

AN ANALYSIS OF THE POLLUTER PAYS PRINCIPLE IN NIGERIA

Gina Elvis-Imo*

Abstract

The polluter pays principle is an economic principle predicated on the internalization of environmental costs into decision making for economic and other development plans, programs and projects that are likely to affect the environment. The principle is thus a way of allocating pollution costs. It has been extensively used in international law, and now has the status of one of the guiding principles of international environmental law. However, the principle does not answer the questions of who the actual polluter is, or which costs shall be covered. This paper therefore examines the implementation of the polluter pays principle in Nigeria and observes that for an effective application, the polluter pays principle must effectively answer the following questions: What constitutes pollution? Who are the polluters? How much must the polluters pay? To whom should such payment be made? Etcetera.

Pollution

Pollution is man aided contamination of the air, water and land with impurities at a level that compromises the usefulness of the environment for beneficial purposes. Section 37 of the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act¹ defines pollution as “man-made or man aided alteration of the chemical, physical or biological quality of the environment beyond acceptable limits....”

Pollution may result from natural causes or human activities and could affect human health and environment in many ways: which include damage to human health caused by specific chemical substances present in the air, food, water and radioactivity; damage to the human environment which affects vegetation, animals, crops, soil and water, damage to the aesthetic

* Senior Lecturer, Faculty of Law, Niger Delta University, Bayelsa State.

¹ Cap N164 Laws of the Federation of Nigeria 2010.

quality of the environment caused by smoke, fumes, noise, dust and dereliction and long term pollution which effects may not be immediate and apparent. There are different types of pollution, such as, oil pollution, water pollution, air pollution, noise pollution etcetera.

Environmental pollution problems in Nigeria relate to oil industry activities which started with the discovery of oil in commercial quantity at Oloibiri² in 1958. Pollution can occur at different stages of oil industry activities: it can occur when drilling or explosive methods are used at the exploration stage,; it can occur when oil is tapped and the unused derivatives, such as gas, escapes into the atmosphere at the production stage, it may also occur at the stage of transporting crude oil through ocean going vessels and oil pipelines; and at the refining stage where oil wastes and effluents are often discharged into the adjoining lands causing damage to fresh water and vegetation. Environmental law therefore functions to strike a necessary balance between the emissions which pollute the environment, generated by economic activities against the need of society for a healthy environment. Those emissions are then set by the government (or its regulators) at levels which are acceptable to the regulated (businesses and the public).³

The Polluter Pays Principle

The Polluter Pays Principle is a principle of international environmental law where the polluting party is required to pay for the damage done to the natural environment. It is one of the key legal and policy principles of international environmental law, designed to shape the development of environmental law. Other key principles include the principle of sustainable development, precautionary principle, the principle of common but differentiated responsibility etcetera. These principles seek to maintain a balance

² A Community in Ogbia Local Government Area of the then Rivers State, now Bayelsa State

³ S Wolf and N Stanley, *Wolf and Stanley on Environmental Law* (5th Edition Routledge 2011) 14 6; S Wolf, A White and N Stanley *Principles of Environmental Law* (3rd ed. CPL 2002) 6

between development and the preservation of a healthy environment, as well as the allocation of liability.⁴ It would seem that the polluter pays principle focuses more on the allocation of liability. The principle envisages that polluters would internalise the costs of the pollution which results from their actions, so that the cost of their goods and services would reflect the true costs of the measures which the state adopts to eliminate, reduce and treat the polluters' emissions. The polluter pays principle also enables the state to charge the cost of rectifying environmental damage to the relevant polluter, provided that the polluter can be identified.⁵

Polluter Pays Principle is also known as Extended Polluter Responsibility (EPR), which seeks to shift the responsibility of dealing with wastes from governments to the entities producing such wastes, by internalising the cost of waste disposal into the cost of the product. This will create an incentive for producers to improve the waste management profile of their companies, thus decreasing waste and increasing possibilities for reuse and recycling.

The Organisation for Economic Cooperation and Development (OECD) defines EPR as:

A concept where manufacturers and importers of products should bear a significant degree of responsibility for the environmental impacts of their products throughout the product life-cycle, including upstream impacts inherent in the selection of materials for the products, impacts from manufacturers' production process itself, and downstream impacts from the use and disposal of the products. Producers accept their responsibility when designing their products to minimize life-cycle environmental impacts, and when accepting legal, physical or socio-economic

⁴ S Wolf and N Stanley, *Wolf and Stanley on Environmental Law* (5th edn Routledge 2011) 14.

⁵ *Ibid.*

*responsibility for environmental impacts that cannot be eliminated by design.*⁶

The Organisation for Economic Cooperation and Development (OECD)⁷ guiding principles defines the Polluter Pays Principle as an instrument for "...allocating costs of pollution prevention and control measures". The OECD Joint Working Party on Agriculture and Environment stated that the polluter should be held responsible for environmental damage caused and should bear the costs of carrying out pollution prevention measures or paying for damaging the state of the environment.⁸ From the OECD definition, four key issues emerge:

- First, is the issue of identifying the polluter. This is crucial to the allocation of costs and making the polluter take responsibility for his pollution, as stipulated by the OECD definition given above⁹;
- It is necessary to ascertain the extent of damage done to the environment and establish the extent of the polluter's liability so that precise monetary value can be attached to the degradation;
- Pollution caused must be identifiable.¹⁰ This is necessary to prove that the polluter is responsible for that resulting pollution; and

⁶ Organisation for Economic Cooperation and Development (OECD). Environment Directorate, Paris France (2006) "Extended Producer Responsibility." Project Fact Sheet.

⁷ A group of 24 Industrialised Countries plus the European Union and Yugoslavia which has special status.

⁸ OECD, 1989 Recommendation of the Council concerning the application of the Polluter Pays Principles to Accidental pollution.

⁹ J Thorton and S Beckwith, Environmental Law (2nd ed Sweet & Maxwell 2004) 14.

¹⁰ T Okenabirhie, 'Polluter Pays Principle in the Nigerian Oil and Gas Industry: Rhetorics or Reality? Environmental and Social Issues in Energy Industry (CAR CEPMLP Annual Review) (2008/2009) <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=30840> Accessed on October 20, 2015

- There must be a damage that must be compensated.¹¹ The damage caused must be real and identifiable as compensable under a compensatory regime provided by the relevant laws.

These issues when properly articulated would help ensure that the polluter is made liable for the cost of his polluting activities. The polluter pays principle envisages that, the parties who generate pollution, and not the victims, the society or the government, should bear the cost of abatement. It therefore allows the party responsible for polluting the environment to take responsibility for his actions. It also allows the polluter to be ‘...charged with the cost of whatever pollution prevention and control measures are determined by the public authorities, whether preventive measures, restoration, or a combination of both.’¹²

The polluter pays principle means that the polluter should bear the expenses of carrying out measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services that cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment. The rationales for the polluter pays principle can be gleaned from issues such as efficiency, equity, judicial/legal and pedagogical reasoning.

The purpose of the policy was to internalise the economic cost of pollution control, cleaning and protection measures and to ensure that government did not distort international trade and investment by subsidizing those environmental costs. The rationale is that when a charge is levied, it induces polluters to treat their effluents, and they will do this as long as the treatments costs remain lower than the amount of the charge they would otherwise

¹¹ Ibid

¹² OECD, ‘Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies’ C (72) 6

be compelled to pay in the absence of pollution abatement.¹³ The Polluter Pays Principle gained international momentum in 1992, at the United Nations Convention on Environment and Development (the Earth Summit) the Rio Declaration. Principle 16 of the Rio Declaration states:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution with due regard to public interest and without distorting international trade and investment.

Cost internationalization of negative externality allows for efficient allocation of resources. Externality relates to any uncompensated cost that is imposed on a third party by a polluter. An external cost exists when two conditions prevail: where an activity by one person causes a loss of welfare to another; and secondly, where the loss of welfare is uncompensated. Thus an external benefit would be an unappropriated benefit accruing to third parties. The idea is that once the polluters are bound to internalize the costs, they will try to reduce the cost by reducing pollution, either through using better technology or through emissions trading.

The judicial/legal interpretation of the polluter pays principle holds that states and local governments are jointly and severally liable for environmental damage caused by parties, either private or public, allowing the public regulatory agencies to act in sub-rogation against industrial polluters. Pedagogically, it is thought that the principle would instill in the producers and consumers a sense of responsibility about the pollution they generate either through production or consumption of goods and services.

¹³ See Goldenberg, J. Energy Environment and Development Earth Scan Publication Limited p.125

The principle can also be described using a fairness argument, as it is only fair that the polluter pays the costs for the pollution which he has caused or contributed to. Making polluters to bear the costs of their polluting activities not only appeals directly to our sense of justice, but it also enhances economic efficiency. The principle essentially means that the producer of goods or other items should be responsible for the cost of preventing or remediating any pollution which the process causes. This includes environmental cost as well as those involving people or property.¹⁴ The principle can be interpreted in a manner which would result in all external costs becoming internalised. The principle can also be interpreted to only internalise parts of the costs. It is a moot point whether the polluter should bear the costs for monitoring and control as a part of enforcement mechanism. While it could be argued that the costs of these activities should be covered by government budgets, the fairness aspect of the polluter pays principle suggests that the polluter, due to his responsibility for the pollution, should bear these costs. Philippe Sands argues that it seems clear from the wording of the polluter pays principle that it would be used to make the polluter pay for the costs incurred by public authorities for pollution prevention and control.¹⁵ This appeal to our sense of justice is why the polluter pays principle has come to resonate so strongly with both policy makers and the public.

No one has the right to harm the person or property of others or even to make use of other people's property without their permission. In that context, there may be uncertainties about what kinds of emissions or by-products of production processes should be characterized as pollution, who should be identified as a polluter, and what the polluter should pay and to whom. If a producer emits a substance into the air, a body of water, or into the ground, and the emissions cause health problems to people in the community or damage to their property, then those emissions would be correctly characterized as pollution and the company as a

¹⁴ Park, D.P. *Energy Law and the Environment*. Taylor and Francis 2002 p.16

¹⁵ Sands, Philippe, *Principles of International Environmental Law*, 2nd edition 2003, Cambridge University Press, p. 285

polluter. The payments that the company would be forced to make would go, not to the government in the form of a tax or to other companies to somehow buy permission to pollute, but to those in the community who have suffered from the polluting activities.¹⁶ Thus, for an effective application, the polluter pays principle must answer the following questions among others. How do we define pollution and therefore a polluter? How much should the polluter pay, once he is identified? And to whom should the payment be made?

Who is a Polluter?

The questions, who is a polluter and to whom should payment be made, bring to the fore the more contentious issue of the setting of entitlements. Thus questions would arise as to who has rights to the property in question; whether or not the polluter has the entitlement to pollute; or whether the victim has an entitlement to live in a pollution free environment. Where the polluter has the entitlement to pollute, payment of compensation/damages would not flow from the polluter to the victim. This does not however diminish the application of the polluter pays principle, because the pollution cost would be internalised through some forms of economic instruments. There are situations where ownership is in dispute or property rights are undefined. These problems need to be clarified, either in the courts, as is typically the case when there are disputes over property rights, or legislatively, as may be necessary when rights are completely undefined, as might be the case with rivers, the oceans, etc. Environmental problems are essentially about interpersonal conflicts over the use of property. That is, property rights and entitlements as well as the idea that somehow the property itself has rights that are being violated by productive human activities. Examples include, water bodies, air, and generally the flora and fauna.

¹⁶Roy E. Cordato, "The Polluter Pays Principle: A Proper Guide for Environmental Policy" Institute for Research on the Economics of Taxation Studies in Social Cost, Regulation, and the Environment: No. 6

Pollution is any byproduct of a production or consumption process that harms or otherwise violates the property rights of others, the polluter would be the person, company, or other organization whose activities are generating that by-product. Thus a polluter is literally the person that causes the pollution, which damage or imposes costs on the environment. Sometimes, the question of who is a polluter may not be very simple, thus some statutes expressly allocate responsibility for pollution. For example, the 1992 International Convention on Civil Liability for Oil Pollution Damage¹⁷ makes the ship owner at the time of the incident, liable for pollution damage caused on the territory or territorial sea of a contracting party, as a result of discharges from ships,¹⁸ subject to three exceptions as follows:¹⁹

- that the ship owner must prove that the damage from the pollution did result from an act of war or natural phenomenon;²⁰
- that the damage was caused by the act or omission of a third party done with intent to cause damage;²¹ and
- that the damage occurred as result of the negligence or other wrongful act of any government or other authority.²²

Furthermore, the position under environmental and safety law generally is that the operator of the installation in particular bears the liabilities and obligations.²³ However, the terms of a petroleum

¹⁷ Originally the 1969 International Convention on Civil Liability for Oil Pollution Damage (the 1969 CLC)

¹⁸ Article 1 (6) (a) of the 1992 Civil Liability Convention (CLC) explains this further to mean 'loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, ...'.

¹⁹ Articles II and III Convention on Civil Liability for Oil Pollution Damage

²⁰ Article III (2) (a) Ibid

²¹ Article III (2) (b)

²² Article III (2) (c).

²³ S Shergold, D Beggs and S Boileau, 'United Kingdom: Incidents at Offshore Facilities- Who is Responsible for Environmental Damage?' (2010) 6 IELR 179

licence for offshore oil and gas installations in the United Kingdom makes liability of the parties involved joint and several.²⁴

In the absence of express statutory provisions, it is sometimes difficult to determine the appropriate person(s) to be regarded as the polluter. For instance, in waste management cases, the polluter could be the producer of the product, but it could also be the seller of the product, or the consumer, among many other persons. Even when deciding upon one category, it can be hard to determine which of the actors within a certain category should be held liable. Again, where a Generator causes pollution, which of these persons can appropriately be referred to as the polluter? Is it the manufacturer of the generator, or the producer of the fuel used to run the generator, or the user of the generator, or the public authorities that failed to adequately generate and distribute power to the user, prompting him to depend on a generator? And in relation to oil industry pollution, who is the actual polluter, is it the multinational oil companies whose operations directly causes the pollution, or the Nigeria Federal Government who issued the Oil Companies licence to carry out those operations, and holds sixty percent equity shares. This is particularly crucial in view of the defence of statutory licence, which often exculpates a polluter company from being strictly liable. The question is, if the operator of the oil facility is not liable because it is operating under statutory authority, then who is liable? A fair guess would be the issuing authority which authorized the operations.

When Does Pollution Occur?

There are two possible interpretations of the question of when pollution occurs. First, pollution can be said to have occurred when a set threshold value has been exceeded. Thus, any environmental damages arising when the polluter has not exceeded a threshold value will not be subject to liability or charges based on the polluter pay principle. Thus, intervention by relevant authorities, in setting the threshold levels becomes imperative..

²⁴ *ibid*

A second interpretation is in relation to damage. That is, pollution can be said to have occurred when damage occurs. In this regards, there is a nexus between the polluter and the damage. A central question becomes the effect of such pollution on the environment. In this sense, pollution will be judged in respect of its effect, rather than its cause.

Is Pollution a Damage to Person or Damage to the Environment?

The concepts, 'Damage to the environment' and 'costs to the environment' appear vague and subjective. Pollution damage may be said to have occurred, where the use of any resource, including the air, water and one's own property, can be defined as harming or 'potentially harming' that resource and therefore the environment. Polluters are not necessarily those who through their production or consumption activities, do damage to the persons or property of others, they could be those who damage or impose costs on the environment. Thus the United Nations Conference on Environment and Development 1992 states that "National authorities should endeavor to promote the internalization of environmental costs through the use of economic instruments..." Thus from the point of view of the environmentalist, the definition of a polluter is far more broad, the polluter may not necessarily be someone who is harming others, but may be someone who is simply using his own property and resources in a way that is not approved of by government officials and/or in a way that offends the environmentalists' sense of justice. In such cases, there is no harm to be measured and no real victims to compensate. It suffices therefore to say that pollution can occasion damage to both the physical and human environment.

What must the polluter pay?

There a close nexus between 'environmental damage' and 'environmental cost'. Thus the amount to be paid is often determined by the extent of the damage, as damage and or compensation are aimed at returning the victim as much as possible to the state he was before the injury occurred. There are

nevertheless instances where the amount to be paid is not determined by the extent of any actual damage done. Rather, it is set at a level that curbs the environmentally disfavored activity to the degree desired by its opponents. And the payment in such cases, whether or not there are real victims goes to the government in the form of a tax.

The polluter pays principle requires that the polluter should bear the costs that pollution damage or pollution control imposes on society. By internalising these costs they become part of the private costs of producing goods and services. In this way, the otherwise free services of the natural environment are being priced and treated in like manner as labour or capital costs. This cost internalisation may have a threefold effect as follows:

- the costs of production may rise and this may lead to a decline in output of the polluting product;
- part of the increased cost of production may be passed on to the consumer in the form of higher prices; and
- the polluter may switch from polluting to less polluting technologies in an effort to avoid the costs of adding pollution control to existing technology, or may switch out of polluting products into less polluting ones.²⁵

The payment to be made should equal the damage done and must be made to the person or persons affected. Inanimate objects and the environment do not incur costs, people do, thus while the polluting conduct may physically cause damage to property, but the reality is that it is the interests of the owner that is actually affected. However, damage to the person (the legal occupant of the damaged property) is often de-emphasised in favour of the physical property.

Liability from oil spills could also be criminal, as for example the imposition of criminal fines under health and environmental

²⁵ See D.W. Pearce, "The Polluter Pay Principle" Briefing Papers on Key Issues in Environmental Economics Gatekeeper Series No. LEEC 89-03 London Environmental Economics Centre

regimes following oil spill incidents.²⁶ Environmental offences can either be fault-based (for example, negligence or nuisance) or based on strict liability, such as the rule in *Rylands v Fletcher*. In terms of oil pipelines, liability may be criminal or civil depending on the cause of the spill.

According to David Pearce,²⁷ among the many misunderstandings about the polluter pays principle, two stand out. First, it is thought that polluter pays means that the manufacturer or provider of the service is the polluter and hence only he or she should pay the costs of clean-up, damage or pollution prevention. That the cost is shared with the consumer appears unfair. The present writer believes that it is manifestly unfair for a consumer to share responsibility for the environmental cost of a manufacturing process which holds no pecuniary or other benefits for him, except as an end user, who buys such product. It is thought that passing the environmental cost to the consumer may not provide any incentive for the manufacturer to stop pollution, because ultimately he does not bear the cost of such pollution, which he passes to the consumers. A fair suggestion is that the consumer should receive signals in the market place that the particular product in question is polluting, that way the consumer can exercise the discretion to either buy such product and share the environmental cost or go for a more environmental friendly product. It is wholly consistent with the polluter pays principle that market prices for polluting products should rise relative to less polluting ones. Consumers then have an incentive to respond by altering their behaviour just as the polluter pays principle's guiding principles require. The idea that consumers should not pay tends to be expressed in concerns about the effect on inflation. Since the prices of polluting products rise, the overall level of inflation may rise. This according to David Pearce, tends to reflect the confusion over the purpose of the polluter pays principle and shows up in the second concern.²⁸

²⁶ Ibid

²⁷ Ibid

²⁸ D.W. Pearce, "The Polluter Pay Principle" (supra)

Second, the polluter pays principle is widely thought of as a tax, and therefore as a means to generate tax revenues. In fact the polluter pays principle is consistent with any means of making the polluter pay, an example is, by setting environmental standards which require expenditure on pollution abatement equipment. But even if the polluter pays principle takes the form of a tax, it is however, an incentive charge, which aims to alter behaviour, not to raise revenues. It will have the effect of raising tax revenues if producers or consumers are locked in to existing technologies or products, where they cannot find or are unwilling to embrace ready substitutes. The polluter pays principle acts as an incentive for both producer and consumers to look for new technologies and substitute products, albeit, less polluting for polluting products, which in the long run would minimize any tax burden on either the producer or consumer.

The basic tenet of polluter pays principle is that the price of a good or service should fully reflect its total cost of production, including the cost of all the resources used. Thus the use of air, water or land for the emission, discharge or storage of wastes is as much a use of resource as are other labour and material inputs. The lack of proper prices for, and the open-access characteristic of many environmental resources means that there is a severe risk that over-exploitation leading to eventual complete destruction will occur. The polluter pays principle seeks to rectify this by making polluters internalise the costs of use or degradation of environmental resources. The aim is to integrate use of the environment (including its waste assimilation capacity) into the economic sphere through the use of price signals and the use of economic instruments such as pollution charges and permits.

Polluter Pays Principle in International Law

The international law perspective can be gleaned from the OECD, United Nations (UN) and the European Union point of view. The polluter pays principle was formulated and recognised

by the OECD²⁹ as an internationally agreed principle in 1972.³⁰ The principle was formulated as an economic principle aimed at allocating the cost of pollution control.³¹ The polluter-pays principle is also recognised by the United Nations in Principle 16 of the Rio Declaration on Environment and Development (1992). Principle 16 of the Rio Declaration reiterates the meaning of the polluter pays principle given by the OECD. The Rio Principles are not mandatory for national governments to follow but they however serve as directive principles for national governments.

Although the Rio Declaration does not constitute binding provisions, but it is based on recognised principles which are crucial to the protection of the integrity of the global environmental and developmental system. The principle means that "...the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or the exceeding of an acceptable level of pollution".³² This definition places on the polluter, the responsibility for the cost of reduction of the pollution caused by his action. Paragraph 4 of the Organisation for Economic Co-operation and Development (OECD) Guiding Principles,³³ which established this principle, further provides in addition to the above definition, that the polluter should "...ensure that the environment is in an acceptable state". This indicates that the polluter should ensure that pollution

²⁹ Para 4, OECD, 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' C (72) 128 5

³⁰ J Barde, 'Economic Instruments in Environmental Policy: Lessons from the OECD experience and their Relevance to Developing Economies' (Working Paper No.92, January 1994) OCDE/GD (93) 193, 5

³¹ OECD, 'The Polluter-Pays Principle: OECD Analysis and Recommendations' OECD/GD (92) 81, 5; OECD, 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' C (72) 128. This paragraph states that allocating costs means that the polluter bears responsibility for the payment of the costs of preventing and controlling pollution

³² OECD, 'Glossary of Statistical Terms' (December 2007) <http://stats.oecd.org/glossary/download.asp> Accessed October 20, 2015

³³ OECD, 'Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies' C (72) 128

is reduced to an optimum level and not necessarily eradicated. The polluter-pays principle or a variation of it is also given recognition in other Environmental Instruments³⁴ as well as case law.

In *Commune de Mesquer v Total France SA and another*,³⁵ the court considered whether, ‘...for the purposes of applying article 15 (c) of Council Directive (EEC) 75/442 which stated that, in accordance with the polluter pays principle, the cost of the waste disposal was to be borne by the previous holders or the producer of the product from which the waste came, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea.’ Accordingly, the court held that “in accordance with the polluter pays principle, however, such a producer could not be liable to bear that cost unless he had contributed by his conduct to the risk that the pollution caused by the shipwreck would occur”.

The implication of this judgement is that the court recognises that the polluter pays principle exists as a principle of law and that it has a role to play in allocating liability. This case also confirms that the polluter pays principle is recognised both at the international level especially at the European Union level. The court here also advanced the polluter pays principle in the sense that, it affirmed that the polluter must be seen to have contributed to the damage done to the environment.

Also, in *Raffinerie Mediterranee (ERG) SPA and Others v Ministero dello Sviluppo Economico*,³⁶ the court held inter alia that, in accordance with the polluter pays principle, the local authority in question must have tangible evidence that can justify the presumption that the pollutants found in the contaminated area is closely linked with what the operators use in their activities. This case clearly establishes the cogent point that, as regards the

³⁴ The Preamble to the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC); the European Union Treaty, Article 191 (2), Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] C83/01; the Energy Charter Treaty 1994 Article 19 (1); the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR) Article 2 (2) (b); and Agenda 21 for the Environment Paragraph 8 (28)

³⁵ [2009] All ER (EC) 525

³⁶ [2010] All ER (D) 133 (Mar)

polluters pays principle, the polluter must be linked to the damage he is alleged to have caused.

These cases according to Ayobami Olaniyan,³⁷

*...utilise the polluter pays principle thus reaffirming the fact that the principle is an established principle of law and that from the above cases and other oil spill incidents, it is obvious that the principle is one that applies after the damage to the environment has been done not before. Thus, the principle does not act in a preventive manner but it acts to remedy the damage that has been done.*³⁸

This reasoning cannot be supported because the polluter pays principle does not only cover the cost of damage and rehabilitation of a polluted environment, it also includes the cost of pollution prevention and control measures as well as liability for environmental harm to victims; cleanup costs of damage to the environment as well as pollution at the source and product impacts, extended producer responsibility etcetera. See for example, the OECD definition of the polluter pays principle.³⁹

Adequate co-ordination is a sine qua non to effective international use of the polluter pays principle because where some countries subsidise private investment in pollution control while others do not, environmental regulations can become a source of trade distortion. To encourage uniform applications of the polluter pays principle, the OECD Council stipulated that the polluter pays principle should constitute a fundamental principle of pollution control in Member Countries in 1972 (implemented in 1974). Internationally, the polluter pays principle has become a principle

³⁷ Ayobami Olaniyan, Imposing Liability for Oil Spill Clean-Ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle; Journal of Law, Policy and Globalization www.iiste.org ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online) Vol.40, 2015 78

³⁸ Ibid

³⁹ OECD, 1989 Recommendation of the Council concerning the application of the Polluter – Pays Principles to Accidental pollution

of non-subsidisation of polluters. Nevertheless, some Member Country governments argued in favour of accelerated national programmes of pollution reduction measures. This led to the acceptance of certain exceptions to the strict polluter pays principle, so that Financial aid could be given to a polluting sector if that sector was already suffering from significant economic difficulties. But such aid could only be given for a fixed amount of time in a clearly defined programme so as to prevent international trade distortion.

Polluter Pays Principle and the Nigeria Oil and Gas Industry

Nigeria is the 6th world's producers of crude oil and has vast reserves of natural gas. Nigeria is the largest producer in Africa and the most prolific oil producer in the sub-saharan Africa. Nigerian economy is largely dependent on the oil sector, which supplies 95% of the country's foreign exchange earnings. Nigeria has a daily production of about 2.0 million barrels of crude oil and a proven gas reserve base of over 187 million cubic feet estimated to be the largest in the world.⁴⁰

However, the oil and gas sector in Nigeria is faced with myriad of problems and challenges. The major problem is oil pollution. Oil pollution is an ancillary risk associated with exploration activities and has gained prominence in the Nigerian oil and gas industry. Oil spills in Nigeria is estimated to have let out over a net volume of 2million barrels to the environment till date and the worst hit areas is the Niger Delta region.⁴¹ The exploration and exploitation of oil in Nigeria has resulted in long term environmental pollution that has had serious implications on the health and environment of the people of the oil producing communities. As a result, environmental pollution from oil and gas

⁴⁰ Egbewole W.O. Yusuf I.A. and Ijaiya H. Recent Developments in the Oil and Gas Law in Nigeria: The role of Law Teachers. A paper presented at the Annual Conference of the Nigeria Law Teachers Conference held at Port-Harcourt, Nigeria from 17th-20th July, 2011

⁴¹ Onyeukwu H. The Deepwater Horizon Spillage and Lesson in Liability Claims for Nigeria <http://www.thenigeriabusiness.com/column22.html> accessed on 12 February 2012

related activities has given rise to a lot of conflict between the indigenous communities and the oil companies because of the interference with the environment that affects their lifestyle and subsistence. The conflict is exacerbated by the low level of development in these communities in comparison to the highly developed areas occupied by the oil and gas companies.⁴²

Environmental pollution problems in Nigeria, and particularly oil industry pollution, are exacerbated by the non-internalization of environmental costs by polluters, and this then becomes a public concern because, this cost is passed to the public.

Nigeria's National Policy on the Environment recognizes the polluter pays principle. It provides that: Nigeria is committed to a national environmental policy that will ensure sustainable development based on proper management of the environment.... This policy, in order to succeed must be built on the following sustainable development principles: The polluter pays principle which suggests that the polluter should bear the cost of preventing and controlling pollution.⁴³ The Policy also recognizes that, sectoral policies, environmental laws and regulations are important, but cannot, alone, be expected to deal with the problems of environment and development. Prices, markets and governmental economic policies also play a complementary role in shaping attitudes and behaviour towards the environment. It therefore has as one of its strategies, to institutionalize Polluter Pays Principle, so that the polluter bears the cost of environmental degradation or pollution; thus providing the positive incentives to limit degradation or pollution of the environment.⁴⁴ It recognizes also the use of economic instruments and incentives as parts of strategies to propel the development process in the desired direction as follows:

⁴² See Adewale O. Sabotage in the Nigerian Petroleum Industry: Some Socio-Legal Perspectives. National Association of Petroleum Engineers (Nigeria) Conference Proceedings 2006. Okenabirhie T.O. Polluter Pays Principles in the Nigeria Oil and Gas Industry: Rhetorics or Reality? www.dumd-ee.ac.uk/cepmlp/gateway/files.php?file=cepmlp-car13-26

⁴³ Paragraph 1 Nigeria's National Policy on the Environment

⁴⁴ Paragraph 11 (d) of the National Policy on the Environment

- (a) incorporate environmental costs in the decisions of producers and consumers so as to reverse the tendency to treat the environment as a "free good" and to stop passing these costs on to other parts of society or to future generations;
- (b) integrate social, environmental and other costs of negative environmental externalities into economic activities so that prices will appropriately reflect the true and total value of resources and contribute towards the prevention of environmental degradation;...
- (e) Develop and implement a mechanism for charging emission fees and fines for all pollutants and effluents (based on quantity, quality and detrimental effects) thereby internalizing all costs and other negative externalities into the production process and output prices.
- (f) Impose penalty taxes, fines, and charges for non-compliance to environmental standards and regulations so that violations to such regulation become costly to the violators.

Again, Nigeria's Agenda 21 on the Environment provides for the Internalisation of environmental costs through the use of Economic Instruments in the management of Natural Resources.⁴⁵ The National Environmental Standards and Regulations Enforcement Agency (NESREA) Act⁴⁶ recognizes and provides for the polluter pays principle as follows:

Where an offence under subsection (1) of this section is committed by a body corporate, it shall on conviction, be liable to a fine, not exceeding N1,000.000 and an

⁴⁵ Agenda 21 on the Environment (made sequel to the United Nations Convention on Environment and Development

⁴⁶ Cap N164 Laws of the Federation of Nigeria 2010

*additional fine of N50,000 for every day the offence subsists.*⁴⁷

Section 28 provides:

The Minister for the purpose of implementing the provisions of this Act, shall by regulations prescribe any specific removal method, financial responsibility level for owners or operators of vessels, or onshore or offshore facilities notice and reporting requirements.

These provisions presuppose that the polluter would bear the costs of removing the polluting substance or discontinuing the polluting activity, and to abate and/or clean up the affected area.

There are a plethora of other legislations and Guidelines embodying the polluter pays principle, examples include the Environmental Impact Assessment (EIA) Act⁴⁸, the Harmful Wastes (Special Criminal Provisions etc) Act⁴⁹, the National Oil Spill Detection and Response Agency (NOSDRA) Act⁵⁰, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN)⁵¹ and the NOSDRA (Amendment) Bill 2012.⁵² Section 6 (2) (3) of the NOSDRA Act provides that, “the failure to clean up the impacted site, to all practical extent including remediation shall attract a further fine of one million naira”. The above section thus makes a polluter responsible for cleaning up an impacted site and a fine of one million naira for the failure to clean up the site. Also, Paragraph 8.1 of EGASPIN provides that “a spiller shall be liable for the damage from a spill for which he is responsible. Where more than one spiller is liable, the liability shall be joint and several”.

⁴⁷ Section 27 subsection (3) of the NESREA Act

⁴⁸ Cap E12 Laws of the Federation of Nigeria 2010

⁴⁹ Cap H1 Laws of the Federation of Nigeria 2010

⁵⁰ Cap N157 Laws of the Federation of Nigeria 2010

⁵¹ Environmental Guidelines and Standards for the Petroleum Industry in Nigeria 2002, Published by the Department of Petroleum Resources (DPR), Paragraph 8.1, ‘Liability’

⁵² See sections 8-11

These legislations set out regulations and standards that prohibit pollution and every form of environmental hazards. In addition, the parties responsible for the pollution have the responsibility of managing the process of remediation of any acts of contamination of the environment as well as compensate those who suffer the consequences of such pollution.

In *Jonah Gbemre v. Shell Petroleum Development Company Limited*,⁵³ Jonah Gbemre (the applicant), claimed on behalf of the Iwherekan community inter alia: A declaration that the actions of the 1st Respondents (Shell Petroleum Development Company) and 2nd Respondents (the Nigerian National Petroleum Corporation) in continuing to flare gas in the course of their oil exploration and production activities in Gbemre's Community is a violation of their fundamental rights (including right to healthy environment) and dignity of human person which is guaranteed by Sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 79 and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act.⁵⁴ The court held that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community was a gross violation of their fundamental right to life and dignity of human person as enshrined in the Constitution.

In *Shell Petroleum Development Company Nigeria Ltd v. Chief G.B.A. Tiebo & Others*,⁵⁵ the plaintiffs (Chief G.B.A. Tiebo and others) claimed that the defendant, an oil exploration company (Shell Petroleum Development Company Nigeria Ltd), on 16th

⁵³ FHC/B/CS/53/05 (November 14, 2005) Federal High Court of Nigeria available at <http://www.ecolex.org/ecolex/ledge/view/RecordDetails;DIDPFDSIjsessionid=0373E91B7EBE>

⁵⁴ Cap. A9 Vol. 1 Laws of the Federation of Nigeria, 2010 A17FCCA47AEC57E3C2?id=COU-156302&index=courtdecisions accessed 22 June 2015 and <http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-156302>. accessed 22 June, 2015.

⁵⁵[1996]NWLR (Pt. 445) 657

January, 1987, negligently caused a major crude oil spillage of over six hundred barrels from its flow station and on its pipeline or other installations at or near the plaintiffs' village called Peremabiri. The plaintiffs commenced their suit on 6th June, 1988 at the Yenagoa High Court of Rivers State claiming against the defendant the sum of Sixty-four million, one hundred and forty six thousand naira (N64, 146, 000. 00) being special and general damages for the negligence of the defendant (Shell Petroleum Development Company Nigeria Ltd) and for allowing crude oil, which the defendant was mining, to spill into the lands, swamps, creeks, ponds, lakes and shrines of the plaintiffs. The plaintiffs sued for themselves and as the representatives of the Peremabiri Community in Yenagoa Local Government Area. At the trial court, the judge gave judgement in the plaintiff's favour awarding six million naira (N6,000,000:00) as general damages for environmental pollution of the land, river, ponds and lakes of the plaintiff and one million naira (N1, 000, 000. 00) as costs. The defendant's appeal to the Court of Appeal was dismissed. On further appeal to the Supreme Court, the award of general damages and costs awarded by the trial court were affirmed. The Supreme Court noted that there was evidence before the trial Judge that there was extensive damage done to the crops, farms, farmlands, ponds, creeks of the plaintiffs and that there was also evidence of widespread environmental pollution.

The polluters in the two cases above were made to compensate their victims for the damages resulting from their polluting activities. However, the liability regime is shaped more by the requirements of the common law remedies of the torts of nuisance, trespass, negligence or the Rule in *Rylands v. Fletcher* than by the statutory remedies provided under the relevant statutes. Although these laws exist; yet it has been difficult to implement the polluter pays principle as a guideline for environmental policy in Nigeria and ensure adequate protection of the physical and human environment from the adverse consequences of oil pollution. Some of the shortcomings of these laws include the out-dated penalty sections, the attitude of enforcement officials and the attitude of the courts.

Property Rights and the Polluter Pays Principle

The polluter pays principle is based on the idea that people should take responsibility for their actions, thus the principle has a basic appeal to our sense of justice and fair play. A person may be required to pay compensation where his action is adjudged to have caused harm to the person or property of another and the amount payable as compensation is related to the monetary value of this damage. The ultimate point being that the tortfeasor should provide full restitution for the suffering of the victim. The issue of remedy, that is, the determination of who is to pay and to whom such payment should be made is dependent on property rights. It is therefore necessary to settle first and foremost the issue of entitlements.

The issue of entitlement is one which every legal system must strive to resolve. A state presented with the conflicting interest of two or more people or groups of people must decide in favour of one. Where the state is unable to do this, access to goods and services and generally life itself will be decided on the basis of *might makes right*⁵⁶, where the stronger or shrewder wins. Since this cannot be the case, it is fundamental that the law set a yardstick for the giving of entitlements. For example, in pollution cases, the entitlement to pollute versus the entitlement to have a pollution free environment and breath clean air, the entitlement to produce noise versus the entitlement to enjoy peace and quiet. And basically which of the conflicting parties will be entitled to prevail. It is not sufficient that the state has made a choice between two conflicting rights, the state must in addition move to enforce the preferred choice of entitlement. For instance, where the loss is left where it falls in an auto accident, it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victims and/or his supporters, if they are stronger, from taking compensation from the injurer. And where the loss is shifted, it is because the state has granted an entitlement to

⁵⁶ Known in everyday parlance as 'survival of the fittest'

compensation and will intervene to prevent the stronger injurer from rebuffing the victim's request for compensation.

While people are free to pursue whatever production or consumption patterns they desire, they must however take responsibility for any damage to the person and/or property of others thereby occasioned. A public policy stance that is guided by a property rights based polluter pays principle would allow businesses to pursue whatever production activities they desire using any techniques they deem most economical so long as the costs of their activities are not thrust upon individual members of the society through invasions of their private properties or on the society at large. If the polluting activities of one party cause harm to others, then the offending parties must be forced to make reparations.

Furthermore, the failure to set entitlements may encourage poor stewardship of resources, giving rise to the mismanagement known as the 'tragedy of the commons'.⁵⁷ Resources not privately owned or when such resources are 'owned in common', users would have no incentive to husband it judiciously or to conserve or replenish such resources for future use. This is because the benefits associated with such conservation methods will not be reaped by those who bear the costs. The idea that polluters should be made to pay for damages that they cause to the health and property of others is sound, and it is thought that this should be the guiding principle for all environmental policies.

Implementing the Polluter Pays Principle

Economics, being a behavioral and social science, attaches the concept of costs to human beings and individual decision making. Cost is what a person must give up when he chooses one course of action as opposed to another, or when someone else's activities prevent a person from choosing one course of action over another. According to economists, efficiency will be maximized when manufacturers take into account all of the costs involved in the production process of a commodity, when deciding how much

⁵⁷ Garrett Hardin, "The Tragedy of the Commons," *Science*, Vol. 162, pp. 1243-48.

to produce and how much to charge. For example, in the case of a company that is polluting a river, such cost might be to downstream recreational users whose activities, such as swimming, fishing and use of the water from the river for domestic life, etc. Their cost would be the value that they place on the activities that the pollution is preventing them from pursuing. It is imperative to note that, the people who use the river are the ones who bear the costs of the pollution of the river and not the river itself. Thus the polluter pays principle must accurately identify the pollution victims and ensure that compensation flows from the offending party to such victims. And in cases where there are no direct or identifiable victims, the relevance of the polluter pays principle would be in ensuring that the polluter bears the cost of rehabilitating and restoring the environment to an acceptable state.

It has been observed that the polluter pays principle works through the internalization of the environmental costs of the polluting activity. And cost internalization can be achieved through the use of regulatory instruments, represented by the command and control strategy and economic instruments, as well as other complementary strategies. The polluter pays principle has been practiced in many different forms in different cultures and economic systems. It is applied through varied economic instruments, such as the government prohibiting subsidies for pollution abatement, to ensure that product prices reflect costs of pollution control; and by ensuring the internalization of all environmental costs, including residual damage, in the form of liability and compensation, taxes and charges, emissions trading, as in cap and trade, deposit refund schemes, liability and insurance, *etc.* Such taxes, whether in the form of a carbon tax or other charges would be set at a level that internalizes the true costs of environmental damage, so that the prices of commodities reflect the real environmental costs of pollution. This is known as Pigouvian tax.

Regulatory Instruments

This is the command and control strategy which entails the use of express legislative provisions, such as Environmental

Protection Statutes, Regulations and Guidelines to control human behaviour. Examples include, the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act, the National Oil Spill Detection and Response Agency (NOSDRA) Act, the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, EGASPIN, the National Policy on the Environment etcetera (already discussed), which contain provisions expressly or impliedly relating to the polluter pays principle.

Economic Instruments

Economic Instruments are market based mechanisms that are designed to influence people's behaviour.⁵⁸ They are policy instruments other than the Command and Control Mechanism that aim at inducing a change in the behaviour of economic agents by internalising environmental or deflection costs through a change in the incentive structure that these agents face. The United Nations Environment Programme states:

*Economic instruments for environmental protection are policy approaches that encourage behaviour through their impact on market signals rather than through explicit directives regarding pollution control levels or methods or resource use.*⁵⁹

Economic instruments affect cost and benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way that is favourable to the environment.⁶⁰ Economic instruments differ from the command and control strategy in that, they have the potential to make pollution control economically advantageous to commercial organisations as well as

⁵⁸ Raja, M.Y. "Economic Approaches in Addressing Environmental Issues" Cover Feature, Malaysia Government Annual Bulletin, *Ingenieur* Page 19

⁵⁹ 'Economic Instruments for Environmental Protection' United Nations Brief on Economic, Trade and Sustainable Development Information and Policy Tools from United Nations Environment Program (UNEP). Published July 2002

⁶⁰ Organisation for Economic Cooperation and Development (OECD)

governments and to lower pollution abatement costs. Economic instruments encompass a range of policy tools from pollution taxes and marketable permits to deposit-refund system performance bonds.⁶¹ It also includes incentives such as subsidies; rewards for desired behaviour; and in similar vein disincentives such as taxes or charges for undesired behaviour.

Pigou⁶² suggests the use of taxes to correct market distortions caused by externality, as these taxes would discourage activities that generate externalities. Such tax is now known as Pigovian tax. Dales⁶³ opines that the introduction of transferable property right could work to promote environmental protection at lower aggregate cost than conventional standards. He advocates the introduction of market permits or licences. The introduction of market permits in the United States, to reduce the leaded content of gasoline, has helped to reduce Chlorofluorocarbons (CFCs) and Sulphur dioxide emissions, which are responsible for acid rain. Where a market permit policy is in place, a firm can only legally emit within its allowed emissions limit. This would naturally reduce emissions, and create incentive for the adoption less polluting production techniques.

The Pigovian Tax:⁶⁴ The Pigovian tax would be set equal to reflect the monetary value of the damage caused by the pollution at the point of optimal pollution. Basically, optimal pollution occurs where the costs of abating pollution any further are greater than the extra benefits obtained. A Pigovian tax would maximise the net benefits of production and industrialisation to society as a whole. Due to difficulties in assessing the monetary value of pollution damage and the costs of controlling such pollution, it is virtually impossible to measure the optimal level of pollution.

⁶¹ United Nations Brief on Economic, Trade and Sustainable Development Information and Policy Tools from United Nations Environment Program (UNEP). Published July 2002

⁶² Pigou, A.C. "The Economics of Welfare" London, Macmillan and Co. Limited (1920) 5

⁶³ Dales, J. *Pollution, Property and Price* (Toronto University Press, 1968) 67

⁶⁴ Pigovian tax refers to taxes suggested by A.C. Pigou, (the author of *The Economics of Welfare*, referred to above)

Setting environmental standards: Setting standards impose a cost on the polluter if he does not already meet them as an incidental feature of choice of technology. Because these environmental costs increase the costs of production of goods and services, the result is a rise in the prices of goods and services. These standards can be translated into pollution permits equal in aggregate value to the amount of emissions allowed under the standard.

Pollution Charges: The pollution charges are prices paid on the use of the environment.⁶⁵ They include effluent charges, which are based on the quantity and quality of the discharged pollutants. User charges are fees paid for the use of collective treatment facilities. They are charges paid by businesses and individuals for the benefit they receive⁶⁶, such as waste treatment and disposal. Product charges aim at reducing the external cost to the society, by passing such charges to the product or some characteristic of such product that can potentially harm the environment when used in the production process, consumed or disposal after its use. There are also Administrative charges which are fees paid to Authorities' pollution control activities.

Marketable Permits: These involve an authority setting maximum limits on the total allowable emission of pollutant by issuing permits that authorise industrial plants or other sources of pollution to emit a stipulated amount of pollutant over a specified period of time. These permits are then allocated to firms or industrial plants and the issuing authority receives revenue for them. These emissions permits are tradable, that is they can be bought and sold. Firms and/or industrial plants are therefore free to

⁶⁵ Bernstein, J.D. "Water Pollution Control: A Guide to the Use of Water Quality Management Principle" Published for the United Nations Environment Programme, The Water and Sanitation Collaboration Council on the World Health Organisations by E & F Spon 1997 ISBN 0419229108

⁶⁶ Oklahoma Policy Institute <http://www.okpolicy.org/resources/online-budget.html>

buy and sell the permits as desired. And such emissions trading can be internal, between plants within the same organisation or external, between different companies. The attraction of this approach is that polluters who face high costs of abatement will tend to buy the permits, while those with low costs of abatement will make gains by selling the permits and abating the pollution. In this way the abatement of pollution is concentrated among the low abatement cost polluters. The overall effect is to minimise the costs of compliance.

Subsidies: The removal of subsidies, particularly in relation to fossil fuel is an effective tool for controlling pollution. They include tax incentives grants and low interest loans designed to induce polluters to curtail the sources of pollution, by investing in various types of pollution control measures. Thus the removal of subsidies on fossil fuels has been strongly canvassed.

Deposit-Refund System: This involves a purchaser paying an additional sum in excess of the usual purchase price when buying a potentially polluting product. The additional sum is in actual fact a refundable deposit, which will be refunded when the user of the said product returns it to an approved centre for proper disposal or recycling.

Enforcement Incentives: These are forms of penalties designed to induce polluters to comply with environmental standards and regulations. They include non-compliance fees, chargeable to polluters when their discharge exceeds acceptable limits. They also include performance bonds, which are payments made to regulating authorities before a potentially polluting activity is undertaken, and then refunded when the environmental performance is proven to be acceptable.

Fetters on Effective Implementation of the Polluter Pays Principle

Although the Polluter Pays Principles is an accepted principle of environmental law in Nigeria, it is pertinent to note

that the Rio Declaration which in Principle 16 embodies the polluter pays principle, does not impose any obligation on states to enforce those principles, being as it were mere declaration and therefore not more than mere guiding principles for national governments. For example, Principle 16 of the Rio Declaration stipulates that “National Authorities should *endeavour to promote....*⁶⁷”, this provision does not place any compulsion and obligation on nation states to implement it thus the application and implementation of the polluter pays principle in the country is marred with exceptions which act as loop holes for polluters to escape liability.⁶⁸ The effectiveness of the polluter pays principle is further attenuated by the fact that the onus of proof in pollution cases is often on the victim. In addition, the adequacy of the compensation paid by polluters under Nigeria laws is questionable. For instance, the Petroleum Act of 1969 banned gas flaring. However the Act provided for an option of paltry fines of US \$0.063 per standard cubit feet flared.⁶⁹ The polluters find it more economically viable to flare the gas and pay the paltry fines, than to invest in facilities for re-injection or utilization of associated gas.

Pipeline Vandalisation and Sabotage:

As already observed, pollution problems in Nigeria relates to oil industry pollution, and the bulk of oil spill in Nigeria is attributed to pipeline vandalisation and sabotage, at least from the point of view of the oil companies. Where the allegation of sabotage is held to be true, the question then becomes one of determining the real polluter, who should be held to account. Is it the vandal or the owner of the facility? And what happens where the perpetrators of these acts are not identifiable. Does the polluter pays principle become irrelevant, impracticable and impotent at that point because liability cannot be placed on anyone? This seems to be where our law stands at the moment. The defences

⁶⁷ Emphasis mine

⁶⁸ See for example, section 11 (5) of the Oil Pipelines Act

⁶⁹ The fine was increased by government in January 1998 to US \$0.125 per standard cubit feet flared.

provided under Section 11 (5) (c) of the Oil Pipeline Act, which exculpates a polluter where damage to a pollution victim results from his own default or the malicious act of a third party has made the application and implementation of the polluter pays principle difficult. In *Paul Kpakol and others v Shell Petroleum Development Company (Nig) Ltd*⁷⁰ the court reasoned as follows:

Can it be proven that the damage was caused by Shell? If the damage was caused by shell, then Shell is mandated to pay damages. Otherwise, if it is proven that the damage was caused by parties other than Shell; then Shell need not pay any compensation to the plaintiff. It therefore held that compensation to the plaintiff was not payable since the damage resulted from the malicious act of a third person without negligence on the part of the defendant.

Another in this line of cases is *Ediagbonya v Dumez (Nigeria) Limited and Another*⁷¹ where the court held that an oil company was not liable for an escape of oil and consequent damage to crops of neighbouring landowners which was caused by an unknown trespasser deliberately drilling a hole in the company oil pipeline.

The case of *Shell Petroleum Development Company (Nig) Ltd v Chief Graham Otoko*⁷² was for compensation for injurious affection and deprivation of the use of the Andoni River and Creeks as a result of crude oil spillage from the defendants facilities, caused by their negligence. At the court of first instance judgment was given for the plaintiff, but on appeal, it was held that the allegation of negligence on the part of the defendant/appellant was not proved and since damage to the plaintiff resulted from the malicious act of a third party the defendant/appellant cannot be held liable.

⁷⁰ Cited in Abodunde Hazrat Are, "Oil Pipelines in Nigeria: An Analysis on Court's Jurisdiction in Matters Regarding Oil Spillage"

⁷¹ (1986) 6 SC 149.

⁷² (1990) 6 N.W.L.R. (Pt 159) 693.

These decisions cannot be supported because if the oil company, who own and operates the facility is not allowed to pay for damage resulting from the independent act of a third party, it would not be justice if such burden is passed to an innocent victim, unless the victim has responsibility of keeping vigilance over oil facilities and has failed in that duty. As we all know, only oil companies have responsibility over their facilities and therefore have a duty to secure such facilities from malicious third parties. And if they cannot do so, should be liable for the natural consequences of its default.

The Defense of Statutory Authority:

Strict liability aims to suppress activities that carry unusually large external costs, but it is relaxed in respect of undertaking carried out under statutory authority, like railways and public utilities supplying water, gas and electricity in bulk. These public utilities authorities are exempted from liability for any harmful consequences which occur in the course of its normal operations, provided it has not been negligent.⁷³ Although the rule in *Rylands v Fletcher*, is often referred to as a strict liability rule, however in view of the exceptions mentioned by Blackburn J himself, it is doubtful if liability under the rule is actually strict, as the myriads of defences have whittled down the efficacy of the rule. For instance, in *Ikpede v Shell BP Development Co (Nig) Ltd*⁷⁴, due to leakage in the defendant's pipeline, crude oil escaped and caused damage to plaintiff's fish swamp. The court held that although all the requirements of the rule were met, the defendant was not liable, since the laying of its pipeline was done in pursuance of a license issued under the Oil Pipelines Act 1956.

Lack of Effective Penalties and Sanctions for Violations of Environmental Laws:

⁷³ See the cases of *Green v Chelsea Waterworks Co.* (1894) 70 LT 547; *National Telephone Co. v Baker* (1893) 2 Ch 186 and *Longhurst v Metropolitan Water Board* [1948] 2 All ER 834

⁷⁴ (1973) All NLR 69

It is observed that ‘without real consequences for environmental violations, there is no incentive for multinational corporations to respect the environment in which they operate’.⁷⁵ The tendency for organisations and individuals to carry out illegal and substandard operations when they know that there are little or no consequences for their actions is very high. A clear example is the indictment by the United Nations Environment Programme (UNEP) which reported that in Ogoniland (Rivers State) industry best practices were not applied in the control, maintenance and decommissioning of oilfield infrastructure and that even Shell Petroleum Development Company (SPDC)’s own procedure in these areas were not applied thus creating public safety issues.⁷⁶ It is thought that if relevant sanctions and penalties were implemented against the Shell Petroleum Development Company and other violators of environmental laws and other relevant laws, the degradation and damage caused to the Niger-Delta environment would not be as severe as reported by UNEP in its Environmental Assessment Report on Ogoniland.⁷⁷

Inefficiency of Monitoring Agencies

The National Oil Spill Detection and Response Agency (NOSDRA) and the Department of Petroleum Resources (DPR) are the two major agencies involved in dealing with oil spill incidents in Nigeria. These monitoring agencies face recurring problems of inefficiency, lack of adequate funding, technology and manpower. It is observed that oil companies, particularly, the multinational oil companies usually decide when oil spill

⁷⁵ Barisere Konne, *Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoni Land* (2014) 47 *Cornell International Law Journal* 196.

⁷⁶ United Nations Environment Programme (UNEP), ‘Environmental Assessment of Ogoniland: Executive Summary’ (2011) <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> Accessed August 20, 2015.

⁷⁷ United Nations Environment Programme (UNEP), ‘Environmental Assessment of Ogoniland’ (2011) <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> Accessed 2 July, 2015.

investigations take place.⁷⁸ Oil companies usually provide transport to the site of the oil spill investigations and they provide technical expertise, which the regulatory agencies such as NOSDRA and the DPR do not have.⁷⁹ Specifically, NOSDRA is saddled with the responsibility of ensuring proper clean-up and remediation of affected sites of oil spill incidences.⁸⁰ Thus, NOSDRA is at the fore front of dealing with oil spill incidences while the DPR has the statutory responsibility of ensuring compliance to petroleum laws, regulations and guidelines in the oil and gas industry.⁸¹ NOSDRA is reported to be usually notified by text or letter when an oil spill investigation will take place.⁸² It is expected that since NOSDRA is the main regulatory government agency saddled with the responsibility to deal with oil spills, it should take the lead in oil spill investigations instead of tagging along while oil companies take the lead in oil spill investigations.

Inadequate Enforcement of Environmental Laws and Guidelines

This is a major issue when it comes to imposing liability on the polluter. Relevant government agencies do not carry out their roles adequately. Thus, provisions of the National Oil Spill Detection and Response Agency (NOSDRA) Act and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria, (EGASPIN) as regards liability of the polluter may not be strictly adhered to or enforced. The polluter pays principle would be effectively implemented in Nigeria, only if existing environmental laws and guidelines are strictly enforced.

The multinational oil companies are often nonchalant about carrying out proper clean up or paying adequate compensation to the host communities for environmental harm, and this has often

⁷⁸ Amnesty International, 'Bad Information: Oil Spill Investigations in the Niger Delta' (2013) <www.amnesty.org> accessed 25 November 2014

⁷⁹ Amnesty International report that oil spill investigations are usually led by oil company personnel and not NOSDRA. Ibid

⁸⁰ National Oil Spill Detection and Response Agency (Establishment) Act No.15, 2006 (NOSDRA Act), sections 6 & 7.

⁸¹ Nigerian National Petroleum Act Cap. N123 L.F.N. 2004 Section 10 (2) (b)

⁸² Ibid

led to breakdown of law and order which sometimes result in loss of equipment and shut down of operations of the oil companies. It is reported that some operators employ some poor indigenes of the host communities, to clean up oil spill, by scooping oil into a bucket with spade.⁸³

Legal Effects of the Polluter-Pays Principle

The legal effects of the polluter pays principle depend on whether the principle is contained in soft law, hard law instruments, or national law and whether the hard law or the national laws instruments imbibe a ‘substantive’ or ‘formal’ approach.⁸⁴

Soft law instruments embody those rules that are not binding per se but which have played important roles in international environmental law.⁸⁵ These instruments ‘...point to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behaviour, and by ‘codifying’ or possibly reflecting rules of customary law’.⁸⁶ The implication of inserting the polluter pays principle in a soft law is two-fold: It would not be legally binding;⁸⁷ and due to the inexact formulation of soft laws, the polluter pays principle would not be seen as a normative principle.⁸⁸ An example of a soft law that embodies the polluter pays principle is the United Nations Convention on Environment and Development, (the Rio Declaration) 1992.

From an economic point of view, the polluter pays principle would make polluters take responsibility for their actions and, ultimately, internalize the pollution costs into the production costs of its goods and services, with positive effects on the price

⁸³ See “Oil Spill: Communities seek N55.8+n from Shell”, the Punch Newspaper November 13, 2008.

⁸⁴ Ayobami Olaniyon, (supra)

⁸⁵ P Sands, Principles of International Environmental Law (2nd ed CUP 2003) 124.

⁸⁶ Ibid

⁸⁷ N Sadeleer, Environmental Principles: From Political Slogans to Legal Rules (OUP 2002) 312.

⁸⁸ Ibid.

system and the efficient allocation of resources. It would also provide strong incentives for pollution prevention, because when those involved in production activities realize that they will be held strictly accountable for any harm that comes to others as a result of their polluting activities, attempts will be made to ameliorate the problems before they occur. There would also be a strong incentive to develop new technologies that are meant to eliminate or minimize pollution from the outset, leading to overall reductions in pollution generally.

The polluter pays principle can also be described as a form of self-monitoring. By making polluters pay for the control and prevention of their pollution, they are forced to monitor themselves. And this would reduce the costs of monitoring by state authorities.

When the polluter pays principle is read in conjunction with the precautionary principle, the interpretation is that the polluter should pay not only where actual damage has occurred, but also when there exists a risk of such damage occurring. A principal tenet of sustainable development is the precautionary principle, which focuses on prevention rather than cure, as a more cost effective environmental policy-making. The polluter pays principle envisages that the polluter rather than society should bear the cost of taking such precautionary measures. And this will act as a disincentive to change individual behavior in terms of the decision whether or not to pollute.

The polluter pays principle would serve as a deterrent to would-be polluters and force them to review their precautionary and control capabilities because the consequences of their actions may result in heavy fines and punitive actions being taken against them. Strict and absolute liability in pollution cases make good sense, but it is thought that this may increase the operating costs of the companies and make the business environment in which oil companies operate to be difficult. Polinsky and Shavell argue that:

...to achieve appropriate deterrence, injurers, should be made to pay for the harm their conduct generates, not less, not more. If injurers pay less than for the harm

*they cause, under deterrence may result- that is, precautions may be inadequate, product prices may be too low, and risk-producing activities may be excessive. Conversely, if injurers are made to pay more than for the harm they cause, wasteful precautions may be taken, product prices may be undesirably curtailed.*⁸⁹

Conclusion

Although the polluter pays principle has international flavor, yet its enforceability in Nigeria is rather weak and ineffective. Pollution incidents are still being recorded almost on a daily basis in the Niger-Delta region of Nigeria. Polluters must be adequately identified and held liable for their actions and they must be made to clean-up the environment and compensate those affected by the harm they have caused. It is necessary to de-emphasise the fault principle and emphasise strict liability in pollution cases. Professor Fekumo⁹⁰ developed a theory of ‘causation and strict liability’ and argued that this theory is not a novelty, as it has a place in our statutory regime.⁹¹ Also relevant in this regards is the case of *Ikpede v Shell BP Development Co (Nig) Ltd*,⁹² The facts of the case are as follows: the plaintiffs claimed damages as a result of the escape of crude oil and or chemicals from oil pipelines of the defendant on to the land of the plaintiffs. They claimed reasonable and adequate compensation; and in the alternative relied on the rule in *Rylands v. Fletcher*. It was held by Ovie-Whiskey, J. (as he then was) that “to lay crude oil carrying pipes through swamp forest land is ... a non-natural user of the land” and that “it is common knowledge that crude oil causes great havoc to fishes and crops if allowed to escape from the pipeline in which it is being carried.” Notwithstanding, the above finding, the

⁸⁹ M Polinsky and S Shavell, ‘Punitive Damages: An Economic Analysis’ (1998) 3 Harvard Law Review 873.

⁹⁰ Fekumo, J.F., “Civil Liability for Damages Caused by Oil Pollution” in Omotola (ed.) *Environmental Law in Nigeria Including Compensation* (Lagos, Faculty of Law, UNILAG, 1990) 254

⁹¹ Section 11(5) (c) of the Oil Pipelines Act

⁹² (1973) MWSJ 61

rule was held not to apply because the acts of the defendants fell under the exception of statutory authority, since they had a license to lay the oil pipes. Nevertheless, they were held liable to pay reasonable and adequate compensation under section 11(5) (c) of the Oil Pipelines Act on the basis of statutory strict liability.

For the polluter pays principle to be efficacious in deterring pollution incidents in Nigeria, there must be proper implementation and enforcement of laws relating to the environment, especially laws dealing with oil industry pollution. This would help early containment of the oil that is spilled and prevent greater damage to the environment. It is believed that if the polluter pays principle is taken more seriously the occurrence of oil industry pollution in Nigeria would be largely reduced.

The National Oil Spill Detection and Response Agency (Amendment) Bill 2012 (NOSDRA Amendment Bill 2012) should be passed into law. Section 8 (1) (d) of the NOSDRA Amendment Bill 2012 provides for liability limit for as much as N15, 000, 000, 000 (fifteen billion naira) for oil spill from any onshore facility and/or deep-water port. This kind of provision is encouraged and it is hoped that when this bill is passed into law, this provision among others would be effectively implemented.

The problem of insecurity in Nigeria and especially, the Niger-Delta must be dealt with so that liability for pollution can be appropriately apportioned. Insecurity would make it difficult for responsible parties to be appropriately identified and held accountable for their environmental damage. On the other hand, a state of security will ensure that relevant oil facilities and installations are well protected and that polluters and those who cause damage to oil facilities are held responsible for their actions.

Moreover, monitoring agencies such as NESREA, NOSDRA and the DPR should be given clear mandates and roles as regards pollution incidents. They must possess adequate manpower and technical expertise for effective monitoring and response to pollution incidents. They must therefore be well equipped and properly funded to effectively deal with such pollution incidents.

Finally, environmental laws and guidelines must be implemented to the letter for a successful imposition of liability on the polluter. If properly implemented, the polluter pays principle would function as a way of attributing environmental liability and thus limit incidents of environmental damage.