

Polluter-Pays Principle and the Regulation of Environmental Pollution in Nigeria: Major Challenges

Jude O. Ezeanokwasa¹

Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe Universty, Awka, Anambra State, Nigeria

Abstract

Recognizing the internationally acclaimed efficiency of the Polluter-Pays principle (PPP) in achieving environmental protection and improvement, Nigeria adopted it as one of its principles in achieving environmental protection. The principle holds polluters responsible for the environmental degradation and pollution caused by them by getting them pay for them (pollution). To achieve the desired goal the PPP is embodied in major environmental regulations statutes, instruments and institutions in Nigeria such as the 1999 National Policy on Environment, as revised in 2016, National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act, National Oil Spill Detection and Response (NOSDRA) (Establishment) Act, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN), and Mining and Minerals Act 2007. Despite the length of time that has passed from the time Nigeria adopted PPP as a key driving principle of its policy on environment, environment pollution and degradation have not abetted. They are rather on the increase as can be attested by the mountains of solid wastes littering our cities and pollution-related restiveness in the Niger Delta. This led this paper to critically inquire into the efficacy of the PPP in Nigeria. The finding is that there are peculiar challenges in Nigeria which must first be tackled before PPP can effectively yield the desired result in the country. These include problem identifying polluters in the country, general ignorance about environmental degradation and pollution, inefficient enforcement agencies, and under-funding of enforcement agencies. The paper recommends that these problems should first be addressed before the PPP can yield positive results in Nigeria. The methodology of this paper is doctrinal.

Keywords: Nigeria, polluter-pays principle, environmental regulation, environmental pollution, environmental protection, challenge

1. Introduction

Cognizant of the indispensable dependence of human life on the environment, the 1999 Nigeria Constitution charges the State with the responsibility of protecting and improving the environment and safeguarding the water, air and land, forest and wildlife of Nigeria.² Doing this entails combatting environmental pollution which undermines the life sustaining capacity of the environment. Ironically, much of environmental pollution comes from anthropogenic sources; that is, from human activities. Nitrogen oxide and sulphur dioxides from the exploitation of fossil fuel pollute the atmosphere thereby causing acid rain with many cascading deleterious effects on the environment and human health. Land pollution, which occurs through activities like mining, estate development and some civil engineering works, leads to erosion and silting of surface water. The restiveness in the Nigerian Niger Delta region is due mainly because of the environmental devastation resulting from oil exploitation. The air, water and physical environment of this area is so polluted that existence is heavily threatened. A responsible government cannot fold its hands and watch the life-sustaining ability of the environment being progressively undermined and threatened. Thus Nigeria in 1999 adopted the Polluter-Pays principle (PPP) as a driving gear of the 1999 National Policy on the Environment (revised in 2016). The PPP holds polluters responsible for the environmental injuries resulting from their activities and in this ways it acts as a restraints on them from polluting the environment. This demonstrably shows Nigeria's determination to guarantee a healthy environment for its citizens. Since then efforts have been made to inject the principle in many legislations and administrative guidelines touching on environment. These include the Minerals and Mining Act 2007, Environmental Impact Assessment (EIA) Act, and the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Statutory institutions and agencies such as the National Environmental Standards and Regulations Enforcement Agency (NESREA) and the National Oil Spill Detection and Response Agency (NOSDRA) saddled with the responsibility of administering such legislations and guidelines become automatically enforcers of the PPP and so relevant partners for the efficiency of the PPP

Notwithstanding the adoption of this internationally acclaimed environmental protection principle for these years, environmental degradation and pollution do not seem to be on the exist-route. Instead it is spreading with

¹ Jude O Ezeanokwasa, Ph.D (Law), Ph.D(Canon Law), LL.B., BL, B.Phil. (Philosophy), B.D.(Theology) Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

² CFRN 1999, s 20.

strength and vigour as is evident in the pervasive presence of mountains of solid wastes in our cities, and oil spillage and atmospheric pollution in the Niger Delta. This spurred this paper to inquire into the factors militating against the efficacy of the PPP in Nigeria. Immediately following the introduction the paper clarifies the concept of PPP. This is important as it gives the nature of the concept and sets its contours for this paper. The next section of the paper deals with the application of the PPP in environmental law in Nigeria. This part tallies with section 5 and exposes Nigeria's history with the PPP. Coming after this are the challenges undermining the smooth course of the PPP in Nigeria. Following next is the conclusion and recommendations. The paper recommends that Nigeria should get its priorities right by first tackling the challenges that cog the wheels of the PPP before it can yield the desired results for the country.

2. The 'Polluter-Pays' Principle (PPP)

PPP was developed in the 1920s as an economic principle in environmental management and it came to resolve the issue of improper allocation of costs resulting from environmental pollution. The improper allocation of production costs resulted from the fact that hitherto the costs of remedying environmental pollution were not considered as integral part of the production costs of the persons or companies that caused the pollution. The costs went to the society at large but not specifically to the polluters, thereby increasing the costs of production of other members of the society who actually did not cause the pollution. An example is the case of a laundryman who could not hang washed clothes outside without them being blackened by the smoke-saturated air in England at the time due to the smoke from the chimneys of factories and industries that were powered by coal. To continue his business, the laundryman had to endure additional costs in finding alternative ways of drying clothes without having them blackened. The costs for finding and utilizing this alternative drying method were additional costs to his business and were induced by the polluter. Moreover, the additional cost raised his cost of production and possibly reduced his profit. The improper allocation of costs lies in the fact that the additional costs to the laundryman should truly be borne by the polluter. The improper allocation of costs affected trade and international investment. The PPP advocates for the internalization of the external costs by which the polluter (factory) merges both the external and private costs in order to achieve a true and realistic price for his products or services and this results to proper allocation of costs.¹

In 1972 the Organization of Economic Cooperation and Development (OECD) recommended the PPP as the "Guiding Principle concerning the International Economic Aspects of Environmental Policies".² In 1973 the Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States on the Programme of Action of the European Communities on the Environment chose PPP as one of the principles of Community's environmental policy.³ From 1973 the European Community adopted the PPP as a permanent principle in environmental legislation.⁴ In 1987 it was raised to the status of a constitutional principle within the European Community with the new article 130 (r) of the Single European Act.⁵ In 1992 it was confirmed by the Treaty on European Union.⁶ The 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation in London referred to PPP as 'a general principle of environmental law.'⁷ Affirming PPP as a general principle of environmental law the United Nations at the 1992 Rio Declaration adopted it as one of the principles for achieving sustainable environment and development. Principle 16 of the 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 the public interest and without distorting international trade and investment.

As a general principle of environmental law, state-members of the international community are obliged to apply the PPP instrument in their municipal legislations that have things to do with the environment. Nigeria formally adopted the PPP in the 1999 National Policy on the Environment (revised in 2016) as one of the principles that would drive Nigeria's policy on environmental protection and remediation.⁸ But its expected positive effect cannot be achieved unless it is adequately applied by confronting the challenges militating

¹ See Munir, M., "History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle", (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322485> accessed January 13, 2017.

² OECD, *Guiding Principle concerning the International Economic Aspects of Environmental Policies*, 26 May 1972 - C(72)128, A(a).

³ Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States, 22 November 1973, Title II, no. 5.

⁴ European Communities' First Programme of Action on Environment, 1973. See Hey, C., "EU Environmental Policies: A short history of the policy strategies", <<http://www.eeb.org/publication/chapter-3.pdf>> accessed January 19, 2017.

⁵ Single European Act 1987, O J L 069, 26/6/1987.

⁶ See Articles 130 R2 and 130 S5 of the Treaty on the European Union, Maastricht, 7 February 1992.

⁷ The Preamble of the Convention contains the following recital 'Taking account of the polluter pays principle as a general principle of international environmental law'.

⁸ 1999 National Policy on Environment (revised in 2016), s 1.5(3).

against its effective application.

3. Who is a Polluter?

The verb “pollute” according to Oxford Dictionary means to contaminate (water, the air, etc.) with harmful or poisonous substances.¹ Environmental science holds that environmental contamination or pollution can result from natural and anthropogenic causes. The lavae from an active volcano for instance represent environmental pollution from a natural cause. They are not caused by any human activity. They erupt due to natural forces in the volcano. On the other hand, urban garbage, gas flaring, civil engineering activities and deforestation represent anthropogenic causes of pollution. Nature, for the purposes of the PPP, cannot be regarded as a polluter for the obvious reason that it is not a person liable for either administrative or judicial action. In other words, a polluter has to be a person. It is in this sense that the European Commission defines a ‘polluter’ as “someone who directly or indirectly damages the environment or who creates conditions leading to such damage.”² The OECD also understands it likewise by defining ‘pollution’ as “...the introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects...”³

The fact that the above two definitions see a polluter as ‘someone’ or a ‘man’ does not, however, mean that only human persons can be polluters. Legal persons like corporations are also polluters from the fact that pollution can occur from the activities of corporation. In Nigeria, corporations like the Shell Petroleum Development Company Limited (hereafter Shell PDC Ltd) have been judicially found liable in a number of cases for pollution in the Niger Delta.⁴ Consequently, a polluter can be a physical or legal person whose activities pollute the environment.

Three classes of polluters can be identified from the definition of a polluter given by the European Council: (a) a person who directly damages the environment; (b) a person who indirectly damages the environment; and (c) a person who creates a condition leading to such damage. An instance of a person who directly pollutes the environment would be a corporation that sends thick puffs of smoke into the air from the chimney of its factory. On the other hand, an example of a person who indirectly pollutes the environment would be a corporation whose product pollutes the environment. In Nigeria where plastics used for sachet and bottled water are disposed of in the streets and on roads, makers of sachet and bottled water come into the class of indirect polluters. The situation with the third type of persons who pollute the environment is that they neither throw any pollutant into the environment by themselves nor produce any product the use of which pollutes the environment. But they create a situation that induces persons to pollute the environment either directly or indirectly. This is analogous to the situation in Nigeria where the fact that government has woefully failed to provide constant and reliable electricity has led people and corporations to run their lives and businesses on generating sets, which cause air pollution with the green-house gases like carbon dioxide and carbon monoxide they throw into the air. In this way the Nigerian government becomes also a polluter. But how far this third class of polluters can be held liable for their acts of pollution is difficult to ascertain.

The clear distinction of these classes of polluters does not however mean that the identification of the polluter in every situation of environmental pollution is that easy in order to determine what each polluter would pay. It could be difficult, and even impossible if environmental pollution arises from several simultaneous causes or from several consecutive causes.⁵

Another class of polluters is that of persons that may be considered as ‘deemed polluters’. These are persons who neither pollute the environment directly or indirectly, nor create a condition that leads to pollution. There is only an uncertain possibility that their activities could pollute the environment and so they pay for pollution prevention measures prescribed by public administration. Their payment is solely for precautionary purposes. By this fact they are deemed polluters. The next question for consideration is, what does a polluter pay?

4. What Does a Polluter Pay?

The phrase ‘polluter pays’ gives an erroneous impression that the polluter intrinsically bears the costs of the externalities. All he does is to merge the externalities with his private costs but he does not actually pay for them. Usually he passes the costs to the consumers who ultimately use his products. Munir underscored this point when he wrote that incentives were required to motivate the polluter to internalize the external cost so that the complete production cost would be reflected in the price of the goods which the consumer pays in the final

¹ ‘Pollute’ <<https://en.oxforddictionaries.com/definition/pollute>> accessed April 19, 2017.

² Annex to Recommendation 75/436, OJ L 194/1, 1975, Pt III.

³ OECD Council Rec C(74) 224 of 15 November 1974.

⁴ See *Shell PDC Ltd v HRH Chief GBA Tiebo VII & ors*, [1996] 4 NWLR (Pt 445) 71; *Chief Simon Onajoke v Seismograph Service Ltd*, suit No SHC/28/67, Sapele High court, delivered January 29 1971 (Unreported); *Seismograph Services Ltd v Onokpasa*, (1972) 4 SC 123; *Ogiale v Shell PDC Ltd* [1997] NWLR (Pt 480) 148.

⁵ Munir, M., “History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle”, (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322485> accessed January 13, 2017.

analysis.¹ But before the consumer can pay for them, the polluter must first internalize them and it is in this sense that it is said that the polluter pays for pollution.

PPP does not however mean that the polluter has to pay for the cost of abating every bit of pollution connected to his product. Though this is desirable, it is not feasible for a number of reasons. First, absolute abatement of pollution is not possible. Pollution is so part of human life and society that it cannot be eliminated completely. It is like crime which no society aims at eradicating but at curtailing it to a very low scale. What is normally talked of is keeping pollution at an acceptable level and not completely eliminating it. Second, any attempt at eliminating pollution completely bears negative implications for national economic productivity. To do this would entail more costs which could push up the production cost to an unaffordable level such that trade and investment, both local and international, would be adversely affected. Underscoring this point, Munir observed that “economic literature, however, does not accept the idea of ‘eliminating pollution’ or zero pollution”.² He put the situation rather sharply when he wrote that ‘zero pollution’ means zero economic activity.³ This reality plays out within the members of the OECD where in spite of PPP being wholeheartedly adopted, still all the external costs are not fully internalized in the member states of the organization. For instance, in spite of the U.S. relying preponderantly for its energy use on imported petroleum, yet the cost of gas is far cheaper in the US than in some of the countries it imports crude oil from, for instance, Nigeria. The question then is, if all the external costs are not to be internalized, what does PPP truly stand for in relation to what law should make a polluter pay?

To this question the OECD stated that the principal reasons for formulating the PPP were (a) “to encourage the rational use of environmental resources” and (b) “to avoid distortions in the international trade and investment”.⁴ PPP therefore is not solely about environmental protection but is equally for making sure that interests of trade and international investment are not jeopardized. Interests of trade and international investment would be jeopardized if the cost of eradicating pollution is such that foreign investors are scared away and local producers would not be able to export. In the final analysis what a polluter pays has to be balanced out between these two interests. The externalities internalized by a polluter must not be such as to make production cost to be too high that trade and international investment would be disadvantaged. At the same time the societal cost not internalized by the polluter must not be so much as to drive the cost of other economic activities so high as to also disadvantage trade and international investment. This conclusion is well in line with the declaration of the OECD to the effect that the PPP is nothing more than an efficiency principle for allocating costs and does not involve bringing pollution down to an optimum level of any type, although it does not exclude the possibility of doing so.⁵ What a polluter pays becomes ultimately what is economically convenient for the country at a given time and not necessarily what is required for eliminating pollution. In other words what a polluter pays is not a hard and fast figure of amount or measure fixed for all times. It is fluid, it changes and varies from time to time depending on the changing economic dynamics of the society. Thus Munir concluded that what a polluter pays is what government authorities decide that is necessary to keep the environment in an acceptable state.⁶ And what constitutes an acceptable state according to Bonus and Holgar is not necessarily the sustainability of the environment but political and economic feasibility as well.⁷ What a polluter pays in the final analysis is what government determines that a polluter should pay or the measure a polluter should comply with in order to safeguard the environment after taking into account the need to safeguard trade and investment, and taking into account also the political exigencies in the country. Measures that polluters have been held to pay for under the PPP include defraying administrative costs borne by public administration in implementing anti-pollution measures through payment of fees charged for this purposes. Potential polluters bear the costs of measures stipulated by public administration towards preventing and controlling accidental pollution. PPP is also actualized by polluters bearing the costs for residual damage resulting from residual pollution from their activities, and by them bearing the costs for trans-frontier or trans-boundary Pollution caused by them.⁸

5. The Polluter Pays Principle in Nigerian Environmental Law

The internationally acclaimed efficiency of the PPP in dealing with the problem of environmental pollution has led Nigeria to adopt the principle in its resolve to live up to its constitutional responsibility of protecting and

¹ *Ibid.*

² Munir, M., “History and Evolution of the Polluter Pays Principle: How an Economic Idea Became a Legal Principle”, (2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322485> accessed January 13, 2017.

³ Munir, M., *The Polluter Pays Principle*, chapter 2, sec. 2.5(a) in M Munir, ‘History and Evolution of the Polluter Pays Principle....’

⁴ OECD, 1972 C(72) 128.

⁵ OECD Note on the Implementation of the PPP by the Environment Committee, OCDE/GD (92)81, 25. See M Munir, ‘History and Evolution of the Polluter Pays Principle’.

⁶ Munir, M., ‘History and Evolution of the Polluter Pays Principle’.

⁷ Bonus and Holgar, “Implications of the Polluter Pays and the User Pays Principles for Developing Countries” in Edward Dommen (ed), *Fair Principles for Sustainable Development*, (Cambridge, 1993), 67

⁸ See Munir, M., “History and Evolution of the Polluter Pays Principle....”

developing the Nigerian environment. The 1999 National Policy on the Environment as revised in 2016 in article 3.3(iv) names the polluter-pays principle amongst the guiding principles for the policy.

Be this as it may, the history of the polluter pays principle in the regulation and protection of the Nigeria environment is much older than the 1999 Policy on Environment. Actually the principle can be regarded as one of the legal tools adopted by Nigeria for protecting the environment after 1988 Koko toxic waste incident. The polluter pays principle is embedded in section 12(1) of the Harmful Wastes (special Criminal Provisions) Act, 1988, which provides that

Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage....

The principle is visible in the environmental protection regulations made under Federal Environmental Protection Agency (FEPA) Act 1988. It directed every industry to install anti-pollution equipment for the detoxification of effluent and chemical discharges emanating from the industry.¹ The 1991 National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations provide that every industry or a facility shall set up machinery for combating pollution hazard and shall maintain equipment in the event of an emergency.² With the repeal of the FEPA Act by the National Environmental Standards, Regulations Enforcement Agency (NESREA) Act³ these regulations are nonetheless deemed to have been made by the NESREA pursuant to section 35, the savings provision of the NESREA Act.

The listing of the polluter pays principle as one of the principles that drive the National Policy on Environment gives it a key place in environmental protection in all government initiatives. In many cases it is not explicitly mentioned but it is actively applied in the enactments and regulations for environmental protection. In the oil industry the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) embodies the polluter pays principle in paragraph 8.1 where it provides that “a spiller shall be liable for the damage from a spill for which he is responsible.” The National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act also applies the pollutee-pays principle. It provides in section 6(2)(3) that “the failure to clean up the impacted site, to all practical extent including remediation shall attract a fine of one million naira.” The element of the polluter-pays principle in this provision is that it makes a polluter responsible for cleaning up an impacted site and not necessarily the fine. In the solid mineral sector, the polluter-pays principle is equally applied. The Minerals and Mining Act 2007 applies the PPP through three channels: first, by polluters paying for the public administration costs for controlling and preventing environmental pollution; second, by polluters paying for the specified pollution control and prevention measures to be complied with by polluters; and third, by polluters paying for the general pollution control and prevention obligations of polluters.

The administration costs for preventing and controlling environmental pollution are cost incurred by the agencies created specifically by the Act for this purpose. These agencies include the Mines Environmental Compliance Department (MECD)⁴ and Mineral Resources and Environmental Management Committee (MREMC).⁵ The payment is made through the fees paid by polluters for the administration of the Act⁶ and for rehabilitation and reclamation of impacted areas.⁷ The second channel for polluters to pay for their pollution is through bearing the costs of complying with measures set up by public administration for pollution control and prevention. Such measures include the: Environmental Impact Assessment Statement,⁸ Environmental Protection and Rehabilitation Program,⁹ Environmental Protection and Rehabilitation Fund (EPRF),¹⁰ and Community Development Agreement,¹¹ which refers to the obligation of involving the community hosting mining activities to be involved in the control and prevention of pollution in their area. The third channel is through bearing the costs for the general obligations for pollution control and prevention, which polluters bear in their respective stages in the mineral exploitation process. A breach of any of these obligations gives rise to the polluter paying compensation to the victim. A holder of an exploration licence, for example, bears the obligation to conduct exploration activities in an environmentally responsible manner.¹² He is to maintain and restore the

¹ National Environmental Protection (Effluent Limitation) Regulations 1991, reg 1(1).

² NEP (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations 1991, reg 8.

³ NESREA Act, s 36.

⁴ MMA, s16(1)(b).

⁵ *Ibid.*, s19(1).

⁶ *Ibid.*, s10(b).

⁷ *Ibid.*, s90(2).

⁸ *Ibid.*, s119(c)(i).

⁹ *Ibid.*, s119(c)(ii).

¹⁰ *Ibid.*, s121(1).

¹¹ *Ibid.*, s116(1).

¹² MMA, s61(1)(b).

land that is the subject of the licence to a safe state from any disturbance resulting from exploration activities including but not limited to filling up any shafts, wells, holes or trenches made by the titleholder.¹ He is to compensate users or occupiers of land for damage to land and property resulting from activities in the exploration area.²

The principle can also be seen in judicial decisions in Nigeria. In *Shell PDC Ltd v Chief G.B.A. Tiebo & Ors*, the damages of six million naira (N6,000,000.00) awarded against the appellant (defendant) by the trial court was confirmed by the Supreme Court. The damages were for the environmental pollution of the community of the respondents (plaintiffs), Peremabiri in the Yenegoa Local Government Area, in the present Bayelsa State. The appellant (defendant) negligently caused a major crude oil spillage of over six hundred barrels from its flow station and other installations at or near the plaintiff's village, and the oil spilled into the lands, swamps, creeks, ponds, lakes and shrines of the plaintiffs. The polluter pays principle was not particularly mentioned as a principle that particularly informed the judgment. It was not necessary for it to be so mentioned. It was enough that the polluter was held responsible for his actions.³ Similarly in *Gbemre v Shell PDC Ltd & ors*,⁴ the polluters, the first and second respondents was held responsible for their actions. In this case, Jonah Gbemre (the applicant) claimed *inter alia* for himself and for the Iwherekan Community in Delta State a declaration that the actions of the 1st respondent (Shell PDC) and 2nd respondent, (the Nigeria National Petroleum Corporation) in continuing to flare gas in the course of their oil exploration and production in the community of the applicant violated the applicant's fundamental rights (including the right to healthy environment) and dignity of human person as guaranteed by section 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and reinforced by articles 4, 16 and 24 of the African charter on Human and Peoples Rights (Ratification and Enforcement) Act.⁵ A finding of fact *inter alia* was that the 1st and 2nd respondents did not comply with section 2(2) of the Environment Impact Assessment Act,⁶ which if complied with, the flaring would not have been commenced in the community. The court held that the actions of the 1st and 2nd respondent by flaring gas in the community of the applicant was a gross violation of their fundamental right to life and dignity of human person as enshrined in the constitution. In consequence the court granted the prayer of the applicant by restraining the 1st and 2nd respondents whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community. Even though the PPP was not explicitly referred to in the case, it was implicitly applied. The polluters, the 1st and 2nd respondents were held responsible for the pollution caused by the gas flaring and in consequence they were restrained from any further flaring of gas in the community. They were restrained particularly because they failed to comply with the Environmental Impact Assessment Act, which is a statute inspired by the PPP.

With these statutory provisions and judicial decisions the PPP transitions from being a mere declared principle of national environmental policy to a principle with binding legal effect; it transitions from being a soft law declaration to a hard law obligation. However, adequate binding effect of the PPP is achieved if it is effectively enforced. Enforcement is nine-tenth of the law, and in this case, nine-tenths of the PPP. But the reality is that certain factors hold the PPP hostage in Nigeria in relation to environmental pollution and degradation.

6. Factors Challenging the Adequate Enforcement of the PPP in Nigeria

These factors arise from the peculiarities of environmental regulation in Nigeria.

6.1 Difficulties in Identifying the Polluter

The polluter pays only if he can be laid hands on. If he cannot be identified, then there is no how he can pay for the pollution caused by him. In the petroleum sector this situation arises in circumstance of oil spill resulting from vandalization of oil pipelines, sabotage of oil installations and illegal oil bunkering. It is difficult to identify the polluters in these activities because they are done clandestinely.

Pipeline vandalization is a big issue in Nigeria's Niger Delta. Records from the Pipeline and Products Marketing Company (PPMC), a department of the Nigeria National Petroleum Company, NNPC, show a growing incidence of this nefarious activity. 93 cases were recorded in in 1993, it decreased to 49 in 1996, 45 in 1997, soared to 81 in 1998, 524 in 1999 and skyrocketed to 800 the first half of 2000.⁷ Though this record is

¹ *Ibid.*, s61(1)(d).

² *Ibid.*, ss61(1)(g), 98(3), 107(a &b).

³ Olaniyan, A., "Imposing Liability for Oil Spill Clean-Ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle" (2015) 40 *Journal of Law, Policy and Globalization* 73-85 at 79.

⁴ (2005) AHRLR 151 (NgHC 2005), <<http://www2.ccolex.org/server2.php/libcat/docs/COU/Full/En/COU-156302.pdf> > accessed April 19, 2017.

⁵ Cap A9 vol. 1 LFN 2004.

⁶ Cap E12 vol 6 LFN 2004.

⁷ Otegh and Okpo, C., and Eze, R.C., "Vandalization of Oil Pipelines in the Niger Delta Region of Nigeria and Poverty: An Overview" (2012) 3(2) *Studies in Sociology of Science* 13-21.

dated, it shows the reality of the problem of pipeline vandalism in Nigeria. Actually oil pipeline vandalism has been on the increase since the return to democracy in 1999 and the pollution that results from them go on unremedied.

6.2 *Pervasive Ignorance of environmental degradation and pollution*

Apart perhaps from the Niger Delta where there is an appreciable level of awareness as regards the environmental hazards associated with oil exploitation, there is still a widespread ignorance of environmental degradation and pollution in the other parts of the country. The myth that the environment is capable of withstanding any kind of action or treatment is still pervasive in the society. The result is that often the polluter is not aware that he is polluting the environment and the victim is in no better position as he does not know that he is a victim of pollution. In this environment of ignorance the polluter-pays principle cannot operate.

6.3 *Inefficient Enforcement Agencies*

The application of the PPP revolves principally on the public administration; it administers the PPP-embodied statutes and discharges also the PPP-compliant functions assigned to the enforcement agencies like the NESREA and NOSDRA. It is not in all circumstances that a polluter pays directly to the victim of his pollution. In most cases he pays indirectly through payment for the services provided by the public administration towards pollution control and prevention. As already seen above a polluter pays for pollution caused by him through either of the following indirect channels: defraying administration costs borne by public administration in implementing anti-pollution measures, bearing the costs of measures stipulated by public administration for potential polluters towards preventing and controlling accidental pollution, bearing the costs for residual damage resulting from residual pollution from their activities, and bearing the costs for trans-frontier or trans-boundary Pollution caused by them.¹ These payments can only yield the desired result of payment for pollution if there is a competent public administration that stipulates the adequate measures for pollution control and prevention. Unfortunately this is not the situation in Nigeria. Concerning the enforcement of the PPP in the oil sector Olaniyan observed that the public agencies, the NOSDRA and the Department of Petroleum Resources (DPR) that should see that oil spillers pay for the spillage, by, for instance, cleaning up the impacted areas, do not have the necessary tools and technical expertise for their work.² They rely on the Oil companies, which are the spillers.³ Underscoring the same anomaly the Amnesty International reported that oil spill investigations in Nigeria are usually led by oil company personnel and not NOSDRA. It stated:

Oil spill investigations are organized and led by oil company personnel. Despite its title, the National Oil Spill Detection and Response Agency (NOSDRA) does not initiate oil spill investigations. It is usually dependent on the company both to take NOSDRA staff to oil spill sites and to supply technical data about spills.⁴

If NOSDRA is beholden to the oil company that is responsible for an oil spill for the logistic for assessing the oil spill, it is only imaginable how NOSDRA can authoritatively get the oil company to pay for the pollution. The piper it is said determines the tune. In this situation the oil companies will be determining the manner and extent the NOSDRA will do its job because it is dependent on the oil companies for the means of doing its job. The final result is that the PPP is undercut.

6.4 *Absence of Professionalism*

To adequately enforce the PPP, technical knowledge of what the environmental pollutants are in every sector of the economy is of primary importance. Otherwise there is no way public administrators in the agencies saddled with the duty of enforcing the PPP would be able to, for instance, know the measures to prescribe for pollution control and prevention. This point finds corroboration in the report of Amnesty International where it noted that with regard to getting the polluters pay for the oil spillage in the Niger Delta, the NOSDRA which is saddled with the duty of preventing and seeing to the cleaning up of areas impacted by oil spill did not have the necessary expertise. Instead, it relied on the expertise of the polluting oil companies and their means of transportation for even accessing the areas of the spill.⁵ Lack of professionalism is caused partly by the heavy unemployment in the country resulting to employment being based on extraneous considerations like nepotism, religion, ethnicity, etc. The effect is that many members of staff of the enforcement agencies lack the basic competence for the job they are hired for.

¹ See Munir, M., "History and Evolution of the Polluter Pays Principle..."

² Olaniyan, A., *op. cit.*, at 83.

³ *Ibid.*

⁴ Amnesty International, 'Bad Information: Oil Spill Investigations in the Niger Delta' (2013) <file:///C:/Users/USER/Downloads/afr440282013en.pdf> accessed March 29, 2017.

⁵ Amnesty International, 'Bad Information: Oil Spill Investigations in the Niger Delta' (2013) <file:///C:/Users/USER/Downloads/afr440282013en.pdf> accessed March 29, 2017.

6.5 *Enabling Statutory Instruments not Regularly Updated*

Public administration does its job in seeing that polluters pay for pollution caused by them in accordance with the provisions of the enabling statutory instruments. The instruments usually recommend environmental protection technologies to be adopted by potential polluters and fines to be imposed when environmental control provisions are flouted. One obvious fact about technologies is that they change from time to time with better one being produced. In the same way fines lose deterrence value over time due to inflation particularly in unstable economies which Nigeria is one of. From the past two years the Jonathan administration ended and the Buhari government came into power, the Naira, the Nigerian currency, has depreciated by over 65 %. The Dollar-Naira exchange rate in May 2015 was 1US Dollar to an average of N219.00 at the parallel market.¹ Today it is 1US Dollar to about N363.5.² Consequently, the legal instruments through which public administration enforces the PPP need to be regularly updated in order to keep pace with development in technologies and to adapt fines to the current real value of the Naira. The Minerals and Mining Act 2007 for instance stipulates a minimum fine of N20,000,000.00 (twenty million naira) for a mineral title holder found guilty for exploiting minerals in an environmentally unfriendly manner contrary to the provisions of the Act.³ As at 2007 when the Act was passed, the average Dollar(US)-Naira exchange rate at the parallel marker was 1US Dollar to N126.67.⁴ At this exchange rate the twenty million naira minimum fine amounted to USD157,890.58. The fine was a huge amount of money that would deter any polluter. Today, with the average Dollar-Naira exchange rate at the parallel market being 1US Dollar to about N363.5, the twenty million naira minimum fine amounts to USD55,020.63. This is about one third of the value of the fine in 2007 when the Act was passed. With this significant monetary depreciation, the law, in this regard, has lost a lot of its biting teeth and so can no longer deter many polluters.

6.6 *Long Duration of Judicial Processes*

It is usual for legal instruments for environmental protection to provide for judicial action against a polluter who, without legitimate justification, fails to comply with a measure for actualizing the PPP.⁵ The action can be civil or criminal as the case may be. In either of the processes, the frustration engendered by the excessive long period of time that judicial processes take in Nigeria is an obstacle to the actualization of the PPP. In criminal proceedings the agencies saddled with the duty of enforcing the principle would be frustrated and disillusioned. The long judicial process can be exploited by unscrupulous enforcement agents to resort to settlement with offenders by which they collect money from them and release them. In civil proceedings the cases might last so long that the victims of environmental pollution may not be alive to receive the award of damages due to them. Furthermore, by the time the cases are finally disposed of, much of the damages awarded to victims would have gone into legal fees.

It is to forestall the predicament of the long judicial process that statutes like National Environmental Standards, Regulation Enforcement Agency (NESREA) (Establishment) Act provides for the establishment of mobile courts for the expeditious disposal of cases of violation of environmental regulations.⁶ So far, only few states like Lagos, Akwa Ibom, and Rivers have cashed into this facility.⁷ Mobile courts might not help much if appeal is open up to the Supreme Court. It is humbly suggested that appeals from environmental matters handled by mobile courts be limited to the Court of Appeal. Another way of dealing with the long duration of judicial proceedings would be to admit to arbitration cases of violation of environmental regulations particularly in distinct sectors of the economy like the solid mineral and, oil and gas sectors. This will definitely cut off the problem of long period of litigation and have the problem resolved in a more amicable setting especially as the victims and operators in these sectors are in more permanent relationship and with mutual benefits and cooperation. For instance Shell PDC Ltd is no stranger to the communities in the Niger Delta, and neither are the communities strangers to Shell PDC Ltd. Arbitration will help to sustain the spirit of cooperation between these two entities. However, a snag in admitting to arbitration cases of violation of environmental protection is that the active parties are not just the polluter and the human or corporate victim. The wider society is also a victim.

¹ 'Thread For Dollar To Naira Daily - Business (3) - Nairaland', <<http://www.nairaland.com/2179109/thread-dollar-naira-daily/3>> accessed June 22, 2017 .

² Nairametrics, "Nigeria: Daily Parallel Market Exchange Rate (February 5, 2018)", <https://nairametrics.com/naira-dollar-parallel-market-exchange-rate-daily/>, accessed February 6, 2018.

³ MMA, s.133.

⁴ Nairametrics, "This Is The Average Dollar Exchange Rate From 2004 Till Date", <https://nairametrics.com/this-is-the-average-dollar-exchange-rate-from-2004-till-date/>, accessed February 6, 2018.

⁵ For instance section 131(a) of the Minerals and Mining Act 2007 makes it an offence for a person to conduct exploration or mines minerals or carries out quarrying operations otherwise than in accordance with the provisions of the Act. And pursuant to section 142 of the Act an offence under the Act and the regulations made under it shall be tried by the Federal High Court.

⁶ NESREA Act, s 8(f).

⁷ MT Ladan, 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' in *8/1 Law, Environment and Development Journal* (2012) <<http://www.lead-journal.org/content/12116.pdf>> accessed April 11, 2015.

Environmental problems are by nature long lasting and transboundary. Since the interest of the society at large is involved, it is a public policy issue which may not be adequately catered for by arbitration.

6.7 Under-Funding of Enforcement Agencies

Part of the mechanisms for implementing the PPP is by a polluter defraying the public administration cost for measures implemented towards pollution control and prevention. These costs are defrayed through the payment of administrative fees charged by public administration in this regard. This presupposes that government funds the enforcement agencies adequately for their jobs prior to the actual or potential polluters paying fees for services rendered by public officers. In this way the actualization of the PPP entails cooperation between the enforcement agencies and polluters both actual and potential. But the experience is that often these agencies are not adequately funded for their functions. They lack the facilities for preventing and controlling pollution. The Amnesty International Report seen above points at this predicament with the NOSDRA which did not have the transportation to access the site of an oil spillage but had to rely on the transportation provided by the polluter-oil company. Bearing in mind that such agencies are also agents of the PPP, their failure in discharging their duties results to the failure of the PPP.

7. Conclusion and Recommendations

By adopting the PPP in the 1999 National Policy on Environment as revised in 2016 Nigeria has shown interest and commitment in providing a healthy environment for its citizenry pursuant to section 20 of the 1999 Constitution (as amended) which enjoins it to protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria. Nigeria did not stop at just adopting the principle but it made sure that it is injected in statutes and other legal instruments touching on the environment such as the EIA Act, Minerals and Mining Act 2007, the NESREA Act, the NOSDRA Act and the EGASPIN. The presence of the PPP in these legal instruments is a clear manifestation of the interest of government in seeing that the PPP enjoys a pervasive application in the country. In this way Nigeria is well positioned for achieving the greater goal of maintaining a sustainable environment that will benefit not only the present generation but also the generations yet unborn. The PPP, however, cannot deliver these desired results if the above identified problems challenging it in Nigeria cannot be addressed. There is need for government to invest in creating awareness about environmental pollution and degradation as well as about their deleterious effects particularly on human and animal life. Efforts must also be made by government to identify environmental polluters in different sectors of the economy because unless they are identified, they cannot be made to take responsibility for their environmental injuries. Agencies saddled with the duty of enforcing the PPP must be made to be efficient through personnel training and equipping them with the state-of-the-art tools for their job. This would go a long way in instilling in them the spirit of professionalism. The legislations and other legal instruments enabling the application of the PPP must be periodically reviewed in order to bring their provisions in tune with the changing situations relevant to the application of the principle. As the PPP has to be enforced also through judicial process, the excessive long time it takes to finally dispose of matters in court is a big frustration for enforcement agencies that sometimes have to go to court in order to bring polluters to take responsibilities for their actions needs to be seriously looked into by government. The excessive long time is also a frustration in civil proceedings for victims who suffer environmental injuries from polluters. Sometimes the damages to be recovered from court are spent on legal fees on account of the long period the case takes in court. Under-funding of enforcement agencies is another problem that government has to address in order to make these agencies effective in their assignment. Unless these problems are addressed the enforcement of the PPP in Nigeria would be a matter of 'the spirit is willing, but the body is weak.'