleum activities for as long as the requirement to prudent operations warrants such suspension.[359] Companies engaged in petroleum activities shall possess the necessary qualifications to perform the work in a prudent manner. They should see to it that anyone carrying out work for them complies with the provisions of the Act.[360] Section 10-1 of the Act outlines the following requirements for conducting petroleum operations in Norway:

1. Petroleum activities according to the Act shall be conducted in a prudent manner and in accordance with applicable legislation for such petroleum activities.

[357] Norwegian Petroleum Activities Act, 1999, sec. 9-1.
[358] Norwegian Petroleum Activities Act, 1999, sec.9-2.
[359] Norwegian Petroleum Activities Act, 1999, sec.9-5.
[360] Norwegian Petroleum Activities Act, 1999, sec.9-7.

2. The petroleum activities shall take due account of the safety of personnel, the environment and of the financial values which the facilities and vessels represent, including also operational availability.
3. The petroleum activities must not unnecessarily or to an unreasonable extent impede or obstruct shipping, fishing, aviation or other activities, or cause damage or threat of damage to pipelines, cables or other subsea facilities.
4. All reasonable precautions shall be taken to prevent damage to animal life and vegetation in the sea, relics of the past on the seabed and to prevent pollution and littering of the seabed, its subsoil, the sea, the atmosphere or onshore.
5. If so, warranted for particular reasons the Ministry may order the petroleum activities to be stopped for as long as it is considered necessary, or stipulate particular conditions for continuation.

The Petroleum Ministry carries out regulatory supervision to see that the provisions laid down in or pursuant to the Act are complied with by all who carry out petroleum activities in Norway. The Ministry may issue such orders as are necessary for the implementation of the provisions laid down in or pursuant to the Act. Expenses related to the regulatory supervision may be required to be covered by the licensee or by the party which the supervision in each case is directed at or where it takes place. It may also be required sector fees to cover expenses with other follow-up activities with respect to the whole or part of the petroleum activities.[361] Section 10-6 provides thus:

> The licensee and other persons engaged in petroleum activities comprised by this Act are obliged to comply with the Act, regulations and individual administrative decisions issued by virtue of the Act through the implementation of necessary systematic measures. In addition, the licensee shall see to it that anyone performing work for him,

[361] Norwegian Petroleum Activities Act, 1999, sec. 10-3.

> either personally, through employees or through contractors or subcontractors, shall comply with the provisions laid down in or pursuant to the Act.

If a serious accident has occurred in connection with petroleum activities, the Ministry may appoint a special commission of inquiry. The same applies to incidents in the activities which have led to danger of loss of life or major damage to property or pollution of the marine environment. The members of the commission shall represent sufficient legal, nautical and technical expertise. The chairman shall satisfy the criteria for being a judge of the Supreme Court. The commission of inquiry may require the licensee and other parties involved in the accident or incident to provide the commission with information which may be relevant to the investigation, and that they shall make available documents, facilities and other objects at a place where it is suitable for the investigation to take place. The licensee may be required to cover the costs in connection with the work of the commission of inquiry[362] In the event of serious or repeated violations of the Act, regulations issued pursuant to the Act, stipulated conditions or orders issued, the King may revoke a licence granted pursuant to the Act.[363]With regard to orders issued in or pursuant to the Act, the authority which has issued the order may stipulate a current fine for each day that passes after expiry of the time limit set for implementation of the order, until it has been complied with. In the event of serious or repeated violations of acts and regulations, stipulated conditions or orders issued, the Ministry may impose a temporary suspension of the activities. The Ministry may initiate necessary measures for the account and risk of the licensee if orders are not complied with. The costs of such measures are grounds for enforcement of distraint.[364]

The overall objectives in Norway's petroleum policy is to secure a legislative framework which effectively promotes the best possible resources management and put in place a basic

[362] Norwegian Petroleum Activities Act, 1999, sec. 10-10.
[363] Norwegian Petroleum Activities Act, 1999, sec. 10-13.
[364] Norwegian Petroleum Activities Act, 1999, sec. 10-16.

foundation for creating highest possible value.[365] The principles of Norwegian petroleum policy were laid out in 1971 in the 'ten oil commandments', a set of goals and strategies to guide national involvement in the development of petroleum resources throughout the value chain, whilst focusing on the protection of the environment.[366] These commandments which underpin Norway's petroleum policy and determine policy directions of the country's petroleum industry are:

1. National supervision and control of Norway's petroleum industry must be ensured for petroleum operations in the country's continental shelf;
2. Petroleum discoveries should be exploited in manners that make Norway as independent as possible from other nations for its supplies of crude oil;
3. That new industry is developed based on petroleum;
4. That the development of an oil industry must take necessary account of existing industrial activities and the protection of nature and the environment;
5. That flaring of exploration gas on the Norwegian continental shelf must not be accepted, except during brief periods of testing;
6. That petroleum from the Norwegian continental shelf must as a main rule be landed in Norway, except in those cases where socio-political considerations dictate a different solution;
7. That the state become involved at all appropriate levels, and contributes to a coordination of Norwegian interests in Norway's petroleum industry as well as the creation of an integrated Norwegian oil community which sets its sights both nationally and internationally;

[365] Hunter (n 278) 52.
[366] Willy H Olsen, Petroleum Revenue Management – An Industry Perspective (2002) Paper Presented at Oil, Gas, Mining and Chemicals Department of the WBG and ESMAPO Workshop on Petroleum Revenue Management, 2.

8. That a state oil company be established which can look after the government's commercial interests and pursue appropriate collaboration with domestic and foreign oil interests;
9. That a pattern of activities is selected north of the 62nd parallel which reflects the special socio-political conditions prevailing in the part of the country; and
10. That large Norwegian petroleum discoveries could present new tasks for Norway's foreign policy.

### 4.6 Critical Analysis of the Four Jurisdictions of Study

Analysis of the petroleum regulations (as legislative elements of petroleum regimes) across the four states of study – Angola, Australia, Nigeria, and Norway – indicate some common trends including:

1. License holders are required to execute petroleum operations in diligent manners using the most appropriate human and technical resources in compliance with the law, the prospecting license, and the concession.
2. Petroleum operators are obliged to explore and produce petroleum in a rational manner, in accordance with the most appropriate technical and scientific practices used in the international petroleum industry and in accordance with the national interest.
3. Petroleum operators are obliged to submit to the relevant regulatory body plans required by applicable law, specifying the practical measures which should be taken in order to prevent harm to the environment, including environmental impact studies and audits, plans for rehabilitation of the landscape and structures or contractual mechanisms and permanent management and environmental auditing plans.

4. Necessary precautions must be taken to protect and preserve the environment, with reference to health, water, soil and subsoil, air, the preservation of biodiversity, flora and fauna, ecosystems, landscape, atmosphere and cultural, archaeological and artistic heritage.

5. Unless they can prove to have acted without fault, licensees are required to repair the damage they cause to third parties in the course of petroleum operations.

The five points highlighted above are relevant to the protection of indigenous rights and interests. However, sufficiency of a petroleum regulation (as legislative element of petroleum regime), with particular reference to protection of rights and interests of indigenous communities in developing states, to a great extent depends on: the regulatory framework of the petroleum industry; enforceability of the regulation; and transparency of the petroleum industry.

### 4.7 Regulatory Framework and Protection of Rights of Indigenous Communities in Angola and Nigeria

What is the best regulation pattern, if any, for the petroleum sector? The regulatory reform challenges of the 20th and 21st centuries are common to all states – developed and developing. For example, regulatory reform has been one of the major preoccupations of the OECD and the World Bank. With the former focusing on 'Western' democracies and the latter addressing developing countries, these bodies have preached a consistent message urging their audiences to engage in regulatory reform as a means of improving economic performance.[367] Two related notions were seen as important to the 21st century regulatory improvement: the creation of

[367] Terence Daintith and John Chandler, 'Offshore Petroleum Regulation: Theory and Disaster as Drivers for Institutional Change' Vol. 39(2) Houston Journal of International Law [2017] 333, 336.

independent regulators, and the institutional separation of policy-making and regulatory functions.[368] Advocacy for the 'independent regulators' scheme is strongly motivated by pollical influences over states' regulatory affairs or the so called 'politically-responsible government departments' which is described thus:

> In many cases, the line Ministry may have the responsibility but little power. De facto, the utilities often dominate the line Ministries and achieve a substantial degree of regulatory capture . . . In other cases, the line Ministry may be the agent of political decisions made by figures central in the political structure (e.g. the Presidential office). The most obvious point about such regulatory systems is their opaqueness. The three main functions affecting infrastructure enterprises:
>
> • policy making;
>
> • ownership and management;
>
> • regulation. [sic]
>
> are carried out by the same agency(ies) and are not functionally distinguished. Hence, the process of regulation tends to become a shifting set of negotiations between the players. Regulation, and end-user pricing in particular, tends to become highly politicized.[369]

On the other hand, the notion of 'separation of policy-making and regulatory function' is closely linked with a second line of institutional development, exemplified for Anglophone countries by the 'Next Steps' program instituted in the United Kingdom in 1988 for the reorganization of government departments. This program sought to separate the policy development and advice functions from the policy execution and service delivery functions within departments.[370] With regards to the jurisdictions of study – Angola, Australia, Nigeria, Norway – there are mixed regulatory approaches to national petroleum operations and

[368] Ibid 337.

[369] Jon Stern and Stuart Holder, 'Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia', 8 UTIL. POL'Y [199] 33, 36.

[370] Daintith and Chandler (n 367) 339.

environmental regulations. While the situation in Angola and Norway indicate single regulatory authority (in the form of the state and the Ministry of Petroleum), Australia and Nigeria seem to have multiple regulatory authorities. Although it is arguable that the Nigerian petroleum industry requires an integrated, coordinated and comprehensive legislation on the environment, removing rivalries, bureaucratic bottlenecks and areas of overlapping, duplication and confusion, in the context of regulatory difficulties associated with multiple national regulatory bodies, Nigeria shares similar challenges with Australia.

The analytical examination of the four jurisdiction of study indicates that, compare to Australia and Norway, the legislative element of the petroleum regimes of Angola and Nigeria make sufficient regulatory provisions for environment protection mechanisms, including environmental impact assessments and environmental management systems, requiring, *inter alia*, that oil companies and petroleum operators carry out environmental impact assessments prior to commencing a petroleum project, and conduct petroleum operations in accordance with relevant municipal legislations and in accordance with standards of the international petroleum industry.

However, unlike Nigeria, the legislative regime of Angola outrightly criminalize negligent environmental torts and hold oil companies and petroleum operators liable to third parties, including indigenous communities, that suffer losses and damage as result of their petroleum activities, In this context, Angola has similar legislative provisions like Austria. Weak legal system and/or poor regulatory framework are not therefore determinants to the issue of insufficient environmental laws and regulations and insufficient protection of indigenous interests in developing countries. There are other externalities including corruption and lack of information to assess the real impact of petroleum operations on the environment in the petroleum industries of many developing countries today For. example, both the government

and the oil companies of Angola petroleum industry were recently accused of breaching environmental justice.[371]

Although the current legislative regimes of Angola make provisions for sound environmental principles, the government takes little care in enforcing the existing laws to protect the public against losses and damages resulting from negligent petroleum operations. In most cases, it prioritizes economic growth over inclusive sustainable development. For example, a depletion of fish stocks is the leading complaint about oil operations in the northern provinces, while indigenous communities claim that there are regular oil spills from offshore facilities. Too many spills in Angola go unreported, and post spill compensation procedures are *ad hoc*. There is a dearth of information on the impact of oil on communities, fisheries and public health. Without independent scientific testing, it is difficult to determine what is depleting fish stocks, damaging crops and affecting the health of local people.[372]

### 4.8 Enforceability of Petroleum Regulations and Transparency of the Petroleum Industries of Angola and Nigeria

The relatively huge revenues derived from petroleum operations is a significant driver of Angolan and Nigerian geo-political and socio-economic indicators.[373] Transparency lies at the centre of all the important and integral conversations on the pathways to deliver the full or holistic potentials of a state's petroleum sector.[374] Once a reasonable level of transparency is attained, other matters of accountability, credibility and compliance will be facilitated.

[371] Maria Lya Ramos, 'Angola Oil Industry Operations', Open Society Initiative for Southern Africa, available at http://www.osisa.org/sites/default/files/angola_oil_english_final_less_photos.pdf. 2.
[372] Ramos (n 371).
[373] Olabode Oyewunmi1 A. and Olusola Olujobi J., 'Transparency in Nigeria's Oil and Gas Industry: Is Policy Re-engineering the Way Out?' 6 (6) International Journal of Energy Economics and Policy [2016], 630-636, 630.

[374] Ibid, 631.

Transparency will further assist in creating an enabling environment which will foster a culture of proper governance and regulation for all the actors in the state's petroleum sector.[375] The achievement of a reasonable level of transparency in the oil and gas industry, is significant to curbing corruption and other dysfunctions of resource-rich developing countries.[376] Despite the global recognition of transparency concept, its role in reducing corruption in the petroleum sectors of Angola and Nigeria, prevention of the resource curse and the due implementation by the primary stakeholders, is still relatively poor.[377]

Prudent use of natural resources is an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction in developing countries. However, if not managed properly, the development of a country's natural resources can create negative environmental impacts. The word 'corruption' is derived from the Latin word 'corruptus', which means 'to broken'. Its derivation stresses the destructive effects of corruption on societal fabric and encompasses all situations where agents and public officers break the confidence entrusted to them.[378] Although some authors argue that some benefits flow from corruption,[379]there is evidence of correlation between corruption and lower economic growth in developing countries.[380] For example, bribery of public officials of the petroleum industries of developing countries undermines good oil governance, effective environmental protection measures, and sustainable development.[381] A typical public-sector definition of corruption is one that attempts to provide an interface between the politicians and

[375] Ibid.

[376] Ibid, 630.

[377] Oyewunmi1 A. and Olujobi (n 373) 630.

[378] Nicholls Colin, *Corruption and Misuse of Public Office* (University of Oxford Press 2006) 1.
[379] Susan Rose-Ackerman, *Corruption and Government* (Cambridge University Press 1999) 26.
[380] Salifu Adam, 'Can Corruption and Economic Crime be controlled in Developing Economies – and if so, is the cost worth it?' [2008] 11 (3) *Journal of Money Laundering Control* 273, 273.
[381] Africa Union Convention on Preventing and Combating Corruption art 1; OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction 26 November 2009.

bureaucrats.[382] The Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, 1997 defines bribery as:

> Promise or giving of undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in other to obtain or retain business or other improper advantage in the conduct of international business.[383]

However, corruption constitutes more than bribery of public officials. Its meaning encompasses utilisation of official position or titles for personal or private gains, either on individual or collective bases, at the expense of the public good, in violation of established rules and ethical considerations, and through the direct or indirect participation of one or more public or private officials, whether they are politicians or bureaucrats. There is no single method for tackling the challenges of corruption in developing countries, since different societies have different perspectives of what constitutes corruption[384] depending on their individual political and economic history at a given time.[385] Nonetheless, the general approach of the international community in the fight against corruption has been to criminalise acts of corruption.[386] Article 1 (1) of the OECD Anti-Bribery Convention provides that Member States shall take measures as may be necessary to establish that it is a criminal offence under their municipal laws for a person to intentionally offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official or to a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in conduct of international business.

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[382] Kempe Hope and Bornwell Chikulo, *Corruption and Development in Africa: Lessons from Country Case Studies* (Palgrave Macmillan 1999) 18.
[383] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction, paras 1, 2.
[384] Ackerman (n 398) 5.
[385] Philippa Webb, 'UN Convention against Corruption' [2005] vol.8 No.1 Journal of International Economic Law 191, 193.
[386] UNGA Convention against Corruption, Resolution 58/4 adopted 31 October 2003, Chapter III; African Union Convention on Prevention and Combatting Corruption adopted 11 July 2003; arts. 5; 13; *Ahmed* v *Federal Republic of Nigeria* [2009] 13 NWLR 536, 540-42.

Bribery of foreign public officials by transnational corporation is punishable by effective, proportionate, and dissuasive criminal penalties in accordance with legal principles that establish liabilities in individual OECD countries. Liabilities under the OECD Anti-Bribery Convention extend to legal persons who are registered in Member States but also carryout economic activities in other jurisdictions. Such companies cannot avoid responsibilities abroad by using their subsidiary companies or intermediaries to offer, promise, or give a bribe to a foreign public official on their behalf in host countries, provided that their home country has jurisdiction to prosecute its nationals for offence committed abroad.[387] However, is criminalisation the way forward in combatting bribery of public official in developing countries?

Angola and Nigeria are the largest oil producers in the Sub-Sahara Africa, and both depend heavily on oil exports. Governments of both countries have enacted anti-corruption legislations designed to criminalise corruption. Section 25(a) of the Public Probity Law of Angola, 2010 forbids any public official from receiving money, goods, real estate, or any other direct or indirect economic benefit as a commission, share, tip, or gift directly or indirectly from an interested party, for oneself or for another person, which is obtained or supported by an act or omission deriving from the powers of the public official. However, the principle of confidentiality enshrined in Angolan oil laws encourages corruption and creates a pathway for the diversion of oil revenues, which are legally shielded from the public domain.[388] Oil companies operating in Angola are also accused of not addressing governance or transparency issues in Angola. They carry out oil transactions with the government without calling the terms of the transactions into question. This has facilitated patronage problems, rent seeking, and exacerbated the resource curse. Some of the oil companies tout their CSR projects, but these

[387] OECD Anti-Bribery Convention arts 1-5
[388] Ramos (n 371).

projects often lack community input, and never address transparency and human rights issues. A series of recent investigations by Angolan and international organisations, and United States government agencies have documented the public officials' ownership of, and shareholdings in, Angolan companies that have been awarded oil contracts.[389] The NOC, Sonangol both administers and regulates the oil industry, which creates a clear conflict of interest. Sonangol performs functions that should be under the purview of the Ministry of Finance, or the Central Bank. Sonangol plays a monitoring role, bypassing the Ministries of Petroleum and Environment. Political institutions to provide checks and balances to potential malfeasance in the oil industry are weak, or non-existent.[390] The government has taken some initiatives to increase transparency by publishing some oil revenue and production data, but this data is neither consistent, nor comprehensive, nor independently verified. [391]

Section 19 of the Corrupt Practices and Other Related Offences Act of Nigeria, 2000 provides that any public officer who uses his office or position to gratify or confer any corrupt or unfair advantage upon himself or any relation or associate of the public officer or any relation or associate of the public officer or any other public officer shall be guilty of an offence and shall, on conviction, be liable for five years imprisonment without option of fine. Despite these efforts, serious questions remain in Nigeria over the way that petroleum licences are allocated and how revenues are paid by oil companies to the government. In *Malabu Oil and Gas Ltd v The Director of Public Prosecutions*[392] Mr Justice Edis was asked to discharge a restraint order, obtained earlier by the director of public prosecutions pursuant to a request for mutual legal assistance from the public prosecutor of Milan (italy). The order restrained distribution of a

[389] Ramos (n 371).
[390] Ibid.
[391] Ibid.

[392] Malabu Oil and Gas Ltd v The Director of Public Prosecutions [2016] Lloyd's Rep. FC Plus 10.

payment made into a civil court of $85 million. The monies represented the balance from $200 million that the United Kingdom's commercial court had ordered Malabu Ltd, a Nigerian registered company, to pay into court as a condition of it defending a claim for unpaid commission brought by Energy Venture Partners (EVP), a BVI company controlled by a Mr Obi. Mr Obi claimed he and EVP were due the commission following Malabu's disposal of an offshore oilfield license, Oil Prospecting Licence (OPL) 245, which it surrendered in 2011 to the government of Nigeria in exchange for payment of $1,092,040,000. The government simultaneously granted a new license to a consortium, formed between subsidiaries of Eni and Shell, which provided the $1 billion in surrender monies and an additional $207 million. When Malabu refused to pay Mr Obi and EVP a commission on the transaction, they sued, and the UK commercial court judge awarded EVP a fee of $110.5 million. The award was 8.5 percent of the $1.2 billion in total payments to Malabu for OPL 245, based on a commission agreement between Malabu and EVP, and finding that that without Mr Obi's involvement and his connections, Malabu would have had difficulty putting the deal together on its own. At the Crown Court hearing on Malabu's application to discharge the restraining order, the public prosecutor of Milan produced evidence obtained from U.S. authorities suggesting that out of the proceeds of $1.2 billion, $10 million had been paid to Bayo Ojo San, a former Nigerian attorney general, and a massive $523 million had been paid to a Mr Aliyu, who was alleged to be associated with important Nigerian politicians. The public prosecutor of Milan also produced incriminating wiretap evidence which the judge summarized as follows:

> It suggests that the [Nigeria] president was personally involved in whatever was being discussed and that he wanted everything signed "by tomorrow". In the second [recording] Bisignani is talking to an unknown man and telling him "Mr Fortunato and the lady have said they want this to do this today or the day after tomorrow. "The lady" is said to be the Nigerian oil minister. The significance of this is that it suggests that the president was involved". If the suspicion that Aliyu is a close associate of his is made good then the fact that $523 million of the proceeds of the April 2011 sale went

> to Aliyu may have direct relevance to the question of whether those proceeds went in part or were promised in part to Nigerian public officials.[393]

Edis J, who emphasized that he was not making any findings of fact based on the evidence, considered the case to be remarkable for the lack of assistance provided by any of the parties (excepting the legal representatives). He pointed out that the public prosecutor of Milan had provided no indication about how the investigation was proceeding or when the next stage might be reached. The judge pointed out that because Malabu had not sought to file any evidence, the public prosecutor of Milan's inferences that the distribution of $523 million had been corrupt remained uncontradicted. The judge upheld the restraint order. He found there were reasonable grounds to believe that some or all of the $85 million still held by the court would go to persons who are or were Nigerian public officials, under an agreement reached while they were in office. The judge said he could not assume that the administration in power in Nigeria from 2011 until 2015 had "rigorously defended the public interest of the people of Nigeria in all respects" despite assurances, given in 2011, that the transaction was legitimate. The judge noted that those assurances must have been given without knowledge of how the proceeds had actually been distributed. Edis J, who emphasized that he was not making any findings of fact based on the evidence, considered the case to be remarkable for the lack of assistance provided by any of the parties (excepting the legal representatives). He pointed out that the public prosecutor of Milan had provided no indication about how the investigation was proceeding or when the next stage might be reached. The judge pointed out that because Malabu had not sought to file any evidence, the public prosecutor of Milan's inferences that the distribution of $523 million had been corrupt remained uncontradicted. The judge upheld the restraint order. He found there were reasonable grounds to believe that some or all of the $85 million still held by the court would go to persons who are or were Nigerian public

[393] Para 18.

officials, under an agreement reached while they were in office. The judge said he could not assume that the administration in power in Nigeria from 2011 until 2015 had "rigorously defended the public interest of the people of Nigeria in all respects" despite assurances, given in 2011, that the transaction was legitimate. The judge noted that those assurances must have been given without knowledge of how the proceeds had actually been distributed.

Effective management of revenues accruing from its natural resources is a crucial factor for a country's development. While increased oil output has generated billions in rents for Nigeria, poverty persists in the country. Corruption and lack of transparency and due process in allocation of oil contract are particular concerns in the nation's oil industry. Some of the international oil companies and their affiliates operating in Nigeria have taken undue advantages of the weak legal systems by getting involved in corrupt practices with public officials while engaging in economic activities.[394] To gain the trust of citizens and civil societies, petroleum transactions between governments and oil companies must be transparent and government official and corporate managers should be held accountable for failures resulting from any misconduct.[395] Petroleum contracts should be in plain language, legible, be presented clearly, and readily available for the public to access.[396] However, is law a means of achieving these goals?

The use of criminal law to tackle societal issues like corruption has raised inevitable question of whether such measures could deliver intended outcomes.[397] Criminological explanation for certain types of criminal behaviours have been unsuccessful partly because they have been

[394] Global Witness Report 'RIGGED: The Scramble for Africa's Oil, Gas and Minerals' (January 2012) <https://www.globalwitness.org/sites/default/files/library/RIGGED%20The%20Scramble%20for%20Africa's%20oil,%20gas%20and%20minerals%20.pdf> accessed 2 December 2015.
[395] Extractive Industries Transparency Initiative Standard 2003, principles 1-12.
[396] Peter Butt, *LexisNexis Concise Australian Legal Dictionary* (4th ed. Butterworths 2011) 586.
[397] Baldwin FN, 'Exposure of Financial Institutions to Criminal Liability' [2006] vol. 13 (4*) Journal of Financial Crime* 387, 401.

formulated in connection with attempts to isolate personal and social crimes.[398] Although the objective situation of a crime could be what provided the opportunity to the criminal act, that same objective which is behind the crime is connected with the criminal act from psychological and sociological perspectives.[399] Criminology also tells us that it is impossible to eliminate deviant and criminal behaviours completely. An acceptable and appreciable goal could be to reduce the crime rate below a so-called 'serious social alarm threshold',[400] and law is not an ultimate solution to that threshold. In reality, officers of oil companies who bribe foreign officials in developing countries do so after evaluating the risk of detection and the punishment against the rewards they and their corporations could gain if the crime is not detected. They would rather risk committing the crime considering, not just the interests of their corporations, but also the amount of remuneration and the promotion they could achieve if they are not caught and punished.[401]

While criminal behaviour may be an expression of general needs and values, it does not necessarily explain the general human desires for values because non-criminal behaviour can be an expression of the same needs and values. For instance, thieves may be motivated to steal by money and some other values, but honest labourers choose to work for similar values rather than stealing.[402] In this context, it becomes difficult to separate criminological, psychological, and sociological theories from economic theoretical explanations for financial crimes, most of which support the notion that human nature and behaviours can be understood as the rational pursuit of self-interests.[403] The issue of endemic corruption in developing countries goes beyond the general economic, criminological, and sociological explanations for persistent

[398] Edwin Sutherland and Donald Cressey, *Criminology* (10th edn. Lippincott 1978) 80.
[399] Travis Hirschi and Michael Gottfredson, *Understanding Crime* (American Society of Criminology 1980) 8.
[400] Antonello Biagioli, 'Financial Crime as a Threat to the Wealth of Nations' [2008] 11 (1) Journal of Money Laundering Control 88, 89.
[401] Cenap Ilter, 'Fraudulent Money Transfers: A Case From Turkey' [2009] 16 (2) Journal of Financial Crime 125, 126-127.
[402] Hirschi and Gottfredson (n 399) 82.
[403] Ibid 72.

societal crimes. According to Thorsten Sellin's Cultural Deviance Theory, societal crimes like corruption is a product of social definition which is relative to the norms of a particular society or community that may perceive certain 'corrupt acts' as ways of survival rather than crime as the rest of the world may see them. It is human nature to conform to the norms of the communities in which they have been socialised and to which they owe allegiance.[404] Criminal statistics shows that given a certain economic and social environment, there is a sort of 'structural parameter' that would associate a particular country with certain kinds of crime. The level of acceptance or rejection of those kinds of crimes would depend both on the country's economic and social environment, and the public perception of the gravity of that category of crime.[405] However, this does not answer the following question: why do some people of the same community choose not to be corrupt even though corruption is endemic in the same community?

Corruption is a cultural phenomenon which has fed into the economic, political, and social spheres of many developing countries, and some of the international oil companies and their affiliates operating in the petroleum industries of developing countries have taken undue advantage of the situation to buttress their economic interests above the need to protect (preserve) the environment. The situation calls for the development of more effective public awareness and strategies that emphasise the economic and social disadvantages of corruption. Measures to minimise endemic corruption in developing countries should take on board the cultural, legal, social, and political situations of the country. Legislative measures criminalising corruption would not resolve the issue of corporate accountability, responsibility, and transparency in the petroleum industries of developing countries.

[404] Ruth Kornhauser, *Social Sources of Delinquency* (University of Chicago Press 1978) 29.
[405] Biagioli (n 400) 90.

## 4.9 The Application of General Principles of Common Law Environmental Liability in Petroleum Operations and Protection of Indigenous Rights and Interests in Nigeria

In addition to the issues of lack of enforceability and transparency in developing oil producing states like Angola and Nigeria, the later state has other factor compounding to insufficiency of the legislative element of the Nigerian petroleum regime in dealing with the issue of environmental tort and protection of rights and interests of indigenous communities. Generally, where the right of natives over lands acquired through customary law is accorded legal recognition, indigenous peoples/communities could contest unlawful acts that contradict their rights to own, use, develop, and control the land in questions without due consents. However, in states like Nigeria. native lands belong to the government- indigenous communities are constitutionally denied of native title to land. Claimants who suffered damages resulting from petroleum operations could only sue for economic losses and physical injuries. With reference to petroleum operations and environmental torts, legal remedies available for indigenous communities in Nigeria do not relate to the land underneath where the petroleum has been discovered. Available remedies only relate to the consequential environmental effects of the petroleum operations on their health and well-being, and operational impacts on the economic, social, and cultural existence.[406] Since there are no express legislative provisions for protection of rights and interests of indigenous communities in Nigeria, the judiciary and native claimants rely on the common law principles of tort of negligence and strict liability (in accordance with the rule of *Rylands v Fletcher*[407]) in litigations involving petroleum operations and environmental torts.

[406] See discussion in Chapter 3 with particular reference to the Constitutional provisions and the Land Use Act both of Nigeria.
[407] Rylands v Fletcher [1868] UKHL 1.

### 4.9.1 Tort of Negligence

Early tort law gave little attention to inadvertent harm. However, the concept of negligence has expounded in the course of the twentieth century to reflect the economic and social pressures that arose in industrial and urban societies. This trend led to the current flexible approaches of the common-law courts in making decisions in the areas of economic and social policies and claims for compensation for environmental pollution,[408] particularly in common law jurisdictions where legislative provisions are not adequate in dealing with these issues arising from petroleum contracts and compensation of third parties for damages caused by petroleum operation.[409] Negligence in law generally means a breach of duty to take care not to injure the plaintiff or any other persons by the defendant, which duty has been breached by the defendant and which breach has led to legal injury on the plaintiff. It is an independent tort and by its very nature, negligence is not actionable *per se*. This is because the tort of negligence can only be established when it is shown that the plaintiff has suffered a legal injury as a result of the defendant's act or omission, and that as a result of the legal injury, the plaintiff has suffered damages.[410]

An indispensable factor in establishing negligence is the neighbour principle, according to which there need to be enough proximity between the plaintiff and the defendant such that the defendant owes the plaintiff a duty of care. The neighbour principle was established in the celebrated case of *Donoghue v Stevenson*.[411] wherein in his *obiter dictum,* Lord Atkin said:

> The rule that you are to love your neighbour becomes in law you must not injure your neighbour, and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can

[408] Deakin Simon and Markesinis and Deakin's Tort Law (7th edn. Clarendon Press 2013) 99.
[409] Furmston Michael, *Cheshire, Fifoot and Furmston's Law of Contract* (6th edn. Oxford University Press 2012) 31.
[410] Amaka G. Eze, 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria', Nnamdi Azikiwe University Journal of International Law and Jurisprudence [2014] 50, 53.
[411] Donoghue v Stevenson (1932) A.C 562.

> reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[412]

To succeed under the neighbour principle, the plaintiff must prove that the defendant owes him a duty of care, a breach of which constitutes the damage caused by the defendant. The existence of a duty of care will depend on the circumstances of a case. Whether or not the defendant has a duty of care to the plaintiff is determined on the incremental approach where the court's decision shall be determined on a case-by-case basis, and on judicial precedents, and on the three criteria that can be inferred from the English ruling in *Caparo Industries* v *Dickman*:[413]

i. the foreseeability for the defendant that the plaintiff would suffer damage;

ii. the proximity between the plaintiff and the defendant; and

iii. whether it is fair, just, and reasonable to assume that a duty of care exists in a given situation.

In *Shell Petroleum Development Company Nigeria Limited v Chief Otoko*,[414] the respondents who were the plaintiffs at the High Court claimed for damages being and as representing compensation payable by the defendants (the appellants) for injurious effect of crude oil spill on the Andoni River (which directly affected some members of the Nigeria Niger Delta Ijaw community) and the consequent deprivation of the use of the creeks and rivers as a result of the defendant's negligence. The respondents contended that the spillage polluted the Andoni River and Creeks with resultant damage to their properties. They alleged that their juju shrines were desecrated and that drinking water in two wells owned by them was polluted, fish and other fauna and flora perished and that their economic life came to a standstill. It was also in

[412] Donoghue v Stevenson (1932) A.C 562, 580.
[413] Caparo Industries v Dickman [1990] UKHL 2.
[414] Shell Petroleum Development Company Nigeria Limited v Chief Otoko [1990] 6 NWLR (pt. 159) 693.

evidence that the spillage was caused by the act of a third party which removed a screw or bolt from the manifold from where the spill occurred. The applicant cleaned up the area by engaging a contractor to do the job. The respondents employed a firm of experts who investigated various aspects of the pollution and carried out a variation of the properties that were destroyed. The High Court found for the plaintiffs/respondents but the defendant/applicant brought the instant appeal calling on the Court of Appeal to determine whether the defendant was liable in negligence to the plaintiffs. Mr. Anyamene (SAN) contended for the appellants that the report of an expert which was tendered by the respondents at the trial court upon which the court acted was no evidence since the expert was not called as a witness to testify in the proceedings and be cross examined. The Court of Appeal accepted this contention and preferred the expert witness of the defendant/appellant who testified at the lower court that the defendant/appellant's pipeline was opened by an unknown person to the plaintiff/respondent's witness who testified that there was no proper supervision of the pipelines as the defendant/applicant's security men were sometimes away from their duty posts for up to two weeks. The appellant also gave evidence at the trial Court that anybody who can handle a spanner can unscrew the valves. The Appeal Court held, *inter alia*, that where the cause of the oil spill is the malicious act of a third party which was not reasonably foreseeable by the defendant so as to provide against it and where there is a finding of fact that the defendant never instigated such an act, the defendant will not be liable.

The issue of 'causation in fact' has been the bane of claims in negligence because an event that is considered an injury or damage to the plaintiff could be attributable to several causes. The onus is on the plaintiff to show that the damage suffered by him was in fact caused by the very act of the defendant and not others or intervening acts.[415] In actions involving petroleum

[415] John Charlesworth, *Charlesworth on Negligence 5 th. Ed.* (ed.R.A Percy) (Sweet and Maxwell 1971) para 77.

operations, a plaintiff intending to use the remedy of negligence must also prove that the defendant did not observe laid down standards and guidelines and has therefore failed in his duty to take care. Foreseeability of harm is one of the relevant components in establishing a breach of the duty of care. In the English case of *Wagon Mound (No I)*[416] a vessel that was on a demised charter to the appellant was being filled in Sydney Harbour, close to the respondent's ship repairer's wharf. In the course of refuelling, oil was spilled from the vessel and ignited a fire from welding works from the wharf which damaged the wharf. It was noteworthy that welding works at the wharf had previously been halted but was later restarted. after. The Privy Council dismissed the claims for negligence stating that for damage in negligence, it must be of such a kind that a reasonable man should have foreseen. By implication, an act or omission of the defendant from which the plaintiff suffered damage may not constitute a breach of the duty to take care if the damage was not reasonably foreseeable as a possible consequence or result of that act or omission. In that case, the damage is said to be remote from the cause.[417]

Burden of proof in the common law tort of negligence is of limited applicability to environmental damages in developing states: first, petroleum operators, including oil companies and contractors, are engaged in a legitimate and approved operational business. Once they have complied with the duties imposed on them by law in their line of business, they would appear to have discharged the duty on them not to injure members of indigenous communities living in the vicinity of their petroleum activities. Secondly, when oil spills or leaks occur, it is almost impossible for those outside the context of the oil companies to establish with certainty the actual cause of the incident so as to determine whether the defendant oil company has failed to discharge its duty of care towards members of the indigenous communities. This is because this *modus operandi* is scientific and upbeat technology which

[416] Wagon Mound (No I) 1(1961) 1 Lloyd's Rep. 1 CPC.

[417] Eze (n 410) 56.

most times may not be intelligible to illiterates in the science and technology logjam including lawyers and judges. The consequence is that the court may unwittingly decide to go along with the story of the pool of experts who are easily pooled together by oil companies owing to the strength of their financial resources compare to the indigenous communities in question.[418] Thirdly, problem faced by victims of oil pollution in attaining redress through the common law tort of negligence is the issue of *locus standi*. For example, Nigerian courts are generally reluctant to grant *locus standi* to people who have not suffered in any way different from that of others or who may not share a common interest with others in the same claim. In *Jumbo v Shell Petroleum Development*,[419] the appellate Court found that the plaintiff who sued on behalf of 9,600 fishermen of the Jumbo House of the Bonny Ijaw community was not himself a fisherman and held that those directly concerned ought to have instituted the action themselves. Similarly, in *Shell Petroleum Development Company Ltd v Otoko*,[420] The Nigerian Court of Appeal acknowledged the impacts of the oil spill on the economic, social and cultural existence of the concerned indigenous communities, however, it also took notice that there were diversification of interests and the fact that there was no joint tort implied that the damage caused to each of them can only be personal to each of them.

It should, however, be emphasised that the problem is not with the propriety of the common law principle of negligence which has developed over the years as a vehicle for seeking redress by the victim of a tort. Rather application of the principle of negligence in oil producing developing states like Nigeria is not sufficient on its own in addressing 'Constitutional issues' like petroleum operations and protection of public environmental rights and interests. In addition to the general issue of lack of transparency in the operations of the oil companies, members of the indigenous communities where the environment is devastated are so poor and

[418] Ibid, )58.
[419] Jumbo v Shell Petroleum Development (1999) 13 N.W.L.R (pt. 633) 57.
[420] Shell Petroleum Development Company Nigeria Limited v Chief Otoko [1990] 6 NWLR (pt. 159) 693.

uninformed that they are not able to obtain information about petrochemical operations so as to adduce sufficient evidence in proof of the operator's negligence.[421]

### 4.9.2 Strict Liability: The Rule of *Rylands v Fletcher*[422]

Strict liability is a legal term referring to the holding of an individual or entity liable for damages or losses, without having to prove carelessness or mistake. When pursuing a legal action for liability, the plaintiff must generally prove that the defendant was somehow at fault, whether by negligence or direct fault, for the damages incurred by the plaintiff. However, there are instances where the plaintiff would not be required to prove direct fault or negligence. A strict liability tort in common law holds a person or entity responsible for unintended consequences of his actions. In other words, some circumstances or activities are known to be fundamentally dangerous, so when something goes wrong, the perpetrator is held legally responsible. *Rylands v Fletcher*[423] concerns liabilities for nuisance. The defendants owned a mill and constructed a reservoir on their land. The reservoir was placed over a disused mine. Water from the reservoir filtered through to the disused mine shafts and then spread to a working mine owned by the claimant causing extensive damage. It was held that the defendants were strictly liable for the damage caused. In his *obiter dictum*, Lord Cranworth explained that:

> If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.[424]

[421] Eze (n 410) 60.
[422] Rylands v Fletcher [1868] UKHL 1.
[423] Rylands v Fletcher [1868] UKHL 1.
[424] Rylands v Fletcher (1868) L.R. 3 H.L. 330.

In the context of petroleum operations and environmental damages in Nigeria, Justice Rowland explained in *SPDC* v *Amaro*[425] that in instances where crude oil previously collected in a pit burrowed by the appellant escape into the adjoining lands of the respondents and damage their lands, pounds, etc. liability on the part of the owner or the person in control of the oil pit exist under the *rule of Rylands* v *Fletcher*. It must be said that the establishment of crude oil pipeline on land with the potential of escape or spill of its contents is clearly non-natural use of the land.[426] However, recent trends in many developed common law countries indicate a combination of the common law principle of strict liability with statutory provisions in the area of environmental regulations and prosecutions, taking the form of 'quasi criminal' environmental torts.[427] For instance, in the United Kingdom, environment regulatory bodies traditionally rely on the use of the criminal law to protect the environment.[428] In England and Wales, the Environment Agency is the main regulatory body. Each year it records around 50,000 environmental incidents and prosecutes approximately 700 offenders. Most of the charges are based on the principle of strict liability and the offences do not require proof of fault.[429] This is not, however, a recent development. In the early 19th century the strict liability offence of public nuisance was occasionally used to protect the environment and punish those who endangered public health.[430]

[425] *SPDC* v *Amaro* [2000] 10 NWLR 256; *McPherson v Buick*, 217 NY 382 (1916); *Henderson v Merrett Syndicates Ltd.* [1994] 3 All ER 506; Le Dain in *Central Trust Co. v Rafuse* (1986) 31 DLR (4th) 481; *Societé Generale De Surveillance S.A v Rastico Nigeria Limited* [1992] 6 NWLR 93, 98.

[426] *SPDC* v *Families of Duboro Community* [2003] 11 NWLR 533; *Ololo*v *Nigerian Agip Oil Co. Ltd* [2001] 13, 88.

[427] Michael Watson, 'The enforcement of environmental law: civil or criminal penalties?', (2005) 17 ELM, 4 available at http://eprints.hud.ac.uk/id/eprint/339/1/WatsonEnforcement.pdf accessed on 19/08/2018.

[428] Ibid.

[429] Ibid.

[430] R v Medley [1834] 2 C & P 292.

This use of strict liability to enforce environmental regulations[431] is also common in other common law developed countries and generally in civil law jurisdictions, although in forms of non-criminal sanctions, including civil and administrative penalties.[432] In the United States, for example, civil penalties are far more common than criminal ones in the area of environmental torts. In 1997, 97% of the cases handled by the Environmental and Natural Resources Division of the United States' Department of Justice were civil administrative ones. Only 3% were criminal cases.[433] In his comparative study of environmental regulation in the United Kingdom and the United States, William Wilson writes that 'apart from the water pollution area, those looking for purpose or design in the way that English law has come to use the criminal law to enforce environmental statutes may look in vain. It has grown up that way piecemeal, and out of habit as much by design.'[434]

## 4.10 Role of the Common Law in Mitigating the Effects of Regulatory Insufficiency for Protection of Indigenous Rights and Interests in Developing States

The terms common law system and civil law system are used to distinguish two distinct legal systems and approaches to law. Generally, the term 'common law' refers to the legal systems which have adopted the historic English legal system. Many Commonwealth and former

[431] William Wilson Making, *Environmental Laws Work: an Anglo-American Comparison* (Hart Publishing 1999) 110; Michael Woods and Richard Macrory, 'Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach '(Centre for Law and the Environment University College London 2003), 2.8.; P de Prez 'Beyond Judicial Sanctions: the Negative Impact of Conviction for Environmental Offences' (2000) 2 *Environmental Law Review* 11–22.

[432] Although the terminology differs across jurisdictions, it is useful to distinguish between civil fines and administrative penalties. Civil fines are essentially financial penalties which lack the moral overtones of comparable criminal sentences. Administrative penalties generally involve the suspension or revocation of licences. Although civil fines can be very substantial, the loss of a licence may be catastrophic for an organization. The denial of permission to operate within the law potentially incapacitates it. It is the corporate equivalent of a custodial sentence (or possibly execution). In theory, the aim is to protect the environment rather than to punish a wrongdoer. In reality, the sanction (or the threat of its use) is a major deterrent. It is, in fact, a much more potent economic deterrent than a criminal conviction and a modest fine. See Michael Watson, 'The enforcement of environmental law: civil or criminal penalties?', (2005) 17 ELM, 5-6 available at http://eprints.hud.ac.uk/id/eprint/339/1/WatsonEnforcement.pdf accessed on 19/08/2018.

[433] Wilson (n 431) 107.

[434] Ibid 110.

Commonwealth countries (including Austria, Canada, Ghana, Nigeria, the United Kingdom and the United States) retain the common law system. The term 'civil law' refers to those other jurisdictions (including Angola and France) which have adopted the European continental system of law derived essentially from ancient Roman law, but owing much to the Germanic tradition. The usual distinction to be made between the two systems is that the common law system tends to be case-centred and hence judge-centred, allowing scope for a discretionary, pragmatic approach to the problems that appear before the courts. The law can be developed on a case-by-case basis. On the other hand, the civil law system tends to be a codified body of general abstract principles which control the exercise of judicial discretion.[435] The principles of common law are derived from the application of natural reason, an innate sense of justice and the dictates of conscience. Unlike the civil law, common law is not the result of legislative enactment. Rather, its authority is derived solely from usages and customs that have been recognised, affirmed and enforced by the courts through judicial decisions.[436] In particular, tortious liability exists in common law primarily to compensate victims by compelling wrongdoers to pay for damage (personal injuries or economic loss) which the victims suffer.[437] Tort law allocates risks collectively in accordance with community values by the fiat of court or legislature.[438]

Common law is not a fixed or absolute set of written rules in the same sense as statutory or legislatively enacted law. The unwritten principles of common law are flexible and adaptable to the changes that occur in a growing society.[439] As the courts examine each new set of facts

[435] http://www.open.edu/openlearn/society-politics-law/judges-and-the-law/content-section-8.1
[436] https://projects.ncsu.edu/cals/course/are309b/Common_Law_Environmental_Remedies.pdf.
[437] *McPherson v Buick*, 217 NY 382 (1916); *Henderson v Merrett Syndicates Ltd.* [1994] 3 All ER 506; Le Dain in *Central Trust Co. v Rafuse* (1986) 31 DLR (4th) 481; *Societé Generale De Surveillance S.A v Rastico Nigeria Limited* [1992] 6 NWLR 93, 98; *Shell Petroleum Development Company Nigeria Ltd (SPDC) v Families of Duboro Community* [2003] 11 NWLR 533; Daniel Greenberg, *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (10thedn. Sweet and Maxwell 2012) 14.1.2; Kirsty Horsey and Erika Rackley, *Tort Law* (3rdedn. University of Oxford Press 2013) 37.
[438] Sappideen Carolyn and Vines Prue (ed.) Fleming's Law of Tort (10th edn. Thomson Reuters 2011) 3.
[439] https://projects.ncsu.edu/cals/course/are309b/Common_Law_Environmental_Remedies.pdf.

in the light of past precedent, an orderly development of common laws occurs through a slow and natural process. This does not, however, imply that the common law expresses a form of 'judicial supremacy'. On the contrary, it reflects the view that free people must take responsibility for their actions and must be held responsible for their actions, with the courts providing an important avenue for holding them accountable through judicial precedence.[440] Advocates of property and market-based approaches to environmental problems, including Adler and Morriss, argue that tort laws could be more protective than statutory regulations in the area of mineral pollution and environmental regulations.[441] However, the balance of importance between legislation and case law has shifted significantly over the centuries. It is increasingly becoming trite law that statutory provisions now supersede common law.[442] Nevertheless, common law is still adapting to the needs of a changing society today.[443] In the tenth edition of Craies on Legislation, Greenberg observed:

> Despite the increasing shift towards control by legislation, there remains a rebuttable presumption that the legislature does not intend to alter a clearly established principle of law . . . So, in many cases, the courts have rejected a possible interpretation of legislation on the grounds that it would involve significant departure from pre-existing common law, without the departure being expressly provided for or a necessary implication from the context of the provision . . . By express provision or necessary implication, however, it is open parliament to abolish or modify ancient principles of common law.[444]

[440] Roger Meiners and Bruce Yandle, 'The Common Law: How it Protects the Environment', PERC Policy Series (May 1, 1998), available at <https://www.perc.org/wp-content/uploads/2018/02/PS13.pdf>, accessed 18/08/2018.
[441] Jonathan H. Adler and Andrew P. Morriss, 'Symposium: Common Law Environmental Protection – Introduction', Case Western Reserve Law Review, Vol. 58, Issue 3 [2008], 577.
[442] *Leach* v *R* (1912) AC 305; Owen McIntyre, 'Statutory Liability for Contaminated Land: Failure of the Common Law?' in John Lowry and Rod Edmunds (eds.), *Environmental Protection and the Common Law* (Portland Oregon 2000) 115.
[443] Paula Giliker and Beckwith Silas, *Tort* (Sweet and Maxwell 2004) 14, 16.
[444] Goff in *Cambridge Water v Eastern Countries Leather* [1994] AC 264; *Bhamjee* v *Forsdick* [2004] 1 WLR 88; Arden in *Monro*v *Revenue and Customs Commissioners*[2008] EWCA (Civ.) 306; Keith Stanton, 'Tort and Environmental Pluralism' in John Lowry and Rod Edmunds (eds.), *Environmental Protection and the Common Law* (Portland Oregon 2000) 94; K Morrow, 'Nuisance and Environmental Protection' in John Lowry and Rod Edmunds (eds.), *Environmental Protection and the Common Law* (Portland Oregon 2000) 139, 157-158; JE Penner, 'Nuisance, the Morality of Neighbourliness, and Environmental Protection' in John Lowry and Rod Edmunds (eds.), *Environmental Protection and the Common Law* (Portland Oregon 2000) 27-8.

Although the list of traditional theories of actions which have been employed by common law courts in the areas of petroleum operations and environmental litigation is not long,[445] many analysts and academics have begun to re-examine the potential of common law causes of action in the field of mineral extraction and environmental torts to supplement, if not supplant, portions of the existing regulatory regime. But, whatever the limitations of statutory environmental regulations, the common law has limitations of its own as well, including the failure to protect many ecological resources today. In some instances, administrative regulation may have hampered or 'sabotaged' common law protections, but in others the common law failed on its own.[446] Nevertheless, while legislation, as an expression of regulation, is designed to prevent harm, tort law is primarily designed to repair its effects, save to the extent that its general rules operate with deterrent effect in terms of the amount of damages or adverse publicity resulting from a successful suit. Thus, in common law developing states like Nigeria where there are no sufficient legislative provisions to protect right and interests of indigenous communities, the common law mitigates the effects of general lack of sufficient regulation in preventing the impacts of petroleum operations on indigenous economic, social and cultural existence.

### 4.11 Conclusions

Petroleum regimes of every state -developed and developing- usually go through various phases. However, the outcome of a best practice regulation should focus on attaining greatest possible net benefit to the community. This should determine the quality of a regulation in addition to its necessity and consultation on its design and administration. Acknowledging the fact that individual states have different communities and needs at different stage of their legal

[445] Julian C. Juergensmeyer, 'Common law Remedies and Protection of the Environment', University of British Colombia Law Review, Vol. 6 [1971] 215, 216.
[446] Adler and Morriss (n 444) 579.

development, ordinarily, a practical petroleum regulation should be one that is tailored to the needs of the petroleum producing state and the current level of development of its petroleum industry. Nevertheless, the sufficiency of the petroleum regulations, as forms of legislative elements of petroleum regime, in dealing with petroleum operations, environmental regulations, and protection of indigenous rights and interests depend on their enforceability and ability to achieve the required necessity that promoted their existence. Furthermore, a well-designed petroleum regulation should ensure sufficient transparency in other to gain greater degree of public confidence. The comparative study of the four petroleum producing states – Angola, Australia, Nigeria, Norway – indicates that weak legal system is not the sole determinant of insufficient petroleum legislations and regulations in developing countries. The main concerns are poor regulatory frameworks, lack of environmental assessment information, enforceability of existing petroleum regulations and lack of transparency in the petroleum industries of developing countries today. Nevertheless, the common law of tort repairs the effects of petroleum operations on indigenous rights and interests in developing common law states like Nigeria where there are no sufficient legislations, as expression of regulation, in preventing impacts of petroleum operations on economic, social and cultural existence of indigenous communities.

## CHAPTER 5

# LEGISLATIVE ELEMENT OF PETROLJUEM REGIME, PETROLEUM OPERATIONS AND RECOGNITION OF RIGHTS AND INTERESTS OF INDIGENOUS COMMUNITIES IN ANGOLA AND NIGERIA

### 5.1 Introduction

Dispossession of native lands in Nigeria has provoked political and social struggles in the Nigerian Niger Delta region.[447] The region has been described as one of the world's most severely petroleum-impacted ecosystems and one of the fifth most petroleum-polluted environments in the world. It is a vast coastal plain at the southernmost part of Nigeria where the river Niger drains into the Atlantic Ocean in the Gulf of Guinea. Considered the largest wetland in Africa and also among the largest in the world, it covers 70,000 square kilometres. Between 7,000 and 25,000 square kilometres of the Delta are covered by mangrove forests, swamps, coastal ridges, and forests. The Niger Delta was once very fertile, providing a habitat for a vast biodiversity and supporting a high population density of indigenous communities who derive their livelihoods from its rich resource base. They are mainly ethnic minorities with a long history of agitation for self-determination.[448] In order to ascertain rights of ownership of indigenous communities over native lands; and protection of indigenous interests against petroleum operations in Sub-Sahara African states, this examines further the legal recognition of indigenous rights and interests in the legal systems of Angola, Australia, Canada and Nigeria. Of these four jurisdictions – Angola, Australia, Canada, Nigeria – the last three share a common colonial history. Although the indigenous peoples in the three countries were in

[447] Cyril I. Obi, *'Oil Extraction, Dispossession, Resistance, and Conflict in Nigeria's Oil-Rich Niger Delta'*, Vol. 30, 1-2 Canadian Journal of Development Studies [2010] 219-236, 221.
[448] Ibid 219-236, 222.

existence before British first made contact, colonial influences remained in Australia and Canada, unlike Nigeria. For this reason, the populace addressed in Nigeria (and Angola) are referred to as 'indigenous communities', while those of Australia and Canada are referred to as 'indigenous peoples.' The issues of social and environmental injustices today relate to the indigenous communities of Angola and Nigeria. In instances where indigenous communities are disposed of the land they acquired from their ancestors through native laws and customs, what interest, if any, do they have in such lands, when they are used for petroleum operations? This question requires a functional approach in comparative analysis, to examine the similarities and differences in the legal frameworks of native title of the three common law countries – Angola, Australia, Canada and Nigeria, in order to determine the adequacy of national legal systems in recognition and protection of rights and interests of indigenous communities against impacts of petroleum operations in sub-Sahara African oil producing states like Angola and Nigeria, today.

### 5.2 Rights of Ownership and Control over Native Lands and Protection of Indigenous Interests against Petroleum Operations in Australia

The peoples whose descendants are now known as aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement. They have been progressively dispossessed of their lands. The dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with aboriginal peoples and Torres Strait Islanders concerning the use of their lands. They include rights to hunting, gathering, and fishing.[449] In 1788, when the first fleet arrived in Australia, and Captain Phillip raised the flag at Sydney Cove, the British claimed not only that the Crown obtained sovereignty over New South Wales (then the whole of the eastern half

[449] Commonwealth Native Title Act, 1993 (as amended by Act No. 122 of 2009), sec. 223.

of the continent) but also ownership of the land as well based on the concept of terra nullius.[450] For the Crown to have peaceful ownership of inhabited lands, it had to enter into a treaty with the natives to acquire the land it wanted. In many cases, those treaties were broken, albeit, the British were prepared to recognise the natives in their colonies.[451] This approach was confirmed in 1889 by the Privy Council which in *Cooper v Stuart*[452] held that Australia in 1788 was a tract of territory practically unoccupied without settled inhabitants.[453] The distinction was made clear by Justice Blackburn in *Milirrpum's* case thus:

> There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words 'desert and uncultivated' are Blackstone's own; they have always been taken to include territory in which live uncivilised inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony is immediately in force there upon its foundation. In those of the latter kind, the colony already has law of its own, that law remains in force until altered.[454]

Two hundred years of anthropology and historical study of Australian Aborigines demonstrated, however, that far from lacking a system of laws and customs, the indigenous peoples of Australia had, over tens of thousands of years, developed complex forms of social organisation, including laws relating to ownership and management of land. Nonetheless, the British were ignorant of this history in 1788. They wrongly believed that the indigenous peoples did not have a system of land law deserving of recognition by the common law. By the middle of the nineteenth century, many in England (including members of the British Government) and in Australia had formed a different view. By then the demand for more and

[450] Kildea (n 224).

[451] Ibid.

[452] Cooper v Stuart (1889) 14 App Cas 286.
[453] Australian Law Reform Commission <www.alrc.gov.au/publications/5.%20Recognition%20of%20Aboriginal%20Customary%20Laws%20at%20Common%20Law%3A%20The%20Settled%20Colony%20Debate/se > accessed on 28 August 2016.
[454] (1971) 17 FLR 141, 201.

more land to accommodate the squatters' expansion into the bush meant that nothing was done about changing the approach which the law had adopted, namely that Australia in 1788 was terra nullius.[455]

However, Australia's approach to native rights and interests in natural resources was tested in two major legal proceedings: first, was the case of *Mabo v Queensland*[456]which concerned the Murray Islands in Torres Strait that had been annexed by the Colony of Queensland in 1879. In 1982, Eddie Mabo and two other members of the Meriam people who occupied the Murray Islands brought an action against the State of Queensland and the Commonwealth of Australia in the High Court claiming that the Crown's sovereignty over the islands in dispute was subject to the rights of the Meriam people based upon their local customs and traditional native title. The High Court by a majority of six to one agreed. Explaining the rationale for its decision, the Court outlined some broad principles which apply not only to the Murray Islands in the Torres Strait but also to mainland Australia today. In summary, those principles are as follows:

1. Although the British Crown acquired sovereignty, it did not acquire beneficial or full ownership of the land. Sovereignty conferred on the Crown an authority to take beneficial ownership of the land if it chose to do so. However, if it did not opt to do so, the land continued to belong to the indigenous people according to their laws and customs. Until it did that, the Crown only had a formal title to the land called "radical" (root) title.[457]
2. Where native title continues to exist, the laws and customs of the indigenous people who have connection with the land determine the rights which the native title confers.

[455] Kilea (n 224).
[456] *Mabo v Queensland* No. 2 1992 (cth).
[457] Radical title is a theoretical legal concept (what is called a "legal fiction") to give effect to the land law system which was inherited from England. This system had evolved from feudal times when the King was considered the owner of all of the land in the kingdom and everyone else held their title from the King.

In such instances, continual present of the natives on the land is not necessary in proving their native title over the land, insofar as there is evidence of tribal existence on the land in 1788.[458]

3. Native title to land is, however, extinguished if the tribe or group having native title loses its connection with the land. If the connection is broken, then the native title is said to be extinguished. That does not mean that there has to have been a continuing physical connection, but that their descendants may have continued to live in the district and continued to maintain a connection with the land in many ways other than physical occupation.[459]
4. Native title over any parcel of land may be surrendered to the Crown, but the rights and privileges conferred by native title are inalienable.
5. If native title existed about a parcel of land, the Aborigines, in effect, had a right to veto any future dealings with that land which might extinguish or impair their native title, including the discretion to veto development of the land.

However, does the grant of petroleum lease extinguish native title to land in Australia? *Mabo* did not answer the question. It was agreed that the grant of a freehold title would do so, but the judges could not agree whether leases would also. Three of the six judges in the majority expressed the view that the grant of a lease would extinguish native title but the other three

[458] Native title is generally a communal rather than an individual title. The laws and customs of the various Aboriginal peoples differ, just like laws differ between the states of Australia or between countries. Moreover, as with the laws and customs of all living communities, the laws and customs of Aboriginal peoples are not static. They change over time to meet the challenges of the day. Given the significant impact of white contact, it is not surprising that the laws and customs of Aboriginal peoples have undergone substantial change over the years.

[459] The connection must have existed and been maintained since the time the Crown first asserted sovereignty—in the case of New South Wales, 1788. Therefore, those claiming native title to land must show: (a) that they are descended from the Aborigines whose land it was in 1788; and (b) that over the generations a traditional connection has been maintained with the land.

raised doubts as to whether that could be said to be so in all cases. [460] The issue was decided in the second case: *The Wik Peoples v The State of Queensland*.[461]

The *Wik* case was about pastoral leases lands (a type of Crown lease used in Australia since the 1840s) which the Wik and Thayorre peoples of northern Queensland had claimed native title over. It was argued by those opposed to the claims that the granting of the pastoral leases had extinguished native title. In general terms, a pastoral lease gives the leaseholder the right to graze cattle or sheep. Such leases usually cover large areas of land in fairly arid parts of Australia so that the amount of activity on any particular part of the land is relatively minimal. Many considered that because the activities on the land were not such as to interfere with the rights of Aborigines to enjoy their native title, it was unlikely that the grant of such leases was inconsistent with the continued existence of native title. Others, including the Commonwealth Government's legal advisers, considered that such leases did extinguish native title. They argued that:

1. at common law a lease confers exclusive possession on the tenant;
2. the tenant's right to exclusive possession is necessarily inconsistent with aboriginal people's native title right to possession of the same land; and
3. since the Crown's sovereignty could extinguish native title by granting inconsistent rights, the grant of a lease extinguished native title.

The principal question which was answered was, in effect, did the granting of the pastoral leases in question necessarily extinguish all native title rights and interests that might otherwise exist on the land? The High Court, by a majority of four to three, answered in the negative. The main principles which emerge from the various judgments are as follows:

[460] Kildea (n 224).

[461] *The Wik Peoples v The State of Queensland* [1996] HCA 40.

1. That granting of a lease does not confer exclusive possession on the leasee. The Court said that the pastoral leases were not leases but were a bundle of statutory rights conferred on the pastoralists by the Land Act to permit them to graze cattle and sheep on Crown land. Unless the lease itself, or the statute under which it had been granted, conferred exclusive possession, merely calling the bundle of statutory rights a 'lease' would not confer exclusive possession.
2. Leases do not necessarily extinguish all native title rights and interests.
3. Whether or not any extinguishment or impairment of native title exist can only be determined by considering the nature of the native title, rights and interests which the Aborigines can establish about the land.

In summary the High Court of Australia rejected the doctrine that Australia was *terra nullius* at the time of European settlement. The Court held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands. Native title can only be extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.[462] In December 1993, the Native Title Act 1993 (Cth) was passed. The Native Title Act Provides a process to determine how and where native title can be established. The Act binds the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory, of the Northern Territory and of Norfolk Island.[463] The preamble of the Native Title Act states thus:

> The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through: (a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International

[462] Commonwealth Native Title Act, 1993, preamble.
[463] Commonwealth Native Title Act, 1993, sec.5.

> Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and (b) the acceptance of the Universal Declaration of Human Rights; and (c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Australian Human Rights Commission Act 1986*.

The Native Title Act sets out how to provide compensation where native title is impaired or extinguished. The Act provides for a future regime in which native title rights are protected and conditions imposed on acts affecting native title land and waters. It gives Indigenous Australians who hold native title rights and interests—or who have made a native title claim—the right to be consulted and in some cases, to participate in decisions about activities proposed to be undertaken on the land. Furthermore, the Act establishes a framework for the recognition and operation of representative bodies that provide services to native title claimants and native title holders.[464] Section 3 of the Native Title Act provides the objectives of the Act thus:

(a) to provide for the recognition and protection of native title; and

(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and

(c) to establish a mechanism for determining claims to native title; and

(d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.

The Native Title Act also confirms that many acts done before the High Court's judgment, that were either valid, or have been validated under the past act, will have extinguished native title.[465] 'Extinguishment' means that all or some native title rights are lost forever in Australian law. Once native title has been extinguished, it cannot be revived except in very limited circumstances. The extinguishment of native title can be total extinguishment which takes away all native title rights or partial extinguishment which takes away only some native title rights.

[464] Native Title Act, 1993(Cth), sec. 4; Deane Fergie 'Native Title Act 1993' available at https://www.adelaide.edu.au/legalandrisk/docs/resources/Native_Title_101.pdf accessed on 09/09/2018.

[465] Native Title Act, 1996 (Cth), sec. 4.

Partial extinguishment shows the difference between two categories of native title rights: 'exclusive' allows native title holders to control access to land and 'non-exclusive' native title does not allow native title holders to control access to land.[466] Section 225 of the Commonwealth Native Title Act, 1993 provides that:

> A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of: (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and (b) the nature and extent of the native title rights and interests in relation to the determination area; and (c) the nature and extent of any other interests in relation to the determination area; and (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

A determination of native title is a decision that native title does or does not exist in a particular area of land and/or waters. A determination will establish whether the holders have exclusive possession and if not, the native title rights and interests the maker of the determination considers to be of importance. Determinations may cover the entire area of an application, or only part of the area of an application. Sometimes the court may decide that native title rights exist over one part of the determination area, but do not exist over another part. Determinations may be conditional upon some future event occurring, (eg: the registration of an indigenous land use agreement).[467]

[466] Fergie, ibid.

[467] Ibid.

### 5.3 Rights of Ownership and Control over Native Lands and Protection of Indigenous Interests against Petroleum Operations in Canada

Aboriginal title in Canada can be founded on treaties. They are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes). These types of lands are not static or mutually exclusive.[468] Section 2 of the Indian Oil and Gas Act of Canada, 1985, defines Indian lands (First Nations or Indigenous lands) as:

> Lands reserved for the Indians, including any interests therein, surrendered in accordance with the *Indian Act* and includes any lands or interests in lands described in any grant, lease, permit, licence or other disposition.

The above definition refers to indigenous lands in Canada, including:

1. reserve lands for a purpose of oil or gas exploration or exploitation;
2. subsurface rights and interests in Indian lands; and
3. rights and interests in reserve lands that have been granted to Her Majesty in right of Canada for oil or gas exploration or exploitation pursuant to a land code adopted under the First Nations Land Management Act.

Every grant, lease, permit, licence or other disposition respecting the exploitation of oil or gas in Indian lands, whether granted, issued, made or issued or purported to be issued or made pursuant to any other regulation is deemed to be subject to the regulations made under the Indian Oil and Gas Act. The Indian Oil and Gas Act does not abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.[469] In *Friends of the Oldman River Society v Canada (Minister of*

[468] *R. v Van der Peet*, [1996] 2 S.C.R. 507.

[469] Indian Oil and Gas Act, 1985, sec. 6.

*Transport)*,[470] the Supreme Court of Canada recommended that the potential consequences of exploration activities on community's livelihood, health and other social matters should be taken into consideration and be seen as an integral part of decision-making on matters affecting environmental quality. However, to what extent are indigenous rights recognised and protected by the current legislative regimes of Canada? The answer depends on the existence of the right in question and whether or not it is an integral part of living of the indigenous people in question.

Canadian courts are careful to avoid the application of traditional common law concepts of property as they develop their understanding of the '*sui generis'* nature of aboriginal rights.[471] In arriving at decisions relating to government interference with natives' rights and interests, the courts of Canada, generally, intemperate Sections 35 (1) of Canada Constitutional Act, 1982 together with Sections 92 (24) and 109 both of the Constitutional Act 1867. Section 35 (1) of Canada Constitutional Act 1982 provides:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada. For greater certainty, 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired. Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection are guaranteed equally to male and female persons.

There is a body of Canadian case law relating to the meaning of the protection offered by Section 35 of the Constitutional Act, 1982.[472] In *R v Sparrow*,[473] Sparrow, a member of the Musqueam band who was fishing for personal use, was charged under Section 61(1) of the

[470] *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] S.C.J. No. 1, per La Forest J., at p.18 (Q.L).

[471] *R. v Sparrow*, [1990] 1 S.C.R. 1075.
[472] Theresa A. McClenaghan, 'Molested and Disturbed Environmental Protection by Aboriginal Peoples through Section 35 of the Constitution Act, 1982', Originally Prepared in Partial Fulfilment of the Requirement of an LLM (Constitutional Law) at Osgoode Hall School of York University, September 1999, 4.
[473] *R v Sparrow* [1990] 1 S.C.J. No. 49 per Dickson C.J. and La Forest J.

Fisheries Act for fishing with a drift net that exceeded regulation length. Sparrow argued that he was exercising an existing aboriginal right to fish and that the net length restriction was inconsistent with Section 35 (1) of the Constitutional Act, 1982 and therefore, invalid. The Supreme Court held, *inter alia*, that the *Musqueam right to fish has always existed and has not been extinguished.* Evidence shows that the Musqueam lived in the area before the settlers arrived, and fishing has always been an integral part of their lives. In explaining the meaning of the term 'existing' in Section 35 (1) of the Constitutional Act, 1982, the Court said:

> The word 'existing' makes it clear that the right to which S. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect . . . an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982 . . . 'existing' means 'unextinguished' rather than exercisable at a certain time in history . . . Far from being defined according to the regulatory scheme in place in 1982, the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time . . . That a right is controlled in great detail by the regulations does not mean that the right is thereby extinguished . . . The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

One of the issues to be determined in *R v Delgamunkw*[474] was whether the provincial government had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of Section 88 of the Indian Act of 1985 which provides that:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act... or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

The Court held that aboriginal title at common law was recognised well before 1982 and is accordingly protected in its full form by Section 35 of the Constitutional Act of Canada, 1982.

[474] *R v Delgamunkw* [1997] 3 S.C.R. 1010.

The constitutionalising of common law aboriginal rights, however, does not mean that those rights exhaust the content of Section 35 of the Constitutional Act. The rights described under Section 35 are rights held collectively by aboriginal people. However, individuals may claim protection in certain circumstances.[475] With particular reference to environmental rights, any extinguishment of environmental aboriginal rights would have to have happened before 1982 when the Constitutional Act entrenched existing aboriginal and treaty rights.[476] Thus, in *R v Van der Peet*[477] the Supreme Court observed that:

> It is this which distinguishes the Aboriginal rights recognized and affirmed in S, 35 (1) from the Aboriginal rights protected by the common law. Subsequent to S. 35 (1) Aboriginal rights cannot be extinguished and can only be regulated or infringed.

In a treaty signed between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions, 1876 (Treaty 6) provided, *inter alia*, that:

> Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government *for the use and benefit of the Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians*, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the Bands here represented, in extinguishment of all claims heretofore preferred [emphases added].[478]

Treaty 6 outlined conditions for disposition of Indian lands thus: the disposed land must be used for the benefit of the Indian owners; the Indians land owners must be consulted, and their consents must be obtained before disposing their land. The government must act in good faith

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[475] McClenaghan (n 472) 10.
[476] Kent McNeil, 'Aboriginal Title and Aboriginal Rights: What is the Connection?', 36 [1997] *Alberto Law Review* 117.
[477] *R v Van der Peet* [1996] 2 S.CR. 507 at para. 28.
[478] Treaty No. 6 of Canada, August 23 and 28 and September 9, 1876, Cat. No.: R33-0664, IAND Publication No. QS-0574-000-EE-A-1, available at <https://www.aadnc-aandc.gc.ca/eng/1100100028710/1100100028783>, access 28/12/2017.

when taking actions or enacting legislations that seek to dispose native lands. Her Majesty further agreed with the Indian land owners that they shall have right to pursue their avocations of hunting and fishing throughout the lands to be disposed, subject however to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such lands as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said government.

In 1930, the Natural Resources Transfer Agreement between the province of Saskatchewan and the Federal Government modified Treaty 6 by extinguishing the treaty right to hunt commercially but expanding the geographical areas in which Indians have the treaty right to hunt for food. Subsequently, in *R v Sundown*,[479] a member of a Cree First Nation that is a party to Treaty 6 (the respondent in this case), cut down some trees in a provincial park and used them to build a log cabin. The provincial parks regulations prohibit the construction of a temporary or permanent dwelling on park land without permission. Pursuant to the provisions of Treaty 6, the respondent is entitled to hunt for food on land that is occupied by the provincial Crown, including the provincial park. He testified that he needed the cabin while hunting, both for shelter and as a place to smoke fish and meat and to skin pelts. Evidence was presented at trial of a long-standing band practice to conduct 'expeditionary' hunts in the area now included within the park. In order to carry out these hunts' shelters were built at the hunting sites. The shelters were originally moss-covered lean-tos, and later tents and log cabins. The respondent was convicted of building a permanent dwelling on park land without permission. In a summary conviction, the Court of Appeal quashed the conviction, and on further appeal, the Supreme Court affirmed that decision of the Court of Appeal. Cory J explained that:

> They [fishing rights] are rights by a collective and are in keeping with the culture and existence of that group. . . [T]hey are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories . . . Any interest in the hunting cabin

[479] *R v Sundown* [1999] 1 SCR 393.

> is a collective right that is derived from the treaty and the traditional expeditionary method of hunting, it belongs to the Band as a whole.[480]

Although a particular legislation may be found to be a *prima facie* interference with aboriginal rights and interests if it restricts the exercise of natives' rights, Section 92 (24) of the Constitutional Act of 1867 provides that it is lawful for the Crown to make laws for the peace, order, and good government of Canada in matters concerning Canadians, including Indians and relating to lands reserved for them. Section 109 of the Constitutional Act of 1867 states further that:

> All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts *existing in respect thereof*, and to any Interest other than that of the Province in the same [emphasis added].

Constitutionally recognised aboriginal rights in Canada are, thus, not absolute. Section 92 (24) gives the government the power to legislate for the Indians. This power carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. Aboriginal rights may thus be infringed insofar the action furthers a compelling and substantial legislative objective, and it is consistent with the special fiduciary relationship between the State and the aboriginal peoples. However, the intentions of parliament to extinguish any aboriginal title should be clearly stated in the legislation which seeks to extinguish it.[481] In *R. v. N.T.C. Smokehouse Ltd.*, L'Heureux-Dubé J. explained further:

> Aboriginal rights can be extinguished through a series of legislative acts. The intention to extinguish must nonetheless be clear and plain, in the sense that the government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. This is diametrically opposed to the position that extinguishment may be achieved by merely regulating an activity or that legislation necessarily inconsistent with the continued enjoyment of an aboriginal right can be deemed to

[480] *R v Sundown* [1999] 1 SCR 393 at paragraphs 35.6.
[481] *Per* Lamer C.J. and Cory, McLachlin and Major JJ in *R v Delgamunkw* [1997] 3 S.C.R. 1010.

> extinguish it. Here, the legislation was insufficient to extinguish the aboriginal right to sell, trade and barter for livelihood, support and sustenance purposes. The statutes and regulations did not address aboriginal fishing in any way that demonstrates an intention to abolish aboriginal interest in the fishery.[482]

Nevertheless, in *R. v Sparrow*,[483] the Supreme Court held, *inter alia*, that Section 35 (1) of the Constitutional Act does not explicitly authorise the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. However, the words 'recognition' and 'affirmation' incorporate government's responsibility to act in a fiduciary capacity with respect to aboriginal people and so import some restraint on the exercise of sovereign power. Government legislative powers continue, including the right to legislate with respect to Indians. However, such powers must be reconciled with government fiduciary duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under Section 35(1). If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps.

First, is there a valid legislative objective? Here, the court would inquire into whether the objective of the parliament to enact the legislation in question is valid and based on grounds of public interest. The public interest justification test could, however, be perceived as be vague and providing no meaningful guidance if it is so broad as to be unworkable test of justification for limitation of constitutional rights. Nevertheless, if a valid legislative objective is found, the analysis proceeds to whether or not the special trust relationship and the responsibility of the government vis-à-vis indigenous people was considered in determining whether the legislation or action in question can be justified.[484] In the area of mineral operations (including petroleum

[482] *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

[483] *R. v Sparrow*, [1990] 1 S.C.R. 1075.

[484] *R. v Sparrow*, [1990] 1 S.C.R. 1075.

operations) and indigenous interests in the land acquired by government for exploration purposes, the Supreme Court in *Delgamunkw*[485] outlined the justification test thus:

1. The right of the affected aboriginal people to exclusive use and occupy the land on which the mining would take place should be taken into consideration with the degree of scrutiny of the infringing action. The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.[486] However, legislation proposed to validate government's action to use an aboriginal land for mining must take account of the interests of the affected aboriginal people.
2. Decisions to use an aboriginal land for mining should be accompanied with assurance that the use cannot destroy the ability of the land to sustain future generations of the affected aboriginal people.
3. When using an aboriginal land for mining, the existing fiduciary relationship between the state and its citizens, including the affected indigenous people, would be satisfied by the involvement of the affected aboriginal people in decisions taken by the Government with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation,
4. Lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.[487]

The current Canadian legal position on native title to land and right to consultation has been established in the case of *Beckman v Little Salmon/Carmacks First Nation.*[488] Little Salmon/Carmacks entered into a land claims agreement with the governments of Canada and the Yukon Territory in 1997, after 20 years of negotiations. Under the treaty, Little Salmon/Carmacks members have a right of access for hunting and fishing for subsistence in

[485] *R v Delgamunkw* [1997] 3 S.C.R. 1010.
[486] *R. v Sparrow*, [1990] 1 S.C.R. 1075.
[487] *Per* Lamer C.J. and Cory, McLachlin and Major JJ in *R v Delgamunkw* [1997] 3 S.C.R. 1010.
[488] *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, 2010 SCC 53 (CanLII).

their traditional territory, which includes a parcel of 65 hectares for which P applied for an agricultural land grant in November 2001. The land applied for by P is within the trapline of S, who is a member of Little Salmon/Carmacks. Little Salmon/Carmacks disclaim any allegation that a grant to P would violate the treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of Little Salmon/Carmacks attach importance to their ongoing treaty interest in surrendered Crown lands (of which the 65 acres forms a small part). Little Salmon/Carmacks contend that in considering the grant to P the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. The Yukon government's Land Application Review Committee ("LARC") considered P's application at a meeting to which it invited Little Salmon/Carmacks. The latter submitted a letter of opposition to P's application prior to the meeting, but did not attend. At the meeting, LARC recommended approval of the application and, in October 2004, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved it. Little Salmon/Carmacks appealed the decision to the Assistant Deputy Minister, who rejected its review request. On judicial review, however, the Director's decision was quashed and set aside. The chambers judge held that the Yukon failed to comply with the duty to consult and accommodate.

The Court held that When a modern land claim treaty has been concluded in Canada, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people — it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself. There must be The Court observed that in that case, a continuing duty to consult existed. Members of Little

Salmon/Carmacks possessed an express treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks, and the Yukon was required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects. The treaty itself set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and full and fair consideration by the party obliged to consult of any views presented. Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, formal consultation processes are now a permanent feature of treaty law, and the Little Salmon/Carmacks Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with aboriginal peoples. It is a way to recognise that Aboriginal peoples have full legal capacity. The legality of the right to consult should be based on the following grounds:

1. The best way for a court to contribute to ensuring that a treaty fosters a positive long relationship between Aboriginal and non-Aboriginal communities consists in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the

contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights.

2. Even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party. Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

3. The consultation that must take place if a right of the Aboriginal party is impaired will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework.

4. Where a treaty provides for a mechanism for consultation, what it does is to override the common law duty to consult Aboriginal peoples; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually.

5. The courts are not blind to omissions, or gaps left in the treaty, by the parties with respect to consultation, and the common law duty to consult could always be applied to fill such a gap.

## 5.4 Rights of Ownership and Control over Native Lands and Protection of Indigenous Interests against Petroleum Operations in Angola

Environmental right is a fundamental human right in Angola. The Constitution requires the state to take requisite measures to protect the environment, ensure that the use of natural resources is within the context of sustainable development, and to respect the environmental rights of present and future generations.[489]Article 87 of the Constitution provides that:

> Citizens and communities shall have the right to the respect, appreciation and preservation of their cultural, linguistic and artistic identity. The state shall promote and encourage the conservation and appreciation of the historic, cultural and artistic heritage of the Angolan people.

Article 9 (2) of the Constitution acknowledges the existence of native lands in Angola. In the event that the state's exercising of its sovereign rights over the country's petroleum is incompatible with or override existing customary land and right of ownership, the government will decide which of the rights shall prevail and under what terms, without prejudice to any compensation which may be due to the holders of the rights thereby overridden.[490] As citizens of Angola, indigenous communities have the right to be informed of the petroleum administrative processes and decisions that affect their interests. They are notified of the administrative acts affecting their legally protected rights and interests. The Constitution guarantees the right to access archives and administrative records, without prejudice to the legal provisions for security and defence matters, state secrecy, criminal investigation, and personal privacy.[491] The Constitution further acknowledges the integration of indigenous communities in the formation and implementation of polices affecting their interest, as well as recognition of indigenous right to self-governance, in accordance with customary law. Public and private

[489] Angola Constitution 2010, art. 39.
[490] Law No. 10/04, art. 9 (2).
[491] Angola Constitution 2010, art. 200.

entities are obliged to respect traditional institutional authorities. In their economic and social relations with indigenous communities, public and private entities (including oil companies and the NOC) are required to respect the values and norms of customary law that are observed within traditional political and community organisations, and to ensure that their activities do not conflict with the Constitution or the dignity of the human person.[492] Article 9 provides further that:

> In any case, rights relating to petroleum operations may only be granted with safeguards for the country's interests in respect of . . . the environment, navigation . . . [and] management and preservation of natural resources . . . For the purposes of this Article, *the entities with powers for specific sectors under the relevant legislation shall be consulted* [emphases added].[493]

It appears that the recent legislative regimes of Angola recognise native ownership of land and uphold indigenous interests in petroleum operation and environmental protection in line with internationally recognised principles. However, the pragmatism of such assertion should rather be based on occurrences on the field. Although the current legislative regimes of Angola make provisions for sound environmental principles and community engagements in environmental policies, the government takes little care in enforcing the existing laws to protect the public and environment. In most cases, it prioritises economic growth over inclusive sustainable development. For example, a depletion of fish stocks is the leading complaint about oil operations in the northern provinces, while coastal residents claim that there are regular oil spills from offshore facilities. Too many spills in Angola go unreported, and post spill compensation procedures are *ad hoc*. There is a dearth of information on the impact of oil on communities, fisheries and public health. Without independent scientific testing, it is difficult

[492] Angola Constitution 2010, arts. 223-224.
[493] Law No. 10/04, art. 9 (3) -(4).

to determine what is depleting fish stocks, damaging crops and affecting the health of local people.[494]

### 5.5 Rights of Ownership and Control over Native Lands and Protection of Indigenous Interests against Petroleum Operations in Nigeria

The history of the Nigerian petroleum industry is embedded in the colonial oil and mineral laws which vested the ownership of oil in the Crown and gave oil exploration monopoly in Nigeria to British and British-allied oil companies. After independence in 1960, the Nigerian military government enacted decrees that vested the ownership of oil and gas in the Nigerian state. Before the British colony was established in Nigeria, ownership and management of native lands were governed by their customary law.[495] The British began to explore and charter the present-day Nigerian Niger Delta territories in 1846. The region became British Oil River Protectorate from 1885 until 1893, when it was expanded to be part of the Niger Coast Protectorate. During these periods, the British concluded protection treaties with the Ijaw people where they promised to protect their native lands, cultures, and traditions from the rest of British colonial Nigeria. Before Nigerian independence, the Ijaw people demanded that the British should revoke the protection treaties and allow them to revert to their previous position of independent ethnic group, rather than become a part of the Nigerian state. However, their wishes were not granted.[496] When Nigeria was undergoing the preliminary stages of returning to democratic governance, an eleven-man Land Use Panel was set up by the government with the mandate to, *inter alia*:[497]

[494] Ramos (n 371) 2.
[495] Ako (n 143) 61.
[496] Ibid.
[497] Nigerian Federal Government White Paper on the Report and Recommendation of the Land Use Act (1978) 1.

i. Undertake an in-depth study of the various land tenue, land use, and land conservation practices in the country and recommend steps to be taken to streamline them.

ii. Study and analyses all the implications of a uniform land policy for the country.

iii. Examine the feasibility of a uniform land policy for the entire country, make necessary recommendations and propose guidelines for implementation.

iv. Examine steps necessary for controlling future land use and also opening and developing new land for the needs of the government and Nigeria's growing population in both urban and rural areas and make appropriate recommendations.

The panel submitted both a majority report and a minority report to the government. While the majority report advised explicitly against either the dispossession of native land or the extension of the land tenure system of the northern Nigeria to the whole country, the minority report recommended that all land in Nigeria (including native lands) be nationalised and that the government should be the custodian of all lands in Nigeria.[498] The military government accepted the recommendation of the minority report and promulgated the Land Use Decree in 1978 (now the 'Land Use Act of Nigeria') which in effect extended the law of public ownership of land hitherto practised in northern Nigerian to the whole of the country.[499] In *Adisa v Oyinwola*,[500] the Supreme Court of Nigeria held that the objective of the Land Act, as contained in its preamble, is to vest all land comprised in the territory of each state (except land for the federal government or its agencies) solely in the Governor of the state, who would hold such land in trust for the people and would be responsible for allocation of lands to individuals and

[498] P Francis, 'For the use and common benefit of all Nigerians: Consequences of the 1978 land nationalization', 54 (3) Africa: Journal of the International African Institute [1984] 7.

[499] Ako (n 143) 61.
[500] Adisa v Oyinwola [2000] 10 NWLR 116.

organizations for residential, agricultural, and commercial purposes. Section 1 of the Land Use Act provides thus:

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

The Land Use Act dispossessed native lands in Nigeria and vested their ownership in the government.[501] It swept away the unlimited rights and interests that indigenous communities had in their lands, and substituted them with limited rights and control by the government.[502] In *Abioye v Yakubu*, the Supreme Court of Nigeria held that the effects of the Land Use Act on native land-holding included the:

> (1) removal of the radical title in land from individual Nigerians, families, and communities and vesting the same in the governor of each state of the federation in trust for the use and benefit of all Nigerians (leaving indigenous communities with 'rights of occupancy'); and
>
> (2) removal of the control and management of lands from family and community heads/chiefs and vesting the same in the governors of each state of the federation (in the case of urban lands) and the appropriate local government (in the case of rural lands).[503]

Section 11 of the Land Use Act provides that:

> The Governor or any public officer duly authorised by the Governor in that behalf shall have the power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereon at any reasonable houses in the day time and the occupier shall permit and give free access to the Governor or any such officer so to enter and inspect.

Section 12 of the Land Use Act provides that:

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[501] *Nkwocha v Governor of Anambra State* [1984] 6 SC 362, 404.
[502] Savanah Bank (Nigeria) Ltd v Ajilo [1989] 2 NWLR (pt. 97) 305, 315 para E-F.

[503] *Abioye v Yakubu* [1991] 5 NWLR (pt. 190) 130 at 223, paras (d)–(g) per Obaseki JSC.

> It shall be lawful for the Governor to grant a licence to any person to enter upon any land which is not the subject of a statutory right of occupancy or of a mining lease, mining right or exclusive prospecting licence granted under the Minerals Act or any other enactment, and remove or extract therefrom any stone, gravel, clay, sand or other similar substance (not being a mineral within the meaning assigned to that term in the Mineral Act) that may be required for building or for the manufacture of building materials. Any such licence may be granted for such period and subject to such conditions as the Military Governor may thing proper of as may be prescribed.

Furthermore, Section 47 provides that:

> (1) The Act shall have effect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federation or of a State and, without prejudice to the generality of the foregoing, no court shall have jurisdiction to inquire into: -
>
> (a) any question concerning or pertaining to the vesting of all land in the Governor in accordance with the provisions of this Act: or
>
> (b) any question concerning or pertaining to the right of the Military Governor to grant a statutory right of occupancy in accordance with the provisions of this Act; or
>
> (c) any question concerning or pertaining to the right of a Local Government to grant a customary right of occupancy under this Act.
>
> (2) No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.

These provisions oust the jurisdictions of the courts in determining the validity of the Land Use Act and the rights and interests of indigenous communities it contradicts. Thus, in *Lemboye v Ogunsuji*,[504] the Nigerian Court of Appeal held that the provision of Section 47 of the Act is inconsistent with the provisions of Sections 1, 4 (8) and 6 of former 1978 Constitution, and therefore void.[505] This decision restored the right to challenge dispossession of native lands in

[504] Lemboye v Ogunsuji [1990] 6 NWLR (pt. 155) 210.

[505] Section 1 of the Constitution (before it was subsequently amended) provides that 'This Constitution is supreme, and its provisions shall have binding force on the authorities and persons . . . If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void'.
Section 4 (8) states that 'Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law'.

Nigeria. However, the government amended the Constitution to ratify the limitations of the Land Use Act. Thus, Section 315 (5) of the existing 1999 Constitution provides that:

> Nothing in this Constitution shall invalidate the Land Use Act. The provisions shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed.

Section 1 of the 1999 Constitution provides that 'the Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria'. Therefore, the dispossession of native lands in Nigeria is absolute and legitimate. Before the promulgation of the Land Use Act, the Ijaw people owned the land beneath which the petroleum resource of the Niger Delta is situated. After the Act entered into force, they were stripped of their native land rights, and the government became vested with the sole right to determine where and when oil operations could be undertaken without consulting with the Ijaw people.[506] The Land Use Act has eroded the native ownership of land, whereby the power to manage and control the use of land was vested in elders, family heads, and traditional rulers.[507]

Indigenous rights arise from the prior occupation of land, native title is a sub-category of indigenous rights dealing solely with land claims.[508] With particular reference to petroleum operations and indigenous interests—native title to land includes rights to own, use, develop, and control the lands which the claimants acquired through their customary law of land ownership or other means of traditional occupation.[509] In jurisdictions – like Angola, Australia,

Section 6 provides that 'The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation'.

[506] Ako (n 143) 61.

[507] *Abioye v Yakubu* [1991] 5 NWLR (pt. 98) 130.

[508] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 513.

[509] United Nations General Assembly Resolution on Rights of Indigenous People adopted on 13 September 2007, Article 26 (2) (3).

Canada – where the right of natives over lands acquired through customary law is accorded legal recognition, indigenous peoples/communities could contest unlawful acts that contradict their rights to own, use, develop, and control the land in questions without due consents. However, in states like Nigeria where indigenous communities are constitutionally denied ownership over native lands, claimants who suffered damages resulting from petroleum operations could only sue for economic losses and physical injuries. For example, petroleum licence holders in Nigeria have rights to dig and get free of charge any gravel, sand, clay, stone or other similar substance (not being a mineral within the meaning assigned thereto in the Minerals Act) within any land included within the area covered by the license to the extent that such gravel, sand, clay, stone or other substance, will facilitate the construction or maintenance of a pipeline or any ancillary installation.[510] However, licensees are obliged to pay compensation:[511]

(1) to any person whose land or interest in land (whether or not it is land respect of which the license has been granted) is injuriously affected by the exercise of the rights conferred by the license, for any such injurious affection not otherwise made good; and

(2) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the license, for any such damage not otherwise made good; and

(3) 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.

[510] Nigerian Oil Pipeline Act, 1990, sec. 11 (4).
[511] Nigerian Oil Pipeline Act, 1990, sec. 11 (5).

The Land Use Act vested ownership native lands in the government.[512] It swept away the unlimited rights and interests that the indigenous communities of the Niger Delta had in their lands, and substituted them with limited rights currently controlled by the federal government.[513] The Act rather created two main categories of land ownership in Nigeria: The Legal Owner of all land in Nigeria is the Government which (on application) may grant native title to indigenous communities in form of *Statutory Right of Occupancy* in order to use native lands inherited by ways of customs and traditions for economic, social, and cultural purposes, including the conducts of traditional worships, building houses, farming, hunting and fishing.[514] Statutory right of occupancy (otherwise native title to land) is a permit to use native land. It does not revert the native lands from the state to indigenous communities. It only grants concerned indigenous communities the permission to use native lands which legally belong to the government. The Land Use Act rather grants the government sovereignty make decisions on how and who should use the lands and for what purpose. Although petroleum license holders are required to obtain previous consent of land owners and occupiers before commencing petroleum operations on licensed lands, solely authority by the government as the legal land owner, ordinarily, supersedes consents of holders of statutory right of occupancy.[515] Available remedies for indigenous communities that suffer environmental torts only relate to the consequential environmental effects of the petroleum operations on their health and well-being, and operational impacts on the economic, social, and cultural existence.

[512] *Nkwocha v Governor of Anambra State* [1984] 6 SC 362, 404.
[513] Savanah Bank (Nigeria) Ltd v Ajilo [1989] 2 NWLR (pt. 97) 305, 315 para E-F.
[514] Nigeria Land Use Act, sec. 12; Lemboye v Ogunsuji [1990] 6 NWLR (pt. 155) 210.
[515] Nigeria Oil Pipeline Act, sec. 6 (1).

## 5.6 Conclusions

The correlation between petroleum operations and protection of rights and interests of indigenous peoples/communities is link indigenous ownership and control over native lands upon which petroleum operations are conducted. While native title refers to a grant of right by government over use of land (which can be reversed), rights of indigenous peoples/communities over native lands arise from prior occupation of the native land in question and prior social organisation and distinctive cultures of the concerned indigenous peoples/communities on that land. Indigenous rights ownership and control over native land should not be confused with native title. indigenous right of ownership and control over native land includes rights of the concerned indigenous peoples/communities to own and control access to ancestries lands; and to freely use and develop the lands for economic. social and cultural advancements. Rights and interests of indigenous peoples/communities living at the vicinity of petroleum operations could hardly be protected at national level (and in accordance with the required minimum standards required in international law) in absence of legal recognition.

International law recognises a form of ownership of control over native lands that reflects the entitlement of the indigenous inhabitants in accordance with their laws and customs and traditional rules of land ownership. Although, governments could enact legislations justifying claims of indigenous lands for purposes of petroleum operations, rights of ownership and control over native lands can only be extinguished in common by valid government acts that are consistent with the continued existence of native title rights and interests in the land. Government actions seeking to infringe rights of indigenous peoples/communities over thehr native lands should be consistent with the special fiduciary relationship between the state and the concerned indigenous peoples/communities to ensure that the proposed petroleum

operations on the land do not compromise their economic, social and cultural existence in international law. Furthermore, there should be a formal negotiation with the indigenous peoples/communities over the use of their native lands. Negotiations should be conducted under the frameworks of common law and the consent of the indigenous peoples/communities must be sort and obtained before commencing petroleum operations on native lands. A legislation may provide for mechanisms for consultation which could override the duty to consult. However, it would not override the general administrative law principle of procedural fairness, which may give rise to a duty to consult with concerned indigenous peoples/communities in international law.

Indigenous peoples/communities, in effect, have rights to veto any dealings with their native lands in common law.

However, the practicability of the required minimum standards for protection of rights and interests of indigenous peoples/communities in international law at national levels is subject to its legal and social philosophies towards recognition of such rights and interests in the legal system in question. While the legal systems of Angola, Australia and Canada acknowledge the international minimum standards for protection of rights and interests of indigenous peoples/communities - with particular reference to indigenous rights of ownership and control over native lands, indigenous communities in Nigeria are constitutionally dispossessed of their native lands. As holders of statutory rights of occupancy to native lands, the interests of indigenous communities of the Nigeria Niger Delta only relate to impacts of environmental degradations caused by petroleum operations on investments made on native lands including, crops, fish pounds, buildings and hurting traps) and the consequences of petroleum activities to indigenous economic, social and cultural existence.

## CHAPTER 6

# CONTRACTUAL ELEMENT OF PETROLEUM REGIME AND PROTECTION OF INDIGENOUS RIGHTS AND INTERESTS

### 6.1 Introduction

Between the late 1920s and 1950s, petroleum operations in developing countries were mostly controlled by a handful of American, British, and Dutch-British companies including, British Petroleum, Chevron, and Royal Dutch Shell. The traditional concession by which the international oil companies acquired substantial petroleum rights in developing countries was initiated in the late nineteenth century by United States oil companies when they began to discover commercial value of petroleum in the Middle East.[516] The first of its kinds was the D'Arcy Concession which was granted by Persia (currently Iran) to William Knox D'Arcy in May 1901. The D'Arcy agreement was an exclusive right to prospect for oil for 60 years in a vast tract of territory of Persia. This marked the beginning of an era of concession agreements between international oil companies and the governments of developing countries. Its popularity increased in the Middle East between 1930 and 1940. Agreements similar to it were executed in Bahrain in 1931, in Saudi Arabia in 1933, and in Kuwait in 1938. In 1933, King Abdul Aziz of Saudi Arabia granted an economic concession to Standard Oil Company (California) of the United States (now Chevron) to drill for oil in his kingdom. In 1948, Standard Oil Company (California) discovered the world's largest oil field in Saudi Arabia.[517] In the wake of this trend, there were international rapid proliferations of this nature of concession agreement in many developing countries. Up till the 1950s, these kinds of

[516] Terence Daintith, *Discretion in the Administration of Offshore Oil and Gas: A Comparative Study* (AMPLA Ltd. 2005) 163.
[517] Vaclay (n 43) 113.

concession contracts were predominantly employed for petroleum arrangements between host governments and the major international oil companies.[518]

The earliest petroleum contracts to include territorial waters were the Arabian American Oil Company (Aramco) concession from Saudi Arabia of 1933 and the Kuwait Oil Company (KOC) concession from Kuwait of 1934.[519] The rights and obligations of the contracting parties under the early concessionaire contracts were defined mostly in general terms.[520] In many cases, they excluded governments of developing states from participating in the ownership, control, and operation of the petroleum resources within their jurisdictions. The rights of the major international oil companies under the traditional concessionary systems were hardly distinguishable from a freehold interest[521] and the duration of the concession was longer than it is today: typically, between 40 years to 75 years.[522] There are instances where some of the international oil companies were paying nominal rent of £150 and a bottle of rum for a whole concession.[523] The era of the United Nations General Assembly Resolution 1803 on permanent sovereignty over natural resources also marked changes in trends in early relationships between developing oil producing states and international oil companies. In particular, the creation of new states in the period of decolonization urged the development of a principle which encompassed their various demands and interests. Rooted in the right of self-determination and with the primary aim of enabling economic development for developing states, the principle of permanent sovereignty over natural resources builds on traditional state prerogatives such as

[518] Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror* (John Wiley and Sons 2003) 48.
[519]Ibid 13.
[520] Gao (n 40) 13.
[521] Asante (205) 38.
[522] Omoregbe (n 199) 59.
[523] 1934 Oil Concession between Kuwait and the Kuwait Oil Company Limited (United Kingdom) art 3 (d); Concession agreements used in compiling this summary include those of D'Arcy: duration of 60 yrs (1901); IPC: duration of 75 yrs (1925); Aramco: duration of 60 yrs (1933); KOC: duration of 75 yrs (1934); Abu Dhabi Petroleum Company: area covering the whole country for 75 yrs (1939); and Abu Dhabi Marine Area Ltd: covering all offshore area for 65 yrs (1953).

territorial sovereignty and sovereign equality of states. This permits states to freely determine and apply laws and policies governing their people and territory under their jurisdiction and choose their own political, social and economic systems.[524] However, Resolution 1803 (XVII) stipulates not only that permanent sovereignty over natural resources must be exercised in the interest of national development and well-being of the peoples concerned, but it also lays out basic rules concerning the treatment of foreign investors.[525] Linked to their sovereignty, the principle gives states the right to possess, use and dispose freely of any surface and subsurface natural resources, connected with their territory.[526]

Petroleum contracts are forms of economic instruments that could be used at national levels to promote internalisation of environmental costs with due regard to the public interest and without distorting international trade and investment, today.[527] But, how sufficient are petroleum contracts (as elements of petroleum regimes) in dealing with issues of petroleum operations and protection of third parties' rights and interests, including environmental damages arising from petroleum operations (subject to the provisions of a petroleum contracts) and their impacts on economic, cultural and social existence of indigenous communities in developing states? This Chapter offers an overview of four main types of contracts used commonly in addressing issues relating to protection of rights and interests of indigenous

[524] Art. 2(1), Charter of the United Nations, Oct. 24, 1945, 1 UNTS 26; UNGA – Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Oct. 24, 1970, 25 UN – GAOR, Supp. No. 28, p. 123, UN Doc. A/8082; Corfu Channel (Merits) (U.K. v. Albania), 1949 ICJ 4, p. 35 (Judgment, Apr. 9); Island of Palmas (U.S. v. Netherlands), 2 Reports of International Arbitral Awards 829, pp. 838-840 (Award, Apr. 4, 1928), ; A. Cassese: International Law, 2nd ed., Oxford 2005, pp. 48-52; I. Brownlie: Principles of Public International Law, 7th ed., Oxford et al. 2008, pp. 289-291; Nico Schrijver, *Sovereignty over Natural Resources – Balancing Rights and Duties* (Cambridge 2008) 399- 401.

[525] Art. 1, paras. 1, 4, UNGA – Res. 1803 (XVII), Permanent sovereignty over natural resources, Dec. 14, 1962, 17 UN – GAOR, Supp. No. 17, p. 15, UN – Doc. A/5217; S. Zamora: "Economic Relations and Development" in The United Nations and International Law, C. C. Joyner ed., Cambridge et al. 1997, p. 259; Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco v. Libya), 17 ILM 1, p. 30 (Award, Jan. 19, 1977).

[526] G. Elian: The Principle of Sovereignty over Natural Resources (Alphen an den Rijn 1979) 11-12, 15-16; Chowdhury (n 208) 93; UNGA – Res. 626 (VII), Right to exploit freely natural wealth and resources, Dec. 21, 1952, 7 UN – GAOR, Supp. No. 20, p. 18, UN Doc. A/2361.

[527] United Nations Rio Declaration on Environment and Development 1992, Principle 16.

peoples/communities (living at the vicinity of petroleum operations) against impacts of oil and gas activities: Production Sharing Contracts of Angola and Nigeria; Concessionaire Agreement of Brazil; Land Use Agreement of Australia; and Community Development Agreement of Nigeria.

### 6.2 Production Sharing Contracts (PSCs) of Angola and Nigeria

Production sharing contract (PSC) was introduced to ensure the involvement of host states in the strategic operations and economic activities of their petroleum industries. It is a legal instrument currently used in Angola, Bangladesh, Brazil, Burma, China, Egypt, Gabon, Guatemala, Indonesia, Jordan, Libya, Malaysia, Nigeria, the Philippines, Peru, Qatar, and many other petroleum producing developing states. As the name implies, PSC requires a sharing of the oil and gas produced between the host country and the oil company (in this case commonly referred to as 'the contractor'). With particular reference to jurisdictions where the state owes the petroleum resources of the country, title to the petroleum under PSC remains vested in the host country or its national oil corporation, in accordance with the country's Constitution and its petroleum regimes.[528] Article 3 of the United Nations General Assembly Resolution 1803 (XVII) which was adopted in 14 December 1962 provides:

> The profits derived must be shared in the proportion freely agreed upon, in in each case, between the investors and the recipient State, *due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its national wealth and resources* [emphasis added].

[528] Peter Cameron, *Petroleum Licensing: A Comparative Study* (Financial Times 1984) 10.

Although their structure and contents may differ from one country to another,[529] the legal structure of a typical PSC could generally be influenced by: (a) the status and scope of the prevailing petroleum legislation of the host country; (b) the organisation of the host country's economy (whether it is a free market, a mixed economy or a state controlled economy); and (c) the host country's degree of experience with petroleum operations.[530] PSC is a distinct petroleum arrangement that guarantees the sovereign right of the state over oil and gas and meets their economic desires by providing capital and technology for their production. In this arrangement, the government assumes minimal or no risk at all in the production of its petroleum resources.[531] The first key feature in a PSC is cost recovery, where project costs are reimbursed from crude sales revenues. The second key feature is profit share, which is the sharing of remaining revenues between the State and the Contractor. Commonly, the Contractor can be a group of different companies with varying shares of the Contractor's profit.[532] The reimbursement of costs from sales revenue is known as cost recovery. The Contractor is allowed to recover current and sunk (past) costs, commonly including capital and operating expenditure, general and administrative costs and interest. A dedicated portion of gross revenue is usually allocated, meaning that the revenue (after royalty, if any) is capped at a specific percentage. Operating costs normally take precedence in the recovery order and can

[529] Governments of host countries developed their own version of PSC in order to meet the demands and requirements of their particular economic, legal, and other relevant circumstances. There are exceptional cases where a host country was satisfied with simply copying the contract style of another country. For example, the PSC concluded in 1973 between Nigerian Oil Corporation and Ashland Oil (Nigeria) Company broadly follows the Indonesian model as regards such basic provisions as the fiscal regime, work obligations, and the production sharing arrangements.

[530] Bernard Taverne, 'Production Sharing Agreements in Principle and in Practice' in David Martyn (ed.), *Upstream Oil and Gas Agreements with Precedents*, London, Sweet and Maxwell, 1996, pp. 43-96 at p.47.
[531] Taiwo Adebola Ogunleye, 'A Legal Analysis of Production Sharing Contract Arrangements in the Nigerian Petroleum Industry', Vol.5 No.8 Journal of Energy Technologies and Policy [2015], 1 file:///C:/Users/Michael/Downloads/24714-27321-1-PB.pdf

[532] David Chen, 'Production Sharing Contract', Palantir Whitepaper available at https://www.palantirsolutions.com/wp-content/uploads/2016/09/Production-Sharing-Contracts.pdf accessed on 28/09/2018.

sometimes be uncapped. If there is not enough available revenue in the current year to recover the costs, the balance is carried forward into future years (or periods). The following figure illustrates this principle. Sometimes, an uplift of carried forward costs is applied for additional recovery.[533] The revenue remaining after cost recovery and royalty is termed profit oil (or gas) and is split between the Contractor and the state. The percentage split applied is determined via many diverse mechanisms. A production-linked mechanism can have the percentage split varying according to production rate. It makes sense for the state to want a higher share of the Profit at higher productivity. Taking this concept further is the use of rate of return, whereby the rate of return of the PSC (based on net cash flow) determines the split. Again, a higher rate of return would raise the percentage split for the state.

Another popular variation is the R-factor, whereby a factor is calculated from cumulative revenue divided by cumulative costs and this ratio determines the split. A higher factor would have a split more favourable to the state.[534] Angola Model PSC, 2004 outlines some of the financial arrangements under PSC thus:[535]

1. The total Crude Oil produced and saved in a Quarter from each Commercial Discovery and its Development Area and not used in Petroleum Operations less the Cost Recovery Crude Oil from the same Development Area shall be shared between the host government and Contractor Group.
2. Beginning at the date of Commercial Discovery, the Contractor rate of return shall be determined at the end of each Quarter on the basis of the accumulated compounded net cash flow for each Development Area, using the following procedure:

[533] Chen (n 532).
[534] Ibid.
[535] Angola Model PSC, 2004 art. 12.

(a) The contractor’s net cash flow computed in United States dollars for a Development Area for each Quarter is:

i. The sum of Contract’s Cost Recovery Crude Oil and share of Development Area Profit Oil regarding the petroleum actually lifted in the Quarter at the Market Price;

ii. Minus Petroleum Income Tax;

iii. Minus Development Expenditures and Production Expenditures;

(b) For this computation, neither any expenditure incurred prior to the date of Commercial Discovery for a Development Area nor any Exploration Expenditure shall be included in the computation of Contractor's net cash flow.

(c) The Contractor's net cash flows for each Quarter are compounded and accumulated for each Development Area from the date of the Commercial Discovery according to the following formula:

ACNCF (Current Quarter) =

(100% + DQ) x ACNCF (Previous Quarter) + NCF (Current Quarter)

100%

Where:

ACNCF = accumulated compounded net cash flow.

NCF = net cash flow

DQ = quarterly compound rate (in percent).

The above formula will be calculated using quarterly compound rates (in percent) of __%, __%, __% and __% which correspond to annual compound rates ("DA") of __%, __%, __% and __%, respectively.

The Angolan cost recovery and share of profit percentage between the state and the Contractors are calculated on quarterly – based on each commercial discovery in a particular area of

development. The first quarter commences from the date a commercial discovery of oil (and/or gas) is made in the area of development and the net cash flow of the Contractors is computed in United States dollar. The rate of return accrued to the Contractor is determined by the development area that yields the highest positive return or accumulated compounded net cash flow compare to development areas that resulted to negative accumulated compounded net cash flow. The quarterly share of profit between the state and the PSC Contractors is in accordance with a scale which is determined by the Agreement. If the Contractor's rete of return in a given quarter declines as result of negative cash flow in a particular area of development, although this would result to a decline of profit, the Contractor's rate of return and share of profit would be increased in subsequent quarter (insofar there is posited accumulate compounded net cash flow in the subsequent quarter) to cover the previous quarter lost, accordingly. The sharing of profit from a development area between the state and the PSC Contractors either based on the provisional estimates after finalisation of accounts; or by an adjustment to be determined by the PSC's Operating Committee. [536] Article 4 of Angola Model PSC 2004 provides thus:

> This Agreement shall not be construed as creating between the Parties any entity with a separate juridical personality, or a corporation, or a civil society, a joint venture or even a partnership.

The PSC continues to be in force until the end of the last production period or, in case there is no production period in the Contract Area, until the end of the exploration period, unless prior to that date anything occurs that in the terms of the Law or the applicable provisions of the agreement or the law constitutes cause for its termination or for termination of the concession. At the end of the exploration period, Contractor Group shall terminate its activities in all areas within the Contract Area which are not at such time part of a Development Area(s); and, except

[536] Angola Model PSC, 2004 art. 12.

as otherwise provided herein, from that time this Agreement shall no longer have any application to any portion of the Contract Area not then part of a Development Area.[537]

Article 31 of the Angolan model PSC creates an Operating Committee, which is a body through which parties to the PSC coordinate and supervise the petroleum operations. The Committee establishes policies for the petroleum operations and defines procedures and guidelines for the petroleum operations. The Operating Committee is composed of four members: two of whom are appointed by NOC and the other two by the Contractor Group of the PSC. The Operating Committee is to control the work inherent in petroleum operations in accordance with the relevant laws of Angola, the provisions of the agreement, and relevant professional rules and standards which are generally accepted in the international petroleum industry.[538] Article 14 provides thus:

> In performing the Petroleum Operations, the Contractor Group, through the Operator, *shall use the most appropriate technology and management experience*, including its own technology, such as patents, "know-how" and other secret technology, *insofar as this is permitted by applicable laws and agreements*. . . In the case of an emergency in the course of the Petroleum Operations requiring an immediate action, Contractor Group, through the Operator, *is authorized to take all actions that it deems necessary for the protection of human life, the interests of the Parties and the environment*, and shall promptly inform Sonangol of all actions so taken [emphasis added].

The Contractor Group is required to adopt all measures necessary, appropriate, and consistent with the technology generally in use in the international petroleum industry in order to prevent loss or waste of petroleum in any form at each stage of operations.[539] With regards to responsibility for environmental torts caused to third parties, Article 34 provides that the:

> Contractor Group, in its capacity as the entity responsible for the execution of the Petroleum Operations within the Contract Area, *shall be liable to third parties . . . for any losses and damage, it may cause to them in conducting the Petroleum Operations*

[537] Angola Model PSC, 2004 art. 5.
[538] Angola Model PSC, 2004, art 14 (1).
[539] Angola Model PSC, 2004, art 23.

> . . . [due to] *wilful misconduct, gross negligence or serious fault*. If Contractor Group comprises more than one entity, the liability of such members is joint and several.

In Nigeria, the use of PSC as a contractual element of the country's petroleum regime can be classified into two eras. The first is the 1973 PSC, while the second is the 1990s.[540] The first PSC in Nigeria was executed on 12th of June 1973 between the Nigerian National Oil Corporation (NNOC), the predecessor of the Nigerian National Petroleum Corporation (NNPC) and Ashland Oil (Nigeria) Company. It was executed as part of the effort of the government to exercise control on petroleum operations in Nigeria. It required NNOC to select suitable oil companies to cooperate with it as contractor in working its concessions.[541] The 1973 PSC covered two oil prospecting licences (OPLs). The initial term was 20 years with a provision for a renewal for an additional term of five years. The contractor provided all the funds for the petroleum exploration, development and production as well as operating expenses. The contract was to terminate if oil was not discovered in commercial quantities within five years from the effective date; and title to petroleum passes to each party at wellhead.[542] However, unlike the Angolan model PSC, the 1973 PSC of Nigeria did not establish a Management Committee to control and manage of the petroleum operations. The contractor was simply required to prepare a work programme and budget and submit it to the NNOC for approval within one month after the effective date of the contract and thereafter at least two months prior to the beginning of each year. The approval must not be unreasonably withheld by the NNOC. Any proposal for revision of the Work programme and budget by the NNOC must be communicated within thirty (30) days after it has been received. If NNOC does not notify the contractor of the revision to the work programme and budget, it shall be deemed

[540] Ogunleye (n 531) 2.

[541] Ibid.

[542] Ibid.

to be approved.[543] The contractor was required to pay production premiums at a graduated rate based on daily production per barrel. The production premiums were however recoverable as operating cost. The contractor was required to recruit and train Nigerians in the conduct of all the petroleum operations. All operating costs, including rents and royalty paid, as well as interest costs on funds borrowed to conduct operations were completely recoverable, out of the proceeds of sale of a maximum of the first 40% of available crude oil. The contractor was allowed to include two percent (2%) of the actual operating costs as overhead charges in the calculation of the total operating costs.[544] The contractor was required to pay for all the equipment necessary for the petroleum operations and such equipment upon arrival in Nigeria became the property of NNOC provided they are not on lease. The recovery of operating costs and the allocation of the available crude oil as follows:

1. Cost Oil: Up to 40% of available crude oil was set aside as "Cost Oil" for reimbursement of the contractor's allowable costs which include rents, royalties and all operating costs including interest costs on fund borrowed to conduct petroleum operations. This allocation was revised to 50% in 1986.
2. Tax Oil: 55% of the balance of the available crude oil after deducting cost oil was allotted as "Tax Oil" and allocated to the contractor for the payment of Petroleum Profit Tax but if the proceeds of Tax oil were insufficient to pay such tax, the NNOC and the contractor are required to provide the additional amount in the proportion to their participating interest shares at the time such additional amount of Petroleum Profit Tax is payable.

[543] Ogunleye (n 531) 2.

[544] Ibid.

3. Profit Oil: The remaining available crude oil after deducting cost oil and tax oil was "Profit Oil" and it was shared in the proportion of 65% for NNOC and 35% for the contractor but if the daily production of available crude oil exceeds 50,000 barrels per day, participating interests which applied were 70% for NNOC and 30% for the contractor.[545]

The Nigerian PSC as executed when the country had little or no knowledge about the concept of a PSC and the model terms that could benefit the country.[546] There were also some challenges with the implementation the PSC which necessitated a renegotiation of some of its terms. This experience discouraged further use of PSC and made the government to adopt the risk service contract in 1979 for the award of eleven oil blocks.[547] Nonetheless, in the early 1990s, when Nigeria sought to increase its petroleum production through the exploration and development of the offshore and inland basin, the government adopted PSC as the appropriate upstream petroleum contract that would be suitable for the award of the acreages. PSC was considered fitting as it would not bring about any financial burden on the government like the joint venture arrangements where there were challenges of meeting cash call obligation.[548] However, some terms of the PSC were at variance with the basic framework of a contemporary PSC, such as the transfer of title to available oil at wellhead which is a feature of concession. Generally, title to oil in most PSCs passes at the point of export or valuation. In the PSC production premiums was recoverable as part of cost oil; this is not common in a present-day PSC.[549]

[545] Ogunley (n 531) 2.

[546] Ibid 1.

[547] Ibid.

[548] Ibid.

[549] Ogunleye (n 531) 2.

One of the recent PSCs is the PSC executed On 22 of April 2007 between NNPC and Gas Transmission and Power Limited, Energy 905 Suntera Limited, and Ideal Oil and Gas Limited which required the Contractors to carryout petroleum operations in accordance with internationally accepted petroleum industry practices and standards and applicable Nigerian law with the objective of avoiding waste and obtaining maximum ultimate recovery of crude oil at minimum coasts.[550] Clause 8 (f) of the Nigerian PSC provides that:

> The Contractor shall indemnify and hold the Corporation (NNPC) harmless against all losses, damages, injuries, expenses, actions of whatever kind and nature including, but not limited to legal fees and expenses suffered by any third party where such loss, damage, injury is as result of Gross Negligence of the Contractor or its sub-contractors except where such losses are shown to result from action or failure to act in the part of the Corporation (NNPC).

Like the Angolan PSC, Nigeria PSC requires the contractor to carryout petroleum operations in accordance with: (a) the relevant municipal legislations of the country; (c) the provisions of the contract; and internationally accepted practices of the petroleum industry. However, both PSCs do not explain the particular international practice to be relied on. This makes the provisions vague. On the issue of third party's environmental right, however, the Angolan PSC gives a more detailed provision of the petroleum operations that may affect third parties' interests and accordingly result to wilful misconduct or negligence on the side of the Contractor. However, this does not ascertain the sufficiency of the petroleum contracts as elements of petroleum regime with the potential of protecting indigenous interests against adverse impacts of petroleum operations in, with particular reference to African petroleum producing states.

[550] Production Sharing Contract (PSC) executed between Nigerian National Petroleum Corporation (NNPC) and Gas Transmission and Power Limited, Energy 905 Suntera Limited, and Ideal Oil and Gas Limited on 22 of April 2007, 8.1 (c).

### 6.3 Licencing Agreement in Nigeria and Protection of Rights and Interests of Indigenous Communities

Section 2 of the Nigerian Petroleum Act, 1990 states that the Minister of petroleum may grant investors:

(a) a licence to be known as an oil exploration licence, to explore for petroleum;

(b) a licence, to be known as oil prospecting licence, to prospect for petroleum; and

(c) a lease, to be known as oil mining lease, to search for, win, work, carry away, and dispose of petroleum.

Nigerian exploration licences, prospecting licences, and petroleum leases acknowledge the inalienable right of the owner of the oil and his right to freely dispose of the petroleum in accordance with national interests and the provisions of municipal legislations.[551] However, the host state usually remains the owner of the oil and gas after production under production share contracts. In general, the licence holder has the exclusive right to conduct exploration upon the land within the area of the licence/lease, and for that purpose may enter the land with his agents and workmen, employ on the land any number of persons for the purpose of such exploration, erect and maintain thereon any machinery and plant, carry out required work within the licenced area, and take, remove and export specimens and samples.[552] However, this does not imply an exclusive right to conduct petroleum operations without governmental interventions, if required. All operational conducts are subject to municipal legislative provisions of the host country.[553] For example, the petroleum law of the host country could require that the licence or lease holder must conduct the exploration activities in a safe, friendly,

[551] Nigerian Minerals and Mining Act, 1990 sec., 1
[552] Nigerian Mineral and Mining Act, 1990 sec. 60.
[553] Angolan Petroleum Activities Law No. 10/04 November 2004 art. 35.

efficient, and workmanlike manner in accordance with the country's relevant laws and regulations.[554] Section 59 of the Nigerian Mineral and Mining Act, 1990 provides thus:

> The Mining Cadastre Office shall, upon receipt of a valid application from a qualified applicant, grant and issue to that person, an Exploration Licence within thirty days of the filing of such application . . . An Exploration licence shall not be granted in respect of any area exceeding 200 square kilometres.

In the early 1990s, when the Federal Government offered the first set of deep offshore and inland basin acreages, it stipulated that all new petroleum exploration contracts would be on a PSC basis. The rationale behind the adoption of the PSC were the funding constraints being experienced in the joint venture arrangement, the high geological risk associated with deep water and inland basins exploration, the desire of the government to retain title to the oil concession and the aspiration to increase the nation's reserve base. Accordingly, oil prospecting licences (OPL) awarded during the 1991 licencing round and subsequent licencing rounds were on PSC terms. The oil company bids for and is awarded the right to explore and produce oil and gas. The OPL is granted in the name of NNPC. The oil company executes a PSC with the NNPC as a contractor for the exploration and production of OPL and the eventual oil mining lease (OML) that would be granted if oil is found in commercial quantity. Between 1991 and 2007, five licencing rounds (1991, 2000, 2005, 2006, and 2007) have been conducted by the Nigerian government in which three different model of PSCs have emerged from the PSCs executed and they are 1993 PSC, 2000 PSC and 2005 PSC. The PSCs are quite similar in many respects but some provisions in the 2000 PSC and 2005 PSC are improvements made based on the shortcomings observed in the 1993 PSC model. The 2005 PSC was used in the 2006, and 2007 licensing rounds.[555] Generally, Nigeria legal system uses different contractual agreement (between oil companies and indigenous communities) in protecting indigenous

[554] Nigerian Mineral and Mining Act, 1990 sec. 61.
[555] Ogunleye (n 531) 3-5.

rights and interests. Such agreements are usually referred to Community Development Agreements.

### 6.3.1 Use of Community Development Agreement as Alternative to Addressing Indigenous Interests in Nigeria

Prior to the commencement of any development activity within a lease area, mineral operators in Nigeria are required to enter into Community Development Agreement (CDA) or other such agreement with the local communities of the area of operation to ensure the transfer of social and economic benefits to the community. The Agreement shall contain undertakings with respect to the social and economic contributions that the project will make to the sustainability of such community and shall address, *inter alia*:

1. educational scholarship, apprenticeship, technical training and employment opportunities for indigenes of the community;
2. financial or other forms of contributory support for infrastructural development and maintenance such as education, health or other community services, roads, water and power;
3. assistance with the creation, development and support to small-scale and micro enterprises; and
4. methods and procedures of environment and socio-economic management and local governance enhancement. The CDA shall be subject to review every five years and shall until reviewed by the parties, have *binding effect* on the parties.

The CDA takes the form of a Memorandum of Understanding between the operator and local communities. The preamble of the 2007 Global Memorandum of Understanding (GMoU) between Shell Petroleum Development Company Nigeria (SPDC) and Degema Cluster 1 communities of Nigeria Niger Delta stated, *inter alia*:

> This GMoU is made in good faith and *without prejudice* . . . to any pending . . . disputes . . . with a view to creating understanding, consolidating the existing cordial and mutually beneficial relationship between DELGA Cluster 1 and SPDC . . . the parties hereby declare and accept their *respective obligations stated herein . . . towards the development and economic empowerment* of DELGA Cluster 1 on the one hand *and the smooth execution of SPDC activities* in the Cluster on the other hand. Both parties acknowledge that these objectives can only be pursed in an atmosphere of mutual support, openness and understanding . . .

The GMoU was specifically created for sustainable development and economic empowerment of the local communities and for the 'smooth execution' of SPDC exploitation and exploration activities in the area. It covers all ongoing and future SPDC projects, works, and activities in the area.[556]Nonetheless, the legal phrase *'without prejudice'* limits the binding effect of the GMoU because it generally implies that the document as a whole:

1. cannot be used as evidence in a court;
2. cannot be taken as the signatory's last word on the subject matters; and
3. cannot be used as a precedent.

Clause 8.1 of the GMoU places, *inter alia*, obligations on the Cluster Development Board (CDB)[557] to:

1. secure SPDC personnel and property in the area;
2. manage issues including but not limited to pipelines surveillance, oil spill management, and conflict resolution;
3. ensure immediate access to spill sites for clean-up and remediation;
4. ensure that no person or group from the communities shall invalidate, vary, add to or re-open negotiations of the terms agreed except in accordance with the terms of the GMoU;

[556]GMoU clauses 3- 7

[557] The CDB is a local institution created under the GMoU with responsibility for coordinating implementation of the development programmes and projects outlined in the GMoU and to manage issues arising amongst the parties

5. use all powers and authority to stop any person(s) of the communities from interfering or restricting SPDC's exploration activities within its licensed area; and
6. contribute to environmental protection through active surveillance and intelligence reporting on all SPDC property, including production facilities, pipelines, flow lines, etc., and ensure that none of these is vandalized, sabotaged, broken, looted or damaged. It is, however, unreasonable to place such highly professional environmental, managerial, legal and security responsibilities on the CDB which is composed mostly of unskilled village heads, men, and women.

However, clauses iv and restraint rights of the local communities to legitimate peaceful environmental protest and renegotiation of the Agreement when necessary. Furthermore, the Agreement shifts environmental responsibility to the local communities which have no environmental knowledge and trainings.[558]SPDC's only obligation under the GMoU is to award appropriate subcontracts to indigenous contractors in accordance in accordance with the Nigerian Content policy;[559] thus, exonerating SPDC from its core community development and environmental obligations in accordance with law. This is inconsistent with the provisions of Section 116 of MMA 2007. The GMoU makes provision that non-governmental organisations shall be participatory partners to the Agreement and its contents[560], but there is no participatory evidence of any such organizations. Third party organisations that assist with monitoring the progress of developments in the host communities are governmental agencies (such as the Rivers State Sustainable Development Agency and the Niger Delta Development Commission) which closely work with SPDC. The process has been undermined by the presence of conflicting interests and the issue of endemic corruption.

[558]GMoU clause 8.2 (f)
[559]GMoU clauses 8, 9; Nigerian Content Policy is the quantum composite value added in the Nigerian economy through utilization of Nigerian human and material resources for the provision of goods and services in the petroleum industry.
[560]GMoU clause 6

## 6.4 Comparative Analysis of the Nigerian Community Development Agreement and the Australian Land Use Agreement as Alternatives Agreements Designed to Protect Rights and Interests of Indigenous Peoples/Communities Against Impacts of Petroleum Operations

The applicability of the Native Title Act in relation to the land use agreement and prior consultation with the concerned indigenous peoples was demonstrated in an Agreement executed between the Ewamian indigenous people of the State of Queensland and North Queensland Miners Association Incorporated (NQMA) on 25 July 2013. The Queensland Native Agreement came into existence in accordance with Section 224 the Commonwealth Native Title Act (1994), which makes it binding on the parties.[561] The Ewamian people were consulted and their consent obtained regarding the proposed petroleum operations on their lands.[562] Article 25 of the Agreement creates a 'Grantee Party' composed of a small scale of miners who has made application to execute an operational Deed and has provided a copy of the Deed to the Native Title Parties, the NQMA, and the State of Queensland. The Grantee Party must provide the Natives with copy of the plan of operations for the mining lease (and detailed information about the operations), within 40 business days of the Grantee Party receiving notice of the state's approval of the plan of operations for the mining lease.[563] Article 13.2 states that:

(a) prior to making and application, the Grantee Party will contact the Native Title Parties to commence negotiations;

[561] Queensland Native Agreement, art 5.3.
[562] Queensland Native Agreement, art 5.1 (b).
[563] Queensland Native Agreement, art 13.1.

(b) negotiation will be held in good faith with a view to reaching agreement on the terms on which the Native Title Parties would agree to the grant of the Level 1 Environmental Authority; and

(c) without limiting the scope of the negotiation, this may, if relevant, include the possibility of including a condition that has the effect that the Native Title Parties are to be entitled to payments in relation to the mining lease.

The Queensland Native Agreement further requires the Grantee Party to provide the Native Title Parties with copies of annual royalty returns lodged by the Grantee Party with the State of Queensland.[564] Article 19.1 provides that:

> The Grantee Party recognises that members of the Ewamian people may wish to exercise native title rights and interests, not being inconsistent with State and Commonwealth law, within the mining Tenement.

The Grantee Party also agrees, subject to the Agreement, to use its best endeavours to minimise the efforts of mining activities on the free movement of Ewamian people and the exercise of native title rights and interests within the mining tenement, and the exercise of the Ewamian people and the pursuit of their customary and traditional activities within the mining tenement.[565] Nothing in the agreement affects the existence of native title within the mining area specified in the agreement.[566]

The concept of establishing a separate form of agreement (which is different from that made between the host government and oil companies) between indigenous peoples/communities and the oil companies operating on their native lands is realistic. The Australian Land Use Agreement proves that well-designed community development agreement with clear

[564] Queensland Native Agreement, art 14.1.
[565] Queensland Native Agreement, art 19.3.
[566] Queensland Native Agreement, art 20.2.

environmental purpose and development schemes, taking accounts of all the interests involved in petroleum operations could be seen as a stepping stone towards attaining effective environmental justice. The Nigerian Community Development Agreement might seem similar to the Australian Land Use Agreement executed between the Ewamian indigenous people of the State of Queensland and North Queensland Miners Association Incorporated (NQMA) on 25 July 2013.[567] However, unlike the Queensland Native Agreement, the Nigerian Community Development Agreement signed between SPDC and the Ijaw people of Degema Local Government Area of the Nigerian Niger Delta does not guarantee prior consultations with the concerned indigenous communities; neither does it ensure transparency and active indigenous participation in the environmental policies that affect their the economic, social, and cultural well-being and existence.

## 6.5 Contractual Element of Petroleum Regime and Environmental Protection in Some Other African Oil Producing States

How do petroleum contracts address the concerns relating to potential environmental and social impacts arising from the conduct of petroleum operations and the need to conduct such operations in a safe manner with regard to the environment and indigenous communities? This Section examines some of the relevant clauses in recent model petroleum contracts and those executed across some African petroleum producing states in order to determine the sufficiency of the contract element of petroleum regime as a form of economic instruments that could be used to promote environmental costs with due regard to indigenous interests.

Clause 55.1 of the 2012 Production Sharing Agreement for Petroleum Exploration Development and Production between Uganda and Tullow Uganda Limited also provides thus:

[567] See discussion of Native Title to Land in Australia under Chapter 3 of this research.

> If any works or installations erected by Licensee or any operations conducted by Licensee endanger or may endanger persons or third party property or cause pollution or harm wildlife or the environment to a degree unacceptable to Government in accordance with international environmental standards and local circumstances, the Licensee shall take appropriate remedial measures approved by Government within a reasonable period and to repair as far as it is reasonably possible any damage to the environment so caused. If, and to the extent necessary for this purpose, Licensee shall discontinue Petroleum Operations in whole or in part until Licensee has taken such remedial measures or has repaired any damage. In the event that Licensee fails to take the appropriate remedial measures within a reasonable time period, the Government may, after consultation with Licensee, carry out such remedial measures for Licensee's account.[568]

Significant number of international industry associations developed best oil and gas practices guidelines, addressing health, safety, social and environmental issues. Petroleum companies can voluntarily join these associations. They include, the International Petroleum Industry Environmental Conservation Association (IPIECA), the American Petroleum Institute (API), and the International Oil and Gas Producers Association (OGP). The associations cover issues such as Biodiversity, Climate Change, Marine Environment, Decommissioning, Human Rights, Social Responsibility, and Water. Besides these global petroleum associations there are several regional and national petroleum associations of which petroleum companies can also sign up for membership, including the Regional Association of Oil, Gas and Biofuels Sector Companies in Latin America and the Caribbean (ARPEL) and the Australian Petroleum Production and Exploration Association (APPEA), which cover similar ground in publishing good petroleum practices and guidance on social and environmental sustainability issues. Others include, the African Petroleum Producers Association (APPA); The International Organisation for Standardization (ISO); and the United Nations Voluntary Principles on Security and Human Rights (UNVPs).[569] These are different individual international petroleum

[568] See also 2011 Ethiopia Model Production Sharing Agreement, Clause 37.9.
[569] Some of these organisations and practices and guidelines shall be examined in the following Chapter of this research.

industry associations and international and regional bodies with, seemingly, separate standards and their memberships are voluntary.[570]

Clause 7.1 (a) of the 2006 Petroleum Agreement executed between the Ghana National Petroleum Corporation and Tullow, Sabre Oil and Gas and Kosmo Energy provides that:

> Subject to the provisions of this Agreement, the Contractors shall be responsible for the conduct of petroleum operations and shall conduct petroleum operations with utmost diligence, efficiency and economy in accordance with *accepted international petroleum industry practises*, under the same or similar circumstances observing sound technical and engineering practices using appropriate advanced technology and effective equipment, machinery, materials and methods [emphasis added].

The above contract required petroleum operators to exercise their rights and carry out their responsibilities under the contract in accordance with accepted petroleum industry practises and to take steps, *inter alia*, that could: (a) result in minimum ecological damage or destruction; (b) control the flow and prevent the escape or the avoidable waste of petroleum discovered in or produced from the contract area; (c) prevent damage to onshore lands and to trees, crops or buildings and other structures; and (d) avoid any actions which endanger the health or safety of persons.[571] Failure to comply with these provisions will result to gross misconduct.[572] Clause 3.7.2 of the 2011 Ethiopia Model Production Sharing Agreement provides that:

> Contractor shall comply with the applicable laws, regulations, and directives relating to the environment, to avoid the damages the Petroleum Operations may cause on the human and natural environment. In the absence of applicable laws, the Contractor shall apply *the most appropriate internationally accepted environment standards* [emphasis added].

[570] Boykett, Peirano, Boria, Kelley, Schimana, Dekrout and OReilly (n 41) 152.

[571] Clause 17.4.

[572] Clause 17.5.

However, there is need for the contracts to specify what constitutes 'diligent', 'expeditious', 'efficient', 'environmentally friendly', 'safe' and 'workmanlike manner' of conducting petroleum operations. The five expressions commonly used in the petroleum contracts of study are: (a) 'accepted international petroleum industry practises'; (b) 'good international petroleum industry practises'; (c) 'best international petroleum industry practices'; (d) modern global oilfield/gas field practises and standards'; and (e)'most appropriate internationally accepted environmental standards'. While expression (e) appears to be vague the expression 'international petroleum industry practises' (otherwise, 'global practises and standards') is common part of the first four expressions. Yet, they are far from specifying what particular 'international petroleum industry practices. The assumption of the parties as to which standards and practice apply is very often a point of dispute well after the contract has been signed, because the contract does not specify the applicable practice.

The difference in accepted practice between the parties has proven to be problematic particularly where new industry players or non- traditional companies are involved. Even though hardly any contracts currently do it, it seems be advisable to spell out the applicable practice or standards.[573] However, with increasing innovations and scientific changes in line with future practices and environmental challenges, specification of a particular international industry practice in the contract could restrict it from adopting future best practices and guidelines which may be created to correct past mistakes and improve best accepted international industry oil and gas practices. This could be justification for non-specification of particular best practise in petroleum contracts executed today. Thus, contractual provisions for accepted best oil and gas practises should require some flexibility during the time of executing

[573] Boykett, Peirano, Boria, Kelley, Schimana, Dekrout and OReilly (n 41)151.

the contract in order not to restrict the contract from adopting future improved methods of best oil and gas practices and guidelines.

Usually, petroleum contracts require oil companies and petroleum operators to comply with relevant municipal legislations and regulations of the host state which are in place to protect the environment against impacts of petroleum activities with the state's jurisdiction. Clause 17.2 of the 2006 Ghana Petroleum Agreement between Ghana National Petroleum Corporation and Tullow, Sabre Oil and Gas and Kosmo Energy provides further that:

> [The] Contractors shall take all necessary steps, in accordance with accepted petroleum industry practice, to perform activities pursuant to the Agreement in a safe manner and shall comply with all requirements of the Law of Ghana, including labour, health and safety and environmental law and regulations issued by the Environmental Protection Agency.

Thus, whilst the petroleum contract may not specify the international petroleum industry practise to be relied upon, one has to look also at laws and regulations that contain rules relating to the environment and health and safety to get a full picture of the obligations on an oil company in these areas. Sometimes the applicable environmental law requires attention to be paid to potential social impacts of the project. International standards and good practice usually do include social issues.[574]

### 6.5.1 Contractual Provisions for Social Impact Assessment and Environmental Management Plan

Historically, petroleum contracts often do not deal extensively with social and environmental issues. However, as recognition of the importance of social and environmental issues in an overall sustainable development context has grown, so is an observable trend for petroleum

[574] Boykett, Peirano, Boria, Kelley, Schimana, Dekrout and O'Reilly (n 41) 147.

contracts to address them with greater specificity.[575] Yet, social and environmental issues, to the extent recently addressed in petroleum contracts, are often lumped together under the rubric of 'Environment, Health and Safety' or just 'Environment'.[576] Paraphs, this is because the field of social impacts is an emerging area. [577] Such impacts include, for example, increases in the price of local goods and services, immigration into the project area causing pressure on local public services and the spread of infectious diseases, resettlement and compensation, potential human rights implications, impacts on livelihood generating sectors such as fisheries and agriculture and particular impacts on indigenous peoples and vulnerable groups.[578] Recent petroleum contracts, generally, include terms set out in the Agreement requiring petroleum license holders to establish measures and methods for implementation of environmental obligations when performing their contractual obligations.[579]

Usually, either the contract or the environmental legislation/regulations of the host state would require the oil company to identify and adequately mitigate potential environmental (and social) impacts that petroleum operations might cause. In order to establish the environmental (and social) conditions prevalent before any field work started; the environmental and social risks of the petroleum project; and how these risks can be managed, the company would be required to submit several documents that require the approval of the government department or agency responsible for environment. In general, approval of at least one of these documents (the baseline assessment) has to be granted before the company can start any field work.[580]

[575] Ibid.

[576] Ibid.
[577] These issues are given considerable attention in next Chapter of this research,
[578] Boykett, Peirano, Boria, Kelley, Schimana, Dekrout and O'Reilly, ibid.

[579] 2012 Production Sharing Agreement for Petroleum Exploration Development and Production between Uganda and Tullow Uganda Limited, Clause 25.13(c).
[580] Boykett, Peirano, Boria, Kelley, Schimana, Dekrout and O'Reilly (n 41) 155.

## 6.6 Comparative Studies of Protection of Rights and Interests of Indigenous Peoples/Communities Under Some of the Petroleum Contracts Executed in Africa and in Brazil

Clause 25.8 of the 2012 Production Sharing Agreement for Petroleum Exploration Development and Production between Uganda and Tullow Uganda Limited, thus:

> The Licensee shall cause a consulting firm or individuals of international standing to carry out environmental impact studies in order: (a) to determine the *prevailing situation relating to the environment, human beings, wildlife or marine life in the Contract Area* and in the adjoining or neighbouring areas at the time of the studies; and (b) *to establish what the effect will be on the environment, human beings, wildlife or marine life in the Contract Area* in consequence of the Petroleum Operations to be undertaken under this Agreement, and to submit for consideration by the Parties measures and methods for minimising environmental damage and carrying out site restoration in the Contract Area. The studies mentioned in paragraph 25.8 shall contain proposed environmental guidelines to be followed in order to avoid irremediable environmental damage and shall include, but not be limited to: (a) access cutting; (b) clearing and timber salvage; (c) *wildlife and habitat protection*; (d) fuel storage and handling; (e) use of explosives; (f) *camps and staging areas*; (g) liquid and solid waste disposal; (h) *cultural and archaeological sites*; (i) selection of drilling sites; (j) terrain stabilisation [emphasis added].[581]

Generally, petroleum contracts provide that where the oil company/Operator's conduct results into environmental damage, the company shall be liable to remedy the situation. Where the petroleum operator consists of more than one person/company their liability shall be joint and several. The operator would be expected to cause as little damage as possible to the surface of the contract area and to trees, crops, buildings and other property thereon, and should forthwith repair any damage caused, and pay reasonable compensation for any loss suffered.[582]

In some instances, petroleum contracts executed in Africa may require oil companies to submit adequate re-settlement program for indigenous communities occupying land required for their operations, instead of paying compensation to such occupants. In such event the oil company

[581] 2012 Production Sharing Agreement for Petroleum Exploration Development and Production between Uganda and Tullow Uganda Limited, Clause 25.11.
[582] Kenya Model Production Sharing Contract, Clause 9(1)(2).

shall implement the re-settlement program upon approval by the government of the host state.[583] Usually, liability under petroleum contracts depends on whether or not the company's conduct amounts to 'wilful misconduct' and/or the said conduct is deliberate and thus amounting to 'gross negligence'. For example, Clause 3.1.5 of the 2017 Morocco Exploration for and Exploitation of Hydrocarbons Joint Operation Agreement between the Office National Hydrocarbons and mines and PETCO provides thus:

> It is agreed that *the Operator shall not be liable to any Party for any acts or omissions, complaints, damages, losses or expenses in relation to or arising out of its conduct of Joint Operations, with the exception of those which may result from the wilful misconduct or gross negligence of the Operator.* For the purpose of this Clause, "wilful misconduct" shall *mean intentional and deliberate non-observance of efficient and prudent exploitation practices* applied in oil fields and natural gas fields, or intentional and deliberate disregard for the terms of the Petroleum Agreement or any approved work programs, to the extent that such attitude is not justified by any special circumstances. *The liability of the Parties toward third parties shall be determined in accordance with Moroccan Law* [emphasis added].[584]

Clause 25.5 of the 2012 Production Sharing Agreement for Petroleum Exploration Development and Production between Uganda and Tullow Uganda Limited states thus:

> The Licensee undertakes, for the purposes of this Agreement, to take all necessary and adequate steps: (a) to ensure adequate compensation for injury to persons or damage to property caused by the effect of the Petroleum Operations; and (b) to avoid irremediable environmental damage to the Contract Area and adjoining or neighbouring lands.

However, different states in amongst the petroleum producing countries of the world apply different approaches towards protection of public rights and interests against impacts of petroleum operations within their jurisdictions. Existing differences amongst states with indigenous populations largely depends on the host state's legal stance on recognition of rights of indigenous peoples (in accordance with international law provisions). Brazil an example of

[583] 2011 Ethiopia Model Production Sharing Agreement, Clause 3.7.6.
[584] 2017 Morocco Exploration for and Exploitation of Hydrocarbons Joint Operation Agreement between the Office National Hydrocarbons and mines and PETCO, Clause 9.1.

a civil petroleum producing jurisdiction with indigenous populations and Ethiopia is one of African oil producing states which faces legal criticisms on how rights and interests of indigenous communities handled through the national petroleum regime. While Ethiopia uses production sharing agreements, Brazil relies of concessionary agreement. The modern concessionary agreements evolved as a reaction against some of the excesses of the traditional concession. In the new model, the oil companies still retain exclusive right to explore specified areas of land, albeit, in exchange for payments of all costs and specified taxes such as royalty, resource rent tax, and income tax. The main differences between the traditional concession and the modern concession are:

1. the terms which characterised the petroleum concession are now changed;
2. the duration is now for an initial period of twenty years;
3. the area is greatly reduced;
4. the oil companies are now given rights only in respect of the petroleum they develop; and
5. the financial obligations are greatly increased in the new concessions (compare to the traditional concession). The oil companies are liable to rents, royalties, and higher tax rates today.

The 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas instruments at national levels to promote internalisation of environmental costs with due regard to the public interest and without distorting international trade and investment, thus:

> The Concessionaire shall plan, prepare, perform and control the Operations in a diligent, efficient and appropriate manner, in accordance with the applicable Brazilian legislation and the Best Practices of the Oil Industry, always in accordance with all provisions of this Agreement, and *not performing any act which would or could constitute a violation of the economic order*. According to such principle, and without

limiting its application, *the Concessionaire shall be obliged to adopt, in all Operations, the necessary actions for the conservation of the oil resources and other natural resources, for the safety of people and property, and the protection of the environment*,. . . and to comply with the relevant technical, scientific and safety rules and procedures, including as for the recovery of fluids, aiming at the rationalization of the Production and the control of the reserve's decline.[585]

The Concessionaire undertakes to use most advanced technical experience and technology, whenever they are appropriate and *economically justified*, for the performance of the Operations, including those which could enhance the economic income and the Production of the Pools.[586]

*In the case that the licenses, authorizations, permits and rights depend on the agreement of third parties, such as land owners, urban, country or native communities, local governments or other entities or persons with legal rights, the negotiation and execution of such agreement will be the sole responsibility of the Concessionaire*. . . [587]

The Concessionaire shall adopt, at its own cost and risk, all the necessary measures for the conservation of reservoirs and other natural resources and for the protection of the air, soil and water in the surface or in the subsurface, *subject to the Brazilian legislation and rules about the environment and, in their absence or lack, adopting the Best Practices of the Oil Industry in this regard*. Within this principle, and without limiting its application, the Concessionaire is obliged to, as a general rule, and not only in respect to the performance of the Operations, but also the relinquishment and abandonment of areas and removal and reversion of assets, to preserve the environment and protect the balance of the ecosystem in the Concession Area, *to avoid the occurrence of damages and losses to the fauna, flora and the natural resources, to consider the safety of persons and animals, to respect the historic and cultural heritage, and to repair or indemnify the damages resulting from the its activities* and to perform the environmental recovery acts determined by the competent agencies.[588]

The Concessionaire shall also act so that *the Operations do not cause any damages or losses which might affect other economic or cultural activities in the Concession Area*, such as agriculture, cattle breeding, forest industry, gathering, mining, archeological, biological and oceanographic research, as well as tourism, or which disturb the well-being of native communities and rural and urban settlements.[589]

[585] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 13.12.
[586] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 13.13.
[587] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 13.15.
[588] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 21.1.
[589] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 21.2.

> *. . . the Concessionaire shall assume full and objective responsibility, for all damages and losses to the environment and third parties which might result, directly or indirectly, from the Operations and their performance. . .*[590]

By expressively mentioning 'Native Communities' and the interests, the 2008 Brazil Concession Agreement seems to have raise possibilities of indigenous communities instituting legal actions against oil companies for breach of indigenous rights and interests mention in the contract. It further protects indigenous interests in the following ways:

1. It requires the Concessionaire to ensure that petroleum operations do not constitute a violation of economic order. Methods used in conducting petroleum operations should be economically justified.
2. It requires the Concessionaire to adopt, in all Operations, the necessary actions for the conservation of the oil resources and other natural resources, for the safety of people and property (including indigenous peoples and their property), and the protection of the environment.
3. Petroleum licences in Brazil could be subject to authorizations or permits agreement of third parties, including native communities. In such cases, Concessionaire should ensure to negotiate with the concerned native communities before executing the agreement with them.
4. The manners of conducting petroleum operations should first be subject to the Brazilian legislation and rules about the environment before, in their absence or lack, adopting the Best Practices of the Oil Industry in this regard. This clause does not only specify the methods to be used, but it, *prima facia*, brings the petroleum activities (and protection of indigenous rights and interests) within the confines of municipal

[590] 2008 Brazil Concession Agreement for Exploration, Development and Production of Oil and Natural Gas, Clause 21.5.

legislations protecting indigenous interests before exploring external regulatory tools in there be need.

5. The Concessionaire shall assume full and objective responsibility, for all damages and losses to the environment and third parties which might result, directly or indirectly, from the Operations and their performance

Although the contract element of petroleum regime could a flexible instrument that could be used at national levels to promote internalisation of environmental costs with due regard to the public interest and without distorting international trade and investment, with particular reference to protection of indigenous interests, it should be emphasised that this assertion depends of on the legal philosophy of land ownership of the host state and whether or not its acknowledges indigenous title to land and petroleum operations. Clause 3.7.7 of the 2011 Ethiopia Model Production Sharing Agreement provides that:

> In *the event the Contractor's Petroleum Operations require the displacement of peoples occupying land in the Contract Area* that is required for the Contractor's Petroleum Operations, the *Contractor shall attempt to negotiate a compensation settlement with such occupants. If any such occupants refuse to be displaced, or refuse to agree on a reasonable amount of compensation for being displaced, the Minister may cause the expropriation of immovable property, if any, and cause the eviction of such occupants for the purpose* of the Contractor's *Petroleum Operations, subject to the payment of a reasonable compensation to the displaced occupants* to be determined by the Minister [emphasis added].

Like the Brazilian Concession, the Ethiopian Model Production Sharing Agreement requires Contractors to negotiate with concerned indigenous communities. However, Ethiopian negotiation is required when indigenous communities affected by petroleum operations are required to be displaced from the native lands the occupy for petroleum purposes. It is mandatory for indigenous communities to evacuate native lands for petroleum operations in Ethiopia; and refusal would demand governmental interventions. This indicate the differences in approaches towards indigenous title to land and petroleum operations in Brazil and Ethiopia.

## 6.7 The Sufficiency of the Contract Element of Petroleum Regime in Dealing with Petroleum Operations and Protection of Indigenous Rights and Interests

Do the aforesaid contractual provisions imply rights of indigenous communities to sue for breach of indigenous interests arising from performance of the contract? The approach may differ between common law and civil law jurisdictions. Civil law jurisdictions are generally familiar with the legal concepts of a contract in favour of a third-party beneficiary who is not present when the contract was executed as well as the right of the third party to enforce the said contract. For example, where a contract is in favour of a third party, under the Dutch Civil Code, the third party will acquire a right from the contract entered into in his favour, although he is not a party to the contract. The Dutch Civil Code merely requires that the third-party beneficiary accepts the clause in his favour.[591] The Swiss Legislation on Obligations of 1881 was the first to accept the third-party contract,[592] followed by the German Civil Code of 1900.[593] In the Netherlands, it was introduced only in 1992, when the sixth book of the present Civil Code acquired force of law. Nevertheless, in the French Civil Code this concept is still lacking.[594]

However, persons who are not party to a contract cannot, generally, sue or be sued for breach of obligations arising from the contract in common law jurisdictions. This is so because, in common law, a contract is a private agreement between the contracting parties to the exclusion of others. For example, in the case of *Price v Easton*[595], Easton agreed to do certain work in consideration of which he would pay a specified sum to Price (a third-party). The work was done. However, Easton failed to pay Price. Price tried to sue to enforce the contract but found

[591] Dutch Civil Code, 1992, art. 6:253-254.
[592] Swiss Legislation on Obligations of 1881, art. 112 .aOR
[593] German Civil Code of 1900, sec. 328ff.
[594] Jan Hallebeek, 'Contracts for a Third-Party Beneficiary: A Brief Sketch from the Corpus Iuris to Present-Day Civil Law.
[595] (1833) 4 B & Ad 433.

his claim unsuccessful because he was not a party to the contract. From the middle of the nineteenth century, the courts of common law reached a conclusion upon the scope of a contract and declared that by the doctrine of privity of contract[596] no one may be entitled to or be bound by the terms of an agreement to which he/she is not an original party.[597] In *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge and Co. Ltd*[598] Viscount Haldane LC explained that:

> In the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitumtertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in *personam*.

Although petroleum contracts make common reference to third parties who could suffer environmental and economic damages arising from the performance of the contract, they generally do not have legal rights in common law to sue any of the parties to the Agreements for breach of obligations arising from the contract.[599] But, if sovereignty belongs to the people of the host state, including the indigenous communities, from whom the government derives its authority[600] to contract with other parties to develop the petroleum resources of the country primarily on grounds of public interests,[601] should not the concept of public interest grant privileges to the people of the country who are the beneficial owners of the state's petroleum resources[602] and in whom interest the petroleum operations are performed to sue for breach of environmental obligations arising from petroleum contracts?

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[596] Privity of contract is the mutual relationship between or among parties to a contract which acts as a bar to actions by third parties to the contract. It remains significant, as to other theories of contract enforcement, with the additional exception of relaxed rules for a third-party beneficiary to enforce the aspects of the contract that creates a benefit to the third party, particularly in many developed common law countries today.
[597] *Gandy* v *Gandy* (1885) 30 Ch. D 57, 69; *Drive Yourself Hire Co (London) Ltd* v *Strutt* [1954] 1 QB 250; *Beswick v Beswick* [1968] AC 58, 72.
[598] *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge and Co. Ltd* [1915] AC 847 at 853. See also *Tweddle v Atkinson* (1861) EWHC (QB) 57; *Beswick v Beswick* [1968] AC 58, 72.
[599] Edwin Peel, *Law of Contract* (13thedn. Sweet& Maxwell 2010) 613.
[600] Constitution of the Federal Republic of Nigeria, 1999, sec, 14(2)(a).
[601] *NNPC v Famfa Oil Nigeria Limited* [2012] NWLR 149.
[602] Angola Constitution, 2010, art. 94.

In the case of *Swain v The Law Society,*[603] the English court recognised that principle of public policy may create an exception to the common law rule of privity, particularly where the purpose of one the parties to the contract (referring to the host government in this context) is to protect the interests of the public, even in the event that those public interests would conflict with the special interest of the other party (referring to the oil companies in this context). The rationale is that the element of public interest in the petroleum contract should ordinarily create enforceable public rights arising from the contract, including environmental rights. The rights referred to are not necessarily the same rights that flow from private law, though. They are, rather, rights arising from public laws that specifically protect environmental rights and interests of the general public from the impacts of petroleum operations. More recently, in *White v Jones*[604] Lord Goff called in question the future of the rule and said;

> Our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration and (through a strict doctrine of privity of contract) stunted through a failure to recognise a *jus quaesitum tertian.*[605]

However, this matter lies solely within the jurisdictions of the host government and the host state's legislative provisions on the issue of public interests in petroleum contracts. Thus, in the case of *Hogan v Hinch*, French CJ stated that:

> The term 'public interest' and its analogues have long informed judicial discretions and evaluative judgments at common law. When used in a statute, the term derives its content from 'the subject matter and the scope and purpose' of the enactment in which it appears.[606] The court is not free to apply idiosyncratic notions of public interest . . . the court must assess public interest by reference to the place of the section in the

[603] [1983] 1 AC 598.
[604] *White v Jones* [1995] 2 AC 207.
[605] *White v Jones* [1995] 2 AC 207 at 262-263.
[606] *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; *Osland v Secretary, Department of Justice* (2010) 84 ALJR 528 at 533-534.

> statutory scheme, the purpose of the Act as a whole and . . . must also look to the larger constitutional and legal context which informs the interpretation of the statute . . .[607]

During its debate on the applicability of the rule of privity in contemporary commercial transactions, the 1996 English Law Commission observed:

> The third-party rule does not cause significant problems in practice (but) we cannot ignore those who do not have access to (good) legal advice and, in any event. Reforms will provide a simpler way of affording a third party right to enforce a contract that present convoluted techniques. This will not only save the parties costs, it will also save the taxpayer the needless litigation costs caused by the complexity of the present law.[608]

Based on the recommendations of the Law Commission, the United Kingdom enacted the 1999 Contracts (Rights of Third Parties) Act to rectify the limitations of the common law in England and Wales today, Section 1 of the Act provides that:

> Subject to the provisions of this Act, a person who is not a party to a contract (a 'third party') may in his own right enforce a term of the contract if—
>
> (a) the contract expressly provides that he may, or
>
> (b) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

The third party must be expressly identified in the contract by name, as a member of a class or as answering a description but need not be in existence when the contract is entered into. The above provision does not, however, confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract. For the purpose of exercising his right to enforce a term of the contract, there shall be available to

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[607] *Hogan v Hinch* (2011) 243 CLR 506, [31-32]; Lord Viscount Simonds in *Midland Silicones Ltd v Scruttons Ltd* ([1962] AC 847, 467-468Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn. Clarendon Press 2013) 99.

[608] Law Com No. 242 on Privity of Contract: Contracts for the Benefit of Third Parties, Item 1 of the Sixth Programme of Law Reform: The Law of Contract, presented to Parliament in July 1996, London, HMSO, 4-5.

the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance, and other relief shall apply accordingly).Where a term of a contract excludes or limits liability in relation to any matter references in the Act to the third party enforcing the term, it would be construed as references to the third party's availing himself of the exclusion or limitation.[609]

### 6.8 Conclusions

Petroleum contracts are forms of economic instruments used to promote internationalization of environmental costs with due regard to public interests and without distorting international trade and investments at national levels. Some of the contract forms associated with the petroleum industry are the modern concessionaire agreements, joint venture agreements, service contracts, technical assistance contract, and production sharing contracts. Nevertheless, the name ascribed to these contract forms are not as important as their terms and conditions. Compare to the legislative element, close examinations of the contents of some of the recent petroleum contracts executed in developing countries indicate significant flexibility of the contract element of petroleum regime in accommodating economic, environmental, legal and social mechanisms of protecting rights and interests of indigenous communities against the impact of petroleum operations in the host state. First, the contract element generally softens the usual rigid atmosphere associated with the legislative element of petroleum regime by introducing some elements of private law into petroleum transactions thereby giving parties to petroleum agreements the right to voluntarily determine the terms and conditions upon which the oil and gas operations relating to a particular petroleum project should be conducted. Secondly, the flexible nature of contract makes it possible for parties to petroleum contracts to

[609] Contracts (Rights of Third Parties) Act, 1999 s. 1.

voluntarily incorporate the relevant aspects of the host state municipal legislations and industry-driven codes and practices into their agreement. This implies the oil company would be liable for breach of best petroleum industry practices which ordinarily are non-binding voluntary codes and practices. However, the applicability of the principle of privity of contract (with particular reference to common law countries) impairs the rights of indigenous communities to sue for breach of obligations arising from the contract, even where the breach impacts on the health and economic, social and cultural existence. Generally, only parties to a contract can sue and be sued for obligations arising from the contract in common law. In addition, some of the contracts executed in developing countries, like Ethiopia, outrightly denied indigenous communities of native title to land and acknowledged forceful resettlement of indigenous communities for purposes of petroleum operations without adequate compensations.

# CHAPTER 7

# PETROLEUM OPERATIONS AND PROTECTION OF INDIGENOUS INTERESTS: REGULATORY RESPONSIBILITIES OF OIL COMPANIES IN DEVELOPING COUNTRIES

## 7.1 Introduction

Do oil companies have regulatory responsibilities? If the answer is affirmative, what is the scope of their regulatory responsibility in the area of petroleum operations, environmental regulations and protection of indigenous rights and interests? Generally speaking, the responsibility to determine and direct significant ways in which environmental indigenous rights could interact with governmental environment policies and corporate economic activities within a state primarily resides with the host governments.[610] However, recent trends show increase industry-driven self-regulation, including the International Standards Organisation (ISO), in the petroleum sector at some national levels.[611] For example, the international petroleum industry associations have developed some 'internationally accepted' environmental standards and best oil and gas operation practices which are contained in oil industry guidelines, voluntary codes of conduct, and statements of environmental principles.[612] These codes mostly evolved in response to shareholder as well as interest group and community pressure on oil companies to be transparent and accountable in environmental management. They allow the oil industry to demonstrate environmental responsibility and enhance public

[610] Cory, J in *R v Nikal* [1996] S.C.J. No. 47 at para.92 (Q.L.).
[611] Wawryk (n 215) 1.
[612] Oil companies and petroleum industry groups recognised that international oil companies operating in developing countries with inadequate environmental laws should adopt best oil and gas practices. However, there is no commonly accepted practice amongst the key players of the industry and no treaties have been negotiated with the specific aim of regulating onshore petroleum operations and operations taking place within the borders of individual oil producing States.

relations.[613] The International community is also recommending best petroleum operation practices and standards of corporate social responsibility to national governments. They include the United Nations Guiding Principles on Business and Human Rights, 2011 and the OECD Guidelines for Multinational Enterprises, 2011. These trends are playing significant roles in shaping the petroleum regimes of some oil producing states today, although they are perceived by some authors as leading to an era of absolute transfer of regulatory responsibility from governments to the private sector.[614]

Voluntary industry-driven self-regulations are increasingly taking the shape of 'Corporate Social Responsibility' (CSR) in developing countries. CSR could be categorised as economic, legal, ethical, and voluntary corporate responsibilities.[615] However, it is mostly classified as the responsibility required of businesses by the society.[616] Until the 1980s, the social entity conception of CSR was never given official 'legal sanction', although many social activists and several business leaders had adopted the idea. As corporations grew in size and power, the central concerns advanced beyond whether they should or should not be run primarily for benefits of shareholders.[617] Even Berle and Means were careful not to imply that corporate management should be free to run companies only in the interest of shareholders:

> Eliminating the sole interest of the passive owner, however, does not necessarily lay a basis for the alternative claim that the new powers should be used in the interest of the controlling groups . . . No tradition supports that proposition. The control groups have, rather, cleared the way for the claims of a group far wider than either the owners or the

[613] Wawryk (n 215) 2.
[614] McClenaghan (n 472) 8.
[615] Carroll Archie, 'Stakeholder Thinking in Three Models of Management Morality: A Perspective with Strategic Implications' in Max Clarkson (ed.), *Corporation and its Stakeholders: Classic and Contemporary Readings* (University of Toronto Press 1998) 141.
[616] Ndu Oko AE and Agbonifoh BA, 'Corporate Social Responsibility in Nigeria: A Study of the Petroleum Industry and the Niger Delta Area' Vol. 6, No. 2 *International Review of Social Sciences and Humanities* [2014] 214-238, 217.

[617] Michael Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' in Donald Chew and Stuart Gillan (eds.), *Corporate Governance at the Crossroads* (McGraw-Hill Irwin 2005) 7-8, 10.

> control. They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control but all society.[618]

The multi-faceted roles of modern corporations have, thus, been presented in recent literatures in ways that illumine their economic powers and responsibilities in enhancing social fabrics.[619] However, the study of corporate governance and business performance still lack sufficient explanation to how managers could establish equitable balance between their accountability to the shareholders and their responsibility to the society when making decisions that could affect both the interests of the corporation and that of the society in general.[620] Some literatures depict the fact that all persons or groups with legitimate participatory interests in a corporation do so to obtain benefits and that there is no *prima facie* priority of one set of interests and benefits over another.[621] Some authors base their arguments on the fact that corporations as corporate citizen owe fiduciary duty to the community to be socially responsible.[622] Most of these arguments are rooted in economic, sociological, and organisational behavioural theories.[623]Although the law provides that corporate board of directors and senior managers should act in the interest of the corporation at all times, bearing in mind that the corporation was established to maximise profits for its owners, recent concerns about the impact of corporate activities to the environment and society at large has led the argument that while acting in the interest of the corporation, they should also take into account the corporation's responsibility to general public. However, there is no clear answer to where their loyalty (in accordance with the law) ends and where the corporation's responsibility (as expected by society to be ethical) begins. Generally, the task of the law is to ensure that different points of views get fair hearing. Nevertheless, law hardly acts as a transmission belt for particular ethical

[618] Adolf Berle and Gardiner Means, *Modern Corporation and Private Property* (Macmillan 1932) 355-56.
[619] Cornelis Groot, *Corporate Governance as Limited Legal Concept* (Wolters Kluwer 2009) 5.
[620] Ibid.
[621] Ibid.
[622] Christopher Cowton, 'Governing the Corporate Citizen: Reflections on the Role of Professionals' in Jesús Conill,ChristophLuetge and Tatjana Schŏnwălder-Kuntze (eds.), *Corporate Citizenship, Contractarianism and Ethical Theory* (Ashgate Publishing 2008) 31.
[623] Erik Banks, *Corporate Governance: Financial Responsibility, Control and Ethics* (Palgrave 2004) 83-84.

theories and there is no necessary connection between ethics and law.[624] Paradoxically, one cannot disobey the law on grounds that it is unethical. Thus, views on CSR still vary, and different schools of thought still sexist.

The first school of thought is of the opinion that businesses through their managers as agents of shareholders are by obligation expected to maximize the present value of the corporation through increase in profit. This view is supported by the fact that economic performance is the corporation's primary social responsibility. Thus, where corporations do not satisfy shareholders, as their first obligation, they will not be in the position to satisfy society. After all, profit making is *sine-qua-non to* corporate success.[625] The second school of thought, supporting the call for CSR, draws its argument on grounds that the corporation may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of the business. Given this, it is expected that managers must not act in contradiction to a minimal set of universal principles. The argument in support of corporate social responsibility adds that corporations have a wider range of responsibilities that extend beyond production of goods and services and profit maximisation. As artificial persons, corporations are members of the society and should, ordinarily, be under obligation or be expected to be responsibly involved in community.[626]

### 7.2 Industry-Driven Self-Regulation as Soft-Law Element of Petroleum Regime

There are recent regulatory influences of the international petroleum industry in efforts of ensuring effective environmental management practices in forms of 'soft law'. However, how effective are such initiations in the petroleum industries of developing countries? Before

[624] Jensen (n 617) 11
[625] Oko and Agbonifoh (n 615) 217.
[626] Oko and Agbonifoh (n 615) 218.

addressing the question, it is pertinent to note that the general consensus of the international community in support of the host state responsibility to ensure ways of implementing industry-driven environmental practices and standards as part of its petroleum regime is through robust national policy that sets out clearly the environmental and social expectations for oil companies within its jurisdiction. The host state could apply a range of approaches in this regard. Some are domestic measures with extraterritorial implications.[627] Example includes, the incorporation of internationally accepted environmental standards as significant part of national environmental policies. This section examines some of the emerging 'best practices' for protection of the environment in the area of environmental management procedures and systems, including Social Impact Assessment (SIA), Environmental Impact Assessment (EIA), and Environmental Management Systems (EMS). When successfully implemented by oil companies, these practices could significantly prevent/minimise the environmental degradation that occurs as a result of oil and gas operations.[628]

### 7.2.1 Environmental Management System (EMS)

Environmental Management Systems (EMS) are procedural rules for organisations which assist their managers in preventing and detecting environmental violations, to comply with existing legal requirements, and to define management processes to be followed to control the impact of oil companies' activities on the environment.[629]At each stage in petroleum operations there are specific management procedures and actions which can be implemented to prevent potential harm to the environment and minimise unavoidable impact of petroleum activities on the environment and well-being of the general public. Environmental considerations should be taken into account throughout the project planning process, from project conception to project

[627] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 1 (a) (2).
[628] Wawryk (n 215) 2.
[629] Ibid 7.

closure, decommissioning, and site restoration. Environmental management is a line management responsibility and appropriate resources should be made available by operating companies to implement the necessary procedures and ensure that they are effective in preventing/minimising environmental impacts.[630] The situation could warrant environmental advice from specialists on exploration, construction, production, and decommissioning, depending on the scale of a petroleum project. Such advice will assist line management in ensuring that the environmental management plan is formulated and implemented, and that appropriate liaison is maintained with both statutory and local authority agencies and with local communities.[631]

One of the major organisations that set standards in the international oil industry is the International Organization for Standardization (ISO).[632] ISO is an international federation of 'standards bodies' from over 100 countries. It was founded in 1946 with the aim of promoting standardisation and related activities to facilitate the international exchange of goods and services. The relevant ISO standards for Environment Management Systems (EMS) are ISO 14001: Environment Management Systems - Specification with Guidance for Use; and ISO 14004: Environment Management Systems - General Guidelines on Principles, Systems and Supporting Techniques. In particular, the aim of the ISO 14004 is to provide organisations with guidelines for a common framework, in order to establish, implement, maintain, and continually improve a system to support better environmental management. The framework of

[630] E&P/IUCN Oil Industry International Exploration and Production Forum, Oil and Gas Exploration and Production in Mangrove Areas: Guidelines for Environmental Protection (Gland, Switzerland: IUCN/E&P Forum, Report No. 2.54/184: 1993) at 9, available at https://portals.iucn.org/library/sites/library/files/documents/IUCN-1993-053.pdf accessed on 31/01/2018.
[631] E&P/IUCN Oil Industry International Exploration and Production Forum, Oil and Gas Exploration and Production in Mangrove Areas: Guidelines for Environmental Protection (Gland, Switzerland: IUCN/E&P Forum, Report No. 2.54/184: 1993) 11.
[632] The ISO standards on EMS have their roots in BS7750, the first international EMS standard. Developed by the British Standards Institution in 1992 as the national Environmental Management Systems (EMS) standard for the United Kingdom, and revised in 1994, the standard has since been withdrawn.

ISO 14004 purports to contribute to the long-term success of the organisation and to the overall goal of sustainable development by:

1. understanding the context in which the organisation operates;
2. determining and understanding the relevant needs and expectations of interested parties, including investors, governments and communities, as they relate to the environmental management system of the organisation;
3. establishing and implementing an environmental policy and environmental objectives;
4. guiding top managers to take leadership role in improving environmental performance;
5. identifying aspects of the organisation's risk and opportunities that need to be addressed in relation to its environmental aspects, compliance obligations and other issues and requirements;
6. increasing awareness of the organisation's intervention with the environment;
7. establishing operational controls as appropriate to manage the organisation's significant environmental aspects and compliance obligations and risks and opportunities that need to be addressed; and
8. evaluating environmental performance and taking actions, as necessary, for the organisation's improvement.[633]

ISO 14004 advices organisations like oil companies to ensure that their operations and associated processes are conducted in controlled ways in order to fulfil commitments to their environmental policy, achieve their environmental objectives, and manage significant

[633] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) 6, available at http://mahdi.hashemitabar.com/cms/images/Download/ISO/iso-14004-2016-english.pdf , accessed on 31/01/2018.

environmental aspects of their policy, compliance obligations and risks and appropriate needs to be addressed. To plan for effective and efficient operational control, oil companies should determine where such controls are needed and for what purpose. They should establish the types and levels of controls that meet their needs. The operational controls they select should be maintained and evaluated periodically.[634]

The outcomes of a systematic approach to environmental management could provide top managements of petroleum companies with qualitative and quantitative data that would enable informed business-environmental decisions that build long-term success and create options for contributing to sustainable development.[635] The following are some other advantages and benefits of environmental management systems:[636]

1. protecting the environment, including the prevention or reduction of adverse environmental impacts;
2. achieving financial and operational benefits that can result from implementing environmentally sound alternatives which strengthen the company's market position;
3. communicating environmental information to relevant interested parties, including investors, governments and communities;
4. demonstrating the company's commitments to sustainable environmental developments to its stakeholders;
5. enhancing management and market share as well as improving cost control;
6. preventing incidents that could result to liability;

[634] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016), Guidelines 8.1.1.
[635] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) 7.
[636] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) 7-8.

7. promoting environmental awareness amongst external providers and all persons doing work under the company's control, including its affiliates, subsidiaries and external contractors; and
8. improving relations between the company and host Government and indigenous communities.

However, understanding the needs and expectations of indigenous communities should also be part of the context in which oil and gas companies operate in developing countries. Identifying and acknowledging indigenous interests and developing community relationships would enable communication and lead to potential for building mutual understanding, trust and respect. Such relationship need not be formal, though.[637] Guidelines 4.2.5 of the ISO 14004 state thus:

> Organizations should determine its interested parties and their needs and expectations, related to their environmental management system. The Organization could benefit from a process that identifies the relevant needs, and expectations of relevant interested parties, in order to determine those that it has to comply with and those it chooses to comply with . . . The input can result to setting the scope of the Organization's environmental management system, establishing its environmental policy, determining its environmental aspects, compliance obligations and risks and opportunities that need to be addressed by the Organization.

The first element of EMS is establishing the company's environmental policy which might require it to make a public statement of its intentions with respect to the environment and safeguard for indigenous interests. The oil company's environmental policy generally defines its strategic direction with respect to the environment within the defined scope of its environmental management system. The environmental policy should thus provide a framework for establishing the environmental objectives of the company and the performance required of it, against which substantial actions could be judged. The environmental policy also

[637] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) Guidelines 4.2.1.

establishes the principles of action for the company; and, thus, should be specific to the company and appropriate to its purposes and the context in which it operates. Guidelines 5.2 of the ISO 14004 state that:

> When developing its environmental policy, the Organization should consider the needs and expectations of, and communication with, interested parties and the actual and potential effects on its activities from external environmental conditions.

The second element, 'planning', involves several components. These include: implementing a systematic approach to identifying significant environmental aspects in all phases of the company's business and under all operating conditions; establishing a procedure to identify and maintain access to all legal and other requirements; setting environmental objectives and targets; and establishing environmental management programmes, which detail methods and procedures for achieving environmental targets and objectives.[638] Compliance obligation can result in risks and opportunities that need to be addressed. Identifying and having access to compliance obligations and understanding how they apply to the company is the first stage in ensuring fulfilment of compliance obligations. The company should also consider how planned and new developments and new or modified actions can affect its compliance status.[639] There should further be a systemic approach for monitoring, measuring, analysing, and evaluating the company's environmental performance on a regular basis. This would enable the oil company to report and communicate accurately on its environmental performance.[640] Progress towards an environmental objective can generally be measured using environmental performance indicators, such as:[641]

[638] Von Zharen W, ISO 14000: Understanding the Environmental Standards (Government Institutes Inc, Rockville, Maryland, 1996) 534-535.
[639] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) Guidelines 6.1.3.1.
[640] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) Guidelines 9.1.1.
[641] ISO Environmental Management System General Guidelines of Implementation – Series 14004 (2016) Guidelines 6.2.4.

1. Quantity of raw material or energy used.
2. Quantity of emissions.
3. Waste prevented per quantity.
4. Efficiency of materials and energy used,
5. Number of environmental incidents.
6. Number of environmental accidents.
7. Quantities of specific pollution emitted.
8. Investment in environmental protection.
9. Percentage of budget spend on low emission technology.

The ISO 14000 series standards give managers a structure for establishing, improving and maintaining programmes for protection of the environment. However, they are non-binding voluntary international standards that provide specific requirements and principles for environmental management. They applicability and enforcement at national levels depends on the legal philosophy of the host state and its willingness to adopt them as part of its national environmental regulations and policies.

Also, many developing countries may find it more difficult to implement the EMS standards, as local oil companies may not have the resources to achieve certification, and/or the infrastructure necessary for certification may be absent. Just as the implementation of EMS may provide oil companies with a competitive advantage, so local companies from emerging economies that cannot afford to gain certification may be placed at a competitive disadvantage in tendering for projects. [642]

[642] Wawryk (n 215) 7-9.

Furthermore, the ISO 14000 Series does not set legal environmental standards. Certification indicates a corporation has a consistent environmental policy but makes no representation regarding the standard of environmental performance or objectives set by a company. If environmental standards in developing countries are lower than developed countries, the EMS certification will indicate an international oil company is complying with municipal laws but will not reveal that the environmental standards observed are not as high as in developed countries.[643]

In addition, public and government misconception, in some developing countries. that EMS set actual environmental standards for operation could lead to misplaced public confidence in the regime for environmental protection, providing a 'shield' under which oil companies can operate using practices that are clearly below 'best practice'.[644] Finally, self-declaration by oil companies regarding their implementation of EMS, in contrast to third party verification, may enable some companies to hold themselves out as having internationally acceptable EMS when in fact this is not the case.[645]

### 7.2.2 Social Impact Assessment (SIA)

'Social impacts' refer to the consequential effects of economic activities, such as petroleum operations, on the well-being and the health and safety of indigenous peoples. The term also includes the impact of petroleum operations on their cultural existence, including how oil and gas activities could change the norms and beliefs that guide and rationalise indigenous people's

[643] Ibid.

[644] Kimerling J, 'International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law' 26 *Colum J Envtl L* [2001] 289.

[645] Wawrky, ibid.

cognition of themselves and their society.[646] Social Impact Assessment (SIA) is a method employed by oil companies for assessing the impact of development strategies and petroleum projects on the communities and their cultures. [647] A number of organisations, including the Interorganisational Committee on Guidelines and Principles for Social Impact Assessment; and the World Bank have produced guidelines for social impact assessment. However, methods for assessing social and cultural impacts of petroleum operations on indigenous communities are less advanced today compare to methods for measuring the effects of development activities on the physical environment such as the air, waters, and soils.[648]

### 7.2.3 Environmental Impact Assessment (EIA)

Environmental Impact Assessment (EIA) is a procedure whereby the significant environmental impacts of a proposed petroleum project are assessed prior to activity taking place. While the features of EIA vary between jurisdictions, Wawryk outlined some of the common elements of EIA:[649]

1. Screening: A mechanism to identify projects with potentially significant adverse environmental impacts in order to identify proposals with minimal impacts.
2. Scoping: A process of determining the range of issues to be addressed in the EIA and for identifying the significant issues relating to a proposed action.
3. Alternatives: The identification and measurement of the impacts of alternatives to a proposed development that may cause less environmental damage, including the option of 'no development'.

[646] The Interorganisational Committee on Guidelines and Principles for Social Impact Assessment, "Guidelines and Principles for Social Impact Assessment" (1995) 15 Environ Impact Assessment Rev 11 at 11 (hereafter ICGPSIA, Guidelines and Principles for SIA).
[647] Wawryk (n 215) 4.
[648] Ibid 4-5.
[649] IUCN Inter-Commission Task Force on Indigenous Peoples, Indigenous Peoples and Sustainability: Cases and Actions (International Books, Utrecht, 1997) at 150.

4. Baseline Environmental Study: This provides a description of the existing environment of the proposed development site and its environs, including a cultural resources survey, prior to any activity taking place.[650]
5. Impact Prediction: A procedure for ensuring that all potentially significant environmental impacts, including cultural and social impacts, are identified and taken into account.
6. Mitigation Measures: The identification and discussion of measures to mitigate predicted adverse environmental impacts.
7. Environmental Impact Statement (EIS) or EIA Report: The document, usually prepared by the proponent of an activity, which describes a proposed development, discloses the predicted impacts on the environment, and sets out information on feasible alternatives and mitigation and protection measures.
8. Public Participation and Review of EIS: Public consultation and participation are an integral part of an effective EIA process, and may take place at all stages in the EIA process. As a minimum, EIA procedures in democratic countries allow for public review and comment of a draft EIS before a final EIS is prepared.[651]
9. Decision: After the final EIS has been prepared, the relevant decision-making body must decide regarding whether the proposed development should proceed, and if so, whether any conditions on development will be imposed.
10. Post-Project Analysis: This includes on-going surveillance and control over development activities and their effect on the environment through monitoring and auditing.[652]

[650] King T, "What Should be the "Cultural Resources" Element of an EIA?" (2000) 20 Environ Impact Assessment Rev 5 at 15-16.
[651] Wood C, Environmental Impact Assessment: A Comparative Review (Longman Group Limited, Essex UK, 1995) 227.
[652] Ibid 197-199.

EIA is now becoming part of environmental law at international and national levels.[653] EIA requirements are contained in treaties, national laws, and industry guidelines, and are imposed as conditions of lending and assistance by international financial organizations.[654] Principle 17 of the 1992 Rio Declaration on Environment and Development states thus:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Article 14(1)(a) of the 1992 United Nations Convention on Biological Diversity requires parties to mining contracts (including petroleum agreements) to:

> Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate. allow for public participation in such procedures.

Article 4(f) of the 1992 United Nations Framework Convention on Climate Change requires all parties, considering their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, to:

> Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.

The importance of EIA is also recognised in regional systems, most notably in Europe, where the European Council Directive 85/337/EEC of 27 June 1985 obliged Economic Commission Member States to have national EIA legislation in place by July 1988, and which has also

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[653] Kiss A and Shelton D, International Environmental Law (Transnational Publishers Inc, Ardsley New York, 2nd ed, 2000) at 203; Pring G, Otto J and Naito K, "Trends in Environmental Law Affecting the Minerals Industry (Part I)" (1999) 17(1) J Energy & Nat Resources L 39 at 54.
[654] Wawryk (n 215) 4.

formed the basis for EIA legislation by non-member European States.[655] The World Conservation Union (IUCN) is an international organisation which brings together states, government agencies, and a diverse range of non-governmental organisations in a unique world partnership. It has some 720 members in all, spread across 123 countries. IUCN seeks to work with its members to achieve development that is sustainable and that provides a lasting improvement in the quality of life for people all over the world. The Oil Industry International Exploration and Production Forum (E&P Forum) is another international association of oil companies and petroleum industry organisations formed in 1974. It was established to represent its members' interests at the International Maritime Organisation and other specialist agencies of the United Nations, and to governmental and other international bodies concerned with regulating the exploration and production of oil and gas. While maintaining this activity, the forum now concerns itself with all aspects of exploration and production operations, with particular emphasis on safety of personnel and protection of the environment. IUCN and the E&P Forum have collaborated to produce Environmental Guidelines for use by industry, authorities and individuals involved with oil and gas exploration and production in mangrove areas.[656] The guidelines were prepared by a working group of representatives from the Conservation Services Division of IUCN and the E&P Forum.

The E&P/IUCN Guidelines recommend for all possible steps to be taken to minimise disturbance of mangrove ecosystems by petroleum companies. Where disturbance is unavoidable, oil and gas operations should be designed to minimise permanent impact upon major environmental processes. Restoration objectives should first consider the potential for

[655] EEC Directive on the Assessment of the Effects of Certain Projects on the Environment adopted 27 June 1985, 85/337/EEC, OJEC L 175 (5/7/85).
[656] E&P/IUCN Oil Industry International Exploration and Production Forum, Oil and Gas Exploration and Production in Mangrove Areas: Guidelines for Environmental Protection (Gland, Switzerland: IUCN/E&P Forum, Report No. 2.54/184: 1993), available at https://portals.iucn.org/library/sites/library/files/documents/IUCN-1993-053.pdf accessed on 31/01/2018.

rehabilitating the original condition and functions of the ecosystem. The guidelines recommend further that:

> A preliminary EIA report should be prepared before beginning any activity on the site. This builds on the findings of the environmental profile and examines the issues in greater detail. Site specific surveys and data gathering will be required, particularly where sensitive issues have been identified. The preliminary EIA will further define and quantify sensitive issues and identify additional environmental, social and cultural issues. The purpose of this exercise is to identify the sensitivities of the area, including the presence of endangered species, water flow and sedimentation patterns, and to recommend environmental control and protection measures. *The final document is prepared in consultation with appropriate authorities and organisations, environmental specialists or institutes, indigenous populations and the general public* [emphasis added].[657]

These guidelines, which represent 'internationally acceptable operating practices' and 'internationally acceptable goals and guidance on environmental protection during oil and gas operations, fully endorse EIA process, and provide recommendations and guidance to oil companies on the EIA process.[658] They emphasise the importance of social and environmental impact assessment for assessing, predicting, avoiding, and mitigating the negative impacts of development on the physical and cultural environment of indigenous communities, including impacts on cultural and religious practices, and resource utilisation and land use patterns.[659] Wawryk further outlined some of the benefits of a thorough and well-conducted EIA thus:[660]

1. it provides a procedure for identification of likely adverse environmental impacts, including cultural impacts, before a decision to proceed with a development activity is made;

[657] E&P/IUCN Oil Industry International Exploration and Production Forum, Oil and Gas Exploration and Production in Mangrove Areas: Guidelines for Environmental Protection (Gland, Switzerland: IUCN/E&P Forum, Report No. 2.54/184: 1993), Chapter 3.
[658] Wawrykj (n 215) 5.
[659] Ibid 6.
[660] Ibid 7.

2. it provides opportunities to the public and affected people, such as indigenous peoples, to present comments and recommendations to the decision maker and participate in the development process;
3. it precludes secrecy in official decision-making, and opens the process of development to scrutiny;
4. it provides an opportunity to identify and take alternative development options; it presents an opportunity to identify and incorporate mitigation measures into a development activity; and
5. conditions of approval may ensure monitoring of environmental (including cultural) impacts, annual reporting by the proponent, post-project analyses and independent environmental auditing.[661]

EIA could allow oil companies to demonstrate their management capabilities for self-regulation thereby avoiding unnecessary regulation by governments of host countries. EIA could further assist petroleum companies to: (a) demonstrate scientific and technical credibility; (b) address the information needs of stakeholders; and (c) provide assurance to government and the public (including indigenous communities), thereby generating trust and confidence and enhancing the company image.[662]

However, despite the potential benefits of EIA, in practice, where EIA is required by legislation, the procedure has suffered from several weaknesses. First, EIAs are usually produced by project proponents, who have the greatest stake in the acceptance of the project, leading to the possibility of biased and inadequate environmental impacts statements.

[661] Gilpin A, Environmental Impact Assessment (EIA): Cutting Edge for the Twenty-First Century (Cambridge University Press, Cambridge UK, 1995) 3.
[662] OE&P Forum, View of Environmental Impact Assessment, Report No. 2.40/135, October 1986 at 3; E&P Forum, Principles for Impact Assessment, at 4.

Second, although EIAs should be conducted prior to the commencement of an activity, in practice environmental assessment, in many developing countries, is conducted only after the economic and technical feasibility studies have been completed and investment decisions have been made, and the developer have already committed to a project in its proposed format. Furthermore, governments may give support to a particular petroleum project primarily on economic grounds—without due consideration of the potential impacts of the projects on indigenous peoples—before an EIA is prepared.[663]

Third, while public participation, including the participation of indigenous communities, is an integral part of the EIA process, public participation in developing countries may suffer from a number of deficiencies, such as difficulties in obtaining access to information. Finally, EIA systems in general suffer from a lack of post-decision monitoring in many developing countries.[664] The EIA process has been further criticised with respect to its application in developing countries because:[665]

1. the coverage of EIA systems in developing countries is inconsistent in relation to the types of petroleum projects covered and the impacts assessed;
2. the consideration of alternatives in EIAs is often weak, and the alternative of 'no action' is often not a viable choice given the constraints of poverty in developing countries today;
3. mitigation is often an 'after-thought', with insufficient opportunities to change previously designated plans;
4. a lack of trained people and financial resources leads to the preparation of inadequate EIA reports in developing countries;

[663] Bates GM, Environmental Law in Australia (Butterworths, Sydney, 4th ed, 1992) at 179 182.
[664] Ibid 183-188.
[665] Wood C, Environmental Impact Assessment: A Comparative Review (Longman Group Limited, Essex UK, 1995) 302-308.

5. the baseline socio-economic and environmental data is inaccurate or absent or difficult to obtain in developing countries;
6. EIA reports are extremely difficult to obtain by the public in developing countries. They are often being classified as confidential, with very limited numbers of copies available for public inspection, if at all. This is often exacerbated by lack of a culture of participation and low levels of literacy;
7. EIA reports often have no influence on environmental decision making and sustainable developments in developing countries; and
8. monitoring of compliance with environmental controls and conditions, and of the EIA system itself, is ineffective or completely absent in many developing countries today.

### 7.3 The United Nations Guiding Principles on Business and Human Rights, 2011

The United Nations Guiding Principles on Business and Human Rights, 2011, are grounded, *inter alia*, in recognition of the role of business enterprises (including oil companies) as specialised organs of society performing specialised functions, to comply with all applicable laws and to respect human rights (including rights of indigenous communities at the vicinity of petroleum operations).[666] Principle 11 requires businesses, including oil companies, to respect human rights. This means that corporations should avoid instances where their activities could infringe and/or have negative impacts on human rights. The Guiding Principles apply as international standards to all business entities regardless of their sizes[667] and the jurisdictions of their operations.[668] They exist independently of states' abilities and/or willingness to fulfil their own human rights obligations, and do not diminish those obligations. Businesses should take adequate measures for the prevention, mitigation and, where appropriate, remediation of

[666] See the introductory statement of the United Nations Guiding Principles on Business and Human Rights.
[667] United Nations Guiding Principles on Business and Human Rights, Principle 14.
[668] United Nations Guiding Principles on Business and Human Rights, Principle 12.

the impact of their economic activities on human rights. [669] Because business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention.[670] In the context of this research, this refers to oil companies, environmental regulations and the impacts of petroleum operations on economic, social and cultural existence of indigenous communities in developing states. The Guiding Principles' Commentary on Principle 12 states, *inter alia,* thus:

> . . . Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the *rights of indigenous peoples* . . . [emphasis added].

Oil companies may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights, particularly in the countries where they operate. But this does not offset a failure to respect human rights throughout their operations. It would be inappropriate for their conducts to undermine the host state's abilities to meet its human rights obligations, including by actions that might weaken the integrity of judicial processes.[671] In order to meet their social and environmental responsibilities, oil companies should have in place appropriate policies, including: (a) a policy commitment to meet their responsibility; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and (c) processes to enable the

[669] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 11 (a) 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.
[670] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 12.
[671] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 11 (a) 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.

remediation of any adverse human rights impacts they cause or to which they contribute.[672] As the basis for embedding these responsibilities, they should express their commitments through a statement of policy to be approved at most senior level of their organisational structures. The term 'statement' is used generically, to describe whatever means an oil company employs to set out publicly its social and environmental responsibilities, commitments, and expectations.[673] The statement of policy should stipulate the company's human rights expectations of personnel, shareholders and other stakeholders that are directly linked to or who may be directly or indirectly affected by the company's operations, products or services. In order to ensure transparency and public trust, the policy statement should be made publicly available and communicated internally and externally to all stakeholders. It should be reflected in the company's operational policies and procedures.[674]

In order to indicate accountability for impacts of petroleum operations on the environment and on economic, social and cultural existence of indigenous communities, oil companies should exercise due diligence in identifying, preventing and mitigating the impacts of their activities. They should have a due diligent process that includes assessment of actual and potential human rights impacts, integration of actions to be taken upon findings, and tracking responses and communicating how the impacts are addressed.[675] The initial step in conducting the required due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which the oil company may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically, this includes assessing the human rights context prior to a proposed petroleum operation, where possible; identifying who may be affected; cataloguing the relevant human rights standards and

[672] United Nations Guiding Principles on Business and Human Rights, Principle 15.
[673] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 16.
[674] United Nations Guiding Principles on Business and Human Rights, Principle 16.
[675] United Nations Guiding Principles on Business and Human Rights, Principle 17.

issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, the company should pay special attention to any particular human rights impacts on individuals from groups or populations (including indigenous communities) that may be at heightened risk of vulnerability or marginalization. The process for assessing the impacts of the company's petroleum operations on the environment and rights and interests of indigenous communities should be incorporated as part of the company's environmental and social impact assessments. The company should undertake its environmental and social impact assessments at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation; in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.[676] Principle 19 provides further that:

> In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes and take appropriate action. Effective integration requires that: (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise; (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts. Appropriate action will vary according to: (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) The extent of its leverage in addressing the adverse impact.[677]

In order to verify whether adverse human rights impacts are being addressed, oil companies should track the effectiveness of their response. The tracking should be based on appropriate qualitative and quantitative indicators; and on feedback from both internal and external sources, including the affected stakeholders.[678] This is relevant in order for the company to know if its

[676] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 18 on process of identify and assessing actual or potential adverse human rights impacts with which companies may be involved either through their own activities or as a result of their business relationships.
[677] United Nations Guiding Principles on Business and Human Rights, Principle 19.
[678] United Nations Guiding Principles on Business and Human Rights, Principle 20.

human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement. Particular efforts should be made towards tracking the effectiveness of feedbacks and responses to impacts on indigenous communities that may be affected by their petroleum operations. Tracking should be integrated into relevant internal reporting processes. The company might employ tools it already uses in relation to other issues. This could include performance contracts and reviews as well as surveys and audits. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the company's operations human rights due diligence from those directly affected.[679]

Where petroleum operations result to adverse impacts, there should be provisions for remediation through legitimate processes.[680]The responsibility of oil companies to respect human rights also requires active engagement in remediation. Where adverse impacts have occurred that the oil company has not caused or contributed to, but which are directly linked to its operations, the responsibility to respect human rights does not require that the company itself provide for remediation, though it may take a role in doing so. Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.[681] However, in all contexts, oil companies should: (a) Comply with all applicable laws and respect internationally recognised human rights, wherever they operate; (b) seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements; and (c) treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.[682] Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, oil companies should first seek to

[679] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 20.
[680] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 21.
[681] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 22.
[682] United Nations Guiding Principles on Business and Human Rights, commentary of Principle 23.

prevent and mitigate those that are most severe or where delayed response would make them irremediable.[683]

However, the applicability of the United Nations Guiding Principles on Business and Human Rights at national level is subject to the host state's political will to incorporate them as elements of its petroleum regime; and to ensure their implementation through effective municipal environmental policies, legislations, regulations and adjudications.[684] Host states should not assume that international oil companies invariably prefer, or benefit from their inaction to take viable municipal measures to protect indigenous rights against impacts of petroleum operations through petroleum regimes.[685] Furthermore, the United Nations Guiding Principles on Business and Human Rights are also rounded in recognition of states' existing obligations to respect, protect and fulfil human rights.[686] The host state may breach its international human right obligations where it fails to take appropriate steps to prevent, investigate, punish and redress environmental torts committed against indigenous communities by oil companies within its jurisdiction.[687]

When deciding its approaches to prevention, investigation and redress of environmental torts. it would be appropriate for the state to consider a smart mix of measures – national and international, mandatory and voluntary – to foster oil companies 'respect for human rights (including rights of indigenous communities) within its jurisdiction. However, it is pertinent for the host state to show greater clarity of its environmental objectives and philosophies of protection of indigenous rights and interests in the measures it applies in dealing with the challenges associated with petroleum operations, environmental regulations and protection of

[683] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 24.
[684] United Nations Guiding Principles on Business and Human Rights, Principle 1.
[685] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 3.
[686] See the introductory statement of the United Nations Guiding Principles on Business and Human Rights.
[687] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 1.

indigenous rights and interests. Areas municipal petroleum regime and environmental policies that require specific clarity include, governing on access to land and entitlements in relation to ownership or use of land. Clarity in these areas could directly shape and/or guide oil companies and significantly the company's private philosophies of protection of indigenous rights and interests while conducting petroleum operations in the host state.[688] For example, clarity in municipal petroleum regimes regarding what international oil companies and their subsidiaries are permitted, let alone required, to do regarding protection of rights and interests of indigenous in the host state, would assist the board of the corporate group in tailoring the company's general corporate policies and approaches on petroleum operations and protection of indigenous rights and interest in ways that uniquely suits the requirements of the host state in question.

Although the host state has sole discretion to decide upon steps to prevent, investigate, and establish forms of punishment for environmental torts and breach of indigenous rights and interests within its jurisdiction, it also has a duty to protect and promote the rule of law in the area of petroleum operations, environmental regulations and indigenous rights and interests.[689] Part of this duty is the requirement to ensure that municipal approaches employed to prevent, investigate and redress issues relating to petroleum operations are based on the principle of equality and fairness. The approach employed should be designed in ways that uphold equal treatment to all the interests involved in petroleum operations – public, private, indigenous. In this context, it is advisable for the host state to explore all permissible preventative and remedial measures (including soft laws and industry-driven corporate standards and procedures) along with municipal laws and regulations and relevant international laws and instruments in the area of petroleum operations and protection of rights and interests of indigenous communities.[690]

[688] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 3.
[689] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 1.
[690] United Nations Guiding Principles on Business and Human Rights, commentary on Principle 1.

Yet, the need to protect indigenous rights and interests should be equally addressed as the need to protect investments in the interest of the oil company and the need to ensure that the state's oil and gas resources are explored and developed primarily in the interest of the general public. All three interests should be accorded fair and equal treatments though all measures employed by the host state in dealing with issues of petroleum operations and environmental regulations.

Although petroleum operations take place in the host state, by its nature, petroleum transaction may directly or indirectly involve participations of foreign oil companies (otherwise international oil company). In most instances, this development leads to multiple regulations and different corporate social responsibility requirements for the corporate group by different governments, depending on where the corporate head office is located and where the corporate group conduct its petroleum operations through its subsidiary companies. For example, most local oil companies that operate in developing states are subsidiary companies of international oil companies (which are the parent companies) with registered offices in foreign states (otherwise home states of the parent oil company and in most instances the location of the head office of the general corporate group). Although the subsidiary is usually a separate legal entity from the parent company, key economic and social decisions, including the corporate group's methods of petroleum operations and its environmental policies and philosophy of corporate social responsibility, are taken at the head office of the corporate group (home state of the parent company) on behalf of the general corporate group. However, these decisions are implemented by the subsidiary in the host state in manners that do not conflict with municipal laws and regulations of the host state.[691] This implies that the practicability of the corporate group policies abroad is subject to the laws of the host state which determines how petroleum operations are conducted within its jurisdiction. This creates lop holes for international oil

[691] *Bodo Community v Shell Petroleum Development Company Nigeria (SPDC)* [2014] EWHC 1973 (TCC); *Akpan and Others v RDS and SPDC*, Case Number/Docket Number: C/09/337050/HA ZA 09 – 1580.

companies to escape liability where environmental torts are committed by the subsidiary in the host state. It further creates scenarios where the corporate group adjusts its environmental procedures and policies on corporate social responsibility in accordance with the municipal laws and regulations of the host state where it operates through the subsidiary. Furthermore, although in most instances the home state of the parent oil company (and the state where the head office of the corporate group is located) is a develop countries which have sufficient legal and regulatory instruments on ground to deal with the challenges of petroleum operations and protection of community rights and interests. the home state has no international obligations to regulate the extraterritorial activities of parent oil company. Within these parameters some human rights treaty bodies, however, recommend that the home states take relevant steps to prevent human rights abuses by the parent company abroad.[692] Nevertheless, the practicability this recommendation, to greater extent, depends on co-operations of the both governments of the host state and home state to ensure that the corporate group applies the same environmental procedures and policies on corporate social responsibility required of it by the home state of the parent company when conducting petroleum operations in the host state through the subsidiary.[693]

The United Nations Guiding Principles on Business and Human Rights are grounded in recognition of the need for rights and obligations to be matched to appropriate and effective remedies when breached in the area of petroleum operations and protection of rights and interests of indigenous communities.[694] In general, petroleum producing states could satisfy the requirement of the Guiding Principles by:[695]

[692] United Nations Guiding Principles on Business and Human Rights, Commentary on Principles 1-3.
[693] Ibid 2.
[694] See the introductory statement of the United Nations Guiding Principles on Business and Human Rights.
[695] United Nations Guiding Principles on Business and Human Rights, Principle 3.

1. Enforcing municipal laws that are aimed at, or have the effect of, requiring oil companies to respect rights of indigenous communities;
2. Periodically assess the sufficiency of existing municipal petroleum regimes in dealing with issues of petroleum operations and protection rights and interests of indigenous communities and address any gaps;
3. Ensuring that other laws and policies governing the creation and ongoing operation of oil companies, such as corporate law, do not constrain but enable their respect for rights of indigenous communities;
4. Proving clear and effective guidance to oil companies on how to rest rights and interests of indigenous communities throughout their operations; and
5. Encouraging, and where appropriate require, oil companies to communicate how they address the impacts of their activities on society, with particular reference to rights and interests of the indigenous communities living at the vicinity of the operations.

However, effective implementation of the United Nations Guiding Principles on Human Rights - with reference to petroleum operations and protection of rights and interests of indigenous communities in developing states- requires regulatory co-operations between the host state and the home state of the international company. In addition, the Guiding Principles do not create new international law obligations. Neither do they limit non-undermine any legal obligations that the host state may have undertaken[696] to protect rights and interests of indigenous communities. They do not affect protection of indigenous rights and interests mostly in states where indigenous communities are disposed of their native lands in accordance with municipal legislations and where the legal system in question do no acknowledge rights of indigenous communities to land. In relation to corporate regulatory responsibilities, the Guiding Principles are not mandatory. Their main objective is to enhancing standards and practices with regard to

[696] See the introductory statement of the United Nations Guiding Principles on Business and Human Rights.

business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalisation.[697] Decisions on corporate behaviours and how oil companies should treat and respect rights and interests of indigenous communities living in the vicinity of petroleum operations sole resides with the host state to be addressed through its petroleum regime.

### 7.4 The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, 2011

The OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises (including international oil companies) operating in or from adhering countries. The Guidelines' recommendations express the shared values of the governments of countries from which a large share of international direct investment originates and which are home to many international oil companies. International oil companies (acting through and/or in collaboration with their subsidiaries abroad) are advised to take fully into account established policies on host states and consider the views of other stakeholders, including indigenous communities. In this regard, they are expected to, *inter alia*:[698]

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.
2. Respect internationally recognised human rights of those affected by their activities.
3. Encourage local capacity building through close co-operation with the indigenous communities living at the vicinity of their economic activities.
4. Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout their overall corporate group.

[697] Ibid.
[698] OECD Guidelines for Multinational Enterprises, 2011, pt. I.

5. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between them and the societies where they operate.

6. Carry out risk-based due diligence as part of their corporate risk management systems in order to identify, prevent and mitigate actual and potential adverse impacts of their activities and to take account of how they are addressed.

7. Engage with relevant stakeholders (including the indigenous communities living in the vicinity of their operations) in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact on concerned indigenous communities.

The Guidelines encourage board of the parent companies of international oil companies and that of their subsidiaries abroad to ensure the strategic guidance of their overall corporate group, the effective monitoring of management and to be accountable to both the overall corporate group and to shareholders, while taking into account the interests of other stakeholders (including indigenous communities). In undertaking these responsibilities, the board needs to ensure the integrity of the overall corporate group's accounting and financial reporting systems, including independent audit, appropriate control systems, in particular, risk management, and financial and operational control, and compliance with the law and relevant standards.[699] With reference to protection of the environment from the adverse impacts of petroleum operations, the Guidelines recommend for international oil companies to:[700]

1. Establish and maintain a system of environmental management appropriate to their enterprises, including:

[699] Ibid, pt. II (A).
[700] Ibid, VI (1)-(8).

a. collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
b. establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and
c. regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.

2. Verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance;
3. Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.
4. Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the corporation's activities. Where proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.
5. Consistent with the scientific and technical understanding of the risks, where there are threats of serious damage to the environment, taking also into account human health and safety, not use the lack of full scientific certainty as a reason for postponing cost-effective measures to prevent or minimise such damage.

6. Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.
7. Continually seek to improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging such activities as:
    a. adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise;
    b. development and provision of products or services that have no undue environmental impacts; are safe in their intended use; reduce greenhouse gas emissions; are efficient in their consumption of energy and natural resources; can be reused, recycled, or disposed of safely;
    c. promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues); and
    d. exploring and assessing ways of improving the environmental performance of the enterprise over the longer term, for instance by developing strategies for emission reduction, efficient resource utilisation and recycling, substitution or reduction of use of toxic substances, or strategies on biodiversity.

The Guidelines encourage participations of indigenous communities in the decision-making process regarding petroleum operations and their consequences on indigenous environmental rights and on the economic, social and cultural existence of the indigenous communities living at the vicinity of petroleum operations. Indigenous participations should involve engagement

of the concerned indigenous communities through interactive processes, including, meetings, hearings or consultation proceedings. Effective engagement is characterised by two-way communication and depends on the good faith of the participants on both sides.[701] Engaging the concerned indigenous communities in the manners described by the Guidelines could, *inter alia*, assist the host state, the oil companies and other stakeholder groups: [702]

1. To successfully initiate operational safeguarding plans prior to commencing a petroleum project;
2. To carefully analysis the possible impacts of the petroleum operations associated with the project on environmental rights and economic, social and cultural existence of the indigenous communities living in the vicinity of the project, before commencing the project;
3. To design effective national and corporate environmental and social policies tailored in accordance with the recent economic and legal levels of development of the host state and the economic, social and cultural needs and interests of the particular indigenous communities that could be affected by the petroleum operations associated with project; and
4. To avoid or minimise the impacts of the project on the use of indigenous lands and native rights and interests in line with relevant municipal legislations and regulation and the framework of internationally recognise obligations of the host state to protect environmental rights of indigenous communities within its jurisdiction.

In general, the text of the Guidelines on the environment reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It They also consider the (Aarhus) Convention on Access to Information,

[701] Ibid, 2011, pt. II (A).
[702] Ibid, 2011, pt. II (A).

Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflect standards contained in such instruments as the ISO Standard on Environmental Management Systems. Environmental management is recently seen as an important part of sustainable development and is increasingly being seen as both a business responsibility and a business opportunity. 'Sound Environmental Management', as use in the context of Guidelines, has broad meaning, embodying activities aimed at controlling both direct and indirect environmental impacts of enterprise activities over the long-term, and involving both pollution control and resource management elements. Multinational enterprises (including international oil companies) have a role to play in both respects. Senior managers of these companies are advised to give appropriate attention to environmental issues within their corporate strategies. Improving environmental performance requires a commitment to a systematic approach and to continual improvement of the system. Thus, an environmental management system should provide the internal framework necessary to control the company's environmental impacts and to integrate environmental considerations into its business operations. Having such a system in place would help to assure indigenous communities that international oil companies and their local subsidiary oil companies are actively working collaboratively to protect the environment against the impacts of petroleum operations on indigenous interests and on their economic, social and cultural existence.[703] Some of the matters covered by the Guidelines may also be regulated by national law or international commitments.[704]

Although the Guidelines are non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards, they are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. Observance of the

[703] OECD Guidelines for Multinational Enterprises, 2011, Commentary on the Environment (60)-(73).
[704] Ibid.

Guidelines by international oil companies and their subsidiaries abroad is voluntary and not legally enforceable**.**[705] The Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist international companies and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise. In non-adhering states, the Guidelines makes provisions for other organisations to assume the responsibilities of the NCP. Such organisation could consist of senior representatives from one or more relevant Ministries of the host state, senior governmental officials, and representatives from relevant government offices. Nevertheless, the said organisation shall be headed by a senior official of an interagency group or one that contains independent experts. Composition of the organisation shall further include representatives of the relevant business communities, representatives of the work force of the concerned oil companies, and representatives from other relevant non-governmental organisations.[706] However, the effectiveness of the said organisation could be undermined in oil producing developing countries by significant government presence in its membership. This is particularly with regards to the issues of lack of transparency and enforceability of petroleum legislations and environmental regulations in many developing countries today.[707]

The practicality of the NPC in non-adhering developing countries: with particular reference to the area of petroleum operations, environmental regulations and protection of rights and interests of indigenous communities, could be ascertained by one of its recent proceedings. On January 25, 2011, the Dutch NCP received a notification to the United Kingdom and Dutch NPCs under the Specific Instance Procedure of the 2010 Edition of the Guidelines by Amnesty

[705] Ibid.
[706] OECD Guidelines for Multinational Enterprises, 2011, Procedural Guidance, 1 (a)(2).
[707] See general discussions on Enforceability and Transparency in Chapter 4 of this research.

International, Friends of the Earth International, and Friends of the Earth Netherlands (hereafter 'the Notifiers').[708] The Notifiers alleged that Shell International violated specific provisions of the 2010 Edition of the Guidelines and, accordingly, submitted a case for breach of the Guidelines by Shell International: with particular reference misleading communications on oil spill in the Nigeria Niger Delta. The Notifiers contended that Shell International provided misleading information and omitted to mention relevant facts relating to the cause of the oil spill. Shell International based its communications on biased and unverified information, thereby failing to provide reliable and relevant information about the alleged spill to external stakeholders. The alleged breach of communication includes, Disclosure (iii), specifically on Point 2, and 4(e) of the 2010 Edition of the Guidelines which provides that Enterprises should ensure that timely, regular, reliable and relevant information regarding their activities, structures, financial situations and performances. The Guidelines encourages Enterprises to apply high quality standard information, including environmental and social reporting, when taking account of the need to protect the environment, public health and safety, and to generally conduct their activities in manners that contribute to the wider goals of sustainable development.

In response to the complaint, Royal Dutch Shell (RDS) the parent company of Shell Petroleum Development Company, Nigeria (SPDC), argued that the complaint is unfounded and unsubstantiated. With regards to its organisational structure, RDS clarified the NPC that it does not have any operation of its own and that the information on the Shell Corporate Group's operations in Nigeria has been furnished by the Corporate Group's relevant affiliates – SPDC and Shell Nigeria Exploration and Production (SNEPCo) – operating in Nigeria. In particular, SPDC is an operator of an unincorporated joint venture with the Nigerian NOC (NNPC) and others with an undivided participating interest in the joint venture of 30%. Shell International

[708] http://mneguidelines.oecd.org/database/searchresults/?q=(Host:(Nigeria)), accessed on 27/11/2018.

further pointed out that RDS sustainability report which is the main source of information on the social and environmental performance of Shell Corporate Group is drawn up in accordance with Shell International's Global Reporting Initiative designed in line with the *Guidelines* recommendations. Shell International claimed further that the data in the said Report are correct and meet the OECD Guidelines requirements.

The NPC observed that the decentralised commercial and legal responsibility of local subsidiaries is a crucial element of the Shell Corporate Group business philosophy. Local management should feel responsible for solving local problems without the comfort a parent company that will intervene when things seriously go wrong. According to the NPC, there is a role to be played by parent companies when international governance standards require more than just compliance to local law. In this specific instance under the OECD Guidelines, RDS cannot ignore its own ultimate responsibility and accountability concerning local operations of SPDC. RDS accepted the NPC's 'good offices' to facilitate a dialogue with view of creating positive conditions for open dialogue. The parties expressed their wiliness to engage in a dialogue to solve the issue at stake. The NPC helped setting the agenda and terms of references for the dialogue, including, a time frame, and facilitated the meetings that took place in the framework of the dialogue. The said NPC proceedings reveal two limitations:

First, the proceedings did not involve the concerned indigenous communities who are directly affected by the said oil spill; neither did the NPC consider the evidence of the affected community members. This begs the question whether the *raison d'être* of NPC is to promote and implement the objectives of the Guidelines in manners that primarily support protection of indigenous interests and environmental rights against of petroleum operations in developing countries or promote international environmental interests without direct positive impacts in host states. Secondly, the NPC's decisions do not appear to have binding effects of the Notifiers and international oil companies. The function of the NPC in this context is merely to create

platforms for dialogue between international organisations and the oil companies operating in host states.

In general, the Guidelines cannot be substituted for the municipal laws and regulations of the host state.[709] The primary obligation of international oil companies and their subsidiaries is to observe relevant municipal legislations and regulations of the host state.[710] Acting through and in collaboration with their subsidiaries in developing countries, international oil companies are expected to uphold the principles and standards of the Guidelines to the fullest extent which does not place them in violation of the laws and regulations of the host state.[711] However, as elements of the petroleum regime, the applicability of the Guidelines and their sufficiency in protecting indigenous environmental rights as well as economic, social and cultural interests against the impacts of petroleum operations in developing countries depend significantly on the extent to which governments are willing to incorporate the relevant aspects of the Guidelines as part of the state's petroleum regime and/or part of its environmental and developmental policies.

Furthermore, the responsibility to protect rights and interests of indigenous communities living at the vicinity of petroleum operations, *prima facia*, lies with the host state. With regards to preventing/minimising the impacts of their operations against environmental degradation, the Guidelines advises oil companies to act with the framework of the laws, regulations and administrative practices of the host state, while also considering relevant international environmental agreements, principles, objectives and standards. Oil companies are only expected (and not obliged) to take due account of the need to protect the environment, public

[709] OECD Guidelines for Multinational Enterprises, 2011, pt. I (2).
[710] Ibid.
[711] Ibid.

health and safety, and to generally conduct petroleum operations in manner contributing to the wider goal of sustainable development.[712]

### 7.5 The Extractive Industries Transparency Initiatives' Principles and Guidelines, 2016

The Extractive Industries Transparency Initiative (EITI) is a global standard which promote openness and transparency in the oil, gas and mineral resources industries. EITI is guided by the belief that the natural resources of a state belong to its citizens. It seeks to strengthen governments of host states and company systems, inform public debate and promote understanding in the oil and gas sector. Membership is voluntary and petroleum states seeking to improve the way they manage their resources can apply to become implementing countries. In order to achieve satisfactory progress on implementing the EITI Standard, adhering states need to meet the requirements on transparency and accountability.[713] The 2016 version of the EITI Standard consists of two parts: part one Implementation of the EITI Standard; and part two Governance and management. Part one includes the EITI Principles – which were agreed by stakeholders in 2003. The Principles lay out the general aims and commitments by stakeholders. Part one further includes the EITI Requirements, which adhering states are expected to implement. The EITI believes in prudent use of national wealth accrued from host states' natural resources as important engine for sustainable economic growth of citizens and as significant contribution to the country's sustainable development and poverty reduction. However, if poverty is not managed properly, host states' natural resources could create negative economic and social impacts.[714] Management of wealth accrued from natural resources in public interests is in the domain of sovereign governments to be exercised in the

[712] OECD Guidelines for Multinational Enterprises, 2011, VI (1)-(8).
[713] https://eiti.org.
[714] EITI Principle 1.

interests of the overall national development.[715] The benefits of resource extraction occur as revenue streams over may years and can be highly price dependent.[716]

It would benefit citizens to understand how revenues and expenditures of natural resources are governed. Over time, this could assist public debate and inform choice of appropriate and realistic options for sustainable development.[717] Public understanding of how government manage petroleum revenues and expenditures also underline the importance of transparency of host states and the oil companies operating within their jurisdictions. They could also enhance public financial management and accountability.[718] However, achievement of greater transparency should be set in the context of respect for principles of contract (in this context, petroleum contracts as a regimes of private law) and the relevant laws and regulations of the host state (as regimes of public law).[719] The EITI acknowledges correlation between enhanced environment for domestic and foreign investment which could be promoted through financial transparency.[720] The EITI is significantly based on the principle and practice of accountability by government to its citizens for the stewardship of revenue streams and public expenditure.[721] The EITI is, accordingly, committed to promoting high standards of transparency and accountability in public and private sectors of the extractive industries.[722] A broadly consistent and workable approach to disclosure of payments and revenues in the extractive industries, which are simple to understand, are required.[723] Payments' disclosure in host states should involve the extractive companies (including international oil companies) operating in their

[715] EITI Principle 2.
[716] EITI Principle 3.
[717] EITI Principle 4.
[718] EITI Principle 5.
[719] EITI Principle 6.
[720] EITI Principle 7.
[721] EITI Principle 8.
[722] EITI Principle 9.
[723] EITI Principle 10.

jurisdictions.[724] In seeking solutions to the challenges of the extractive industry, the EITI acknowledges the important roles and participations of extractive companies, multilateral organisations, financial organisations, investors and non-governmental organisations in the industry as stakeholders.[725]

The EITI requires effective multi-stakeholder oversight, including a functioning multi-stakeholder group that involves the government, companies, and the full, independent, active and effective participation of civil society. Governments of adhering states are required to commit to work with civil society and companies and establish a multi-stakeholder group to oversee the implementation of the EITI in their jurisdictions. In establishing the multi-stakeholder group, governments should:

(a) ensure that the invitation to participate in the group is open and transparent.

(b) ensure that stakeholders are adequately represented. This does not mean that they need to be equally represented numerically. The multi-stakeholder group must comprise appropriate stakeholders, including but not necessarily limited to: the private sector; civil society, including independent civil society groups and other civil society such as the media and unions; and relevant government entities which can also include parliamentarians.

(b) each stakeholder group must have the right to appoint its own representatives, bearing in mind the desirability of pluralistic and diverse representation.

(c) the nomination process must be independent and free from any suggestion of coercion.

[724] EITI Principle 11.
[725] EITI Principle12.

(d) civil society groups involved in the EITI as members of the multi-stakeholder group must be operationally, and in policy terms, independent of government and/or companies. iii. Consider establishing the legal basis of the group.[726]

The role, responsibilities and rights of the multi-stakeholder group include:

(a) members of the multi-stakeholder group should have the capacity to carry out their duties. (b) the multi-stakeholder group should undertake effective outreach activities with civil society groups and companies, including through communication such as media, website and letters, informing stakeholders of the government's commitment to implement the EITI, and the central role of companies and civil society.

(c) the multi-stakeholder group should also widely disseminate the public information that results from the EITI process such as the EITI Report.

(d) members of the multi-stakeholder group should liaise with their constituency groups.[727]

The key requirements related to multi-stakeholder oversight include: (a) government engagement; (b) industry engagement; (c) civil society engagement; (d) the establishment and functioning of a multi-stakeholder group; and (e) an agreed work plan with clear objectives for EITI implementation, and a timetable that is aligned with the deadlines established by the EITI Board.[728] Governments of adhering host states are required to issue unequivocal public statements of their intention to implement the EITI. The statement must be made by the head of state or government, or an appropriately delegated government representative.[729] Governments of adhering host states are expected to appoint a senior individual to lead the implementation of the EITI. The appointee should have the confidence of all stakeholders, the

[726] EITI Requirement 1.4 (a).
[727] EITI Requirement 1.4 (b).
[728] https://eiti.org/sites/default/files/documents/the_eiti_standard_2016_-_english.pdf.
[729] EITI Requirement 1.1 (a).

authority and freedom to coordinate action on the EITI across relevant ministries and agencies, and be able to mobilise resources for EITI implementation.[730] Governments should be fully, actively and effectively engaged in the EITI process;[731] and ensure that senior government officials are represented on the multi-stakeholder group.[732]

Extractive companies are required to be fully, actively and effectively engaged in the EITI process.[733] However, it is the responsibility of host states to ensure that there is an enabling environment for company participation with regard to relevant laws, regulations, and administrative rules as well as actual practice in implementation of the EITI.[734] Furthermore, representatives of extractive companies have fundamental rights to substantively engaged in the EITI in ways that are not restricted to members of the multi-stakeholder group.[735] Governments of adhering states should ensure that there are no obstacles to company participation in the EITI process.[736]

In accordance with the civil society protocol in section 5 of the EITI Standard, civil society must be fully, actively and effectively engaged in the EITI process.[737] Governments of adhering states should ensure enabling environment for civil society participation in accordance with their relevant laws, regulations, and administrative rules. The fundamental rights of civil society to substantively engaged in the EITI, including but not restricted to members of the multi-stakeholder group, must be respected by adhering host states.[738] Governments must ensure that there are no obstacles to civil society participation in the EITI process in their

[730] EITI Requirement 1.1 (b).
[731] EITI Requirement 1.1 (c).
[732] EITI Requirement 1.1 (d).
[733] EITI Requirement 1.2 (a).
[734] EITI Requirement 1.2 (b).
[735] EITI Requirement 1.2 (b).
[736] EITI Requirement 1.2 (c).
[737] EITI Requirement 1.3 (a).
[738] EITI Requirement 1.3 (b).

jurisdictions.[739] They are further advice to refrain from actions which could result in narrowing or restricting public debate in relation to implementation of the EITI in their states.[740] Stakeholders, including but not limited to members of the multi-stakeholder group should: (a) be able to speak freely on transparency and natural resource governance issues; (b) be substantially engaged in the design, implementation, monitoring and evaluation of the EITI process, and ensure that it contributes to public debate; (c) have the right to communicate and cooperate with each other; and (d) be able to operate freely and express opinions about the EITI without restraint, coercion or reprisal.[741]

The EITI has recently introduce new forms of international pressures on governments of host states and the oil companies operating within their jurisdictions to be more transparent with their economic transactions and be accountable for the impacts of their operations on the environments and rights and interests of indigenous communities. Although there are ground-breaking results of the EITI in the overall extractive industries, the benefits are yet to be significantly noticed in many developing countries, including Nigeria, which are current adhering states. For example, after an estimated 50 years of exploration, the oil and gas sector continue to play a significant role in Nigerian economy and accounts 53% of total revenue to the government. Nigeria EITI has been effective in strengthening public debate and promoting policy options around signature bonuses, unpaid royalties, fuel subsidies, crude oil and refined products theft, and unpaid subsidies by the national oil company (NNPC). It has identified USD 9.8 billion owed to the Federal Government, of which USD 2.4 billion has been recovered through Nigeria EITI's efforts. However, Nigeria continues to face significant challenges in

[739] EITI Requirement 1.3 (c).
[740] EITI Requirement 1.3 (d).
[741] EITI Requirement 1.3 (e).

managing the country's petroleum sector due to unaccountable use of revenues and corruption.[742]

### 7.6 The Concept of CSR in Developing Countries

The industry-driven self-regulatory mechanisms and international and inter-governmental best petroleum practices and recommended environmental standards, which are discussed above, generally translate as mechanisms of corporate social responsibility (CSR) in many developing countries, today. However, the practicality of the concept of CSR and the role it plays in the legal system of a host state depends on public perception of the concept and the philosophy attached to it by the host government, respectively. This Section examines the understanding of CSR in developing countries: with particular reference to Nigeria. It would be appropriate to first determine who are the stakeholders of the corporation? The United Nations Norms on Transnational Corporation and Other Business Enterprises states:

> The term 'stakeholder' includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term 'stakeholder' shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.[743]

Corporate stakeholders are generally categorised as 'primary stakeholders' and 'secondary stakeholders. Primary stakeholder group is one whose participation in the corporation defines its existence, success, and survival as a legal entity. This group typically comprises of

[742] https://eiti.org/nigeria.
[743] United Nations Norms on Responsibility of Transnational Corporation and other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), art. 22.

shareholders and investors, employees, customers and consumers of its goods and services, suppliers, and the host government whose laws and regulations the corporation must obey, and to whom taxes and other obligations from the corporation may be due. Failure to engage the interests of primary stakeholders could result in failure of the corporate system. Secondary stakeholder group comprises of those whom observations or campaign could significantly affect the reputation of the corporation at national and international levels. This in turn might have negative impacts on the shares of the corporation. However, depending on the economic and legal approach of a given jurisdiction, secondary stakeholder group are not engaged in any direct transactions with the corporation. They include the media and other wide range of special interest groups like indigenous communities. Although they may be capable of mobilising public opinion in favour of, or in opposition of the corporate performance, the corporation has no direct legal obligations towards them except the law provides otherwise or where a contractual arrangement exists between a set of secondary stakeholder group and the corporation in question.

The concept of 'shareholder primacy' is well established as the dominant philosophy in English company law.[744] In general, common law treats corporations as 'nexus of contracts' through which the various participants arrange to transact with each other.[745] The first company law in Nigeria was the Companies Ordinance of 1912, which was a local enactment of the Companies (Consolidation) Act 1908 of England. The current company law (now known as the Companies and Allied Matters Act 1990 - CAMA) is further modelled on the United Kingdom Company Act, 1948, to a great extent. Section 172(1) of the United Kingdom Company Act, 2006 provides that:

[744] *Hutton v West Cork Railway Co Ltd* (1883) 23 Ch D 654 at 673 per Bowen LJ.
[745] Margaret Blair, 'Whose Interests Should Corporations Serve?' in Max Clarkson (ed.), *Corporation and its Stakeholders: Classic and Contemporary Readings* (University of Toronto Press 1998) 51.

> *A director of a company must act* in the way he considers, in good faith, would be most likely to promote the success of the company *for the benefit of its members as a whole*, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the *company's employees*,
>
> (c) the need to foster the company's business relationships with *suppliers, customers* and others,
>
> (d) the impact of the company's operations on *the community and the environment*,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to *act fairly as between members of the company* [emphasis added].

The concept of shareholders supremacy is prominently embedded in the terms of the aforementioned provisions by the requirement that the business of the company should be run in the interests of its members. It, however, also identifies the company's employees, suppliers, customers, and the community as its members. The company shareholders can, in general, exercise their votes in their economic interest. Strictly speaking, a member of a company enjoys personal property rights in the company.[746] However, Milman explained that:

> The need to have regard to the interests of the community is listed in s. 172(1)(d) in terms of the business operations of the company. Presumably, business operations would include any downsizing of the said operations. This is one further area of commercial activity where the state often picks up the bill at the end of the day by requiring the establishment special regional investment funds and other local initiatives to address any attendant unemployment. *This brings corporate social responsibility into a sharp focus* [emphasis added].[747]

For many years there has been special discrete legislation rendering companies and their officers liable for breaches of environmental regulations in the United Kingdom. Where the

[746] David Milman, 'Stakeholders in Modern UK Company Law', 1 available at http://eprints.lancs.ac.uk/87553/1/Stakeholders_in_modern_UK_company_law.pdf , accessed on 01/02/20.

[747] Milman, ibid, 5.

state is a major investor in a company it can try to influence the directors to adopt an environmentally friendly policy. Nonetheless, the final decision lies with the directors who are expected to have regard to the interests of shareholders as well as those of the company's other stakeholders.[748] Milman concluded thus:

> Clearly considerable advances have been made in recent times to put the concept of the stakeholder on a firmer footing in modern UK Company Law. But the debate continues.[749]

While in the United Kingdom there has been a noticeable shift in focus in the conception of the purpose of the corporation to 'enlightened shareholder value' and the requirement that companies should report on the impact of their operations on other stakeholders such as employees, suppliers, communities and the environment, the Nigerian legal framework has not gone the same direction. The Nigerian legal system continues to reflect the shareholder supremacy and wealth maximization goal. Section 79 of Nigeria Company and Allied Matters Act, 1990 provides thus:

> The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration, shall be entered as members in its register of members. Every other person who agrees in writing to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. In the case of a company having a share capital, each member shall be a shareholder of the company and shall hold at least one share.

Companies in Nigeria are viewed as private businesses to be run exclusively in the interests of shareholders.[750] Corporate activities in Nigeria are, thus, not framed from stakeholder perspective. CSR in Nigeria rather reflect the local realities where corporate contributions to

[748] *R (on the application of People and Planet) v HM Treasury* [2009] EWHC 3020 (Admin) per Sales J.; Milman Ibid.

[749] Ibid 7.

[750] *Kotoye v Saraki* [1994] 7 NWLR (Pt. 357) 414 at 467.

society are seen from a philanthropic perspective. National interviews conducted by Amaeshi, Ogbechie, and Amao highlighted the following descriptions of CSR in Nigerian context:[751]

> [CSR is] The corporate act of giving back to the immediate and wider community in which organisations carry out their business in a manner that is meaningful and valuable and relevant to that community.
>
> [CSR] is a way for the companies to reach out to their host communities by positively impacting on their environment.
>
> [CSR] is a way of saying 'thank you' to the environment in which they [sic] operate and a way of also showing a sense of belonging to the society at large.

All the interviewees acknowledged that Nigerian firms are engaged in one CSR activity or the other. However, in line with this philanthropic and altruistic understanding of CSR, 85% of the respondents said that there is an awareness of CSR in Nigeria but without significant actions, while 7.7% either claimed there is almost no awareness of CSR or there is high awareness with significant actions.[752]

### 7.7 Conclusions

There are significant international influences in environmental regulations and sustainable developments in developing countries, today. Some of the concepts for best/internationally accepted oil and gas practices, including environmental management systems, environmental performance evaluation, environmental impact assessment, and social impact assessment, which are increasingly becoming significant aspects of national petroleum laws and environmental regulations (otherwise soft-laws), evolved from the private sector in form of industry-driven non-binding self-regulations. There are also recent international influences in

[751] Kenneth M Amaeshi, Bongo C Adi Chris Ogbechie and Olufemi O Amao, 'Corporate Social Responsibility (CSR) in Nigeria: western mimicry or indigenous practices?' No. 39-2006 ICCSR Research Paper Series - ISSN 1479-5124, 21-23 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.544.1053&rep=rep1&type=pdf.
[752] Amaeshi, Ogbechie and Amao (n 751) 26.

forms of recommendations and guidelines for best social business practices, including the United Nations Guiding Principles on Businesses and Human Rights and the OECD Guidelines 2011, aimed at ensuring sustainable developments and protection of rights and interests of indigenous communities against impacts of petroleum operations in developing countries and emerging economies. These trends translate as aspects of CSR in some developing countries. However, the practicability of the concept of CSR in host states depends on public understanding of the concept and the legal philosophy of the host state. CSR means different things to different countries depending of the level of economic and legal development of a state. For example, while in most Western states CSR is perceived as a combination of economic accountability to stakeholders and environmental responsibility to the general society, the concept is generally seen as a mere voluntary philanthropic contribution of businesses to society in many developing countries. The notion that corporations could be responsible to society and secondary stakeholders (including the indigenous communities living at the vicinity of corporate activities) as they are accountable to shareholders and other primary stakeholders (including) is yet to be acknowledged in some developing legal systems.

International law acknowledges the significant roles of modern corporations (including oil companies) in effecting sustainable development schemes in developing countries. It also warns against instances where corporations activities, including petroleum operations, undermine the rights and interests of indigenous communities. However, the sufficiency of international recommendations and guidelines in the area of petroleum operations and protection of indigenous rights and interests at national levels depends on the willingness of the host state to incorporate them as elements of its petroleum regime; and to ensure their implementation through effective municipal environmental policies, legislations, regulations and adjudications. Furthermore, oil companies have no direct regulatory responsibilities: with particular reference to petroleum operations and protection of rights and interests of indigenous

communities in developing countries. The sufficiency of any acclaimed regulatory responsibility of oil companies in this area depends on the willingness of the host state initiate some forms of mix municipal regimes comprising of mandatory national and international laws, and voluntary industry-driven codes and guideless (in forms of soft-laws) specifically designed to foster oil companies to respect the rights and interests of the indigenous communities living at vicinities of petroleum operations.

The practicability of industry-driven regulatory codes and guidelines (otherwise soft-laws) in developing countries is undermined by lack of understandings of the concepts associated with the codes and guidelines and insufficient monitoring and supervisory systems on ground. First, there are no viable systems of collecting environmental data, and developing countries generally find it difficult to implement environmental management systems as local oil companies lack the resources of effecting sufficient environmental systems in accordance with international standards. Secondly, methods of assessing social impact of petroleum operations on indigenous communities are less advanced compared to methods for assessing the effects of developmental activities on physical environments, including waters, air, and soils in developing states. Thirdly, although environmental impact assessment should be conducted prior to commencing a petroleum project, generally, assessments commence after economic and technical feasibility studies have been completed and investment decisions have been made in developing countries. Finally, although public consultations and participations of concerned groups of the states who are closely affected by the petroleum operations are viewed as significant part of environmental and social impact assessments, these procedural aspect of environment and social assessment cannot be envisaged in developing states where indigenous communities are disposed of native lands though a proposed petroleum operations could be detrimental to their health as economic, social and cultural existence.

## 8. CONCLUSIONS

There are three main interests in petroleum operations: public, private and indigenous. Public interest relates to the impacts of petroleum operations on the economic, social and environmental well-being of the overall public of the host state; and the responsibility of its government to ensure that the state petroleum resources are primarily developed in public interest. Private interest in petroleum operations is *prima facia* economic oriented. It refers to the investment interests oil companies in petroleum operations and their corporate environmental responsibilities in international law and in accordance with the corporate regulations and petroleum regimes of the host state. Indigenous interest is a sub-category of public interest which relates to a segment of the host state's populace that suffers more severe economic, health and environmental costs from the petroleum operations of the state compare to the rest of the overall public. Indigenous interest particularly concerns the interests of indigenous peoples/communities living in the vicinity of the petroleum operations and whom economic, social and cultural existence are likely to be affected by the oil and gas operation on their native lands.

International law recognises requires some minimum standards for protection of rights and interests of indigenous peoples/communities. It acknowledges rights of indigenous peoples/communities to: (a) economic, social, and cultural existence; (b) internal self-determination; (c) ownership over native lands; (d) access to natural resources; (e) conservation and environmental protection; and (f) free prior and informed consent. Indigenous peoples/communities have right to identify themselves as group of individuals within their existing state, with common historical tradition; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and economic existence, a common historical tradition. Indigenous interest in petroleum operations refers to the specific interests

of indigenous peoples/communities living at the vicinity of petroleum operations. Although international law recognises state's ownership and control of petroleum resources in its jurisdiction, this does not automatically extinguish the surface rights of indigenous peoples/communities over their native lands whereunder the petroleum is discovered and upon which petroleum operations are conducted. Indigenous rights over native lands arise from the prior occupation of the land and the prior social organisation and distinctive cultures of the concerned indigenous peoples/communities on the area in question. However, the existence of indigenous right over native land within a jurisdiction depends on the legal provisions of the state in question, provided that the state's municipal legislation on land ownership is applied to the overall public without discrimination and insofar there are legislative procedures for peaceful resettlement and compensation in accordance with international provisions. International law further recognises the rights of indigenous peoples/communities to be duly consulted and requires governments and oil companies to ensure that the consent of the concerned indigenous peoples/communities is obtained prior to commencements of petroleum operations on their native lands. However, the international standards for protection of rights and interests of indigenous peoples/communities at national levels require municipal legislations modelled in accordance with the provisions of international law in this area. Usually, host states regulate their petroleum industries via their constitutions and petroleum regimes. Legislations (including environmental regulations), petroleum contracts and industry driven soft laws are the elements of a state petroleum regime. This research set out to determine the sufficiency of the petroleum regimes of Angola and Nigeria in protecting the rights and interests of the indigenous communities living at the vicinity of petroleum operations in accordance with the minimum standards required in international law.

Recent concept of best practices in the area of petroleum operations. environmental regulations and protection of rights and interests of indigenous peoples/communities include,

environmental management system, environmental impact assessment and social impact assessment, which are inspired by best oil and gas guidelines and practices of the international oil industry. In addition, international recommendations on protection of indigenous rights and interests include active participation of concerned indigenous communities in the petroleum affairs around their vicinity through meetings, hearings, or consultation proceedings. Effective consultation in this context should be two-way consultations: consultation between the oil companies and indigenous communities; and consultation between government representatives and the indigenous communities. The text of international instruments and inter-governmental guidelines in this area mostly reflect the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21 (within the Rio Declaration). It They also consider the (Aarhus) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters and reflect standards contained in such instruments as the ISO Standard on Environmental Management Systems. However, oil companies do not have regulatory responsibilities in developing countries. The applicability of these industry-driven none-binding soft-laws and international guidelines and recommendations, at national levels, depends on the willingness of the host state to incorporate them as significant part of its petroleum laws and regulations. Responsibility for protection of indigenous rights and interests solely lies with governments of host states. The primary obligation of international oil companies and their subsidiaries in developing countries is to comply with the municipal laws and regulations of the host state. The sufficiency of industry-driven self-regulations and international (and inter-governmental) guidelines for best oil and gas practices and recommendations for protection of indigenous rights and interests against impacts of petroleum operations as part of the soft-law element of petroleum regime in developing countries is further undermined by: (a) inadequate monitoring and supervisory systems on ground; (b) lack of viable systems of collecting environmental data; challenges in

implementing environmental management systems due to lack of resources for effecting sufficient environmental systems in accordance with international standards; (c) inadequate methods of assessing social impact of petroleum operations on indigenous communities; (d) although environmental impact assessment should be conducted prior to commencing a petroleum project, generally, assessments commence after economic and technical feasibility studies have been completed and investment decisions have been made; and (e) although public consultations and participations of concerned groups of the states who are closely affected by the petroleum operations are viewed as significant part of environmental and social impact assessments, these procedural aspect of environment and social assessment cannot be envisaged in developing states where indigenous communities are disposed of native lands though a proposed petroleum operations could be detrimental to their health as economic, social and cultural existence.

The comparative analysis of the regulatory frameworks of the petroleum elements in Angola, Australia, Nigeria and Norway indicates that weak legal system is not an excuse for inadequate regulatory mechanisms in protecting indigenous rights and interests against impacts of petroleum operations in Angola and Nigeria. It reveals some similarities in regulatory approaches designed in line with international standards and guidelines for protection of indigenous rights and interests. However, the analytical study indicates further that the sufficiency of regulation as aspect of the legislative element of the petroleum regimes of Angola and Nigeria are significantly undermined by lack of enforceability and inability to achieve the required necessity that promoted their existence. In addition, a well-designed petroleum regulation should ensure sufficient transparency in other to gain greater degree of public confidence. However, the transparency of the petroleum industry of Angola and Nigeria are further undermined by endemic corruption. With particular reference to Nigeria, where there are no sufficient legislations, as expression of regulation, in preventing impacts of

petroleum operations on economic, social and cultural existence of indigenous communities, though the common law of tort seems to repair the effects of petroleum operations on indigenous rights and interests, the common law does not resolve the issue of regulatory insufficiency which is deeply rooted in non-reignition of native title to land in the Nigerian legal system. Therefore, regulations as aspects of the legislation element of petroleum regime is not enough to protection indigenous rights and interests against petroleum operations in Angola and Nigeria.

Petroleum contracts are generally perceived as forms of economic instruments used to promote internationalization of environmental costs with due regard to public interests and without distorting international trade and investments at national levels. To advocate for correlation between economic advancement, environment protection and sustainable development, petroleum contracts represent flexible legal mechanisms for aligning the public, private and indigenous interests. However, an overview of the various forms of petroleum contracts examined in this research supports the idea that the contents (otherwise, terms and conditions) of individual contract are far more significant than the name ascribed to it when determining the sufficiency of petroleum contract (as element of national petroleum regime) in addressing issues of petroleum operations, environmental regulations and protection of indigenous rights and interests. For example, the primary *reason d'être* for the initiation of production sharing contract (PSC) – with particular reference to the notion of sharing of the oil and gas produced between the host state and the oil company (in this case commonly referred to as 'the contractor') – resonates with the PSCs executed in different jurisdictions. Nevertheless, differences may exist in extent of acknowledgement of native title to land and protection of environmental rights and indigenous interests against impacts of petroleum operations in each PSC. These differences are, *prima facie*, influenced by the legal philosophy of the host state towards native title and protection of indigenous interests against impacts of petroleum

operations. Furthermore, the rights of indigenous communities (whom economic, social and cultural existence are impaired by petroleum operations) to sue parties to petroleum contracts for breach of environmental obligations arising from the contract, generally, differs between civil and common law jurisdictions. Whereas only parties to a contract can, usually, sue and be sued for obligations arising from the contract in common law jurisdictions, civil law jurisdictions are generally familiar with the legal concepts of a contract in favour of a third-party beneficiary who is not present when the contract was executed as well as the right of the third party to enforce the said contract. For instance, while the Ethiopian model petroleum contract outrightly denied indigenous communities of native title to land and acknowledged forceful resettlement of indigenous communities for purposes of petroleum operations without adequate compensations; the Brazilian model contract acknowledges native title and indigenous interests in petroleum operations. By identifying 'Native Communities' as beneficiaries and acknowledging ways of protecting indigenous interests from the impact of petroleum operations, the Brazilian model contract further establishes legal grounds for concerned indigenous communities to institute actions for breach of obligations arising from performance of the contract, which affects their environmental rights and the impact of the breach on their economic, social and cultural existence.

As an element of national petroleum regime, the sufficiency of the petroleum contract in dealing with the challenges associated with petroleum operations, environmental regulations and protection of indigenous rights and interests lies in its flexibility as binding private legal instrument. Whereas regulations, as an aspect of national legislation and element of petroleum regime, is primarily based on public law and industry driven self-regulation as an aspects of the soft-law element of petroleum regime is mostly based on the concept of voluntary none-binding private mechanisms; petroleum agreement as the contract element of petroleum regime is an hybrid of public and private law in the sense that it, generally, combines relevant

environmental regulations of the host state and industry-driven voluntary guidelines for best oil and gas practices and none-binding recommendations on corporate social responsibility in one flexible binding legal instrument.

First, the comparative analysis between the legislation element and the contract element of petroleum regime demonstrates that the contract element generally softens the usual rigid atmosphere associated with the legislative element of petroleum regime by introducing some elements of private legal arrangements into petroleum transactions thereby giving parties to the agreement the right to voluntarily determine the terms and conditions upon which the oil and gas operations relating to a particular petroleum project should be conducted. In the context of petroleum operations, environmental regulations and protection of indigenous rights and interests, parties to petroleum contracts could expressly acknowledge the concerned indigenous communities as beneficiaries of the contract and incorporate ways to protection of indigenous rights and interests from the impacts of petroleum operations, in line with relevant international laws and recommendations in this field. Although the legal system of the host state may not acknowledge native title to land, a carefully designed petroleum contract (tailored in accordance with level of development of the state's petroleum sector) could incorporate divers ways of protecting indigenous interests without distorting basic provisions of municipal legislations and regulations. Doing so (and identifying the concerned indigenous communities in the contract) could grant rights to indigenous communities living in the vicinity of petroleum operations to institute action against parties to petroleum contracts for breach of obligations resulting to environmental torts, without been party to the contract.

Secondly, the flexible nature of the contract element of petroleum regime makes it possible for parties to petroleum contracts to voluntarily incorporate industry-driven codes and practices and internationally recommendations on corporate social responsibility into their agreement. The notion of a contract as a voluntary binding private legal instrument implies that (by signing

contracts that incorporate codes and conducts of best oil and gas practices by the international oil industry and those of other relevant associations; and international guidelines and recommendations for responsible corporate practices towards prevention/minimization of environmental degradation and protect indigenous rights and interests against impacts of petroleum activities) parties to petroleum contracts, including international oil companies and their subsidiaries could be obliged to observe non-binding industry-driven codes and conducts as well as international recommendations in this area of study, insofar, the contract is designed in ways that makes parent oil companies to share obligations with their subsidiaries operating in developing countries.

Finally, even in jurisdiction where petroleum contracts are skeptical about inclusion of clauses giving rights to third-parties to sue for breach of performance that affects their rights and interests, the Australian Land Use Agreement indicates practicable alternative where a separate contractual agreement between petroleum operators and indigenous peoples/communities (based on legislative provisions and existing contract between the petroleum operator in question and the state) could be used to protect the rights and interests of the concerned indigenous peoples/communities in accordance with the requirements of international law. This research, thus, concludes that a well-designed contract of element of petroleum regime is the best possible legal mechanism that could assure protection of rights and interests of indigenous communities in Angola and Nigeria in accordance with the required minimum standards in international law.

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