

Constitutional Environmental Rights: Investigating their Potentials for a Sustainable Niger Delta

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Abstract

Nigeria is at a crossroad – how to balance developmental needs with environmental protection. The challenge is exacerbated because Nigeria operates a mono-economy which overwhelmingly depends on the crude oil resources from the Niger Delta for its economic survival. As a result, the protection of the Niger Delta environment has not been accorded the priority it deserves. The thesis aims to investigate the potentials of Constitutional Environmental Rights (CERs) to assist in resolving the environmental sustainability crisis in the Niger Delta.

The thesis will utilize insights developed by environmental justice scholarship as the theoretical framework to investigate the main causes of the sustainability crisis in the Niger Delta and to propose ways to tackle these environmental challenges. The thesis draws inspiration from the research carried out by David Boyd on the efficacy of CERs for environmental sustainability for its analytical framework.

Although Trans-National Corporations (TNCs) and international trade contribute to the sustainability crisis in the Niger Delta, the thesis will not focus on these. Instead, it will focus on the internal legal causes of the sustainability crisis in the Niger Delta, because the external causes of the sustainability crisis have been addressed at length by other researchers. Moreover, addressing the internal causes of the sustainability crisis could also address some of the impacts of the external causes of the sustainability crisis in the Niger Delta. As such, the thesis uses 3 of Boyd's CERs performance indices in analyzing the suitability of CERs to tackle the 3 identified major internal causes of the sustainability crisis in the Niger Delta. Specifically, Boyd's index 1 (impetus for the enactment of stronger environmental laws) could address gaps in Nigeria's environmental regulatory framework. Index 4 (improvement in the implementation and enforcement of environmental laws) could address the non-implementation and non-enforcement problems with the existing environmental regulatory framework in Nigeria. Lastly, index 6 (increased public participation in environmental governance) could address the marginalization of the Niger Delta in resource governance in Nigeria. These indices will not only help to uncover the weaknesses in Nigerian laws and their enforcement but will also identify potential barriers to CERs within the current legal and policy architecture and suggest solutions on how CERs would be implemented if recognized in Nigeria to avoid these barriers.

The main contribution of the thesis is a detailed case study of how CERs may work in Nigeria to tackle the environmental crisis in the Niger Delta, and a detailed and specific analysis of what would be required in terms of domestic political, structural and legal change to ensure that CERs could contribute to the sustainability of the Niger Delta as much as they have in other countries.

The research makes specific recommendations for changes to Nigerian law, policy and institutions, such as adoption of CERs in the enforceable part of the Constitution, ownership and control by federating units of natural resources found in their territories, and elimination of barriers to access to justice. This would come about through strategically crafted constitutional provisions and laws to address the underlying factors that would limit the effectiveness of CERs in Nigeria. The thesis argues that addressing these fundamentals and constitutionalizing environmental rights will lead to improved environmental outcomes for the Niger Delta.

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Dedication

Absolutely to the
Glory of
God

Lists of Abbreviations

AATF	African Agricultural Technology Foundation
ACHPRs	African Charter on Human and Peoples' Rights
AU	African Union
APC	All Progressive Congress
AGF	Attorney General of the Federation
BOT	Board of Trustees
IBAMA	Brazilian Institute of the Environment and Renewable Natural Resources
BPI	Bureau of Plant Industry
CO2	Carbon Dioxide
CJN	Chief Justice of Nigeria
CSO	Civil Society Organization
CCP	Code of Civil Procedure
CERs	Constitutional Environmental Rights
DENR	Department of Environment and Natural Resources
DSS	Department of State Services
EFCC	Economic and Financial Crimes Commission
ELC	Environment and Land Court
ECC	Environmental Compliance Certificate
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
ENGOS	Environmental Nongovernmental Organizations
EU	European Union
FCT	Federal Capital Territory

FEPA	Federal Environmental Protection Agency
FHC	Federal High Court
GMOs	Genetically Modified Organisms
GHG	Greenhouse Gas
HEJN	Hartford Environmental Justice Network
HRs	Human Rights
HYPREP	Hydrocarbon Pollution Remediation Project
ICPC	Independent Corrupt Practices and Other Related Offences Commission
ICJ	International Court of Justice
ISAAA	International Service for the Acquisition of Agri-Biotech Applications, Inc.
JVCs	Joint Venture Contracts
LUA	Land Use Act
LGAs	Local Government Areas
LT-LEDS	Long-Term Low Emissions Development Strategy
MI	Milligram
MOE	Minister of Environment
MAPA	Ministry of Agriculture, Livestock and Supply
MOSOP	Movement for the Survival of Ogoni People
MEA	Multilateral Environmental Agreement
ANP	National Agency of Petroleum, Natural Gas and Biofuels
NASS	National Assembly of Nigeria
NBF	National Biosafety Framework
NCCAP	National Climate Change Action Plan
NCBP	National Committee on Biosafety of the Philippines
NCC	National Constitutional Conference

NCPC	National Convention Planning Committee
NESREA	National Environmental Standards and Regulations Enforcement Agency
NJC	National Judicial Council
NJI	National Judicial Institute
NOSDRA	National Oil Spill Detection and Response Agency
NPRC	National Political Reforms Conference
SNUC	National System of Nature Conservation Units
NDDC	Niger Delta Development Commission
NBA	Nigerian Bar Association
NNPC	Nigerian National Petroleum Corporation
NNPCL	Nigerian National Petroleum Company Limited
NPCC	Nigeria's Policy on Climate Change
NO	Nitrogen Oxide
NGOs	Non-governmental organizations
OECD	Organization for Economic Co-operation and Development
PANDEF	Pan Niger Delta Forum
PHCF	Petroleum Host Community Funds
PIB	Petroleum Industry Bill
PIGB	Petroleum Industry Governance Bill
PEPs	Politically Exposed Persons
PCARA	Presidential Committee on Audit of Recovered Assets
PM	Public Ministry
RTC	Regional Trial Court
RMAFC	Revenue Mobilisation Allocation and Fiscal Commission
RDS	Royal Dutch Shell Plc.

RPEC	Rules of Procedure for Environmental Cases
S.A.N.	Senior Advocate of Nigeria
SC-46	Service Contract
SPDC	Shell Petroleum Development Company
SERAP	Socio-Economic Rights and Accountability Project
EJNF	South African Environmental Justice Networking Forum
SLAPP	Strategic Lawsuits Against Public Participation
SO	Sulphur Oxide
TEPO	Temporary Environmental Protection Orders
TNCs	Trans-National Corporations
UK	United Kingdom
UN	United Nations
UNDP	United Nations' Development Programme
UNEP	United Nations' Environment Programme
USAID	United States Agency for International Development
USEPA	United States Environmental Protection Agency
UEP	Urban Environmental Program
WHO	World Health Organization

Chapter 1 - Introduction

1.1 Background of the Thesis

The Niger Delta is in the southern part of Nigeria, sharing its external borders with the Atlantic Ocean on the south and Cameroon on the east.¹ Its total surface area is about 112,110 square kilometres, representing about 12% of Nigeria's total surface area.² According to section 2 (b) of the *Niger Delta Development Act, 2000* (NDDC Act),³ the region consists of 9 states with a diverse population of about 40 different ethnic groups, with over 250 different languages and dialects.⁴



Figure 1: Map of Nigeria with the Niger Delta hedged in Green and Nigeria's international neighbors hedged in ash color.⁵

¹ Niger-Delta Regional Development Master Plan at p. 49, online<www.nddc.gov.ng/NDRMP%20Chapter%201.pdf> [Master Plan]

² Martin Samy, Heineken Lokpobiri & Ade Dawodu, "The arguments for environmental rights in Niger Delta: a theoretical framework", (2015) 10 (2) Society and Business Review; pp. 132-149 at 136 [Samy et al].

³ *NDDC Act, 2000*, LFN, 2004. The States are Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers.

⁴ Samy et al, *supra*, note 2.

⁵ Map of Nigeria, online:

<<https://www.bing.com/images/search?view=detailV2&ccid=EZhB9Rmi&id=0DC50903EA5D382C57456798299E6B1D340A2686&thid=OIP.EZhB9Rmiv5kSFSstnrd1sxQHAGX&mediaurl=https%3A%2F%2Fd.ibtimes.co.uk%2Fen%2Ffull%2F1460475%2Fniger-delta->

Although what seems to place the Niger Delta on the world's map is its oil and gas resources with the attendant negative impacts of their exploitation, the Niger Delta is also rich in other regards. For instance, the Niger Delta is endowed with 5 different ecological zones - the Mangrove Forest and Coastal Vegetation, Freshwater Swamp Forest, lowland Rain Forest, Derived Savannah and Montane Region.⁶ There is also a variety of climatic conditions, "from the hot equatorial forest type in the southern lowlands to the humid tropical in the northern highlands and the cool montane type in the Obudu plateau area",⁷ which may explain why the Niger Delta is a haven for agriculture.

The region is equally rich in other non-renewable resources including "granite, barites, marble, clay, gypsum, phosphate rock, feldspar, limestone sand, gravel, coal, gold, tin, columbite, tantalite, lead, zinc and wolf Amite", but these resources have not been harnessed for wealth creation, ostensibly because of the petro-dollars from its crude oil and natural gas resources.⁸

The region is a perfect example of the oft-mentioned resource curse.⁹ While the government has realized about \$1 trillion USD from oil and gas resources in the region¹⁰ since its discovery in Oloibiri in present-day Bayelsa state in 1956,¹¹ many of its people have not only been deprived of benefitting from these revenues "but their livelihoods, based on fishing and farming, have also been completely destroyed or undermined by the oil industry."¹² This situation led the United

map.jpg%3Fw%3D367&expw=1032&expw=1200&q=map+of+nigeria+showing+the+niger+delta&simid=607993530852246156&ck=5A6E743C4F07C40A133BDF9F8A2ADE30&selectedindex=0&form=IRPRST&idpp=overlayview&ajaxhist=0&vt=0&sim=11>.

⁶ Master Plan, *supra* note 1 at 60.

⁷*Ibid* at 65.

⁸*Ibid* at 77.

⁹Alex Grzybowski, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: A Report by the United Nations Interagency Framework Team for Preventive Action* (New York: UN Secretariat, 2012) at 15–16 [Grzybowski].

¹⁰ Rhuks Ako & Damilola Olawuyi, "Environmental Justice in Nigeria Divergent tales, paradoxes and future prospects" in Ryan Holifield, Jayajit Chakraborty and Gordon Walker, 1st ed, *The Routledge Handbook on Environmental Justice* (London: Routledge, 2017) 567 at 567 [Ako & Olawuyi in Routledge Handbook on Environmental Justice].

¹¹ Joseph Ebegbulem, Dickson Ekpe & Theophilus Adejumo, "Nigeria Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis", (2013) 4(3) *International Journal of Business and Social Science* 279 at 280 [Ebegbulem, Ekpe & Adejumo].

¹² Messrs CEE Bankwatch Network et al, *The Reality behind EU "Energy Security the Case of Nigeria*, Report of the fact-finding mission to the Niger-Delta 3-4 <<https://bankwatch.org/sites/default/files/energy-security-nigeria.pdf>> (last accessed September 6, 2017) [Fact finding mission to the Niger-Delta].

Nations' Environment Programme (UNEP) to conclude that the "oil industry has been a key sector of the Nigerian economy for over 50 years. But many Nigerians have paid a high price."¹³

The negative impact of resource extraction on the Niger Delta people and environment is huge. Between 1958 and 2010, it is estimated that around 546 million gallons of crude oil had been spilled into the environment,¹⁴ corresponding to an annual spill of about 11 million gallons of crude oil.¹⁵ With forestry, agriculture and fishing accounting for 44% of the peoples' sources of livelihood,¹⁶ the resultant effect can be explained in terms of the poverty index of the region. According to the World Bank, one quarter of the households in the Niger Delta "belongs to the lowest welfare quintile (the core poor),"¹⁷ meaning that of the region's more than 42 million people,¹⁸ at least 10.5 million are extremely poor (people surviving on less than \$1.90 USD a day).¹⁹ Another proof of the region's endemic poverty may be gleaned from the fact that about 46% of employed persons in the Niger Delta "earn less than 5,000 Naira per month"²⁰ which is equivalent to CAD \$7.35. This is just half an hour's minimum wage in Ontario.

In critical sectors, the region also falls short. About 80% of the people living in the rural areas and about 55% of urban dwellers do not have access to safe drinking water.²¹ An estimated 73% of the people rely on firewood as their primary energy source.²² About 72 % of households in the Niger Delta are not linked to the national power grid which means that without affordable private alternatives, which is unavailable, they do not have electricity.²³

¹³ UNEP, *Environmental Assessment of Ogoniland: A Report by the United Nations Environment Programme* (Nairobi: UNEP Secretariat, 2011) 7 [UNEP Report].

¹⁴ *Ibid.*

¹⁵ Samy et al, *supra* note 2 at 137.

¹⁶ UNDP, *Niger Delta Human Development Report* (Abuja: UNDP, 2006) 25 <<http://bebor.org/wp-content/uploads/2012/09/UNDP-Niger-Delta-Human-Development-Report.pdf>> [UNDP Report].

¹⁷ The World Bank, *Niger-Delta Social and Conflict Analysis* (The World Bank: Africa's Sustainable Development Department, 2008) 14 <http://siteresources.worldbank.org/EXTSOCIALDEV/Resources/3177394-1168615404141/3328201-1172597654983/Niger_Delta_May2008.pdf> [The World Bank on the Niger Delta].

¹⁸ Nigeria Data Portal, *Total Population*, online: <<https://nigeria.opendataforafrica.org/xspplpb/nigeria-census>>.

¹⁹ World Economic Forum, *Three things Nigeria must do to end Extreme Poverty*, online: <<https://www.weforum.org/agenda/2019/03/90-million-nigerians-live-in-extreme-poverty-here-are-3-ways-to-bring-them-out/>>.

²⁰ Master Plan, *supra* note 1 at 68.

²¹ *Ibid* at 77.

²² UNDP Report, *supra* note 16 at 29.

²³ The Master Plan, *supra* note 1 at 95.

The sustainability crisis, coupled with infrastructure gaps, has a bearing on the peoples' health, with UNEP concluding that as regards the Ogoni people of the Niger Delta, there is "evidence of a relationship between exposure to spilled oils and acute physical and psychological effects, as well as possible genotoxic and endocrine effects".²⁴ The World Bank reports that infant mortality in the Niger Delta, which stands at 120 per thousand, is greater than the national average of 100 per thousand.²⁵ The life expectancy quotient has been on a downward spiral – it was 60 years in the 1970s, 46.8 years by 2000²⁶ - and has fallen, according to the World Health Organization (WHO), to 40 years in 2015, below the national 54-year average.²⁷ In essence, a Nigerian from another region will most likely outlive their Niger Deltan contemporary.

The grim picture painted above calls for concerted efforts to arrest these negative developments. As such, the goal of this thesis is to explore pathways to environmental sustainability for the vulnerable people in the Niger Delta. One such pathway, as canvassed by experts such as David Boyd, is through Constitutional Environmental Rights (CERs).²⁸

Boyd defines CERs as "environmental provisions [that] have been incorporated into national constitutions."²⁹ What Boyd calls CERs, Louis Kotzé refers to as 'environmental constitutionalism' and argues that "constitutional environmental care is now commonplace, as is evidenced by numerous domestic constitutions. This means that domestic environmental concerns and protective measures have gradually become constitutionalized. Where environmental care is couched in constitutionalist language, as it is here, it is termed 'environmental constitutionalism.'"³⁰ What is deducible from these definitions is that CERs are constitutional guarantees and rights that protect the environment both from human interference and for human well-being.

²⁴ UNEP Report, *supra* note 13 at 9.

²⁵ Paul Francis, Deirdre Lapin & Paula Rossiasco, *Securing Development and Peace in the Niger Delta A Social and Conflict Analysis for Change* (Washington: The Woodrow Wilson International Center for Scholars, 2011) See table 1:1 at 10 and 11 [Francis et al].

²⁶ The Master Plan, *supra* note 1 at 59.

²⁷ WHO, *Oil, Pollution, and Lives Cut Short: Health in the Niger Delta* (April 13, 2015), online: <<http://www.sustainability-international.org/oil-pollution-and-lives-cut-short-health-in-the-niger-delta/>>.

²⁸ David Boyd, *The Environmental Rights Revolution* (Vancouver: UBC Press, 2012) [Boyd].

²⁹ David Boyd, "Constitutions, Human Rights and the Environment: National Approaches" in Anna Grear & Louis Kotze, ed, *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) 170 at 170 [Boyd 2].

³⁰ Louis Kotzé, "Arguing Global Environmental Constitutionalism" (2012) 1 (1) TEL 199 at 208 [Kotzé].

Boyd's research indicates that in countries he studied which have adopted CERs, the CERs have wrought benefits that he categorizes into 9 environmental performance indices, which are useful in resolving the environmental sustainability crisis. They are, that CERs:

1. provide impetus for the enactment of stronger environmental laws;
2. offer a safety net by addressing gaps in environmental legislation;
3. provide bulwarks against environmental legislation rollbacks;
4. lead to improved implementation and enforcement of environmental laws;
5. strengthen Environmental Justice;
6. lead to increased public participation in environmental governance;
7. lead to increased corporate and government accountability;
8. provide a level playing field amidst competing socio-economic interests; and
9. strengthen education and public values about environmental protection.³¹

However, Boyd has not undertaken a detailed study of Nigeria.³² In section 1.7. of this chapter, an outline of how the thesis will utilize insights from Boyd's research will be provided. The thesis will investigate how CERs could produce similar outcomes in Nigeria, if deployed to tackle the sustainability crisis in the Niger Delta. If not, what are the barriers to success, and how could they be overcome? The bulk of this work analyzes these barriers in Nigeria and how to overcome them. In my career as a litigator in Nigeria, I worked on several environmental litigation files, but mostly with unfavorable outcomes for environmental protection because of the challenges of using civil litigation to prosecute environmental litigation. For instance, the limitation period in civil litigation means that cases filed outside the limitation period will be struck out by the court for lack of jurisdiction. Whereas there is no limitation period in Nigeria to institute fundamental rights cases which would be the genre under which justiciable CERs would be classified. The thesis will analyze these limitations and how CERs could assist in resolving

³¹ Boyd, *supra* note 28 at 233-244.

³² *Ibid* at 156.

the barriers to environmental litigation in Nigeria in chapter 5. The reliance on civil litigation for environmental protection with the uncertain outcomes ensues because Nigeria does not have justiciable CERs. As such, the thesis investigates how justiciable CERs could assist in the environmental sustainability of the Niger Delta.

1.2 Ogoniland as the Face of the Niger Delta Sustainability Crisis

Ogoniland remains the only part of the Niger Delta where a reputable international agency – the UNEP – has conducted an environmental assessment of the impact of the oil and gas industry on the environment and the people.³³ Indeed, the Ogoni people typify the Niger-Delta struggle in many regards, ranging from crushing poverty amid stupendous oil wealth, to environmental degradation and gross human right abuses.³⁴ Perhaps what makes their struggle unique is their ability to attract international goodwill to the struggle³⁵ which in turn, has brought international condemnation and pressure,³⁶ which led to the “international boycott of Shell in the 1990s.”³⁷

To resolve the Ogoniland environmental crisis, the Nigerian government requested the UNEP to conduct an assessment of the environmental degradation in Ogoniland.³⁸ The assessment took UNEP 14 months of painstaking work³⁹ after which a report was presented to the federal government in 2011.⁴⁰ But UNEP warned that the report should be regarded as a baseline, since 14 months was inadequate to carry out a comprehensive assessment in Ogoniland, and this suggests that the report may not have captured the full extent of the environmental degradation in Ogoniland.⁴¹

The report blamed the Nigerian government and Shell for their respective roles in the environmental injustices and described Ogoniland as a “tragic history of pollution from oil spills

³³ UNEP Report, *supra* note 13.

³⁴ Carmen Gonzalez, “Environmental Justice, Human Rights, and the Global South”, (2015) 13 Santa Clara Journal of International Law 151 at 152 [Gonzalez].

³⁵ Ike Okonta & Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (San Francisco: Sierra Club Books, 2001) at 200-201.

³⁶ Claude Welch, “The Ogoni and Self Determination: Increasing Violence in Nigeria”, (1995) 33(4) The Journal of Modern African Studies 635 at 649.

³⁷ Anna Zalik, “Oil ‘futures’: Shell’s Scenarios and the Social Constitution of the Global Oil Market” (2010) 41(4) Geoforum 553 at 555 [Zalik].

³⁸ UNEP Report, *supra* note 13 at 6.

³⁹ *Ibid.*

⁴⁰ The UNEP Report on Ogoniland, *The Guardian* (23 August 2015) online: <<https://guardian.ng/opinion/the-unep-report-on-ogoniland/>> [The Guardian].

⁴¹ *Ibid* at 12.

and oil well fires.”⁴² The report noted for instance that 10 among the 15 sites investigated which Shell “records show as having completed remediation, still have pollution exceeding the [Shell] SPDC (and government) remediation closure values. The study found that the contamination at eight of these sites has migrated to the groundwater.”⁴³ UNEP recommended an urgent cleanup and environmental restoration of Ogoniland.⁴⁴ Considering the level of environmental devastation observed, UNEP opined that between 25-30 years may be required for a comprehensive physical restoration of Ogoniland.⁴⁵

Unfortunately, the federal government and Shell are yet to treat the report with the urgency it requires and have not provided any coherent response to the Ogoniland Report.⁴⁶ Indeed, in 2021 – a decade after the report was released, the federal government has admitted that the report is not being implemented in a timely and comprehensible manner. It pledged its preparedness “to regain lost time occasioned by a slip in achieving some timelines in the implementation of the...Report on the clean-up of Ogoniland.”⁴⁷ In the segment on critique of Environmental Justice scholarship, the thesis will provide examples of instances of tardiness in the implementation of the report.

As observed by UNEP, Ogoniland is a microcosm of the Niger Delta with its story of environmental degradation duplicated all over the Niger-Delta.⁴⁸ As shown from the Ogoniland story, the clean-up of the environment is essential, especially since 44% of the Niger Delta people depend on the environment for their livelihoods.⁴⁹ In summary, the Environmental Justice epistemology mirrors the challenges of the Niger Delta people, regarding not only their lack of recognition in the entire resource extractive processes but also the lack of clean-up of the environment that has been degraded in the course of oil exploitation⁵⁰ and inequitable

⁴² UNEP Report, *supra* note 13 at 8.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 12 and 15.

⁴⁵ *Ibid* at 12.

⁴⁶ Hydrocarbon Pollution Remediation Project, “President Buhari Inaugurates Second Governing Council and BoT of Hyprep” (15 March 2021), online: <<https://hyprep.gov.ng/president-buhari-inaugurates-second-governing-council-and-bot-of-hyprep/>> [HYPREP].

⁴⁷ *Ibid.*

⁴⁸ The Guardian, *supra* note 40.

⁴⁹ UNDP Report, *supra* note 16 at 25.

⁵⁰ UNEP Report, *supra* note 13 at 8.

distribution of associated benefits⁵¹ - which includes among others, revenue from resources extracted from the Niger Delta,⁵² employment opportunities in the petroleum industry,⁵³ rights to extract crude oil from marginal fields (oil blocs),⁵⁴ and other infrastructure⁵⁵ - and their exclusion from the decision-making processes.⁵⁶ A more detailed discussion of these issues will be undertaken in chapter 5.

1.3 Research Questions

The aim of this thesis is to investigate how CERs could contribute to the environmental sustainability of the Niger Delta by tackling some of the key internal causes of these environmental challenges. Specifically, the research will use 3 of Boyd's CERs performance indices to assess the 3 major internal law and policy causes of the environmental crisis in the Niger Delta that the thesis will identify, and thereby determine whether, and how, legally enforceable CERs might be useful for the Niger Delta. If not, the thesis will analyze what must change for CERs to achieve the successes Boyd indicates they have achieved in other jurisdictions.

The thesis will look at the prospect of deploying CERs to tackle the (i) lack of environmental regulation; (ii) lack of enforcement; and (iii) the marginalization of the Niger Delta from resource governance in Nigeria. CERs will be analysed as effective alternatives to other internal approaches such as creating new government agencies, producing policies/white papers, or

⁵¹ Seun Bamidele, "The Resurgence of the Niger-Delta Avengers (NDAs) Group in the Niger-Delta Region of Nigeria: Where Does the Economic Deprivation Lie?", (2017) 24(4) International Journal on Minority and Group Rights 537 at 539 [Bamidele].

⁵² Moses Duruji, "Resurgent Ethno-Nationalism and the Renewed Demand for Biafra in South-East Nigeria", (2012) 14(4) National Identities at p.329 [Duruji].

⁵³ "NNPC Appointments: Open Letter to President Muhammadu Buhari – PANDEF", *Wealthinfo* (21 May 2020) online: <<https://www.wealthinfo.net/nnpc-appointments-open-letter-to-president-muhammadu-buhari-pandef/>> [PANDEF]. Note that PANDEF stands for The Pan Niger Delta Forum.

⁵⁴ Dapo Akinrefon, "Niger-Delta Coalition Demands Scrap of Oil Blocs" *Vanguard* (7 March 2013) online: <<https://www.vanguardngr.com/2013/03/niger-delta-coalition-demands-scrap-of-oil-blocs/>>.

The federal government designed the marginal field policy to encourage indigenous participation in the oil sector, so only Nigerians are qualified to bid for marginal fields. Oil mining leases are usually awarded to cover specific locations. Oil mining lessors, who are mostly the TNCs, are encouraged by the federal government to farm-out to indigenous oil companies, some part of their mining lease or marginal oil fields which the TNCs do not consider as having enough yield and worth exploring for oil.

⁵⁵ Godwin Tsa, "\$22.7bn Loan: Southeast Indigenes Sue Buhari, AGF Over Discrimination" *The Sun* (28 June 2020) online: <<https://www.sunnewsonline.com/22-7bn-loan-southeast-indigenes-sue-buhari-agf-over-discrimination/>>.

⁵⁶ Onyeniyi Abe, "Utilisation of Natural Resources in Nigeria: Human Right Considerations" (2014) 3 India Q. 258 at 258-259 [Abe].

pursuing tortious litigation or extraterritorial litigation to tackle the 3 internal causes of environmental degradation in the Niger Delta.

Drawing from the aim of the thesis, the fundamental questions that this thesis will address are:

1. What role could CERs play in tackling the 3 internal causes of environmental harm in the Niger Delta? Specifically:

- a. How could CERs provide the impetus for the enactment of stronger environmental laws and policies to address the existing gaps in Nigeria's environmental regulatory framework?⁵⁷
- b. How could CERs lead to improvement in the implementation of environmental law and policies to address the non-enforcement of the existing environmental regulatory framework in Nigeria?⁵⁸ and
- c. How could CERs help to widen access to justice to enhance the ability of the Niger Delta people to sue and obtain remedies for environmental harms that they suffer due to extraction of petroleum resources in their territory?⁵⁹

2. If CERs have this potential in Nigeria, what internal reforms would be needed for CERs to effectively address the 3 internal causes of the sustainability crisis in the Niger Delta? For instance:

- a. What financing and regulatory structures would assist environmental regulation and regulatory agencies to advance the effectiveness of CERs in dealing with the 3 internal causes of the Niger Delta sustainability crisis?

⁵⁷ Boyd's environmental performance index 1 indicates that CERs could provide the impetus for the enactment of stronger environmental laws.

⁵⁸ Boyd's environmental performance index 4 shows that CERs could lead to the improvement in the implementation and enforcement of environmental laws.

⁵⁹ Boyd's environmental performance index 6 reveals that CERs could widen access to justice to enhance the ability of the Niger Delta people to sue and obtain remedies for environmental harms that they suffer due to extraction of petroleum resources in their territory.

- b. How would a reform towards the quick dispensation of, and easier access to, justice enhance the effectiveness of CERs in tackling the 3 internal causes of the Niger Delta sustainability crisis?
- c. How would the diversification of the Nigerian economy away from over-dependence on the oil and gas resources of the Niger Delta provide the government with the political will to implement and enhance the efficacy of CERs to address the 3 internal causes of the Niger Delta?
- d. What financing and institutional structures would contribute to independence of the Nigerian judiciary to enable the judiciary to enforce CERs to tackle the 3 internal causes of the Niger Delta environmental crisis?
- e. How would a transparency reform to address corruption in Nigeria boost effectiveness of CERs in tackling the 3 internal causes of the Niger Delta sustainability crisis?

3. If CERs have these possibilities, how could Nigeria adopt enforceable CERs for the benefit of its people, especially the Niger Delta?

The answers to these questions will enable the thesis to evaluate the potentials of CERs to tackle the 3 internal causes of the sustainability crisis in the Niger Delta. They will also help to determine what reforms are necessary in the regulatory and general policy architecture for a fuller realization of the potentials of CERs.

1.4. Scope of Thesis

It may be expedient to delineate the focus area of the thesis. Although Nigeria is grappling with many environmental challenges, including domestic and industrial waste collection/disposal, inadequate environmental infrastructure, flooding, desertification, soil erosion and deforestation,⁶⁰ which are further compounded by global environmental challenges like climate change, ozone layer depletion and transboundary dumping of hazardous waste,⁶¹ the focus area

⁶⁰ Margaret Okorodudu-Fubara, *Law of Environmental Protection (Materials and Text)* (Ibadan: Carltop Publications (Nigeria) Limited, 1994) at p. 8 [Okorodudu-Fubara].

⁶¹ *Ibid* at 9.

of the thesis will be the petroleum industry because the industry is a major driver in instigating and perpetuating the sustainability crisis in the Niger Delta.⁶²

Furthermore, while the causes of the sustainability crisis in the Niger Delta include the conduct of the Trans-National Corporations (TNCs) who wield considerable power over the Nigerian government's policy formulation and implementation processes,⁶³ international trade law⁶⁴ and the sustained resource exploitation to feed the developed economies,⁶⁵ the thesis will focus on the internal legal causes of the sustainability crisis in the Niger Delta, 2 reasons. First, the external causes of the sustainability crisis have been addressed at length by other researchers. For example, Joshua Eaton has addressed the power of TNCs in terms of how to eliminate or reduce their stranglehold on the Nigerian government,⁶⁶ and Carmen Gonzalez has analyzed both the impact of international trade law on developing countries⁶⁷ and the unbridled consumption pattern in the developed economies which leads to sustained resource exploitation in the developing countries to feed western markets.⁶⁸ However, there is little literature on the role that CERs could play in tackling the internal causes of the Niger Delta sustainability crisis, and this thesis intends to fill this gap.

Second, addressing the internal causes of the sustainability crisis could also address some of the impacts of the external causes of the sustainability crisis in the Niger Delta. For instance, enacting stronger environmental laws and their across-the-board enforcement could address the unsustainable exploitation of natural resources by TNCs in the Niger Delta, in disregard of the negative environmental impact of their actions. Compelled by strong regulation and stringent

⁶² V. Jike, "Environmental Degradation, Social Disequilibrium, and the Dilemma of Sustainable Development in the Niger-Delta of Nigeria" (2004) 34(5) *Journal of Black Studies* 686 at 689.

⁶³ Rhuks Ako, "A lega(l)cy unfulfilled: Reflections of the Wiwa-led MOSOP and the localisation of human rights" (015) 2(4) *The Extractive Industries and Society* 625 at 628 [Ako].

The TNCs may feature prominently in the research because of the strategic role that they play in the exploitation of resources in the Niger-Delta which further degrade the Niger-Delta environment, however, the TNCs would not be the main focus of the research.

⁶⁴ Carmen Gonzalez, "Bridging the North-South Divide: International Environmental Law in the Anthropocene", (2015) 32 (2) *Pace Env'tl.L.Rev.* 407 at 413 [Gonzalez 2].

⁶⁵ Fact finding mission to the Niger-Delta, *supra* note 12 at 3 & 14.

⁶⁶ Joshua Eaton, "The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment" (1997) 15 *B.U.Int'l L.J.* 261 at 271 [Eaton].

⁶⁷ Gonzalez 2, *supra* note 64 at 412-413.

⁶⁸ *Ibid* at 417.

enforcement, TNC would be forced to operate in a sustainable manner and have greater regard for the consequences of their operations.

Furthermore, it would be too unwieldy to tackle all the internal barriers to the sustainability of the Niger Delta in a single PhD thesis. For this reason, I will concentrate on 3 of the internal causes, which are: (i) gaps in Nigeria's environmental regulatory framework;⁶⁹ (ii) the non-implementation and non-enforcement of existing environmental laws;⁷⁰ and (iii) the marginalization of the Niger Delta in resource governance in Nigeria.⁷¹ There are 2 major reasons to focus on these 3 internal causes.

First, experts have identified them not only as among the fundamental causes of the environmental harm in the Niger Delta but also as the superstructures on which other causes rest.⁷² Eloamaka Okonkwo puts it succinctly:

[A]chieving environmental justice in Nigeria and indeed in other developing countries may not be an easy task. The comparative discussion, for instance, shows that the Nigerian laws are largely outdated, uncover weaknesses and gaps in the relevant laws, and show regulatory gaps in the laws of all the countries discussed. Furthermore, examination of regulatory enforcement has unravelled many problems. With these problems, Nigeria is making little or no progress in reducing environmental injustice caused by oil and gas activities. Not only has this book showed that oil-related pollution caused disproportionate environmental burdens in Nigeria and other developing countries discussed, it also showed weak regulation and inadequate environmental protection to sustain human health and well-being. Facts showed that there is no meaningful and transparent public participation in decision-making and no equitable accessibility of procedures and processes needed to tackle negative environmental impacts. The comparison also revealed a significant level of government hesitation or weak political will to enforce the already weak Nigerian laws and some binding treaties such as the African Charter to give effect to fair and equitable principles in which EJ is rooted. Furthermore, the book shows reform difficulties discussed throughout the book attributed to many reasons caused by minority and under-representation of the Niger Deltans in key places...Causing more issues in the author's opinion is the unclear usage of 13 per cent derivation resource based on the revenue accruing to the Federation Account because not [only] is the allocation not enough to justify the burdens, it is allocated to the states without provision on how the states should use the allocation. All these issues have

⁶⁹ Kayode Oyende, *Oil Pollution Law and Governance in Nigeria* (Ibadan: Stirling-Horden Publishers Ltd., 2017) at 63 [Oyende].

⁷⁰ Eaton, *supra*, note 66 at 271.

⁷¹ Christian A. Lutz, "The Niger Delta Conflict and Military Reform in Nigeria" in Jürgen Rüland, Maria-Gabriela Manea & Hans Born, eds, *The Politics of Military Reform: Experiences from Indonesia and Nigeria* (Heidelberg, New York, Dordrecht and London: Springer, 2012) 201 at 205.

⁷² Eloamaka Okonkwo, *Environmental Justice and Oil Pollution Laws Comparing Enforcement in the United States and Nigeria* 1st Edition (London: Routledge, 2020) at 219 [Okonkwo].

contributed to environmental injustice, as they cause threats to life and health, deaths, hardship, hunger, forced migration, and more.⁷³

Secondly, the 3 internal causes are issues that are mainly related to, and addressed by, laws and policies. The thesis proposes effective and feasible legislative, regulatory and policy changes. It proposes to primarily use 3 of Boyd's CERs performance indices in analyzing the suitability of CERs to tackle the 3 internal causes of the sustainability crisis in the Niger Delta. These indices will not only help to uncover the weaknesses in Nigerian laws and their enforcement but will also identify potential barriers to CERs within the current legal and policy architecture. The thesis offers solutions on how CERs would be implemented if recognized in Nigeria to avoid these barriers.

2 reasons account for the selection of these 3 indices. The first is that they speak directly to the 3 internal causes of the Niger Delta environmental sustainability crisis.⁷⁴ Specifically, Boyd's CERs performance index 1 (suggesting that CERs often provide impetus for the enactment of stronger environmental laws) could address gaps in Nigeria's environmental regulatory framework. Boyd's CERs performance index 4 (arguing that CERs can lead to improvement in the implementation and enforcement of environmental laws) could address the non-implementation and non-enforcement problems with the existing environmental regulatory framework in Nigeria. Lastly Boyd's CERs performance index 6 (finding that CERs can lead to increased public participation in environmental governance) could address the marginalization of the Niger Delta in resource governance in Nigeria.

The second reason for using these 3 indices is that Boyd's remaining indices are either variants of, or could be discussed under, the 3 indices chosen for the thesis. For instance, indices 2, (CERs offering a safety net by addressing gaps in environmental legislation) 3 (CERs providing bulwarks against environmental legislation rollbacks) and 8 (CERs providing a level playing field amidst competing socio-economic interests) could be subsumed under index 1 (CERs providing impetus for the enactment of stronger environmental laws). Furthermore, index 7 (CERs leading to increased corporate and government accountability) could be subsumed under index 4 (CERs leading to improvement in the implementation and enforcement of environmental

⁷³ *Ibid.*

⁷⁴ Boyd, *supra* note 28 at 26.

laws). Lastly, indices 5 (CERs strengthening Environmental Justice); and 9 (CERs strengthening education and public values about environmental protection) could be subsumed under index 9 (CERs leading to increased public participation in environmental governance).⁷⁵ In the segment on the Application of Boyd's CERs Framework to the Thesis, a detailed analysis of the application of Boyd's 3 CERs performance indices to the 3 causes of the sustainability crisis will be undertaken.

The table below represents Boyd's indices chosen for this research, the issues they can address, and the other indices that can be addressed by the chosen indices.

Adopted Index	Identified Problem	Subsumed index
Index 1- CERs providing impetus for the enactment of stronger environmental laws	Gaps in Nigeria's environmental regulatory framework.	Index 2 – CERs offering a safety net by addressing gaps in environmental legislation Index 3 – CERs providing bulwarks against environmental legislation rollbacks; and Index 8 CERs providing a level playing field amidst competing socio-economic interests.
Index 4 – CERs leading to improvement in the implementation and enforcement of environmental laws	Non-implementation and non-enforcement of the existing environmental regulatory framework.	Index 7 – CERs leading to increased corporate and government accountability
Index 6 – CERs leading to increased public involvement in environmental governance	Marginalization of the Niger Delta in resource governance in Nigeria.	Index 5 - CERs strengthening Environmental Justice; and Index 9 -CERs strengthening education and public values about environmental protection

Table 1.1: Boyd's indices and the cause of the Niger-Delta environmental crisis.

⁷⁵ *Ibid* at 28-32. See also Boyd 2, *supra* note 29 at 186.

1.5 Conceptualizing CERs

1.5. 1 History of CERs

It may be difficult to track with exactitude the point at which CERs emerged.⁷⁶ At the international level, while Dinah Shelton traces the origin of environmental rights to the *United Nations' Conference on Human Rights, 1968*,⁷⁷ which produced the *Proclamation of Teheran* of that year, Stephen Turner traces the origin of environmental rights to the *United Nations' Conference on Human Environment (Stockholm Declaration), 1972*.⁷⁸ But there is no direct mention of either environmental rights or the environment in the preamble to, or in any of the 19 articles of, the *Proclamation of Teheran*.⁷⁹ However, the *Stockholm Declaration* is replete with provisions on environmental rights,⁸⁰ for instance, its principle 1 provides for a fundamental right to a healthy environment.⁸¹

At the regional level, there is consensus on the emergence of CERs. Louis Kotze and Ane'l du Plessis opine that the *African Charter on Human and Peoples' Rights, 1981 (ACHPRs)* “was the first regional human rights instrument in the world to provide an environmental right.”⁸² This is corroborated by a host of experts including Michael Kidd,⁸³ Werner Scholtz,⁸⁴ and Turner.⁸⁵

⁷⁶ Stephen Turner, “Introduction: A Brief History of Environmental Rights and the Development of Standards” in Stephen Turner et al, ed. *Environmental Rights the Development of Standards* (UK: Cambridge University Press, 2019) 3 [Turner].

⁷⁷ Dinah Shelton, “Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?” (2006) 35 (35) *Denv.J.Int'l L. & Pol'y* 129 at 129 [Shelton].

⁷⁸ Turner, *supra* note 76 at 1.

⁷⁹ *The Proclamation of Teheran*, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF.32/41 at 3 (1968) <<http://hrlibrary.umn.edu/instree/l2ptichr.htm>>.

⁸⁰ The United Nations, *Report of the United Nations' Conference on the Human Environment*, Stockholm 5-16 June 1972 <https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1>.

⁸¹ Principle 1 provides that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

⁸² Louis Kotze' & Ane'l du Plessis, “The African Charter on Human and Peoples' Rights and Environmental Rights Standards” in Stephen Turner et al, ed, *Environmental Rights the Development of Standards* (UK: Cambridge University Press, 2019) 93 at 98.

⁸³ Michael Kidd, “Environmental Law in Africa”, in Anna Grear & Louis Kotze, ed, *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) 509 at 512.

⁸⁴ Werner Scholtz, “Human rights and the environment in the African Union context”, in Anna Grear & Louis Kotze, ed, *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) 401 at 402.

⁸⁵ Turner, *supra*, note 76 at 6.

This unanimity at the regional level is transferred to the domestic level, where there is a convergence of opinions that 1974 was the year that CERs emerged at the domestic level, but there is disagreement on where it first emerged. Joshua Gellers opines that environmental rights were domesticated for the first time in the *Constitution of the former Socialist Federative Republic of Yugoslavia (Yugoslavia) of 1974*.⁸⁶ Article 87 of the said Constitution provides that:

Working people and citizens, organizations of associated labour, socio-political communities, local communities and other self-managing organizations and communities shall have the right and the duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the like, which endanger these values, and imperil the health and lives of the people.⁸⁷

Turner however argues that the *Constitution of Portugal*, also in 1974, is the first to incorporate environmental rights.⁸⁸ Article 66 of the Portuguese Constitution stipulates, among others, that everyone “has the right to a healthy and ecologically balanced human living environment and the duty to defend it.”⁸⁹ Since 1974, CERs have expanded to such an extent that about 150 national Constitutions have enshrined environmental rights (either in enforceable forms or as policy statements) in their provisions.⁹⁰

Having traced the origin of CERs, a synopsis of the types of CERs that have been introduced in these respective spheres is a significant incident of that history. This necessitates further analysis of the types of CERs at the domestic level. The next segment will address this.

1.5.2 Types of CERs

There is no consensus on the different classes of CERs that are adopted by countries. Nicholas Bryner opines that CERs have 2 classes - substantive CERs (those rights that “create some

⁸⁶ Joshua Gellers, “Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis” (2012) 29(4) Review of Policy Research 523 at 531 [Gellers].

⁸⁷ The constitution of the Socialist Federative Republic of Yugoslavia, 1974 <<https://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf>>.

⁸⁸ Turner, *supra* note 76 at p. 5.

⁸⁹ The Constitution of the Portuguese Republic of April 2, 1976, <<https://dre.pt/part-i>>.

The Portuguese Constitution was not promulgated until April 2, 1976, even though a constituent assembly was put in place in 1974 to commence work on it. This position is stated in the preamble to the Constitution itself. From the foregoing and considering that the Constitution of Yugoslavia came into force on February 21, 1974, the thesis adopts Geller’s version of the historical account.

⁹⁰ James May & Erin Daly, “Global Constitutional Environmental Rights” in Shawkat Alam et al, ed, *Routledge Handbook of International Environmental Law* 603 at 603 [May & Daly].

minimum enforceable guarantee of environmental quality or outcome”) and procedural CERs (those rights that “do not mandate a specific outcome or measure of environmental quality. [But] [t]hey require certain steps in decision-making and policy design in order to safeguard vulnerable interests and to promote transparency, accountability, and representative participation.”)⁹¹ Boyd insists that there are 5 types of CERs. According to him, “[c]onstitutional provisions related to environmental protection can be grouped into five categories: government’s responsibility to protect the environment; substantive rights to environmental quality; procedural environmental rights; individual responsibility to protect the environment; and a miscellaneous ‘catch-all’ category of common provisions.”⁹² May insists that CERs are of 3 kinds: Policy statements, Procedural CERs, and Substantive CERs.⁹³ Gellers affirms that there are 3 types of CERs which are Solidarity, Procedural and Substantive CERs.⁹⁴

The thesis will adopt the classification by May because it accords with the way rights are provided for in Nigeria’s Constitution. Further details on the classification of rights in the Nigerian Constitution will be provided in the segment on Environmental Objectives under the Nigerian Constitution. Seeing that policy statements are not enforceable, in the light of May’s argument that an “unenforceable right is hardly a right at all”,⁹⁵ the thesis will analyze both

⁹¹ Nicholas Bryner, “A Constitutional Right to a Healthy Environment” in Douglas Fisher ed, *Research Handbook on Fundamental Concepts of Environmental Law* (UK and USA: Edward Elgar Publishing Limited, 2016) 168 at 173 [Bryner].

⁹² Boyd, *supra* note 28 at 52 and 59 –70.

Under the first category (government’s responsibility to protect the environment), Boyd mentions government’s duty to protect the environment as coming under this category. Under the second category (substantive rights to environmental quality), Boyd mentions the right to live in a healthy environment as coming under the category. Under the third category (procedural environmental rights), Boyd lists the right to information; the right to participate in decision-making; and access to justice as CERs coming under the category. Under the fourth category (individual responsibility to protect the environment), Boyd mentions the individual duty to protect the environment as coming under the category. Under the fifth category (a miscellaneous ‘catch-all’ category of common provisions), Boyd lists the right to clean water; restraints on private property rights to protect the environment; prohibitions on importing hazardous waste; and the rights of nature as coming under the category.

⁹³ James May, “Constituting Fundamental Environmental Rights Worldwide”, (2005) 23 Pace Env’tl.L.Rev. 113 at 115-116 [May].

Policy statement is when environmental rights are adopted in the Constitution to serve as ideals to influence government decisions regarding the environment. But the shortcoming of policy statement is that it is not enforceable. See May, *ibid* at 116.

⁹⁴ Gellers, *supra* note 86 at 524.

Gellers defines environmental solidarity rights as rights “that establish a specific right relating to the environment that, unlike other forms of rights that may be secured by states alone, mandates global participation for successful enforcement. Solidarity rights are labeled as such because they represent the broad community of actors and universal cooperation required to ‘[attain] a livable world.’” According to Gellers, examples of these rights include the right of self-determination, the right of nondiscrimination, the right to development and the right to peace.

⁹⁵ May, *supra* note 93 at 133.

substantive and procedural CERs because these are the 2 classes of CERs that can be legally enforced.⁹⁶

1.5.2.1 Substantive CERs

There is a lack of unanimity in terms of what rights constitute substantive CERs. Donald Anton and Dinah Shelton seem to suggest that the right to life, the right to health, the right to adequate standard of living, the right to home life, the right to property, the right to respect for privacy, and the right to family life have been interpreted by the courts as substantive CERs.⁹⁷ Gellers argues that “substantive rights that may be used to address environmental issues that affect human life include ‘the right to life, the right to health, the right to an adequate standard of living, and the right to privacy’”,⁹⁸ while May and Daly opine that substantive CERs include “adequate environmental conditions of clean water, air, and land.”⁹⁹

However, the thesis will focus on the right to a healthy environment and the right to clean water as substantive CERs because this appears consistent with the classification of substantive CERs by the African Union and adopted by Nigeria. These 2 rights are the only substantive CERs adopted by the *Revised African Convention on the Conservation of Nature and Natural Resources*, 2017 (Africa’s revised Convention of Nature),¹⁰⁰ to which Nigeria is a signatory.¹⁰¹

⁹⁶ Lanse Minkler and Nishith Prakash, “The Role of Constitutions on Poverty: A Cross National Investigation” (2017) 45(3) *Journal of Comparative Economics* 563 at 568.

⁹⁷ Donald Anton & Dinah Shelton, *Environmental Protection and Human Rights* (New York Cambridge University Press, 2011) 436–487 [Anton & Shelton].

⁹⁸ Gellers, *supra* note 86 at 524.

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⁹⁹ James May & Erin Daly, “Vindicating Fundamental Environmental Rights Worldwide” (2009) 11 (2) *Oregon Review of International Law* 365 at 367 [May & Daly 2].

¹⁰⁰ African Union, *The Revised African Convention on the Conservation of Nature and Natural Resources* <https://au.int/sites/default/files/treaties/7782-treaty-0029_-_revised_african_convention_on_the_conservation_of_nature_and_natural_resources_e.pdf> [Africa’s Revised Conservation Convention].

Article III provides that “In taking action to achieve the objectives of this Convention and implement its provisions, the parties shall be guided by the following: The rights of all peoples to a satisfactory environment favourable to their development.”

Article VII (2) provides that parties “...shall endeavour to guarantee to their populations a sufficient and continuous supply of suitable water...”

¹⁰¹ Nigeria signed the instrument on December 12, 2003, but as of February 6, 2019, Nigeria had not ratified the instrument. See African Union, “List of Countries which have Signed, Ratified/Acceded to the Revised African

Africa's revised Convention of Nature is Africa's foremost Multilateral Environmental Agreement (MEA), "the first to deal with a wide spectrum of sustainable development issues, including land and soil, water, and biological diversity conservation and sustainable use."¹⁰² According to the International Union for the Conservation of Nature, Africa's revised Convention of Nature "was the first regional convention on the environment that served as a basis for the African states to conserve their environment and natural resources and address issues of regional importance...and seeks to integrate conservation and better environmental management strategies into social and economic development aspirations."¹⁰³ Seeing that the objectives of *Africa's revised Convention of Nature* include the enhancement of environmental protection in the African continent¹⁰⁴ and the provision of a framework for the implementation of global MEAs, including the *Stockholm Declaration*, the *Rio Declaration* and *Agenda 21*,¹⁰⁵ it could be argued that its provisions would be authoritative on the constituents of substantive CERs, at least in Africa.

However, some experts are not convinced about the usefulness of substantive CERs. First, it has been argued that substantive CERs are not necessary because Human Rights (HRs) could be and have been applied to protect the environment. According to Malgosia Fitzmaurice, there "is as well the question of redundancy: do we really need a specific generic...environmental right. The environmental issues can and have been addressed and redressed by the application of existing, established human rights."¹⁰⁶ Some experts, including Shelton, argue that applying "existing human rights law has its own limits, however, because it cannot easily resolve threats to other

Convention on the Conservation of Nature and Natural Resources" <https://au.int/sites/default/files/treaties/7782-sl-revised_african_convention_on_the_conservation_of_nature_and_natural_resources.pdf> [List of Signatories].

¹⁰² Civil Society Legislative Advocacy Centre, *The Revised African Convention on the Conservation of Nature and Natural Resources* <<https://www.cislac.org/2013/02/04/the-revised-african-convention-on-the-conservation-of-nature-and-natural-resources-2/>> [Civil Society Legislative Advocacy Centre].

¹⁰³ International Union for Conservation of Nature and Natural Resources, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources*, 2nd ed, (IUCN Environmental Policy and Law Paper No. 56 Rev., 2006) ix.

¹⁰⁴ Article II provides that the "objectives of this Convention are: 1. to enhance environmental protection; 2. to foster the conservation and sustainable use of natural resources; and 3. to harmonize and coordinate policies in these fields with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes."

¹⁰⁵ According to the preamble, the instrument was adopted "to continue furthering the principles of the Stockholm Declaration, to contribute to the implementation of the Rio Declaration and of Agenda 21, and to work closely together towards the implementation of global and regional instruments supporting their goals."

¹⁰⁶ Malgosia Fitzmaurice, "Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law" (2002) 2(1) N.S.A.I.L. 1 at 7.

species or to ecological processes if these are not directly and immediately linked to human well-being.”¹⁰⁷ This is why CERs are also important.

The second criticism is like the first. The argument is that procedural CERs make substantive CERs redundant. The thesis argues that while procedural CERs could help to address certain environmental wrongs, procedural CERs alone may not be able to secure the environment from some forms of environmental degradation because unlike substantive CERs, procedural CERs do not impose substantive qualitative environmental benchmarks to be attained. Writing about procedural CERs, May argues that “as valuable as these prophylactic features [procedural CERs] are, they do not protect substantive rights. It is ...fundamental environmental right that empowers individuals to protect an inalienable human right to a healthy environment.”¹⁰⁸ In support of this view, Shelton concludes that

Some advocates of procedural rights also may have held an overly optimistic view that a fully informed public with rights of participation in environmental decision-making, and access to remedies for environmental harm, would ensure a high level of environmental protection. Such a beneficial outcome may result, but it cannot always be assured...In the environmental field, well-known problems of achieving environmental protection in the face of short-term economic costs, as well as scientific uncertainty or the perception thereof, make reliance on procedure alone insufficient to ensure a safe, healthy or ecologically sound environment.¹⁰⁹

This thesis will therefore address both procedural and substantive CERs.

Third, it has been argued that substantive CERs are vague, and therefore difficult to enforce.¹¹⁰ May argues that “while constitutions are often criticized for being aspirational if not downright unrealistic, fundamental environmental rights epitomize this problem: In what society are policies promulgated ‘in accord with the rhythm and harmony of nature?’”¹¹¹ Shelton weighs in that “the claim of a human right to environmental quality has met resistance from those who argue that the concept cannot be given content and that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental conditions.”¹¹²

¹⁰⁷ Shelton, *supra* note 77 at 131.

¹⁰⁸ May, *supra* note 93 at 116.

¹⁰⁹ Dinah Shelton, “Developing Substantive Environmental Rights”, (2010) 1(1) JHRE 89 at 91 [Shelton 2].

¹¹⁰ Kotzé, *supra* note 30 at 210.

¹¹¹ May & Daly 2, *supra* note 99 at 408.

¹¹² Shelton 2, *supra*, note 109.

However, the courts have been able to give content to, and are enforcing, substantive CERs. The case of *Arco Machore Levy in favor of the Asociacion Ecologista Limonense "Ser Y Conserve, Limon" vs. the Ministry of the Environment and Energy*, decided by the Supreme Court of Costa Rica, is an example. The Ministry of Environment had given a concession to a company to exploit crude oil on the country's Caribbean coast. Although the Environmental Impact Assessment (EIA) that was carried out had indicated that the exploitation of crude oil would significantly affect aquatic fauna, fishery and especially sea turtles, the Ministry was determined to allow the concession to proceed, and a suit was brought against the Ministry regarding its decision to proceed with the concession. The Supreme Court applied the provisions of the constitutional right to a healthy environment (article 50)¹¹³ to the case and ruled against the concession, holding that:

However, article 50 of the Constitution, as noted, directs the State to guarantee the right to a healthy environment. Such an obligation implies that the State must take all possible technical measures to ensure that the activity it approves will not cause damage to the environment...The Constitution requires not only compliance with certain formalities, but also the use, as stated, of all legally and factually possible means to preserve the environment. In the specific case of the exploitation of hydrocarbons, environmental zeal must be more rigorous.¹¹⁴

Similarly, the Ecuadorian case of *Wheeler v. Director de la Procuraduría General del Estado en Loja*¹¹⁵ is apt here. It was alleged that a provincial government in Ecuador had proceeded to expand a road bordering the Vilcabamba River without first conducting an EIA and that the debris from the road construction was thrown into the Vilcabamba River, thereby not only impeding its flow, but also causing momentous injury to the river. In its judgment, the provincial court of Loja held that the rights of the Vilcabamba River had been violated and directed the government to enforce environmental regulations in respect of the road project.¹¹⁶ In coming to its decision, the court applied the right to a healthy environment to the case and held that 'concerning the allegation of the provincial government, that the population ... needs roads, it

¹¹³ Article 50 of the Constitution of Costa Rica, 1949 (as amended) provides that all persons "have the right to a healthy and ecologically balanced environment. For that, they are legitimated to denounce the acts that infringe this right and to claim reparation for the damage caused. The State will guarantee, will defend and will preserve this right. See Costa Rica 1949 (rev. 2011) <https://www.constituteproject.org/constitution/Costa_Rica_2011?lang=en>.

¹¹⁴ *Arco Machore Levy in favor of the Asociacion Ecologista Limonense "Ser Y Conserve, Limon" vs. the Ministry of the Environment and Energy*, Reference Number: 00-007280-0007-CO at para. 8 (V) <<https://vlex.co.cr/vid/-498442750>>.

¹¹⁵ *Wheeler v. Director de la Procuraduría General del Estado en Loja*, case No. 11121-2011-0010.

¹¹⁶ Louis Kotzé and Paola Calzadilla, "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador" (2017) 6 (3) TEL 401 at 427-428 [Kotzé & Calzadilla].

has to be indicated that ... the interest of those communities in a road is reduced in comparison with the interest for a healthy environment.’¹¹⁷ From the foregoing, it is clear that substantive CERs have teeth and therefore it is useful to examine to what extent, and how their benefits could be made to work in the Niger Delta.¹¹⁸

1.5.2.2 Procedural CERs

Just like substantive CERs, there is a divergence of opinions on the classification of procedural CERs. May identifies 7 types of procedural CERs. According to him, several “constitutions contain heightened procedural safeguards for environmental interests, including freedom of association; access to information; public participation; access to courts, opinion, expression and the press; and advanced notification.”¹¹⁹ Kotzé identifies 5 types and argues that “procedural elements of environmental constitutionalism could include, inter alia, access to information; transparency; participative and representative environmental governance; access to justice; and ways to better enforce environmental laws.”¹²⁰ Gellers recognizes 4 – the right to information; the right to public participation, the right to freedom of association; and access to justice.¹²¹ Shelton argues that there are 3 types - the right to environmental information; the right to public participation; and the right to remedies from environmental harm.¹²² Boyd agrees with Shelton on the number but argues that they are the right to information; the right to public participation; and access to justice.¹²³ The thesis will adopt Boyd’s characterization of procedural CERs because they accord with procedural CERs recognizable by Article XVI (tagged ‘Procedural Rights’) of Africa’s revised Convention on Nature.¹²⁴

Again, some experts question the usefulness of procedural CERs. For instance, Thomas Ng likens procedural CERs to due process and argues that due process “entails a remedy where there

¹¹⁷ *Ibid* at 428.

¹¹⁸ Bryner, *supra* note 91 at 174.

¹¹⁹ May, *supra* note 93 at 116.

¹²⁰ Kotzé, *supra* note 30 at 209-210.

¹²¹ Gellers, *supra* note 86 at 524.

¹²² Shelton, *supra* note 77 at 132.

¹²³ Boyd, *supra* note 28 at 66.

¹²⁴ Africa’s Revised Conservation Convention, *supra*, note 100.

Article XVI (1) provides that the “parties shall adopt legislative and regulatory measures necessary to ensure timely and appropriate a) dissemination of environmental information b) access of the public to environmental information c) participation of the public in decision-making with a potentially significant environmental impact; and d) access to justice in matters related to protection of environment and natural resources.”

is a violation of a right, however, in the area of environment such remedy will be ineffective for the damage to the environment most likely cannot be remedied.”¹²⁵ However, it could be argued that apart from providing remedy for environmental degradation through access to justice, procedural CERs also provide the means to avoid damage to the environment through preventive measures including court-based mechanisms like injunctions and prohibitions, thereby foreclosing any need for remedy.¹²⁶

Also, experts argue that there is no need for procedural CERs because these areas are already covered by legislation.¹²⁷ In response, it could be argued that procedural CERs are necessary and go further than legislative procedural laws in terms of compelling obedience, effectiveness and compliance with their provisions.¹²⁸ Also, procedural CERs are harder to amend or repeal unlike legislation, and therefore would provide better environmental guarantees than legislation. Steve Vanderheiden opines that (procedural) CERs “[entrench] a recognition of the importance of environmental protection... [offer] the possibility of unifying principles for legislation and regulation... [and secure] these principles against the vicissitudes of routine politics’...[given] the trumping power of constitutional [procedural environmental] rights.”¹²⁹

Lastly, some experts question the utility of procedural CERs beyond supporting the fulfilment of substantive CERs. On the contrary, apart from supporting substantive CERs, they are also ends in and of themselves. May rightly puts these 2 roles in perspective thus:

procedural rights can provide means to an end or ends in themselves. Procedural rights can be a means for achieving human rights, including those to life, property, water, welfare, education, and the environment. Procedural rights are also their own reward, promoting discourse and democratization and concomitant rights to assemble, speak, and participate in governance...Countries can also develop

¹²⁵ Thomas Ng, *Human Rights = Environmental Rights? Commentary on the Relationship between Human Rights, Environmental Rights and the Right to the Environment* (Germany: LAP LAMBERT Academic Publishing, 2011) 45.

¹²⁶ James May, “Constitutional Directions in Procedural Environmental Rights” (2013) 28 J.Env’tl.L. & Litig. 27 at 31 [May 2].

¹²⁷ *Ibid* at 45.

¹²⁸ Joshua Gellers & Chris Jeffords, “Toward Environmental Democracy?: Procedural Environmental Rights and Environmental Justice” (2018) 18(1) Global Environmental Politics 99 at 101 [Gellers & Jeffords].

¹²⁹ Steve Vanderheiden, “Climate Change, Environmental Rights, and Emission Shares” in Steve Vanderheiden ed, *Environmental Rights* (London: Routledge, 2017) 215 at 220 [Vanderheiden].

See also Selina O’Doherty, “Environmental human rights – concepts of responsibility” in Markku Oksanen, Ashley Dodsworth & Selina O’Doherty eds, *Environmental Human Rights A Political Theory Perspective* (London: Routledge, 2017) 149 at 149 [O’Doherty].

procedural rights to advance specific normative values, such as a quality environment.¹³⁰

As the above literature indicates, both substantive and procedural CERs play strategic and complimentary roles in the achievement of environmental sustainability. Therefore, the imposition of “substantive environmental quality standards does not exclude but rather reinforces procedural rights. Indeed, human rights tribunals have read the procedural rights and corresponding State obligations into substantive human rights guarantees...This approach has been important in instances where the guarantees of procedural rights in human rights instruments are not strong.”¹³¹ Nigeria should not let these challenges keep it from embracing CERs, as this would rob the Niger Delta and its people of the opportunity to tap into potential environmental and human benefits which CERs can provide.

1.5.3 CERs in Nigeria

1.5.3.1 Environmental Objectives under the Nigerian Constitution

It is important to clarify that the Nigerian Constitution already contains reference to environmental guarantees, titled “Environmental Objectives” in section 20 of the 1999 Constitution. This provides that the state “shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.” Experts are divided on the import of section 20. While Olayinka Ojo refers to it simply as an “environmental provision,”¹³² Kaniye Ebeku argues that it is rather a “right to environment.”¹³³ However, Samy et al.¹³⁴ Onyeka Anaebo and Eghosa Ekhatior¹³⁵ argue that going by the wording of section 20, the provision seems to create a state duty to protect the environment, rather than granting citizens a right to environment.

Another important factor is that section 20 is contained in chapter II of the 1999 Constitution, titled “Fundamental Objectives and Directive Principles of State Policy.” Chapter II is

¹³⁰ May 2, *supra* note 126 at 28-29.

¹³¹ Shelton 2, *supra* note 109 at 112.

¹³² Olayinka Ojo, “Enforceability of Environmental Rights: A Possible Panacea to Man’s Environmental Imbroglio – Nigeria’s Niger-Delta as a Case Study” (2020) 33 (1) *Afrika Focus* 125 at 125.

¹³³ Kaniye Ebeku, “Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: *Gbemre v. Shell* Revisited” (2007) 16 (3) *RECIEL* 310 at 316 [Ebeku].

¹³⁴ Samy et al, *supra*, note 2 at 139.

¹³⁵ Onyeka Anaebo & Eghosa Ekhatior, “Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation” (2105) 17 (2) *Env L Rev* 82 at 90.

unenforceable by reason of section 6 (6) c) of the 1999 Constitution, which provides that judicial powers in the country “shall not...extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with Chapter II of this Constitution.”¹³⁶ Thus, the 1999 Constitution only provides for non-justiciable environmental objectives and this seems insufficient to protect the Niger Delta from the incidence of oil and gas exploitation in its territory, since “no court of law can exercise jurisdiction to hear any matter that is connected with the provisions of that chapter. In other words, even the government’s ‘constitutional’ responsibility to protect the environment cannot be judicially enforced, let alone environmental rights for victims of environmental damage.”¹³⁷

Writing on the importance of justiciability to the enjoyment of CERs, Boyd contends that in “the absence of enforceability, governments may evade their responsibility to protect the environment, and affected individuals may be deprived of a remedy for violations of their right to a healthy environment.”¹³⁸ This is exemplified by the Niger Delta situation. In view of the above, if the analysis in the thesis indicates that CERs could help to wrestle with environmental degradation, the thesis will be recommending that Nigeria adopt CERs (the right to a healthy environment, the right to water, the right to environmental information, the right to public participation in environmental matters and access to justice) in the enforceable part of its Constitution for 2 reasons. Firstly, even if section 20 of the 1999 Constitution were made justiciable, it seems inadequate to provide the kind of protection needed for environmental sustainability in the Niger Delta because the language of section 20 is restrictive. It only provides that the state “shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.” It would be onerous, for instance, to extend the right provided in section 20 to include procedural CERs and thereby empower citizens to legally enforce this state obligation. Secondly, the level of effort required to make section 20 of the 1999 Constitution justiciable is the same as required to provide for a new set of CERs: both will require the amendment of the 1999 Constitution, and it seems strategic to aim for greater certainty of protection. In the segment on procedure to amend the Nigerian Constitution is a

¹³⁶ The Constitution of the Federal Republic of Nigeria, 1999 [Nigeria’s 1999 Constitution].

¹³⁷ Samy et al, *supra*, note 2 at 139.

¹³⁸ Boyd 2, *supra*, note 29 at 185.

synopsis of the process for amending the Nigerian Constitution to include environmental rights. It would, for instance, be more logical to aim for a definite positive right of the people to enjoy a healthy environment that corresponds to, and enables the enforcement of, a state duty to protect the environment.

1.5.3.2 Expansive Interpretation of Human Rights to include Environmental Rights in Nigeria

One of the effects of lack of CERs in Nigeria is the fact that Nigerians now resort to applying to the courts for an expansive interpretation of other constitutionally enforceable HRs, like the right to life and the right to the dignity of the human person, to access and enforce the right to a healthy environment. But as with all constitutional interpretations, including CERs, court decisions are unpredictable. The case of *Jonah Gbemre v. Shell & Others*¹³⁹ highlight the judicial unpredictability. The applicant on behalf of his community in the Niger Delta, instituted the suit against the defendant at the Federal High Court (FHC). The applicant alleged, among others, that the continued flare of gas by the defendant during crude oil extraction in their community as permitted under section 3(2) (a) and (b) of the *Associated Gas Re-injection Act, 1979*,¹⁴⁰ violates their right to life (section 33(1)) and right to the dignity of human person (section 34(1)) guaranteed by the Nigerian Constitution, and by extension, their right to a healthy environment. The court observed, among others, that the said section 3(2) (a) and (b) of the *Act*, which permits gas flare in Nigeria, is inconsistent with the right to life and right to the dignity of human person guaranteed by the Constitution.¹⁴¹ Consequently, the court extended the application of the right to life and the right to the dignity of human person to include the right to a healthy environment and held that “these constitutionally guaranteed rights inevitably include the right to a clean, poison-free, pollution-free healthy environment.”¹⁴²

At first glance, this decision creates the impression that Nigeria protects the right to environment as an element of the constitutional right to life or right to dignity of human person. However, in practice this may not be the case because *Gbemre’s Case* is currently on appeal and until the appeal is decided, the precedent enunciated in the case is not a definitive pronouncement on this

¹³⁹ (2005) AHRLR 151 (NgHC 2005) <<https://www.globalhealthrights.org/wp-content/uploads/2013/02/HC-2005-Gbemre-v.-Shell-Petroleum-Development-Company-and-Ors..pdf>> [*Gbemre v. Shell*].

¹⁴⁰ Cap A25 Vol. 1, L.F.N., 2004 [*Associated Gas Re-injection Act, 1979*]

¹⁴¹ Para. 5 (6) of the Judgment.

¹⁴² Para. 5 (3) of the Judgment.

important issue. However, the quick resolution of the appeal is not imminent as it appears that the appellate process has stalled. According to Rhuks Ako,

Returning to the Gbemre case, although the defendants have appealed the decision of the High Court, the appellate process has stagnated under strange circumstances. First, it was reported that staff of the Court of Appeal (CA) wrongly adjourned the case without any notice to the applicant or his lawyers and misplaced the case file. Second, a date to hear the substantive appeal is yet to be fixed several years later. This case has the potential to change the legal landscape of enforcing the right to environment in Nigeria generally and oil-related litigation in particular. The sluggishness in determining the case may not be unrelated to the fear of the possible impacts an unfavourable decision may have for the oil sector. In the interim, and for as long as the Gbemre case remains on appeal, the status quo – gas flaring and its attendant negative impacts on human rights – remains.¹⁴³

From the perspective of the HRs approach to the environmental sustainability of the Niger Delta, Gbemre's case seems a missed opportunity on several fronts. First, the enforcement of Gbemre's case had the potential to end gas flare in the Niger Delta since the "focus [of the case] was on the establishment of a right to a clean, poison-free and pollution-free healthy environment. The judgment also aimed at bringing a total end to gas flaring in Jwherekan Community [and by extension, the Niger Delta]."¹⁴⁴ Second, the enforcement of Gbemre's case would give a new lease of life to the judiciary and provide the needed impetus to uphold environmental laws and further the sustainability of the Niger Delta. Gbemre's case "is the first...strong intervention by the judiciary to curb the excesses of the oil MNCs and order the enactment of a law which will compel environmentally friendly practice."¹⁴⁵ However, the victory in Gbemre's case remains pyrrhic as the pending appeal prevents the enforcement of the environmentally friendly judgement.¹⁴⁶ Third, the implementation of the decision in Gbemre's case would have reconciled Nigerian laws allowing gas flare with the provisions of the Nigerian Constitution on the right to life (section 33 (1)),¹⁴⁷ the right to dignity of the human person (section 34 (1))¹⁴⁸ and with the

¹⁴³ Rhuks Ako, *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (London & New York, Routledge, 2013) at 26 [Ako 2].

Despite repeated search, I have not been able to confirm the current status of the case.

¹⁴⁴ Bukola Faturoti, Godswill Agbaitoro and Obinna Onya, *Environmental Protection in the Nigerian Oil and Gas Industry and Jonah Gbemre v. Shell PDC Nigeria Limited: Let the Plunder Continue?* (2019) 27 (2) A.J.I.C.L. 225 at 234 [Faturoti, Agbaitoro & Onya].

¹⁴⁵ *Ibid* at 235.

¹⁴⁶ *Ibid*.

¹⁴⁷ Section 33 (1) of Nigeria's 1999 Constitution provides that every person "has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria."

¹⁴⁸ Section 34 (1) of Nigeria's 1999 Constitution provides that every individual "is entitled to respect for the dignity of his person, and accordingly—(a) no person shall be subjected to torture or to inhuman or degrading treatment; (b)

provision of the ACHPRs on the right to a healthy environment (article 24).¹⁴⁹ As argued by some experts, Gbemre's case was meant to "bring about a reform of the laws relating to gas flaring in Nigeria by declaring the practice to be inconsistent with the rights enshrined under sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and Article...24 of the African Charter on Human and Peoples' Rights."¹⁵⁰ Lastly, according to some experts, the implementation of the Gbemre decision has the potential to reduce or eradicate militancy in the Niger Delta, which has resulted in the loss of oil revenue for the Nigerian government as militant groups in the region justify their actions as responses to the TNCs-induced environmental crisis.¹⁵¹ From the foregoing, enforceable CERs could present a more direct and grounded opportunity to address the environmental degradation of the Niger Delta since the basis of a judicial approach would not then be an expansive interpretation of constitutional HRs provisions nor reliance on the provisions of the African Charter but would be premised on domestic CERs.

1.5.3.3 CERs Complimenting Conventional Human Rights in Nigeria

In many countries, HRs have been extended and applied to protect the environment.¹⁵² This may explain why some experts argue that there is no difference between HRs and CERs because both have similar aims. CERs recognize that the right to an "adequate environment is as basic a condition of human flourishing as any of those that are already protected as human rights."¹⁵³ The argument, for instance, is that the right to an adequate environment satisfies the criteria for a human right to life and right to dignity of human person guaranteed by the Nigerian Constitution, since these constitutional provisions protect human interests that could be threatened by

no person shall be held in slavery or servitude; and (c) no person shall be required to perform forced or compulsory labour."

¹⁴⁹ African Union, *African Charter on Human and Peoples' Rights* <https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf>.

Article 24 provides that "All peoples shall have a right to a general satisfactory environment favourable to their development."

¹⁵⁰ Faturoti, Agbaitoro & Onya, *supra* note 144 at 227-228.

¹⁵¹ *Ibid* at 238.

¹⁵² Shelton, *supra* note 77 at 131.

¹⁵³ Tim Hayword, *Constitutional Environmental Rights* (UK: Oxford University Press, 2004) at 8.

See also Joshua Gellers, *The Global Emergence of Constitutional Environmental Rights* (London, Routledge, 2017) at 2.

environmental harms and would also be truly universal, as environmental interests are common to all humans.¹⁵⁴

On the other hand, Shelton admits that although both HRs and CERs are similar and sometimes overlap, both are different in their pursued objectives. Shelton argues that although both have shared “interests and objectives”, they are not necessarily interchangeable as “obviously not all human rights violations are necessarily linked to environmental degradation. Likewise, environmental issues cannot always be addressed effectively within the human rights framework, and any attempt to force all such issues into a human rights rubric may fundamentally distort the concept of human rights.”¹⁵⁵ Shelton’s opinion seems apt because existing human rights only apply to the environment when there is an overlap between environmental concerns and their immediate, anthropocentric focus areas. Justice Glazebrook corroborates Shelton by arguing that the “focus of existing [human] rights [are] not specifically on the environment. They will only apply where environmental concerns happen to coincide with their immediate focus.”¹⁵⁶

From the foregoing and given the unpredictability around judicial reasoning generally, and the Nigerian courts’ decisions in cases where the ask is extending existing HRs to environmental protection, it may be expedient for Nigeria to adopt CERs both as compliments to existing HRs and as additional tools to tackle the sustainability crisis in the Niger Delta. So, if Nigeria decided to adopt justiciable CERs, how would this be done in practice?

1.5.3.4 Procedure to amend the Nigerian Constitution to provide for Environmental Rights

Justiciable HRs, without CERs components, were adopted for the first time in Nigeria in Chapter III of the defunct 1960 independent Constitution, tagged “Fundamental Rights.”¹⁵⁷ But the compartmentalisation between enforceable HRs and unenforceable CERs in Nigeria appeared for the first time in Nigeria’s defunct 1979 Constitution and the current Constitution only maintained

¹⁵⁴ Vanderheiden, *supra* note 129 at 220.

¹⁵⁵ Dinah Shelton, “Human Rights, Environmental Rights, and the Right to Environment” in Steve Vanderheiden ed, *Environmental Rights* (London: Routledge, 2017) 509 at 511.

¹⁵⁶ Justice Glazebrook, “Human rights and the Environment” in Paul Martin et al, eds, *The Search for Environmental Justice* (UK & USA: Edward Elgar Publishing, 2015) 85 at 86 [Glazebrook].

¹⁵⁷ Hemen Faga, Francis Aloh and Uchechukwu Uguru, “Is the Non-Justiciability of Economic and Socio-Cultural Rights in the Nigerian Constitution Unassailable? Re-Examining Judicial Bypass from the Lens of South African and Indian Experiences” (2020) 14 (3) *Fiat Justisia* 203 at 203 [Faga, Aloh & Uguru]. See the defunct 1960 Constitution.

that tradition.¹⁵⁸ According to experts, 2 reasons were advanced by the framers of the 1999 Constitution for maintaining the practice of compartmentalizing HRs and CERs in Nigeria. First, HRs “were deemed self-executing rights and imposed little or no positive duties on the government; In contrast, [CERs] are ‘programmatically’ positive rights that would require the government to take deliberate steps to ensure the enjoyment of the rights.”¹⁵⁹ The argument exposes the disparagement of the environment by Nigeria and supports the broader argument made in this thesis - that Nigeria rationalizes economic and other considerations over the protection of the Niger Delta environment. Unfortunately, the environment cannot wait for when the government is ready to protect it. As argued by Emosiorame Idornigie-Pearce, CERs should not be “left to an unspecified future mainly because a state is unable to fulfil their obligations. [Environmental] policies which have been laid down [even in the unenforceable segment of the Constitution] are expected to be executed by the state.”¹⁶⁰ Second, the framers of the 1999 Constitution argued that HRs are ‘easily justiciable. By contrast, [CERs] are different...They impose obligations of a kind, which are not [easily] justiciable.’”¹⁶¹ On the contrary, and as already argued above in the segment on Substantive CERs, courts around the world have been able to give content to, and are enforcing, CERs. This is a pointer to the justiciability of CERs and the potential ability of Nigerian courts to adjudicate on justiciable CERs if adopted in the Constitution.

How would enforceable CERs be included in the Nigerian Constitution? The Nigerian Constitution provides separate procedures for amending various segments of the constitution. There are at least 3 routes to provide for justiciable CERs in Nigeria. First, by making the limited content of section 20 of the Constitution justiciable; secondly, by amending the Constitution to provide for environmental rights in a separate Chapter; and lastly, by inclusion of environmental rights in Chapter IV (Fundamental Rights) of the Constitution. To make section 20 of the Constitution justiciable, section 6 (6) (C) of the Constitution must be amended. A Bill to amend

¹⁵⁸ Emosiorame Idornigie-Pearce, “Realisation of Socio-Economic Rights in Nigeria: A Comparative Study” (2022) Thesis submitted to Canterbury Christ Church University for the Degree of Doctor of Philosophy at 23-24 <j31ZO (proquest.com)> [Idornigie-Pearce]. See also the Constitution of the Federal Republic of Nigeria, 1979. While enforceable CERs were contained in chapter IV titled, “Fundamental Rights” of the defunct 1963 Constitution, CERs were contained in chapter II of the said constitution, titled “Fundamental Objective and Directive Principles of State Policy.”

¹⁵⁹ Faga, Aloh & Uguru, *supra* note 157 at 204.

¹⁶⁰ Idornigie-Pearce, *supra* note 158 at 24.

¹⁶¹ Faga, Aloh & Uguru, *supra* note 157 at 204.

section 6 (6) (C) must be approved by at least two-third of the members of the Senate and the House of Representatives. Then the Bill is approved by at least two-thirds of the 36 State Houses of Assembly.¹⁶² The same process to make section 20 justiciable is also required to provide for enforceable rights in any other part of the Constitution other than Chapter IV. However, to include environmental rights in Chapter IV where other justiciable constitutional rights are provided for, such a Bill must be approved by at least four-fifths of the members of the Senate and of the House of Representatives and approved by at least two-thirds of the 36 States Houses of Assembly.¹⁶³ This is a more onerous task. From the analysis, adding CERs to the Constitution outside the justiciable Chapter IV is the least cumbersome and more rewarding approach. Because of the socio-political configuration of Nigeria, achieving even this seemingly less cumbersome constitutional approach would still constitute a barrier to the adoption of enforceable CERs in Nigeria. In chapter 3 in the segment on political dynamic of Nigeria, the thesis will analyze the issues that could prevent the legislature from enacting laws that could be beneficial to the Niger Delta and how the impediments to environmental law-making in Nigeria could be addressed. However, before this is done, it is necessary to inquire whether CERs could fulfil their potential in the context of Nigeria. This is the purpose of this thesis.

1.6 Methodology – Doctrinal Research Methodology

Legal doctrinal research methodology may be regarded as one of the main methodologies for legal research. Suzanne Egan describes it as the “core legal research method”,¹⁶⁴ and Terry Hutchinson opines that the methodology “best typifies a distinctly legal approach to research.”¹⁶⁵ A unique feature of the methodology which makes it apt for legal research is its suitability to provide a systematic analysis of the rules governing specific legal categories, the relationship

¹⁶² Section 9 (2) provides that “An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.”

¹⁶³ Section 9 (3) provides that “An Act of the National Assembly for the purpose of altering the provisions of this section, section 8, or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by a resolution of the House of Assembly of not less than two-thirds of all the States.”

¹⁶⁴ Suzanne Egan, “The Doctrinal Approach in International Human Rights Law Scholarship” in Lee McConnell & Rhona Smith, eds, *Research Methods in Human Rights* (London: Routledge, 2018) at 24 [Egan].

¹⁶⁵ Terry Hutchinson, “Doctrinal Research Researching the Jury” in Dawn Watkins and Mandy Burton, 2nd eds, *Research Methods in Law* (London & New York, Routledge, (2018) at 8.

between rules, and problematic areas as well as a forecast of future events.¹⁶⁶ The thesis employs the methodology to analyze the Nigerian regulatory framework on environmental protection, and to analyze the relationship between the extant laws as they are currently structured and the Niger Delta environmental crisis. It analyzes the specific rules of other jurisdictions and make predictions about possible results of adopting certain rules and legal structures in Nigeria. The methodology is apt in research projects where legal norms may have to be researched and analyzed,¹⁶⁷ which is what this thesis does. This project is an attempt at analyzing laws and legal systems relating to environmental protection in the Niger Delta situation within the Nigerian legal framework.

The core of doctrinal scholarship is to probe the laws in relation to a subject matter and this entails the identification of relevant legal norms – treaties, constitutional and statutory provisions; and judicial pronouncements (both international and domestic) – and secondary sources that are relevant to the research at hand.¹⁶⁸ Central to the thesis is the analysis of the efficacy of CER provisions in countries that have deployed them and the potential for Nigeria to benefit from a similar exercise. The methodology is apt for the thesis since doctrinal scholarship typically goes beyond unexamined statements of the law to a critique of the law, and results in recommendations for possible reforms and/or reconstruction.¹⁶⁹

This thesis aims not only to restate the law as it relates to the Niger Delta and environmental laws either in Nigeria or elsewhere, but also to scrutinize the rules and the milieu in which they are enacted and implemented to draw analogies and make conclusions on possible reforms to the Constitution for CERs as well as other legal and regulatory reforms for addressing the Niger Delta environmental crisis. The thesis analyzes not just the law as it is, but the reason for, and consequences of the norms. In addition, the thesis also examines the structures that hold up the system as it currently exists. As well, it explores possibilities for change, consequences of such change, and the structures that are required to sustain the changed systems and regulations. The

¹⁶⁶ Terry Hutchinson & Nigel Duncan, “Defining and Describing What We Do: Doctrinal Legal Research” (2014) 17(1) *Deakin LR* 87 at 101.

¹⁶⁷ Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in reforming the Law” (2015) 8(3) *Erasmus Law Review* 130 at 133.

¹⁶⁸ Suzanne Egan, “The Doctrinal Approach in International Human Rights Law Scholarship” in Lee McConnell & Rhona Smith, eds, *Research Methods in Human Rights* (London: Routledge, 2018) at 31-32 [Egan].

¹⁶⁹ *Ibid* at 27–28.

legal doctrinal methodology is enriched because it is deployed alongside Boyd's Framework on CERs which serves as the research's analytical framework, as explained below.

1.7 Analytical Framework – Boyd's CERs Framework

Boyd, a leading Canadian environmentalist, lawyer and Associate Professor at the University of British Columbia, and presently the UN Special Rapporteur on Human Rights and the Environment,¹⁷⁰ conducted quantitative research to investigate the efficacy of CERs in furthering environmental sustainability.¹⁷¹ From "an almost exhaustive empirical analysis, Boyd concludes that there is a consistent correlation between constitutional environmental protection and superior environmental performance which might explain why 150 national constitutions today include environmental protection provisions...In other words, there is sufficient empirical evidence that environmental constitutionalism improves environmental governance outcomes."¹⁷²

For these reasons, and in the manner provided in the research methodology, the thesis will apply Boyd's CERs Framework as the research's analytical framework to answer the research questions. Boyd argues that "the ultimate test of constitutional environmental rights is whether they contribute to cleaner air, soil, and water, and healthier people and ecosystems."¹⁷³ To investigate whether CERs lead to better environmental performance, Boyd carried out empirical research comparing the environmental outcomes of Organization for Economic Co-operation and Development (OECD) countries with CERs and those without.

To develop his conclusions, Boyd analyzes 5 key measures: national ecological footprint;¹⁷⁴ the evaluation of environmental performances of the OECD countries (by the Simon Fraser University);¹⁷⁵ the ranking of environmental performance of the seventeen biggest and richest OECD countries (by the Conference Board of Canada);¹⁷⁶ the ease of ratification of 5 MEAs by

¹⁷⁰ David Boyd, "Biography" <<http://davidrichardboyd.com/biography/>>.

¹⁷¹ Boyd, *supra* note 28 at 17.

¹⁷² Louis Kotze, *Global Environmental Constitutionalism in the Anthropocene* (England: Bloomsbury Publishing, 2020) 146.

¹⁷³ Boyd 2, *supra* note 29 at 196.

¹⁷⁴ Boyd, *supra* note 28 at 258.

¹⁷⁵ *Ibid* at p. 261.

¹⁷⁶ *Ibid* at p. 263.

OECD countries (which may indicate a desire to protect the environment);¹⁷⁷ and the analysis of emission rates of 3 compounds - (Nitrogen Oxide (NO), Sulphur Oxide (SO) and Greenhouse Gas (GHG)) by the OECD countries.¹⁷⁸

The results indicate that OECD countries with CERs perform better than their counterparts without CERs across these 5 areas.¹⁷⁹ Specifically, it shows that countries with justiciable CERs have smaller ecological footprints, achieve better environmental performances, are predisposed to ratify MEAs and have reduced NO, SO and GHG emission rates.¹⁸⁰ From the foregoing, Boyd concludes that, notwithstanding their drawbacks, CERs tend to lead to 9 beneficial environmental outcomes or what the thesis calls ‘Boyd’s CERs performance indices.’ These findings are encouraging, because even a slight improvement in the sustainability profile of the Niger Delta would be of immense benefit to the Niger Delta people.

Boyd, however, acknowledges that the impact of CERs was not very discernible in countries where there is no rule of law (for example effective legal institutions, including an independent judiciary), or in countries with large poor populations, deep conflicts or repressive regimes, including many African countries.¹⁸¹ This perspective is significant because Nigeria has elements of the impediments mentioned by Boyd. The thesis takes a critical look at how these impediments, which frustrate the realization of CER-induced environmental outcomes in these countries, could be overcome, for a successful deployment of CERs in Nigeria.

1.7.1 Application of Boyd’s CERs Framework to the Thesis

Boyd’s research establishes that there is a positive relationship between justiciable CERs and environmental performance in OECD countries with strong governance structures. As shown above, Nigeria does not have enforceable CERs. The thesis uses 3 of Boyd’s CERs performance

¹⁷⁷ *Ibid* at p. 265.

¹⁷⁸ *Ibid* at p. 256.

¹⁷⁹ For result on Ecological Footprint, see Boyd, *ibid* at 258.

see Boyd, *ibid* at 260 for the analysis of the ranking of OECD countries by the Simon Fraser University.

see Boyd, *ibid* at 263 for the analysis of the ranking OECD countries by the Conference Board of Canada.

see Boyd, *ibid* at 267 for the analysis of the ease of ratification of 5 MEAs by OECD countries,

see Boyd, *ibid* at 269, 270 & 272 for the analysis of emission rates of 3 compounds among OECD countries.

¹⁸⁰ Boyd 2, *supra* note 29 at 196.

¹⁸¹ *Ibid* at 197.

indices to examine whether justiciable CERs could help to tackle 3 of the main internal causes of the environmental degradation in the Niger Delta. The next sections elaborate on this.

1.7.1.1 Addressing Gaps in Nigeria's Regulatory Framework

Boyd's CERs performance index 1 suggests that CERs can provide impetus for the enactment of stronger environmental laws, as evidenced by the results in the countries he studied. The question the thesis ask is, could CERs help to address gaps in Nigeria's environmental regulatory framework? Boyd argues that CERs influence environmental law-making in 3 ways.

First, CERs can have cascading effects on environmental law-making. According to Boyd, there "is extensive evidence that constitutional recognition of the right to a healthy environment influences the development of national environmental legislation. In at least seventy-eight out of ninety-two nations, environmental laws were strengthened after the constitutionalization of environmental protection to incorporate substantive, and in many countries procedural, environmental rights."¹⁸²

Second, the evidence shows that courts are more likely to act upon environmental laws which are backed up by CERs, and this encourages the legislature to enact additional environmental legislation. According to Boyd, the "constitutionalization of environmental protection provides another major benefit to environmental legislation in that courts appear more likely to defend environmental laws and regulations...The knowledge that environmental laws have a constitutional backstop may encourage governments to enact stronger environmental laws with confidence that the laws will withstand legal challenges."¹⁸³

Third, a constitutional Right to Environment means that governments must do advance screening of proposed new laws to ensure their compliance with this right. Boyd opines that "[a]nother benefit of constitutional recognition of the right to a healthy environment is that most, if not all, governments will employ lawyers to screen all prospective laws and regulations to ensure that they are consistent with the government duty to respect, protect, and fulfill the right."¹⁸⁴

¹⁸² Boyd, *supra* note 28 at 233.

¹⁸³ *Ibid* at 234.

¹⁸⁴ *Ibid*.

The thesis investigates whether adopting justiciable CERs in Nigeria could lead to better environmental laws and what other changes would be needed for CERs to provide this benefit. But it may require more than just constitutionalizing enforceable environmental rights for the legislature in Nigeria to begin to be persuaded to enact environmental laws that would be useful in the Niger Delta context. The thesis focuses on 2 key barriers that may likely challenge the potentials of environmental law-making to tackle the environmental degradation in the Niger Delta: (i) the conflicting interests of Nigerian legislators and (ii) the under-representation of the Niger Delta in Nigeria's National Assembly (NASS). Chapter 3 explores the potential benefits and barriers to CERs being able to lead to improved environmental law-making in Nigeria. The chapter examines the state of the environmental laws, prior to and after the adoption of CERs, in countries with enforceable CERs, to ascertain the improvements in environmental laws in these countries and how much the improvements could be attributed to CERs, as well as what would be needed for CERs to manifest these improvements in Nigeria.

1.7.1.2 Implementation and Enforcement of Environmental Laws

The thesis will investigate whether Boyd's CERs performance index 4 - the finding that CERs can lead to improvement in the implementation and enforcement of environmental law - could address the problem of non-implementation and non-enforcement of existing environmental legislation in Nigeria. Boyd observes that in many countries where enforcement of environmental regulations had been lacking, CERs have led to improved implementation and enforcement.¹⁸⁵ Specifically, he argues that CERs "should ensure that governments establish and adequately resource a system for implementing, monitoring compliance with, and enforcing environmental laws and regulations."¹⁸⁶

This suggests that justiciable CERs in the Niger Delta context might have the potential to help in the following three areas: (i) prompting the monitoring of compliance with environmental regulations; (ii) leading to the actual implementation of environmental regulations by the respective agencies of government; and (iii) enhancing judicial enforcement of environmental laws and regulations. Boyd opines that litigation based on CERs can improve the implementation and enforcement of environmental laws. He also argues that relying on environmental litigation,

¹⁸⁵ *Ibid* at 29.

¹⁸⁶ *Ibid*.

the people, groups and environmental non-governmental organizations “have supplemented the enforcement efforts of the state, drawn attention to violations, and provided an impetus for allocation of additional resources to environmental services and protection.”¹⁸⁷

However, certain peculiarities in Nigeria could reduce the potency of CERs in enhancing environmental compliance. The thesis will analyze these tendencies under 2 broad categories: (i) the high level of corruption, evidenced by environmental regulatory agencies receiving (financial and other) inducements to refrain from enforcing environmental laws; and (ii) the political economy of Nigeria, which is dependent on the oil and gas resources of the Niger Delta, meaning that the government is not interested in implementing and enforcing environmental legislation which could reduce government finances. Chapter 4 analyzes these issues and proposes solutions on how they could be overcome. The chapter also examines the level of implementation and enforcement of the environmental laws, before and after the adoption of CERs, in the countries that have adopted enforceable CERs, to evaluate advancements made in the implementation and enforcement of environmental laws in those countries and whether such advancements could be credited to CERs. Again, it concludes with specific recommendations for Nigeria.

1.7.1.3 Enhancing the ability of the Niger Delta to sue and obtain remedies from environmental injuries.

Lastly, the thesis investigates whether Boyd’s CERs performance index 6, showing that CERs could widen access to justice and that a wider access to justice could enhance the ability of the Niger Delta to sue and obtain remedies from environmental harms that they suffer, in 2 ways. First, CERs could widen access to justice by providing the people with different cost-effective avenues to approach the courts to protect the environment. According to him, procedural innovations “have radically increased the ability of citizens, communities, and environmental nongovernmental organizations (ENGOS) to seek judicial protection of their constitutional rights, including the right to a healthy environment. These innovations reduce costs, decrease delays, and minimize risks previously associated with pursuing judicial remedies.”¹⁸⁸

¹⁸⁷ *Ibid* at 237.

¹⁸⁸ Boyd 2, *supra* note 29, at 190-191.

Second, CERs could also widen access to justice by relaxing rules on standing in environmental litigation and this could provide the Niger Delta with the added impetus to sue and obtain remedies for environmental harms through environmental litigation. According to Boyd,

A key development in terms of access to justice has been the use of the constitutional right to a healthy environment (and legislation implementing this right) to rewrite traditional rules of standing to include collective and diffuse interests. In many nations studied here, administrative processes and courthouse doors are now open to citizens without a traditional economic or personal interest at stake. As a result, the state appears to have lost its monopoly in terms of representing the public interest.¹⁸⁹

However, on the premise that the independence of the Nigerian judiciary is suspect with the suspicion that it is controlled by the executive arm of government, in addition to other barriers to access to justice, what is not immediately obvious is whether CERs would enhance the ability of the Niger Delta to sue and obtain remedies for the various environmental injuries and deliver similar benefits in Nigeria. Chapter 5 analyzes the potential challenges to CERs to deliver these benefits in the Niger Delta. The chapter also examines access to justice issues, prior to and after the adoption of CERs, in jurisdictions that have adopted enforceable CERs, to investigate the improvement in the ability of the people to sue and obtain remedies for environmental harms in those jurisdictions and how much of such improvement is due to a widened access to justice. As always, the chapter concludes with recommendations for the Niger Delta context.

1.8 Importance and the Originality of the Thesis

As stated earlier, the thesis will build on Boyd's CERs framework. Boyd focused on OECD countries and did not specifically research the potential impact of CERs in Nigeria. Therefore, a detailed and specific analysis of Nigerian circumstances, and what would be required there in terms of political, legal, economic and social change to ensure that CERs contribute to sustainability, is needed. The thesis adds to the CERs literature by undertaking this specific case study and this will lead to recommendations for changes in Nigerian law. This analysis makes critical and specific analyzes of what would be needed for CERs to make a significant impact on environmental justice in the Niger Delta.

With this thesis, the intention is to contribute to the development of environmental law and environmental justice by building on the existing scholarship in the areas of CERs. This research

¹⁸⁹ Boyd, *supra* note 28 at 239.

also brings fresh insights and deepen existing insights into the practical implications of constitutionalizing environmental rights in Nigeria by examining the prospects offered by the constitutionalization within the context of the Niger Delta. It thus expands the limited literature on CERs and the Niger Delta Environmental Justice crisis.

For instance, Eaton has analyzed the negative impacts of the activities of the TNCs on the Niger Delta and recommends the negotiation of a Treaty, “formally recognizing the human right to a healthy environment” and creating “an... adjudicatory system to hear matters arising from the breach of such a right.”¹⁹⁰ Oyeniyi Abe has also examined the impact of TNCs and recommends “the enforceability of environmental justice under the constitution and indeed under customary international law”, as solutions.¹⁹¹ Kaniye Ebeku has addressed the judicial approach to the recognition and enforcement of a right to a healthy environment in Nigeria through the expansive interpretation of the existing right to life to include the right to a healthy environment.¹⁹² However, research has yet to be undertaken on the Niger Delta that seeks to harness the potential of CERs in the Niger Delta in order to propose a new legal framework for mitigating the Niger Delta environmental crisis. The thesis undertakes that specific study. It focuses on the inadequacy of environmental laws in Nigeria; the non-implementation and non-enforcement of existing environmental laws in Nigeria; and the limited access to justice in Nigeria.

The thesis is an attempt to make a significant contribution through its use of Environmental Justice as a theoretical framework. It offers an opportunity to explore the root causes of the Niger Delta crisis, and to fully address the impact of governmental policies and processes on the Niger Delta people, viewing the crisis from a different, more holistic perspective. For instance, the research looks at how the inadequacy of environmental laws in Nigeria fuels the Niger Delta sustainability crisis; how the non-implementation and non-enforcement of existing environmental laws in Nigeria exacerbate the Niger Delta sustainability crisis; and how the revenue allocation formula which is skewed against the Niger Delta and the policy of the federal government to receive compensation for environmental harms which are suffered by the Niger Delta people, have fueled the sustainability crisis through the destruction of oil and gas facilities

¹⁹⁰ Eaton, *supra* note 66 at 264.

¹⁹¹ Abe, *supra* note 56 at p. 257.

¹⁹² Ebeku, *supra*, note 133 at 312.

by the youths, in protest of these policies.¹⁹³ The research also contributes to the literature on Environmental Justice by providing a focused case study. Through this research, conclusions and recommendations are drawn to inform legislation, policies and decisions on the environmental crisis plaguing the Niger Delta, and even in a broader context.

1.9 Summary of Chapters

Chapter 1 has provided the context of the problem, the research questions, and the methodology for answering them. Chapter 2 presents the theoretical framework of Environmental Justice, which is the lens this thesis uses to analyze the sustainability crisis in the Niger Delta. It relates the various components of Environmental Justice to, and situate them within the context of, the Niger Delta environmental crisis. The chapter analyzes the linkages between Environmental Justice and CERs and establishes the usefulness of Environmental Justice to the research. Environmental Justice and CERs have critical, mutually inclusive and reinforcing linkages, providing points for CERs to translate into measurable and tangible benefits for environmental sustainability, especially through procedural rights. The chapter, therefore, provides an analysis of how Environmental Justice, in partnership with CERs, could contribute to the understanding of the underlying causes, and provide solutions to, the Niger Delta sustainability crisis.

Chapter 3 examines the potentials for CERs to lead to a more robust environmental regulatory regime for Nigeria. The chapter examines the cascading effect of CERs on environmental law-making; the likely increase in environmental law-making, since courts would more likely be disposed to uphold environmental laws backed up by CERs; and advance screening in proposed laws to align with the constitutional right to a healthy environment. The chapter also examines the conflicting interests of Nigerian legislators and the under-representation of the Niger Delta in Nigeria's NASS as potential barriers to the efficacy of CERs to produce these benefits in Nigeria and how these limitations could be addressed. The chapter offers an understanding of the possibilities of, as well as the barriers to, CERs-engineered improvement in the environmental legislation in Nigeria, particularly in the context of the Niger Delta.

Chapter 4 explores the potential for CERs to enhance vigorous implementation and enforcement of environmental laws in Nigeria. The aim of the chapter is to analyze the impacts that CERs

¹⁹³ The World Bank on the Niger Delta, *supra* note 17 at 14.

have recorded in other countries in these areas to serve as precedents to Nigeria and how Nigeria could overcome potential barriers to CERs having similar results in Nigeria. The chapter examines the potentials of CERs to provoke prompt monitoring of compliance with environmental regulations; actual implementation of environmental regulations by the respective agencies of government; and enhanced judicial impetus to enforce environmental laws. The chapter as well examines the high level of corruption and the political economy of Nigeria, which is dependent from the oil and gas resources of the Niger Delta as potential barriers to the effectiveness of CERs to produce these results in Nigeria and how these barriers could be overcome.

Chapter 5 investigates the possibilities of CERs widening access to justice and how that could enhance the ability of the Niger Delta to sue and obtain remedies for environmental harms in Nigeria. The chapter explores how CERs could widen access to justice and provide the Niger Delta with different cost-effective avenues to the court to protect the environment. It also investigates how CERs could widen access to justice through the relaxation of the rules on standing in environmental litigation, which could provide the Niger Delta with expanded opportunities to obtain remedies for environmental injuries. However, there are potential barriers to the CERs delivering these benefits in Nigeria. The chapter examines some of these barriers including the lack of independence of the Nigerian judiciary and the slow dispensation of justice in Nigeria as some of the potential challenges to the delivery of these CERs benefits and how they could be overcome.

The Conclusion in chapter 6 summarizes the research findings and makes recommendations on the possible role of CERs in mitigating 3 of the main internal barriers to tackling the Niger Delta sustainability crisis, as well as changes necessary for effective deployment of CERs. It is proposed to serve as a catalyst for future research.

Chapter 2 - Theoretical Framework – Environmental Justice

2.1 Introduction

The research is predicated on the environmental justice approach to environmental sustainability. Environmental Justice is conceptualized both as an activist movement and a theoretical framework. As a theoretical framework Environmental Justice and related literature and CERs have critical, mutually inclusive and reinforcing linkages, providing points for CERs to translate into measurable and tangible benefits for environmental sustainability.

In the context of the Niger Delta environmental crisis, Environmental justice issues could be addressed by CERs (especially procedural rights), which could play an essential role in the Niger Delta. Environmental Justice components would be useful in recognizing instances of environmental injustices in the Niger Delta fueled by laws and policies while CERs could offer an alternative platform for ameliorating the environmental injustices. However, environmental justice has various criticisms levelled at it. The CERs-Environmental Justice linkages have also been criticized. As well, there are existing context-specific barriers to Environmental Justice in Nigeria and the Niger Delta.

The chapter analyzes both conceptions of environmental justice and highlights the components of each conception. It also relates the various components of Environmental Justice to, and situate them within the context of, the Niger Delta environmental crisis. It undertakes a critique of Environmental Justice especially as it is proposed to be employed within an African and Niger Delta context, provides different perspectives to the criticisms of Environmental Justice and suggests potential work arounds to the identified barriers. The chapter analyzes the linkages between Environmental Justice and CERs as proposed to be deployed to address the Niger Delta environmental crisis and establishes the usefulness of Environmental Justice to the research.

2.2. Conceptualizing Environmental Justice

2.2.1 Status of Environmental Justice

There seems to be a lack of consensus on the status of Environmental Justice. There appears to be 2 schools of thoughts on whether Environmental Justice is a movement or both a movement

and a theory. Experts like Alice Kaswan,¹⁹⁴ Alice Mah¹⁹⁵ and Rhuks Ako¹⁹⁶ are of the opinion that Environmental Justice is a resistance movement dedicated to mobilization and engagement in protest against strands of environmental injustices in marginalized and less-privileged communities. Another school of thought with experts including Esme Murdock¹⁹⁷ and Robert Figueroa¹⁹⁸ argues that Environmental Justice is both a movement and a theory with an intellectual dimension. Murdock welded together the 2 schools and opines that Environmental Justice is “a grassroots and people-driven movement” with “academic and intellectual dimensions”¹⁹⁹ Walker corroborated the dual-purpose theory by describing Environmental Justice “both as a political discursive frame and as a focus of academic study.”²⁰⁰

The thesis agrees with the second school of thought. While organizing against environmental injustices are sometimes expressed by but not limited to physical protestations and mobilizations, the theoretical dimension of Environmental Justice seeks to probe and unearth the underlying factors that influence the various decisions that result in environmental injustices and also seek ways to address them.²⁰¹ While not discountenancing the movement ambit of Environmental Justice, in this segment on the theoretical framework, emphasis will however be placed on the intellectual underpinning of Environmental Justice.

2.2.2 History of Environmental Justice

There is a plethora of opinions on the history of Environmental Justice. Leah Temper traces the origin of Environmental Justice to the protest which led to the killings of environmental activists in India in the year 1730 CE. According to Temper, Maharaja Abhayasingh of Jodhpur wanted

¹⁹⁴ Alice Kaswan, “Environmental Justice: Bridging the Gap between Environmental Laws and Justice” (1997-1998) 47 (2) Am.U.L.Rev. 221 at 223 [Kaswan].

¹⁹⁵ Alice Mah, “Toxic Legacies and Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 122 [Mah].

¹⁹⁶ Ako 2, *supra* note 143 at 8.

¹⁹⁷ Esme Murdock, “A History of Environmental Justice Foundations, Narratives, and Perspectives” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 6 at 11 [Murdock].

¹⁹⁸ Robert Figueroa, “Indigenous Peoples and Cultural Losses” in John Dryzek, Richard Norgaard and David Schlosberg eds, *The Oxford Handbook of Climate Change and Society* (Oxford: Oxford University Press, 2012) 2 [Figueroa].

¹⁹⁹ Murdock, *supra* note 197 at 9.

²⁰⁰ Gordon Walker, “Beyond Recognition and Proximity: Exploring the multiple Spatialities of Environmental Justice” in Ryan Holifield, Michael Porter and Gordon Walker, ed., *Spaces of Environmental Justice* (USA & UK: Wiley-Blackwell, 2010) 22 [Walker 1].

²⁰¹ Ako 2, *supra* note 143 at 1-8.

wood to construct a fortress, but the request was resisted by members of the Bishnoi led by Amrita Devi who is described by Temper as ‘the first known tree-hugger and eco-feminist.’

To break their resolve, Abhayasingh sent soldiers to forcefully cut the trees, but Devi protested and decided to hug a tree to prevent the cutting. The axe-carrying soldiers had to cut her along with the tree which resulted in her death. Her death did not deter her children nor the community, who followed in Devi’s footsteps by hugging a tree each and they were accordingly chopped alongside the trees by the soldiers. Seeing that death did not break the communal resolve, Abhayasingh called off the operation, apologized to the community and prohibited by a royal edict which apparently is still in force, the cutting of trees in that community.²⁰² Temper opined that the Bishnois’ struggle provided extraordinary proof of historical achievement in the environmental justice movement and “has gone on to inspire other movements in India, particularly the Chipko Andolan ‘forest huggers’ movement in the Himalayas led by women and can thus be seen as an important influence for global EJ...The Bishnoi philosophy can be seen as an early example of EJ activism.”²⁰³

Robert Stolz has a different version of the emergence of Environmental Justice. Although he does not explicitly say that he was writing about the emergence of Environmental Justice movement, his article on the Ashio Copper Mine pollution crisis of the 1890s in Japan clearly speaks to the emergence of Environmental Justice movement.²⁰⁴ According to him, the Tone River and its tributary – the Watarase River - pollution led to sicknesses, deaths and even poverty to the communities who depended on the river for survival. The people’s protest of these conditions caused the government to set up 2 different pollution prevention committees to address the issue.²⁰⁵

In 1897, the first committee was constituted to address the issue. The committee applied the polluter-pay-principle and ordered the owners of the mine to abate the pollution and to operate the business in an environmentally sustainable manner. When the pollution was not fully

²⁰² Leah Temper, “Globalizing Environmental Justice Radical and Transformative Movements Past and Present” in Ryan Holifield, Jayajit Chakraborty and Gordon Walker, 1st ed, *The Routledge Handbook of Environmental Justice* (London: Routledge, 2017) 490 at 493-494 [Temper].

²⁰³ *Ibid* at 494.

²⁰⁴ Robert Stolz, “Nature over Nation: Tanaka Shōzō’s Fundamental River Law” (2006) 18 (3) *Japan Forum* 417-437 [Stolz].

²⁰⁵ *Ibid*.

addressed, Tanaka Shōzō (Tanaka) a peasant farmer who has been described as among Japan's "first public EJ activists and thinkers,"²⁰⁶ took up the fight with the government by petitioning Japan's emperor in 1901 and appealing for government's further intervention in the mine pollution.²⁰⁷

In 1902, the government responded by constituting a second committee to address the pollution crisis. The second committee discovered enormous deposits of insoluble copper in the bed of the river within the precinct of the mine. It was also discovered that when the 2 rivers flooded, the flood water would spread the copper around the rivers, with the copper eventually finding its way into the land area and poisoning farmlands, thereby posing a threat to the environment and to human health. It was also observed that "some Ashio miners were in fact afflicted with chronic copper poisoning."²⁰⁸

The second committee then recommended that the government should take direct responsibility for abating the pollution by constructing a reservoir in Kawabe and Rishima – near the point of convergence between the 2 rivers - to retain the excess water in order to prevent the flooding. However, the inhabitants of those places quickly mobilized against the move, threatening not only to withhold paying taxes but also to mobilize against joining military service by its people. The government caved in and moved the project to Tanaka village.²⁰⁹

On the contrary, Jane Holder and Donald McGillivray's historical account situates the emergence of Environmental Justice at a much later date. They opine that Environmental Justice "began at grassroots level (churches, colleges, community groups) in the United States in the 1960s in close alliance with the civil rights movement."²¹⁰ Lily Chinn corroborates Holder and McGillivray by tracing the origin of Environmental Justice to the "synergy of the grass-roots environmental and civil rights movements of the 1960s and 1970s" in the US.²¹¹ Diane Sicotte

²⁰⁶ Temper, *supra* note 202 at 497.

²⁰⁷ Stolz, *supra* note 204 at 420 & 421.

²⁰⁸ *Ibid* at 422.

²⁰⁹ *Ibid* at 423.

²¹⁰ Jane Holder & Donald McGillivray, "Bringing Environmental Justice to the Centre of Environmental Law Research: Developing a Collective Case Study Methodology" in Andreas Philippopoulos-Mihalopoulos & Victoria Brooks, eds, *Research Methods in Environmental Law*, (UK and USA: Edward Elgar Publishing Limited, 2017) 184 at 186 [Holder & McGillivray].

²¹¹ Lily Chinn, "Can the Market Be Fair and Efficient? An Environmental Justice Critique of Emissions Trading", (1999) 26 (1) *Ecological Law Quarterly* 80 at 84-85 [Chinn].

and Robert Brulle agree with 1970 start date but cited a different incident as the defining event. They opine that Environmental Justice emerged in the US “in the late 1970s from a critique of bureaucratic ‘reform’ environmentalism, and of the wilderness conservation focus of environmental organizations, which ignored the environmental concerns of urban, poor, and racial/ethnic minority communities.”²¹²

However, there is a consensus among Mah,²¹³ Murdock,²¹⁴ Kaswan,²¹⁵ Lisa Sun-Hee Park and Stevie Ruiz²¹⁶ on when, where and how Environmental Justice emerged. According to them, Environmental Justice emerged in 1982 in the US on the cusp of the protest by minorities against the location of a toxic-generating polychlorinated biphenyl landfill in Warren County, North Carolina - a predominantly black community.²¹⁷ Although the protest, led by about 500 people, which lasted for 6 weeks, did not stop the citing of the plant, the uproar created by the protest birthed the Environmental Justice movement.²¹⁸ Government response was in the form of violence against these protesting African-Americans as the “police assaulted, beat, and tackled these environmental justice activists. Explicit forms of state-sponsored violence were used against the [protesters].”²¹⁹ Protesters numbering 414 were subsequently arrested, with some of them prosecuted and jailed making the Warren County protest to go down in the annals of the US civil movement as the “first time anyone in the United States had been jailed trying to halt a toxic waste landfill.”²²⁰

As argued by Murdock, history is subjective – shaped by the experience and account of the historian, and the history of Environmental Justice may not be immune from these vagaries. The thesis adopts Murdock’s opinion that we should be open-minded in “considerations of who,

²¹² Diane Sicotte and Robert Brulle, “Social Movements for Environmental Justice through the Lens of Social Movement Theory” in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, 1st ed, *The Routledge Handbook of Environmental Justice* (London: Routledge, 2017) 25 at 26.

²¹³ Mah, *supra* note 195 at 122.

²¹⁴ Murdock, *supra* note 197 at 7.

²¹⁵ Kaswan, *supra* note 194 at 226.

²¹⁶ Lisa Park and Stevie Ruiz, “Racial Minorities in the United States Race, Migration, and Reimagining Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 225 at 225 [Park & Ruiz].

²¹⁷ Mah, *supra* note 195 at 122.

²¹⁸ Eileen McGurty, “Warren County, NC, and the Emergence of the Environmental Justice Movement: Unlikely Coalitions and Shared Meanings in Local Collective Action” (2000) 13 (4) *Society & Natural Resources* 373 at 373.

²¹⁹ Park & Ruiz, *supra* note 216 at 225.

²²⁰ Murdock, *supra* note 197 at 7.

when, where, and what can be encompassed within the history and concept of environmental justice...[and] to use this history as a guideline.”²²¹

2.2.3 Global Movement of Environmental Justice

From this earlier version,²²² Environmental Justice soon transformed into one of the resistance movements against colonialism that were emerging all over the world.²²³ It soon found its way into international treaty making through Principle 3 of the *1994 Draft Declaration of Principles on Human Rights and the Environment*²²⁴ which is widely regarded as the best enunciation of Environmental Justice in international law.²²⁵

However, David Schlosberg is of the opinion that Environmental Justice expanded globally along 2 ways – the horizontal and vertical expansions. While horizontal expansion involves the application of Environmental Justice principles to country-specific environmental injustices occurring in those countries, vertical expansion involves the application of Environmental Justice to transnational environmental injustices that are manifesting in those countries.²²⁶

Gordon Walker corroborates Schlosberg on the horizontal and vertical modes of translocation of Environmental Justice scholarship.²²⁷ Also, even though Sophie Thériault has not explicitly endorsed the 2-dimensional approach, she seems to validate the argument by stating that Environmental Justice activism “has since considerably expanded, first by migrating ‘beyond the US and the sites of grassroots activism within which it originated’ to reach policymakers and academics throughout the world, and also by embracing multiple sites and processes of injustice.”²²⁸

²²¹ *Ibid* at 6.

²²² Sophie Thériault, “Environmental Justice and the Inter-American Court of Human Rights” in Anna Grear and Louis Kotze, ed., *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) 309 at 311 [Thériault].

²²³ Carmen Gonzalez, “Environmental Justice and International Environmental Law” in Shawkat Alam et al, eds, *Routledge Handbook of International Environmental Law* (USA & Canada: Routledge, 2013) 77 at 80 [Gonzalez 3].

²²⁴ The principle provides that everybody “shall be free from any form of discrimination in regard to actions and decisions that affect the environment”.

²²⁵ Abe, *supra* note 56 at 258.

²²⁶ David Schlosberg, “Theorising Environmental Justice: The Expanding Sphere of a Discourse” (2013) 22 (1) *Environmental Politics* 37 at 41-42 [Schlosberg].

²²⁷ Gordon Walker, “Globalizing Environmental Justice - The Geography and Politics of Frame Contextualization and Evolution” (2009) 9 (3) *Global Social Policy* 355 at 356.

²²⁸ Thériault, *supra* note 222.

In the Niger Delta situation, people are not just grappling with localized incidences of environmental injustice like oil spills and gas flare as a result of the activities of the TNCs in exploiting the oil resources, they are also grappling with the consequences of globalized Environmental Justice issues which seem to exacerbate, and be exacerbated by the already dire environmental sustainability crisis in the Niger Delta.²²⁹ In the course of the chapter, the components of Environmental Justice will be analyzed to see if they can offer insights on the root causes of the Niger Delta environmental degradation and pathways to overcome them.

2.2.4 Meaning of Environmental Justice

Understanding of Environmental Justice is generally context-specific; as such, it means different things to different people.²³⁰ It is, therefore, arguable whether there is a single definition that completely captures the various dimensions of Environmental Justice.²³¹ In the US, the United States Environmental Protection Agency (USEPA) views Environmental Justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²³² It has been argued that the USEPA’s definition was influenced by the unfair concentration of facilities that generated environmental harms in marginalized communities. Issues of race, discrimination and inequality were the dominant determinants in the allocation of environmental harms and goods; as such, USEPA’s definition was geared towards acknowledging and addressing these core influencers of environmental injustices.²³³

The Scottish government defines Environmental Justice as the “concern that no social group, especially if already deprived in other socio-economic respects, should suffer a disproportionate burden of negative environmental impacts; [and also] the...concern that all communities should have access to the information and mechanisms to allow them to participate fully in decisions

²²⁹ Ako 2, *supra* note 143.

²³⁰ Kenneth Ajibo, “Transboundary Hazardous Wastes and Environmental Justice: Implications for Economically Developing Countries” (2016) 18(4) Env L Rev 267 at 269 [Ajibo].

²³¹ Robert Kuehn, “A Taxonomy of Environmental Justice” (2000) 30 Env’t L.Rep. 10681 at 10681 [Kuehn].

²³² The United States Environmental Protection Agency, “Environmental Justice”, online: available at <<https://www.epa.gov/environmentaljustice>>.

²³³ Ajibo, *supra* note 230.

affecting their environment.”²³⁴ This definition seems to place emphasis on both distributional and procedural components of Environmental Justice. This is deliberate because the recurring theme in environmental injustices in Scotland is poverty, as such, “the Scottish definition is more concerned with protecting ‘deprived communities.’”²³⁵ However, the Scottish definition seems inadequate because it is 2-dimensional – focusing only on the distributive and procedural approach to Environmental Justice. As would be seen in the segment below on the components of Environmental Justice, there seem to be more than 2 dimensions of Environmental Justice.

In the UK, Environmental Justice is officially conceptualized by the government thus:

Everyone should share in the benefits of increased prosperity and a clean and safe environment. We have to improve access to services, tackle social exclusion, and reduce the harm to health caused by poverty, poor housing, unemployment and pollution. Our needs must not be met by treating others, including future generations and people elsewhere in the world, unfairly.²³⁶

Income disparity is the primary driver of inequality in the UK and the definition of Environmental Justice is intended to address that.²³⁷ However, on a comparative note, the UK’s definition seems wider than the Scottish because it incorporates many dimensions of Environmental Justice and related concepts including distribution, right to a healthy environment, participation, social justice and intergenerational equity.

In South America, because of the history of colonization and its attendant impact, Environmental Justice is seen from the lens of decolonization. As such, from a “decolonial perspective, Environmental Justice entails developing a politics of difference that is not simply based on the search for recognition or inclusion in dominant structures, such as the liberal nation-state or global economic systems, but focused rather on the construction of ‘otherness.’”²³⁸

²³⁴ Mark Poustie, “Environmental Justice in SEPA’s Environmental Protection Activities” (2004) A Report for the Scottish Environment Protection Agency at 4 <https://www.sepa.org.uk/media/163177/environmental_justice.pdf>.

²³⁵ Okonkwo, *supra* note 72 at 39.

²³⁶ Economic and Social Research Council, UK, “Environmental Justice Right and Means to a Healthy Environment for All” (Special Briefing No. 7, 2001) at 7 <https://www.researchgate.net/publication/291842385_Environmental_justice_-_rights_and_means_to_a_healthy_environment_for_all>.

²³⁷ Ako 2, *supra* note 143 at 2-4.

²³⁸ Iokiñe Rodriguez, “Latin American Decolonial Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 78 at 86.

In Africa, Okonkwo notes that Environmental Justice principles have been included in section 24 (right to a healthy environment),²³⁹ 26 (right to housing)²⁴⁰ and 27 (right to health care, food, water and social security)²⁴¹ of the South African 1996 Constitution and that this should serve as a template for Nigeria.²⁴² These provisions would be useful in Nigeria because they could promote Environmental Justice in the Niger Delta.

However, a non-governmental organization - the South African Environmental Justice Networking Forum (EJNF) defines Environmental Justice thus:

Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life – economic quality, health care, housing, human rights, environmental protection, and democracy. In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others.²⁴³

This definition reflects the aspirations of a post-apartheid South Africa by incorporating social justice, discrimination and addressing abuse of power. In construing Environmental Justice this way, EJNF seeks to inspire equitable allocation of environmental consequences, and questions social issues and the misuse of power “which renders the vulnerable [members of the lower class] to environmental destruction. It challenges the social, political and economic inequalities that make people of a particular class (usually the lower class) suffer the negative impacts of

²³⁹ Section 24 of the Constitution of South Africa, 1996 provides that everyone “has the right— (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

²⁴⁰ Section 26 of the Constitution of South Africa, 1996 provides that “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

²⁴¹ Section 27 of the Constitution of South Africa, 1996 provides that “(1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.”

²⁴² Okonkwo, *supra* note 72 at 39.

²⁴³ South African Environmental Justice Networking Forum, “Environmental (In)Justice” (1997), online: <[50](http://www.ejolt.org/2013/02/environmental-injustice/#:~:text=The%20South%20African%20Environmental%20Justice%20Networking%20Forum%20asserts%3A,care%2C%20housing%2C%20human%20rights%2C%20environmental%20protection%2C%20and%20democracy.>”.></p>
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environmental degradation caused by the avaricious-driven behaviours and attitudes of others (usually the wealthy).”²⁴⁴

But it seems that the definition by EJNF does not have continent-wide applicability since, as would be seen below, experts have identified other elements of Environmental Justice in other parts of Africa that are not captured in EJNF’s definition. Because of the peculiar environmental challenges faced in Africa apart from South Africa, Environmental Justice in a broader African context should consider these other dimensions of environmental harms suffered by a wide range of Africans.²⁴⁵

In Africa where resource exploitation by the TNCs leaves in its wake deprivation, human right abuses, corruption, and environmental degradation, coupled with government’s failure to provide social services and remedial mechanisms like accessible justice machinery and systems and infrastructure, Environmental Justice should ensure “equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the fair exchange of resources...[and] as a movement to rein in and subject corporate and bureaucratic decision making, as well as relevant market processes, to democratic scrutiny and accountability.”²⁴⁶

Also, land ownership and concomitant rights of access to natural resources are central to African communities. As such, any definition of Environmental Justice in Africa should include access to land and natural resources. Rhuks Ako puts it this way,

unlike the global North where land is primarily an economic resource, land is an integral part of peoples’ heritage; it links the individual to the community, is the basis of ancestry and binds the community. In other words, environmental justice in Africa...is not simply about democratic participation in the distribution of environmental benefits and burdens. It is more fundamental; it is about participating in defending the essence of community, enjoying the benefits thereof and passing same to the next generations.²⁴⁷

Also in an African context, Environmental Justice needs to further address the issues of self-determination, rules of engagement between the TNCs and the host state on the one hand

²⁴⁴ Margaret Ssebunya, Stephen Morgan and Beatrice Okyere-Manu, “Environmental Justice: Towards an African Perspective” in Munamato Chemhuru, ed, *African Environmental Ethics A Critical Reader* (Switzerland: Springer, 2019) 175 at 176 [Ssebunya et al].

²⁴⁵ Ako 2, *supra* note 143 at 8.

²⁴⁶ Ajibo, *supra* note 230 at 269.

²⁴⁷ Ako 2, *supra* note 143 at 8.

and with the resource-bearing communities on the other hand.²⁴⁸ Especially for the Niger Delta, with the notion that the “environmental injustice problem in the Niger Delta goes to the heart of the global economic system,”²⁴⁹ Environmental Justice must address the impact of the global economic system on the people of the Niger Delta and the environment. The crude oil from the Niger Delta is central to energy security in the world as Nigeria is currently Africa’s number 1 crude oil producing country and 13th in the world.²⁵⁰ As such, the TNCs must continue to exploit the resource to meet global energy demand, notwithstanding the environmental harm this is generating.²⁵¹ As we seek solutions to these problems through the Environmental Justice framework, this framework must be broad enough to address “the global regimes of power that overwhelmingly contribute both historically and continuously to the relegation of particular geopolitical places, geographies, and peoples to the bottom of our global hierarchy.”²⁵²

From the foregoing, the thesis adopts the definition of Environmental Justice by L. Obiora because it is broad enough to address the African peculiarities discussed above,²⁵³ and therefore would be effective in the Niger Delta. Obiora sees Environmental Justice as

the equitable distribution of environmental amenities, the rectification and retribution of environmental abuses, the restoration of nature, and the fair exchange of resources. Its main insight challenges the uneven allocation of environmental risks as well as the benefits of environmental protection, industrial production, and economic growth. Given its structural focus, the environmental justice struggle could be seen, not simply as an attack against environmental discrimination, but as a movement to rein in and subject corporate and bureaucratic decision making, as well as relevant market processes, to democratic scrutiny and accountability.²⁵⁴

Obiora’s version of Environmental Justice addresses fair distribution of environmental goods and burdens, corrective justice, nature’s restoration, equitable exchange of resources, environmental protection, economic growth, participation in resource governance, democracy and accountability. These concepts are lacking and are highly desirable in the Nigeria. They would be useful in assisting to resolve the environmental injustice in the Niger Delta.

²⁴⁸ *Ibid.*

²⁴⁹ Okonkwo, *supra* note 72 at 38.

²⁵⁰ Nigeria Extractive Transparency Initiative, “Overview” <https://eti.org/es/implementing_country/32>.

²⁵¹ Fact finding mission to the Niger-Delta, *supra* note 12 at 3-4.

²⁵² Murdock, *supra* note 197 at 13.

²⁵³ Okonkwo, *supra* note 72 at 39.

²⁵⁴ L. Obiora, “Symbolic Episodes in the Quest for Environmental Justice” (1999) 21 (2) Hum.Rts.Q. 464 at 477.

2.2.5 Components of an Environmental Justice Framework

The understanding of the components of Environmental Justice is central to the thesis. There is a difference of opinions on the constituents of Environmental Justice. Opinions are divided over whether Environmental Justice is monovalent, bivalent, trivalent or tetravalent. On the monovalent theory Maureen Reed and Colleen George suggest that despite the attempt to break new frontiers, Environmental Justice is still predominantly one-dimensional with only the distributive component. They argue that “conceptually speaking, environmental justice research is still primarily framed around the sociospatial distributions of environmental hazards. Most prominent among these are discussions of air pollution, landfill sites, and toxic waste, albeit with increasingly sophisticated tools such as innovations in GIS and community information systems.”²⁵⁵

However, distributive justice alone, which according to Kaswan, is “justice in the existing distribution of environmental benefits and burdens”,²⁵⁶ cannot answer all the Environmental Justice questions. Murdock paints a picture which exposes the inadequacy of distributive justice as the only component of Environmental Justice and makes a case for restorative, participatory and procedural justice frameworks.

[P]eople who live near polluting facilities are frequently treated as second-class citizens whom the rest of society is morally free to ignore. Thus, solutions to harms of this kind must involve not only the cleanup or abatement of the pollution's point source—that is, redistributing the environmental burdens—but creating or restoring a positive, more dynamic community image and concept and correcting the prejudices that outsiders may have about the community. Moreover, improving the community's image may also require deep involvement of community members in whatever actions are taken to address the pollution problems. “Deep involvement” means that community members themselves must have a direct role in the decision-making process, rather than just university experts or federal and state employees—a concept also referred to as participative and procedural justice.²⁵⁷

From the foregoing, the thesis is of the view that distributive justice alone is inadequate to explain and answer all the various strands of environmental injustice in the Niger Delta and around the world.

²⁵⁵ Maureen Reed & Colleen George, “Where in the world is Environmental Justice?” (2011) 35 (6) *Progress in Human Geography* 835 at 838 [Reed & George].

²⁵⁶ Kaswan, *supra* note 194 at 223.

²⁵⁷ Murdock, *supra* note 197 at 11.

On the other hand, Kaswan argues that Environmental Justice is bivalent with 2 components – distributive and political justices - with the latter interested in “the decision making processes that determine the distribution of environmental benefits and burdens.”²⁵⁸ Again, the weakness in the bivalent argument is that a 2-dimensional approach to Environmental Justice is not enough to explain, or offer a complete solution, to all the strands of environmental injustices.²⁵⁹ Take for instance, the now famous 2016 ‘#NoDAPL movement in Standing Rock, USA where Indigenous youth protested against the construction of the 1886 km underground oil pipeline – the Dakota Access Pipeline – which would destroy drinking water sources and sacred places of the Indigenous people.²⁶⁰ In this situation, distributive and political justices would seem inadequate in addressing the concerns of the Indigenous people. Recognition as an element of Environmental Justice would be most appropriate because their contention was not about equitable sharing of resources but about respect for the value that Indigenous people place on water and land.²⁶¹ Based on the above, while misrecognition is when “people who should have been treated equally have systematically been treated differently because of who they are, resulting in the injustice”, recognition on the other hand, is concerned with “the processes of disrespect, insult and degradation that devalue some people and some place identities in comparison to others.”²⁶²

Other experts argue that Environmental Justice is trivalent. Schlosberg for instance, opines that Environmental Justice has a 3-pronged strategy to analyze environmental wrongs – with the recognitive, distributive and participatory standpoints.²⁶³ Ako is also a proponent of this school of thought but disagrees with Schlosberg on the characterization of the 3 components. Ako instead argues that the components of Environmental Justice are distribution, procedure and entitlement.²⁶⁴ The thesis adopts the earlier argument that even a 3-dimensional approach to Environmental Justice seems inadequate in the analysis of environmental injustices because it

²⁵⁸ Kaswan, *supra* note 194 at 223.

²⁵⁹ Murdock, *supra* note 197 at 11.

²⁶⁰ Sam Levin, “Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests”, *The Guardian* (2 November, 2016) <<https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer>>.

²⁶¹ Brendan Coolsaet & Pierre-Yves Neron, “Recognition and Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* 1st (London: Routledge, 2020) 52 at 59.

²⁶² Walker 1, *supra* note 200 at 25.

²⁶³ Schlosberg, *supra* note 27 at p. 519.

²⁶⁴ Ako 2, *supra*, note 143 at 5.

excludes restorative justice, which has been described as the “attempts to restore the victim to the condition [he or] she was in before the unjust activity occurred”,²⁶⁵ as a component of Environmental Justice.

Robert Kuehn is a proponent of the tetravalent theory, which argues that Environmental Justice has 4 components: distributive; procedural; corrective; and social justice.²⁶⁶ Robert Melchior Figueroa argues rather that the 4 components of Environmental Justice are distributive, recognition, participatory, and restorative justices.²⁶⁷ While Figueroa and Kuehn agree that distributive justice is a component of Environmental Justice, Figueroa substitutes social justice for recognition. The rest are issues of nomenclature. For instance, what Kuehn terms procedural and corrective justices, Figueroa calls participatory and restorative justices respectively.²⁶⁸

In the analysis of the components of Environmental Justice below, the thesis will adopt the tetravalent approach because it goes further than the other approaches in analyzing and employing Environmental Justice to address environmental harms in the Niger Delta. Specifically, the thesis will adopt with, minor adjustment, Figueroa’s components of Environmental Justice (distributive, recognition, participatory, and restorative justices) instead of Kuehn (distributive, procedural, corrective and social justices) because Kuehn excludes recognition which, in my view and as will be seen later in the analysis, would be central to the achievement of Environmental Justice in the Niger Delta. However, the thesis will substitute Kuehn’s procedural justice for Figueroa’s participatory justice because procedural justice includes participatory justice and goes even further. The thesis will elaborate on this point in the segment on procedural justice.

2.3. Analysis and Application of the Components of Environmental Justice to the Environmental Sustainability Crisis in the Niger Delta

2.3.1 Contextual Usage of “Sustainability” in the Thesis

²⁶⁵ Kuehn, *supra*, note 231 at 10693.

²⁶⁶ *Ibid* at 10681.

²⁶⁷ Figueroa, *supra*, note 198 at 2.

²⁶⁸ *Ibid* at 6.

It is expedient to give context to the way ‘sustainability’ is used in the thesis since the concept has polarized opinion, with some experts dismissing it as either vague or meaningless²⁶⁹ and a hopeless buzzword.²⁷⁰ Even among proponents, it means different things²⁷¹ and this may have influenced Christian Becker to opine that it is “difficult to determine the exact meaning and to provide one single definition of the term *sustainability*.”²⁷² The seeming confusion is further exacerbated when sustainability is used interchangeably with the concept of Sustainable Development.²⁷³

Some experts see sustainability as 4 dimensional - upholding economic endeavors, preserving the environment, safeguarding social justice and developing both spiritual and cultural ethics.²⁷⁴ This 4 dimensional approach to sustainability is adopted by Africa’s revised Convention on Nature (article XIV (1) (b)).²⁷⁵ For others, sustainability has 3 dimensions²⁷⁶ - the environmental, economic and social dimensions.²⁷⁷ Still, others argue that sustainability is 2 dimensional.²⁷⁸ The International Court of Justice (ICJ) seems to have adopted the 2 dimensional approach in its decisions, first in the *Gabcikovo-Nagymaros Project* where it held that all through “the ages, mankind has, for economic and other reasons, constantly interfered with nature... This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”²⁷⁹ Later in the *Pulp Mills on the River Uruguay*, the ICJ

²⁶⁹ Guler Aras and David Crowther, “Redefining Sustainability” in Guler Aras and David Crowther, ed., *A Handbook of Corporate Governance and Social Responsibility* (New York: Routledge, 2016) at 51 [Aras & Crowther].

²⁷⁰ Christian Becker, *Sustainability Ethics and Sustainability Research* (The Netherlands: Springer, 2012) at 9 [Becker].

²⁷¹ Aras & Crowther, *supra* note 269 at 51 and 53.

²⁷² Becker, *supra* note 270 at 9.

²⁷³ Aras & Crowther, *supra* note 269 at 51.

²⁷⁴ *Ibid* at 56.

²⁷⁵ Africa’s Revised Conservation Convention, *supra*, note 100.

Article XIV (1) tagged “Sustainable Development and Natural Resources” provides that the “parties shall ensure that ...b) in the formulation of all development plans, full consideration is given to ecological, as well as to economic, cultural and social factors.”

²⁷⁶ Becker, *supra* note 270 at 9.

²⁷⁷ Mary Kaidonis, Natalie Stoianoff and Jane Andrew, “The Shifting meaning of Sustainability” in Guler Aras and David Crowther, ed., *A Handbook of Corporate Governance and Social Responsibility* (New York: Routledge, 2016) at 83.

²⁷⁸ Aras & Crowther, *supra* note 269 at 54.

²⁷⁹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997), I. C. J. Reports 78 (I.C.J.) <<https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>>.

The fact of the case was that Czechoslovakia and Hungary entered into a joint partnership to construct the Gabtikovo-Nagymaros Barrage System over the Danube River to generate electricity, improve navigation in the Danube River and also address the flooding of the Danube River. Hungary reneged on the deal, citing environmental

held that the “interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection...is the essence of sustainable development.”²⁸⁰

This thesis, however, adopts the 3-dimensional approach to sustainability for 2 reasons: first, it accords with Nigeria’s approach to sustainability as contained in Nigeria’s revised *National Policy on the Environment*, 2016 (item 3.2 (iii)).²⁸¹ Second, it also accords with the UN Brundtland Commission Report’s notion of sustainable development. According to the Brundtland Report, what “is needed now is a new era of economic growth - growth that is forceful and at the same time socially and environmentally sustainable.”²⁸² The Brundtland Report is more than 3 decades old, but it still strongly influences how sustainability is viewed and interpreted presently. For example, the modern view of sustainability, weak or strong, is premised on the Brundtland Report.²⁸³ While weak sustainability is often depicted by the Venn diagram, strong sustainability is illustrated by the concept of nested dependencies.²⁸⁴ The weak sustainability model, as shown in figure 2 below, is represented by 3 overlapping circles which represent each of the 3 dimensions of sustainability – environmental, social and economic. The criticism against this model, and why it is termed ‘weak’, is that the economy could co-exist

concerns for its action and later terminated the partnership when Slovakia - successor to Czechoslovakia - proceeded alone with the construction work. The ICJ, in its judgment, ordered both countries, in line with the joint partnership, to find an amicable solution to the dispute.

²⁸⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (2010), I.C.J. Reports (I.C.J.) <<https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>>.

The fact of the case was that Argentina and Uruguay had entered into a treaty, specifying conditions for the utilization of resources of the River Uruguay. Uruguay proceeded to construct 2 pulp mills along the riverbank and Argentina sued, arguing that the unilateral action constituted a breach of certain substantive and procedural treaty obligations. The ICJ held that Uruguay did not breach substantive treaty obligations but found that it had breached its procedural duty to inform Argentina of the construction of the pulp mills.

²⁸¹ Federal Ministry of Environment, Nigeria, “National Policy on the Environment (Revised 2016) at 12 <<http://extwprlegs1.fao.org/docs/pdf/nig176320.pdf>>.

Item 3.2 provides that the “strategic objective of the National Policy on the Environment is to coordinate environmental protection and natural resources conservation for sustainable development. This goal will be achieved by the following strategic objectives...iii. promoting an understanding of the essential linkages between the environment, social and economic development issues.”

²⁸² Sustainable Development, “Report of the World Commission on Environment and Development: Our Common Future” at 7 <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>>.

See also Klaus Bosselmann, *The Principle of Sustainability transforming Law and Governance*, 2nd ed., (UK & New York: Routledge: 2016) 27. The Brundtland Commission coined the concept of Sustainable Development. See Bosselmann, *ibid* at 23.

²⁸³ Arnaud Dragicevic “Deconstructing sustainability” (2018) 26 (6) Sustainable Development 525 at 525 [Dragicevic].

²⁸⁴ Rodrigo Lozano, “Envisioning sustainability three-dimensionally” (2008) 16 (17) Journal of Cleaner Production 1838 at 1839.

independently of, without recourse to, either the social or environmental dimensions of sustainability. This is shown in each part of the 3 circles that do not interact with the other 2 circles.²⁸⁵

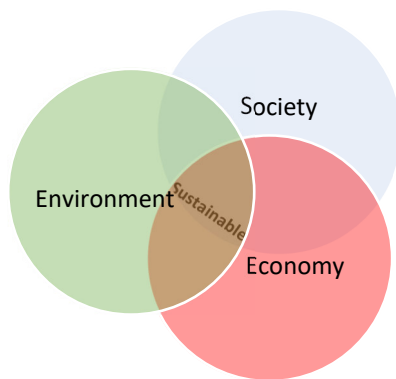


Figure 2: Venn Diagram–weak Sustainability

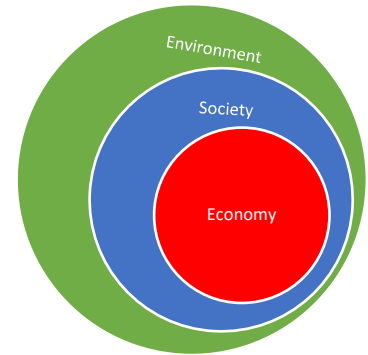


Figure 3: Nested Dependency–Strong Sustainability

The nested dependencies on the other hand, as shown in figure 3, is represented by 1 small (economy), 1 medium (society) and 1 large (environment) circles, nesting together. In this model, the “economy is embedded within the social area, which is within the natural environment, such that natural ecosystems fully embrace the economic and social realms. The economic capital is still placed at the center of the wealth creation that drives the development, but it is now constrained by social and environmental considerations.”²⁸⁶

Although both the economic and social dimensions of sustainability are important and have bearings on the attainment of environmental sustainability, the thesis will focus primarily on the environmental dimension to sustainability because as indicated by the concept of nested dependencies, some experts are of the view that the environmental consideration should be the overarching element of sustainability. Bosselmann particularly argues that the recognition of environmental sustainability is decisive as not realizing it amounts to impairing both the social and economic dimensions of sustainability because, for him, the only form of sustainable

²⁸⁵ Kathleen Smythe, “An Historian’s Critique of Sustainability” (2014) 6 (5) *Culture Unbound* 913 at 914-915.

²⁸⁶ Dragicevic, *supra* note 283 at 526.

development is “ecologically sustainable development.”²⁸⁷ Having clarified the way sustainability will be explored in the thesis, the next segment will analyze and apply components of Environmental Justice to the Environmental Sustainability Crisis in the Niger Delta

2.3.2. Application of the Components of Environmental Justice to the Niger Delta

2.3.2.1 Recognition as Environmental Justice

Recognition “is concerned with the harms that result from failing to acknowledge or respect differences across groups of people. Recognition-based environmental injustice therefore refers to harms suffered by (often marginalized) groups whose histories, cultures, and identities are intimately bound up with their distinct relationships to the environment.”²⁸⁸ If we go by this definition, then recognition is concerned with the disregard and contempt that diminish some people and identities. In this way, the lack of recognition is not only restraining because it fails to acknowledge and give voice to disadvantaged people, but it also devalues the disadvantaged people and their culture.²⁸⁹ Recognition is not as widely discussed as other components of Environmental Justice.²⁹⁰ In fact, experts argue that of all the components of Environmental Justice, recognition is possibly the most overlooked because the “idea of recognition is complex and...has a long philosophical and political history, with roots in Hegelian ethics, critical theory and post- and decolonial studies.”²⁹¹

Perhaps to provide clarity on what constitutes recognition in view of its complexities, experts have provided examples of incidences of misrecognition. Brendan Coolsaet and Pierre-Yves Néron argue that it would constitute misrecognition when “people who should have been treated equally have systematically been treated differently because of who they are, resulting in the injustice. This is typically the case, for example, when communities of colour face greater environmental risk than do other communities.”²⁹² Another dimension of misrecognition would be when some people, in the course of the exploitation of resources, are not accorded the same

²⁸⁷ Bosselmann, *supra* note 282 at 21.

²⁸⁸ Breena Holland, “Capabilities, Well-Being, and Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 64 at 73 [Holland].

²⁸⁹ Schlosberg, *supra* note 226 at 125.

²⁹⁰ Reed & George, *supra*, note 255 at 838.

²⁹¹ Brendan Coolsaet & Pierre-Yves Néron, “Recognition and Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 52 at 52 [Coolsaet & Néron].

²⁹² *Ibid* at 58.

protection given to others by the law.²⁹³ Lastly, misrecognition would likely occur when the peoples' cultural and religious practices which are intrinsically tied to the environment, and the environment becomes commercialized in the course of resource extraction, in total disregard to those cultural and religious practices.²⁹⁴

The Niger Delta people have similar stories about the way that they are treated in the resource governance value chain in Nigeria. Experts are of the view that the Niger Delta people have not been recognized in Nigeria's oil industry by the government, policy makers and TNCs.²⁹⁵ On this, Bamidele argues that the militancy in the Niger Delta is an upshot of the non-recognition of the role that the Niger Delta plays in terms of its financial contribution to the Nigerian federation,²⁹⁶ because recognition "not only deals with the way in which we accommodate and respect different people, their cultural practices, their identities and their knowledge systems, but is also relevant to issues of self-respect and self-worth."²⁹⁷

The thesis will investigate whether the recognition of the strategic role that the Niger Delta plays in terms of being the economic livewire of the Nigerian state could assist in wrestling with the environmental degradation in the Niger Delta which is a fall out of the exploitation of oil and gas resources in the Niger Delta. This seems apt since recognition is concerned with how best we can "account for the harms to well-being resulting from decisions that disregard or fail to recognize the environment's significance and value to the cultures, traditions, and identities of different people, especially members of non-dominant groups in society."²⁹⁸

²⁹³ Holland, *supra* note 288 at 73-74.

²⁹⁴ Coolsaet & Néron, *supra* note 291 at 58.

²⁹⁵ Daniel Smith, "Corruption Complaints, Inequality and Ethnic Grievances in Post-Biafra Nigeria, (2014) 35(5) TWQ 787 at 788 [Smith].

²⁹⁶ Bamidele, *supra*, note 51 at 539.

²⁹⁷ Coolsaet & Néron, *supra* note 291 at 52.

²⁹⁸ Holland, *supra* note 288 at 64.

2.3.2 Distributive Environmental Justice

Distributive justice is concerned “with fairness in the distribution of environmental benefits and burdens. For example, when people of certain racial or ethnic groups are disproportionately burdened by exposure to environmental risks, such as those associated with close proximity to hazardous waste facilities, we can think of this as a failure of distributive justice.”²⁹⁹ Distributive justice therefore advocates impartiality in the allocation of advantages and disadvantages from environmental resources which is not the case in the Niger Delta.³⁰⁰

For instance, an incidence of lack of distributive justice is the failure to provide other infrastructure to a particular segment of the population. Alice Kaswan explains that in “addition to raising concerns about unjustified inequality, the absence of essential infrastructure resonates with... distributive justice.”³⁰¹ The Niger Delta has serious infrastructure deficit in Nigeria when compared to other parts of the country and this is even more glaring as a distributional justice issue when viewed from the perspective that the resources used in providing infrastructure in the rest of Nigeria come from the oil wells of the Niger Delta. Chapter 5 of this thesis focuses on CERs and the marginalization of the Niger Delta, it provides a further analysis of lack of infrastructure and its implication for the Niger Delta.

There seems to be an institutionalized inequitable policy of resource distribution in Nigeria which is skewed against the people of the Niger Delta, and this prevents them from the benefits of resource extraction in their territory, through legislation. Examples include the *Constitution of Nigeria, 1999*³⁰² which nationalized natural resource ownership, and the *Land Use Decree, 1978*³⁰³ which abolished customary ownership of land and created the present centralized land ownership structure. The effect of both laws is that the people of the Niger Delta have been

²⁹⁹ *Ibid* at 71.

³⁰⁰ Paul Orogun, “Resource Control, Revenue Allocation and Petroleum Politics in Nigeria: the Niger Delta Question” (2010) 75(5) *GeoJournal* 459 at 467 [Orogun].

³⁰¹ Alice Kaswan, “Distributive Environmental Justice” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 21 at 28.

³⁰² Item 39 of the 2nd Schedule to the *Constitution of the Federal Republic of Nigeria, 1999*, gives the federal government exclusive right over mines and minerals, “including oil fields, oil mining, geological surveys and natural gas.” [Item 39 of the 2nd Schedule to the 1999 Constitution].

³⁰³ Section 1 of the Land Use Decree, 1978, provides that subject “to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”

divested of ownership of land and resources and can no longer negotiate with the TNCs for compensation for land use and access nor lay claim to royalties from oil and gas mining.

The resource ownership structure in Nigeria which is enshrined in the Constitution places resource ownership and control in the federal government, which takes the decisions on resource allocation and distribution.³⁰⁴ Presently, the Niger Delta receives only 13%³⁰⁵ of the revenue from petroleum resources extracted in its territory while the federal government keeps the remaining 87%.³⁰⁶ The inequity in resource allocation to the Niger Delta is re-enforced by the new *Petroleum Industry Act, 2021* (PIA) which authorizes the operators in Nigeria's petroleum industry to allocate to their host communities development trust fund (PHCF), "3% of [their] actual annual operating expenditure of the preceding financial year" (section 240 (2)).³⁰⁷ While 3% allocated as PHCF is calculated from the operator's annual operating expenditure, the PIA allocates 30% of the profits earned by the federal government for oil prospecting in the frontier basins (section 9 (4) and (5)),³⁰⁸ which are located outside the Niger Delta.³⁰⁹ Some experts maintain that section 9 was introduced to counterweight section 240 (2).³¹⁰ An in-depth analysis of the Niger Delta in the context of the PIA will be undertaken in chapter 3 in the segment on the

³⁰⁴ Item 39 of the 2nd Schedule to the 1999 Constitution, *supra* note 302.

³⁰⁵ Section 162(2) of the Constitution, 1999, provides that "...that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen *per cent* of the revenue accruing to the Federation Account directly from any natural resources."

³⁰⁶ Section 162(1) of the Constitution, 1999, provides that the Federation "shall maintain a special account to be called 'the Federation Account' into which shall be paid all revenues collected by the Government of the Federation..."

³⁰⁷ *Petroleum Industry Act, 2021*, No. 6 of 2021 <<https://hrpib.org.ng/wp-content/uploads/2021/09/Petroleum-Industry-Act-2021-pdf.pdf>> [PIA].

Section 240 (2) provides that a "settlor, where applicable through the operator, shall make an annual contribution to the applicable host communities development trust fund of an amount equal to 3% of its actual annual operating expenditure of the preceding financial year in the upstream petroleum operations affecting the host communities for which the applicable host communities development trust fund was established."

³⁰⁸ Section 9 (4) provides that there "shall be maintained, for the purpose of this section, a Frontier Exploration Fund which shall be 30% of NNPC Limited's profit oil and profit gas as in the production sharing, profit sharing and risk service contracts."

Section 9 (5) provides that NNPC Limited "shall transfer the 30% of profit oil and profit gas under subsection (4) to the Frontier Exploration Fund escrow account dedicated for the development of frontier acreages and utilise the funds to carry out exploration and development activities in the frontier acreages subject to appropriation by the National Assembly."

³⁰⁹ Frontier Basins are in Anambra, Bida, Benue Trough, Gongola, Sokoto and Dahomey. See Kingsley Jeremiah, "Stakeholders highlight Potential of Frontier Inland Basins, seek Collaboration", *The Guardian Newspaper* (11 December, 2019) <<https://guardian.ng/energy/stakeholders-highlight-potential-of-frontier-inland-basins-seek-collaboration/>> [Jeremiah].

³¹⁰ Emma Amaize et al, "PIA: Sylva under Fire over 3% Equity, Buhari Begs", *Vanguard* (19 August 2021) <<https://www.vanguardngr.com/2021/08/pia-sylva-under-fire-over-3-equity-buhari-begs/>> [Amaize].

PIA and the Niger Delta. It has been argued that increasing the allocation of oil revenue to the Niger Delta might benefit the Niger Delta people by way of job creation, provision of infrastructure and funding of social intervention schemes.³¹¹

Another indication of lack of fairness in the distribution of environmental goods in Nigeria is the fact that the federal government is the entity entitled to receive compensation for environmental harms to the exclusion of the Niger Delta people who bear the brunt of the activities.³¹² For instance, before its repeal in 2021 by the PIA,³¹³ section 3(2)(c) of the defunct *Associated Gas Re-injection Act, 1979*, (AGRA)³¹⁴ provided that any fine payable for gas flare “shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the federal government by companies engaged in the production of oil.”³¹⁵ How much of this trickles down to the Niger Delta people who actually bear the brunt of these acts is hampered by corruption and lack of transparency in governance.³¹⁶ The thesis will unpack this in chapter 5 in the segment on corruption as a potential barrier toward the effectiveness of CERs in the Niger Delta context. Arguably, there has been a shift with the enactment of the PIA. Although the federal government still receives the compensation for gas flare (section 104 (1) and (2)),³¹⁷ the money received is now to be applied for environmental remediation and relief in the host communities in connection with which the penalties were levied (section 104 (4)).³¹⁸ The new regime established by the PIA regarding the penalty for gas flare is that a federal agency – the Nigerian Midstream and Downstream Petroleum Regulatory Authority determines the penalty for gas flare, while another federal agency - the Midstream and Downstream Gas Infrastructure

³¹¹ Eaton, *supra* note 66 at 291.

³¹² Samy et al, *supra* note 2 at 135.

³¹³ PIA, *supra*, note 307.

Section 310 (1) of the PIA provides that from “the effective date of this Act the following enactments and regulations are repealed—(a) Associated Gas Reinjection Act, 1979 ... and its Amendments.”

³¹⁴ *Associated Gas Re-Injection Act*, *supra* note 140.

³¹⁵ *Ibid.*

³¹⁶ The World Bank on the Niger Delta, *supra* note 17 at XI.

³¹⁷ Section 104 provides that “(1) A licensee, lessee or marginal field operator that flares or vents natural gas, except —(a) in the case of an emergency, (b) pursuant to an exemption granted by the Commission, or (c) as an acceptable safety practice under established regulations, commits an offence under this Act and is liable to a fine as prescribed by the Commission in regulations under this Act. (2) A fine due under this section shall be paid in the same manner and be subject to the same procedure for the payment of royalties to the Government by companies engaged in the production of petroleum.”

³¹⁸ Section 104 (4) provides that “Money received from gas flaring penalties by the Commission under this section, shall be for the purpose of environmental remediation and relief of the host communities of the settlers on which the penalties are levied.”

Fund - now receives and administers the penalty “for midstream and downstream gas infrastructure investment within the Host Community of a designated facility” (section 33).³¹⁹

However, considering the high level of public sector corruption in Nigeria which could frustrate the complete and effective utilization of the compensation for the benefit of the Niger Delta,³²⁰ perhaps, an amendment of this law to state that compensation be paid to the community affected by the gas flares would enable the Niger Delta to directly receive and administer compensation for gas flare, since they bear the harmful effect of it, and would assist in assuaging the angst in the Niger Delta.³²¹ Beyond the payment of compensation for gas flare, considering the effect of gas flare on the Niger Delta environment, a permanent solution would be a complete elimination of gas flare in the Niger Delta, yet the PIA permits gas flare by oil and gas companies operating in Nigeria, including the Niger Delta (section 107).³²²

As an example of the deleterious effect of gas flare on the Niger Delta environment, in Ogoniland, UNEP detected benzene – a known carcinogenic hydrocarbon substance – “in all air samples at concentrations ranging from 0.155 to 48.2 µg/m³. Approximately 10 per cent of detected benzene concentrations in Ogoniland were higher than the concentrations WHO and the United States Environmental Protection Agency (USEPA) report as corresponding to a 1 in 10,000 cancer risk.”³²³ From this perspective, it seems that the PIA re-enforces the sustainability crisis in the Niger Delta instead of ameliorating same. It may be expedient to amend the provision allowing for gas flare in Nigeria. Furthermore, on the policy front, there is a deliberate siting of oil processing, refining and transportation industries outside the Niger Delta for the

³¹⁹ Section 33 of the PIA provides that “...the Authority may make regulations [in respect of] ...(y) any other matters as may be determined by the Authority under this Act which includes imposition of gas flare penalty arising from midstream operations which shall be for the credit of the Midstream and Downstream Gas Infrastructure Fund, and shall be utilised for midstream and downstream gas infrastructure investment within the Host Community of a designated facility.”

³²⁰ Matthew Page, *A New Taxonomy for Corruption in Nigeria* (New York: Carnegie Endowment for International Peace, 2018) 1 <https://carnegieendowment.org/files/CP_338_Page_Nigeria_FINAL.pdf> [Page].

³²¹ Emma Amaize, “Niger Delta Militants Plan to Attack Chevron, Shell, NNPC Facilities”, *Vanguard* (20 October, 2020) <<https://www.vanguardngr.com/2020/10/niger-delta-militants-plan-to-attack-chevron-shell-nnpc-facilities/>>.

³²² Section 107 provides that the Commission/Authority “may grant a permit to a licensee or lessee to allow the flaring or venting of natural gas for a specific period—(a) where it is required for facility start-up; or (b) for strategic operational reasons, including testing.”

³²³ UNEP Report, *supra* note 13 at 11.

benefits of non-Niger Delta parts of Nigeria, with the Niger Delta serving only as feed stock for those facilities.³²⁴

In this regard, CERs could help by entrenching distribution principles in the Constitution that ensure that the Niger Delta gets a share of the oil revenues commensurate with its contribution to the national revenues. Federating units in Nigeria should own, and control natural resources found in their territories. The Niger Delta has been advocating for this since the discovery of oil in commercial quantity in Oloibiri in 1956 in the present day Bayelsa State, but the federal government has been resisting this change in the resource ownership structure with the agitations often turning into violent conflicts.³²⁵ Ownership of resources by the federating units could guarantee availability of financial resources to develop the Niger Delta and ensure peace. According to experts, the “comparative study...suggests that federal government ownership and management of natural resources produce conflicts between constituent units as they vie for their share of the proceeds. By contrast, provincial ownership and management eliminate this direct competition between constituent units for natural resource revenues.”³²⁶ The federal government has been resisting the argument for the federating units to own and control resources found in their territories and may not change its approach soon. At the very least, a return to the revenue formula provided by both the defunct Independence Constitution, 1960 (section 134)³²⁷ and the Republican Constitution, 1963 (section 140 (1))³²⁸ which provided for a 50% derivation formula for the resource-bearing states will ensure that the Niger Delta gets a fair share of the revenue

³²⁴ Smith, *supra* note 295 at 793.

An example is the establishment of Kaduna Refining and Petrochemical Company in Kaduna in Nigeria’s northern region by the federal government, far away from the oil wells of the Niger Delta, from where the raw material - crude oil - must be moved through pipelines to Kaduna in the north. See Nigerian National Petroleum Corporation, “Kaduna Refining and Petrochemical Company (KRPC)” <<https://www.nnpcgroup.com/Refining/Pages/KRPC.aspx>>.

³²⁵ Celestine Onah, Ikechukwu Asadu & Benjamin Amujiri, “Dynamics of the Politico-Administrative Conflicts of Resource Control in Nigeria: Exploring the Oil Politics of Who gets What, When, and How” (2022) 46(2) Nat.Res.F. 245 at 250.

³²⁶ Daniel Béland, Catarina Segatto & André Lecours, “The Fiscal Politics of Resource Revenue: Federalism, Oil Ownership and Territorial Conflict in Brazil and Canada” (2020) 8 (5) Territory, Politics, Governance 676 at 667.

³²⁷ The Independence Constitution of Nigeria, 1960 [The Independence constitution of Nigeria, 1960]. Section 134 of the Independence Constitution of Nigeria, 1960, provided that there “shall be paid by the Federation to each Region a sum equal to fifty per cent of- (a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region.”

³²⁸ The Republican Constitution of Nigeria, 1963, <<https://www.dawodu.com/const63.pdf>> [Republican Constitution of Nigeria, 1963].

Section 140 (1) provides that there “shall be paid by the Federation to each Region a sum equal to fifty per cent of - (a) the proceeds of any royalty received by the Federation in respect of any minerals extracted in that Region.”

from resources that are extracted from its territory. CERs could also entrench distribution principles that recognize the Niger Delta and its people as the primary victims of environmental damage and as primary beneficiaries of whatever compensation schemes have been devised for environmental degradation.

2.3.3 Procedural Environmental Justice

In the segment on components of Environmental Justice, it was indicated that experts regard procedural justice and participation as similar. In fact, it has been argued that procedural justice is “the ability to participate in and influence environmental decision-making processes.”³²⁹ Kimberly Suiseeeya observes that even though participation is often treated as though it were interchangeable with procedural justice, they are in fact, different concepts. According to her, participation “may or may not confront and redress the power imbalances, exclusion, and misrecognition that produce environmental injustice. By focusing on ability to participate in and influence decision-making processes, procedural justice demands attention to power in environmental governance.”³³⁰ It seems that while participation is concerned with the opportunity to be involved in the decision-making processes, procedural justice goes further by looking at the power dynamics behind the decision-making process itself, including the process of selection of the participants in the decision-making processes in resource governance.³³¹

Procedural justice plays at least 2 crucial roles in resource governance. First, it looks ahead of the decision-making and participatory processes put in place to see if they are just to every participating segment of the people who ought to participate in resource governance. Secondly, after the accomplishment of the decision-making and participatory processes, it reviews the entire processes to see if each segment of participants was treated fairly. Kuehn puts it succinctly that procedural justice examines the procedure ahead of “its use (*ex ante*), they question whether the decision making and public participation procedures are fair to all concerned or whether they favor one side over the other. Also, looking back (*ex post*), the complaints question whether the completed decision making process did, in fact, treat all with equal concern and respect.”³³²

³²⁹ Kimberly Suiseeeya, “Procedural Justice Matters Power, Representation, and Participation in Environmental Governance” in Brendan Coolsaet, 1st ed, *Environmental Justice Key Issues* (London: Routledge, 2020) 37 at 38, particularly box 4.1 [Suiseeeya].

³³⁰ *Ibid* at 47.

³³¹ Kuehn, *supra* note 231 at 10688.

³³² *Ibid*.

Given “that participation is the primary mechanism for advancing procedural justice,”³³³ the thesis will devote the rest of the discussion in this segment to participation. A detailed analysis of other elements of procedural justice will be undertaken in chapter 3 under the segment on CERs filling the gaps in Nigeria’s environmental regulatory framework.

Suiseeya opines that the central theme of participation is that everyone must possess the “ability to engage in and influence decision-making processes that impact their territories, communities, and well-being, regardless of the scale at which decisions are made. Because environmental injustice results from power asymmetries and vice versa, leveraging decision-making processes to confront and acknowledge these imbalances can help lead to better decisions and, ultimately, outcomes.”³³⁴ Schlosberg advocates the participation of the host communities, who are often at the receiving end of adverse consequences of resource extraction, in the extractive and decision-making processes.³³⁵

Given the benefits of participation in resource governance, it seems that participation is a win-win concept. For instance, it has been argued that participation in resource governance ensures the legitimization of the decision-making processes, which in turn, increases the probability of acceptance of the outcome(s) by the participants in the decision-making processes.³³⁶ Also, these various elements of Environmental Justice are linked: participation, a form of procedural justice, is central to effective distributive justice. The decisions about what to distribute, the why, how and when of it, are taken at the pre-decision stage. It seems therefore that how equitable the distribution of harms and goods is, depends on the fairness of the participatory processes.³³⁷ Lastly, participation encourages a bottom-up approach to resource governance, because from “the perspective of frontline communities, e.g. those whose well-being will be most impacted by a governance initiative, procedural justice is often where environmental governance initiatives should start.”³³⁸

³³³ Suiseeya, *supra* note 329 at 48.

³³⁴ *Ibid.*

³³⁵ Schlosberg, *supra* note 226 at p. 125.

³³⁶ Suiseeya, *supra* note 329 at 41.

³³⁷ Kuehn, *supra* note 231 at 10688.

³³⁸ Suiseeya, *supra* note 329 at 41.

However, there are barriers to effective participation. They include language and financial barriers; and the ability and the know-how to access participatory mechanisms.³³⁹ These barriers are all present in the Niger Delta. These are some of the challenges that are evident in Nigeria's resource governance and have been identified as some of the issues that are preventing people of Niger Delta from participating effectively in resource governance in Nigeria.

Experts assert that the Niger Delta people are excluded from participating in extractive industry decision making processes, and this has also been cited as one of the precursors to the violence witnessed in the region.³⁴⁰ For instance, in respect of the defunct Federal Environmental Protection Agency (FEPA) which was created in 1988 as the main environmental regulatory agency in Nigeria³⁴¹ until its replacement in 2007 by the National Environmental Standards and Regulations Enforcement Agency (NESREA),³⁴² Eaton opines that FEPA did not have a provision that allowed the Niger Delta inhabitants, who are the persons most affected by environmental degradation, to participate in decision-making processes. Rather, it was the President of Nigeria who made decisions through appointment powers to the board, dismissal, fund allotment, and general control, "making FEPA even more likely to protect government interests, over the interests of pollution victims, when making its decisions."³⁴³

Unfortunately, NESREA, just like its predecessor, makes no provision for the participation of Nigerians, including the Niger Delta people in its decision-making processes, neither has it provided for the duty to consult and inform the Niger Delta people on the environmental governance processes. The President of Nigeria still takes and enforces decisions through the Minister of Environment and is not obligated to consult the people.³⁴⁴ The thesis will investigate what role CERs could play in reversing the exclusion of the Niger Delta people from the governance processes of the oil and gas resources found in their land, since as argued by Suiseeya, the core of participation "is the belief that decisions about activities that have

³³⁹ *Ibid* at 44.

³⁴⁰ Fact finding mission to the Niger-Delta, *supra*, note 12.

³⁴¹ Okorodudu-Fubara, *supra*, note 60 at p. 39.

³⁴² Section 36 of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act*, No. 25 of 2007, <<http://extwprlegs1.fao.org/docs/pdf/nig120569.pdf>> [NESREA Act]. NESREA Act repealed the Federal Environmental Protection Agency Act, which created the FEPA.

³⁴³ Eaton, *supra*, note 66 at 289.

³⁴⁴ Sections 7; 8; and 33 of the *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act*, 2007.

significant human welfare effects should be made with impacted communities, which also tend to be communities with the least access, representation, and power in decision-making processes.”³⁴⁵

2.3.4 Restorative or Corrective Environmental Justice

Restorative justice is often used interchangeably with corrective justice, commutative justice, compensatory justice and retributive justice.³⁴⁶ Perhaps to also show that both corrective and restorative justices are one and the same thing, Kuehn uses both concepts interchangeably by arguing that corrective justice “attempts to restore the victim to the condition she was in before the unjust activity occurred. Corrective justice involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.”³⁴⁷ In this segment, the thesis will use restorative and corrective justices interchangeably.

Figueroa is of the view that restorative justice is not a stand-alone component of Environmental Justice; rather, it is an element of recognition. Figueroa’s standpoint flows from a conception of restorative justice as a process to seek healing, as against retribution, through dialogue and reconciliation between the offenders and the victims of environmental harms.³⁴⁸ It is arguable that most of the components of Environmental Justice conflate with each other, not just recognition and restorative justice. For instance, “the concepts and practices of recognition are closely linked to distributional issues as part of a more holistic concern with individual functioning and flourishing”³⁴⁹ and the coming together of recognition and distributary justice in this circumstance does not subsume one component into another. Therefore, the thesis will treat restorative justice as a stand-alone component of Environmental Justice.

What then is restorative/corrective justice? Okonkwo defines corrective justice as the “use of legislation, rules, and regulations, or lawsuits to reward, compensate, or punish guilty parties for damages done.”³⁵⁰ From the definition, at least 2 dimensions of restorative/corrective justice may

³⁴⁵ Suisseea, *supra*, note 329 at 42.

³⁴⁶ Kuehn, *supra*, note 231 at 10693-10694.

³⁴⁷ *Ibid* at 10693.

³⁴⁸ Figueroa, *supra* note 198 at 12.

³⁴⁹ Holland, *supra* note 288 at 74.

³⁵⁰ Okonkwo, *supra* note 72 at 36.

be deduced – first, it involves the obligation to repair environmental damages caused; and second, the punishment of lawbreakers whose actions have resulted in environmental injuries. Kuehn seems to affirm these 2 dimensions by stating that corrective justice “involves fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and communities are addressed.”³⁵¹ Some experts cite the payment of compensation and damages by offenders for environmental injuries caused; the various (strict and vicarious) liabilities regimes in torts; the polluter-pay-principle; the placement of the burden of proof on the offender in environmental litigation; and the clean-up operations of degraded environment as practical manifestations of restorative/corrective justice.³⁵²

2.4 Critiques of Environmental Justice Scholarship

As a theory, Environmental Justice is not without its critics. Some of the main critiques are examined in the next sections.

2.4.1 Distribution or Eradication of Environmental Harms?

First, it has been alleged that Environmental Justice is concerned with the distribution and spread of environmental harm as opposed to the eradication of it. Some experts even define Environmental Justice “exclusively in terms of distributing environmental ‘bads’ so that they are not all located in areas populated by marginalized groups. Conceptualizing Environmental Justice in this way characterizes the movement as accepting environmental harms so long as they are shared equitably among members of society.”³⁵³

However, while Environmental Justice may point the searchlight on the concentration of environmental harms in poor neighborhoods, ultimately Environmental Justice must be concerned with the eradication of environmental harms. An example of this would be the response of the local community regarding the various environmental issues that were bedeviling Hartford, a predominantly minority and poor community in Connecticut in the USA in the 1990s. There was an unusual concentration of businesses that generated environmental harms, including landfills that served the entire state of Connecticut and regional waste disposing

³⁵¹ Kuehn, *supra* note 231 at 10693.

³⁵² *Ibid.*

³⁵³ Gellers & Jeffords, *supra* note 128 at 103.

incinerators in Hartford. The local Environmental Justice movement - the Hartford Environmental Justice Network (HEJN) made up of about 1,800 individuals and 30 institutional members - came together to campaign for the eradication of these environmental harms as against their relocations to other areas outside Hartford.³⁵⁴ To sustain and magnify the protest, HEJN entered into coalitions with other liked-minded groups including the Natural Resource Defense Council, the Connecticut Fund for the Environment and National Association for the Advancement of Colored People Legal Defense Fund who lent their voices and their resources to the cause.³⁵⁵ The increasing pressure from the protests, which called for the clean-up of the landfill rather than its relocation from Hartford, paid off as the operators yielded and cleaned up the landfills.³⁵⁶

As a result of the sustained campaign by HEJN and allied groups, the operators were forced to enter into an agreement with HEJN to clean-up the landfill while HEJN stopped the protest.³⁵⁷ Apart from entering coalitions, part of the reason why HEJN succeeded was the shift in the policies of the federal government which became responsive to the Environmental Justice needs of minority and marginalized groups. It started with the signing into law in 1994 by President Bill Clinton of Executive Order 12898: *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.³⁵⁸ The Executive Order provided in section 1-101 that “each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions.”

As a follow-up, the federal government, in 1995, initiated the Urban Environmental Program (UEP) to be administered by the USEPA and Hartford was one of the cities chosen for the pilot scheme.³⁵⁹ The UEP sought to address environmental injustices “in a way that engages, informs,

³⁵⁴ Stefanie Chambers, “Minority Empowerment and Environmental Justice” (2007) 43 (1) Urban Affairs Review 28 at 28 & 34 [Chambers].

³⁵⁵ *Ibid* at 36.

³⁵⁶ *Ibid*.

³⁵⁷ *Ibid*.

³⁵⁸ Executive Order 12898 of February 11, 1994, vol. 59, No. 32 <<https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>>.

³⁵⁹ United States’ Environmental Protection Agency, “Urban Environment Program” (1995) <<https://www3.epa.gov/region1/eco/uep/index.html>>.

and responds to local resident needs. The UEP takes an active role in listening to community needs and concerns, identifying projects, and providing resources to implement projects that make measurable improvements in public health and the quality of the urban environment.”³⁶⁰

The impacts of these initiatives – the Executive Order and UEP - boosted HEJN’s effort because it was “evident that they contribute[d] to state and local governmental attention to Environmental Justice. It also seems that the executive order and UEP have made the government more receptive to Environmental Justice. This has undoubtedly enhanced the legitimacy of its [HEJN] dealings with the government.”³⁶¹

As will be seen in the thesis, there are many groups in the Niger Delta like the Movement for the Survival of Ogoni People (MOSOP)³⁶² and PANDEF³⁶³ with aims like the HEJN. Indeed, the campaign by MOSOP, especially during the leadership of the late Ken Saro-Wiwa, to promote Environmental Justice in the Niger-Delta is unique because of MOSOP’s ability to attract international goodwill to the campaign which, in turn, has brought international condemnation³⁶⁴ and pressure to bear on Shell, culminating in the “global boycott of Shell in the 1990s.”³⁶⁵ MOSOP’s campaign forced Shell to rethink its engagement model with the Niger Delta, but it remains to be seen how long Shell abides by the commitment.

In response to considerable social unrest and bad press in the mid-1990s, Shell...adopted a new approach dealing with the Niger Delta in 1998, known as partnership development. This model aims at achieving community consent that is referred to in the corporate world as a company's 'social licence to operate'. The construction of a large community development bureaucracy within Shell Nigeria, and the mushrooming of local civil society organisations as sub-contractors for particular community development interventions - youth training, women in development, micro-credit and conflict resolution - have formed part of the programme's implementation. The partnership approach has also been accompanied by a renewed engagement of international development agencies which had cut ties with the Abacha regime following the 1995 execution of Ken Saro- Wiwa and eight other Ogoni rights leaders.³⁶⁶

³⁶⁰ *Ibid.*

³⁶¹ Chambers, *supra* note 354 at 50.

³⁶² Tijen Demirel-Pegg & Scott Pegg, “Razed, Repressed and Bought off: The Demobilization of the Ogoni Protest Campaign in the Niger Delta” (2015) 2 *Extractive Industries & Soc’y* 654 at 657.

³⁶³ PANDEF, *supra* note 53.

³⁶⁴ Anna Zalik, “The Niger Delta: ‘Petro Violence’ and ‘Partnership Development’” (2004) 31 (101) *Review of African Political Economy* 401 at 402 [Zalik 1]

³⁶⁵ Anna Zalik, “Oil ‘futures’: Shell’s Scenarios and the Social Constitution of the Global Oil Market” (2010) 41(4) *Geoforum* 553 at 555.

³⁶⁶ Zalik 1, *supra* note 364 at 402.

These groups have been mobilizing against the environmental injustices in the Niger Delta without obtaining result similar to the HEJN's, ostensibly because there is no equivalence of Executive Order 12898 and initiatives like the UEP in Nigeria. A dearth of relevant laws and policies tailored toward addressing environmental injustices has been cited as one of the contributory factors to the environmental degradation of the Niger Delta; there would be no legal basis to proceed against the violators of the environment nor policy framework to pressurize the government into addressing environmental harms in the Niger Delta.³⁶⁷ What this indicates is that beyond the distribution of environmental harms instead of concentrating environmental harms in poor and disadvantaged neighborhoods, ultimately, Environmental Justice is targeted at the eradication of environmental harms.

2.4.2 Can Environmental Justice Tackle Capitalism?

Secondly, experts argue that environmental degradation in developing countries is fueled by capitalism, and that especially for the Niger Delta, Environmental Justice is too idealistic and therefore incapable of wrestling with either capitalism – the underlying cause of the environmental injustices - or the resultant environmental injustices themselves.³⁶⁸ The argument is that capitalism seeks to maximize profit, but stringent environmental regulations in developed countries mean that the TNCs must find ways to internalize their environmental costs, and therefore developing countries become the destination of choice for the export of environmental harms from developed countries.³⁶⁹ Developing countries have become soft targets for developed countries and their enterprises to export of environmental injustices for reasons including “lower costs, low wages and weak environmental and regulatory legislation...with ‘enforcement gaps.’”³⁷⁰

What this indicates, according to critics, is that for the TNCs, “profits drive their choices of location, commodity and how they choose to operate... (C)apitalism has become the unchallenged custodian of allocating environmental goods and ‘bads’, privileging the logic of the

³⁶⁷ Okonkwo, *supra* note 72 at 219.

³⁶⁸ Gonzalez, *supra* note 34 at 177 and 187.

³⁶⁹ Daniel Faber, “The Political Economy of Environmental Justice” in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, 1st ed, *The Routledge Handbook on Environmental Justice* (London: Routledge, 2017) 61 at 61.

³⁷⁰ Ruchi Anand, “Free-Market Economics, Multinational Corporations and Environmental Justice in a Globalized World” in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, 1st ed, *The Routledge Handbook on Environmental Justice* (London: Routledge, 2017) 479 at 481 [Anand].

so-called ‘free market’ over any other contender, environmental justice included.”³⁷¹ Ruchi Anand argues that with capitalism, Environmental Justice seems ill-equipped to combat the resultant environmental injuries because the “profit motives associated with every conceivable relationship have led to the commodification of sustainable development and environmental justice. The future of environmental justice, national and international, looks rather bleak in the face of the spreading culture of capitalism.”³⁷²

However, research by Boyd,³⁷³ Gonzalez³⁷⁴ and Suseeya³⁷⁵ indicates that Environmental Justice is capable of wrestling with environmental injuries arising from the operations of TNCs, especially through the deployment of CERs. Their research has shown that marginalized communities have been relying on CERs to obtain remedies for environmental harm from businesses. The thesis revisits this point when considering the nexus between Environmental Justice and CERs.

2.4.3 The Cost Benefit Analysis of Environmental Justice

Thirdly, experts argue that from a cost benefit analysis perspective, achieving Environmental Justice either by proactively incorporating Environmental Justice components into planning, decisions and policies, or reactively through litigation and other reactive measures, is potentially expensive and could have serious cost implications, including channeling resources that ought to have gone into projects for the benefit of the marginalized communities into tackling Environmental Justice considerations.³⁷⁶ Chinn argues that businesses may need to sacrifice Environmental Justice issues for efficiency, but in “contrast, an environmental justice analysis does not view efficiency as a goal. Instead, environmental justice advocates [placing] a high premium on relieving low-income and minority communities of environmental burdens regardless of resulting higher costs to certain market participants or society as a whole.”³⁷⁷ However, it is potentially more costly not to incorporate Environmental Justice objectives into

³⁷¹ *Ibid* at 486.

³⁷² *Ibid*.

³⁷³ Boyd 2, *supra* note 29 at 192.

³⁷⁴ Gonzalez 3, *supra* note 223 at 85.

³⁷⁵ Suseeya, *supra* note 329 at 45.

³⁷⁶ Christopher Foreman, *The Promise and Peril of Environmental Justice* (USA: Brookings Institution Press, 1998) at 109-111.

³⁷⁷ Chinn, *supra*, note 211 at 83-84.

businesses because issues of “[environmental] justice and human rights also matter,”³⁷⁸ and environmental harms also create costs such as health care, reduced productivity of the environment and people, etc.

The thesis uses the Ogoniland imbroglio to highlight the potential (higher) cost of not inculcating Environmental Justice principles in resource governance. Environmental justice might involve shutting down or pausing the business operations that are causing the environmental harm in order to clean-up the environment, or in the case of the Niger Delta, due to unrest caused by protesting communities and youths. These alternatives may consume more resources than the initial cost of operating the business in an environmentally just manner.

In Ogoniland, UNEP recommended the setting up of an agency with an initial lifespan of 10 years to implement its report. It also recommended that an initial take off grant of \$1billion (USD), to be contributed to by both the government and the operators in the Nigerian oil industry, be given to the agency as initial funding.³⁷⁹ This capital layout made the cleanup exercise the largest ever undertaken in the world.³⁸⁰ In response, the federal government of Nigeria finally set up the HYPREP in 2016 – 5 years after the release of the report - to implement the report and the pilot remediation activities only commenced in 2018 – 7 years after the release of the report.³⁸¹

Because oil pollution in Ogoniland had not been promptly addressed, it spread alarmingly and contaminated soil and ground water sources. UNEP therefore also recommended setting up an Integrated Contaminated Soil Management Centre for bioremediation, which should “be a modern industrial enterprise in Ogoniland employing hundreds of people.”³⁸² The federal government responded by commencing the construction in 2017 of the Integrated Contaminated

³⁷⁸ Francine Rochford, “Environmental Justice and Water Markets—an Antipodean Critique” (2018) 30 JEL 83 at 87.

³⁷⁹ UNEP Report, *supra* note 13 at 15.

³⁸⁰ Camillus Eboh & Felix Onuah, “U.N. Slams Shell as Nigeria Needs Biggest Ever Oil Clean-Up”, *REUTERS* (4 August 2011) <<https://www.reuters.com/article/us-nigeriaogoniland/u-n-slams-shell-as-nigeria-needs-biggest-ever-oil-clean-up-idUSTRE7734MQ20110804> [<https://perma.cc/C5QB-5C3Q>]>.

³⁸¹ HYPREP, “Ogoni Clean-Up: Achievements in Three Years” (23 June 2020) <<https://hyprep.gov.ng/ogoni-clean-up-achievements-in-three-years/>> [HYPREP 2].

³⁸² UNEP Report, *supra* note 13 at 13.

Soil Management Centre in Ogoni – 6 years after the release of the report.³⁸³ Due to groundwater contamination, UNEP also recommended the urgent provision of potable water to the people.³⁸⁴ In response, the federal government on March 3, 2021 – 10 years after the report - awarded the contract for 6 water supply infrastructures in Ogoni estimated at N6.05billion Naira (about \$9million CAD).³⁸⁵ It is debatable whether all these resources would have been needed if Shell had operated in an environmentally sustainable manner in Ogoniland in the first place. Above all, Shell abandoned their operation in Ogoniland in 1993 - more than twenty-nine years ago - because of the antagonism between it and the Ogoni people as a result of Shell's failure to operate its crude oil exploitation business in an environmentally sustainable and just manner.³⁸⁶ Apart from the cost implication of the investment in machinery that is not being put into productive use, Shell has not made any income from Ogoniland. Between 1958 when oil was discovered in Ogoniland and 1993 when Shell left - a period of thirty-five years - Shell drilled about 634 million barrels of oil estimated at \$100 billion USD, yet twenty-nine years later, Shell was not able to make money because of its failure to inculcate the principles of Environmental Justice into its operation.³⁸⁷ Perhaps, the loss of these enormous earnings explains why Shell wants to go back to Ogoniland. According to MOSOP, Shell is making frantic efforts to resume oil exploitation in Ogoniland but the people have made it clear in a public statement in 2017 that Shell is not welcome in their land because its previous operation in Ogoniland was not conducted in an environmentally sustainable and just manner.³⁸⁸ This suggests that doing business in an environmentally just manner can be more cost effective than not.

³⁸³ Abila Sylvanus, "An Appraisal of Critical Highlights of the United Nations Environment Programme Report (UNEP) on the Environmental Assessment of Ogoni Land, The Setting Up of the Hydrocarbon Remediation Project (HYPREP) by the Federal Government of Nigeria, Its Operations and Recommended Pathways Towards Creating a Sustainable Environment and Development in Ogoni Land" (2019) 9 (8) *Journal of Environment and Earth Science* 45 at 50.

³⁸⁴ UNEP Report, *supra* note 13 at 13.

³⁸⁵ HYPREP, *supra* note 46.

³⁸⁶ Victor Adefemi Isumonah, "Minority political mobilization in the struggle for resource control in Nigeria" (2015) 2(4) *The Extractive Industries and Society* 645 at 645.

³⁸⁷ Ikpobari Senewo, "The Ogoni Bill of Rights (OBR): Extent of actualization 25 years later?" (2015) 2(4) *The Extractive Industries and Society* 664 at 665 [Senewo].

³⁸⁸ Movement for the Survival of Ogoni People (MOSOP), "Plan to Resume Oil Production in Ogoni is a Plan to Kill the Ogoni People", *The Nigerian Voice* (19 July 2017) <<https://www.thenigerianvoice.com/news/254851/plan-to-resume-oil-production-in-ogoni-is-a-plan-to-kill-the.html>>.

2.4.4 Environmental Justice as a “Western” Concept

Fourthly, it has also been argued, especially by experts from Africa such as Margaret Ssebunya, Stephen Morgan and Beatrice Okyere-Manu, that Environmental Justice as presently constituted is Westernized³⁸⁹ and does not take into context the peculiarities of an African setting, and therefore it is incapable of resolving environmental harms in Africa.³⁹⁰ Other experts have identified some of the concepts that should be incorporated into the Environmental Justice framework to include Afrocentric perspectives. The thesis firstly identifies these concepts and then addresses them together.

Ssebunya et al argue that there “has also been the absence of an environmental justice theory that takes into consideration the cultural and traditional principles of the African people.”³⁹¹ Holder and McGillivray also note the absence of knowledge from the host communities in Environmental Justice framework development processes which make them ineffective in Africa.³⁹² Murdock observes that Environmental Justice in Africa does not take into account local circumstances.³⁹³ John Mweshi adds that the Western Environmental Justice framework models lack the concept of ‘harmonious relations’ which is a “plausible way out of the theoretical quagmire that characterises Western environmental ethics. Further, understanding justice within the framework of the African view of harmonious relations [between various components of the environment] allows us to broaden the concept of environmental justice and has a lot to contribute to an African perspective on environmental ethics.”³⁹⁴

What then is Afrocentric Environmental Justice? Ssebunya et al provide the following answers:

it should be unmistakable that any African theory of environmental justice cannot be whole or complete without incorporating features of solidarity and interconnectedness of humans with one another and also with the environment. Thus, an Afrocentric ...environmental justice theory ought to take into account the principles which stress the importance of human interconnectedness with one another and with the natural environment. Such a theory should integrate the important

³⁸⁹ There are diverse Western perspectives on environment justice including the Indigenous people and canonical environmental ethics, but I will be focusing on mainstream Western environmental ethics. See Lynda Collins, *The Ecological Constitution Reframing Environmental Law* (London & New York: Routledge, 2021) 64-66.

³⁹⁰ Ssebunya et al, *supra* note 244 at 180.

³⁹¹ *Ibid* at 184.

³⁹² Holder & McGillivray, *supra* note 210 at 186.

³⁹³ Murdock, *supra* note 197 at 11.

³⁹⁴ John Mweshi, “The African Emphasis on Harmonious Relations: Implications for Environmental Ethics and Justice” in Munamato Chemhuru, ed, *African Environmental Ethics A Critical Reader* (Switzerland: Springer, 2019) 191 at 192 [Mweshi].

principles of solidarity, shared values, and mutual responsibilities that permeate the communitarian lives of the African people.³⁹⁵

A synthesis of all the various positions of these experts indicates that an Afrocentric Environmental Justice framework should consist of the principles of solidarity, shared values, mutual responsibilities and harmonious relationship. It should also recognize local circumstances and knowledge, and the culture and traditions of the victims. Paying particular attention to these elements will be part of the analysis of the Niger Delta, since the main concern of the thesis is ensuring that Environmental Justice achieves justice and sustainability for the Niger Delta people and their land.

2.4.5 Anthropocentricity of Environmental Justice

Fifthly, it has also been argued that Westernized Environmental Justice is anthropocentric as against an Afrocentric Environmental Justice that adopts an eco-centric environmental ethic. This will likely affect the effectiveness of Environmental Justice in Africa. Ssebunya et al argue:

From the discussion of the Western perspectives on environmental justice, it is evident that environmental justice theories appear to mainly concentrate on humans (that is, attaining fair distribution of environmental burdens and resources for both the rich and the poor, majority and minority groups as well as the advantaged and the disadvantaged) with little or nothing said with regards to the wellbeing and sustainability of the natural environment. Thus, one is forced to ask: How does the environmental [sic] benefit from environmental justice if humans are the only beneficiaries? This is a genuine question that renders the usually anthropocentric Western theories of environmental justice inadequate.³⁹⁶

Ssebunya et al conclude that Environmental Justice discussed in an African context should equally address the natural environment and human's interests.³⁹⁷ Nompumelelo Manzini also argues that anthropocentrism is a Western ideology that views the environment as an object for humans to “‘interrogate, subdue, dominate and manipulate’. An example would be the kind that argues that oil spills in the sea are bad, because of what they do to human beings. Or that they are bad for fish because human beings are the ones who eat the fish.”³⁹⁸ Like Ssebunya et al,

³⁹⁵ Ssebunya, *supra* note 244 at 184.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ Nompumelelo Manzini, “African Environmental Ethics as Southern Environmental Ethics” in Munamato Chemhuru, ed, *African Environmental Ethics A Critical Reader* (Switzerland: Springer, 2019) 111 at 116.

Manzini concludes that as a result, “talk around the community is not anthropocentric, as the community in the African sense refers to those living and dead, animals, plants, ancestors.”³⁹⁹

The thesis concedes that it would appear that the initial effort in Environmental Justice was geared towards protecting human beings from the adverse impacts of inequitable distribution of environmental benefits.⁴⁰⁰ This may explain why the initial definitions of Environmental Justice as already analyzed seem to be human centered. But many experts including Veselaj Zeqir, Mustafa Behxhet and Krasniqi Zenel have opined that there has been a shift from an anthropocentric to an ecocentric Environmental Justice framework with emphasis placed on both the environment and human beings.⁴⁰¹ Satish Shastri affirms this by also arguing that regarding the Environmental Justice framework, “[recently], however, there has been a paradigm shift from its anthropocentric approach to an eco-centric approach.”⁴⁰² Nicole Ross also acknowledges that there has been a shift towards eco-centricity but that the shift in focus is enforced by current environmental crises like “global warming, escalating natural disasters, [and the] depletion of natural resources.”⁴⁰³ From the foregoing, it is difficult to sustain the argument that Westernized Environmental Justice is purely anthropocentric while the African version is eco-centric and for that reason, Environmental Justice will not be effective in Africa.

2.4.6 The Individualism of Environmental Justice

Sixthly, it has also been argued that Westernized Environmental Justice is individualistic and therefore not likely to flourish in Africa where emphasis is on forging strong communal bonds. Some of the proponents of this theory include Thaddeus Metz,⁴⁰⁴ Godfrey Tangwa, Segun Ogungbemi and Munyaradzi Murove.⁴⁰⁵ In contrast, Afrocentric Environmental Justice is built on communal thinking where an individual is part of a community and resources are

³⁹⁹ *Ibid* at 117.

⁴⁰⁰ Satish Shastri, “Environmental Ethics Anthropocentric to Eco-Centric Approach: A Paradigm Shift” (2013) 55 (4) J.I.L.I. 521 at 530 [Shastri].

⁴⁰¹ Veselaj Zeqir, Mustafa Behxhet & Krasniqi Zenel, “Pro-ecological Views of Kosovar Teachers Measured by Endorsement of the New Ecological Paradigm Statements” (2019) 21 (1) Journal of Teacher Education for Sustainability 88 at 89.

⁴⁰² Shastri, *supra*, note 400 at 532.

⁴⁰³ Nicole Ross, “Anthropocentric Tendencies in Environmental Education: A Critical Discourse Analysis of Nature-Based Learning” (2020) 15 (3) Ethics and Education 355 at 359.

⁴⁰⁴ Thaddeus Metz, “An African Theory of Moral Status: A Relational Alternative to Individualism and Holism” in Munamoto Chemhuru, ed, *African Environmental Ethics A Critical Reader* (Switzerland: Springer, 2019) 9 at 9.

⁴⁰⁵ Ssebunya, *supra* note 244 at 181.

communally-owned for the benefit of everyone with the corresponding communal duty to protect the common heritage.⁴⁰⁶ Consequently, “though resources were held in common, offenders were charged and fined heavily to deter others from repeating the offence. Communalism, collectivism and working with others as a team were and continue to be essential components of the African communitarian society through which Africans ensured proper management of the environmental resources.”⁴⁰⁷ On account of this, while Mweshi concludes that there needs to be “a shift from considering the value of individuals to considerations of collective entities,”⁴⁰⁸ Aida Terblanché-Greeff argues that the West “has much to learn from others who are not driven by individualistic values and economics.”⁴⁰⁹

However, at the risk of repeating the argument on the segment on the history, meaning and components of Environmental Justice, it is arguable that even a Western Environmental Justice framework protects both individuals and communities from environmental harms. As a mass movement, Environmental Justice thrives on the collective power of mobilization and community spirit. The participatory component of Environmental Justice is meant to ensure the building of consensus towards resource governance and its impacts on the individuals and communities alike. However, the thesis in its analysis, will pay particular attention to these elements, because the central thrust of the thesis is the achievement of Environmental Justice and sustainability for the Niger Delta. The thesis is of the view that modern Western Environmental Justice has evolved a lot to be able to accommodate the various dimensions of Afrocentric environmental ethics including eco-centrism, communalism, harmonious relationship, solidarity, shared values, and mutual responsibilities. These nuances on the Afrocentric approach are engaged in the Niger Delta situation.

⁴⁰⁶ There are varied viewpoints on Africa’s Environmental Justice, including the traditional and religious ethics that underpin conceptions of African Environmental Justice, but the thesis will concentrate on the dominant Africa’s Environmental Justice. See Kai Horsthemke, *Animals and African Ethics* (Palgrave Macmillan, 2015) at 2-3.

⁴⁰⁷ Ssebunya, *supra* note 244 at 182.

⁴⁰⁸ Mweshi, *supra* note 394 at 198.

⁴⁰⁹ Aida Terblanché-Greeff, “Ubuntu and Environmental Ethics: The West Can Learn from Africa When Faced with Climate Change” in Munamoto Chemhuru, ed, *African Environmental Ethics A Critical Reader* (Switzerland: Springer, 2019) 93 at 106.

2.4.7 Barriers to achieving Environmental Justice in Nigeria

Lastly and specifically in the Niger Delta, it has also been argued that Environmental Justice would not be able to assist in resolving the Niger Delta sustainability crisis because of Nigeria's governance issues, including weak and outdated laws and enforcement gaps. According to Okonkwo,

[A]chieving environmental justice in Nigeria...may not be an easy task. The comparative discussion, for instance, shows that the Nigerian laws are largely outdated, uncover weaknesses and gaps in the relevant laws, and show regulatory gaps...Furthermore, examination of regulatory enforcement has unravelled many problems. With these problems, Nigeria is making little or no progress in reducing environmental injustice caused by oil and gas activities. Not only has this book showed that oil-related pollution caused disproportionate environmental burdens in Nigeria...it also showed weak regulation and inadequate environmental protection to sustain human health and well-being. Facts showed that there is no meaningful and transparent public participation in decision-making and no equitable accessibility of procedures and processes needed to tackle negative environmental impacts. The comparison also revealed a significant level of government hesitation or weak political will to enforce the already weak Nigerian laws and some binding treaties such as the African Charter to give effect to fair and equitable principles in which EJ is rooted.⁴¹⁰

In agreement with Okonkwo, indeed the issues highlighted are of critical interest to the present project. The issues identified by Okonkwo as inimical to the effectiveness of Environmental Justice in the Niger Delta are the same issues that the thesis has identified as challenges to the achievement of environmental sustainability in the Niger Delta. In the next segment, the thesis analyzes the roles Environmental Justice and CERs could play in resolving these impediments.

2.5. The Usefulness of the Environmental Justice Perspective in this Thesis

Using Environmental Justice as the intellectual anchor for the research will serve at least 3 purposes. First, it will help expose the causes of the environmental degradation in the Niger Delta.⁴¹¹ Anand argues that “the conceptualization and understanding of the notion of environmental justice is imperative to fully appreciate the factors that underlie oil-related conflicts in the Niger Delta, and a prerequisite to their long-term resolution.”⁴¹²

As part of this, in the thesis, Environmental Justice will help to investigate the structural imbalance in the Nigerian federation due to (1) ownership of resources, and (2) distribution of oil

⁴¹⁰ Okonkwo, *supra* note 72 at 219.

⁴¹¹ Gonzalez 3, *supra* note 223 at p. 84.

⁴¹² Ako & Olawuyi, *supra* note 10 at 572.

revenue across the federal, states and local governments, all of which sustain and exacerbate the Niger Delta's environmental conditions.⁴¹³ It will also help to analyze the nexus between the absence of Environmental Justice in the extractive industry in the Nigeria and the militancy in the Niger Delta. Experts assert that environmental injustice is the underlying cause of the militancy in the Niger Delta, and this has led to the destruction of oil and gas facilities, further worsening the environmental conditions of the Niger Delta.⁴¹⁴

Second, the Environmental Justice approach will explain why the impact of the environmental degradation in the Niger Delta is severely felt by the poor. Environmental Justice epistemology has established that the most vulnerable segments of society disproportionately bear the burden of environmental costs.⁴¹⁵ This holds true for the Niger Delta. UNEP, for example, discovered that in the Nisisioken Ogale community, the people's only source of drinking water was from wells which had been "contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) guideline."⁴¹⁶ UNEP also found that in Ogoniland, due to the consistent pollution of the creeks by crude oil and the attendant obliteration of fish habitats, fishing, which is one of the main occupations of the people, was almost non-existent. Fish farming was not spared either as fish farm businesses set up in or near the creeks were ruined by an "ever-present layer of floating oil."⁴¹⁷

Indeed, "acknowledged as a dimension of Environmental injustice",⁴¹⁸ poverty is a burden on the Niger Delta. Boyd argues that "there is a growing body of evidence that a disproportionate burden of harm from environmental degradation – toxic pollution, overfishing, habitat destruction, etc. – is borne by people who are poor, belong to ethnic minorities, or are otherwise disadvantaged."⁴¹⁹ This is the case in the Niger Delta. The linkages between environmental degradation and poverty are apparent. About 60% of the Niger Delta population depends on the environment for livelihoods while 60% of the family income of half of the extremely poor families comes from the utilization of the environment.⁴²⁰ Agriculture alone employs 44.2 % of

⁴¹³ The World Bank on the Niger Delta, *supra* note 17 at XII.

⁴¹⁴ Bamidele, *supra* note 51 at 539.

⁴¹⁵ Gonzalez 3, *supra* note 223 at 84 & 85.

⁴¹⁶ UNEP Report, *supra* note 13 at 11.

⁴¹⁷ *Ibid* at 10.

⁴¹⁸ Gellers & Jeffords, *supra* note 128 at 106.

⁴¹⁹ Boyd, *supra* note 28 at 32.

⁴²⁰ World Bank on the Niger Delta *supra*, note 17 at 17.

the population.⁴²¹ Due to the dependence of the people on the environment, the “destruction of the environment from oil spills, gas flaring and deforestation have made the poorest communities vulnerable and have had direct deleterious impacts. Hence, protecting the natural environment of the Niger Delta is closely linked to the protection of the rights and economic wellbeing of its citizens.”⁴²²

Third, CERs could assist in promoting Environmental Justice in the Niger Delta. Experts are of the view that Environmental Justice is idealistic and would require substantive tools like the CERs to tackle environmental injustices. Ako and Olawuyi opine that the solution for the environmental degradation in the Niger Delta would involve an extensive reconfiguration of Environmental Justice to place a premium on discovering and tackling the “human rights impacts of resource development projects that result in poor and vulnerable populations suffering disproportionate adverse impacts of resource development. Practically, this approach means that existing resource regimes must be reformed to include elements of active public participation; accountability; equality and non-discrimination; access to information; and access to justice.”⁴²³ This refers to procedural aspects of Environmental Justice.

Kotze corroborates by asserting that (Environmental) Justice “is abstract and vague, and thus unable to provide clear guidance... it remains ‘merely a non-legal (moral) idea,’ requiring more concrete legal constructs such as human rights, which themselves are based on the notion of justice.”⁴²⁴ Although Kotze spoke about human rights generally, CERs are a subset of human rights and therefore within Kotze’s contemplation. Indeed, the linkages between CERs and Environmental Justice have been explored, with Boyd arguing that CERs “should promote Environmental Justice by ensuring a minimum standard of environmental quality for all members of society.”⁴²⁵

In the same vein, Gonzalez has identified the following CERs as drivers of Environmental Justice: the right to a healthy environment, the right to environmental information, the right of

⁴²¹ Master Plan, *supra* note 1 at 68.

⁴²² World Bank on the Niger Delta, *supra* note 17 at 15.

⁴²³ Ako & Olawuyi, *supra* note 10 at 572.

⁴²⁴ Louis Kotze, “Human Rights, the Environment, and the Global South” in Shawkat Alam et al, ed, *International Environmental Law and the Global South* (USA: Cambridge University Press, 2015) 171 at 173.

⁴²⁵ Boyd 2, *supra* note 29 at 192.

redress for environmental harm and right to participation.⁴²⁶ Sui-seeya adds that free and prior informed consent “has emerged globally as one of the most popular tools for working towards environmental justice at the community level. It is a tool used to secure the consent of communities for the implementation of a project or intervention that will impact the community.”⁴²⁷ There are, however, contrary opinions that assert that CERs do not further Environmental Justice. I will address these assertions and their counterarguments in the next segment.

2.6 Critique of the linkage between Environmental Justice and CERs

2.6.1 Lack of Empirical Evidence

First, critics doubt the ability of CERs to promote Environmental Justice. For instance, it has been argued that there is no empirical proof that CERs promote Environmental Justice thereby leading to tangible improvement in the environment.⁴²⁸ It has also been argued that despite the wide-spread attempt to dress Environmental Justice issues as rights-based issues and the subsequent deployment of CERs to tackle them, environmental injuries are still prevalent which may indicate not a lack of effort but the incongruence of CERs as an effective measure to tackle Environmental Injustice.⁴²⁹

Gonzalez pins the inability of CERs to promote Environmental Justice on globalization and the individualistic nature of CERs, among others. On globalization, she argues that rights-based initiatives have not been able to hold the developed countries and the TNCs accountable for environmental injuries that they cause in developing countries because “nations in the global South are structurally dependent on the global North...through international investment law (which often protects the interests of the foreign investor against those of the local citizens and the environment), and through the vast economic power of transnational corporations.”⁴³⁰

On the individualism of CERs, she argues that one feature of Environmental Justice is the “emphasis on communitarian notions of justice. Human rights law, with its emphasis on

⁴²⁶ Gonzalez 3, *supra* note 223 at 85.

⁴²⁷ Sui-seeya, *supra* note 329 at 45.

⁴²⁸ Gellers & Jeffords, *supra* note 128 at 101.

⁴²⁹ Evan Comer, “Constitutional Rights and Environmental Justice - A Comparative Analysis” (2016) 94 (8) J. Animal & Env'tl. L. 113 [Comer].

⁴³⁰ Gonzelez, *supra* note 34 at 177.

individual rights, may be ill-suited to the task of advancing the collective rights of indigenous peoples, racial and ethnic minorities, and other subordinated communities disparately burdened by environmental degradation.”⁴³¹

However, there is empirical evidence supported by research indicating that CERs could promote Environmental Justice, with the attendant translation into improved environmental outcomes.⁴³² Specifically, CERs could be put to communal use and are being deployed to tackle globalization. In the course of this thesis, examples are provided of communal deployment of CERs and with elaboration on the ability of CERs to mitigate the impact of globalization on the environment. One case that typifies the adaptation of CERs to communal use to tackle globalization is the Matanza Riachuelo River incidence in Argentina.

The Matanza Riachuelo river basin is arguably among the world’s 30 most degraded environments with about 300 open landfills and 11,000 companies including TNCs operating within the river basin. In addition, about 20% of Argentina’s population live within the river basin but without basic waste disposal and sanitary facilities, further putting pressure on the marine ecosystem.⁴³³ Energized by the right to public participation provision in the Argentine 1994 Constitution,⁴³⁴ the residents of the river basin alongside civil society groups and Non-governmental organizations (NGOs)⁴³⁵ came together and sued the government of Argentina, the Province and Municipality of Buenos Aires and 44 businesses for environmental harms they have suffered as a result of the degradation of the river basin.⁴³⁶ On July 8, 2008, the Argentine Supreme Court ordered, among others, the comprehensive clean-up of the river basin and directed the creation of the River Basin Authority (Authority) to superintend it.⁴³⁷ The Authority

⁴³¹ *Ibid* at 183.

⁴³² Kerri Woods, “Environmental Human Rights” in Ryan Holifield, Jayajit Chakraborty & Gordon Walker, 1st ed, *The Routledge Handbook on Environmental Justice* (London: Routledge, 2017) 149 at 149.

⁴³³ Daniel Ryan & Andrés Nápoli, “Legal Mobilization and the Politics of Water Pollution. The Case of the Matanza-Riachuelo Basin in Argentina” in Catherine Ashcraft & Tamar Mayer, 1st ed, *The Politics of Fresh Water Access, Conflict and Identity* (UK: Routledge, 2016) 28 at 30 [Ryan & Nápoli].

⁴³⁴ Matthew Amengual, *Politicized Enforcement in Argentina* (UK: Cambridge University Press, 2016) 159 [Amengual].

⁴³⁵ Lucas Christel & Ricardo Gutiérrez, “Making Rights Come Alive: Environmental Rights and Modes of Participation in Argentina” (2017) 26 (3) *Journal of Environment & Development* 322 at 324 [Christel & Gutiérrez].

⁴³⁶ The Environment and Natural Resources Foundation, *The Matanza-Riachuelo River Basin Case* at 1 <https://www.internationalwaterlaw.org/cases/Argentina_Matanza-Riachuelo-River_Case/FARN_Summary.pdf> [The Environment and Natural Resources Foundation].

⁴³⁷ *Mendoza Beatriz Silvia and Others –V- The National Government and Others in regard to damage suffered (Damages stemming from the environmental contamination of the Matanza-Riachuelo River)* at 10

was also mandated to supervise the expansion of potable water supply, the provision of sewage disposal facilities, emergency health plans for the inhabitants of the river area and the clean-up of the entire river basin area, including the land-fills.⁴³⁸ The judgment led to a complete clean-up and remediation of the river basin.⁴³⁹ It also led to the provisions of potable water to approximately 1 million people, effluent treatment facilities, about 211 specimen locations to observe the quality of soil, water, air around the basin area, 12 mobile health posts to screen and treat kids for hazardous pollutants and the relocation of 18,000 families in the severely contaminated parts of the river basin to modern government built houses.⁴⁴⁰ The thesis will elaborate on this case in greater detail in chapter 3 in the segment on CERs giving impetus to the enforcement of environmental laws and regulations.

The above corroborates the result of empirical research conducted by Boyd,⁴⁴¹ Gellers and Jeffords on whether CERs have any tangible effect on Environmental Justice.⁴⁴² The result reveals that CERs were deployed by those who have suffered environmental harms to obtain redress from such injuries.⁴⁴³

2.6.2 CERs Reinforcing Existing Power Dynamics

Second, experts argue that CER mechanisms favor the powerful against the vulnerable, while Environmental Justice seeks to empower the powerless, and therefore, the 2 concepts are antithetical. The judicial system is often cited as an example of the inclination to favor the educated, wealthy and powerful against “the poor and marginalized communities that suffer the disproportionate burden of environmental harm.”⁴⁴⁴ Some of the specifics cited by experts include the fact that litigation is potentially expensive, slow, technically complicated (with issues of standing, costs, limitations and jurisdiction), and not user-friendly for the poor and illiterate.⁴⁴⁵

<https://www.escri-net.org/sites/default/files/Sentencia_CSJN_2008_english.pdf> [*The Matanza-Riachuelo River Basin Case*], The translation of the original text of the judgment in Spanish to English done by Michael Posner of the Human Rights Program of the Harvard Law School.

⁴³⁸ *Ibid* at 12-13.

⁴³⁹ Boyd 2, *supra* note 29 at 192-193.

⁴⁴⁰ Futurepolicy.org “Argentinian Supreme Court’s Judgment on Environmental Rights”

<<https://www.futurepolicy.org/crimes/argentinian-supreme-courts-pioneering-judgement-on-environmental-rights/>>.

⁴⁴¹ David Boyd, *supra*, note 28.

⁴⁴² Gellers & Jeffords, *supra* note 128.

⁴⁴³ *Ibid* at 100.

⁴⁴⁴ Boyd, *supra* note 28 at 42.

⁴⁴⁵ May & Daly 2, *supra* note 99 at 366-367.

However, in some places, CERs are being reformed to deal with these issues of access to justice, with tangible results. States have been proactive in making CERs more responsive to the needs of the down-trodden and evidence abounds that marginalized and vulnerable communities are becoming successful in environmental litigation.⁴⁴⁶ Some of these measures include establishing independent public institutions like the ombudsman in Namibia⁴⁴⁷ and the Ministerio Publico (Public Ministry) in Brazil,⁴⁴⁸ and vesting them with powers to defend the environment. Their powers include reporting, enforcing environmental laws, citizens' rights litigation and preventing actions with potential to damage the environment or infringe the right to a healthy environment.⁴⁴⁹ They serve as public prosecutors and can either initiate investigations and/or proceedings on their own or act on citizen complaints. In Namibia, the ombudsman has constitutional powers to investigate environmental damage and associated problems.⁴⁵⁰ In Brazil, the Ministerio Publico, has constitutional powers to protect collective interests, including the environment.⁴⁵¹ A detailed discussion of these measures, including their effectiveness and implementation challenges, will be undertaken in chapter 3 under the segment on CERs leading to the implementation of environmental laws and regulations and in chapter 5 which focuses on access to Justice.

2.6.3 CERs: Positive Rights and Non-Enforcement

Third, a further point that has been made is that CERs are mostly couched in positive rights, which governments tend to ignore. In such circumstances, CERs become a restraint on Environmental Justice. According to Comer, the "vast majority of environmental rights are framed as *positive* rights, which serves to compound the issues associated with enforceability. Positive rights, which normally include most socio-economic rights, require a state to spend

⁴⁴⁶ Karen Morrow, "Sustainability, Environmental Citizenship Rights and the ongoing Challenges of Reshaping Supranational Environmental Governance" in Anna Grear & Louis Kotze, ed., *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) at 209.

⁴⁴⁷ Article 91 © of the Namibian Constitution, 1990 (as amended) vests the Ombudsman with "the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia." See the Constitution of the Republic of Namibia, 1990 <<https://www.refworld.org/pdfid/47175fd361.pdf>> [Namibian Constitution].

⁴⁴⁸ Article 129 (III) of the Constitution of Brazil provides that the "institutional functions of the Public Ministry are: to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests." [Brazil's Constitution]

⁴⁴⁹ Boyd, *supra* note 28 at 69.

⁴⁵⁰ Namibian Constitution, *supra* note 447.

⁴⁵¹ Article 129 (III) of Brazil's Constitution, *supra*, note 448.

resources to provide a service or program mandated in the constitution.”⁴⁵² Citing the Philippines as an example,⁴⁵³ Comer opines that the “hypothesis holds that if a government becomes fiscally unable to support a positive right effectively, such a right may just be ignored as an aspirational principle.”⁴⁵⁴

However, while the thesis concedes that no country has achieved optimum environmental sustainability,⁴⁵⁵ considerable evidence points to an upward trend in the enforcement of CERs by countries that have adopted them. Contrary to Comer, the Philippines is a reference point in terms of a country that has complied with and enforced CERs.⁴⁵⁶ Collins affirms that country’s pioneering role in the enforcement of CERs by acknowledging that its Supreme Court was the first in the world to rely “on the concept of intergenerational equity in deciding an environmental dispute.”⁴⁵⁷

The case was *Oposa vs. Factorian*⁴⁵⁸ where the petitioners, who were minors, brought the suit on their behalf as well as on behalf of unborn generations against the Secretary of the Department of Environment and Natural Resources, seeking the cancellation of all existing timber license agreements in the country. The argument was that at the prevailing rate of timber utilization, there would be little to no timber left for them and future generations. It was in evidence that in 25 years, the Philippines’ natural rainforest had depleted from 53% to only about 2.8% of the country’s land surface. The defendant argued that the petitioners did not have *locus standi* to sue because the case did not disclose any specific right that was violated. The Supreme Court, however, held that the petitioners had standing to sue based on the principle of intergenerational equity, and that the principle itself is premised on the ‘rhythm and harmony of nature,’ which “indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas and

⁴⁵² Comer, *supra* note 429 at 107-108.

⁴⁵³ *Ibid* at 116.

⁴⁵⁴ *Ibid* at 108.

⁴⁵⁵ Kotzé, *supra* note 30 at 211.

⁴⁵⁶ Boyd, *supra* note 28 at 167-170.

⁴⁵⁷ Lynda Collins, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance” (2007) 30 (1) Dalhousie L.J. 79 at 135.

⁴⁵⁸ G.R. No. 101083, Judgment of July 30, 1993

<<http://hrlibrary.umn.edu/research/Philippines/Oposa%20v%20Factoran,%20GR%20No.%20101083,%20July%2030,%201993,%20on%20the%20State's%20Responsibility%20To%20Protect%20the%20Right%20To%20Live%20in%20a%20Healthy%20Environment.pdf>> [Oposa vs. Factorian].

other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations.”⁴⁵⁹ The impact of the judgment could be seen from the fact that “when the case was filed, there were ninety-two timber-harvesting licenses in the Philippines; by 2006, there were only three, and the rate of deforestation had fallen.”⁴⁶⁰

In coming to the decision, the Supreme Court applied many provisions of the law (both legislative and constitutional) which created positive rights to live in a healthy environment and duties on government and industry to conserve nature for the benefit of the current and future generations.⁴⁶¹ It applied various legislative provisions including section 1 (1) of Title XIV, Book IV of the *Administrative Code*,⁴⁶² section 1 of the *Philippine Environmental Policy*⁴⁶³ and the *Philippine Environment Code*.⁴⁶⁴ Most importantly, the Court also applied the right to a healthy environment provision (art.16) of the Constitution⁴⁶⁵ and held that

We do not agree with the trial court's conclusions that the plaintiffs failed to allege with sufficient definiteness a specific legal right involved or a specific legal wrong committed... A reading of the complaint itself belies these conclusions. The complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law.⁴⁶⁶

⁴⁵⁹ *Ibid* at 7-8.

⁴⁶⁰ Boyd, *supra* note 28 at 167.

⁴⁶¹ *Oposa vs. Factorian*, *supra* note 458 at 9-11.

⁴⁶² Executive Order No. 292 of July 25, 1987. Online: available at <https://www.officialgazette.gov.ph/1987/07/25/executive-order-no-292-s-1987/> (last accessed June 22, 2021). Section 1 (1) of Title XIV provides that the State “shall ensure, for the benefit of the Filipino people, the full exploration and development as well as the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, consistent with the necessity of maintaining a sound ecological balance and protecting and enhancing the quality of the environment and the objective of making the exploration, development and utilization of such natural resources equitably accessible to the different segments of the present as well as future generations.”

⁴⁶³ Presidential Decree No. 1151 of June 6, 1979, <https://lawphil.net/statutes/presdecs/pd1977/pd_1151_1977.html>.

Section 1 of the Philippine Environmental Policy provides that it is “hereby declared a continuing policy of the State (a) to create, develop, maintain and improve conditions under which man and nature can thrive in productive and enjoyable harmony with each other, (b) to fulfill the social, economic and other requirements of present and future generations of Filipinos, and (c) to insure the attainment of an environmental quality that is conducive to a life of dignity and well-being.”

⁴⁶⁴ Presidential Decree No. 1152 of June 6, 1977, <https://www.doe.gov.ph/sites/default/files/pdf/ocsp/pd_1152.pdf>.

⁴⁶⁵ Section 16 of the Philippine’s constitution, 1987 provides that the State “shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature. This right unites with the right to health which is provided for in the preceding section of the same article.”

⁴⁶⁶ *Oposa vs. Factorian*, *supra* note 458 at 9-10.

The above disputes may disprove Comer's argument that it is difficult to force governments to implement positive CER provisions. In fact, May and Daly argue that the Supreme Court in the case "determined that rights to a quality environment are enforceable whether or not they are textually expressed."⁴⁶⁷

Apart from this case, the courts in the Philippines have decided other CERs cases and their implementation has had profound effect on the environment. For instance, in the case of *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*,⁴⁶⁸ which was a complaint against a crude oil leak from a pipeline that stretches up to 100 kilometres and services Manila and 3 other provinces, the Supreme Court of the Philippines, despite the strategic economic importance of the pipeline, issued a restraining order against the pipeline's operator to stop operations until the oil leak was addressed and the order was obeyed.⁴⁶⁹ Specifically, the Court ordered the respondent pipeline operator "to undertake and continue the remediation, rehabilitation and restoration of the affected Barangay Bangkal environment until full restoration of the affected area to its condition prior to the leakage is achieved."⁴⁷⁰

In coming to the decision, the Court was influenced by section 16 of the Philippine's Constitution which provides for a right to a healthy environment because it ordered that "the pipeline be closely and regularly monitored to obviate another catastrophic event which will prejudice the health of the affected people, and to preserve and protect the environment not only for the present but also for the future generations to come."⁴⁷¹ This indicates that the courts can, and should, play a leading role in promoting adherence to, and implementation of environmental regulatory frameworks within the context of CERs.⁴⁷²

In *Metro Manila Development Authority (MMDA) et al. v. Concerned Citizens of Manila Bay*,⁴⁷³ which is another case decided by the Supreme Court of the Philippines, the respondents

⁴⁶⁷ May & Daly 1, *supra* note 90 at 615.

⁴⁶⁸ 194238 (S.C. Mar. 29, 2011) (Phil.) [*West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*].

⁴⁶⁹ Hilario Davide, "The Environment as Life Sources and the Writ of Kalikasan in the Philippines" (2012) 29(2) *Pace Env'tl.L.Rev.* at 592-601 [Davide].

⁴⁷⁰ *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.* *supra* note 468.

⁴⁷¹ *Ibid.*

⁴⁷² Davide, *supra* note 469 at 592-601.

⁴⁷³ G.R. Nos. 171947-48, decided by the Supreme Court on December 18, 2008

<<https://www.elaw.org/content/philippines-metropolitan-manila-development-authority-et-al-v-concerned-residents-manila-bay->> [*MMDA et al. v. Concerned Citizens of Manila Bay*].

instituted an action at the Regional Trial Court (RTC) to compel the appellant government Agency to implement the provisions of various laws including improving the water quality of Manila Bay to the standard stipulated by the Environment Code. Specifically, it was in evidence that the analysis of water samples around the Manila Bay revealed a high level of contamination by fecal coliform bacteria ranging from between 50,000 to 80,000 per milligram (ml) well above the prescribed limit of not more than 200 bacteria per 100 ml for bathing and other recreational activities.⁴⁷⁴ They also sought mandatory orders against other government agencies to, among others, clean up Manila Bay which had been decrepit and therefore constituted a health hazard. They argued that the pollution of Manila Bay not only infringed their right to a healthy environment, but also constituted a violation of several laws, including the *Pollution Control Law*,⁴⁷⁵ the *Water Code*,⁴⁷⁶ the *Sanitation Code*,⁴⁷⁷ the *Illegal Disposal of Wastes Decree*,⁴⁷⁸ the *Marine Pollution Law*⁴⁷⁹ and the *Toxic and Hazardous Wastes Law*.⁴⁸⁰ The RTC upheld the respondents' arguments and directed the various government agencies to enforce these laws. The court ordered the agencies involved, within 6 months of the date of the delivery of the judgment, to "clean up, rehabilitate and preserve Manila Bay, and restore and maintain its waters to ... make it fit for swimming, skin-diving and other forms of contact recreation."⁴⁸¹

On further appeals by the government agencies to both the court of appeal and later to the Supreme Court, the judgment of the RTC was affirmed, with the Supreme Court deciding that "these government agencies are enjoined, as a matter of statutory obligation, to perform certain functions relating directly or indirectly to the cleanup, rehabilitation, protection, and preservation of the Manila Bay. They are precluded from choosing not to perform these duties."⁴⁸² Despite the severe financial impact of the judgment, the judgment was enforced. To ensure this, the Court ordered a ninety-day periodic progress report of the clean-up exercise to the court, and on one

⁴⁷⁴ *Ibid.*

⁴⁷⁵ No. 984 of August 18, 1976, <https://www.lawphil.net/statutes/presdecs/pd1976/pd_984_1976.html>.

⁴⁷⁶ No. 1067 of December 31, 1976, <<https://www.officialgazette.gov.ph/1976/12/31/presidential-decree-no-1067-s-1976/>>.

⁴⁷⁷ No. 856 of December 23, 1975, <https://www.lawphil.net/statutes/presdecs/pd1975/pd_856_1975.html>.

⁴⁷⁸ No. 825 of November 7, 1975, <<https://www.officialgazette.gov.ph/1975/11/07/presidential-decree-no-825-s-1975/>>.

⁴⁷⁹ No. 979 of August 18, 1976, <<https://emb.gov.ph/wp-content/uploads/2015/11/PD-979.pdf>>.

⁴⁸⁰ No. 6969 of October 26, 1990, <<https://www.officialgazette.gov.ph/1990/10/26/republic-act-no-6969/>>.

⁴⁸¹ *MMDA et al. v. Concerned Citizens of Manila Bay*, *supra*, note 473.

⁴⁸² *Ibid.*

occasion, the entire Supreme Court, led by the Chief Justice, visited the scene to physically inspect compliance with the judgement.⁴⁸³

These cases further establish that the Philippines is making efforts in enforcing positive CERs provisions. This is even to Comer's delight, who opines that "the Supreme Court of the Philippines continues to play an activist role in environmental decision making, establishing special environmental courts to hear cases pertaining to the violation of environmental rights and other laws."⁴⁸⁴

2.6.4 CERs and the Anti-Development Tendency

It has been argued that CERs are pro-environment and anti-development and seeing that development is one of developing countries' greatest needs, CERs could eclipse development rights.⁴⁸⁵ Ruth Gordon argues that "environmentalism came at a particularly inauspicious time for the global South, which feared environmentalism would slow its development," as such, the "global South continued to insist on development as its main priority."⁴⁸⁶

However, CERs are not against development but only seek to strike a balance between environmental protection and development,⁴⁸⁷ and are based on the notion that development without environmental sustainability is not enduring. The Argentine *Matanza Riachuelo River incidence* case,⁴⁸⁸ and the Philippines' cases of *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*⁴⁸⁹ and *Metro Manila Development Authority (MMDA) et al. v. Concerned Citizens of Manila Bay*⁴⁹⁰ that I have already discussed, might indicate the disposition of developing countries towards development. The applicants did not ask that the various environment-degrading industries be wound down, but rather that they should operate in an environmentally sustainable manner.

⁴⁸³ Davide, *supra* note 469 at 599.

⁴⁸⁴ Comer, *supra* note 429 at 123.

⁴⁸⁵ Boyd, *supra* note 28 at 34.

⁴⁸⁶ Ruth Gordon, "Unsustainable Development" in Shawkat Alam et al, ed, *International Environmental Law and the Global South* (USA: Cambridge University Press, 2015) 50 at 52 & 65.

⁴⁸⁷ See the case of *Goa Foundation v Konkan Railways Corporation* <<https://www.elaw.org/es/content/india-goa-foundation-v-union-india-wp-no-2211997-konkan-railway>> Here, the Indian judiciary refused to stop a development initiative on grounds that the resultant environmental impact is minimal.

⁴⁸⁸ *The Matanza-Riachuelo River Basin Case*, *supra* note 437.

⁴⁸⁹ *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*, *supra* note 468.

⁴⁹⁰ *MMDA et al. v. Concerned Citizens of Manila Bay*, *supra* note 473.

Nigeria is an example of economic considerations taking precedence over environmental sustainability. Because petroleum revenues constitute the bulk of state revenues, “the Nigerian government has been willing to take extreme measures to protect the interests of the oil industry.”⁴⁹¹ It seems Nigeria needs countervailing mechanisms like CERs, among others, to reform its development programs towards environmentally sustainable models.

2.6.5 CERs and Increased Caseloads

Sixth, critics further argue that CERs will lead to explosion in the institution of court cases, with the tendency to stifle economic growth and worsen the existing backlogs of court cases.

Reference could be made to Colombia in terms of the high volume of cases filed in court since the constitutional entrenchment of environmental rights - from 1991 to 2012, more than 300,000 thousand new cases involving CERs were filed in courts.⁴⁹² Equally in Costa Rica, there was an exponential rise in the filing of CERs cases from 2,000 thousand to over 10,000 thousand cases yearly.⁴⁹³ As of January, 2021, there are approximately 1,500 climate litigation cases pending in various courts worldwide⁴⁹⁴ and in 2020, there were about 2,815 transnational cases on environmental rights pending in courts worldwide.⁴⁹⁵ The thesis concedes that CERs could multiply the number of cases filed in courts. However, some countries have devised strategies to handle the additional CERs-induced cases so that they do not overburden the courts and thwart the expeditious dispensation of justice. The thesis highlights 2 examples.

Costa Rica, faced with the explosion of CERs cases, responded by opening its court doors 24 hours a day all year round to attend to these cases and this addressed the pressure experienced by the judiciary.⁴⁹⁶ Also, some countries like Kenya have responded by creating specialized courts – Environmental Courts and Tribunals to handle environmental litigation – as a way of relieving the regular courts of the burden of handling the additional CERs cases. As of 2010, there were

⁴⁹¹ Michael M'Gonigle & Louise Takeda, “The Liberal Limits of Environmental Law: A Green Legal Critique”, (2013) 30(3) *Pace Env'tl.L.Rev.* at 1027 [M'Gonigle & Takeda].

⁴⁹² Boyd, *supra* note 28 at 247.

⁴⁹³ *Ibid* at 135.

⁴⁹⁴ Shaikh Eskander, Sam Fankhauser & Joana Setzer, “Global Lessons from Climate Change Legislation and Litigation”, (2021) 2 (1), *Environmental and Energy Policy and the Economy* 44 at 45.

⁴⁹⁵ Lisa Benjamin, “The Responsibilities of Corporations: New Directions in Environmental Litigation” in Veerle Heyvaert & Leslie-Anne Duvic-Paoli, ed, *Research Handbook on Transnational Environmental Law*, (UK & USA: Edward Elgar Publishing Limited, 2020) 229 at 232.

⁴⁹⁶ Boyd, *supra* note 28 at 135.

about 350 of such courts in 41 countries and by 2015, the numbers had more than doubled with over 800 of such courts all over the world.⁴⁹⁷ From the above, Nigeria should not shy away from adopting CERs on grounds that it will lead to explosion in cases; rather, Nigeria could adopt mechanisms deployed by other countries to deal with it, if Environmental Justice is to be achieved.

Furthermore, an unflinching enforcement of CERs by the courts could send signals to environmental violators that avoiding environmental litigation and court sanctions requires being mindful that their activities do not result in environmental injuries. This deterrence could ultimately reduce the expected floodgate of litigation. Thus, while much criticism can be levelled against CERs over their dubious capacity to achieve environmental sustainability, CERs have led to concrete positive results in many instances across the globe. This thesis explores whether and how CERs could do the same for the Niger Delta situation.

2.7 Conclusion

This chapter analyzed the status, historical/global development, meaning and components of Environmental Justice. It also analyzed the usefulness of Environmental Justice and its various components in the specific context of the Niger Delta environmental crisis. It further examined the CERs-Environmental Justice linkages and how those linkages provide points of interaction with the Niger Delta environmental crisis.

The chapter also examined criticisms levelled at Environmental Justice which include accusations that it is aimed at distribution, but not eradication, of environmental harms, that it is ill equipped to tackle capitalism, that its benefit does not outweigh the costs by a margin wide enough to merit the effort and cost of its deployment. Also, critics of Environmental Justice argue that it is steeped in western individualistic, anthropocentric conceptions of rights and therefore unsuitable in an African context which applies to the Niger Delta.

As well, the CER-Environmental Justice linkages have been criticized for lacking in empirical impact, the belief that CERs and the overarching rights system reinforce existing power dynamics which are not favourable to Environmental Justice outcomes, and that CERs provide

⁴⁹⁷ George Pring & Catherine Pring, "Twenty-First Century Environmental Dispute Resolution - is there an 'ECT' in your Future?" (2015) 33 (1) J.En.& Nat.Res.L.10 at 10.

for positive rights without much of coercive enforcement measures, giving governments large maneuvering rooms. Critics also opine that CERs tend to stifle development which is a critical need of developing countries and that they lead to increased caseloads in courts, leading to counterproductive results. There are concerns also that there are many barriers unique to the Nigerian context that hamper the deployment of CERs and their success. The chapter has engaged these concerns by offering some rebuttals and suggestions to address the barriers to CERs.

In conclusion, the goals of both CERs and Environmental Justice can be made to align. Boyd argues that the supreme objectives of CERs “are to reduce the level of harm being inflicted on humans and the Earth and to redistribute inequitable allocations of environmental harms.”⁴⁹⁸ These are goals shared with Environmental Justice. At the practical level, as shown in the *Matanza-Riachuelo River Basin Case*, marginalized communities have frequently relied on CERs to further Environmental Justice. However, what is not immediately obvious is whether enforceable CERs could have similar impacts if adopted in Nigeria. The thesis aims to investigate the potential of CERs for Nigeria.

⁴⁹⁸ Boyd, *supra* note 28 at 28.

Chapter 3 – CERs Potentials and Barriers: Towards a More Robust Environmental Legislative Regime for Nigeria

3.1. Introduction

Experts opine that one of the causes of the environmental sustainability crisis in the Niger Delta is the existence of gaps in the Nigerian environmental regulatory framework which aids the degradation of the Niger Delta environment.⁴⁹⁹ In fact, Nigeria's former Vice President, Professor Yemi Osinbajo, a lawyer and Senior Advocate of Nigeria (S.A.N.), laments the "gaping inadequacies in environmental protection regulation...[to include] the absence of a comprehensive legislation on environmental protection for the country."⁵⁰⁰

According to Margaret Okorodudu-Fubara, Nigeria did not do much by way of environmental legislating to protect the Niger Delta's environment until the 1988 Koko incident, where hazardous waste from Italy was dumped in the country and galvanized the nation's political leadership into the setting up of the defunct FEPA.⁵⁰¹ Okorodudu-Fubara opines that the "reticence and inaction on the problem of the environment in Nigeria accounted for the dearth of law and policy on the environment in the country."⁵⁰² Eaton agrees with Okorodudu-Fubara and argues that one of the problems in the Niger Delta remains the lack of adequate regulatory mechanisms to protect the Niger Delta environment.⁵⁰³ The World Bank,⁵⁰⁴ UNDP⁵⁰⁵ and UNEP⁵⁰⁶ corroborate this position.

In 1987, Nigeria did not have an environmental regulatory framework.⁵⁰⁷ In December 1988, Nigeria created its defunct flagship environmental regulatory agency – the FEPA - through the promulgation by the then military government of the *FEPA Decree*.⁵⁰⁸ It was not until 1989 that

⁴⁹⁹ Eaton, *supra* note 66 at 271.

⁵⁰⁰ Yemi Osinbajo, "Some Public Law Considerations in Environmental Protection" in J. A. Omotola, ed, *Environmental Laws Including Compensation* (Lagos: Faculty of Law, University of Lagos, 1990) 128 at 129.

⁵⁰¹ Okorodudu-Fubara, *supra* note 60 at 8.

⁵⁰² *Ibid.*

⁵⁰³ Eaton, *supra*, note 66 at 271–272.

⁵⁰⁴ The World Bank on the Niger Delta, *supra* note 17 at 15 & 46.

⁵⁰⁵ UNDP Report, *supra* note 16 at 81.

⁵⁰⁶ UNEP Report, *supra* note 13 at 11-12.

⁵⁰⁷ Okorodudu-Fubara, *supra* note 60 at 1.

⁵⁰⁸ Decree No .58 of December 30, 1988 (later renamed as the *Federal Environmental Protection Agency Act*, which has been repealed - see note 342, *supra*).

Nigeria put in place a National Policy on Environment.⁵⁰⁹ Nigeria had to wait another 10 years to create a Federal Ministry of Environment in 1999.⁵¹⁰

Nigeria has not made the kind of leap that was expected or required after that 1988 experience, as the country still lacks a comprehensive environmental management framework.⁵¹¹ Perhaps because of this, the Nigerian environmental regulatory framework has been described as “weak, ineffective, obsolete, inadequate and even unenforced, leading to the escalation of the cases of pollution and the environmental damage caused by the oil and gas companies.”⁵¹² A large part of the blame for this sorry state belongs to the Nigerian legislature. According to experts, the “ineffectiveness of Nigerian environmental laws to curb mindless environmental degradation in the Niger Delta has also been blamed on Nigeria’s lawmakers who [prefer] short-term economic gain by consorting with the oil and gas industry, over long-term environmental protection.”⁵¹³

The reality is that Nigeria now has a few environmental laws (including the *NESREA Act*⁵¹⁴ and the *National Oil Spill Detection and Response Agency (Establishment) Act, 2006 (NOSDRA Act)*⁵¹⁵ but lacks enforceable CERs.⁵¹⁶ Although environmental rights are provided for in section 20, Chapter II (Fundamental Objectives and Directive Principles of State Policy) of Nigeria’s 1999 Constitution, the rights are not enforceable because section 6(6)(c) provides that the rights contained in chapter II are not enforceable.⁵¹⁷ The thesis has already analyzed in chapter 1 (in the segment on *Environmental Objectives under the Nigerian Constitution*) the implications of the lack of justiciability of section 20 of the Constitution for environmental protection.

Does Nigeria need CERs? Experts answer in the affirmative, because of the severe environmental degradation, especially in the Niger Delta which could be described as Nigeria’s

⁵⁰⁹ Okorodudu-Fubara, *supra*, note 60 at 56.

⁵¹⁰ NESREA, “FAQ” <<http://www.nesrea.gov.ng/faq/>>.

⁵¹¹ Oyende, *supra*, note 69 at 63.

⁵¹² Samy et al, *supra* note 2 at 138.

⁵¹³ *Ibid.*

⁵¹⁴ The *National Environmental Standards and Regulations Enforcement Agency (Establishment) Act*, No. 25 of 2007, <<http://extwprlegs1.fao.org/docs/pdf/nig120569.pdf>>.

⁵¹⁵ NOSDRA Act.

⁵¹⁶ Samy et al, *supra* note 2 at 138.

⁵¹⁷ Section 6 (6)(C) of the Constitution of Nigeria, 1999 provides that the “judicial powers vested in accordance with the foregoing provisions of this section— shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”

“tragedy.”⁵¹⁸ Having established that Nigeria neither has enforceable CERs nor adequate environmental laws to protect the environment, including the Niger Delta environment, the key question that this chapter seeks to answer is: Could CERs galvanize Nigeria into establishing stronger environmental regulations to deal with environmental challenges? Boyd observes that the impact of CERs on law-making has been generally ignored, even though this seems to be where CERs have their greatest impact, since “if implemented and enforced, legislation tackles all instances of a problem and applies nationally...For example, legally binding national air quality standards should, if adequately implemented and enforced, result in cleaner air throughout the entire country.”⁵¹⁹ Christel and Gutiérrez seem to corroborate Boyd on the impact of CERs on legislation by admitting that enacting new and stronger “[e]nvironmental legislation is usually the first step in the enforcement of constitutional environmental rights.”⁵²⁰

Specifically, Boyd argues that environmental law-making would benefit from CERs in 3 aspects: (i) CERs seem to have a cascading effect on environmental law-making, meaning that the presence of CERs would naturally provoke the enactment of consequential environmental legislation; (ii) the favorable disposition of the courts to uphold environmental laws backed up by CERs would likely lead to an increase in environmental law-making; and (iii) CERs would lead to advance screening of proposed laws to align with CERs or risk being declared unconstitutional.⁵²¹ The chapter will examine how CERs could deliver these outcomes in Nigeria, for the benefit of the Niger Delta.

The first part of the chapter will examine the potential for CERs to instigate the enactment of more and stronger environmental laws in Nigeria for the protection of the Niger Delta environment. It will analyze the impact of CERs on environmental law-making in Brazil, Kenya and Bolivia. It will also examine how CERs could serve as a screen against the enactment of anti-environmental legislation and a bulwark against rollback on existing environmental laws and policies. However, it is not immediately obvious whether CERs would produce these benefits in Nigeria as there are barriers to environmental law-making in Nigeria. The second part of the chapter will examine barriers to creating better environmental laws such as the conflicting

⁵¹⁸ Samy et al, *supra* note 2.

⁵¹⁹ Boyd, *supra* note 28 at 235.

⁵²⁰ Christel & Gutiérrez, *supra*, note 435 at 329.

⁵²¹ Boyd, *supra* note 28 at 233-234.

interests of Nigerian legislators and the under-representation of the Niger Delta in Nigeria's NASS as potential barriers to the efficacy of CERs to produce these benefits in Nigeria and how these limitations could be addressed. The analysis of the ability and willingness of Nigerian courts to uphold environmental laws backed up by CERs, and what procedural CERs and the procedural changes might aid in this regard, will be undertaken in chapter 4 which is focused on judicial enforcement and changes.

3.2. The Potential for CERs to have a Cascading Effect on Environmental Law-making

Boyd opines that the “knowledge that environmental laws have a constitutional backstop may encourage governments to enact [new and] stronger environmental laws with confidence that the laws will withstand legal challenges.”⁵²² In support of this assertion, Boyd observes that new environmental laws were enacted soon after a justiciable right to a healthy environment was constitutionalized in about 80 of the 99 countries he examined.⁵²³ The view is that if the right to a healthy environment were justiciable in Nigeria, there may be an incentive to enact legislation that outlaws gas flaring, for example, which has had a deleterious impact on the Niger Delta environment. The analysis will look at some examples from other countries where enacting CERs resulted in a cascading effect on environmental law-making, including the enactment of substantive environmental laws and regulations, institutional reforms and increased funding of environmental regulatory agencies.

3.2.1 Brazil

3.2.1.1 Brazil Law No. 7.735 of 1989 and Institutional Reforms in Brazil

Brazil is one example where CERs have influenced the legislature to enact new environmental laws, and as would be seen shortly, these laws have led to the creation of institutions to further the sustainability of the environment. As argued by Boyd that CERs could supply the legislature with the needed impetus to enact environmental legislation, it is pertinent to add that the environmental police was created to satisfy the environmental rights provisions of the 1988 Constitution. According to experts, environmental police “can be considered a direct consequence of the 1988 constitutional provisions and of the encompassing outlook on

⁵²² *Ibid* at 234.

⁵²³ Boyd 2, *supra* note 29 at 187.

For a list of countries with justiciable CERs and does without, see Boyd, *supra* note 28 at 53-57.

environmental issues that informs them.”⁵²⁴ Nigeria does not have enforceable CERs, nor an overarching environmental regulatory agency like the environmental police, which is a derivative of CERs. The Brazilian Constitution directs all the levels of governments to jointly “protect the environment and combat pollution in any of its forms” (article 23 (VI)). The Constitution also permits the President of Brazil to adopt and implement legally binding temporary measures to address urgent and relevant issues, pending legislative approval (article 62).⁵²⁵

There was not in existence an integrated federal agency to implement environmental regulations and protect the environment and the existing environmental agencies were ineffective.⁵²⁶ In line with article 62 of the Constitution, President Jose Sarney adopted *Provisional Measure No. 34, 1989* which established the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA or the environmental police) as “an autarchic entity with a special regime, endorsed with legal personality of public law, administrative and financial autonomy ... with the purpose of formulating, coordinating, executing and implementing the national policy of the environment and the preservation, conservation and rational use, control and promotion of renewable natural resources.”⁵²⁷ Since this was a provisional measure, the federal legislature subsequently enacted *Law No. 7.735 of 1989* (Law 7.735) which guaranteed the permanence of the environmental police in Brazil.⁵²⁸

To operate as an overarching environmental regulatory body, Law 7.735 also fused under the jurisdiction of the Environmental Police 4 institutions that were regulating the environment

⁵²⁴ Jose Drummond & Ana Barros-Platiau, "Brazilian Environmental Laws and Policies, 1934-2002: A Critical Overview." (2006) 28 (1) Law & Policy 83 at 96 [Drummond & Barros-Platiau].

⁵²⁵ Article 62 of the Brazilian Constitution provides that in “relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law; such measures shall be submitted immediately to the National Congress.”

⁵²⁶ Ibama, “About Ibama” <<https://www.gov.br/ibama/pt-br/acesso-a-informacao/institucional/sobre-o-ibama#historico>>.

⁵²⁷ The Provisional Measure No. 34 of January 23, 1989, <<https://legislacao.presidencia.gov.br/atos/?tipo=MPV&numero=34&ano=1989&ato=a09ATTU1EeFpWTcc3>>.

⁵²⁸ Law No. 7,735 of February 22, 1989, <http://www.planalto.gov.br/ccivil_03/leis/17735.htm>.

Article 2 provides that the Brazilian Institute of the Environment and Renewable Natural Resources “is created – IBAMA, a federal authority endorsed with legal personality under public law, administrative and financial autonomy, linked to the Ministry of the Environment, with the purpose of: I - exercise the power of environmental police; II - to implement actions of national environmental policies, related to federal attributions, environmental licensing, environmental quality control, authorization for the use of natural resources and environmental supervision, monitoring and control, in reference to the guidelines emanating from the Ministry of the Environment; and III - to implement the actions that are the responsibility of the Union, in accordance with the current environmental legislation.”

previously - the Special Secretariat for the Environment, the Superintendent of Fisheries Development, the Superintendent of Rubber, and the Brazilian Institute of Forest Development.⁵²⁹

Writing on the centrality of the environmental police to environmental regulation in Brazil, Jose Drummond and Ana Barros-Platiau opine that the environmental police “became the country's major executive environmental agency... [The environmental police] executes national environmental policies in the fields of preservation, conservation, regulation, and the promotion of the sustainable use of environmental resources, besides monitoring and control.”⁵³⁰ In chapter 4 in the segment on CERs giving impetus for monitoring compliance with environmental regulations, the thesis will analyze the performance and the challenges of the environmental police, especially during the presidency of Mr. Bolsonaro during which Brazil witnessed the dismantling of many environmental policies in Brazil.⁵³¹

The feebleness of Nigeria’s attempt at environmental governance and its inability to reverse the dire environmental conditions confronting its people, especially in the Niger Delta, has been exposed. The feeble attempt could be viewed as representing a total disdain for environmental rights, as Nigeria remains one of the few major crude oil producing countries that have yet to enact enforceable CERs “for the benefit of its vast population, particularly those inhabiting the oil- and gas-producing Niger Delta region,”⁵³² a group that numbers Canada as one of its members. The next segment will analyze another CERs-enabled legislation that seeks to further environmental sustainability in Brazil.

⁵²⁹ Article 4 provides that the “assets, budgetary, extra-budgetary and financial resources, competence, attributions, personnel, including inactive and pensioners, the positions, functions and jobs of the Superintendence of Rubber - SUDHEVEA and the Brazilian Institute of Forest Development - IBDF ... as well as those of the Superintendence of Fisheries Development - SUDEPE and the Special Secretariat for the Environment - SEMA are transferred to the Brazilian Institute of the Environment and Renewable Natural Resources, which will also succeed them in the rights, credits and obligations, arising from law, administrative act or contract, including the respective revenues.”

⁵³⁰ Drummond & Barros-Platiau, *supra* note 522 at 96.

⁵³¹ Suely De Araújo, “Environmental Policy in the Bolsonaro Government: The Response of Environmentalists in the Legislative Arena” (2020) 14 (2) Brazilian Political Science Review 1 at 1 [Araújo].

⁵³² Samy et al, *supra* note 2 at 133.

3.2.1.2 Civil Code, 2002 and the Strict Environmental Liability Regime in Brazil

A key example of environmental harm and injustice is that Nigeria releases about 17.2 billion m³ of gas into the Niger Delta environment annually,⁵³³ and this is partly attributable to the provision of section 3 of *the Associated Gas Rejected Act*, 1979, which allows gas flaring for a fee.⁵³⁴ Before 1979, Nigeria did not have any regulatory framework for gas flaring.⁵³⁵ In addition, Nigeria's sanctioning regime for the discharge of harmful substances into the environment as provided for in section 27(3) of the *NESREA Act*⁵³⁶ has been described as a mere "pittance" and therefore, completely ineffectual.⁵³⁷ The section absolves a manager of an erring corporation of blame for discharging harmful substances into the environment if the manager can prove lack of knowledge of the occurrence.

The provision, in effect, creates a "loophole for managers claiming ignorance of the offense, even if that ignorance was negligent, reckless, or even feigned."⁵³⁸ If one contrasts this with the strict liability regime in Brazil, then one begins to have a sense of the unfortunate state of environmental legislation in Nigeria. Article 927 of the *Brazil Civil Code*, 2002 (Civil Code) provides that the person, "who, by unlawful act, causes harm to others, is obliged to repair it. There is an obligation to repair the damage, regardless of fault, in the cases specified by law, or where the activity normally carried out by the offender implies, by its nature, risk to the rights of others."⁵³⁹

A brief history of the Civil Code, 2002 would reveal the influence of CERs on its enactment. Brazil had enacted a Civil Code in 1916, but it "had two major defects: first, the code reflected the interests of a small conservative bourgeoisie culture that no longer existed, and second, the

⁵³³ Anslem Ajugwo, "Negative Effects of Gas Flaring: The Nigerian Experience" (2013) 1(1) Journal of Environment Pollution and Human Health at 6.

⁵³⁴ *The Associated Gas Rejected Act*, 1979, *supra* note 140.

⁵³⁵ Nnimmo Bassey, "Gas Flaring: Assaulting Communities, Jeopardizing the World", (National Environmental Consultation hosted by the Environmental Rights Action in conjunction with the Federal Ministry of Environment) delivered at Reiz Hotel, Abuja, December 10-11, 2008 [Unpublished] <<https://milieudefensie.nl/publicaties/rapporten/gas-flaring-assaulting-communities-jeopardizing-the-world>>.

⁵³⁶ *NESREA Act*, *supra* note 342.

⁵³⁷ Eaton, *supra* note 66 at 288.

Eaton, however, made the above observations regarding the provisions of section 20(4) of the defunct FEPA which is similarly worded with the current section 27(3) *NESREA Act*, 2007.

⁵³⁸ Eaton, *ibid* at 288-289.

⁵³⁹ LAW No 10,406 of January 10, 2002, <http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm>.

code's language was very archaic, even for jurists.”⁵⁴⁰ The Brazilian legislature began the process of amending the 1916 Code in 1969. A draft was presented to the House of Representatives and then “to the Senate in 1977. The revision became a never-ending discussion. As of 2000, the project had not been approved, nor sent to the President, and nobody knew when or if the Revised Brazilian Civil Code would come into force.”⁵⁴¹ In 2002, the new Code was finally enacted and the impact of the 1988 Constitution on it is telling because “the new code harmonizes the 1916 Civil Code, [and] the 1988 Federal Constitution...”⁵⁴² In other words, CERs helped reshape the Code.

3.2.1.3 Law No. 9, 985, 2000 Implementing and Managing Conservation Units in Brazil

The influence of the CERs on the enactment of *Law No. 9, 985, 2000*⁵⁴³ is obvious. The legislation establishes the National System of Nature Conservation Units (SNUC) (article 1). SNUC responsibilities are provided in article 4.⁵⁴⁴ They include the duty to protect “the natural resources necessary for the subsistence of traditional populations, respecting and valuing their knowledge and culture and promoting them socially and economically.” According to its preamble, *Law No. 9, 985, 2000* was enacted to implement the provisions of article 225 (I, II, III, and VII) of the Constitution, which guarantees to everyone the right to an ecologically balanced environment.⁵⁴⁵

⁵⁴⁰ André Soares de Camargo, “Essay: The Revised Brazilian Civil Code” (2003) 11 (1) U. Miami Int’l & Comp. L. Rev. 161 at 163.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid* at 165.

⁵⁴³ Law No. 9,985, of July 18, 2000, <<https://www2.camara.leg.br/legin/fed/lei/2000/lei-9985-18-julho-2000-359708-publicacaooriginal-1-pl.html>>.

⁵⁴⁴ Article 4 provides that the SNUC “has the following objectives: I - to contribute to the maintenance of biological diversity and genetic resources in national territory and in jurisdictional waters; II - protect endangered species at regional and national level; III - contribute to the preservation and restoration of the diversity of natural ecosystems; IV - promoting sustainable development from natural resources; V - promote the use of nature conservation principles and practices in the development process; VI - protect natural and little altered landscapes of remarkable scenic beauty; VII - protect the relevant characteristics of geological, geomorphological, speleological, archaeological, paleontological and cultural nature; VIII - protect and recover water and edaficos resources; IX - recover or restore degraded ecosystems; X - provide means and incentives for scientific research activities, studies and environmental monitoring; XI - valuing biological diversity economically and socially; XII - promote conditions and promote environmental education and interpretation, recreation in contract with nature and ecological tourism; XIII - protect the natural resources necessary for the subsistence of traditional populations, respecting and valuing their knowledge and culture and promoting them socially and economically.”

⁵⁴⁵ Article 225 of the Constitution provides that everyone “has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations. §1º. To assure the effectiveness of this right, it is the responsibility of the Government to: I. preserve and restore essential ecological

What is more, *Law No. 9, 985, 2000* establishes an exclusive extractive reserve for the local populations to exploit the resources, farm and support their livelihoods as they deem fit (article 18).⁵⁴⁶ The level of exclusivity could be seen in the restrictions on public visits to the extractive reserves unless such is compatible with the interests of the local population.⁵⁴⁷ The law also places an outright ban on the exploitation of mineral resources in the exclusive reserve.⁵⁴⁸ A similar exclusive reserve for the Niger Delta would potentially contribute to the sustainability of the Niger Delta and the eradication of poverty among its people. As discussed in the Introduction, 44% of the Niger Delta people rely on agriculture, fishing and forestry for livelihoods.⁵⁴⁹ But the degradation of the environment has destroyed the peoples' means of survival.

On the effect of oil pollution on agriculture, UNEP found out that in the Niger Delta, any "crops in areas directly impacted by oil spills will be damaged, and root crops, such as cassava, will become unusable. When farming recommences, plants generally show signs of stress and yields are reportedly lower than in non-impacted areas."⁵⁵⁰ The degradation of the Niger Delta also affected forestry. According to UNEP, oil pollution "in many intertidal creeks has left mangroves denuded of leaves and stems, leaving roots coated in a bitumen-like substance sometimes 1 cm or more thick."⁵⁵¹

On fishing, UNEP observes that mangroves "are spawning areas for fish and nurseries for juvenile fish and the extensive pollution of these areas is impacting the fish life-cycle."⁵⁵² UNEP

processes and provide for ecological management of species and ecosystems; II. preserve the diversity and integrity of the Country's genetic patrimony and to supervise entities dedicated to research and manipulation of genetic material; III. define, in all units of the Federation, territorial spaces and their components that are to be specially protected, with any change or suppression permitted only through law, prohibiting any use that compromises the integrity of the characteristics that justify their protection; ... VII. protect the fauna and the flora, prohibiting, as provided by law, all practices that jeopardize their ecological functions, cause extinction of species or subject animals to cruelty."

⁵⁴⁶ Article 18 provides that the Extractive Reserve "is an area used by traditional extractive populations, whose livelihood is based on extractivism and, in addition, subsistence agriculture and small animal husbandry, and has as its basic objectives to protect the livelihoods and culture of these populations, and to ensure the sustainable use of the unit's natural resources."

⁵⁴⁷ Article 18 (§ 3) provides that public visitation "is permitted, provided it is compatible with local interests and in accordance with the provisions of the Management Plan of the area."

⁵⁴⁸ Article 18 (§ 6) provides that the "exploitation of mineral resources and amateur or professional hunting are prohibited."

⁵⁴⁹ UNDP Report, *supra*, note 16 at 25.

⁵⁵⁰ UNEP Report, *supra*, note 13 at 10.

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

adds that where “a number of entrepreneurs had set up fish farms in or close to the creeks, their businesses have been ruined by an ever-present layer of floating oil.”⁵⁵³ It could be argued that this would not happen in Brazil because *Law No. 9, 985, 2000* would secure an exclusive extractive reserve for the populations where the exploitation of mineral resources is prohibited. Experts acknowledge the link between the Constitution and *Law No. 9, 985, 2000* by arguing that the law seeks to strengthen the constitutional right to an ecologically balanced environment (article 225).⁵⁵⁴ They welcome the environmental regulatory regime put in place by *Law No. 9, 985, 2000* and argue that the “main objectives of the SNUC are to contribute to the conservation of biological diversity and genetic resources, protect threatened species, promote sustainable development based on natural resources, and stimulate the use of conservation principles and practices in the process of economic development.”⁵⁵⁵ If CERs could push the legislature to enact similar legislation in Nigeria, it could benefit the Niger Delta.

3.2.1.4 Law No. 9.433, 1997 and the National Water Resources Policy in Brazil

*Law No. 9.433, 1997*⁵⁵⁶ was enacted to provide for the National Water Resources Policy in Brazil and it creates the National Water Resources Management System to implement the provisions of article 21 (XIX) of the Constitution.⁵⁵⁷ The objectives of the policy include the sustainable use of water for present and future generation (article 2).⁵⁵⁸ Its other areas of interests include the adaptation “of the management of water resources to the physical, biological, demographic, economic, social and cultural needs of the country's various regions”; and the integration of water resources management with environmental management (article 3).⁵⁵⁹

⁵⁵³ *Ibid.*

⁵⁵⁴ Drummond & Barros-Platau, *supra*, note 524 at 98.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Law No. 9.433, of 8 January 1997, <<http://extwprlegs1.fao.org/docs/pdf/bra12967ENGoriginal.pdf>>.

⁵⁵⁷ Article 21 provides that the Union “shall have the power to: XIX. establish a national system for management of water resources and define criteria for granting rights for their use.”

⁵⁵⁸ Article 2 provides that the “objectives of the National Water Resources Policy are the following: I - To ensure the necessary availability of water to current and future generations, under appropriate quality standards for the respective users; II - The rational and integrated use of water resources, including water transport, with a view to sustainable development; III - The prevention and control of critical water events of natural origin or those which result from the inappropriate use of natural resources.”

⁵⁵⁹ Article 3 provides that the “general action directives for the implementation of National Water Resources Policy are the following: I - The systematic management of water resources, including aspects of quantity and quality; II - Adaptation of the management of water resources to the physical, biological, demographic, economic, social and cultural needs of the country's various regions; III - Integrated management of water resources with environmental management; IV - The coordination of Water Resources Planning and that of the user sectors with regional, state

The Law creates various rights for using water (article 12)⁵⁶⁰ and these rights may be suspended where it is necessary for the avoidance or reversal of dangerous environmental injury (article 15 (IV)).⁵⁶¹ Having noted that water is a finite natural resource with financial value (article 1 (II)),⁵⁶² the law establishes various charges for different water uses, and in disbursing the funds accruing from the charges, priority is given to funding water-related issues in the location contiguous to the water source (article 22).⁵⁶³ Specifically, the law enjoins that the monies realized from levying water users “may be applied to sunk costs in projects and works that change, taking into consideration the benefits to the community, and the quality, quantity of and the discharge system from a body of water” (article 22 (2)).

In fixing the charges, consideration is given to the pollution of water sources by the users who are awarded licenses to use water (article 21 (II)).⁵⁶⁴ The law punishes pollution of water sources through imposition of fines, remediation of water sources and reimbursement of resources expended by the regulatory agencies to bring the violators to justice (article 50 (2)).⁵⁶⁵ The

and national planning; V - The coordination of water resources management and soil use; VI - The integration of watershed management with the management of river and coastal zone systems.”

⁵⁶⁰ Article 12 provides that rights “for the following uses of water resources shall be subject to award by the public authorities: I - Derivation or capture of a portion of the water existing in a body of water for final consumption, including public supply, or as an input into a productive process; II - Extraction of water from an underground aquifer for final consumption or as an input into a productive process; III - Emission into a body of water of drainage and other liquid or gaseous residue, treated or non-treated, for purposes of dilution, transport, or final disposal; IV - Use of hydroelectric potential; V - Other uses which alter the system, quantity or quality of the water existing in a body of water.”

⁵⁶¹ Article 15 provides that the “awarding of usage rights for water resources may be partially or totally suspended, permanently or for a specific period, under the following conditions: IV -- Need to prevent or reverse serious environmental damage.”

⁵⁶² Article 1 provides that the National Water Resources Policy “is based on the following fundamentals ... II - Water is a limited natural resource with economic value.”

⁵⁶³ Article 22 provides that sums “collected by charging for the use of water resources shall be applied on a priority basis in the watershed in which they were generated and shall be used.”

⁵⁶⁴ Article 21 provides that in “establishing the sums to be charged for the use of water resources, the following must be taken into consideration, among other items ... II - Emissions of drainage and other liquids or gaseous waste, volumes emitted and the variation system, and the physical-chemical, biological and toxicity characteristics of the effluent.”

⁵⁶⁵ Article 50 (2) provides that in “the case of sections III and IV, regardless of the penalty of a fine, the expenses incurred by the administration to enforce the measures provided for in the aforementioned items shall be charged to the violator, pursuant to Articles 36, 53, 56 and 58 of the Water Code, without prejudice to the violator's liability for indemnification of any harm that was caused.”

punishment is severe if the pollution of water source endangers human life or health or leads to loss of animals or goods (article 50 (1)).⁵⁶⁶

According to experts, on the basis of the *Law No. 9.433, 1997*, the committee overseeing the heavily “polluted Paraiba do Sul river, affecting the industrialized states of Sao Paulo, Rio de Janeiro, and Minas Gerais, recently took the lead in charging fees for ‘primary’ water tapping and for discharges. This is the first time that Brazilian cities and companies are being charged for these uses of water.”⁵⁶⁷ By article 44 (IV),⁵⁶⁸ these charges are used to finance water-related projects in the affected areas contiguous to where the charges emanated from. Looking at some of the critical points of the legislation which include the “use of water resources to satisfy the needs of small population centers, distributed within the rural environment” (Article 12 (V) (I)) and the need “to prevent or reverse serious environmental damage” (article 15 (IV)), investing these charges in this way could mean justice for the poor water users who would otherwise be left without any remedy from the exploitation of water resources on which their livelihoods depend. It is this clear thinking on how to recompense the poor water users by investing in water-related projects to ensure the availability of quality water that is lacking in the Niger Delta.

Because of the high incidence of pollution by the TNCs of the limited water sources on which Niger Delta communities depend for their livelihoods, similar legislation and regulatory agencies are highly desirable in Nigeria. As discussed in chapter 2 in the segment on Analysis and Application of the Components of Environmental Justice to the Environmental Sustainability Crisis in the Niger Delta, the TNCs do not get punished for polluting water sources nor are they made to remediate polluted water sources in the Niger Delta.

In some communities in the Niger Delta, a UNEP “investigation found that the surface water throughout the creeks contains hydrocarbons. Floating layers of oil vary from thick black oil to thin sheens. The highest reading of dissolved hydrocarbon in the water column, of 7,420 µg/l,

⁵⁶⁶ Article 50 (1) provides that in “the event of damage to the public water supply service, risk to health or life, the loss of goods or animals, or losses to any third parties as a consequence of the violation that was committed, the fines to be applied shall be no less than one-half the maximum amount agreed to in abstract.”

⁵⁶⁷ Drummond & Barros-Platau, *supra* note 524 at 99.

⁵⁶⁸ Article 44 provides that the Water Agencies “shall be responsible for the following within their activity areas: ... IV -- Analyzing and issuing opinions on projects and works to be financed with funds generated from charging for the use of water resources and remitting them to the financial institution responsible for the management of such funds.”

was detected at Ataba-Otokroma, bordering the Gokana and Andoni LGAs.”⁵⁶⁹ This was not a one-off but the norm because at 41 different locations in Ogoniland, UNEP found that “hydrocarbon pollution has reached the groundwater at levels in excess of the Nigerian standards.”⁵⁷⁰ According to UNEP, the “most serious case of groundwater contamination is at Nisisioken Ogale, in Eleme LGA, close to a Nigerian National Petroleum Company product pipeline where an 8 cm layer of refined oil was observed floating on the groundwater which serves the community wells.”⁵⁷¹

As discussed in chapter 2 in the segment on Critique of Environmental Justice Scholarship, UNEP in 2011 did recommend the immediate provision of potable water to the people, as an alternative to the continued consumption of the polluted water sources. However, the federal government only got around to awarding contracts for only 6 water supply infrastructures in Ogoniland in March 2021,⁵⁷² leaving a large section of the people to continue to depend on the polluted water sources for their daily water needs. Although some experts argue that over-centralization of the management of water resources in Brazil by *Law No. 9.433, 1997* could affect the realization of the objective the law,⁵⁷³ if CERs (particularly the right to water) would galvanize the legislature into enacting similar legislation in Nigeria, but with de-centralized management, it would benefit the Niger Delta whose water sources are and have been constantly polluted by the TNCs.

3.2.1.5 Law No. 13, 105, 2015 providing direction for Civil Proceedings in Brazil

Law No. 13,105, 2015 (Code of Civil Procedure or CCP)⁵⁷⁴ was enacted to regulate civil proceedings, including environmental litigation in Brazil (article 13).⁵⁷⁵ The CCP regulates the jurisdiction of the various civil courts in Brazil (article 44).⁵⁷⁶ The Code expects the respective

⁵⁶⁹ UNEP Report, *supra* note 13 at 10.

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² HYPREP, *supra* note 46.

⁵⁷³ Drummond & Barros-Platau, *supra*, note 524 at 99.

⁵⁷⁴ Law No. 13,105 of March 16, 2015 (Code of Civil Procedure), <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm>.

⁵⁷⁵ Article 13 provides that the “civil jurisdiction shall be governed by Brazilian procedural rules, with the exception of the specific provisions provided for in international treaties, conventions or agreements to which Brazil is a party.”

⁵⁷⁶ Article 44 provides that in “compliance with the limits established by the Federal Constitution, jurisdiction is determined by the rules provided for in this Code or in special legislation, by the rules of judicial organization and, also, as it may be, by the constitutions of the States.”

parties to fund the various costs associated with litigation (article 82),⁵⁷⁷ which includes the victorious party's attorney's fee (Article 85),⁵⁷⁸ "the cost of pleadings, compensation for travel expenses, the compensation of experts and the travel allowances of witnesses" (article 84). However, the Code makes exception for those who cannot afford to pay these costs, whether Brazilians or foreign nationals, who are entitled to free legal services, at the expense of the state (article 98).⁵⁷⁹

As will be seen in chapter 5 which analyzes Access to Justice, because the prevalence of poverty in the Niger Delta is estimated at 43% (the highest in the Nigeria)⁵⁸⁰ and unemployment is between 50% and 70% (also the highest in Nigeria)⁵⁸¹ people are not able to afford litigation and incidental costs and are more likely to live with age-long environmental injustices rather than go to court. Although Nigeria has a legal aid program to assist poor litigants, there are various bottlenecks. In chapter 5 in the segment on barriers to access to justice, the thesis x-rays these bottlenecks in greater detail and proffers possible solutions.

The Brazilian CCP has also introduced many innovations to improve the quality of services that litigants obtain from the courts. One of the innovations is the provision, at no cost to litigants, of 'simple assistants' who act as procedural substitutes to parties in the litigation, but under the general direction of the parties (article 122).⁵⁸² According to article 121, the simple assistant "will act as an assistant to the main party, exercise the same powers and be subject to the same procedural burden as the assisted one."

A similar innovation is highly desirable in Nigeria, for the benefit of the Niger Delta. Some of the Niger Delta states have very high illiteracy rates,⁵⁸³ and experts opine that the high illiteracy

⁵⁷⁷ Article 82 provides that except "for the provisions concerning the gratuity of justice, it is for the parties to provide the costs of the acts they perform or require in the proceedings, anticipating payment, from the beginning to the final judgment or, in the execution, until the full satisfaction of the right recognized in the title."

⁵⁷⁸ Article 85 provides that the "sentence will order the loser to pay fees to the winner's lawyer but makes exception to those who cannot afford to pay these costs."

⁵⁷⁹ Article 98 provides that the "natural or legal person, Brazilian or foreign, with insufficient resources to pay the costs, procedural expenses and attorneys' fees is entitled to the gratuity of justice, in the form of the law."

⁵⁸⁰ Francis et al, *supra*, note 25 at 10.

⁵⁸¹ *Ibid* at 30.

⁵⁸² Article 122 provides that simple assistance "does not prevent the principal from recognising the merits of the request, [withdraw] from the action, renouncing the right to what is based on the action or from compromising on the rights at issue."

⁵⁸³ StartSomeGood, "Educate 1000 Schoolchildren in Rural Niger Delta", <<https://startsomegood.com/educate-children-in-rural-niger-delta>>.

rate constitutes a barrier to access to (environmental) justice in the Niger Delta.⁵⁸⁴ Simple assistance for illiterate litigants would go a long way in widening access to justice in Nigeria. The thesis analyzes, at length in chapter 5 in the segment on barriers to access to justice, how illiteracy is constituting a barrier to environmental litigation in the Niger Delta.

Another innovation introduced by the Brazilian Code targeted at improving the quality of court decisions is the setting up of a pool of experts kept in a register to assist the courts with technical and scientific matters (article 156).⁵⁸⁵ Experts are appointed, from among registered professional groups (article 156 (§ 1)),⁵⁸⁶ through a rigorous process which includes public consultations (article 156 (§ 2)),⁵⁸⁷ and the “courts will carry out periodic evaluations and reassessments to maintain the register, considering professional training, updating of knowledge and experience of interested experts (article 156 (§ 3)).

The lack of environmental awareness within courts has been identified as one of the barriers to access to justice.⁵⁸⁸ As will be analyzed in chapter 5 in the segment of the Lack of Awareness within the Review Bodies, the Nigerian judiciary seems to be struggling in this area. The adoption of CERs by Nigeria could magnify the problem because deciding environmental litigation is complex. Dinah Shelton expresses doubts as to “whether legally trained, nontechnical judges are the appropriate arbiters of a clean and healthy environment.”⁵⁸⁹ According to Okonkwo, to “help in justice delivery [in Nigeria], there is a need to inform and equip the judges with the necessary skills, information and material.”⁵⁹⁰ As such, this innovation

⁵⁸⁴ Olaitan Olusegun & Olatunji Oyelade, “Access to Justice for Nigerian Women: A Veritable Tool to Achieving Sustainable Development” (2022) 22 (1) I.J.D.L. 4 at 20 [Olusegun & Oyelade].

⁵⁸⁵ Article 156 provides that the “judge will be assisted by an expert when the proof of the fact depends on technical or scientific knowledge.”

⁵⁸⁶ Article 156 (§ 1) provides that the “experts shall be appointed among legally qualified professionals and the technical or scientific bodies duly registered in a register maintained by the court to which the judge is bound.”

⁵⁸⁷ Article 156 (§ 2) provides that to “form the register, the courts must conduct public consultation, through dissemination in the worldwide network of computers or in newspapers of great circulation, in addition to direct consultation with universities, class councils, the Public Prosecutor’s Office, the Public Defender’s Office and the Brazilian Bar Association, for the appointment of professionals or interested technical bodies.”

⁵⁸⁸ Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 1st ed, (United Nations, 2000), see the table titled, *Elements of Access to Justice* at 135, <<https://unece.org/fileadmin/DAM/env/pp/acig.pdf>> [Aarhus Convention: An Implementation Guide, 1st ed].

⁵⁸⁹ Shelton 2, *supra*, note 109 at 119.

⁵⁹⁰ Eloamaka Okonkwo, “Assessing the Role of the Courts in Enhancing Access to Environmental Justice in Oil Pollution Matters in Nigeria,” (2020) 28 (2) A.J.I.C.L. 195 at 206.

is highly recommended for Nigeria. If CERs could lead to the enactment of similar legislation in Nigeria, it would benefit the Niger Delta.

3.2.1.6 Law No. 10, 623, 2021 promoting the Conservation, Recovery, and Improvement of Federal Conservation Units in Brazil

According to the preamble, *Law No. 10, 623, 2021*⁵⁹¹ establishes “the Adopt a Park Programme, with the purpose of promoting conservation, recovery, and improvement of the federal conservation units by private national and foreign individuals and legal entities.” The Federal Ministry of Environment (MOE) is saddled with the responsibility to manage the conservation program (article 3).⁵⁹² The MOE identifies a unit to be conserved, including private areas with the owner’s consent, and the unit will be included in the adopt a park program (article 5).⁵⁹³ The adoption is thereafter formalized with evidence of a statement of adoption which should contain information including the limits of the conservation unit adopted and the length of the adoption (article 15).⁵⁹⁴ The environmental agenda of the program, contained in the objectives of the program, includes the recovery of degraded environment and preventing and tackling forest fires (article 1).⁵⁹⁵

It seems that similar legislation and policy would be relevant in the Niger Delta. For instance, there are no deliberate efforts to recover degraded environment in the Niger Delta. In the Ejama-

⁵⁹¹ Law No. 10, 623, <<https://www.gov.br/mma/pt-br/assuntos/areasprotegidas/ecoturismo/adoteumparque/ADOPTAPARKDECREENO.106239feb2021.pdf>>.

⁵⁹² Article 3 provides that the Adopt a Park Programme “shall be coordinated by the Ministry of the Environment, through the Chico Mendes Institute for Biodiversity Conservation – the Chico Mendes Institute.”

⁵⁹³ Article 5 provides that the “selection of federal conservation units to be included in the Adopt a Park Programme must be carried out by the Ministry of the Environment, in consideration of convenience and opportunity... Owner consent will be required for the inclusion of private areas which constitute federal conservation units in the Adopt a Park.”

⁵⁹⁴ Article 15 provides that the “adoption must be formalised by means of a Statement of Adoption, along with a work plan to be agreed between the Chico Mendes Institute and the adopter, which must contain at least the following: I – the delimitation of the object; II – the period of validity; III – the estimate of goods and services to be donated by the adopter; IV – the duties and benefits conferred upon the adopter; V – the duties of the Chico Mendes Institute in cases of donations with charges and burdens; VI – the estimate of objectives to be contemplated in the project; VII – the minimum value of the donation, and an estimate of the value of the goods and services to be donated by the adopter; and VIII – the applicable penalties.”

⁵⁹⁵ Article 1 provides that the Adopt a Park Programme “is thus instituted, with the purpose of promoting conservation, recovery, and improvement of the federal conservation units by private national and foreign individuals and legal entities. § 1. The objectives of the Adopt a Park Programme are: I – consolidating and implementing management plans for the federal conservation units; II – monitoring federal conservation units; III – recovering environmentally degraded areas; IV – supporting the prevention and combatting forest fires; V – supporting the prevention and combatting illegal deforestation; and VI - promoting improvements, investments, infrastructure, and maintenance in the federal conservation units.”

Ebubu, Eleme Local Government Area in Rivers State, Niger Delta, UNEP “found heavy contamination present 40 years after an oil spill occurred, despite repeated clean-up attempts.”⁵⁹⁶ UNEP discovered that “pollution of soil by petroleum hydrocarbons in Ogoniland is extensive in land areas, sediments and swampland,”⁵⁹⁷ as a result of which, “wetlands around Ogoniland are highly degraded and facing disintegration.”⁵⁹⁸ Nothing has been done to remedy this situation. On preventing forest fires, UNEP notes that the Niger Delta is susceptible to forest fire. When “an oil spill occurs on land, fires often break out, killing vegetation and creating a crust over the land, making remediation or revegetation difficult.”⁵⁹⁹

Furthermore, *Law No. 10, 623* reinforces Brazil’s police powers to act in furtherance of the objectives of the law.⁶⁰⁰ Similar legislation that would allow police to act and safeguard the environment in the Niger Delta would assist in tackling degradation there. Such legislation would be justified in light of the deliberate actions of the TNCs that degrade the Niger Delta environment. For instance, UNEP discovered that water channels dredged by the TNCs have become “widened and the resulting dredged material are clearly evident in satellite images, decades after the dredging operation. Without proper rehabilitation, former mangrove areas which have been converted to bare ground are being colonized by invasive species such as nipa palm.”⁶⁰¹ UNEP also discovered that the TNCs have turned some communities in the Niger Delta into dumps for waste materials.

UNEP project team observed hundreds of industrial packing bags containing 1,000-1,500 m³ of waste, believed to be cuttings from oil drilling operations, dumped at a former sand mine in Oken Oyaa in Eleme LGA. The open disposal of such waste in an unlined pit demonstrates that the chain of custody in the region between the waste generator, transporter and disposal facility is not being followed.⁶⁰²

Also, it seems that the TNCs deliberately under-report the high incidence of environmental degradation to avoid public opprobrium. UNEP discovered that in Ogoniland, 10 out of 15 “investigated sites which [Shell] records show as having completed remediation, still have

⁵⁹⁶ UNEP Report, *supra* note 13 at 9.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid* at 10.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Article 1 (§ 2) provides that for “the attainment of the objectives concerning § 1, the exercise of the police power shall not be delegated.”

⁶⁰¹ UNEP Report, *supra* note 13 at 10.

⁶⁰² *Ibid* at 12.

pollution exceeding the [Shell] (and government) remediation closure values. The study found that the contamination at eight of these sites has migrated to the groundwater.”⁶⁰³ Such acts should be stopped in Nigeria, including by CERs litigation.

It would be a welcome development for the Niger Delta if CERs could lead to the enactment of similar legislation. Indeed, the chapter notes the influence of CERs on *Law No. 10, 623*, as evidenced in the preamble which states that the law was enacted to further the fulfilment of article 225 of the Constitution (right to an ecologically balanced environment). Also worthy of note is the fact that the law was signed into law by Brazil’s extreme left and anti-environment President Bolsonaro. If CERs could lead to the enactment of this law, despite Bolsonaro’s anti-environmental agenda, there is hope for CERs elsewhere, including the Niger Delta despite obvious political challenges.

3.2.2 Kenya

3.2.2.1 CERs and the Kenyan Constitution

Kenya is another example of CERs leading to the enactment of additional and stronger laws to protect the environment. The Kenyan Independence Constitution, 1963 had been amended 38 times but from the 1990’s, Kenyans, including opposition political parties, religious organizations and civil society, were agitating for a new Constitution because the Constitution fell short of the peoples’ expectation in its failure to recognize socio-economic rights, solidarity and environmental rights, the lack of either an Ombudsman or a Human Rights Commission to implement constitutional rights, the ease with which existing constitutional rights could be suspended or limited and the inadequacy of enforcement measures.⁶⁰⁴

When the government rejected the overwhelming call from the people to amend the Constitution, civil society and opposition political parties came together to form the National Convention Planning Committee (NCPC) to midwife a new Constitution, and in 1997 the NCPC summoned a delegate conference which created the National Convention Assembly to coordinate discussion

⁶⁰³ *Ibid.*

⁶⁰⁴ Final Report of the Constitution of Kenya Review Commission, 2005 at 3, 24, 37, 114 & 115, <<https://academia-ke.org/library/download/the-final-report-of-the-constitution-of-kenya-review-commission-2005/?wpdmdl=8524&refresh=60e15d29f07a51625382185>> [CKRC Final Report].

on the proposed Constitution.⁶⁰⁵ The pressure from these initiatives paid off as the government set up the Constitution of Kenya Review Commission (Commission) in 2000⁶⁰⁶ to “ensure a comprehensive review of the [1963] Constitution.”⁶⁰⁷ The Commission consulted widely and the views of Kenyans formed the basis of its recommendation to include Affirmative Action, principles of social and environmental justice, solidarity and environmental rights, into the Draft Bill to amend the Constitution.⁶⁰⁸ In August 2010, through a referendum, majority of Kenyans voted to adopt the revised Draft Bill, which provided for enforceable CERs, as the new Constitution, 2010.⁶⁰⁹ In the segments below, the thesis will analyze the content and impact of the CERs provisions in the Kenyan constitution on environmental law-making and the attendant effect on Kenya’s environmental sustainability.

3.2.2.2 Parallels in Constitution-Making Processes between Kenya and Nigeria

At least 3 parallels could be drawn between the process of amendment of Kenya’s 2010 Constitution and similar exercises in Nigeria to amend the 1999 Constitution. First, while the Kenyan government initially rejected the clarion call to amend the Constitution, when it became obvious that most Kenyans wanted the amendment, the government took over and drove the process. In contrast, Nigerians have been agitating for a new Constitution, including the addition of justiciable CERs, since the transition from military rule to democracy in 1999 but the federal government has not been as responsive as its Kenyan counterpart.⁶¹⁰ This may be indicative of the lack of public participation of Nigerians, particularly Niger-Deltans, in governance generally.

Interestingly, since the return to democracy rule in 1999, Nigerians have shown interest in the introduction of CERs in the country. 2 successive federal governments have responded to demands by Nigerians resulting in the convening of 2 constitutional conferences to aggregate the

⁶⁰⁵ Report of the Committee of Eminent Persons on the Constitution Review Process, 2006 at 14-15, <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Committee-of-Eminent-Persons-on-the-Constitution-Review-Process.pdf>>.

⁶⁰⁶ Eric Kramon & Daniel Posner, “Kenya’s New Constitution” (2011) 22 (2) Journal of Democracy 89 at 90.

⁶⁰⁷ CKRC Final Report, *supra*, note 604 at 9 & 43.

⁶⁰⁸ *Ibid* at 54, 107-108 & 111.

⁶⁰⁹ Brian Sang, “Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence” (2018) 26 (1) A.J.I.C.L 1 at 1.

⁶¹⁰ Samuel Ogidan & Joy Anigbogu, “You Can’t Stop Amendment of Constitution, PDP Warns Buhari”, *Independent* (21 June 2021), <<https://independent.ng/you-cant-stop-amendment-of-constitution-pdp-warns-buhari/>>.

views of Nigerians for a holistic amendment of the 1999 Constitution.⁶¹¹ The first was the National Political Reforms Conference (NPRC), convened by former President Olusegun Obasanjo in 2005.⁶¹² In its Report, the NPRC recommended the enshrinement of the “right of every Nigerian to clean and healthy environment under Fundamental Human Rights provision.”⁶¹³ Although the Report was not implemented, it suggests that Nigerians desire CERs.

Again in 2014, President Goodluck Jonathan responded to renewed demands from Nigerians and convoked the National Constitutional Conference (NCC).⁶¹⁴ The NCC Report had more far-reaching recommendations on CERs. For instance, it recommended the inclusion of a right to a safe and satisfactory environment, right to water, right to clean air and right of nature in the Constitution (section 5.7.1(1)).⁶¹⁵ It recommended that both Chapter II and IV of the Constitution should be merged to make Chapter II justiciable (section 5.3.1.(3))⁶¹⁶ and this would be strategic because the merger would make the environmental agenda in section 20 of Chapter II of the Constitution enforceable.

Furthermore, it recommended that the ACHPRs be incorporated into the Nigerian Constitution (section 5.3.1.(4)).⁶¹⁷ This would further strengthen the environmental provisions in the Constitution because the ACHPRs provides for the right to a healthy environment (article 24),⁶¹⁸ right to information (article 9(1)),⁶¹⁹ right to public participation (article 13(1))⁶²⁰ and independence of courts (article 26).⁶²¹ To widen access to justice, the Report recommended

⁶¹¹ 2014 Constitutional Conference Report, Vol. 1 at 20, <<https://thewillnigeria.com/news/wp-content/uploads/2014/08/1.pdf>> [2014 Constitutional Conference Report].

⁶¹² Uzuazo Etemire, “The 2014 Nigerian National Conference and the Development of Environmental Law and Governance” (2014) 47 (4) *Law and Politics in Africa, Asia and Latin America* 482 at 482 [Etemire].

⁶¹³ 2005 National Political Reform Conference Report at 4, <<https://dawodu.com/npre1.pdf>>.

⁶¹⁴ 2014 Constitutional Conference Report, *supra*, note 611 at 22-23.

⁶¹⁵ Section 5.7.1 (1) provides that the “vital need to preserve the integrity of the Nigerian environment and thus secure its sustainability for present and future generations requires clear and direct stipulations in the Nigerian Constitution. This must include justiciable rights to a safe and satisfactory (as stipulated by Article 24 of the African Charter on Peoples and Human Rights to which Nigeria is a signatory) environment including the rights to water, clean air, food, shelter. As a people living very closely to and depending for livelihoods on nature/environment we should enshrine the rights of nature to maintain its natural cycles without disruption in our Constitution.”

⁶¹⁶ Section 5.3.1. (3)) recommended the “merger of Chapters Two and Four of the 1999 Constitution while causing them to be executable or justiceable under our law as it is the practice in other civilized societies of the world.”

⁶¹⁷ *Ibid* at 119.

⁶¹⁸ Article 24 provides that all peoples “shall have the right to a general satisfactory environment favorable to their development.”

⁶¹⁹ Article 9 (1) provides that every individual “shall have the right to receive information.”

⁶²⁰ Article 13 (1) provides that every citizen “shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

⁶²¹ Article 26 provides that states parties “shall have the duty to guarantee the independence of the Courts...”

abolishing pre-action notice requirements and the requirement to show *locus standi* when instituting public interest cases as well as the repeal of the *Public Officers Protection Act*, which limits the timeframe within which to institute proceedings against a public officer (section 5.8.16.(14)).⁶²²

To strengthen the environmental regulatory framework, it recommended various amendments to the *Gas Re-injection Act*, 1979, including expunging the provision that allows gas flaring for a fee; the imposition of personal liability on the directors, management staff and controlling minds of any corporate concerns that violate the provision on gas flaring; and the payment of fines for gas flaring directly to the communities affected (section 5.7.2.(4)).⁶²³ It recommended the replacement of provisions on *mens rea* with strict liability (section 5.7.2.(7))⁶²⁴ and the Polluter Pays Principle with the Polluter Stop Principle (section 5.7.3.(1)(vi))⁶²⁵ in environmental laws.

On land use (as noted by the thesis in chapter 2), the Report also observed that the Land Use Act (LUA) “has taken away the land rights from local communities” (section 5.7.1.(5))⁶²⁶ and recommended that the LUA be retained in the Constitution but amended to allow owners of land the right to determine the price of their lands (section 5.10(2)a)⁶²⁷ and the communal right to protect their lands from activities that could degrade them (section 5.10(2)e)).⁶²⁸

As argued by the thesis in chapter 2, the revenue derivation and resource sharing formula are not equitable to the Niger Delta. The NCC Report recommended a review of the derivation formula

⁶²² Section 5.8.16 (14) provides that “(i) Pre-action Notice should be abolished; (ii) Public Officers Protection Act should be repealed; and (iii) The requirement of locus standi in Public Interest Litigation should be abolished.”

⁶²³ Section 5.7.2 (4) provides that the Gas Re-injection Act, 1979 “should be amended to: i. Removes the provision that empowers the minister to authorize the flaring of gas; ii. To impose stiffer sanction including fines equivalent to commercial price of natural gas and holding the heads of offending agencies personally liable; ... and v. The penalty for gas flaring should be paid to the communities that are directly affected by such flaring rather than the Federal Government.”

⁶²⁴ Section 5.7.2 (7) provides that environmental laws “should do away with the requirement of ‘mens rea’ and incorporate the principle of ‘strict liability.’”

⁶²⁵ Section 5.7.3. (1) vi) provides that the Polluter Pays principle “is good, but we need to raise the bar and demand that a polluter stops principle.”

⁶²⁶ P. 200

⁶²⁷ Section 5.10 (2) provides that the Conference “further noted the ambiguities and contradictions of the Act on the issue of customary tenure. Upon considering all the cases, we are of the view that: a) The Land Use Act should remain in the Constitution but be amended to take care of those concerns, particularly on compensation in Section 29(4) of the Act to read; land owners should determine the price and value of their land based on open market value.”

⁶²⁸ Section 5.10 (2) e) provides that the “right of communities to have land protected from human activities that would hinder or degrade the productivity of such land, through pollution and flooding. Such law should also guarantee the maintenance of adequate tree cover for mitigating impacts of climate change.”

to provide a greater share to oil bearing states (section 5.4.6(1))⁶²⁹ and the entrenchment of 'resource democracy' as a way of addressing conflicts associated with the struggle for resource ownership (section 5.7.1.(9) and (10)).⁶³⁰ From the foregoing, the NCC Report "gave the 'environment' a central place in its deliberations and recommendations."⁶³¹ Unlike Kenya, the Nigerian government has not implemented the Report. This includes both the President Jonathan-led federal government which initiated the constitutional project and the Buhari administration that succeeded Jonathan. Nonetheless, these demands indicate the desire of Nigerians for CERs and the accompanying improved environmental outcomes.

Second, the Nigerian Constitution has been amended in piecemeal fashion and not comprehensively as was done in Kenya, hence the constant agitation by Nigerians for a new Constitution. Speaking about this agitation and the recalcitrance of President Buhari to drive the process, Olu Fasan opines that if "he [President Buhari] reads the mood of the nation correctly, he will know that Nigerians are not talking about constitutional amendments, they are talking about a new Constitution...after all, since 1999, the Constitution has been amended four times almost without a whimper, with the nation hardly engaged in the process."⁶³²

Third, Kenyans were made part of the constitutional amendment processes. They spoke loudly through the 2 referendums, with the last one birthing the new Constitution. The Kenyan constitution of 2010 provides for environmental rights and its CERs have become the basis for the enactment of various environmental laws,⁶³³ which the thesis analyzes below. In contrast,

⁶²⁹ Section 5.4.6 provides that having "critically examined the issues in contention, Conference recognizes the need to: 1 Review the percentage of revenue allocation to States producing oil (and other resources)."

⁶³⁰ By *resource democracy*, the report means the devolution of powers over the management of resources to the states and local communities to allow these entities participate in resource governance. See *ibid* at 202.

While section 5.7.1 (9) provides that "right of the people to own and manage their resources by entrenching resource democracy gives rights to federating units to prospect for and develop resources in their territories. This will remove conflicts between federating units and promote progressive and active development", section 5.7.1 (10) provides that the "power on the issue of resource management should devolve to States and local communities, in order to allow them to participate in the management of resources."

⁶³¹ Etemire, *supra* note 612 at 490.

⁶³² Olu Fasan, "Restructuring: Buhari is Wrong to Abdicate Leadership on Constitutional Change", *Vanguard Newspaper* (17 July 2021), <<https://www.vanguardngr.com/2021/06/restructuring-buhari-is-wrong-to-abdicate-leadership-on-constitutional-change/>>.

⁶³³ The Preamble provides that "We, the people of Kenya - RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations." Article 10 (2) provides that the "national values and principles of governance include a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; c. good governance, integrity, transparency and accountability; and d. sustainable development."

Nigerians do not play such roles at all in Constitution amendment processes. The 1999 Constitution was handed down by the military⁶³⁴ and it does not provide for referendums.

3.2.2.3 Impact of CERs on Environmental Law-making in Kenya

(a) The Environment and Land Court Act, 2011 (ELCA) powering Institutional Reforms

Article 162(2)(b) of the Constitution of Kenya mandates the legislature to establish specialized courts to handle land and environmental litigation. The legislature enacted the Environmental

Article 35 (1) provides that “Every citizen has the right of access to a. information held by the State; and b. information held by another person and required for the exercise or protection of any right or fundamental freedom.” Article 42 provides: “Every person has the right to a clean and healthy environment, which includes the right (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.”

Article 43 (1) “1. Every person has the right- d. to clean and safe water in adequate quantities.”

Article 48 provides that the State “shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Article 59 provides that “1. There is established the Kenya National Human Rights and Equality Commission. 2. The functions of the Commission area- to promote respect for human rights and develop a culture of human rights in the Republic;3. Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Article 69 provides that “1. The State shall-a. ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; b. work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; c. protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; d. encourage public participation in the management, protection and conservation of the environment; e. protect genetic resources and biological diversity; f. establish systems of environmental impact assessment, environmental audit and monitoring of the environment; g. eliminate processes and activities that are likely to endanger the environment; and h. utilise the environment and natural resources for the benefit of the people of Kenya. 2. Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

Article 70 provides for “1. If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. 2. On application under clause (1), the court may make any order, or give any directions, it considers appropriate a. to prevent, stop or discontinue any act or omission that is harmful to the environment; b. to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or c. to provide compensation for any victim of a violation of the right to a clean and healthy environment. 3. For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

Article 72 says that “Parliament shall enact legislation to give full effect to the provisions of this Part.”

Article 162 provides that “2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- Establishment of labor courts a. employment and labour relations; and b. the environment and the use and occupation of, and title to, land. 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

⁶³⁴ The Constitution of the Federal Republic of Nigeria (Promulgation) Decree No 24 of 1999, Laws of the Federation of Nigeria, <http://constitutionnet.org/sites/default/files/constitution_promulgation_decree.pdf>.

and Land Court Act (ELCA)⁶³⁵ which created the Environment and Land Court (ELC) as “a superior court to hear and determine disputes relating to the environment.”⁶³⁶ The Preamble to the ELCA acknowledges the constitutional link by providing that the ELCA was enacted: “to give effect to Article 162(2)(b) of the constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.”

Pursuant to article 162(2), the Kenyan legislature was roused to enact the ELCA to satisfy the provisions of articles 60 and 69 of the 2010 Constitution.⁶³⁷ This point was not lost on the court in *Abdalla Rhova Hiribae & 3 Others Vs. The Hon Attorney General & 6 Others*,⁶³⁸ where it held that the “[c]onstitution, [2010] has, however, set a bar that is much higher than the obligation imposed by statute on the respondents. It mandates, at Articles 60 and 69, that a comprehensive legislative and policy framework with regard to land and the environment be put in place.” It may be argued that the legislation has not met the constitutional standard, but there is in existence, and the recognition by national actors, of a constitutional standard. In chapter 4 in the segment on CERs providing the impetus for the enforcement of environmental laws, the thesis will analyze the contribution of the ELCA to environmental sustainability in Kenya.

(b) The Climate Change Act, 2016 (CCA) and the Guiding Environmental Principles in Kenya

Another law enacted by the Kenyan legislature based on CERs is the CCA.⁶³⁹ To underscore the influence of CERs on its enactment, section 4(2)(a) of the CCA provides that the institutions vested with duties under the Act shall discharge them in accordance with Kenyan “national values and principles of governance in Article 10 of the Constitution.” The *National values and the principles of governance* which are the bedrock of the CCA include environmental principles

⁶³⁵ No. 19 of 2011,

<<https://www.bing.com/search?q=the+Environment+and+Land+Court+Act+kenya+pdf&cvid=f22167e120ec426c80dc1d9133a9f644&FORM=ANNTA1&PC=U531>> [ELCA].

⁶³⁶ Article 162 (2) provides that “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to – (b) the environment and the use and occupation of, and title to, land.”

⁶³⁷ Article 60 (1) provides for the principles of Land Policy and article 60 (2) provides that “These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.”

Article 69 provides for “Obligations in respect of the environment.”

⁶³⁸ Civil Case No. 14 of 2010 at para. 65 <<http://kenyalaw.org/caselaw/cases/view/98995/>> [*Hiribae Vs. AG*].

In the segment on CERs enabling the horizontal enforcement of CERs, I will provide the facts of the case.

⁶³⁹ No. 11 of May 27, 2016, <http://www.environment.go.ke/wp-content/uploads/2018/08/The_Kenya_Climate_Change_Act_2016.pdf>.

like sustainability, public participation and accountability.⁶⁴⁰ In addition, in the discharge of their duties under the CCA, institutions must be guided by both the constitutionally guaranteed right to an uncontaminated and healthy environment for the enjoyment of the current and future generations; and state and individual obligations in respect of the environment (section 4(2)(b) CCA).⁶⁴¹

3.2.2.4 CCA and Institutional Change in Kenya

New laws often require new institutions to ensure their effectiveness. The influence of CERs permeates the functionality of institutions created under the CCA. For instance, the CCA creates the National Climate Change Council (the Council) as the main institution to coordinate climate change policies in Kenya (sec. 5(1) and (6), with duties including the development (through public consultation and in line with national values provided by Article 10 of the Constitution), implementation and updating every 5 years of the National Climate Change Action Plan (NCCAP) geared toward decarbonization and the of achievement of sustainable development (sec. 13 (1), (3) (a) and (8)).⁶⁴²

However, the first NCCAP which operated from 2013 to 2017 was developed in 2012 ahead of the coming into effect of the CCA⁶⁴³ but on the basis of the Constitution “which provides ground for the formulation of adaptation and mitigation legislation, policies and strategies by

⁶⁴⁰ Article 10 (2) of the Kenyan Constitution provides that “The national values and principles of governance include a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; c. good governance, integrity, transparency and accountability; and d. sustainable development.”

⁶⁴¹ Section 4 provides that “In discharging their functions and duties under this Act, the Council, the Cabinet Secretary, county government, any state officer and state organ shall be guided by the following – (b) be guided by the provisions of Articles 42 and 69 of the Constitution.”

⁶⁴² Section 5 (1) provides that there “is established an unincorporated body to be known as the National Climate Change Council.”

Section 6 provides that “The Council shall provide an overarching national climate change coordination mechanism and shall – (h) set the targets for the regulation of greenhouse gas emissions.”

Section 13 (1) provides that “The Cabinet Secretary shall, in accordance with Article 10 of the Constitution and section 3 of this Act, and through public consultation, formulate a National Climate Change Action Plan.”

Section 13 (3) provides that “The National Climate Change Action Plan shall prescribes measures and mechanisms – (a) to guide the [country] toward the achievement of low carbon climate resilient sustainable development.”

Section 13 (8) provides that “The Cabinet Secretary shall, in every five year period, review and update the National Climate Change Action Plan.”

⁶⁴³ Government of Kenya, “National Climate Change Action Plan 2013 -2017” at 1, <<https://cdkn.org/wp-content/uploads/2013/03/Kenya-National-Climate-Change-Action-Plan.pdf>>.

guaranteeing the right to a clean and healthy environment under the Bill of Rights.”⁶⁴⁴ The first NCCAP was able to accomplish some milestones including increased renewable energy utilization in power generation and reforestation.

Furthermore, adaptation and mitigation programs were efficiently executed, which minimized risks and “built adaptive capacity through disaster risk reduction, drought management, and adaptation in the agricultural sector including irrigation, improving the climate resilience of pastoralists, and sustainable land management.”⁶⁴⁵ In addition, the first NCCAP led to the establishment of the National Climate Change Resource Centre, the Climate Change Directorate and a greenhouse gas inventory unit.⁶⁴⁶ In 2018, the second NCCAP (2018 to 2023) was adopted to build upon the foundation laid by the first. The specific goal of the second NCCAP is achievement of sustainable development through a low carbon climate resilient framework with a focus on adaptation and increasing the climate resilience of vulnerable groups.⁶⁴⁷ Hopefully when a postscript of the second NCCAP is written in 2023, it will have managed to achieve these goals.

3.2.2.5 Nigeria’s Policy on Climate Change (NPCC)

Like Kenya, Nigeria had adopted, in 2012, its initial NPCC⁶⁴⁸ “to strengthen national initiatives to adapt to and mitigate climate change.”⁶⁴⁹ The NPCC has been revised and is expected to operate from 2021 to 2030.⁶⁵⁰ The revised NPCC not only appreciates the threat posed by climate change, but it also recognizes the nexus between climate change and sustainability by acknowledging that climate change “is perhaps the biggest challenge facing humanity. It is complex and dynamic and requires dimensional and multi-sectoral mitigation and adaptation

⁶⁴⁴ *Ibid* at 10.

⁶⁴⁵ Ministry of Environment and Forestry, Kenya, “National Climate Change Action Plan 2018 – 2022” at 9, <http://www.environment.go.ke/wp-content/uploads/2020/03/NCCAP_2018-2022_ExecutiveSummary-Compressed-1.pdf>.

⁶⁴⁶ *Ibid*.

⁶⁴⁷ *Ibid* at 4.

⁶⁴⁸ Federal Ministry of Environment, Nigeria, “National Climate Change Policy for Nigeria 2021–2030” at p. 7, <https://climatechange.gov.ng/wp-content/uploads/2021/08/NCCP_NIGERIA_REVISIED_2-JUNE-2021.pdf> [National Climate Change Policy for Nigeria, 2021-2030].

⁶⁴⁹ Federal Ministry of Environment (Department of Climate Change), Nigeria, “National Policy on Climate Change” at 11, <<https://climatechange.gov.ng/wp-content/uploads/2020/09/national-climate-change-policy-1-1.pdf>>.

The date of the adoption of the NPCC is not stated and every search to identify the date of adoption did not yield result.

⁶⁵⁰ National Climate Change Policy for Nigeria, 2021-2030, *supra* note 648.

initiatives within a dynamic policy framework to properly tackle it. Government recognizes this and is committed to tackling any presumed threat to its national sustainable development.”⁶⁵¹

In view of the above, the revised NPCC has interesting policy thrusts. For instance, one of its aims is to promote sustainability through an aggressive reduction of GHG emissions in Nigeria.⁶⁵² If this is implemented, it would boost the sustainability profile of the Niger Delta environment, because the emission of CO₂ while extracting oil in the Niger Delta has been identified as a major contributor to its environmental degradation.⁶⁵³ Also, the centrality of sustainability and public participation in the revised NPCC is discernible from its mission statement: to “[e]nsure sustainable development and a climate proofed economy through multi-stakeholder engagement.”⁶⁵⁴ Furthermore, the guiding principles of the revised NCCP include effective public participation, social inclusion, environmental sustainability, enhancement of the quality of the environment and equilibrium and equity,⁶⁵⁵ which are some of the areas recognized by the thesis as crucial to the sustainability of the Niger Delta’s environment.

However, there are potential challenges to the realization of the objectives of the revised NPCC. First, comparatively, while Kenya’s NCCAP has both a constitutional and legislative basis of operation, Nigeria’s revised NPCC does not have any constitutional underpinning since Nigeria does not have enforceable CERs. It is also debatable whether the NPCC has a legislative basis, despite the recent enactment of the *Climate Change Act, 2021*.⁶⁵⁶ Although it is stated in the revised NPCC that its anchor is section 20 of the 1999 Constitution,⁶⁵⁷ the thesis argued in

⁶⁵¹ *Ibid* at 2.

⁶⁵² *Ibid* at 9.

⁶⁵³ Eaton, *supra* note 66 at 269.

⁶⁵⁴ National Climate Change Policy for Nigeria, 2021-2030, *supra* note 648 at 15.

⁶⁵⁵ *Ibid* at 16.

Paragraph 3.5 Guiding Principles provides that the “following principles are relevant to the attainment of the strategic objectives of the Policy: ... ii. Effective citizenship participation... iv. Gender equality and social inclusion. v. Sustainable management of the environment. vi. Shared vision and responsibility among stakeholders. vii. Pre-caution when faced with uncertainty. viii. Promotion of environmental quality and ecological equilibrium. ix. Comprehensive and coordinated approach among government, civil society organizations and the private sector. x. Transparency, accountability and equity. xi. Monitoring, evaluation and reporting of all climate change interventions and lessons.”

⁶⁵⁶ Terhemba Daka, “Buhari signs Climate Change, AMCON Amendment Bills into Law”, *The Guardian* (19 November 2021), <<https://guardian.ng/news/buhari-signs-climate-change-amcon-amendment-bills-into-law/>>. Despite repeated search, I have not been able to locate the Climate Change Act, 2021, as such, I cannot confirm if there is legislative provision for the NPCC.

⁶⁵⁷ National Climate Change Policy for Nigeria, 2021-2030, *supra*, note 648 at 9.

chapter 1 that section 20 of the Constitution is not enforceable. This could affect the implementation of the NPCC beyond 2023 when a new government is expected in Nigeria.

Second, the revised NPCC provides that Nigeria is committed to reducing its GHGs emission by 20% by 2030.⁶⁵⁸ This plan seems highly ambitious in the light of Nigeria's non-committal stance towards the termination of gas flaring in the Niger Delta. The *Associated Gas Re-injection Act 1979* provided a permissible terminal date of January 1, 1984 for gas flaring (section 3 (1)).⁶⁵⁹ Instead of working to achieve that aim, the legislation has been amended several times to accommodate gas flaring, which is still on-going.⁶⁶⁰ If a piece of legislation has not been implemented over the years, it is debatable whether Nigeria will implement the revised NPCC which, comparatively, does not carry as much weight.

Third, in line with goal 7 of Africa's *Agenda 2063* which provides that Africa will strive to achieve "[e]nvironmentally sustainable and climate resilient economies and communities",⁶⁶¹ the revised NPCC seems to commit to ending GHGs emissions in Nigeria by 2063.⁶⁶² However, Nigeria's renewed investment drive in the oil industry seems to negate that resolve. For instance, the PIA allocates 30% of the profit realized by the federal government for oil and gas investments to oil prospecting in the frontier basins (section 9 (1) and (4)),⁶⁶³ which are located outside the Niger Delta⁶⁶⁴ and with the non-committal stance of the federal government towards ending gas flaring in Nigeria make it unlikely that GHGs emissions will end by 2063. The

⁶⁵⁸ *Ibid* at 11 & 17.

⁶⁵⁹ *Associated Gas Re-injection Act 1979*, *supra* note 140.

Section 3 (1) provides that subject "to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1 January, 1984 flare gas produced in association with oil without the permission in writing of the Minister."

⁶⁶⁰ Ako, *supra*, note 63 at 628.

⁶⁶¹ African Union, "Goals & Priority Areas of Agenda 2063", <<https://au.int/agenda2063/goals>>.

⁶⁶² National Climate Change Policy for Nigeria, 2021-2030, *supra*, note 648 at 13.

⁶⁶³ Section 9 (1) provides that the "functions of the Commission with respect to frontier basins shall be to— (a) promote the exploration of the frontier basins of Nigeria; (b) develop exploration strategies and portfolio management for the exploration of unassigned frontier acreages in Nigeria ; (c) identify opportunities and increase information about the petroleum resources base within frontier basins in Nigeria ; and (d) undertake studies, analyse and evaluate unassigned frontier basins in Nigeria."

Section 9 (4) provides that there "shall be maintained, for the purpose of this section, a Frontier Exploration Fund which shall be 30% of NNPC Limited's profit oil and profit gas as in the production sharing, profit sharing and risk service contracts."

⁶⁶⁴ According to Eniola Akinkuotu and Leke Baiyewu, even though the PIA "doesn't identify the frontier basins, a statement by the President [Buhari] in 2019 identified the frontier basins as Chad Basin, Gongola Basin, Anambra Basin, Sokoto Basin, Dahomey Basin, Bida Basin and Benue Trough." See Eniola Akinkuotu & Leke Baiyewu, "PIB: North, Ogun's quests for Oil get Boost, Exploration Receives 30%", *Punch Newspaper* (5 July 2021) <<https://punchng.com/pib-north-oguns-quests-for-oil-get-boost-exploration-receives-30/>>.

Nigerian government would have to show greater commitment towards the implementation of existing legal frameworks on the environment. In chapter 4, the thesis will analyze the potentials of CERs to galvanize the government into implementing extant environmental laws for better outcomes for the Niger Delta environment.

3.2.2.6 CCA and Funding of Climate Change Action in Kenya and Nigeria

Realizing the centrality of funding to climate change mitigation and adaptation policies, the Kenyan CCA establishes a climate change fund for the funding of climate change-related projects including decarbonization, mitigation and adaptation projects (sec. 25).⁶⁶⁵

In Nigeria, the federal government estimates that from 2010 and 2018, Nigeria emitted GHGs amounting to about 247 to 347 million tonnes of CO₂-equivalent and the number is projected to reach 878 million tonnes of CO₂-equivalent by 2030.⁶⁶⁶ According to Eaton, the unbroken “flaring of gas in the Niger Delta area over the last [sixty] years or so has contributed significantly to the release of ‘Greenhouse gases’ into the atmosphere and not surprisingly to ‘Acid-Rain.’ The Niger Delta communities...suffer from respiratory diseases and have become half-deaf from the incessant din of the gas flares.”⁶⁶⁷ Despite the impact of climate change on the Niger Delta people, unlike Kenya, Nigeria does not have a specific fund dedicated to climate change mitigation and adaptation measures.

However, Nigeria has a fund dedicated to environmental challenges generally. Section 3 (c) of the *Allocation of Revenue (Federation Account, Etc.) Act 1981*⁶⁶⁸ created an ‘ecological fund’ of which 1% of the money allocated to the federal government goes to tackling ecological problems. In 1984, the funding source of the ecological fund was changed. Section 2 (1) (d) of

⁶⁶⁵ Section 25 (1) provides that “There is hereby established the Climate Change Fund which shall be a financial mechanism for priority climate change actions and interventions approved by the Council.”

Section 25 (5) provides that “In administering the Funds, the Council shall - (f) set out procedures, criteria and eligibility for funding research institutions, private, public, civil societies research, development and investment ventures that enhance low carbon climate resilient development.”

⁶⁶⁶ The Federal Government of Nigeria, “Nigeria’s Nationally Determined Contribution – Update”

<<https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Nigeria%20First/NDC%20INTERIM%20REPORT%20SUBMISSION%20-%20NIGERIA.pdf>>.

⁶⁶⁷ Eaton, *supra* note 66 at 269.

⁶⁶⁸ Act No. 1 of January 1, 1981 <<https://gazettes.africa/archive/ng/1981/ng-government-gazette-supplement-dated-1981-02-03-no-6-part-a.pdf>>.

the *Allocation of Revenue (Federation Account, etc.) Decree, 1984*⁶⁶⁹ allocated of 1% of all revenue accruing to the Nigerian federation to the ecological fund. Due to mounting environmental challenges, including that about 90% of Nigeria's total land mass is affected by erosion, leading 'to impoverishment of the soil as nutrients are washed away, loss of livelihood as farmlands become wasteland thus increasing the menace of rural-urban migration and pollution and silting of available sources of drinking water,'⁶⁷⁰ there was an increase in the allocation to the ecological fund. *Decree 106 of 1992* "raised the percentage of the fund accruable to the [ecological] fund from one to two per cent. A further modification to this was effected in the federation account order of July 8, 2002. This raised the total [allocation to the ecological fund] to three per cent."⁶⁷¹

However, the ecological fund is being implemented in a top-down manner without any inputs from the beneficiary communities and states where projects funded from the ecological fund are sited. This disconnect has affected the buy-in by these strategic partners, thereby depriving the federal government of local knowledge, community project monitoring, and proper prioritizing in the identification and execution of projects that would touch the lives of the affected communities. Ibrahim Gaidam, a former governor of Yobe State, once voiced his frustration with this top-down approach by arguing that the attitude of the federal government "of not involving the affected communities or the state governments in the Federally- funded ecological projects needs to be reviewed" because the disconnect from the people affects the ability of the federal government to identify and execute priority projects. For example, while "the entire Sahelian frontline states of the north are faced with the common problem of desertification, the Federal Government undertakes projects which are at cross-purpose with even detrimental to the overall objectives of combating desertification and eradication of poverty."⁶⁷²

⁶⁶⁹ Decree No. 36 of December 31, 1984. Online: available at <https://gazettes.africa/archive/ng/1984/ng-government-gazette-supplement-dated-1984-12-31-no-74-part-a.pdf> (last accessed July 2, 2021).

Note that in 1984, Nigeria was under a military government and that explains why the title of the law changed to a decree.

⁶⁷⁰ Emeka Ezekiel, "Ecological Fund: Trapped in the Web of Endless Controversy", *Perspectives* (14 August 2010) <<https://olusegunadekoya.wordpress.com/2010/08/19/nigerian-ecological-fund-issues/>> [Ezekiel].

⁶⁷¹ Dan Agbese, "The Ecological Fund and the Cans of Worms" *The Guardian* (29 September 2017) <<https://guardian.ng/opinion/the-ecological-fund-and-the-cans-of-worms/>> [Agbese].

Despite my repeated searches, I could not find the 1992 and 2002 Decrees, hence my reliance on secondary source.

⁶⁷² Ezekiel, *supra*, note 670.

Also, corruption has prevented Nigerians from benefitting from the ecological fund. In 2002, during the tenure of President Obasanjo, about 1.7 billion naira from the ecological fund was declared missing but new facts “show that the ecological fund ... was actually diverted by the then accountant-general of the federation, Kayode Naiyeju, who had received a verbal instruction from [President] Obasanjo that the money be diverted [to the President Obasanjo’s political party] to fund the 2003 general elections.”⁶⁷³ Corruption in the management of the ecological fund continued in the government of President Jonathan (2010-2015) as about 200 billion naira from the ecological fund “was wasted on projects that were either non-existent, shoddily executed or were awarded without due process.”⁶⁷⁴

There is no marked shift in the overhang of corruption in the management of the ecological fund under the succeeding President Muhammadu Buhari where issues around the fund remains opaque. Dan Agbese opines that the “public deserves to know whether the money allocated to the [ecological] fund at the federal and state levels is spent in accordance with the core mandates of the fund. But the opacity of the operations of the fund points to this inescapable fact: corruption is the name of the game.”⁶⁷⁵

The ecological fund is domiciled in the presidency and “is administered on the instruction of the president through the Ecological Fund Office.”⁶⁷⁶ Since there is no legislative framework to define its administration and structure, this can lead to abuse in its management. There is the need to enact legislation in the mold of Kenya’s CCA to provide certainty and uniformity in implementing the ecological fund. If CERs could lead to the enactment of a similar legislation in Nigeria, it could transform the management of the ecological fund to tackle environmental challenges, especially in the Niger Delta.

⁶⁷³ “Revealed: How PDP Spent N1.7b Ecological Fund for Election”, *Perspectives* (15 August 2007) <<https://olusegunadekoya.wordpress.com/2010/08/19/nigerian-ecological-fund-issues/>>.

⁶⁷⁴ Ezekiel, *supra*, note 670.

⁶⁷⁵ Agbese, *supra* note 671.

⁶⁷⁶ *Ibid.*

3.2.2.7 Kenyan Law on the Sustainability of the Petroleum Industry

(a) The Petroleum Act, 2019 (KPA).

Another law in Kenya that was enacted to satisfy the various provisions of the Constitution is the KPA.⁶⁷⁷ Its preamble provides that its goal is “to provide a framework for the contracting, exploration, development and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations; and for connected purposes.”

The KPA has very interesting environmental provisions. Section 97(1) re-enforces existing environmental protection duties placed on persons operating in the petroleum industry that are stipulated in other instruments.⁶⁷⁸ Apart from the duty to develop a clean-up plan, section 97(2) also mandates any person operating a petroleum business, on the occurrence of any spill, fire or explosion in the petroleum value chain, to clean up the degraded environment in a manner approved by the regulator.⁶⁷⁹ Section 97(3) provides that where the environmental violator “fails, or unreasonably delays, to carry out the work referred to in subsection (2), the licensing authority may cause any work not carried out to be executed at the expense of the said operator or person transporting or selling the petroleum.”

Similar provisions are critically needed in Nigeria. In chapter 2 (in the segment on corrective/restorative justice), the thesis analyzed the 2011 UNEP Report on Ogoniland, its recommendation for the clean-up of its degraded environment, and how the clean-up has not been comprehensively performed eleven years later. The casual manner of implementing the UNEP Report regarding the clean-up could be because Nigeria’s equivalent of the KPA at the

⁶⁷⁷ No.2 of 2019 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/PetroleumAct_No._2of2019.pdf>.

⁶⁷⁸ Article 97 (1) provides that a “person engaged in petroleum business shall comply with the applicable environmental, health and safety laws.”

⁶⁷⁹ 97 (2) provides that “In the event of a fire, explosion, oil spill, injury or fatality occurring in the course of operating a petroleum logistics facility, transportation or sale of petroleum, either by accident or through negligence, the operator or person transporting or selling the petroleum shall forthwith clean up the polluted or damaged environment, at the operator’s own expense, to the satisfaction of the licensing authority and any other relevant authority.”

Article 113 (2) of KPA also provides that where “petroleum infrastructure is removed, the surface of the land shall forthwith be restored to its former condition as far as possible by the contractor or licensee and in default thereof restoration may be carried out by the owner of the land, and the costs thereof shall be recoverable from the contractor or licensee.”

time– the defunct *Petroleum Act, 1969* (NPA)⁶⁸⁰ - neither provided for the Polluter Pays Principle, nor empowered the regulator to carry out the clean-up and later be reimbursed by the operator. Even the NESREA Act,⁶⁸¹ which is Nigeria’s main environmental protection law, is equally silent on the Polluter Pays Principle. However, section 6 (3) of the NOSDRA Act enacts the polluter pays principle in Nigeria and stipulates a fine of one million naira (about \$ 1, 470 CAD) for failure to clean up the impacted environment.⁶⁸²

In comparison with the KPA, the regime put in place by NOSDRA Act regarding the clean-up of the degraded environment does not go far enough for 4 reasons. First, where there is failure to clean-up the degraded environment, the KPA mandates the regulator to undertake the clean-up and then proceed against the spiller for reimbursement. This ensures that the environment is rehabilitated. In Nigeria, where the oil spiller fails to clean-up, the only option available is for the regulator to impose fines, which does not halt the continuing and worsening effects of uncleaned pollution.

Second, fines payable for oil spills in Nigeria do not go to the communities impacted by the oil spill but go to the federation account to be shared to all the states of the federation, local government councils and other institutions qualified for statutory financial transfer.⁶⁸³ The payment of fines to the impacted communities would help the people invest in programs that might minimize the impact of the environmental degradation.

Third, the KPA gives the oil spiller a timeframe to embark on the clean-up operation, whereas there is no such provision in NOSDRA Act or any other Nigerian law. As such, the determination of when to commence clean-up operations and the imposition of fines is at the

⁶⁸⁰ The Petroleum Act of November 27, 1969 <<https://ngfcp.dpr.gov.ng/media/1070/petroleum-act.pdf>>.

⁶⁸¹ NESREA Act, *supra* note 342.

Section 2 of the Act creates the Agency and saddled it with the “responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria’s natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.

⁶⁸² No.15 of 2006 [NOSDRA Act].

Section 6 (2) provides that an oil spiller should “report an oil spill to the Agency in writing not later than 24hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five Hundred Thousand Naira (N500,000.00) for each day of failure to report the occurrence.”

Section 6 (3) 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.”

⁶⁸³ See section 162 of the Nigerian Constitution.

discretion of the regulator. This may explain why clean-up operations in Nigeria are not treated with the required urgency. In chapter 2 (in the segment on Cost Benefit Analysis of Environmental Justice), the thesis discussed the continued delay in the Ogoniland clean-up despite the 2011 recommendation by UNEP. Operations did not start until 2018 with a pilot remediation project.⁶⁸⁴ The clean-up is on-going but undertaken with a piecemeal approach.⁶⁸⁵

Fourth, the fine of one million naira (about \$1,470 CAD) imposed by NOSDRA Act for failure to clean-up the degraded environment is paltry and is an unlikely deterrent for TNCs. In Ogoniland, UNEP had recommended a financial portfolio of \$1 billion USD for the clean-up exercise. Left at Shell's discretion, it would gladly pay the fine of \$1,470 CAD instead of embarking on the clean-up, which might explain why Shell did not see the need to act in the first place until UNEP stepped in.

However, the PIA which repealed the NPA seems to have an improved environmental protection regime for Nigeria's oil industry. For instance, the PIA now mandates operators to submit environmental management plans for approval by the regulator (section 102 (1)).⁶⁸⁶ The regulator must be satisfied that the operator can restore the environment from any negative effect of its activities (section 102 (3)(b)).⁶⁸⁷

The PIA establishes an 'environmental remediation fund' to rehabilitate a degraded environment, and contribution to the fund is compulsory for all operators in Nigeria's oil industry (section 103 (1)).⁶⁸⁸ Where the operator fails to rehabilitate the environment, the regulator could apply the funds for that purpose (section 103 (4)).⁶⁸⁹ One of the causes of the Niger Delta environmental

⁶⁸⁴ HYPREP 2, *supra* note 381.

⁶⁸⁵ HYPREP, *supra* note 46.

⁶⁸⁶ Section 102 (1) provides that a "licensee or lessee who engages in upstream and midstream petroleum operations shall within— (a) one year of the effective date, or (b) six months after the grant of the applicable licence or lease, submit for approval an environmental management plan in respect of projects which require environmental impact assessment to the Commission or Authority, as the case may be."

⁶⁸⁷ Section 102 (3) provides that the regulator "shall approve the environmental management plan, where— (a) it complies with relevant environmental Acts; and (b) the applicant has the capacity or has provided for the capacity to rehabilitate and manage negative impacts on the environment."

⁶⁸⁸ Section 103 (1) provides that as "a condition for the grant of a licence or lease and prior to the approval of the environmental management plan by the Commission or Authority, a licensee or lessee shall pay a prescribed financial contribution to an environmental remediation fund established by the Commission or Authority, as the case may be, for the rehabilitation or management of negative environmental impacts with respect to the licence or lease."

⁶⁸⁹ Section 103 (4) provides that where the operator "fails to rehabilitate or manage or is unable to undertake the rehabilitation or management of any negative impact on the environment, the Commission or Authority, as the case

degradation, as identified by experts, is the failure to implement and enforce existing laws in Nigeria – this is the focus of chapter 4 of the thesis. Hopefully, regulators will implement the environmental provisions in the PIA which seem promising, for the good of the Niger Delta.

(b) Kenyan Law and Land Use

Also, the KPA land use regime seems equitable and fair. First, the KPA requires the petroleum business operators to obtain the consent of the landowners where they want to extract oil and gas and site their businesses.⁶⁹⁰ Second, acquisition of land is not free as the petroleum business operators must negotiate with the landowners on the amount of compensation to be paid for the land. Third, the compensation agreed must be paid to landowners if land is eventually acquired to carry out a petroleum business.⁶⁹¹ Fourth, in the event of the failure to agree on any issue regarding compensation to be paid, an application can be made to the appropriate forum to determine the question.⁶⁹² Fifth, the KPA allows the landowner the choice to object to the use of his or her land for a petroleum business.⁶⁹³

In Nigeria, the defunct NPA did not have the equivalent of these provisions. The *Land Use Act, 1979* (LUA)⁶⁹⁴ regulates land ownership and acquisition in Nigeria and in comparable terms, its land use regime is not as equitable as the KPA. The LUA vests all land in each state of the Nigerian federation in the State Governor in trust to administer on behalf of all indigenes of the

may be, may, upon written notice to the holder, apply the fund under subsection (1) to rehabilitate or manage the negative environmental impact.”

⁶⁹⁰ Article 108 (2) of the KPA provides that anyone who wants to “enter upon any land, other than that person’s land to – (a) undertake exploratory activities relating to petroleum operations; (b) carry out a survey of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld,”

⁶⁹¹ Article 110 (1) of the KPA provides that “An owner, after receipt of a request for consent under section 108 shall consent in writing to the development of petroleum operations, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent so given shall be binding on all parties having an interest in the land.”

⁶⁹² Article 112 of KPA provides that if “any difficulty or question arises as to the person entitled to compensation payable under this Act, the determination on entitlement shall be made in accordance with the provisions of the relevant written laws.”

⁶⁹³ Article 111 (1) of KPA provides that anybody “who objects to a proposal to develop petroleum infrastructure on his land shall raise his objection in accordance with the provisions of the relevant written laws. (2) In the case of acquisition of rights of way or way leaves, the person shall raise the objection in accordance with the provisions of the relevant written laws.”

⁶⁹⁴ Cap. L5, Laws of the Federation, 2004 online: available at <https://www.lawyerd.ng/wp-content/uploads/2015/11/LAND-USE-ACT-2004.pdf> (last accessed October 2, 2020).

state.⁶⁹⁵ The impact of the provision is that it divests Nigerians, including the Niger Delta people, of their prior interest in land and thereby takes away the power of the Niger Delta people to negotiate and receive compensation from the proprietors of petroleum businesses. It is now the State Governor that has such a right and once the Governor gives consent to land acquisition, the petroleum business operator begins operation with no need for any conversation with the prior landowners.

To complicate the issue, unlike the KPA, the LUA takes away the jurisdiction of the court in cases concerning failure to pay compensation for land acquired under the LUA. This forecloses the ability of the Niger Delta people to challenge in court any failure to compensate them for the taking over of their traditional lands.⁶⁹⁶ In chapter 4 (under the segment on preventing the Niger Delta people from receiving compensation for environmental injury), the thesis will analyze the implication of these provisions of the LUA for the Niger Delta people.

Interestingly, although it seems limited, the PIA tries to replicate some of the provisions of the KPA on the payment of compensation for acquisition of privately owned land by operators in the oil industry. For instance, although the PIA is silent on how the amount of compensation is to be agreed, the PIA insists on the payment of compensation to the rightsholders of land acquired for the operation of oil business in Nigeria (section 101 (1) (c) (ii)).⁶⁹⁷ Also, the PIA now vests in the Federal High Court (FHC) the jurisdiction to determine the issues of ownership and fair compensation on the acquisition of land in the hands of rightsholders for oil business in Nigeria (section 101 (1) (d)).⁶⁹⁸

⁶⁹⁵ Section I, part 1 provides that “all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”

⁶⁹⁶ Section 47 (2) provides that “No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.”

⁶⁹⁷ Section 101 (1) provides that a “licensee or lessee shall not enter upon, occupy or exercise any of the rights or powers conferred by its licence or lease in relation to... (c) any part consisting of privately owned or legally occupied land other than private land falling under paragraph (b) except permission in writing to do so has been obtained by the licensee or lessee from the Commission, which may grant permission if the licensee or lessee has... (ii) paid or tendered to the person in lawful occupation or the owner or owners of the land fair and adequate compensation.”

⁶⁹⁸ Section 101 (1) (d) provides that “dispute under paragraph (c) as to who is in lawful occupation or the owner of any land or as to the amount of any compensation payable, the licensee or lessee, pending the determination of the dispute, shall deposit with the Federal High Court, with jurisdiction over the matter, such sum as shall be determined by the Federal High Court to be reasonable compensation payable to the rightful owner or occupier of the land, having due regard to the existing regulatory framework.”

However, these provisions of the PIA on acquisition of privately owned land and payment of compensation seem to conflict with the provisions of the LUA earlier analyzed, which divests Nigerians of their prior interest in land and takes away the power of the court to enquire into the payment of compensation for land acquired for oil operations. To further complicate the issues, the PIA recognizes the LUA as the overriding legislation in respect of the acquisition of land in Nigeria, presupposing that in the event of conflict between both regimes, the provisions of the LUA would supersede (section 115 (1)).⁶⁹⁹

In addition to the acknowledgment by the PIA of the superiority of the LUA on issues of land acquisitions and payments of compensation, even though both are Acts of the NASS, the LUA is listed among existing laws in Nigeria's 1999 Constitution (section 315 (5)d)).⁷⁰⁰ It seems that this listing has conferred on the LUA pre-eminence among other Acts of the NASS, because, as argued by experts, by the listing, the LUA "has continued to enjoy an inflexible Constitutional sanctity."⁷⁰¹ The NASS would have to harmonize these conflicting provisions of the PIA and the LUA to provide certainty on the regime of land acquisition and the payment of compensation in respect of it, but, more importantly, on empowering Niger Deltans to be consulted and have the power to say no to oil and gas projects.

3.2.2.9 Comparing the state of Kenyan and Nigerian Petroleum Laws

Unlike Nigeria, the progressive nature of the Kenyan legislative system can be seen in its ability to gradually improve its laws. The *Petroleum (Exploration and Production) Act, 1984*, with just 12 provisions, was the law in Kenya regulating "the negotiation and conclusion by the Government of petroleum agreements relating to the exploration for, development, production and transportation of, petroleum."⁷⁰² However, section 128 (1) of the KPA repeals the 1984 law and has improved its limited resource governance regime, including the introduction of new

⁶⁹⁹ Section 115 (1) provides that a "licence or permit shall be issued subject to compliance by the applicant with the provisions of the Land Use Act in respect of compensation for acquisition of land for midstream and downstream petroleum operations."

⁷⁰⁰ Section 315 (5) provides that "Nothing in this Constitution shall invalidate the following enactments, that is to say...(d) the Land Use Act."

⁷⁰¹ Peter Oluyede & David Aihe, *Cases and Materials on Constitutional Law in Nigeria* (Ibadan: University Press PLC, 2003) 571.

⁷⁰² See the Preamble to the Petroleum (Exploration and Production) Act, 1984, Chapter 308 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Petroleum_ExplorationandProduction_Act_Cap308_.pdf>.

provisions on environmental protection around the petroleum value chain in Kenya (analyzed above) which were not captured in the repealed 1984 law.

This is commendable when viewed from the backdrop that oil was discovered in Kenya in 2012 and oil production only commenced in 2018.⁷⁰³ Yet, laws were already in place since 1984 – about 3 decades before the discovery and eventual production of oil - to protect the environment against the potential downside of the oil industry. In contrast, Nigeria has a far older petroleum regulatory framework. The NPA was enacted in 1969, 13 years after oil was discovered in Nigeria in 1956 and 11 years after Nigeria became an oil producer in 1958.⁷⁰⁴ The NPA is obsolete and inadequate. Nigeria has been trying to amend this law for more than a decade now and has just succeeded with the enactment of the PIA.⁷⁰⁵ In the segment on barriers to environmental law-making in Nigeria, the thesis will discuss the attempts to amend the NPA through the PIA and why the efforts did not yield immediate results.

3.2.3 Bolivia

3.2.5.1 CERs and the Bolivian Constitution

Bolivia is another example of constitutionalizing environmental rights. Its 2009 Constitution is bold.⁷⁰⁶ Bolivia's journey to constitutionalizing environmental rights was a product of the mass

⁷⁰³ Paul Antonopoulos, "Kenya offers the world its first oil production", *News* (27 August 2019) <<https://geopolitics.news/africa/eurasiaafricachina-kenya-offers-the-world-its-first-oil-production/>>.

⁷⁰⁴ Nigerian National Petroleum Corporation, "History of the Nigerian Petroleum Industry" <<https://nnpcgroup.com/NNPC-Business/Business-Information/Pages/Industry-History.aspx>>.

⁷⁰⁵ PIA, *supra*, note 307.

⁷⁰⁶ The 2009 State Political Constitution of Bolivia <Bolivia: Constitución Política del Estado de 2009, 7 de febrero de 2009 (lexivox.org)> [The Bolivian Constitution].

Article 9 provides that the "following are essential purposes and functions of the State, in addition to those established in the Constitution and the law: (6) To promote and guarantee the responsible and planned use of natural resources, and to stimulate their industrialization through the development and strengthening of the productive base in its different dimensions and levels, as well as to preserve the environment for the welfare of present and future generations."

Article 16 (I) provides that every "person has the right to water and food."

Article 20 (1) (III) provides access "to water and sewer systems are human rights, neither are the object of concession or privatization, and are subject to a regimen of licensing and registration, in accordance with the law."

Article 30 (II) provides that in "the framework of the unity of the State, and in accordance with this Constitution, the nations and rural native indigenous peoples enjoy the following rights: 10. To live in a healthy environment, with appropriate management and exploitation of the ecosystems."

Article 33 provides that everyone "has the right to a healthy, protected, and balanced environment. The exercise of this right must be granted to individuals and collectives of present and future generations, as well as to other living things, so they may develop in a normal and permanent way."

Article 34 provides that “any person, “in his own right or on behalf of a collective, is authorized to take legal action in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.”

Article 108 provides that the “duties of Bolivians are: 15. To protect and defend the natural resources, and to contribute to their sustainable use in order to preserve the rights of future generations. 16. To protect and defend an environment suitable for the development of living beings.”

Article 218 provides that “I. The Public Defender (Defensor del Pueblo) shall oversee the enforcement, promotion, dissemination of and compliance with human rights, both individual and collective, that are established in the Constitution, laws and international instruments. The function of the Public Defender shall extend to the administrative activity of the entire public sector and the activity of private institutions that provide public services... III. The Public Defender is an institution with operational, financial and administrative autonomy, in accordance with the law. Its functions shall be governed by the principles of free services, accessibility, swiftness and solidarity. In the exercise of its functions it does not receive instructions from the organs of the State.”

Article 241 provides that “I. The sovereign people shall participate, through the organized civil society, in the design of public policies. II. Organized Civil Society shall exercise public monitoring of public management at all levels of the State, and of businesses, public enterprises, and private ventures that administer public fiscal resources. III. It will exercise public monitoring of the quality of public services... V. Civil society shall organize itself to define the structure and composition of public participation and monitoring. VI. The entities of the State shall create spaces of participation and public monitoring on the part of society.”

Article 255 (II) provides that the “negotiation, signing and ratification of international relations shall be guided by the principles of: 8. Food security and sovereignty for the entire population; the prohibition of importation, production and commercialization of genetically modified organisms and toxic elements that harm health and the environment.”

Article 299 (II) provides that the “following authorities shall be exercised concurrently by the central level of the State and the autonomous territorial entities. 1. To preserve, conserve and contribute to the protection of the environment and the wild fauna maintained in ecological equilibrium, and the control of environmental contamination.”

Article 312 (III) provides that all “forms of economic organization have the obligation to protect the environment.”

Article 342 provides that it “is the duty of the State and the population to conserve, protect and use natural resources and the biodiversity in a sustainable manner, as well as to maintain the equilibrium of the environment.”

Article 343 provides that “The population has the right to participate in environmental management, and to be consulted and informed prior to decisions that could affect the quality of the environment.”

Article 344 provides that “I. The manufacture and use of chemical, biological and nuclear weapons on Bolivian territory is prohibited, as well as the internment, transit and deposit of nuclear and toxic wastes. II. The State shall regulate the internment, production, sale and employment of techniques, methods, supplies and substances that affect health and the environment.”

Article 345 provides that the “policies of environmental management are based on the following: 1. Participatory planning and management, with public control. 2. The application of systems of evaluation of environmental impact and control of the quality of the environment, without exception and in a way that traverses all activity of production of goods and services that use, transform or affect natural resources and the environment. 3. Liability for the conducting of any activity that produces environmental harm; civil, criminal and administrative penalties for non compliance with the norms for the protection of the environment.”

Article 347 provides that “I. The State and the society shall promote the mitigation of harmful effects on the environment and of the environmental contamination and damage that affect the country. Liability will be declared for damage to historic environments, and liability for environmental crimes shall not lapse. II. Those who carry out activities that impact the environment must, at all stages of production, avoid, minimize, mitigate, remediate, repair and make compensation for the harms caused to the environment and the health of persons, and shall establish the security measures necessary to neutralize the possible effects of environmental contamination and damage.”

Article 351 (III) provides that the “management and administration of natural resources shall be carried out guaranteeing social participation and control in the design of the sector policies.”

Article 358 provides that “The rights to the use and exploitation of natural resources shall be subject to the Constitution and the law. These rights shall be subject to periodic review for compliance with the technical, economic and environmental regulations. The violation of the law shall lead to the reversion or nullification of the rights of use and exploitation.”

movement against the country's neoliberal economic reforms, which led to many miners losing their jobs due to downsizing and provided the initial groundwork for opposition against President Hugo Banzer. When the government further privatized water infrastructure in Cochabamba in favour of an international business concern, which increased water charges by 150 percent, a protest known as the 'water war' erupted because "in the minds of the participants, the protests were 'an all-out last-ditch stand against neoliberalism.'"⁷⁰⁷ Among the faces of the protest was Evo Morales who became the first Indigenous Bolivian President in 2005. In 2008, the constituent assembly produced a draft Constitution, which was approved by a referendum in 2009 and entered into force that year.⁷⁰⁸ The clearest indication of the public discontent with neoliberal policies and the will of the people to embrace social/Environmental Justice and rights is the preamble to the Constitution:

A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates; based on respect for the economic, social, juridical, political and cultural pluralism of the inhabitants of this land; and on collective coexistence with access to water, work, education, health and housing for all. We have left the colonial, republican and neo-liberal State

Article 373 provides that "I. Water constitutes a fundamental right for life, within the framework of the sovereignty of the people. The State shall promote the use and access to water on the basis of principles of solidarity, complementariness, reciprocity, equity, diversity and sustainability. II. Water resources in all their states, surface and subterranean, constitute finite, vulnerable, strategic resources, and serve a social, cultural and environmental function. These resource cannot be the object of private appropriation and they, as well as water services, shall not be given as concessions and are subject to a system of licensing, registration and authorization pursuant to the law." Article 378 (I) provides that "The different forms of energy and their sources constitute a strategic resource; access to them is a fundamental and essential right for full development and the social development of the country; and they shall be governed by the principles of efficiency, continuity, adaptability, and environmental preservation." Article 380 (I) provides that "The renewable natural resources shall be exploited in a sustainable way, respecting the characteristics and natural value of each ecosystem." Article 385 (I) provides that "The protected areas constitute a common good, and they form part of the natural and cultural patrimony of the country. They perform environmental, cultural, social and economic functions for sustainable development." Article 387 (I) provides that "The State shall guarantee the conservation of natural forests in the areas of native forests, their sustainable exploitation, and the conservation and recovery of the flora, fauna, and degraded areas." Article 390 (I) provides that "Because of its high environmental sensitivity, existing biodiversity, water resources and for the eco-regions, the Bolivian Amazonia basin constitutes a strategic area of special protection for the comprehensive development of the country." Article 391 (I) provides that "The State shall prioritize the sustainable, integral development of the Bolivian Amazonia, through a comprehensive, participatory, shared and equitable administration of the Amazon jungle. The administration shall be directed to the generation of employment and the improvement of the income of its inhabitants, within the framework of protection and sustainability of the environment."

⁷⁰⁷ Phoebe King, "Neo -Bolivarian Constitutional Design Comparing the 1999 Venezuelan, 2008 Ecuadorian, and 2009 Bolivian Constitutions" in Denis Galligan & Mila Versteeg, ed, *Social and Political Foundations of Constitutions* (New York: Cambridge University Press, 2013) 366 at 385.

⁷⁰⁸ *Ibid* at 386.

in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian law.⁷⁰⁹

Also, the preamble paid tribute to the water war:

We, the Bolivian people, of plural composition, from the depths of history, inspired by the struggles of the past, by the anti-colonial indigenous uprising, and in independence, by the popular struggles of liberation, by the indigenous, social and labor marches, by the water and October wars, by the struggles for land and territory, construct a new State in memory of our martyrs.⁷¹⁰

But in what may be regarded as one of its boldest statements, the 2009 Constitution pays tribute to the rights of Mother Earth or *Pachamama* in its preamble.⁷¹¹ Although not “explicitly entrenching the rights of Mother Earth, the constitution does seem to keep the door open, if not to the future constitutionalization of such rights, then at least to their *ex post* recognition through statutory regulation.”⁷¹² This constitutional provision became the basis for the enactment of 2 laws recognizing the rights of Mother Earth, analyzed below.

3.2.5.2 Bolivian Laws giving Constitutional Rights to Nature

(a) The Act of the Rights of Mother Earth, 2010 (the Act)⁷¹³

Paola Calzadilla and Louis Kotzé affirm that the Act, which is “the world’s first statutory law granting rights to nature, builds on this constitutional foundation.”⁷¹⁴ The intent of the *Act*, as provided in article 1, is “to recognize the rights of Mother Earth.” One of the novelties of the *Act* is article 10 which not only creates the titular Office of Mother Earth “whose mission is to ensure the validity, promotion, distribution and compliance of the rights of Mother Earth established in this Act,” but also provides for the enactment of another ‘special’ law to establish the “structure, function and attribute” of that office.⁷¹⁵

Although the *Act* is silent on the occupant of the office of Mother Earth and how any vacancy in the office is to be filled, the *Act* mirrors both the World Charter of Nature, 1982, and the Earth

⁷⁰⁹ The Bolivian Constitution, *supra*, note 706.

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*

⁷¹² Paola Calzadilla & Louis Kotzé, “Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia” (2018) 7 (3) TEL 397 at 402 [Calzadilla & Kotzé].

⁷¹³ Bolivia’s Act of the Rights of Mother Earth, 2010, online: available at <http://14ug3411bmyv3qn58y1rxkcc.wpengine.netdna-cdn.com/wp-content/uploads/2013/04/bolivia-law-of-rights-of-mother-earth-eng-js121011.pdf> (last accessed July 5, 2020).

⁷¹⁴ Calzadilla & Kotzé, *supra*, note 712 at 407.

⁷¹⁵ As of 2018, the office was not established. See Calzadilla & Kotzé, *ibid.*, at 409-410.

Charter in its eco-centric stance.⁷¹⁶ The *Act* also accommodates anthropocentric interests.⁷¹⁷ For example, by article 8 (2) of the Act the State is obligated to create “balanced forms of production and patterns of consumption to satisfy the needs of the Bolivian people to live well.” However, despite the potential for conflicts between its eco-centric and anthropocentric components, the *Act* is a model for what is possible in the drive to protect the environment for the good of all.

(b) Bolivia’s Framework Law on Mother Earth and Integral Development to Live Well, 2012 (the Law)⁷¹⁸

According to Calzadilla and Kotze’, this law, which is a result “that accompanied the adoption of the new Constitution...was aimed at defending and protecting Mother Earth while guiding legislative developments at all levels of the state.”⁷¹⁹ Parliament enacted the Law to give life to the provisions of article 10 of the *Act of the Rights of Mother Earth*.⁷²⁰ The Law has 4 core mandates stipulated in article 3, as follows:

1. Determine the guidelines and principles that guide access to the components, zones and life systems of Mother Earth.
2. Establish the objectives of integral development that guide the creation of the conditions to move towards Living Well in harmony and balance with Mother Earth.
3. Guide the specific laws, policies, norms, strategies, plans, programs and projects of the Plurinational State of Bolivia for Living Well through integral development in harmony and balance with Mother Earth.
4. Define the institutional framework to promote and operationalize integral development in harmony and balance with Mother Earth to Live Well.

The Law, in article 10, places 7 duties on the central government, which include to “[f]ormulate, implement, monitor and evaluate policies, standards, strategies, plans, programs and projects for the fulfillment of the objectives, goals and indicators of Living Well, through integral development in harmony and balance with Mother Earth.” Article 11 also places on the society and persons jointly, 5 duties which include the duty “to advance the fulfillment of the principles and objectives of integral development in harmony and balance with Mother Earth.” Article 34

⁷¹⁶ *Ibid* at 408.

⁷¹⁷ *Ibid*.

⁷¹⁸ Bolivia’s Framework Law on Mother Earth and Integral Development to Live Well, 2012 <https://www.lexivox.org/norms/BO-L-N300.xhtml?dcmi_identifier=BO-L-N300&format=xhtml> [Bolivia’s Framework Law on Mother Earth].

⁷¹⁹ Calzadilla & Kotzé, *supra* note 712 at 405.

⁷²⁰ See article 1 of Bolivia’s Framework Law on Mother Earth, *supra* note 718.

vests on the courts and administrative tribunals, the jurisdiction “for protecting the rights of Mother Earth, its life systems and its components.”

Reviewing both laws, Calzadilla and Kotzé argue that the “two laws seem to complement each other, as they include eco-centric aspirations related to the recognition and protection of the rights of Mother Earth in a context of integral development for Vivir Bien. However, several powerful pro-development provisions are included in these laws, which potentially counter-balance the eco-centric provisions.”⁷²¹ This will be analyzed next.

3.2.5.3 Conflict between Petroleum Economy and Environmental Laws - Bolivia

Despite the pro-environment intent of the Bolivian Constitution, Bolivia, like Nigeria, depends on export of its crude oil and other extractive raw materials for economic survival. This means that its resolve to prioritize environmental protection over economic development will be seriously tested. As such, strains “between this vision of harmonious development and the constraints of economic development based on the extraction of raw materials have become particularly apparent.”⁷²²

The tension between these 2 paradigms is clearly captured in the case of the *Isiboro Sécure National Park and Indigenous Territory (TIPNIS)*,⁷²³ decided by the International Tribunal for the Rights of Nature (Tribunal).⁷²⁴ While the status of the Tribunal is up for debate,⁷²⁵ Bolivia’s

⁷²¹ Calzadilla & Kotzé, *supra*, note 712 at 407.

⁷²² Frédérique Weyer, “Implementing ‘Vivir Bien’: Results and Lessons from the Biocultura Programme, Bolivia” (2017) Open Edition Journals 1 at 3.

⁷²³ *Isiboro Sécure National Park and Indigenous Territory* <<https://therightsofnature.org/wp-content/uploads/2019/05/TIPNIS-Judgement-English-.pdf>> [*Isiboro Sécure National Park and Indigenous Territory*].

⁷²⁴ Global Alliance for the Rights of Nature, “About Us”, <<https://therightsofnature.org/get-to-know-us/>>. The Tribunal is set up to adjudicate on “cases within the context of a Rights of Nature based earth jurisprudence. The adjudication process provides a platform for informed legal analysis of diverse cases based on Rights of Nature. With each case, the Tribunal will recommend actions for reparation, mitigation, restoration and prevention of further damages and harm.”

⁷²⁵ Global Alliance for the Rights of Nature, “What is an International Rights of Nature Tribunal?” <<https://therightsofnature.org/rights-of-nature-tribunal/>>.

The Tribunal is an initiative of the Global Alliance for the Rights of Nature (Alliance). The Alliance is an association of professionals, individuals and groups in about 100 countries of the world, dedicated to the universal realization of the rights of nature.

At the World People’s Conference on Climate Change and the Rights of Mother Earth held in April 2010 in Cochabamba, Bolivia and attended by the representatives of 142 countries, it was agreed that “given the lack of a legal international organism to guard against and sanction climate and environmental crimes that violate the Rights of Mother Earth and humanity,” an International Climate and Environmental Justice Tribunal be created to adjudicate on these areas. See World People’s Conference on Climate Change and the Rights of Mother Earth April

recognition of the Tribunal's jurisdiction in the case, having participated in, and interacted with, the Tribunal's official processes,⁷²⁶ may have legitimized the Tribunal's adjudicatory process, at least in the context of this case. This case seems apposite for analysis for the following reasons: (i) Given the facts of the case, it is doubtful if any domestic Bolivian court hearing the suit would have come to a different conclusion; and (ii) Although the Tribunal acts as an international adjudicatory forum, the case under review arose as a result of the contravention of Bolivia's domestic environmental laws by the government which exposes the tension between "the Mother Earth discourse embedded in the processes of environmental governance and...the struggles around extraction of resources in the post-neoliberal development model."⁷²⁷

The facts were that to further open Bolivia's hinterland and make it easier for extractivism and agri-business in 2010,⁷²⁸ the government of Bolivia initiated the Villa Tunari - San Ignacio de Moxos road project across the heartland of the TIPNIS Indigenous peoples' settlement. To be able to do this, the government repealed the law on *the Protection of the Indigenous Territory and Isiboro Sécure National Park – TIPNIS*, 2011,⁷²⁹ which forbade the construction of the road and instead, enacted the *Law on the Protection, Integral and Sustainable Development of the Indigenous Territory and Isiboro Sécure National Park – TIPNIS*, 2017,⁷³⁰ which granted the government powers to go ahead with the road project.

The government ignored the 'protected area' status of the TIPNIS under article 385 of the Constitution and only conducted an environmental impact assessment (EIA) on the first phase, but not on the second and third phases of the project.⁷³¹ The 2011 Strategic Environmental Assessment indicated that the project would result in "loss of biodiversity, integrated environmental functions and the loss of ecosystems and appropriate habitats for both indigenous

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<<https://www.ieneearth.org/docs/WorldPeoplesConferenceonClimateChange.pdf>> See also *Isiboro Sécure National Park and Indigenous Territory*, *supra* note 723 at 1. The Tribunal draws inspiration from these developments.

⁷²⁶ *Isiboro Sécure National Park and Indigenous Territory*, *supra* note 723 at 3-4 (paras. 9-12).

⁷²⁷ Daniela Sanchez-Lopez, "Reshaping notions of Citizenship: the TIPNIS Indigenous Movement in Bolivia", (2015) 2(1) Development Studies Research at 20 at 21.

⁷²⁸ Nicole Fabricant & Nancy Postero, "Performing Indigeneity in Bolivia: The Struggle over the TIPNIS", in Cecilie Ødegaard & Juan Andía, ed, *Indigenous Life Projects and Extractivism Ethnographies from South America* (Switzerland: Palgrave Macmillan, 2018) 245 at 255 [Fabricant & Postero].

⁷²⁹ Law No. 969, 2017.

⁷³⁰ *Ibid.*

⁷³¹ *Isiboro Sécure National Park and Indigenous Territory*, *supra*, note 723 at 20 (para. 68).

peoples and, in general, the suffering of the Bolivian people.”⁷³² In addition, the government had gone ahead to grant crude oil mining leases covering about 35% of the total land mass of the TIPNIS.⁷³³ The Tribunal held that Bolivia had violated both the provisions of the *Act of the Rights of Mother Earth*, 2010 and the *Framework Law on Mother Earth and Integral Development to Live Well*, 2012.⁷³⁴ Although the government flouted the judgment and proceeded to construct the road,⁷³⁵ the case exposes the contradiction in Bolivia between capitalism and/or development and environmental preservation, a contradiction suffered by most developing countries.⁷³⁶ According to experts,

[many] residents feared that the [construction of the Villa Tunari - San Ignacio de Moxos] road would bring ever-greater ecological destruction to a region already deeply affected by cattle ranching and illegal forestry. They were particularly concerned that it would open up their lands to further colonisation by Andean coca growers, who already inhabited one section of the park. Other local indigenous communities were pleased with the possibilities that the paved road might bring by linking them to bigger cities and markets and bringing increased access to education and healthcare systems.⁷³⁷

Bolivia’s alternative worldview revolves around the preservation of nature as against an economic model in which losses to humans and the environment are “dismissed as necessary for the benefit of economic development.”⁷³⁸ However, despite Bolivia’s best effort, the economic reality seems to push environmental protection to the back burner. But that is not to say that environmentalists should cower under the weight of economic development. The thesis has already made the argument in chapter 1 that CERs could provide the means to tackle globalization and its harms, and Bolivia’s effort should be commended and should serve as an example for Nigeria, in terms of the initial effort needed to position environmental concerns as the overarching aspect of sustainability.

⁷³² *Ibid* at 19 (para. 67).

⁷³³ *Ibid* at 6.

⁷³⁴ *Ibid* at 24 (para. 83).

⁷³⁵ “ABC–San de Moxos-Trinidad Road –Bolivia Construction Project Profile”, *Timetric, London* (31 July 2018) <<https://www-proquest-com.proxy.bib.uottawa.ca/docview/2085206123?pq-origsite=primo>>.

⁷³⁶ Calzadilla & Kotzé, *supra* note 712 at 400.

⁷³⁷ Fabricant & Postero, *supra* note 728 at 255.

⁷³⁸ Juan Andía & Cecilie Ødegaard, “Introduction: Indigenous Peoples, Extractivism, and Turbulences in South America” in Cecilie Ødegaard & Juan Andía, ed, *Indigenous Life Projects and Extractivism Ethnographies from South America* (Switzerland: Palgrave Macmillan, 2018) 1 at 24.

3.3. CERs as a screen against new Anti-Environmental Laws and a Bulwark against Rollbacks of existing Standards

Boyd argues that one of the benefits of CERs is that they act as screens for potential anti-environmental legislation because laws that contradict CERs would be declared unconstitutional.⁷³⁹ This presupposes that CERs could assist in maintaining environmental standards already achieved by preventing the enactment of potentially anti-environmental laws that would derogate from CERs. Relatedly, CERs could also assist in sustaining environmental standards already attained by acting as bulwark against environmental rollback because CERs would act as check against the dismantling of existing environmental legislation, also known as the principle of non-regression.

According to Boyd, one of the benefits of CERs “which is being achieved in practice in some nations, is the prevention of rollbacks. Courts have articulated the principle...that current environmental laws and policies represent a baseline that can be improved upon but not weakened...courts recognize that there is only viable direction, and that is stronger environmental laws and policies.”⁷⁴⁰ Boyd discusses this benefit of CERs acting as check against environmental rollback separately.⁷⁴¹ But because this benefit and the earlier benefit achieved by CERs acting as screens against the enactment of anti-environmental laws and seek to maintain existing environmental standards through environmental law-making, the thesis will analyze both at this stage.

3.3.1 The potential of CERs to act as a screen against the Enactment of Laws incompatible with CERs

CERs may discourage the enactment of anti-environmental laws since they will be inconsistent with the Constitution. Boyd posits that constitutionalizing environmental rights “offers the strongest form of legal protection because a constitution is the ‘fundamental and paramount law of the nation.’ A basic principle of constitutional law is that all legislation, regulation, and government policy must be consistent with the constitution or risk being struck down by the

⁷³⁹ Boyd, *supra* note 28 at 28-29.

⁷⁴⁰ Lynda Collins & David Boyd, “Non-Regression and the Charter Right to a Healthy Environment” (2016) 29 J.E.L.P. at 285 [Collins & Boyd].

⁷⁴¹ Boyd, *supra* note 28 at 236.

judiciary.”⁷⁴² In essence, CERs will be acting as benchmarks for legislative and policy formulations. Boyd argues that “most, if not all, governments will employ lawyers to screen all prospective laws and regulations to ensure that they are consistent with the governmental duty to respect, protect, and fulfill the right,”⁷⁴³ potentially in order to prevent the cost and delay of litigation challenging the constitutionality of these laws.

This advanced screening could be done either formally or informally. In France, it is done formally and involves the review of all intended laws by the Constitutional Council to ensure that they are not running afoul of the Constitution, while in Colombia, it is an informal process known as the ‘anticipation effect’ where “the close scrutiny of the Constitutional Court has compelled legislators to consider constitutional case law when drafting the content of new legislations.”⁷⁴⁴

3.3.2 Anti- Environmental Legislation and Policies in Nigeria

Advance screening of laws would benefit the Niger Delta, if Nigeria were to have justiciable CERs. The thesis has already mentioned how Nigeria enacted the AGRA which seems to legitimize gas flaring by the oil companies because section 3 (2) permits gas flaring for a fee. In addition, these fees are to be paid to the federal government not to the Niger Delta people who bear the brunt of the flaring. Of particular importance is the provision of section 3 (1) of the AGRA which set January 1, 1984, as the terminal date to end gas flaring in Nigeria. But instead of working to realise that aspiration, a regulation – the *Associated Gas Re-injection (Continued Flaring of Gas) Regulations, 1985*⁷⁴⁵ was promulgated, pursuant to the AGRA, which extended the power of the supervising minister to authorize gas flaring for fee in Nigeria. This is still the current situation under the PIA (section 104 (1)).⁷⁴⁶

⁷⁴² *Ibid* at 28-29.

⁷⁴³ *Ibid* at 234.

⁷⁴⁴ Boyd 2, *supra* note 29 at 188.

⁷⁴⁵ January 1, 1985, <<https://www.lawyard.ng/wp-content/uploads/2016/01/ASSOCIATED-GAS-RE-INJECTION-ACT.pdf>>.

⁷⁴⁶ Section 104 (1) provides that a “licensee, lessee or marginal field operator that flares or vents natural gas, except — (a) in the case of an emergency, (b) pursuant to an exemption granted by the Commission, or (c) as an acceptable safety practice under established regulations, commits an offence under this Act and is liable to a fine as prescribed by the Commission in regulations under this Act.”

It could be argued that if Nigeria had enforceable CERs, the government would have been wary of passing a new law with the effect of continuing to incentivise gas flaring after the statutory terminal date. Experts are, however, of the view that the TNCs may have pressured the Nigerian government into shifting the terminal date to end gas flaring because they were not ready to invest in gas-gathering infrastructure.⁷⁴⁷ Ako argues that “the frequent amendment of the end date for gas flaring[is] at the behest of oil companies.”⁷⁴⁸ It is not certain that CERs will be able to help the government to resist these kinds of pressures. However, they at least offer additional tools to pressure the government to consider the environmental impact of decisions, actions and omissions.

Nigeria is hugely dependent on the export of oil and gas resources from the Niger Delta for its economic survival and this is not lost on the judiciary who would be tasked with upholding enforceable CERs. In the Nigerian case of *Irou v. Shell-BP*,⁷⁴⁹ on an application for an injunction against the Shell for polluting the plaintiff’s creek, land and fishpond, the high court held “that nothing should be done to disturb the operations of the oil industry which ‘is the main source of this country's revenue.’”⁷⁵⁰ As seen from this decision, there are many potential barriers to realizing the full potential of CER benefits. Section 4 of this chapter will therefore be devoted to analyzing some of the potential barriers against the fulfilment of CERs if expanded and made justiciable in Nigeria.

3.3.3 CERs and Environmental Rollback

3.3.3.1 The potential of CERs to Prevent Environmental Rollback

One benefit of CERs in relation to environmental legislation is that they can help to prevent environmental legislative rollback, since extant legislation can only be changed in conformity with the Constitution.⁷⁵¹ Boyd argues that the non-regression, standstill⁷⁵² or progressive

⁷⁴⁷ Ako & Olawuyi, *supra* note 10 at 571.

⁷⁴⁸ Ako, *supra* note 63 at 628.

⁷⁴⁹ Unreported Suit No. W/89/71 in the Warri High Court, now in Delta State, Nigeria [*Irou v. Shell-BP*].

⁷⁵⁰ Jędrzej Frynas, “Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria” (1999) 43 J. Afr. L. 121 at 122 [Frynas].

⁷⁵¹ Collins & Boyd, *supra* note 740 at 285.

⁷⁵² Michel Prieur, “The Principle of Non-Regression” in Michael Faure, ed, *Elgar Encyclopedia of Environmental Law* (UK & USA, Edward Elgar Publishing Limited, 2016) at 251 [Prieur].

doctrine,⁷⁵³ is “that governments are precluded from weakening levels of environmental protection except in limited circumstances where there is compelling public interest. In other words, existing environmental laws and standards represent a baseline that can be improved but not weakened.”⁷⁵⁴

Michel Prieur argues that rollback manifests in many ways and is often insidious because “governments do not have the courage to announce backtracking in environmental protection officially for fear of an unfavourable public response from environmental and consumer NGOs.”⁷⁵⁵ He sees “backtracking on environmental law and maybe its disappearance”⁷⁵⁶ as the latest threat to environmental sustainability, citing

well-known examples of regression in environmental law, such as the withdrawal of States Parties from several international treaties, for example Canada from the Kyoto Protocol in 2011 and from the desertification Convention in 2013, or France from the ECO-ROPA convention about major disasters of the Council of Europe in 2012. In national law we could mention France’s reduction of the level of contamination of agricultural activities in 2013, or the reduction of industrial environmental impact studies for industrial pollution by decree of 11 August 2016, or Mexico’s presidential decree of 2013 reducing the surface of a national park.⁷⁵⁷

This suggests that the non-regression doctrine is a necessity, especially for the Niger Delta. If Nigeria is not in a hurry to enact environmental laws to increase the pool of statutes in this area, at least further derogation of existing environmental norms could be halted.

Although this occurred at the international treaty level (which is not the immediate focus of this thesis), perhaps an example of regression made possible because of a lack of CERs would be Canada’s withdrawal from the *Kyoto Protocol*⁷⁵⁸ in 2011, citing the harm to the economy as a reason.⁷⁵⁹ With that decision, Canada became the first country in the world to withdraw from the *Kyoto Protocol*. According to then Prime Minister Stephen Harper’s Conservative government,

⁷⁵³ Report on Admissibility and Merits No. 38/09, Case 12.670; National Association of ExEmployees of the Peruvian Social Security Institute et al. V. Perú, adopted by the Inter-American Commission on Human Rights, March 27, 2009, para. 140 <http://www.corteidh.or.cr/docs/casos/articulos/seriec_198_ing.pdf>.

⁷⁵⁴ Boyd, *supra* note 28 at 224.

⁷⁵⁵ Michel Prieur, Non-Regression in Environmental Law (2012) 5(2) Survey and Perspectives integrating Environment and Society at 53.

⁷⁵⁶ Prieur, *supra* note 752 at 251.

⁷⁵⁷ *Ibid* at 252.

⁷⁵⁸ The United Nations, “Canada Withdrawal from Kyoto Protocol to the United Nations Framework Convention on Climate Change” (Depositary Notification C.N.1313.2002.TREATIES-56 of 17 December 2002) <https://unfccc.int/files/kyoto_protocol/background/application/pdf/canada.pdf.pdf>.

⁷⁵⁹ “Canada Pulls out of Kyoto Protocol”, *CBC* (12 December 2011) <<https://www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072>>.

the “decision to do so will save the government an estimated \$14 billion in penalties.”⁷⁶⁰ Again in 2013, Canada scored another first by being the first country to withdraw its membership from the *United Nations Convention to Combat Desertification*, although Canada rejoined the Convention in December, 2016 by depositing a fresh instrument of accession of the Convention with the UN Secretary-General.⁷⁶¹ According to the then Conservative government, ‘membership in this Convention was costly for Canadians.’⁷⁶²

Collins and Boyd argue that it was easier for Canada to make these withdrawals because there were no CERs to insist on “continuous progress in environmental protection and [provide] stability and predictability for regulated entities and the affected public.”⁷⁶³ In short, CERs would impose duties on the government that would make it harder for such unilateral executive actions, whether at the domestic legislation or treaty level.⁷⁶⁴ Some countries have enacted the non-regression doctrine into their laws. Article 423(3) of the Constitution of Ecuador, 2008, is an example. It provides that in “all integration bodies and processes, the Ecuadorian State shall pledge: To strengthen the harmonization of national laws, with emphasis on labor, migratory, border, environmental, social, educational, cultural and public health rights and systems, in accordance with the principles of progressivity and non-regressivity.”⁷⁶⁵ The concept of non-regression could be a tool in the CERs armory for countries that are ready to deploy CERs to tackle environmental degradation.

3.3.3.2 Nigeria and Environmental Rollback

The federal government of Nigeria acknowledges that climate change “is perhaps the biggest challenge facing humanity. It is complex and dynamic and requires dimensional and multi-sectoral mitigation and adaptation initiatives within a dynamic policy framework to properly

⁷⁶⁰ *Ibid.*

⁷⁶¹ The United Nations, “United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994” End Note 4, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&clang=_en#4>.

⁷⁶² “Canada quietly Pulls out of UN Anti-Droughts Convention”, *CBC* (27 March 2013) <<https://www.cbc.ca/news/canada/canada-quietly-pulls-out-of-un-anti-droughts-convention-1.1388320>>.

⁷⁶³ Collins & Boyd, *supra* note 740 at 293.

⁷⁶⁴ *Ibid* at 288-289.

⁷⁶⁵ The Constitution of the Republic of Ecuador, 2008 <Ecuador: 2008 Constitution in English (georgetown.edu)>.

tackle it. Government recognizes this and is committed to tackling any presumed threat to its national sustainable development.”⁷⁶⁶

In line with the declaration, the federal government released its decarbonization policy contained in Nigeria’s *Long-Term Low Emissions Development Strategy, 2021* (LT-LEDS). The LT-LEDS recognizes that the transition from carbon-based energy to cleaner energy is central to sustainability and therefore aims to achieve net-zero carbon emissions in 2060.⁷⁶⁷ It acknowledges that Nigeria’s energy vision should be premised on decarbonization of the energy sector.⁷⁶⁸ It also admits that to achieve decarbonization, clear targets must be set. Consequently, it “pledged an unconditional 20% reduction on Business as Usual (BAU) emissions by 2030, and a 45% conditional commitment which could be achieved with financial assistance, technology transfer and capacity building.”⁷⁶⁹

The LT-LEDS acknowledges that gas flaring is the major source of GHG emissions because it accounts for about 80% of GHG emissions in Nigeria and therefore pledges “to reduce flaring down to less than 10% by the year 2020 and end it completely by 2030.”⁷⁷⁰ Despite this pledge, a year after the 2020 target date, the PIA was enacted and it still permits gas flaring (section 104(1)).⁷⁷¹ The implication is that whatever gains intended to be achieved through the LT-LEDS will likely be reversed by the PIA.

Seeing that there is still no legal framework for the prohibition of gas flaring in Nigeria, amendments to laws to further extend the deadline on decarbonization policy seem a possibility. But rollback on net-zero gas emissions will continue to harm not just the Niger Delta environment but the rest of the world. According to the latest CO₂ emission Reports, Nigeria emitted 126.92 metric ton of CO₂ in 2020, thereby contributing 0.35% of the world total

⁷⁶⁶ National Climate Change Policy for Nigeria 2021–2030, *supra*, note 648 at 2.

⁷⁶⁷ Department of Climate, Federal Ministry of Environment, Nigeria, “2050 Long-Term Vision for Nigeria (LTV-2050)” at ii, <https://climatechange.gov.ng/wp-content/uploads/2022/01/Nigeria_LTS1.pdf> [2050 Long-Term Climate Vision for Nigeria].

⁷⁶⁸ *Ibid* at 22.

⁷⁶⁹ *Ibid* at 3 & 4.

⁷⁷⁰ *Ibid* at 26.

⁷⁷¹ Section 104 (1) provides that a “licensee, lessee or marginal field operator that flares or vents natural gas, except — (a) in the case of an emergency, (b) pursuant to an exemption granted by the Commission, or (c) as an acceptable safety practice under established regulations, commits an offence under this Act and is liable to a fine as prescribed by the Commission in regulations under this Act.”

emission for the year.⁷⁷² These numbers are likely to go up with the current rollback. Even the government acknowledges that as Nigeria's "economy is expected to grow rapidly by at least 7% per annum, particularly in the post COVID-19 period, to meet the demands of its large population that is projected to increase to about 402 million by 2050, Nigeria is expected to emit more GHGs in the very near future."⁷⁷³ From the analyzed potential of CERs in preventing environmental rollbacks, it seems that CERs could bolster non-regression which would be essential in the Nigerian context.

3.4. Barriers to Environmental Law-making in Nigeria

So far, this chapter has set out the potential of CERs to enhance environmental law-making in Nigeria. Boyd posits that CERs impose 'on the law-maker and subordinate authorities an obligation that they may not circumvent. Equivocation is no longer an option.'⁷⁷⁴ This presupposes that once enforceable CERs are in place, the legislature will have no option but to begin to roll out environment-friendly laws. However, it may require more than just constitutionalizing enforceable environmental rights for the legislature in Nigeria to begin to be pressured to enact environmental laws that would be useful in the Niger Delta context. The rest of this chapter will focus on two key conditions that may hinder such legislative initiatives. These are the dynamics of the Nigerian Politics and the skewed representation of the Niger Delta region in Nigeria's NASS.

3.4.1 The Dynamics of the Nigerian Politics

Boyd asserts that CERs could lead to the enactment of supporting laws.⁷⁷⁵ He argues particularly that a constitutional right to a healthy environment could "cause environmental laws to improve 'to a state in which they no longer flatter to deceive but justify the high hopes and claims of the draftsmen and legislator.'"⁷⁷⁶

However, the reality is that in some cases, the legislature is not on the same wavelength as the Constitution. Kenya is an example. Although its 2010 Constitution mandated the parliament,

⁷⁷² M. Crippa et al, "GHG Emissions of all World Countries - 2021 Report" (Luxembourg: Publications Office of the European Union, 2021) <https://edgar.jrc.ec.europa.eu/report_2021#emissions_table>.

⁷⁷³ 2050 Long-Term Climate Vision for Nigeria, *supra* note 767 at 1.

⁷⁷⁴ Boyd, *supra* note 28 at 29.

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.*

within specific timeframes after the coming into effect of the Constitution, to enact environmentally friendly laws, Joel Bosek doubted whether this would happen.⁷⁷⁷ For instance, article 42 provides for the right to a clean and healthy environment. Article 72 mandates the legislature within 5 years to “enact legislation to give full effect to the provisions.” Also, article 63 of the Kenyan Constitution creates communal land ownership.

Unlike in the Niger Delta, article 63(4) of the Kenyan Constitution specifies that communal land “shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.” The 5th Schedule to the Constitution mandates that the anticipated legislation be enacted within 5 years. In satisfaction of these provisions, the legislature enacted the *ELCA, 2011* “to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.”⁷⁷⁸

However, Bosek suspected that the enactment of suitable environmental laws in accordance with the constitutional mandate would not materialize soon and when they did, such laws would be hastily drafted because the Kenyan legislature “has often been reluctant to adhere to recommendations by experts, particularly in matters where the Members of Parliament have vested interests. One would therefore expect that 'appropriate legislation' on the environment will take quite some time to be legislated in line with the new Constitution's requirement.” Indeed, the scenario that “will most likely come from parliament within the four years of existence of the Constitution is legislation that will hurriedly be enacted to beat the constitutional deadline.”⁷⁷⁹ However, the Kenyan legislature was able to enact the *ELCA* in 2011, a year after the Constitution became effective. From the earlier analysis of the *ELCA*, it seems the law has bridged the gap in the area of remedies available to environmental litigants and has also removed procedural barriers to environmental litigation in Kenya.

⁷⁷⁷ Joel Bosek, "Implementing Environmental Rights in Kenya's New Constitutional Order: Prospects and Potential Challenges" (2014) 14 (2) African Human Rights LJ 489 at 505 [Bosek].

⁷⁷⁸ See the Preamble to the *ELCA*, note 635.

⁷⁷⁹ Bosek, *supra* note 777 at 505.

The Nigerian legislature has been demonstrating a similar propensity to its Kenyan counterpart as described by Bosek. It has been alleged that Nigerian legislators appeared “to have abdicated [their] primary [constitutional] role [of legislating and maintaining oversight to make the country progress] in pursuit of personal interests”, such that 12 years after the restoration of democracy in Nigeria in 1999, the legislature could only pass 134 bills into law.⁷⁸⁰ The number of non-money bills passed is actually much fewer since the 134 bills include the various mandatory federal and agencies money bills “in which the lawmakers often have vested interests or to attract more contracts to enrich the pockets of the legislators without any radical approach to salvage the economic yearnings and aspiration of the public.”⁷⁸¹ If this is the legislature’s record in all areas of its activity, it is even less likely to enact strong environmental laws for the Niger Delta, as the next point will show.

The reported symbiotic relation between the TNCs operating in Nigeria and the Nigerian officials, including the legislators, could prevent the legislature from enacting laws that may be stringent on the TNCs. There are concerns that the TNCs wield considerable influence over Nigeria’s government, with Ako declaring for instance that “Shell is the Nigerian State and the Nigerian State is Shell.”⁷⁸² An illustration of this influence could also be gleaned from the passage of a weak law in 2015 introducing biotechnology into Nigeria.⁷⁸³ In passing the *National Biosafety Agency Management Act* (Act),⁷⁸⁴ the NASS ignored the more stringent African Union (AU) regulatory framework, the *African Model Law on Biosafety* which was adopted in 2003⁷⁸⁵ and created a unified and stronger Biosafety Clearing House for the African continent.⁷⁸⁶

The NASS came under severe pressure from international biotechnology companies like Monsanto who not only sponsored the *Act* but also funded the public hearings that the NASS conducted on its proposed bill.⁷⁸⁷ As pointed out by Mariann Orovwuje, during the public hearing

⁷⁸⁰ Samuel Oni, “The Legislature and Constituency Representation in the Fourth Republic of Nigeria’s Democratic Governance” (2013) 21(2) *Ife Psychol* 232 at 237 [Oni].

⁷⁸¹ *Ibid.*

⁷⁸² Ako, *supra*, note 63 at 628.

⁷⁸³ Nnimmo Bassey, “Don’t Sign that Biosafety Bill, Mr. President”, *The Eco-Instigator* Issue 14, (December, 2016) at 9 <<https://homef.org/wp-content/uploads/2019/01/eco-instigator-14.pdf>>.

⁷⁸⁴ *The National Biosafety Agency Management Act, 2015*, <nig162641.pdf (fao.org)>.

⁷⁸⁵ Mariann Orovwuje, “Nigerian Biosafety Act: The Journey and the need to Act” at 19 <http://aefjn.org/wp-content/uploads/2016/05/Nigerian-Biosafety-Act_The-Journey-and-they-need-to-Act.pdf> [Orovwuje].

⁷⁸⁶ Haidee Swanby, “The Revised African Model Law on Biosafety and the African Biosafety Strategy” ACB Briefing Paper No. 9, 2009 at 3 <https://acbio.org.za/wp-content/uploads/2015/02/AU_Biosafety-brief.pdf>.

⁷⁸⁷ Orovwuje, *supra*, note 785 at 23.

of the bill, the “backpage of the printed biosafety bill that was distributed to stakeholders...had the logo of USAID and AATF [African Agricultural Technology Foundation], key institutions promoting GMOs and driving the passage of a weak biosafety bill, which will allow the flooding of our country with all kinds of unwholesome food.”⁷⁸⁸

Indeed, Boyd acknowledges the power that TNCs wield⁷⁸⁹ but argues that CERs could offset the TNCs’ influence over the legislature since the legislators would be aware that their decisions could be tested in, and invalidated by, a court if they conflict with CER provisions. In other words, CERs impose an inextricable obligation on the lawmakers, meaning “equivocation is no longer an option.”⁷⁹⁰ As analyzed above, the stipulation by the Kenyan Constitution of a specific timeframe for the legislature to enact specific laws to support CERs presumably roused a reluctant legislature to enact the *ELCA* within the stipulated constitutional timeframe. If CERs could achieve this in Nigeria, it would be a big plus for the Niger Delta.

3.4.2 The Skewed Representation against the Niger Delta in the NASS

Beyond the attitude of federal legislators, it could be argued that the manner of assignment of seats in the NASS means that the Niger Delta representatives in the NASS will have to depend on others to get laws that will benefit the Niger Delta passed. The second limb of the argument is that legislators from non-Niger Delta states could use their majority to try to stop the enactment of laws that could help in addressing the environmental conditions in the Niger Delta. This thesis acknowledges that Niger Delta representatives in the NASS, who belong to different political parties, may not always vote in unison across party lines and this could further limit the ability of the Niger Delta representatives to continue to project the interest of the region.

3.4.2.1 Distribution of seats in the NASS

There seems to be a deliberate intent to whittle down the representation from the Niger Delta in the NASS. A few statistics would buttress the point. Nigeria embraced the presidential system of government in 1979. Section 43 of the 1979 Constitution provided for a bi-cameral NASS. While the Senate consisted of 95 senators, 5 per State (section 44),⁷⁹¹ the House of Representatives

⁷⁸⁸ *Ibid* at 24.

⁷⁸⁹ Boyd, *supra* note 28 at 42.

⁷⁹⁰ *Ibid* at 29.

⁷⁹¹ The 1979 Constitution, *supra* note 158.

consisted of 450 legislators (section 45).⁷⁹² On the distribution of seats, Nigeria had 19 States in 1979 with the Niger Delta covering 5 of these States, which translated into 25 senators out of 95 (more than one-quarter).⁷⁹³ In the House of Representatives, section 65 (b) of the 1979 Constitution assigned 114 seats to the Niger Delta, translating to more than one-quarter of the 449 total.⁷⁹⁴ In 1983, the military took power again, suspended the 1979 Constitution and introduced martial laws with the military ruling elite taking over law-making responsibility until May 29, 1999, when Nigeria once again returned to civil rule.⁷⁹⁵

However, between 1966 and 1999, the military altered Nigeria's constitutional configurations in substantial ways. The military used fiat to progressively create States, the Federal Capital Territory (FCT) and Local Government Areas (LGAs)⁷⁹⁶ such that by 1999, Nigeria had 36 States plus the FCT with 6 Area Councils, and 774 LGAs (First Schedule, Part 1 of the 1999 Nigeria's Constitution).⁷⁹⁷ At Independence in 1960, Nigeria had only 3 regions – Northern, Eastern and Western regions.⁷⁹⁸ By 1963, Nigeria became a Republic with 4 regions following the creation of the Mid-Western out of the Western region.⁷⁹⁹ In 1967 after the military took over power, the then federal military government abolished the regional arrangements and created 12 States to replace the regions as the second tier of government.⁸⁰⁰ From there, the succeeding military governments kept balkanizing the States and LGAs⁸⁰¹ such that when the military

⁷⁹² *Ibid.*

⁷⁹³ States in the Niger Delta were Bendel, Cross River, Imo, Ondo and Rivers. See the first schedule, part I of the 1979 Constitution, *ibid.*

⁷⁹⁴ The distribution of the 449 seats among the states in the House of Representatives 1979 were as follows: Kano – 46, Lagos – 12, Sokoto – 37, Bauchi – 20, Rivers – 14, Kaduna – 33, Ondo – 22, Oyo – 42, Plateau – 16, Anambra – 29, Benue – 19, Borno – 24, Imo – 30, Niger – 10, Ogun – 12, Bendel – 20, Gongola – 21, Cross River – 28; and Kwara – 14. See African Elections Database, “Nigeria Detailed Election Results”, <http://africanelections.tripod.com/ng_detail.html#1979_House_of_Representatives_Election>.

⁷⁹⁵ Oni, *supra* note 780 at 236.

⁷⁹⁶ Brennan Kraxberger, “Negotiations of ‘Tradition’ in Nigeria: Creation of States, the Military and Local Domains”, (2009) 44(4) JAAS 449 at 460 [Kraxberger].

⁷⁹⁷ The Nigerian Constitution, 1999 <Constitution of the Federal Republic of Nigeria (edojudiciary.gov.ng)> [Nigeria's 1999 Constitution].

⁷⁹⁸ Section 3 (1) of Nigeria's Constitution, 1960. See Independence Constitution of Nigeria, 1960, *supra* note 327.

⁷⁹⁹ Section 3 (1) of Nigeria's Constitution, 1963. See Republican Constitution of Nigeria, 1963, *supra* note 328.

⁸⁰⁰ Abiola Ojo, “Constitutional Law and Military Rule in Nigeria” (Ibadan: Evans Brothers (Nigeria Publishers) Limited, 1987) 17.

⁸⁰¹ David Yongo, “States Creation since 1967: An Imperative of the Military Contribution to Nation Building in Nigeria” (2015) 7(3) African Journal of History and Culture 71 at 77 [Yongo].

handed over power to civilians in 1999, Nigeria had become a federation of 36 States, with 774 LGAs and a FCT with 6 Area Councils.⁸⁰²

Because the military leadership traditionally came from the northern part of Nigeria,⁸⁰³ more new States, LGAs and the FCT with 6 Area Councils were created by the military in the North (section 3).⁸⁰⁴ It seems that the military deliberately favoured the North in the creation of these political units since they are the basis for representation in NASS and the sharing of federal revenues that come primarily from the oil wells of the Niger Delta. Brennan Kraxberger pointedly argues that the sharing of revenues from the oil and gas resources of the Niger Delta to these political units – States, LGAs and the FCT “with little regard for internal revenue generation capacity or good governance – [has] contributed to a systemic trend toward additional formal political units. New states have not been required to generate their own budgets, contributing to a system wherein states are best characterized as distributive containers for centrally controlled resources.”⁸⁰⁵

3.4.2.2 The 1999 Constitution Affirming the Distribution of Seats in the NASS

The 1999 Constitution provides constitutional affirmation for the various State creation exercises of the military. These new States impacted the distribution of seats in the NASS to the detriment of the Niger Delta.⁸⁰⁶ The 1999 Constitution retained the bi-cameral legislative setup (section (1)).⁸⁰⁷ Section 48 of the 1999 Constitution provides that each State shall have 3 senators and 1 senator for the FCT, with 27 senate seats allocated to the Niger Delta out of 109, representing less than one quarter of the total seats, and also less than the number of seats that the Niger Delta had under the 1979 Constitution.⁸⁰⁸

Regarding the House of Representatives, section 71(b) of the Constitution gives the Niger Delta 81 out of the 360 seats – less than one-quarter of the total seats and also fewer seats than the

⁸⁰² Nigeria’s 1999 Constitution, *supra* note 797.

⁸⁰³ Yongo, *supra* note 801 at 77.

⁸⁰⁴ Nigeria’s 1999 Constitution, *supra* note 797.

⁸⁰⁵ Kraxberger, *supra*, note 796 at 451.

⁸⁰⁶ Marc-Antoine De Montclos, “The politics and Crisis of the Petroleum Industry Bill in Nigeria” (2014) 52 (3) J.Mod.Afr.Stud. 403 at 420 [De Montclos].

⁸⁰⁷ Nigeria’s 1999 Constitution, *supra* note 797.

⁸⁰⁸ *Ibid.*

Niger Delta had under the 1979 Constitution.⁸⁰⁹ If the regional arrangement at Independence were still in place today with each region having 3 senate seats, the North would have 3 senate seats and Southern Nigeria, including the Niger Delta, would have 9 senate seats. If the regional arrangement after Nigeria became a Republic was in place today, the North would have 3 senate seats and southern Nigeria, including the Niger Delta, would have 12 senate seats. But presently, the North has 19 States with 57 senate seats and the FCT with 1 senate seat – totaling 58 senate seats out of 109 senate seats. The same pattern can also be seen in the House of Representatives as the North retains 190 seats, while the South, including the Niger Delta, has 170 seats.⁸¹⁰ With this numerical strength, the North can easily get any bill passed and block the passage of any bill in the NASS.

3.4.2.3 Population as a Factor in the Distribution of seats in NASS

The 1999 Constitution makes population one of the bases for allocation of seats in the NASS (section 73 (2)).⁸¹¹ Because of this, census-taking in Nigeria has become a “tense political activity.”⁸¹² Censuses conducted in Nigeria by Britain prior to Nigeria’s independence in 1960 suffered from a different challenge – under-enumeration, because “many people deliberately

⁸⁰⁹ Distribution of seats in the House of Representatives currently: Kano – 24, Lagos – 23, Kaduna – 16, Oyo – 17, Katsina – 15, Rivers – 13, Bauchi – 11, Borno – 10, Jigawa – 11, Benue – 11, Delta – 10, Niger – 10, Anambra – 11, Akwa Ibom – 10, Imo – 10, Ogun – 9, Sokoto – 11, Osun – 9, Ondo – 8, Zamfara – 7, Kogi – 8, Kebbi – 9, Enugu – 8, Plateau – 8, Cross River – 8, Abia – 8, Abuja – 2, Yobe – 6, Ekiti – 6, Gombe – 6, Kwara – 6, Taraba – 6, Ebonyi – 6, Nassarawa – 5, Bayelsa – 5, Adamawa – 8; and Edo – 9. See the Independent National Election Commission, “2019 House of Representative Election Results”, <<https://www.inecnigeria.org/2019-house-of-representative-elections-result/>> [2019 House of Representative Election Results]. See also The Independent National Election Commission, “2019 General Elections Independent National Electoral Commission final List of Candidates for House of Representatives”, <<https://www.inecnigeria.org/wp-content/uploads/2019/02/2019-GENERAL-ELECTIONS-FINAL-LIST-OF-CANDIDATES-FOR-HOUSE-OF-REPRESENTATIVES-1.pdf>> [2019 General Elections Independent National Electoral Commission final List of Candidates for House of Representatives].

⁸¹⁰ Distribution of seats in the House of Representatives currently: Kano – 24, Lagos – 23, Kaduna – 16, Oyo – 17, Katsina – 15, Rivers – 13, Bauchi – 11, Borno – 10, Jigawa – 11, Benue – 11, Delta – 10, Niger – 10, Anambra – 11, Akwa Ibom – 10, Imo – 10, Ogun – 9, Sokoto – 11, Osun – 9, Ondo – 8, Zamfara – 7, Kogi – 8, Kebbi – 9, Enugu – 8, Plateau – 8, Cross River – 8, Abia – 8, Abuja – 2, Yobe – 6, Ekiti – 6, Gombe – 6, Kwara – 6, Taraba – 6, Ebonyi – 6, Nassarawa – 5, Bayelsa – 5, Adamawa – 8; and Edo – 9. See 2019 House of Representative Election Results, *ibid*. See also 2019 General Elections Independent National Electoral Commission Final List of Candidates for House of Representatives, *ibid*.

⁸¹¹ Section 73 (2) provides that notwithstanding “subsection (1) of this section, the Independent National Electoral Commission may at any time carry out such a review and alter the districts or constituencies in accordance with the provisions of this section to such extent as it considers necessary, in consequence of any amendment to section 3 of this Constitution or any provision replacing that section, or by reason of the holding of a census of the population, or pursuant to an Act of the National Assembly.”

⁸¹² Oka Obono & Elizabeth Omoluabi, “Technical and Political Aspects of the 2006 Nigerian Population and Housing Census” (2014) 27 (2) African Population Studies 249 at 249 [Obono & Omoluabi].

avoided enumeration for fear of taxation.”⁸¹³ However, Nigerian censuses now faces a different challenge – the return of bogus numbers which could be traceable to the pre-independence census of 1951-1953 conducted by Britain. The “idea of avoidance of enumeration suddenly ended in 1954 when the regional representative was based on the figure enumerated from the 1953 census. With the use of census data for seats allocation, census became highly politicized.”⁸¹⁴ Consequently, the 1951-1953 census “helped shape the political character of all subsequent Nigerian Censuses... They marked the beginning of the politicization of census figures by various ethnic interests.”⁸¹⁵ Since the Constitution kept population as the basis for the distribution of political seats, Nigeria continues to witness bogus census figures which has impugned the integrity of all the censuses, leading to the cancellation of the 1962 and 1973 censuses.⁸¹⁶

As long as the 1999 Constitution retains population as the basis of allocation of political seats and the census remains the only way to determine the population figures, census discord in Nigeria will likely continue.⁸¹⁷ Going forward, it would be strategic if Nigeria embraced technology in the conduct of censuses because the enumeration process is largely manual and this creates risks of error and manipulation.⁸¹⁸ Technology could mitigate some of the error and manipulation risks.⁸¹⁹ Also, legislation could be enacted to criminalize all forms of official and private activities that are aimed at the manipulation of census figures.⁸²⁰ These could contribute towards ensuring the achievement of accurate census figures in Nigeria.

The unequal distribution of seats in the NASS becomes significant by virtue of section 56 (2) of the 1999 Constitution, which provides for a simple majority in the determination of any question in the NASS.⁸²¹ With the low numbers of representation in the NASS from the Niger Delta,

⁸¹³ Funsho Olorunfemi & Irewolede Fashagba, “Population Census Administration in Nigeria” in Rotimi Ajayi & Joseph Fashagba, ed, *Nigerian Politics* (Switzerland: Springer, 2021) 353 at 362 [Olorunfemi & Fashagba].

⁸¹⁴ *Ibid.*

⁸¹⁵ Obono & Omoluabi, *supra* note 812 at 250.

⁸¹⁶ *Ibid* at 249.

⁸¹⁷ Femi Mimiko, “Census in Nigeria: The Politics and the Imperative of Depoliticization” (2006) 5 (1) *Asian & Afr.Stud.* 1 at 10 & 14.

⁸¹⁸ Olorunfemi & Fashagba, *supra* note 813 at 359-360.

⁸¹⁹ National Conference 2014, “Final Draft of the Conference Report” at 108 (para. 5.2.1 (u)), <<https://media.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf>> [Final Draft of the Conference Report, 2014].

⁸²⁰ *Ibid* at 109 (para. 5.2.1 (v)) at p. 109.

⁸²¹ Nigeria’s 1999 Constitution, *supra* note 797.

issues of particular benefit to the Niger Delta hardly make it to law-making stage. In addition, there is the likelihood of the Niger Delta representatives vote not as a bloc but rather on party lines, further decimating the ranks of these representatives.

As a way out, a fairer model of distribution of seats in the NASS should be adopted. Also, a sensitization program targeting NASS members from the majority groups should be put in place, to impress on them that a peaceful and prosperous Niger Delta would be beneficial to all Nigerians. In chapter 4, this thesis will analyze the negative impact of the push back from the Niger Delta people on the domination by the majority groups in Nigeria and how that affects the Nigerian economy. Experience has shown that a peaceful Niger Delta where oil installations are not being destroyed will further the sustainability of the environment, whereas, a volatile Niger Delta has the potential to contribute to the environmental sustainability crisis of the Niger Delta

3.4.3 The PIA – an Example of Legislation skewed against the Niger Delta

3.4.3.1 History of the PIA

One piece of legislation that has highlighted the implication of the skewed representation of the Niger Delta in the NASS is the PIA. Before its passage into law, the then Petroleum Industry Bill (now the PIA) “was proposed and touted as some sort of a messiah legislation, which almost all stakeholders look up to, towards solving the myriad of challenges in the Nigerian oil and gas industry, However, tensions created by competing interests appear to have forestalled the passage of the [PIA] by successive government administrations.”⁸²²

A brief trajectory of the PIA will expose these competing interests. After Nigeria transitioned to democracy in 1999, the government of President Olusegun Obasanjo, dissatisfied with the entire oil industry, set up the Oil and Gas Sector Reform Implementation Committee (the Committee) in 2000, to review the situation and advise the government on reforming the oil industry.⁸²³ The Committee’s recommendations became the basis of the draft Petroleum Industry Bill (PIB)

⁸²² Nojeem Amodu, “Sustainable Development and Corporate Social Responsibility under the 2018 Petroleum Host and Impacted Communities Development Trust Bill: Is Nigeria Rehashing Past Mistakes?” (2019) 11 (4) African Journal of Legal Studies 319 at 320.

⁸²³ Chijioke Nwaozuzu & Isreal Onyije, “Nigeria Petroleum Industry Reforms: Understanding the Elements of the Petroleum Industry Governance Bill (PIGB)” Emerald Energy Institute (for Petroleum & Energy Economics, Policy and Strategic Studies), University of Port Harcourt, Port Harcourt, Rivers State, Nigeria (Energy Mix Report) <<https://www.energymixreport.com/nigeria-petroleum-industry-reforms-understanding-the-elements-of-the-petroleum-industry-governance-bill-pigb/>> [Nwaozuzu & Onyije].

which was sent to the NASS in September, 2008, for deliberation and possible enactment into law, by the government of President Umaru Yar'Adua who had succeeded Obasanjo in 2007. Unfortunately, the NASS was not able to pass the PIB into law in the lifetime of the Republic, owing to "the death of President Umaru Musa Yar'Adua and procrastination from legislators [which] made a vote impossible."⁸²⁴

Following the death of President Yar'Adua in office in 2010, his vice, Goodluck Jonathan, who was the first Nigerian Vice-President from the Niger Delta, was sworn in as President.⁸²⁵ In 2011, Goodluck Jonathan won a fresh presidential term.⁸²⁶ With his new mandate as the first President from the Niger Delta, there was renewed optimism that the PIB would be passed since the bill had ambitious plans for the oil-bearing communities of the Niger Delta. For example, it aimed to enhance the participation of the host communities in resource governance. It also aimed to encourage the participation of companies owned by Nigerians in the crude oil value chain, "to protect health, safety and the environment, to improve the efficiency of regulatory entities by avoiding conflicts of interests, to reduce discretionary ministerial powers and political interferences, to deregulate the downstream sector and to engender accountability, transparency, competitiveness and openness."⁸²⁷

In 2012, given "the strong opposition to the [PIB], [sensing that] the law could only be voted through if a compromise is reached between the executive and the legislature, the government and transnational oil companies, the private sector, trade unions and the NNPC, Northerners and Southerners, etc.," a totally new and watered-down version of the PIB was sent to the NASS by the government. By then, mutual suspicions between the various ethnic groups in Nigeria had led to organized opposition against the PIB.⁸²⁸ At the heart of the resistance in the NASS by members from the northern part of Nigeria was the creation of Petroleum Host Community Funds (PHCF) to provide funding for the development of the oil-bearing communities in the Niger Delta. The PHCF "was envisaged to be funded by upstream petroleum companies through

⁸²⁴ De Montclos, *supra* note 806 at 408.

⁸²⁵ Ahmed Idris, "Nigeria's Goodluck Jonathan Sworn in as President", *BBC* (6 May 2010) <<http://news.bbc.co.uk/2/hi/africa/8664150.stm>>.

⁸²⁶ "Nigeria: Goodluck Jonathan Sworn in as President", *BBC* (29 May 2011) <<https://www.bbc.com/news/world-africa-13587545>>.

⁸²⁷ De Montclos, *supra* note 806 at 409.

⁸²⁸ *Ibid* at 419-420.

the remittance of 10% of their net profits from operations in the onshore areas and in the offshore shallow water areas directly into the PHCF on a monthly basis.”⁸²⁹

But members of NASS mainly outside the Niger Delta area felt that any payment to the Niger Delta would reduce their share of the oil revenue. Those from the northern part of the country, who are the majority in both arms of the NASS, therefore saw the PIA as an effort to deny the north from benefitting from the oil funds, and an infringement “upon the ‘federal character’ which requires resource-wealthy regions to finance the development of the poorest areas, which are usually in the North.”⁸³⁰ Not left out of the resistance to the PIB were representatives from the non-oil producing parts of southern Nigeria, who, like their northern counterparts, also felt that the PIA would reduce their share of the oil revenue. Of Nigeria’s 36 States, only Lagos is financially viable; the rest “depend on funding from the central government in Abuja, which derives from hydrocarbon extraction. In other words, non-oil-producing states in the South would also suffer from a substantial rise in the bonus given to the Niger Delta, to the detriment of other regions of the Federation.”⁸³¹

President Jonathan was aware that the representatives of Niger Delta were and still are clearly in the minority in the NASS, “with only 23% of seats in the House of Representatives (82 out of 360) and less than 23% in the Senate (27 out of 109). Out of 36 states, 27 do not produce oil and would certainly resist a reduction of the ‘federal character’ that regulates the redistribution of the oil rent,” therefore, a weaker and much more conciliatory version of the PIB bill was sent to the NASS in 2012 but this was still rejected for the same reasons stated above.⁸³²

The 8th NASS of 2015-2019, determined to pass the PIA, decided to unbundle it into 4 different laws: the Petroleum Industry Governance Bill (PIGB), the Petroleum Host and Impacted Community Bill, the Petroleum Industry Administration Bill and the Petroleum Industry Fiscal Bill and try to pass each individually.⁸³³ In 2018, the NASS passed the PIGB and transmitted same to Nigeria’s current President Buhari, himself from the North, for assent. Unfortunately,

⁸²⁹ Agaptus Nwozor et al, “Reform in a Limbo: The Politics and Politicization of Reforms in Nigeria’s Petroleum Sector” (2020) 10(4) International Journal of Energy Economics and Policy 184 at 188 [Nwozor et al].

⁸³⁰ De Montclos, *supra*, note 806 at 414-415.

⁸³¹ *Ibid* at 415.

⁸³² Nwozor et al, *supra* note 829 at 189.

⁸³³ Nwaozuzu & Onyije, *supra* note 823.

President Buhari refused to assent to the bill, citing “constitutional and legal reasons” for his decision and with that ended the attempt by the 8th NASS to pass the PIB.⁸³⁴ A fresh Bill was forwarded by the executive to the NASS of 2019-2023 and the Bill was passed and assented to by President Buhari on August 16, 2021.⁸³⁵ But the undercurrent that stalled previous efforts to amend the law indicates the resistance that would likely follow any efforts at addressing the peculiar challenges of the Niger Delta.

3.4.3.2 The PIA and the Niger Delta

The PIA seems to continue the inequitable resource allocation to the Niger Delta.⁸³⁶ First, the original bill had conceived the payment of the 10% as PHCF from the net profits made by the operators in the oil and gas industry to the oil-bearing communities in the Niger Delta.⁸³⁷ But the PIA now mandates operators to allocate “3% of [their] actual annual operating expenditure of the preceding financial year” as PHCF (section 240 (2)).⁸³⁸ Perhaps to expose the political undertone behind the framing of section 240 (2), the PIA rather allocates 30% of the profits earned by the federal government for oil prospecting in the frontier basins (section 9 (4) and (5)),⁸³⁹ which are

⁸³⁴ Bassey Udo, “Nigeria’s Revised Petroleum Industry Bill may be Passed June 2020 – Minister”, *Premium Times* (24 November 2020) <<https://www.premiumtimesng.com/news/top-news/368863-nigerias-revised-petroleum-industry-bill-may-be-passed-june-2020-minister.html>>.

⁸³⁵ Bridget Edokwe, “Buhari signs Petroleum Industry Bill into Law”, *BarristerNG.com* (16 August 2021) <<https://barristerng.com/buhari-signs-petroleum-industry-bill-into-law/>>.

⁸³⁶ The PIA is relatively new having been enacted in August 2021, and there is little analysis of it to date. That is why the thesis is analyzing it in detail.

⁸³⁷ Nwozor et al, *supra*, note 829 at 188.

⁸³⁸ Section 240 (2) provides that a “settlor, where applicable through the operator, shall make an annual contribution to the applicable host communities development trust fund of an amount equal to 3% of its actual annual operating expenditure of the preceding financial year in the upstream petroleum operations affecting the host communities for which the applicable host communities development trust fund was established.”

⁸³⁹ Section 9 (4) provides that there “shall be maintained, for the purpose of this section, a Frontier Exploration Fund which shall be 30% of NNPC Limited’s profit oil and profit gas as in the production sharing, profit sharing and risk service contracts.”

Section 9 (5) provides that NNPC Limited “shall transfer the 30% of profit oil and profit gas under subsection (4) to the Frontier Exploration Fund escrow account dedicated for the development of frontier acreages and utilise the funds to carry out exploration and development activities in the frontier acreages subject to appropriation by the National Assembly.”

located outside the Niger Delta.⁸⁴⁰ Some experts argue that section 9, which is reinforced by section 64,⁸⁴¹ was introduced to counterbalance the provision of 240 (2) of the PIA.⁸⁴²

A few observations may be made regarding these provisions. First, whereas section 9 governs the allocation of profits made by the federal government (a mandatory joint venture partner with all the operators in the oil and gas industry), section 240(2) only binds an operator, meaning that in communities where there is no current operation, there will be no PHCF. This provision would not address the age-long neglect of the oil-bearing communities in the Niger Delta. The Ogoni experience may be apt for it seems that the wording of section 240 would disqualify Ogoni from the PHCF, since there are currently no operations in Ogoni. This would be so despite an estimated \$100 billion USD that Shell has made from Ogoni from drilling about 634 million barrels of oil between 1958 and 1993 when it operated in Ogoni.⁸⁴³ The inequity in section 240 (2) could also be gleaned from the fact that Ogoni would not also qualify for the PHCF despite the devastation of its environment by Shell, since there is no currency of operation in its territory. As observed by UNEP,

Ogoni community is exposed to petroleum hydrocarbons in outdoor air and drinking water, sometimes at elevated concentrations. They are also exposed through dermal contacts from contaminated soil, sediments and surface water. Since average life expectancy in Nigeria is less than 50 years, it is a fair assumption that most members of the current Ogoniland community have lived with chronic oil pollution throughout their lives.⁸⁴⁴

Ogoni would not qualify for the PHCF despite still bearing the brunt of Shell's presence with abandoned oil facilities still crisscrossing its communities, constituting risks to the environment and inhabitants. For instance, UNEP observes the lack of maintenance of the rights of way regarding both active and decommissioned oil and gas facilities in Ogoni.⁸⁴⁵ UNEP also notes that the "oilfield in Ogoniland is interwoven with the Ogoni community, with many families

⁸⁴⁰ Jeremiah, *supra* note 309.

⁸⁴¹ 64 provides that the "objectives of NNPC Limited shall include to— (c) lift and sell royalty oil and tax oil on behalf of the Commission and the Service respectively for an agreed commercial fee and in the case of profit oil and profit gas payable to the concessionaire, NNPC Limited shall promptly remit the proceeds of the sales of the profit oil and profit gas to the Federation less its 30% for management fee and Frontier Exploration Fund as specified in section 9 (4) of this Act."

⁸⁴² Amaize et al, *supra* note 310.

⁸⁴³ Ikpobari Senewo, "The Ogoni Bill of Rights (OBR): Extent of actualization 25 years later?" (2015) 2(4) The Extractive Industries and Society 664 at 665.

⁸⁴⁴ UNEP Report, *supra* note 13 at 10.

⁸⁴⁵ *Ibid* at 96.

living close to oilfield facilities...This is true for both pipeline rights of way and rights of way to facilities.”⁸⁴⁶ Specifically at Yorla 9, UNEP found that a family’s living home with young kids was just a few meters away from an oil well but within the proximity of well’s pad with the family even farming on the land within the oil well’s right of way.⁸⁴⁷ UNEP describes this as unsettling and inappropriate since

[A]n immediate hazard is that the children may fall and drown in the (currently unprotected) well pit around the wellhead. Moreover, surrounding the well site are a number of other mud and water pits which, even if uncontaminated, are also potential hazards to both children and adults. In addition, the family is unprotected from fire, which is not unusual at disused oil wells in Ogoniland.⁸⁴⁸

In another location in Ogoni, UNEP discovered a flare pipeline close to an oil flow station established very near to a whole community with homes made from flammable building materials. With all these, UNEP concludes that this “is a clear indication of the loss of control on the part of both the pipeline operator and the government regulator. This is a serious safety breach.”⁸⁴⁹ It seems unfair that Ogoni stands as a relic of the devastation from oil production and that the PIA does not address historic environmental harms and their ongoing effects.

Second, the inequity to the Niger Delta can also be gleaned from section 235(3) of the PIA which fails to define host communities in respect of offshore investment. Instead, it mandates operators to determine who qualifies as host communities who can benefit from the PHCF.⁸⁵⁰ With the frosty relationship between the operators in the oil industry in Nigeria and the Niger Delta, this is potentially a volatile provision that could further rupture the peace in the Niger Delta. As an example, Shell is divesting from Nigeria, citing its exasperation with the oil-bearing communities in the Niger Delta as one of the reasons. According to its Chief Executive Officer, Mr. Ben van Beurden, “additional community issues in the Niger Delta were becoming a huge challenge for the company.”⁸⁵¹ As argued by Policy Alert - a Civil Society Organization (CSO) in Nigeria, the provision could further fan the embers of discord between the communities and

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid* at 97.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ *Ibid* at 98.

⁸⁵⁰ Section 235 provides that for “settlers operating in shallow water and deep offshore, the littoral communities and any other community determined by the settlers shall be host communities for the purposes of this Act.”

⁸⁵¹ “Nigeria Considers Options on Shell’s Divestment Plan”, *Arise News* (19 May, 2021) <<https://www.arise.tv/nigeria-considers-options-on-shells-divestment-plan/>>.

the TNCs. According to them, “[w]e are also concerned that the host communities’ component of the legislation flies in the face of one of its stated objectives to address tensions between host communities and companies as it has all the ingredients for escalating rather than abating such conflicts.”⁸⁵²

Third, the PIA creates a Board of Trustees (BOT) to administer the PHCF (section 243).⁸⁵³ Again, the responsibility to select members of (section 242(2)),⁸⁵⁴ constitute the BOT (section 242(1)),⁸⁵⁵ and give general direction to its functioning (section 242(3))⁸⁵⁶ is transferred to the operators. PANDEF is critical of this provision and argues that “with the overwhelming powers given to the ‘settlers’ on administration of the Trust, the Act obtrudes servility on host communities.”⁸⁵⁷

Fourth, section 9 seems to shortchange the 36 States of the federation and the LGAs, including those from the Niger Delta, who are constitutionally qualified to receive allocation from the federation account. Section 162 (1) and (3) of the Constitution provides that all monies earned by the federal government should go to the federation account to be shared to States and the LGAs in a pre-determined formula.⁸⁵⁸ States and LGAs in the Niger Delta would be particularly

⁸⁵² Chioma Onuegbu, “Signing PIB into Law amidst Flaws, protest Insensitive – Policy Alert”, *Vanguard Newspaper* (21 August, 2021) <<https://www.vanguardngr.com/2021/08/signing-pib-into-law-amidst-flaws-protest-insensitive-policy-alert/>> [Onuegbu].

⁸⁵³ Section 243 provides that the Board of Trustees “shall be responsible for the general management of the host communities development trust.”

⁸⁵⁴ Section 242 (2) provides that the “settlor shall, in consultation with the host communities determine the membership of the Board of Trustees to include persons of high integrity and professional standing, who shall come from the host communities and the Members of the Board of Trustees shall elect a Chairman from amongst themselves.”

⁸⁵⁵ Section 242 (1) provides that the “constitution of the host communities development trust shall contain provisions requiring the Board of Trustees to be set up by the settlor, who shall determine its membership and the criteria for their appointment, provided that the membership of the Board of Trustees of the host communities development trust shall be subject to the approval of the Commission or Authority, as the case may be.”

⁸⁵⁶ Section 242 (3) provides that the “settlor shall determine—(a) the selection process, procedure for meeting, financial regulations and administrative procedures of the Board of Trustees; (b) the remuneration, discipline, qualification, disqualification, suspension and removal of members of the Board of Trustees; and (c) other matters other than the above relating to the operation and activities of the Board of Trustees.”

⁸⁵⁷ Amaize et al, *supra*, note 310.

⁸⁵⁸ Section 162 (1) provides that the Federation “shall maintain a special account to be called ‘the Federation Account’ into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.”

Section 162 (3) provides that Any “amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.”

affected since the Constitution mandates that they receive 13% as derivation funds from oil and gas resources exploited from their communities (section 162 (2)).⁸⁵⁹ Section 9 of the PIA may negate this because it seems to by-pass the federation account and provide direct funding of Frontier Basins. According to Policy Alert, the ‘controversial provision for a direct payment of 30 percent profit of oil and gas to the Frontier Exploration Fund shortchanges oil producing states and local governments of some of its 13% derivation as it bypasses the requirement in section 162(2) ...which provides that all revenues be channeled through the federation account.’⁸⁶⁰

Already, all the 17 Governors of states in the Southern Nigeria, across party lines, have rejected the provisions of section 9 and section 240 (2) of the PIA which they think is paltry.⁸⁶¹ Stakeholders in the Niger Delta have also condemned the provision of section 240 (2), describing it as “miserly” and “urging the President [of Nigeria] to stop taking decisions that would escalate tension in the oil-rich region.”⁸⁶² However, President Buhari appealed to the Niger Delta to accept the PHCF as presently allocated, arguing that Nigeria has lost already “an estimated \$50 billion worth of investments in ten years as a result of non-passage of the [PIA], lack of progress and stagnation in the petroleum industry.”⁸⁶³

However, the politically incensed road to PIA suggests that with Nigeria “being dominated by the Northern elite, resource allocation [is] biased against the interests of the people in the oil producing areas.”⁸⁶⁴ From the foregoing, it remains to be seen whether members of the NASS from the North would be interested in repealing these vexatious provisions. According to a

⁸⁵⁹ Section 162 (2) provides that the President “upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account. In determining the formula, the National Assembly shall take into account, allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density: Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.”

⁸⁶⁰ Onuegbu, *supra* note 852.

⁸⁶¹ Kazeem Ugbodaga, “PIB: Southern Governors reject 3 Percent Share of Oil Revenue”, *PM News* (5 July, 2021) <<https://pmnewsnigeria.com/2021/07/05/pib-southern-governors-reject-3-percent-share-of-oil-revenue-full-text-of-meeting/>>.

⁸⁶² Amaize et al, *supra* note 310.

⁸⁶³ *Ibid.*

⁸⁶⁴ Jędrzej Frynas, “Litigation in the Nigerian Oil Industry: A Socio-legal Analysis of the Legal Disputes between OH Companies and Village Communities” Thesis submitted in fulfilment of the degree of PhD. in Management, Economics, Politics (MEP) at the University of St Andrews February 1999 at 50 <<https://www.proquest.com/docview/1827848610/fulltextPDF/F3C70290ABB4316PQ/1?accountid=14701>>.

former senator from the North, who participated in the passage of the PIA and the immediate past national chairman of the ruling All Progressive Congress (APC), the passage of the PIA “was a case of the majority having their way...’it [the PIA] has already become a law, nobody can turn it down except God our creator.”⁸⁶⁵ Declarations like these may not give confidence that the NASS would be willing to revisit the PIA soon.

Fifth, section 9 allows prospecting for oil in Frontier Basins at a time when the rest of the world, including the TNCs operating in the Niger-Delta, are divesting from carbon-based operations and transiting to cleaner energy, without any plans for a post-carbon economy for the Niger Delta whose environment has been devastated by decades of oil exploitation seems short-sighted.⁸⁶⁶ As the TNCs begin to divest from Nigeria, the government has given them conditions to be met for allowing divestment, but there is no mention of the Niger Delta in the plan. According to the government, “special attention would be paid to abandonment and relinquishment costs; severance of operator staff; third party contract liabilities; competency of the buyer; post purchased technical, operational, and financial capabilities especially in the era of activist investors’ sentiments against funding of fossil fuel projects and alignment with Nigeria’s national strategic interest.”⁸⁶⁷ Policy Alert regrets that amid the current energy transition from carbon-based energy to ‘clean energy’, a period ‘when fossil fuel investments are being deprioritized elsewhere as a result of the global energy transition, the PIA failed to provide a bridge between the current era of fossil fuel dependency and the low-carbon energy that Nigeria aspires to within the framework of government’s much vaunted commitments under the Paris Agreement.’⁸⁶⁸

From the above analysis, CERs have the potential to provoke the enactment of environmentally friendly laws. They could also act as a screen to prevent the enactment of anti-environmental legislation in the mold of PIA, which seems to encourage further investments in carbon-based operations, despite the negative effect of carbon on the environment. It could also prevent

⁸⁶⁵ Bridget Edokwe, “We’ve passed PIB, Electoral Law, only God can Change Them – Sen. Abdullahi Adamu”, *BarristerNG.com* (21 July 2021) <<https://barristerng.com/weve-passed-pib-electoral-law-only-god-can-change-them-sen-abdullahi-adamu/>>.

⁸⁶⁶ “NNPC lists Relinquishment Cost, Legacy Liabilities for Oil Majors’ Divestment”, *Premium Times* (2 August 2021) <<https://www.premiumtimesng.com/business/business-news/477088-nnpc-lists-relinquishment-cost-legacy-liabilities-for-oil-majors-divestment.html>>.

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Onuegbu, *supra* note 852.

environmental rollback as exemplified by the *PIA* which permits gas flaring for a fee, against Nigeria's commitment in the LT-LEDS, which initially sought to cut GHG emissions. The LT-LEDS seems to appreciate the role that CERs could play in promoting sustainability as Nigeria begins to grapple with decarbonization.

Nigeria's [LT-LEDS] deserves environmental innovation that is focused on organizational implementation and change. Environmental innovation encompasses many different aspects including economic, social, and technological change in way of doing things designed to promote environmental integrity. The focus is on the environment... It includes emphasis on conversation but also distribution of wealth within the nation to reduce disparities between rich and poor and achieve social and economic justice. It calls for precaution and the use of science to enhance social and environmental outcomes, through the identification of environmental risks and externalities as well as incorporating such externalities in national economic accounting frameworks. It entails using strategic, coordinated, and integrated planning to deliver sustainable development, the green economy and poverty alleviation but also that citizens should have access to information concerning the environment, as well as the opportunity to participate in decisionmaking processes.⁸⁶⁹

But it is debatable whether the constraints to law-making in Nigeria, as highlighted above, will not blunt the edge of CERs in that regard.

3.5. Conclusion

In this chapter, the thesis has examined how enforceable CERs could spur Nigeria into enacting environmental laws to fill existing gaps in environmental legislation in Nigeria. Second, it also examined how CERs could act as constitutional screen against the enactment of anti-environmental legislation. Third, it further examined how CERs might act as a bulwark against environmental rollback by preventing the repeal of extant environmental laws or the lowering of extant regulatory standards because the rollback would not only prevent the realization of CERs but would also be unconstitutional, as has been the case in other some other countries.

The literature indicates that these standards are achievable and that they present opportunities for better environmental outcomes because the enactment of enforceable CERs “provides a legitimate foundation and means for creating... environmental rights, values and other sources of ecological obligation upon private and public actors; provides checks and balances for the creation of legislation and... provides the means to dictate the content of laws.”⁸⁷⁰ In terms of precedent and as indicated in the analysis made earlier in this chapter, under the segments on

⁸⁶⁹ 2050 Long-Term Climate Vision for Nigeria, *supra* note 767 at 32.

⁸⁷⁰ Kotzé, *supra* note 30 at 209.

CERs improving the quality and quantity of environmental laws, Kenya offers a classic example of what is possible within the CERs revolution. Kenya was shackled down by a Constitution that had no provision for environmental rights, and this had cascading negative effects on the environmental conditions of the country. But the enactment of the 2010 Constitution in Kenya supplied the legislature with the impetus to enact new environmental legislation to satisfy the constitutional demands.

In summary, despite the challenges, as seen from the experiences of some of the countries analyzed in this chapter, including Kenya, Brazil and Bolivia, CERs have the potential to be valuable for the Niger Delta because they could lead to the enactment of new environmental laws and guarantee the benchmark environmental regulatory standard which is a requisite for the environmental sustainability of the Niger Delta. However, for this to happen, the conflicting interests of the Nigerian legislators and the skewed representation against the Niger Delta in NASS must be addressed. Without removing these significant barriers, CERs will not be able to galvanize the Nigerian legislature into enacting environmentally sensitive legislation for the benefit of the Niger Delta. While the move away from a carbon-based economy is increasingly gathering momentum across the globe, oil will continue to be crucial for at least the next few years, so CERs remain important in the Niger Delta context. Even in the event of a total move away from oil and crude, CERs will continue to be relevant in relation to Environmental Justice concerns relating to any alternatives to oil that are explored; the de-commissioning of oil installations; as well as the damage that has already been done and needs to be remedied.

Chapter 4 – CERs: Towards More Vigorous Environmental Regulatory and Enforcement Regimes for Nigeria

4.1. Introduction

Nigeria struggles not only with a lack of strong environmental protection laws but also with the lack of enforcement of existing laws. As such, Oyende is of the view that “appropriate governance, management and delivery systems... are still urgently needed.”⁸⁷¹ Eaton agrees and adds that particularly for the Niger Delta, one of the problems is the lack of enforcement of extant laws to protect its environment.⁸⁷² Nigeria has not shown sufficient commitment to monitoring compliance, or to implementing and enforcing extant environmental laws that protect the Niger Delta environment. From the foregoing, the key question that this chapter seeks to answer is: could CERs assist in addressing the compliance monitoring, implementation and enforcement gaps in environmental protection in Nigeria for the benefit of the Niger Delta? To answer this question, with Brazil; Argentina; and Kenya as precedents, the chapter will examine how CERs could provoke improved compliance monitoring, implementation and enforcement of these laws.

Boyd observes that in many countries where issues of compliance monitoring, implementation and enforcement of environmental regulations were treated with levity, CERs have brought improvements. He argues that theoretically “constitutional recognition of a right to a healthy environment should ensure that governments establish and adequately resource a system for implementing, monitoring compliance with, and enforcing environmental laws and regulations.”⁸⁷³ From Boyd’s analysis, CERs in the Niger Delta context might be helpful in the following 3 areas:

- (i) prompting the monitoring of compliance with environmental regulations;
- (ii) leading to the actual implementation of environmental regulations by the respective agencies of government; and
- (iii) giving the courts greater impetus to enforce environmental laws and regulations.

⁸⁷¹ Oyende, *supra* note 69 at 53-54 & 77.

⁸⁷² Eaton, *supra* note 66 at 271–272.

⁸⁷³ Boyd, *supra* note 28 at 29.

If CERs could achieve these benefits in Nigeria, it would translate into an improved environment for the Niger Delta. However, there are potential challenges to CERs achieving these benefits in Nigeria. These include conflicts of interests arising from the dual mandates of environmental regulatory agencies in Nigeria. Also, the high incidence of corruption in Nigeria could inhibit the effectiveness of CERs in delivering these benefits because compromised regulatory and enforcement agencies/agents are also a risk to compliance monitoring, implementation and enforcement of environmental laws.

Furthermore, the political economy of Nigeria is hugely dependent on the exploitation of the petroleum resources of the Niger Delta, signifying that the Nigerian government may not be favorably disposed to stringent environmental compliance monitoring, implementation, and enforcement. Finally, courts may not be disposed to stringent enforcement of environmental laws around the petroleum industry value-chain because of the understanding that Nigeria's economy largely depends on proceeds from the petroleum industry. The chapter therefore examines whether and how CERs could improve compliance monitoring, implementation, and enforcement of environmental regulations in Nigeria. The chapter also examines the above-mentioned challenges to this and makes recommendations on how these challenges could be overcome.

4.2 Monitoring Compliance with Environmental Regulations

4.2.1. CERs Influencing Institutional Reforms in Brazil to Improve Environmental Compliance Monitoring

The first benefit is that CERs could lead to institutional reforms which could, in turn, enhance the ability of government agencies to monitor compliance with existing constitutional/legislative/regulatory provisions on environmental safety.⁸⁷⁴ Brazil is an example. Brazil's 1988 Constitution guarantees everyone the right to an ecologically stable environment and places the duty to preserve it on the government and society (article 225). For instance, the Public Ministry (PM) in Brazil existed prior to the enactment of the 1988 constitution. In fact, the "beginnings of the [PM] can be traced back to the early sixteenth century, when its purpose was the enforcement of criminal laws on behalf of the royal family during Brazil's

⁸⁷⁴ *Ibid.*

colonization.”⁸⁷⁵ But the 1988 Constitution extends the duties of the PM to include environmental protection (article 129 (III)).⁸⁷⁶ According to Shannon Clark, the PM “has been successful at increasing compliance with environmental laws.”⁸⁷⁷ In São Paulo alone, investigations of breaches of environmental regulations conducted by the PM increased from a paltry 3 investigations in 1984 to 5,890 in the 2 decades between 1988 and 2008, averaging about 298 annual investigations, with the PM relying on the threat of lawsuits to coax compliance with extant environmental regulations from violators.⁸⁷⁸ This happened in Brazil’s biggest industrial area of Cubatão, against 24 companies including both local businesses and TNCs. The PM was able to compel the businesses to install anti-pollution emission technology, for example, with the threat of the lawsuit.⁸⁷⁹

At another level, the PM has also made a commitment to supervise and monitor the performance of regulators in the environmental sub-sector in Brazil, which has helped to galvanize relevant agencies into carrying out their supervisory duties. According to Clark, the PM “has been successful at holding environmental agencies accountable.”⁸⁸⁰ For example, the PM extended its regulatory oversight to the activities of the Ministry of Environment (MOE) when the latter tried to compromise environmental sustainability. The Brazilian Minister of Environment issued a Normative Instruction in 2020⁸⁸¹ which sought to regularize illegal occupation of the Atlantic Forest in Brazil.⁸⁸² The Atlantic Forest is about 1.3 million km² and stretches into 17 States of the Brazilian federation.⁸⁸³

⁸⁷⁵ Shannon Clark, “Better Representing the ‘Diffuse and Collective Interests’: Reducing Legalism in Brazil’s Ministério Público to Improve Environmental Enforcement” (2017) 35 (1) *UCLA Journal of Environmental Law & Policy* 83 at 85 [Clark].

⁸⁷⁶ Article 129 provides that the “institutional functions of the Public Ministry are ...III. to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests.”

⁸⁷⁷ Clark, *supra* note 875 at 85.

⁸⁷⁸ *Ibid* at 86.

⁸⁷⁹ *Ibid*.

⁸⁸⁰ *Ibid* at 86-87.

⁸⁸¹ Official Gazette of the Union, “Normative Instruction No. 4 of April 2, 2020”, published April 6, 2020 (Edition: 66 | Section: 1 | Page: 74), <<https://www.in.gov.br/en/web/dou/-/instrucao-normativa-n-4-de-2-de-abril-de-2020-251347926>>.

⁸⁸² Article 1 of Chapter 1 provides that the Normative Instruction “aims to regulate the technical and administrative procedures for land regularization, in the modality of expropriation of rural properties and or compensation of improvements, located in federal conservation units in the public domain.”

⁸⁸³ The National Association of Prosecutors of the Republic, Brazil, “After MPF Action, MMA Revokes Harmful Order to the Atlantic Forest”, <<https://anpr.org.br/imprensa/noticias/24111-apos-acao-do-mpf-mma-revoga-despacho-prejudicial-a-mata-atlantica>> [ANPR].

But the instruction conflicted with the *Atlantic Forest Law, 2006*, which in its preamble, “provides for the use and protection of the native vegetation of the Atlantic Forest Biome.”⁸⁸⁴ The law outlaws the cutting of the original vegetation of the Atlantic Forest except in limited circumstances (article 20 of Chapter I)⁸⁸⁵ and criminalizes illegal occupation of the Atlantic Forest (articles 42 and 43 of Chapter II).⁸⁸⁶ Based on the law, the PM instituted proceedings in court, challenging the legality of the instruction issued by the Minister of Environment and asked the court to revoke the instruction.⁸⁸⁷ Moved by the lawsuit, the MOE withdrew and revoked the instruction.⁸⁸⁸ In addition, the PM “released on its social networks videos, post and stories warning the population of the risk of destruction of the biome, considered national heritage by the Federal Constitution. Also, in opposition to the order, the [PM]...issued recommendations to local environmental agencies not to adopt any action based on [the Normative Instruction].”⁸⁸⁹

It could be argued that the PM was able to challenge the MOE because of CERs, as the PM has the constitutional responsibility “to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests” (article 129(III)).⁸⁹⁰ Secondly, although the President of Brazil constitutionally appoints the Procurator-General of the Federation, who is the head of the PM (article 128(1)),⁸⁹¹ the

⁸⁸⁴ Law No. 11,428 of December 22, 2006, <http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11428.htm>.

⁸⁸⁵ Article 20 of Chapter I provides that the “cutting and suppression of the primary vegetation of the Atlantic Forest Biome will only be authorized on an exceptional basis, when necessary for the realization of works, projects or activities of public utility, scientific research and preservationist practices.”

⁸⁸⁶ Article 42 of Chapter III provides that the “action or omission of individuals or legal entities that import non-compliance with the precepts of this Law and its regulations or result in damage to flora, fauna and other natural attributes subject the violators to the sanctions provided for by law.”

Article 43 of Chapter III provides that the following penalty, “detention, from 1 (one) to 3 (three) years, or fine, or both sentences cumulatively.”

⁸⁸⁷ Jenny Gonzales, “Brazil Dismantles Environmental Laws via huge surge in Executive Acts: Study”, *Mongabay* (5 August 2020), <<https://news.mongabay.com/2020/08/brazil-end-runs-environmental-laws-via-huge-surge-in-executive-acts-study/>>.

⁸⁸⁸ ANPR, *supra* note 883.

The search for both the official gazette revoking the instruction and the suit did not yield results.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ Brazil’s Constitution, *supra* note 448.

⁸⁹¹ Article 128 (1) provides that the “head of the Public Ministry of the Federal Government is the Procurator-General of the Republic, appointed by the President of the Republic from career members over thirty-five years of age, after approval by an absolute majority of the members of the Federal Senate, for a term of office of two years, re-appointment being permitted.”

Constitution guarantees the PM independence (article 127(1))⁸⁹² and administrative and financial autonomy (article 127(2)) in carrying out its duties.⁸⁹³

This would not be possible in Nigeria because there are no CERs nor other constitutional guarantees of institutional, financial and operational independence to government agencies which would enable government agencies to challenge the government through policy statements and even court proceedings to ensure environmental protection. The Attorney General of the Federation (AGF), whose office is a creation of the Constitution, is arguably Nigeria's equivalent of the PM (section 174),⁸⁹⁴ because the AGF is the "Chief Prosecutor and guardian of the public interest."⁸⁹⁵

But by the Constitution, the AGF is an appointee of the President of Nigeria (sections 147(2) and 150(1)),⁸⁹⁶ is answerable to the President. It is unlikely that the AGF would defy the President, his appointor, and institute proceedings challenging government positions,⁸⁹⁷ as was done by the PM in Brazil. It seems that one way of dealing with the AGF's lack of independence would be to insulate the office of the AGF from political interference. As such, the chapter agrees with the current effort by the NASS to split the office of the AGF into 2 – the AGF and Minister of Justice – through a constitutional amendment.

⁸⁹² Article 127 (1) provides that the "Unity, indivisibility and functional independence are institutional principles of the Public Ministry."

⁸⁹³ Article 127 (2) provides that the Public Ministry "is assured functional and administrative autonomy."

⁸⁹⁴ Section 174 provides that "(1) The Attorney-General of the Federation shall have power— (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly; (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person ; and (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. (2) The powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department. (3) In exercising his powers under this section the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process."

⁸⁹⁵ Andrew Abuza, "A Reflection on Issues Involved in the Exercise of the Power of the Attorney-General to enter A Nolle Prosequi under the 1999 Constitution of Nigeria" (2020), 2000 (1) *Africa Journal of Comparative Constitutional Law* at 79-109.

⁸⁹⁶ Section 147 (2) provides that "Any appointment to the office of the Minister of the Government of the Federation shall, if the nomination of any person to such office is confirmed by the Senate, be made by the President." Section 150 (1) provides that there "shall be an Attorney-General of the Federation who shall be the Chief Law Officer and a Minister of the Government of the Federation."

⁸⁹⁷ Chinedum Umeche & Pontian Okoli, "An Appraisal of the Powers of the Attorney General of the Federation with Respect to Criminal Proceedings under the Nigerian Constitution" (2008) 34 (1) *Commonwealth L.Bull.* 43 at 50.

The action by NASS is “to avoid the visible politicization of the two critical offices. The lawmakers envisage that the Minister of Justice will deal with policy and administrative issues, while the AG will oversee dispensation of justice without fear or favour.”⁸⁹⁸ If the constitutional amendment is successful, the AGF would begin to be more assertive in carrying out constitutional duties since he or she will not be hamstrung by political considerations. This chapter recommends that in addition to CERs, Nigeria should adopt the Brazilian model by making the office of the AGF financially, structurally and administratively independent. This would make the AGF loyal to the Constitution, rather than the President.

4.2.2. Brazil’s Environmental Police Monitoring Compliance with Environmental Regulations

As seen earlier in chapter 3, another institution created to ensure compliance with environmental regulations in Brazil is the Environmental Police with the duties of “environmental licensing, environmental quality control... supervision and, monitoring.”⁸⁹⁹

One strategy that the Environmental Police uses to monitor compliance with environmental norms is technology. From 2013 and with the aid of GPS navigators, its members have been geo-referencing the precise locations of environmental crimes and this has increased “the effectiveness of its [environmental policing] actions, [as] reflected in the increase in the number of environmental criminals records every year, without a significant increase in its staff.”⁹⁰⁰ Another technology deployed by the Environmental Police is the BatchGeo software, which “allows the generation of maps with ease from the insertion of data, such as postal code..., address, city, intersections, and state, which are arranged in a spreadsheet table or program. This allowed the elaboration of maps where it was possible to visualize the environmental crime

⁸⁹⁸ Godwin Tsai, “Senior Lawyers divided over Proposed Amendment to split Office of AGF”, *The Sun* (7 February 2022), <<https://www.sunnewsonline.com/senior-lawyers-divided-over-proposed-amendment-to-split-office-of-agf/>> [Tsai].

⁸⁹⁹ Ibama, “About Ibama” <<https://www.gov.br/ibama/pt-br/acesso-a-informacao/institucional/sobre-o-ibama#historico>>.

⁹⁰⁰ Eduardo de Oliveira et al, “EduGeocollaboration in Environmental Inspection Activities in the Environmental Military Police of Rio De Janeiro State – Brazil” (2020) 13 (2) *Boletim do Observatório Ambiental Alberto Ribeiro Lamego* 261 at 264-265 [Oliveira et al].

spot.”⁹⁰¹ This has improved operations, increased efficiency and reduced cost because of the precision in locating environmental crime spots.⁹⁰²

Another strategy employed by the environmental police is geo-collaboration which involves partnering with the communities to obtain information on environmental violations through various avenues including phone calls and emails, analyzing the received information for authenticity and then acting on them. This again has improved efficiency, resulting in the apprehension of many environmental violators.⁹⁰³ Even more importantly, it has also enhanced community participation, which is essential for Environmental Justice. Perhaps, the number of seizures and environmental violator arrests is an indication of this efficiency. Between 2013 and early 2014, the Environmental Police in a nationwide crackdown seized a total of 142,744.70 kg of illegally hunted fishes and 1149 illegally hunted animals.⁹⁰⁴ In Rio de Janeiro alone, from 2014 to 2016, there was an upswing in the apprehension of environmental violators with 1,747 suspects apprehended in 2014, 2,597 in 2015 and 3,002 in 2016.⁹⁰⁵

As part of their engagement with the populace, the Environmental Police also embark on “publicity campaigns with the purpose of publicizing its work and means of contact, to stimulate the communication of crimes by the population, again empowering community participation. During the first half of 2014, 861 complaints were received and, in the same period of 2017, 2,245, [complaints were received].”⁹⁰⁶

Apart from these strategies, what has also aided the effectiveness of the Environmental Police is the size and spread of its workforce. It has presence “in almost all Brazilian municipalities and it has territorial coverage exceeding that of all other institutions.”⁹⁰⁷ As of 2020, “all federal states have at least one unit specialized in environmental policing, with more than 7,000 officers dedicated to protecting the environment.”⁹⁰⁸

⁹⁰¹ *Ibid* at 284.

⁹⁰² *Ibid*.

⁹⁰³ *Ibid* at 263 & 265.

⁹⁰⁴ Aline Chagas et al, “Illegal Hunting and Fishing in Brazil: a Study Based on Data Provided by Environmental Military Police” (2015) 13 (2) *Brazil Journal of Nature Conservation* 183 at 184 & 186 [Chagas et al].

⁹⁰⁵ Oliveira et al, *supra* note 900 at 268.

⁹⁰⁶ *Ibid* at 285.

⁹⁰⁷ Chagas et al, *supra* note 904 at 188.

⁹⁰⁸ Oliveira, *supra* note 900 at 263.

However, despite CERs, Brazil under the Bolsonaro presidency has witnessed a weakening of environmental policies and regulations. Mr. Bolsonaro's attack on environmental policies has been described by Suely De Araújo as "a complete and total rupture."⁹⁰⁹ It has been alleged that Mr. Bolsonaro has found a willing ally in Ricardo Salles whom he appointed as the Minister of Environment. Mr. Salles' superintendence has been described by Andrea Hoffmann as leading to "a neoliberal strategy, with disastrous effects for forest protection."⁹¹⁰ The next segment will analyze the anti-environmental policies of Bolsonaro, their effects and the resilience of CERs in the face of government onslaught seeking to reverse the gains made by CERs.

4.2.3. Bolsonaro's Anti-Environment Policies and CERs

A key argument of this thesis has been that a strategic reason for CERs is that it is very difficult to change constitutional rules, and that governments will be bound by these obligations. The Bolsonaro government has been a true test of the CERs adopted in Brazil in 1988. It has put in place various mechanisms to weaken environmental regulations in Brazil. One strategy seems to be the transfer of agencies under the supervision of MOE to other ministries. For instance, the National Water Agency was moved to the Ministry of Regional Development, the Brazilian Forest Service which handled forest concessions was moved to the Ministry of Agriculture, Livestock and Supply (MAPA), the department that oversaw fisheries and their conservation was moved to MAPA and the department in charge of public forest management which manages forest concessions was moved to MAPA. The implication is that the MOE is no longer in charge of most of its core regulatory responsibilities and the transfers have also affected the synergy between these transferred departments and the MOE.⁹¹¹

However, the PM challenged the transfer of the Brazilian Forest Service from the MOE to MAPA in the federal court. It argued that MAPA will now be saddled with the responsibility of granting forest concessions but that such a responsibility "is incompatible with the nature and competences of [MAPA], 'which lacks institutional capacity for the performance of the function

⁹⁰⁹ Araújo, *supra* note 531 at 2.

⁹¹⁰ Andrea Hoffmann, "Brazil Under Bolsonaro" (2020) 11 (2) Latin American Policy 335 at 336 [Hoffmann].

⁹¹¹ Araújo, *supra* note 531 at 2-3.

assigned to it.”⁹¹² In May 2020, the court reversed the transfer. The influence of CERs on the judgment is discernable.

As observed in chapter 3 of the thesis, one of the benefits of CERs is the potential to galvanize the legislature into enacting environmental legislation to bolster CERs. *Law No. 11,284, 2006*⁹¹³ grounded forest concessions in the MOE. As such, it was easy for the court to reverse the transfer to MAPA:

[A]ttributing the management of public forests to the Ministry of the Environment was a political decision of the Legislative Power, which even had the sanction of the Executive Branch. It is then left to the Executive Branch to 'establish the conditions under which the law must be enforced and provide the best way to make its determinations effective', and not to change it unilaterally.⁹¹⁴

Another strategy adopted by the Bolsonaro presidency is the outright abolishment of some environmentally sensitive departments without the transfer of their duties to other agencies. For example, both the Climate Change Secretariat and the Department of Environmental Education have been scrapped by the government. As their names imply, these departments were strategic in the fight against environmental degradation.⁹¹⁵

The decision by Mr. Bolsonaro to cut funding to the environment subsector also undermines environmental sustainability.⁹¹⁶ Even if the government may be witnessing shortfalls in revenues due to Covid-19, the Brazilian environmental subsector had witnessed consistent annual decline in budgetary allocations from the Bolsonaro government even before the pandemic. In “the 2020 budget, BRL 77 million – 25.3% less than in 2019 – was set aside for Ibama [Environmental Police] inspections. These inspections include some 1,200 operations across the country annually.”⁹¹⁷ While the MOE has seen a steady decline in funding, the same is not the case with

⁹¹² Case Number: 1013760-70.2020.4.01.3900.

See Federal Court, “Sentence suspends Decree that transferred from MMA to the Ministry of Agriculture the Power to Grant Public Forests” (8 July 2020), <<https://portal.trf1.jus.br/sjpa/comunicacao-social/imprensa/noticias/sentenca-suspende-decreto-que-transferiu-do-mma-para-o-ministerio-da-agricultura-o-poder-de-concessao-de-florestas-publicas.htm>>.

⁹¹³ Law No. 11,284 of March 2, 2006. My repeated search for the primary source of the law has not yielded result.

⁹¹⁴ Federal Court, “Sentence suspends Decree that transferred from MMA to the Ministry of Agriculture the Power to Grant Public Forests” (July 8, 2020), <<https://portal.trf1.jus.br/sjpa/comunicacao-social/imprensa/noticias/sentenca-suspende-decreto-que-transferiu-do-mma-para-o-ministerio-da-agricultura-o-poder-de-concessao-de-florestas-publicas.htm>>.

⁹¹⁵ Araújo, *supra* note 529 at 3.

⁹¹⁶ Sara Villén-Pérez et al, “Brazilian Amazon Gold: Indigenous Land Rights under Risk” (2020) 8 (4) *Elementa* 1 at 2.

⁹¹⁷ Araújo, *supra* note 531 at 3.

other seemingly favored ministries like the MAPA. In the 2020-2023 budget plan, while BRL 2.2 billion was allocated to the MOE and agencies under it for the 4-year period, BRL 100 billion was allocated to MAPA to fund a single agricultural project.⁹¹⁸

On the implications of both the policy change and funding cuts for environmental regulation, Justin Rowlatt observed that the “environmental police force, IBAMA, is facing new challenges due to government policy changes...Cuts to government funding...have left the authority with little resources to protect the Amazon from illegal logging and mining.”⁹¹⁹ It seems that the funding cuts have particularly impacted the protection of the Amazon because it has been confirmed that the “pace of deforestation [in the Amazon] ... was 10% faster in 2020 than in 2019. Yet the president merrily slashed the budget for environmental enforcement for the third year in a row.”⁹²⁰ Andrea Hoffmann confirmed that because of the anti-environmental policies of Mr. Bolsonaro, “the 2020 Amazon deforestation rate is the highest in the last decade.”⁹²¹

However, and as seen earlier in the chapter, unlike the Environmental Police, the PM has been constitutionally insulated from funding cuts because it enjoys financial autonomy:

As set forth in the Brazilian Constitution, the Ministério Público has functional as well as administrative and financial independence from the three traditional branches of government. Each prosecutor enjoys functional autonomy – he chooses how to conduct his investigations and judicial actions. To protect this independence, the constitution provides guarantees of life tenure, as well as protection from demotion, transfer, and salary reduction. As an institution, the Ministério Público enjoys administrative and financial autonomy. It creates its own job openings, writes its own budget, and determines its own salary levels. While the governor appoints the attorney general, he is restricted to choosing from a list of three prosecutors elected by the other prosecutors. Having emerged from the constitutional process as a powerful and independent institution, the Ministério Público is often referred to as the ‘fourth branch’ of government.⁹²²

⁹¹⁸ *Ibid* at 16.

⁹¹⁹ “Brazil: Environment police battle for Amazon rainforest”, *BBC* (25 April 2021) <<https://www.bbc.com/news/av/science-environment-56847298>>.

⁹²⁰ “At Loggerheads over the Amazon; Biden and Bolsonaro”, *The Economist* (20 March 2021) <<https://go-gale-com.proxy.bib.uottawa.ca/ps/i.do?p=AONE&u=otta77973&id=GALE%7CA655444978&v=2.1&it=r>> [The Economist].

⁹²¹ Hoffmann, *supra* note 910 at 336.

⁹²² Lesley McAllister, “Public Prosecutors and Environmental Protection in Brazil” in Aldemaro Romero & Sarah West, ed, *Environmental Issues in Latin America and the Caribbean* (Netherlands: Springer, 2005) 207 at 220 [Lesley McAllister].

This indicates that constitutionalizing environmental rights and other essential supporting institutions including assuring financial, structural and administrative autonomy to environmental regulatory bodies contributes to environmental sustainability. The next segment will analyze the utility of CERs for resisting Bolsonaro's anti-environmental policies, which underscores the relevance of CERs to Nigeria, despite that government's seeming aversion to environmental sustainability.

4.2.4. CERs Empowering Resilience to Bolsonaro's Anti-Environment Policies

At least 4 useful lessons could be drawn from Mr. Bolsonaro's anti-environmental policies vis-à-vis the efficacy of CERs. First, when environmental rights are not enshrined in the Constitution as they are in Brazil but remain as policies as is the case in Nigeria, they are at the mercy of the government and can be dismantled without much resistance. Mr. Bolsonaro was able to either abolish or transfer environmentally sensitive agencies and cut funding from the remaining agencies because these are policy decisions, but he has not been able to remove environmental provisions in the Constitution. Bolsonaro has not been able to cut funding nor interfere with the workings of the PM regarding its environmental responsibilities because its financial and institutional independence are constitutionally guaranteed.

Second, Brazilian courts are still enforcing CERs since they have a duty to enforce constitutional provisions. The case of the *Claim of Non-Compliance with Fundamental Precept*⁹²³ heard by the Brazilian Supreme Court, which is the first climate-related case to be heard by the Court,⁹²⁴ seems apt in demonstrating the willingness of the courts to enforce CERs despite the anti-environmental proclivity of Mr. Bolsonaro.

Brazil enacted the *National Policy on Climate Change Act (PNMC)*, 2009⁹²⁵ to initiate measures to reduce climate vulnerabilities (art. 2 (I)). The law creates "the National Fund on Climate Change" (art. 6 (II)) and provides for "specific appropriations for climate change actions in the Union budget" (art. 6 (IX)) and "financial and economic mechanisms, at the national level,

⁹²³ ADPF 708, *the Supreme Court of Brazil* <<http://portal.stf.jus.br/processos/detalhe.asp?incidente=5951856>> [The Supreme Court of Brazil].

⁹²⁴ Maria Tigre, "Brazil's First Climate Case to Reach the Supreme Court", *Opinio Juris in Association with the International Commission of Jurists* (13 October 2020) <<http://opiniojuris.org/2020/10/13/brazils-first-climate-case-to-reach-the-supreme-court/>> [Tigre].

⁹²⁵ No. 12,187 of December 29, 2009, <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/112187.htm>.

related to mitigation and adaptation to climate change” (art. 6 (XI)). However, Bolsonaro refused to finance the Climate Change Fund. The suit was instituted at the Supreme Court in June 2020 by 4 political parties, alleging that Bolsonaro’s failure to finance the Fund is a breach of the constitutional right to a healthy environment.⁹²⁶ The plaintiffs also “[questioned] the government’s dissolution of the Secretariat of Climate Change, the government agency responsible for the Fund, as the stripping down of the Fund’s institutional governance. These actions [furthered] a disregard from the current administration of environmental policies, leading to a trend of environmental regression.”⁹²⁷ The plaintiffs asked the Court to declare Bolsonaro’s action unconstitutional and for an order compelling Bolsonaro to re-activate the Climate Change Fund.⁹²⁸

In response, the government argued that there was no constitutional provision compelling the government to set up the Fund, that how the government manages the fund is a policy matter, which is not justiciable, therefore, the Court’s intervention will violate the principles of separation of power.⁹²⁹ The court had already ruled that ‘environmental protection is not a political option, but a constitutional duty’ and that “this state of affairs affects each person’s right to a healthy environment, as well as other fundamental constitutional rights, such as the right to life, health, food and water security, housing, work, and could impact ‘the right to cultural identity, the way of life, and the livelihood of Indigenous peoples.’”⁹³⁰ It had also declared that it “would judge the case based on facts, the Constitution, internationally agreed commitments, and the national legislation.”⁹³¹

Perhaps influenced by the constitutional right to public participation in environmental governance (section 225)⁹³² and the *PNMC* which provides for public participation in the formulation and implementation of climate policy (art. 3)⁹³³ and for the involvement of

⁹²⁶ Tigre, *supra*, note 924.

⁹²⁷ Maria Tigre & Alex Goodman, “ADPF708/Climate Fund. What to expect from Brazil’s First Public Hearing on Climate Policy?” *The Global Network for Human Rights and the Environment* (22 September 2020) <<https://gnhre.org/2020/09/22/adpf708-climate-fund-what-to-expect-from-brazils-first-public-hearing-on-climate-policy/>> [Tigre & Goodman].

⁹²⁸ *Ibid.*

⁹²⁹ Tigre, *supra*, note 924.

⁹³⁰ *Ibid.*

⁹³¹ *Ibid.*

⁹³² Brazil’s Constitution, *supra* note 448.

⁹³³ Article 3 provides that the National Policy on Climate Change “and the actions arising therefrom, carried out under the responsibility of the political entities and public administration bodies, shall observe the principles of

academia, businesses and civil society in the formulation and implementation of climate change policy (art. 5 (V)),⁹³⁴ the Court, between September 21-22, 2020, conducted its first ever public hearing to listen to broader opinions independent of the parties. Sixty-six experts “provided their thoughts on climate change in Brazil. These included scientists, environmentalists, Indigenous people, businesspeople from the agribusiness and financial sectors, NGO representatives, economists, researchers, parliamentarians, and representatives of the federal and state governments... The Court sought to expand public participation by convening the unprecedented public hearing.”⁹³⁵

As an indication of what the final judgment would be, the Court in its earlier rulings, affirmed the principles of sustainability by declaring “that the country’s inaction, if proven, is ‘potentially harmful from any perspective: environmental, social, cultural or economic.’”⁹³⁶ In its final judgment delivered in July 2022, the Court held that the Executive Branch of the Federal Government is constitutionally obligated to “make the resources of the Climate Fund work and allocate annually for the purpose of mitigating climate change... due to the constitutional duty of protection to the environment..., international rights and commitments assumed by Brazil..., as well as the constitutional principle of separation of powers.”⁹³⁷ With this decision, the Court has “recognised the climate fund as the main tool available to cut Brazil’s emissions. Not using it was therefore a breach ‘by omission’ of the national constitution, which requires the state to protect the environment for current and future generations.”⁹³⁸

In a broader context, the Court affirmed that Treaties “on environmental law are a type of human rights treaty and, for that reason, enjoy supranational status. There is therefore no legally valid option to simply omit to combat climate change.”⁹³⁹ If access to justice in Nigeria is improved to

precaution, prevention, citizen participation, sustainable development and that of common but differentiated responsibilities.”

⁹³⁴ Article 5 provides that “the Guidelines of the National Climate Change Policy: V - the encouragement and support for the participation of the federal, state, district and municipal governments, as well as the productive sector, academia and organized civil society, in the development and implementation of policies, plans, programs and actions related to climate change.”

⁹³⁵ Tigre, *supra* note 924.

⁹³⁶ Tigre & Goodman, *supra* note 927.

⁹³⁷ The Supreme Court of Brazil, *supra* note 923.

⁹³⁸ Isabella Kaminski, “Brazilian Court World’s First to recognise Paris Agreement as Human Rights Treaty”, *Climate Home News* (7 July 2022) <Brazilian court world's first to recognise Paris Agreement as human rights treaty (climatechangenews.com)> [Kaminski].

⁹³⁹ *Ibid.*

this level, the Niger Delta could begin to hold the Nigerian government accountable on its environmental Treaty obligations towards the sustainability of the Niger Delta environment. The filing of the case by political parties also indicates broader access to justice and public participation in resource governance for Brazilians. If the law in Nigeria is developed up to this level, it would present more opportunities for the Niger Delta people, who would then have a broader range of options at the courts to ventilate their environmental grievances.

Third, perhaps to comply with CERs, despite the weakening of environmental policies by Mr. Bolsonaro,⁹⁴⁰ the PM and other regulatory agencies have managed to assert their independence in monitoring compliance with environmental regulations. For instance, in 2021 the federal police conducted a double raid on the MOE and on the home of the Minister of Environment to investigate the export of timber unlawfully harvested from the Amazon rainforest. The investigation - whose prime targets were “the environment minister, Ricardo Salles, and his environmental chief, Eduardo Bim – was celebrated by activists...about 160 officers had raided addresses in the capital, Brasília, São Paulo, and the Amazon state of Pará with search warrants as part of the inquiry into suspected acts of corruption involving government employees and loggers.”⁹⁴¹

In fact, in the case of the *Claim of Non-Compliance with Fundamental Precept*⁹⁴² analyzed above, the Supreme Court noted “that the government ‘hurriedly’ resumed some of the climate fund’s activities after the legal challenge was filed, but not all. It ordered the state to properly reactivate the fund, prepare and present annual plans for allocating resources and disburse funds to projects.”⁹⁴³ This may be indicative of broad enforcement of environmental norms in Brazil, despite the onslaught by Mr. Bolsonaro.

The broad enforcement of environmental laws and regulations by the PM has engendered in the public the notion that infractions against the law perpetuated by powerful state, corporate and individual interests “environmental or otherwise—will not be ignored. By filing cases against powerful industries and governmental entities, the PM gained a reputation as above and distant

⁹⁴⁰ Tom Phillips, “Brazilian Police Raid Environment Ministry Over ‘Illegal’ Timber Sales”, *The Guardian* (19 May 2021) <<https://www.theguardian.com/world/2021/may/19/brazilian-police-raid-environment-ministry-timber-sales>>.

⁹⁴¹ Ibid.

⁹⁴² The Supreme Court of Brazil, *supra* note 923.

⁹⁴³ Kaminski, *supra*, note 938.

from the corruption associated with all levels of the Brazilian government and gained legitimacy in the eyes of the public.”⁹⁴⁴ These achievements would not be possible without CERs. Lesley McAllister explores the link between the successes recorded by the PM and CERs thus:

A new model of environmental regulation is being forged in Brazil that may stem the chronic under-enforcement of environmental laws. The public prosecutors of the Ministério Público have become active in environmental protection, enforcing Brazil’s environmental laws against private as well as public actors. Transformed by the Federal Constitution of 1988 from an institution that was dedicated primarily to defending the interests of the state in criminal cases into one that is also responsible for defending environmental and other public interests, the Ministério Público has changed the face of environmental law enforcement in Brazil.⁹⁴⁵

Lastly, emboldened by CERs, there has been a push back against Bolsonaro’s anti-environmental policies, including from the legislature, the people and the international community. The Bolsonaro government sent the *Land Regularization Bill*, 2019⁹⁴⁶ to the legislature to legalize, on very liberal terms, illegal occupation of federally controlled lands from 2008 to 2018. This would legitimize illegal occupation of the Amazon rain forest during this period. But the legislature spurned the pressure from Bolsonaro’s government and refused to vote on the proposal until it expired on May 19, 2020, as the concern was that the legalization of illegal occupiers on public lands would regularize their stay and prevent their ejection, resulting in deforestation and environmental degradation because amenities would now be provided around the new settlements.⁹⁴⁷

Another bill sent to the legislature in February 2020 by the Bolsonaro government was Bill PL 191/2020 which sought to allow further mining activities and utilization of water resources to produce electricity on Indigenous peoples’ land.⁹⁴⁸ Indigenous peoples’ land makes up 23% of the Amazon rainforest, stretching to over 100 million hectares and equals Colombia in size.⁹⁴⁹ The Amazon is not only vital to Brazil; it is also strategic to the Earth’s environmental sustainability because not “only is the rainforest brimming with irreplaceable biodiversity, it is

⁹⁴⁴ Clark, *supra* note 875 at 87.

⁹⁴⁵ McAllister, *supra* note 922 at 207.

⁹⁴⁶ Brazil National Congress, “Bill MP N° 910/2019” <<https://www.congressonacional.leg.br/materias/medidas-provisorias/-/mpv/140116>>.

⁹⁴⁷ Araújo, *supra* note 531 at 6-7.

⁹⁴⁸ Bill PL 191/2020.

I have not been able to locate the primary source of the Bill. For the secondary source, see Sara Villén-Pérez et al, “Brazilian Amazon Gold: Indigenous Land Rights under Risk” (2020) 8 (4) *Elementa* 1 at 1 [Villén-Pérez et al].

⁹⁴⁹ *Ibid.*

also a carbon sink. Burning or chopping it down turns it into a source of carbon emissions instead.”⁹⁵⁰

Mining already accounts for about 10% of the deforestation in the Amazon, and, as such, further mining activities would exacerbate the environmental condition of the Amazon. It is estimated that mining is responsible for about 70 km of forest loss because transport infrastructure to move machinery, workers and products must be developed around the mining site, housing built near the mining site to accommodate workers, and feedstock companies set up near the mining site to supply raw materials needed.⁹⁵¹

In addition, chemical pollution from the different mining procedures is a health hazard for the local populace including flora and fauna as chemicals accumulate in food chains and supplies. Recently in Brazil, two tailing dams collapsed with severe environmental, social and economic consequences for the areas and water bodies affected by the toxic sediment in the worst ecological catastrophe in Brazilian history.⁹⁵² This has heightened awareness of the risks to ecological systems and human health that mining operations pose.⁹⁵³ In 2009, over 400 leaders of the Indigenous people in Brazil led a demonstration protesting the various policies of the government, including Bill PL 191/2020.⁹⁵⁴ In response to this pressure,⁹⁵⁵ the Speaker of the Chamber of Deputies “declared that he does not intend to allow a reading of the mining bill while he is in office.”⁹⁵⁶ The international community also mounted pressure on Mr. Bolsonaro to reverse his anti-environmental policies.⁹⁵⁷

If the above is anything to go by, Bolsonaro did not have a free rein in dismantling environmental protection in Brazil. During the public hearing conducted by the Court in the *Claim of non-compliance with fundamental precept case*, “some government officials acknowledged a few shortcomings in current policies, such as the reduced enforcement of environmental regulation and implementation of existing environmental laws.”⁹⁵⁸ This may

⁹⁵⁰ The Economist, *supra* note 920.

⁹⁵¹ Villén-Pérez et al, *supra* note 948 at 2.

⁹⁵² *Ibid.*

⁹⁵³ *Ibid.*

⁹⁵⁴ *Ibid* at 3.

⁹⁵⁵ *Ibid.*

⁹⁵⁶ Araújo, *supra*, note 531 at 8.

⁹⁵⁷ The Economist, *supra*, note 920.

⁹⁵⁸ Tigre, *supra*, note 924.

signal a change of attitude by Bolsonaro. Without these reactions, maybe Brazil would have witnessed further and unprecedented dismantling of environmental regulations. These scenarios are indicative that CERs, much more than ordinary legislation and policies, have the resilience to withstand political maneuverings aimed at crippling them. This is why they are needed in the Niger Delta.

4.3 Implementation of Environmental Regulations by Agencies

The second benefit that this chapter will examine is that CERs could lead to on-the-ground improvement in the implementation of environmental laws and regulations, which should in turn lead to the improvement on the environmental profile of the Niger Delta. For the Niger Delta, a rigorous implementation of environmental regulations could serve a variety of purposes and deliver diverse benefits.

As seen in the segment on monitoring compliance with environmental norms by government agencies (the first benefit considered in this chapter), monitoring compliance and implementation sometimes dovetail. As such, some examples cited above under monitoring compliance also reveal the implementation of environmental norms by government agencies.

Besides those, there are many other benefits to implementing environmental norms. First, implementation would serve as a deterrent against the continued degradation of the environment.

Second, implementation of laws could improve the socio-economic situation of the Niger Delta people by ensuring that clean-ups of their degraded lands and polluted waters is completed, which in turn will improve the environmental and living conditions of the Niger Delta.⁹⁵⁹ For example, as already noted, UNEP discovered that oil pollution had severely affected fishing and farming which are the mainstay of the Ogoni people, thereby depriving them of the sources of their livelihoods and this in turn pushes the people into ventures like oil bunkering and illegal artisanal refining of crude oil that further degrade the Niger Delta environment.⁹⁶⁰

⁹⁵⁹ UNEP Report, *supra* note 13 at 178 & 181.

⁹⁶⁰ UNEP defines Bunkering as “the illegal tapping of oil industry infrastructure with a view to procuring oil illegally”. See UNEP Report, *ibid* at 101.

On Artisanal Refining, UNEP opines that the “process of artisanal refining typically involves primitive illegal stills – often metal pipes and drums welded together – in which crude oil is boiled and the resultant fumes are collected, cooled and condensed in tanks to be used locally for lighting, energy or transport.” See UNEP Report, *ibid* at 102.

Third, enforcement of sanctions and fines could be an important source of revenue for government agencies who have been hamstrung by lack of funds to carry out their mandates.⁹⁶¹ For instance, the Director General of the NOSDRA cited lack of funds as the reason why NOSDRA could not carry out its responsibilities.⁹⁶² Imposing and collecting fines could be a source of revenue to government to assist in further implementing environmental laws.

The PM in 2022 seized from criminals in Brazil, ‘Standak Top’ a pesticide valued at R\$ 2,074,000.00 (\$556, 479.74 CAD). The PM thereafter conducted a public auction of the product since it was still useful and all the proceeds realized “from the sale will be passed on to the National Anti-Drug Fund (Funad) to carry out projects, campaigns, studies and training straining that promote the reduction of drug supply and demand.”⁹⁶³ Similarly, Chevron Corporation, a TNC operating in Brazil’s petroleum industry was fined by the regulator for the oil spill that happened in its facility. Chevron accepted and paid \$ 17.3 million (USD) in satisfaction of the fine, despite the admission by the regulator that Chevron was not negligent and that the “spill caused no discernable environmental damage, [did]not reach shore and did not harm human or animal life... [and] was controlled within four days.”⁹⁶⁴ As will be seen later in the chapter in the segment on *Conflicts arising from the NNPC’s Dual Mandates*, imposing and collecting fines is fraught with challenges, even in Brazil, but the fines, if eventually collected, would bolster government’s financial base and could be ploughed back into the implementation and enforcement of environmental laws.

Fourth, strict implementation of environmental regulations could lift the gloom being felt by the Niger Delta people who feel abandoned by an insensitive government.⁹⁶⁵ Experts assert that this

On the impact of artisanal refining on the environment, UNEP observes that the distilleries used in the refining “are heated on open fires fed by crude oil that is tipped into pits in the ground. As part of the oil burns away, some seeps into the ground”. See UNEP Report, *Ibid*.

⁹⁶¹ Eaton, *supra*, note 66 at 290.

⁹⁶² Chidimma Okeke, “NOSDRA New DG to Address Underground Water Pollution, Oil Spills”, *Business & Human Rights Resource Centre*, (3 April 2019) <<https://www.business-humanrights.org/en/nigeria-regulatory-agency-pledges-to-pay-more-attention-to-underground-water-pollution-from-oil-spills>>.

⁹⁶³ Ministry of Justice and Public Security, “Ministry of Justice and Public Security holds, in an unprecedented way, Auction of Agricultural Pesticides seized from Criminals”, (30 March 2022) <<https://www.gov.br/mj/pt-br/assuntos/noticias/ministerio-da-justica-e-seguranca-publica-realiza-de-forma-inedita-leilao-de-defensivos-agricolas-apreendidos-de-criminosos>>.

⁹⁶⁴ Jeb Blount, “Chevron Pays \$17.3 Million Brazil Fine for November Spill”, *Market Screener* (27 September 2012) <<https://www.marketscreener.com/quote/stock/PETROBRAS-6496795/news/Chevron-pays-17-3-million-Brazil-fine-for-November-spill-15241203/>>.

⁹⁶⁵ UNEP Report, *supra* note 13 at 6.

is one of the reasons why the people take to the destruction of oil facilities to spite the government and the TNCs.⁹⁶⁶ Implementation of laws could renew their confidence in government and government policies and actions; this would result in greater adherence to government regulation, instead of taking the laws into their hands. Many of these benefits have been seen in Brazil, despite Bolsonaro, as explained above.

Fifth, Boyd emphasizes that CERs can put pressure on the government to find and invest resources to fund the environmental regulatory agencies, so they can deliver on implementation. According to him, theoretically, “constitutional recognition of the right to a healthy environment should ensure that governments establish and adequately resource a system for implementing, monitoring compliance with, and enforcing environmental laws and regulations.”⁹⁶⁷ Much like Bolsonaro’s Brazil, Nigeria also has huge funding gaps in the implementation of environmental laws. This is a point that has been made repeatedly by various agencies of government that regulate the environment. Some of them are turning to TNCs for logistical assistance to carry out their jobs. These scenarios have created conflicts of interest for the agencies, to the detriment of the environment.

Shell has been particularly involved in providing funds and logistical support for security agencies in Nigeria.⁹⁶⁸ The Director General of NOSDRA alluded to this thus: “[p]eople are saying that NOSDRA depends on oil operators to carry out its [regulatory] duties. They say we enter their helicopters, boats and use other equipment belonging to operators to inspect or monitor spills, but what can we do really? We don’t have the tools to work.”⁹⁶⁹ Nigeria’s lack of facilities is particularly acute and was seriously exposed by UNEP during its environmental assessment of the impact of the crude oil extractive industry on Ogoniland in 2011. UNEP later confessed that the assignment was the most tasking job in its history.⁹⁷⁰ UNEP had to send all the samples taken from Ogoniland to ISO 17025 accredited laboratories abroad for scientific examination⁹⁷¹ as a result of the non-existence of these facilities in Nigeria. Although this was in

⁹⁶⁶ Duruji, *supra* note 52 at 329.

⁹⁶⁷ Boyd, *supra* note 28 at 29.

⁹⁶⁸ Ako, *supra*, note 63 at 628.

⁹⁶⁹ Egufe Yafugborhi, “Nigeria lags behind in Response to Oil Spills”, *Vanguard Newspaper* (18 April 2018) <<https://www.vanguardngr.com/2018/04/nigeria-lags-behind-response-oil-spill-nosdra/>>.

⁹⁷⁰ UNEP Report, *supra* note 13 at 8.

⁹⁷¹ *Ibid* at 9.

2011, there is no record of any improvement in this direction in the past decade. The Director General of NESREA has admitted that the agency also lacks the requisite manpower to effectively discharge its mandate of regulating Nigeria's environment.⁹⁷² This is not an exception but the norm. The Director General of NOSDRA similarly admitted that the agency lacks the required manpower to carry out its duties of detecting and sanctioning companies that release crude oil into the environment.⁹⁷³ This highlights the institutional failure that has trailed environmental regulation and compliance monitoring in Nigeria.

Contrasting this with Brazil, one readily sees the huge gap that Nigeria must bridge to be able to implement environmental laws. In Brazil, the MP alone has about 9, 000 prosecutors and additional 10,000-person support staff.⁹⁷⁴ Although these statistics were published in 2017, I have found no record of the staff strength of the PM under President Bolsonaro's government. However, even if the staff strength has diminished under Bolsonaro's presidency, it would not be as a result of any external pressure, because the Constitution guarantees the PM both financial and administrative autonomy which enables it undertake staff recruitment independent of other institutions of government, including the Presidency (article 127 (2)).⁹⁷⁵

Because of this relatively high number of staff members, the PM is able to prosecute about 96% of environmental litigation in Brazil and this alone has "improved compliance with environmental laws and helped contribute to the [PM's] reputation as an independent body, separate from the corruption known to plague other governmental bodies in Brazil."⁹⁷⁶ It is hoped that if Nigeria adopts CERs, it would lead to similar results in terms of galvanizing

⁹⁷² "NESREA Begins Capacity Building on Environmental Laws and Climate Change Adaptation", *AgroNature* (8 March, 2018) <<https://agronaturenigeria.com/nesrea-begins-capacity-building-on-environmental-laws-and-climate-change-adaptation/>>.

⁹⁷³ Chidimma Okeke, "Regulatory agency pledges to pay more attention to underground water pollution from oil spills", *Business & Human Rights Resource Centre* (15 April, 2019) <<https://www.business-humanrights.org/en/nigeria-regulatory-agency-pledges-to-pay-more-attention-to-underground-water-pollution-from-oil-spills>>.

⁹⁷⁴ Salo Coslovsky, "Relational Regulation in the Brazilian Ministério Público: The Organizational Basis of Regulatory Responsiveness" (2011) 5 (1) *Regulation & Governance* 70 at 73.

⁹⁷⁵ Article 127 (2) provides that the Public Ministry "is assured functional and administrative autonomy, and it may, observing provisions of art. 169, propose to the Legislature creation and abolition of its positions and auxiliary services, filling them through competitive public examinations, or such examinations and comparison of professional credentials; remuneration policy; and career plans."

⁹⁷⁶ Clark, *supra* note 875 at 83.

government to make the necessary investment in, and implement, the institutional reform needed to enforce environmental laws and regulations.

4.4 Enforcement of Environmental Laws and Regulations by the Courts

In addition to government enforcement agencies, Boyd opines that CERs provide the courts with added impetus to enforce environmental laws and regulations. The “constitutionalization of environmental protection ‘brought a degree of legal fidelity and sanctioning power that environmental regulatory agencies lacked, and prosecution of environmental cases worked to dispel the longstanding notion of impunity for environmental harm.’”⁹⁷⁷

Enforcement by the courts is very important in the implementation of environmental laws and regulations. Experts like Lucas Christel and Ricardo Gutiérrez argue that “the advance of environmental rights depends on how people...utilize existing legal provisions to redress their grievances.”⁹⁷⁸ They rely on the Argentine’s Supreme Court’s enforcement of CERs that led to the clean-up by the government of the then heavily polluted Matanza-Riachuelo River in Argentina.⁹⁷⁹ We turn to that example now.

4.4.1. The Matanza-Riachuelo River’s Case in Argentina

Boyd has given the example of this case to suggest that courts are more likely to enforce environmental laws and regulations where there are CERs. According to him, before the constitutional reforms that introduced CERs in Argentina in 1994, “‘there was a considerable vacuum in national legislation on the judicial protection of so-called diffuse and collective interest,’ including the environment. Today, Argentina is a ... leader in judicial recognition and enforcement of the constitutional right to live in a healthy environment.”⁹⁸⁰

Daniel Ryan and Andrés Nápoli note that the river Matanza-Riachuelo basin is reputed to be among thirty of the world’s most contaminated places which is not altogether surprising since the river supports the industrial and household needs of so many people. About 20% of Argentina’s population, or 8,212,000 people, call the river basin area home, with many of them lacking basic

⁹⁷⁷ Boyd, *supra* note 28 at 133.

⁹⁷⁸ Christel & Gutiérrez, *supra*, note 435 at 323.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Boyd, *supra*, note 28 at 129.

sanitation facilities and the river serving as the outlet for sewage disposal and sanitation needs. Also, about 11,000 companies, including high pollution-generating industries in the Dock Sur Petrochemical Area, operate within the environs of the river basin with the river also serving as an effluent disposal outlet for them. Furthermore, the river plays host to about 300 open landfills that are not only illegally operated, but also serve as warehouses for all manners of waste including household, mechanized and hazardous wastes.⁹⁸¹

Galvanized by the shift in the power balance due to CERs, in July of 2004 the residents and victims of the pollution of the Matanza-Riachuelo River basin area led by local resident Beatriz Silvia Mendoza and supported by the country's public ombudsman and ENGOs - the Environment and Natural Resources Foundation, Greenpeace Foundation, Argentina, Center for Legal and Social Studies and the Boca Neighborhood Association - instituted proceedings. The case against the Argentine central government, the Province of Buenos Aires, the leadership of the Buenos Aires Municipality and forty-four companies was for compensation for injuries suffered from the pollution of the Matanza-Riachuelo River.⁹⁸²

Before setting out how CERs influenced the decision, it is notable that the case took some unexpected twists. In June 20, 2006, the Argentinian Supreme Court in exercise of its "ordained faculty and legally recognized power to protect the general interest", ruled that the defendants generally must submit to the Court the river's clean-up proposal, while the forty-four companies specifically must submit reports on measures adopted to stop and decontaminate the pollution of the river.⁹⁸³ Various public hearings were conducted by the Court with opportunities given to the public to make inputs into the governments' clean-up proposal and this culminated in the setting up by the Court of an independent experts group from the University of Buenos Aires to vet the governments' clean-up proposal.⁹⁸⁴

On July 8, 2008, the Supreme Court handed down its final judgment, ordering the creation of the River Basin Authority (Authority) to oversee the clean-up program. The Authority was given 3 cardinal objectives: improving the quality of life of those living within the river basin area;

⁹⁸¹ Ryan & Nápoli, *supra*, note 433 at 30.

⁹⁸² *The Matanza-Riachuelo River Basin Case*, *supra* note 437 at 1-3.

⁹⁸³ *Ibid* at 2.

⁹⁸⁴ The Environment and Natural Resources Foundation, *supra* note 436 at 2.

restoring the river's ecosystem; and preventing the occurrence/reoccurrence of avoidable harm. In addition, the Authority was ordered to report to the Court within ninety days on how the judgment was being executed. There was a daily fine imposed on the head of the Authority for failure to execute the judgment.⁹⁸⁵ Within thirty days, the Authority was also ordered to fashion ways to get the public informed of its activities. Again, the head of the Authority was at risk of a daily fine.⁹⁸⁶ The Authority was also ordered to superintend over the expansion of potable water supply for the inhabitants of the river basin area, the provision of sewage disposal facilities, emergency health plans for the inhabitants and the clean-up of the entire river basin area, including the landfills.⁹⁸⁷

However, there are doubts over the full implementation of the judgment. Given the magnitude of the degradation, the reach of the judgment and the comparative lack of resources in Argentina, this is not surprising. Matthew Amengual observes that notwithstanding years spent building the capacities of the relevant institutions and raising a substantial war chest running into several millions of dollars, "compliance with the order of the Supreme Court was partial. While the Court's decisions triggered a wide range of important moves, such as the development of capacities to assist firms in upgrading their production systems, enforcement remained highly dependent on political support and capabilities of regulatory agencies."⁹⁸⁸ Despite the judgment's implementation gap, Daniel Ryan and Andrés Nápoli observe that "the judicialization of the issue and the court's involvement have substantially changed the politics of pollution control in the Riachuelo."⁹⁸⁹ There have equally been on the ground improvements as a result of the judgment, which include the provision of potable water to more than 1 "million people, the expansion of wastewater treatment systems and the creation of 211 sampling stations for monitoring water, air, and soil quality... Nearly 18 000 families have been relocated from some of the most polluted areas into new housing while 12 new mobile health units check and treat children for dangerous contaminants."⁹⁹⁰

⁹⁸⁵ *The Matanza-Riachuelo River Basin Case*, *supra* note 437 at 10.

⁹⁸⁶ *Ibid* at 10-11.

⁹⁸⁷ *Ibid* at 12-13.

⁹⁸⁸ Amengual, *supra* note 434 at 159-160.

⁹⁸⁹ Ryan & Nápoli, *supra* note 433 at 30.

⁹⁹⁰ Futurepolicy.org, "Argentinian Supreme Court's Judgment on Environmental Rights", <<https://www.futurepolicy.org/crimes/argentinian-supreme-courts-pioneering-judgement-on-environmental-rights/>>.

Based on CERs, the outcomes discussed below were achieved in Argentina. First, the judgment was predicated on the interpretation of articles 41⁹⁹¹ and 43⁹⁹² of the Constitution. Article 41 not only provides for the right to a healthy environment, but also stipulates that environmental damage “shall generate as a priority the obligation to repair it.” Article 43 guarantees access to justice for the enforcement of constitutional rights by filing an *amparo* action.⁹⁹³ To demonstrate the impact of these provisions on the suit, the Court held that in accordance with the provisions of “articles 41 and 43 of the fundamental law...(t)he National State and the province of Buenos Aires have the duty to ensure the common use of the environment and the collective well-being shaped by the environment, an environmental stewardship pursued through prevention, restoration, and ultimately, through compensation for collective harm.”⁹⁹⁴ It is therefore doubtful whether the Court would have come to the same decision without these constitutional provisions.⁹⁹⁵

Secondly, article 86 of the Constitution of Argentina⁹⁹⁶ created the public ombudsman with the right to litigate on behalf of the inhabitants to protect constitutionally guaranteed rights. It was based on this provision that the Court granted the ombudsman standing to join in prosecuting the case. Consequently, the Court held that “pursuant to Article 86 of the National

⁹⁹¹ Article 41 of the Constitution of Argentina provides that all “inhabitants enjoy the right to a healthful, balanced environment fit for human development, so that productive activities satisfy current needs without compromising those of future generations, and have the duty to preserve the environment. Environmental damage shall generate as a priority the obligation to repair it under the terms that the law shall establish. The authorities shall provide for the protection of this right, for the rational use of natural resources, for the preservation of the natural and cultural patrimony and of biological diversity, and for information and education on the environment...The entry into the National territory of dangerous or potentially dangerous wastes and of radioactive materials is prohibited.”

⁹⁹² Article 43 of the Constitution of Argentina provides that any person “may file an expeditious and swift action of “amparo,” whenever no other more appropriate judicial means exists, against any act or omission by public authorities or by private individuals, that presently or imminently harms, restricts, alters or threatens, in an arbitrary or manifestly illegal manner, the rights and guarantees recognized by this Constitution, by a treaty, or by a law. As appropriate, the judge may declare the norm upon which the harmful act or omission is founded unconstitutional.”

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⁹⁹⁴ *The Matanza-Riachuelo River Basin Case*, *supra* note 437 at 1 (para.1 (b)).

⁹⁹⁵ Christel & Gutiérrez, *supra* note 435 at 335.

⁹⁹⁶ Article 86 of the Constitution of Argentina provides that the Defender of the People “is an independent body created within the ambit of the National Congress, which shall operate with full functional autonomy, without taking orders from any authority. Its mission is the defense and protection of human rights and other rights, guarantees and interests protected by this Constitution and by the law, against deeds, acts, and omissions of the Administration, and the review of the exercise of public administrative functions. The Defender of the People has standing to litigate.”

Constitution...and in conformity with article 41 of the supreme law...While hoping that the ombudsman was not empowered to alter the objective or subjective submissions of the plaintiffs, this court admitted his participation as a third party interested in the above mentioned environmental plan.”⁹⁹⁷ Nigeria does not have the equivalent of article 86. Even if there were, there is no justiciable CERs for such an ombudsman to enforce.

Thirdly, the Court ordered the River Basin Authority to simultaneously (1) enhance the living conditions of the river basin area residents; (2) restore the environmental components of the river basin ecosystem; and (3) avert environmental injuries that are foreseeable.⁹⁹⁸ This was done sequel to article 41 of the Constitution. In making the decision, the Court held that the “dictated sentence consists of a binding mandate on the defendants, with specific details that arise from the legal bases which follow and whose content has been determined by this Tribunal in exercise of the powers deriving from the Constitution.”⁹⁹⁹

Lastly, the Supreme Court heard this matter as a court of first instance, meaning that the matter was handled expeditiously without the usual appellate judicial mechanisms. This was made possible by the provisions of article 117 of the Constitution.¹⁰⁰⁰ To underscore this, the Court held that its acceptance of “the filing of the matter [is] governed by article 117 of the National Constitution, which addresses pollution of inter-jurisdictional environmental resources, and accepting the National State and Province of Buenos Aires are legally recognized parties to this matter.”¹⁰⁰¹ It is debatable whether the Court would have been able to assume jurisdiction to hear the case if not for article 117.

Reviewing the impact of the case on the enjoyment of CERs in Argentina, Lucas Christel and Ricardo Gutiérrez emphasize that “this paradigmatic case has brought to the fore the role of the National Supreme Court of Justice...and the federal courts in advancing environmental rights by compelling the state (at all levels) to carry on administrative measures in order to secure the right to a healthy environment.”¹⁰⁰² It would be difficult to obtain similar results in Nigeria without

⁹⁹⁷ *The Matanza-Riachuelo River Basin Case*, *supra* note 437 at 2 (para.2).

⁹⁹⁸ *Ibid* at 10 (paras.16-17).

⁹⁹⁹ *Ibid* at 9 (para.15).

¹⁰⁰⁰ Article 117 of the Constitution, Brazil, has been revoked.

¹⁰⁰¹ *The Matanza-Riachuelo River Basin Case*, *supra* note 437 at 1 (para.1(b)).

¹⁰⁰² Christel & Gutiérrez, *supra* note 435 at 335.

CERs or other tools such as a public ombudsman and of the amparo process (as will be discussed in chapter 5).

4.4.2. The case of *Musyoka & Ors. V. The A.G. & Ors. in Kenya*

CERs seems to have also had positive effects in Kenya. In *Musyoka & Ors. V. The A.G. & Ors.*,¹⁰⁰³ the plaintiffs, in a representative action on behalf of their community, sued Metal Refinery (EPZ) Limited to enforce their right to a healthy environment in article 42 of the Constitution. The plaintiffs complained that toxic waste from the lead battery recycling plant operated by the refinery was injurious to their health and harmed their environment. The court agreed that their rights to a healthy environment had been violated.

The court held that “the State actors are constitutionally obligated under Article 42 to protect the environment of the entire country, and that once pollution has been discovered, it should be remedied.”¹⁰⁰⁴ The court also faulted the exclusion of the plaintiffs from participating in resource governance, particularly the environmental impact assessment and the attendant engagement of stakeholders likely to be affected by the project.¹⁰⁰⁵ It awarded 1.3 billion Kenyan shillings (about \$16 million CAD) to the plaintiffs to be paid by the defendants, including the State and the refinery, and ordered the refinery to clean up the plaintiffs’ community within ninety days of the judgment.¹⁰⁰⁶

It is not clear whether the judgment has been implemented, but the decision demonstrates the positive impact of the inclusion of CERs in the Kenyan Constitution, and at the very least, a symbolic victory for CERs. As analyzed earlier in chapter 3, this would not have been possible in pre-2010 Kenya without CERs to utilize to put pressure on the government and the TNCs, the Niger Delta does not have the same tools available for use by Kenyans.

¹⁰⁰³ ELC. PET No. 1/2016 <https://media.business-humanrights.org/media/documents/files/documents/Judgment_0.pdf> [*Musyoka & Ors. V. The A.G. & Ors.*].

¹⁰⁰⁴ *Ibid* at para. 111.

Article 42 of the Kenyan Constitution provides that everybody has “the right to a clean and healthy environment, which includes the right a. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and b. to have obligations relating to the environment fulfilled under Article 70.”

¹⁰⁰⁵ *Ibid* at para. 104.

¹⁰⁰⁶ *Ibid* at para. 171.

4.4.3. Extraterritorial Litigation filling the gap for Niger Deltans

Owing to the lack of enforceable CERs in Nigeria, the Niger Delta has embraced extraterritorial litigation. This has come with significant cost, procedural hurdles, and logistical, technical, and other challenges. This option not only offers the Niger Delta people the opportunity to proceed against the TNCs in their respective home countries, but also guarantees quicker dispensation of justice and the availability of a bouquet of remedies. The extraterritorial courts to which the Niger Delta people resort are more likely to be insulated from Nigerian political or industry influence¹⁰⁰⁷ compared to domestic litigation.

The chapter notes particularly the extraterritorial jurisdiction assumed by domestic courts abroad. These courts apply CERs (for countries that have constitutionalized environmental rights), the law of torts (for countries without enforceable CERs) or the prevailing law in either the host or home country. This is often bolstered by support from international ENGOs to plaintiffs in developing countries. All these have enabled the institution of a significant number of litigation cases abroad against TNCs for the environmental degradation in host countries.¹⁰⁰⁸

4.4.3.1 *The case of Akpan v. Shell*

In 2008, the plaintiff, a fisherman and farmer from the Niger Delta, with the assistance of an international ENGO, Ereniging Miliendefensie, who joined the suit as a co-plaintiff, instituted the case of *Akpan v. Shell*¹⁰⁰⁹ in the Netherlands against both Shell and its parent company, the Royal Dutch Shell Plc. (RDS). The plaintiff complained about environmental injury to his livelihood as a result of the crude oil spill from Shell's facilities which affected his entire community.¹⁰¹⁰ The defendants challenged the jurisdiction of the district court of the Hague to hear the matter, on the grounds among others that since Shell is a company incorporated under Nigerian law, and separate from RDS, the court did not have jurisdiction to try RDS for torts committed by Shell.

¹⁰⁰⁷ Carmen Gonzalez, "An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms" (2011) 32 (3) U Pa J Int'l L 723 at 774 [Gonzalez 4].

¹⁰⁰⁸ Robert Percival, "Global Law and the Environment" (2011) 86 Wash.L.Rev. 579 at 606.

¹⁰⁰⁹ C/09/337050/HA ZA 09-1580 < <http://humanrightsinbusiness.eu/wp-content/uploads/2015/01/final-judgment-shell-oil-spill-ikot-ada-udo-2.pdf> > [*Akpan & Anor. VS RDS & Anor.*].

¹⁰¹⁰ Cedric Ryngaert, "Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shel Litigation in the Netherlands" (2013) 2(8) McGill International Journal of Sustainable Development Law and Policy 245 at 248 & 250 [Ryngaert].

However the court, in an interim judgment of February 24, 2010, noted that “for quite some time there has been an international trend to hold parent companies of multinationals liable in their own country for the harmful practices of foreign (sub-) subsidiaries, in which the foreign (sub-) subsidiary involved was also summoned together with the parent company on several occasion.”¹⁰¹¹ Having established that RDS is the parent company of Shell, the court assumed jurisdiction in the case and ruled that under Dutch law, “the parent company of a subsidiary may be liable based on the tort of negligence against people who suffered damage as a result of the activities of that (sub-) subsidiary.”¹⁰¹²

Shell also challenged the jurisdiction of the court on grounds of *forum non conveniens* by contending that a court in the Netherlands could not try it for torts committed under Nigerian law. The court ruled that “the *forum non conveniens* restriction no longer plays any role in today’s international private law...The conclusion is that the District Court...has jurisdiction over the claims initiated in the subject proceedings, not only against the legal entity RDS in The Hague, but also against the Nigerian legal entity.”¹⁰¹³ The court then heard the matter on its merits. Shell relied on the defence of sabotage and argued that under the Nigerian law of negligence, the defendant is not liable for the losses suffered by the plaintiff if the injury is caused by sabotage, such as an oil spill caused by the willful and deliberate tampering with the defendant’s facilities by third parties.

In 2013, the court gave its final judgment. The court dismissed the claim against RDS on the ground that “parent companies like RDS in general have no obligation under Nigerian law to prevent their (sub-) subsidiaries such as [Shell] SPDC from inflicting damage on others through their business operations.”¹⁰¹⁴ The court arrived at this conclusion based on the difference in operation between RDS and Shell. Perhaps if both companies were in a linear relationship, the court would have come to a different decision.

In respect of the claim against Shell, the court held that under the Nigerian law of negligence, Shell owed the plaintiff a duty of care to secure its facilities in a way that would make it difficult

¹⁰¹¹ *Akpan & Anor. VS RDS & Anor*, *supra* note 1009 at 9.

¹⁰¹² *Ibid* at 8.

¹⁰¹³ *Ibid* at 10.

¹⁰¹⁴ *Ibid* at 17 & 18.

for sabotage to occur and the duty was breached by Shell when the facility was tampered with. Based on this, the court awarded compensation to the victims.¹⁰¹⁵

The judgment may have profound ramifications for the Niger Delta, with Cedric Ryngaert opining that the case “may constitute an important precedent for future transnational tort cases against multinational corporations for overseas environmental harm. It demonstrates that victims of foreign torts can overcome a number of impediments such as *forum non conveniens* that had previously hampered their chances of successful extraterritorial tort litigation, especially in Europe.”¹⁰¹⁶

Also, the court was able to sidestep the precedent enunciated by Nigerian courts that a plaintiff cannot be compensated for losses suffered as a result of environmental injuries caused by sabotage of TNCs facilities. The Dutch court noted that where sabotage “was involved, the [Nigerian] court consistently ruled that the operator was not liable. This clearly demonstrates that under Nigerian law, operators have no general duty of care in respect of the people living in the vicinity of their oil pipelines and oil facilities to prevent sabotage of these pipelines and facilities” and “to date, Nigerian case law does not designate installing and keeping an oil pipeline or an oil facility in and of itself as creating or maintaining a dangerous situation that gives rise to a general duty of care, even though sabotage frequently occurs in Nigeria.”¹⁰¹⁷

Furthermore, the judgment affirmed the *locus standi* of international ENGOs to jointly sue as co-plaintiffs in environmental litigation involving the Niger Delta and this is a plus, considering the financial, logistical and intellectual resources that the international ENGOs bring to public interest litigations. The court dismissed the objection by Shell that Ereniging Miliendefensie – a Dutch-based international ENGOs - ought not to be joined as a co-plaintiff because it suffered no personal injuries.

The District Court considers conducting campaigns aimed at stopping environmental pollution in the production of oil in Nigeria as a factual activity that Milieudéfensie developed to promote the environmental interests in Nigeria. Finally, the description of Milieudéfensie’s objective in its articles of association is to promote environmental protection worldwide. Although this is a comprehensive objective, this does not mean that it is insufficiently specific. Nor is there sufficient reason to assume that local

¹⁰¹⁵ *Ibid* at 23.

¹⁰¹⁶ Ryngaert, *supra* note 1010 at 250.

¹⁰¹⁷ *Akpan & Anor. VS RDS & Anor, supra* note 1009 at 21.

environmental damage abroad allegedly falls outside that description of Milieudefensie's objective.¹⁰¹⁸

Therefore, Nigeria should allow standing for international ENGOs as well, to enhance the capacity to achieve justice for environmental harms in the Niger Delta. The decision in *Akpan v. Shell* seems to have energized the Niger Delta because in 2012, the Bodo community in the Niger Delta sued Shell in the UK in the case of *Bodo Community and Others v Shell*,¹⁰¹⁹ due to an oil spill from Shell's facility that affected the entire community. The Bodo oil spill has been described as "the second largest in the whole world, only surpassed by the Gulf of Mexico spill of 2010."¹⁰²⁰ I will turn to the analysis of the case in the next segment and how CERs could potentially provide alternative to the Niger Delta to litigate these cases in-country, rather than pursuing justice abroad which are fraught with different challenges.

4.4.3.2 The case of *Bodo Community and Others v. Shell*

In *Bodo Community and Others v Shell*, the high court in the UK assumed jurisdiction to try the case on the basis of section 30 (1) of the *Civil Justice and Judgment Act, 1982*¹⁰²¹ (as amended), which vest courts in England, Wales or Northern Ireland with the jurisdiction to hear suits "for trespass to, or any other tort affecting, immovable property...in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with the question of the title to, or the right to possession of, that property."

Although crude oil worth an estimated US\$10 million passed through Shell's pipelines in Bodo community daily¹⁰²² and the magnitude of the Bodo community oil spills are comparable to the Exxon Valdez spill which cost Exxon about \$5 billion in settlement and clean-up expenses, Shell only offered to settle the suit out-of-court with the Bodo community with '50 bags of rice, 50 bags of beans, 50 bags of garri (a cassava product), 50 cartons of sugar, 50 cartons of milk powder, 50 cartons of tea, 50 cartons of tomatoes and 50 tins of groundnut oil.'¹⁰²³ These items

¹⁰¹⁸ *Ibid* at 11 & 12.

¹⁰¹⁹ [2014] EWHC 1973 (TCC).

¹⁰²⁰ Tadaferua Ujorha, "Nigeria: Is Bodo Oil Spill Triggering Epic Number of Funerals?", *allAfrica* (10 November 2019) <<https://allafrica.com/stories/201911110050.html>>.

¹⁰²¹ 1982, c. 27 <<https://www.legislation.gov.uk/ukpga/1982/27>>.

¹⁰²² Scott Pegg & Nenibarini Zabbey, "Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta", (2013) 48 (3) *Community Development Journal* 391 at 402.

¹⁰²³ *Ibid* at 401.

were rejected by the community who at the time had a population of more than 69,000 and felt the items were derisory.¹⁰²⁴

Upon the assumption of jurisdiction by the court, Shell finally agreed to settle the suit out of court for 55 million GBP, “with 35 million pounds shared evenly between 15,600 Bodo individuals and the remaining 20 million pounds set aside in a trust fund for projects such as health clinics and schools.”¹⁰²⁵ According to Leigh Day, the UK law firm that represented the Bodo community, the agreed compensation has been paid and the clean-up of the Bodo community has also commenced.¹⁰²⁶

Shell apparently opted for an out-of-court settlement, having previously admitted that the 2 separate spills complained of resulted from corrosion of its facilities. The then Managing Director of Shell Nigeria, Mutiu Sunmonu, had said that ‘[f]rom the outset, we’ve accepted responsibility for the two deeply regrettable operational spills in Bodo... We’ve always wanted to compensate the community fairly and we are pleased to have reached agreement.’¹⁰²⁷ Therefore, the people of the Niger Delta have had some success with extraterritorial litigation in relation to environmental damage from oil. However, this approach is not without its challenges.

4.4.3.3 Challenges to Extraterritorial Litigation

The institution of litigation in foreign jurisdictions has its own challenges. In Europe, the plaintiff must show that the parent company, domiciled in Europe, should have foreseen the damage suffered by the plaintiff. The plaintiff must also establish that the parent company directly controlled the operation of the subsidiary.¹⁰²⁸

¹⁰²⁴ Amnesty International, “Nigeria: Petroleum, Pollution and Poverty in the Niger Delta” (London: Amnesty International Publications, 2009) 8 <<https://www.amnesty.org/en/wp-content/uploads/2021/06/afr440172009en.pdf>>.

¹⁰²⁵ Julia Payne & Simon Falush, “Shell to pay out \$83 Million to settle Nigeria Oil Spill Claims”, *Reuters* (6 January 2015) <<https://www.reuters.com/article/us-shell-nigeria-spill-idUSKBN0KG00920150107>> [Payne & Falush].

¹⁰²⁶ Leigh Day, “Nigeria – Oil Spills” <<https://www.leighday.co.uk/International/Corporate-accountability/Environmental-damage/Nigeria>>.

¹⁰²⁷ Payne & Falush, *supra* note 1025.

¹⁰²⁸ Matthias Weller & Alexia Pato, “Local Parents as ‘Anchor Defendants’ in European Courts for Claims against their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends”, (2018) 23(2) *Unif.L.Rev.* 397 at 404.

Beyond jurisdictional issues, there may be unease on the part of would-be-litigants from the Niger Delta to proceed against the TNCs in the latter's countries stemming from uncertainty as to the courts' disposition and the likelihood of favorable foreign judgments against the TNCs from these foreign jurisdictions. This uncertainty and unease are underpinned by the complicity of some of these countries in the environmental degradation of the Niger Delta.

For instance, the UK has been mentioned as laying the foundation for gas flaring in Nigeria during its colonial rule. The then UK Secretary of State for the Colonies did not see anything wrong with the TNCs flaring gas in the Niger Delta and had argued at the time that '[u]ntil there is a worthwhile market and until there are facilities (e.g. pipelines and storage tanks) to use the gas, it is normal practice to burn off the by-product from the oil wells.'¹⁰²⁹ Presently, the EU is more concerned with ensuring energy security for its people, therefore nothing must disrupt the oil and gas outflows abroad (including Nigeria) which account for 80% of oil and 60% of EU's total energy needs.¹⁰³⁰ Despite the desire of the TNCs to divest from Nigeria,¹⁰³¹ the EU energy dependency and attendant issues are not likely to change soon because the EU's energy policy has not changed fundamentally. For instance,

[The] European Commission [has] listed Nigeria as one of a number of countries that are considered of 'strategic' importance for the EU's 'energy security'... New infrastructure projects are under discussion aimed at increasing the capacity of Nigeria to export hydrocarbons (especially natural gas) to European and global markets... The companies operate in violation of national law with continued flaring of gas, inadequate maintenance of equipment and lack of adequate response measures to recurrent oil spills. The more oil and gas that is extracted, the more that environmental degradation, conflict and human rights violations will occur in the Delta... The EU should end its dependency on fossil fuels and begin investing in the societal and technological changes needed to ensure a just transition towards a more sustainable, fossil free future. The EU should cease building large scale oil and gas infrastructure projects, since these will further lock Europeans into hydrocarbon dependency whilst exacerbating human rights abuses and environmental degradation in oil producing countries like Nigeria.¹⁰³²

¹⁰²⁹ Faturoti, Agbaitoro & Onya. *supra* note 144 at 229.

¹⁰³⁰ "The Reality Behind EU 'Energy Security' the Case of Nigeria", Report of the Fact-Finding Mission to the Niger Delta (CEE Bankwatch Network et al, 2011) at 3 <<http://bankwatch.org/sites/default/files/energy-security-nigeria.pdf>> [The Reality Behind EU 'Energy Security' the Case of Nigeria].

¹⁰³¹ "NNPC lists relinquishment cost, Legacy Liabilities for Oil Majors' Divestment", *Premium Times* (2 August 2021) <<https://www.premiumtimesng.com/business/business-news/477088-nnpc-lists-relinquishment-cost-legacy-liabilities-for-oil-majors-divestment.html>>.

¹⁰³² The Reality Behind EU 'Energy Security' the Case of Nigeria, *supra* note 1030 at 14.

While there is no evidence that these issues have influenced foreign courts in handing out unfavorable judgments against Niger Delta plaintiffs, they could be a source of unease on the part of the Niger Delta people about suing the TNCs in their home countries. Despite these challenges to extraterritorial litigation, the chapter has already listed some of the issues that make extraterritorial environmental litigation a viable option for litigants in the Niger Delta, which include quick dispensation of justice and independence of the judiciary from external influence.¹⁰³³ Ideally and as already discussed, CERs in Nigeria should be a better option for addressing the issues that militate against the operation of an efficient court system and make extraterritorial environmental rights litigation necessary. For now, extraterritorial litigation remains a necessary but costly window to ventilate environmental grievances in the Niger Delta. The thesis is interested in investigating how CERs could help address these fundamental problems and make in-country litigation in Nigeria easier and more effective so that already impoverished plaintiffs are not additionally burdened by litigating in a foreign forum.

The above sections have highlighted the potential of CERs to contribute to the sustainability of the Niger Delta environment by enhancing the compliance monitoring, implementation and enforcement of environmental laws in Nigeria. CERs seem to embolden environmental regulatory agencies like the PM in Brazil, despite presidential opposition, to monitor compliance and implement environmental laws. It also indicates that courts are more willing to enforce environmental laws once CERs are adopted. Kenya's experience affirms this. The courts are willing to reverse previous precedents that did not recognize environmental rights once CERs are adopted. Furthermore, individuals, ENGOs and the public ombudsman in Argentina rely on CERs to obtain redress for age-old environmental injustices.

However, the literature also indicates that CERs alone may not make the difference. Other ingredients, including financial and administrative independence of the judiciary and regulatory agencies like the PM in Brazil need to be available for CERs to succeed. In addition, there are peculiar challenges in Nigeria that could frustrate CERs' ability to contribute to the sustainability of the Niger Delta environment. The next segment will analyze these challenges and make recommendation on how they could be addressed.

¹⁰³³ Gonzalez 4, *supra* note 1007 at 774.

4.5 Why CERs may not lead to Improved Compliance Monitoring, Implementation and Enforcement of Environmental Laws in Nigeria

The thesis concedes that constitutionalising environmental rights will not automatically lead to compliance monitoring, implementation and enforcement of environmental norms because of certain peculiarities in Nigeria which could reduce the potency of CERs in that regard.

Continent-wise, Boyd highlights some of the challenges:

Some of the problems hindering enforcement of environmental laws on the [African] continent are government institutions that lack the financial and human resources to monitor and control activities; government officials entrusted with enforcing laws or protecting rights under those laws who often have more to gain by condoning violations or engaging in violations themselves, court systems that are backlogged, bankrupt, or otherwise not functioning; and the imperatives of daily life for the poor, which overwhelm any likely risks associated with violating the law.¹⁰³⁴

The issues mentioned by Boyd have already been or will be addressed in the chapter.

Specifically on Nigeria, Boyd also observes that:

Although most African nations have in place framework laws and regulations...environmental abuses persist, with Nigeria providing a notorious example. Billions of dollars worth of oil has been extracted from the Niger Delta, yet the region continues to suffer from crumbling social infrastructure and services, high unemployment, chronic poverty, terrible environmental conditions, and endemic conflict. Because of extreme poverty and the compelling need for economic development, environmental protection is often not a priority.¹⁰³⁵

Boyd therefore considers poverty and economic development as barriers to environmental sustainability in Nigeria. In chapter 5 of the thesis in the segment on *Overcoming Barriers to Access to Justice*, the challenge posed by poverty to the realization of CER objectives in Nigeria will be addressed.

However, some experts have identified corruption as, arguably, Nigeria's greatest challenge. While Smith describes it as Nigeria's 'rotten core',¹⁰³⁶ Page argues that corruption is "the single greatest obstacle preventing Nigeria from achieving its enormous potential. It drains billions of dollars a year from the country's economy, stymies development, and weakens the social contract between the government and its people."¹⁰³⁷ From the foregoing, the chapter will discuss in the next segment how (i) corruption could inhibit CERs' abilities to enhance

¹⁰³⁴ Boyd, *supra* note 28 at 157.

¹⁰³⁵ Boyd, *supra* note 28 at 158-159.

¹⁰³⁶ Smith, *supra* note 295 at 788.

¹⁰³⁷ Page, *supra* note 320 at 1.

compliance monitoring, implementation and enforcement of environmental norms in Nigeria; and (ii) Nigeria's economic development that depends on the petroleum resources from the Niger Delta. The segment will make recommendations on how these 2 challenges could be addressed to boost the sustainability profile of the Niger Delta environment.

4.5.1. Corruption

A significant barrier to CERs achieving their potential in Nigeria is the problem of corruption at all levels of government, including within the judiciary. Nigeria has had its fair share of public sector corruption, with Smith describing corruption as the “rotten core”¹⁰³⁸ which has “accounted more than anything else for Nigeria’s ills.”¹⁰³⁹ Public sector corruption has also been described as “the single greatest obstacle preventing Nigeria from achieving its enormous potential. It drains billions of dollars a year from the country’s economy, stymies development, and weakens the social contract between the government and its people.”¹⁰⁴⁰

Chatham House estimates that approximately \$582 billion (USD) has been pilfered from Nigeria since 1960.¹⁰⁴¹ Because Nigeria’s economy is predominantly sustained by the oil and gas resources of the Niger Delta (which according to the World Bank “contributes 99 percent of export revenues, 85 percent of government revenues, and [approximately] 52 percent of gross domestic product”),¹⁰⁴² the bulk of the money stolen by corrupt government officials is likely from the proceeds of the oil and gas resources of the Niger Delta.

An example might suffice to illustrate the prevalence of corruption in Nigeria’s public sector: the suspension in 2020 and subsequent removal from office in 2021 of Mr. Ibrahim Magu, then acting Chairman of the Economic and Financial Crimes Commission (EFCC) by the federal government. The suspension followed Mr. Magu’s indictment by the Presidential Committee on Audit of Recovered Assets (PCARA) for lack of accountability in the discharge of his duties. He was alleged, among others, to have failed to account for about 332 pieces of real estate property

¹⁰³⁸ Smith, *supra* note 295 at 788.

¹⁰³⁹ *Ibid.*

¹⁰⁴⁰ Page, *supra* note 320 at 1.

¹⁰⁴¹ Yekeen Nurudeen, “Nigerian Officials Stole \$582b since 1960 – Chatham House Report” (International Centre for Investigative Reporting, 2017) <<https://www.icirnigeria.org/nigerian-officials-stole-582b-since-1960-chatham-house-report/>>.

¹⁰⁴² The World Bank on the Niger Delta, *supra* note 17 at ix.

recovered by the agency from corrupt public officials who had used their offices to enrich themselves.¹⁰⁴³

The PCARA observed the EFCC's inability to protect the physical integrity of recovered assets, some of which were recovered about 2 decades ago; they were left to deteriorate to the detriment of the economy and the environment. An example related specifically to the environmental harms from oil and gas exploitation would be the negligence that led to the sinking of 2 vessels loaded with petroleum products in Lagos and Port Harcourt, "in spite of several warnings from the Navy on the need to evacuate the petroleum products in the vessels. The total value of the assets lost due to the negligence runs into millions of US dollars."¹⁰⁴⁴ While the economic loss from the incidents can be, and has been, readily quantified, the environmental impact, which has not been quantified, may be quite enormous.

The complicity of the federal government is also exposed as the federal government cannot feign ignorance of Mr. Magu's indiscretion. Mr. Magu's confirmation for appointment as the substantive chairman of the EFCC was first rejected by the Senate on December 15, 2016.¹⁰⁴⁵ The Senate had relied on the Report submitted to it by Nigeria's Department of State Services (DSS) which opined that the nominee had not been above board in his previous dealings. Evidence was submitted that he used public office for private gains and had questionable dealings with potential suspects. The federal government, instead of withdrawing the nomination, re-submitted it on January 24th, 2017. Again, the Senate rejected him, relying on a further Report by the DSS.¹⁰⁴⁶ The government ignored all these and instead declared that Mr. Magu "would remain in office whether or not he is confirmed by the Senate."¹⁰⁴⁷

In the wake of the second rejection, the then Vice President of Nigeria, Yemi Osinbajo, a Professor of Law and a Senior Advocate of Nigeria, declared that 'it is up to the Senate to make

¹⁰⁴³ Ismaila Chafe, "Magu Failed to Account for 332 Recovered Property worth Billions", *News Agency of Nigeria* (12 July 2020) <<https://www.nannews.ng/magu-failed-to-account-for-332-recovered-property-worth-billions/>>.

¹⁰⁴⁴ *Ibid.*

¹⁰⁴⁵ Ebuka Onyeji, "Despite Senate Rejection, Magu remains EFCC Chairman – Lawyers", *Premium Times* (15 December 2016) <<https://www.premiumtimesng.com/news/headlines/218091-despite-senate-rejection-magu-remains-efcc-chairman-lawyers.html>> [Onyeji].

¹⁰⁴⁶ "Nigerian Senate Rejects Magu as EFCC Boss", *Ripples Nigeria* (15 March 2017) <<https://www.ripplesnigeria.com/nigerian-senate-rejects-magu-efcc-boss/>>.

¹⁰⁴⁷ Onyeji, *supra*, note 1045.

their judgement. If our candidate is rejected...we can re-present our candidate.’¹⁰⁴⁸ In a direct reference to the inadequacy of legislation in this area which the government was exploiting, the then Vice President had argued that “although the EFCC Act requires that an EFCC chairman be confirmed by the Senate, part of Section 171 of the Constitution, which is superior to the act, does not mandate such Senate confirmation.”¹⁰⁴⁹ The Executive was able to exploit loopholes in the law to keep Mr. Magu in office despite his rejection twice by the Senate.

As argued in chapter 3 (in the segment on CERs spurring the enactment of legislation in resource governance in Nigeria), this scenario is indicative of the need to enact holistic legislation to tackle corruption in Nigeria. If a rejected appointee does not resign on his or her own volition on ethical grounds, then he or she should be made to quit via the provisions of the law. If this had happened when the nomination was first rejected, perhaps harm such as the environmental damage caused by the sinking of those 2 vessels with their contents may have been avoided.

Another instance of corruption that has direct bearing on the Niger Delta and its environmental challenges is the incident involving the Niger Delta Development Commission (NDDC) - the interventionist agency set up in 2000 by the federal government to accelerate the development of the Niger Delta.¹⁰⁵⁰ The federal government had directed that an audit be conducted on the activities of the NDDC. The audit report submitted to the federal government on September 2, 2021, reveals that the “bulk of funds the Commission received for the development of the Niger Delta region, was diverted into private pockets, ...that [the] execution of 13,777 projects [awarded by the Commission for the benefit of the Niger Delta] were substantially compromised.”¹⁰⁵¹ These contracts have a monetary value of over 3 trillion Naira (N 3,274,206,032,213.24) (about \$4.4 billion CAD).¹⁰⁵²

¹⁰⁴⁸ Idris Akinbajo, “Magu to remain Acting EFCC Chairman as Presidency Declares ‘Full Support’ for Anti-Corruption Chief”, *Premium Times* (12 April 2017) <<https://www.premiumtimesng.com/news/headlines/228617-magu-to-remain-acting-efcc-chairman-as-presidency-declares-full-support-for-anti-corruption-chief.html>>.

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ Niger-Delta Development Commission (Establishment, Etc.) (No. 6 of 2000), <<http://extwprlegs1.fao.org/docs/pdf/nig42654.pdf>>.

¹⁰⁵¹ Ikechukwu Nnochiri, “NDDC: Buhari Receives Forensic Audit Report, says N6trn Approved in 18yrs” *Vanguard Newspaper* (2 September 2021) <<https://www.vanguardngr.com/2021/09/nddc-buhari-receives-forensic-audit-report-says-n6trn-approved-in-18yrs/>>.

¹⁰⁵² Lovina Anthony, “NDDC: Group urges AGF to subject Forensic Audit to Legal Scrutiny”, *Daily Post Newspaper* (10 September 2021) <<https://dailypost.ng/2021/09/10/nddc-group-urges-agf-to-subject-forensic-audit-to-legal-scrutiny/>>.

As revealed from the audit, if this huge financial outlay had been applied judiciously, it would have both assisted in the development of the Niger Delta and boosted the sustainability profile of its environment. President Buhari, more than 3 months after the submission of the audit to him, pledged to review the audit report and then proceed against those found culpable of misappropriating NDDC funds. According to him, “we shall review the forensic audit. Going forward we shall ensure every recoverable kobo, is recovered for use in service of the people of this region and those found culpable shall face the Law.”¹⁰⁵³

However, considering the way Nigeria prosecutes its anti-corruption cases and the way the NDDC has been managed since the advent of President Buhari’s administration, it remains to be seen whether this pledge will be translated to action. Stakeholders in the Niger Delta have already expressed disappointment with the way the government is handling the audit report and have called for the government to release the report to the public and begin the prosecution of those identified in it.¹⁰⁵⁴ They have also called for the inauguration of the permanent Board to administer the NDDC in line with the provisions of the NDDC Act (section 2 (1)),¹⁰⁵⁵ and the cessation of the use of a provisional structure to run the NDDC which has been the case since the inception of President Buhari’s government, more than 7 and a half years ago.¹⁰⁵⁶

On January 4, 2023, President Buhari finally inaugurated a permanent Board of the NDDC and mandated the newly constituted Board to implement the audit report.¹⁰⁵⁷ Government collusion in corruption is a likely reason for the nonchalance in handling the audit report. Earlier recovered

¹⁰⁵³ Lovina Anthony, “NDDC: President Buhari Promises to Review Forensic Audit Report, Directs Remittance of Outstanding Funds”, *Daily Post* (30 December 2021), <<https://dailypost.ng/2021/12/30/nddc-president-buhari-promises-to-review-forensic-audit-report-directs-remittance-of-outstanding-funds/>>.

¹⁰⁵⁴ Femi Folaranmi, “NDDC Audit: Stakeholders want Report made Public”, *The Sun* (20 December 2021), <<https://www.sunnewsonline.com/nddc-audit-stakeholders-want-report-made-public/>>.

¹⁰⁵⁵ Section 2 (I) provides that there “is hereby established for the Commission a governing Board...which shall consist of- (a) a chairman; (b) one person who shall be an indigene of an oil producing area to represent each of the following member States, that is- (i) Abia State; (ii) Akwa Ibom State; (iii) Bayelsa State; (iv) Cross River State; (v) Delta State; (vi) Edo State; (vii) Imo State; (viii) Ondo State; and (ix) Rivers State; (c) three persons to represent non-oil mineral producing States provided that such membership should be drawn from the remaining geo-political zones which are not represented in the Commission; (d) one representative of oil producing companies in the Niger-Delta nominated by the oil producing companies; (e) one person to represent the Federal Ministry of Finance; (f) one person to represent Federal Ministry of Environment; (g) the managing director of the Commission; and (h) two executive directors.”

¹⁰⁵⁶ “Group faults Buhari on NDDC Forensic Audit, Continued Illegal Sole Administrator”, *Vanguard Newspaper* (30 December 2021) <<https://www.vanguardngr.com/2021/12/group-faults-buhari-on-nddc-forensic-audit-continued-illegal-sole-administrator/>>.

¹⁰⁵⁷ Luminous Jannamike, “FG Inaugurates NDDC Governing Board”, *Vanguard Newspaper* (4 January 2023) <FG inaugurates NDDC governing board - Vanguard News (vanguardngr.com)>.

loots from past administrations by various foreign countries were repatriated to the Buhari regime. But a re-looting by members of that administration and an inability to account for the repatriated funds has resulted in countries with custody of looted Nigerian funds imposing specific conditions for further repatriation.

Some of the conditions include identification of specific projects to be funded by the recovered funds and monitoring and evaluation implemented to ensure the funds are not being misappropriated again. For example, Transparency International estimates that late General Sanni Abacha, who ruled Nigeria as a military leader between 1993 and 1998 had stolen about \$5 billion USD from the public treasury and stashed the loot abroad in different countries.¹⁰⁵⁸ So far, Nigeria, with the cooperation of these countries where the stolen monies are warehoused, has been able to recover \$2.6 billion USD of these stolen funds.¹⁰⁵⁹

However, there are allegations that these recovered loots have been re-looted by Nigerian government officials. According to Kingsley Jeremiah, “stunning revelations continue to emerge daily regarding the extent to which public officials are looting the treasury, most stakeholders are gutted by the lack of accountability, and the gross lack of transparency regarding recovered loots from overseas despite conditions mandating proper use/application of such funds.”¹⁰⁶⁰ The re-looting occurs despite the conditionalities tied to the release of the funds. For example, the “condition for the return of the last batch of the money from Switzerland was that the money would be used for the second Niger Bridge, Lagos-Ibadan Expressway, and the Abuja-Kano Expressway. But the present state of the projects, most stakeholders agree, does not justify that the money was judiciously expended.”¹⁰⁶¹

Also, the recent exposure of syndicated crude oil theft that has been ignored by governments provide compelling evidence of corruption that directly impact the Niger Delta. Shell Nigeria

¹⁰⁵⁸ “US to Return \$23 Million looted by Late Dictator Abacha to Nigeria—Officials”, *CNN* (24 August 2022) <Abacha's loot: US to return \$23 million stashed funds to Nigeria | CNN>.

¹⁰⁵⁹ Onyinye Ukaegbu, “Where’s the Rest? Recovering Abacha Loot”, *Business Day* (15 May 2020) <Where’s the rest? Recovering Abacha loot - Businessday NG>.

¹⁰⁶⁰ Kingsley Jeremiah, “Concerns over alleged Re-Looting of over \$1.5b Abacha Booty”, *The Guardian Newspaper* (30 May 2021), <Concerns over alleged re-looting of over \$1.5b Abacha booty | The Guardian Nigeria News - Nigeria and World News — Nigeria — The Guardian Nigeria News – Nigeria and World News>.

¹⁰⁶¹ *Ibid.*

argues that crude oil theft “poses an existential threat to the country's oil industry.”¹⁰⁶² The Nigerian government admits this. According to the Chairman and Chief Executive Officer of the Nigerian Upstream Petroleum Regulatory Commission, Gbenga Komolafe, “the prevailing level of crude oil theft in the country is now a national threat and organised crime.”¹⁰⁶³ Between 80 to 95% of crude oil exploited in Nigeria is stolen,¹⁰⁶⁴ leading to an annual loss of about \$4 billion USD in oil revenue.¹⁰⁶⁵ Because of the level of sophistication and resources needed to carry out an operation of this magnitude, some oil operators have accused government of connivance in the crude oil theft. They “have raised concerns about the culpability of the nation’s security agencies, noting that barges of oil could not have been stolen and moved on the coastal waters without collaboration of some powerful Nigerians.”¹⁰⁶⁶

The impact of corruption, particularly as it relates to environmental sustainability is huge. First, corruption has been identified as “one of the major causes of environmental degradation in developing countries.”¹⁰⁶⁷ The nexus between corruption and environmental degradation is underscored by the fact that environmental norms are either ignored or not implemented by government officials, after receiving bribes from the regulated entities.¹⁰⁶⁸

Second, corruption also leads to the watering down of environmental regulatory norms to make them easier for TNCs to fulfil.¹⁰⁶⁹ Furthermore, there has been outright embezzlement of funds meant for environmental interventionist projects. Chatham House reports that in Nigeria, “[e]nvironmental remediation programs have long been a lucrative corruption mechanism. A recent audit of the Ecological Fund revealed how politicians, civil servants, and contractors

¹⁰⁶² “Shell Nigeria says Crude Oil Theft an Existential Threat to Industry”, *Reuters* (7 July 2022), <Shell Nigeria says crude oil theft an existential threat to industry | Reuters>.

¹⁰⁶³ Femi Adekoya, Kingsley Jeremiah & Ernest Nzor, “Crude Theft Killing Nigeria’s Oil Businesses, Operators Lament”, *Guardian Newspaper* (28 March 2022), <Crude theft killing Nigeria’s oil businesses, operators lament | The Guardian Nigeria News - Nigeria and World News — Nigeria — The Guardian Nigeria News – Nigeria and World News> [Adekoya, Jeremiah & Nzor].

¹⁰⁶⁴ *Ibid.*

¹⁰⁶⁵ Obas Esiedesa, “End Crude Oil Theft by May 29, Buhari Orders Security Agencies”, *Vanguard Newspaper* (5 January 2023) <End crude oil theft by May 29, Buhari orders security agencies (vanguardngr.com)>.

¹⁰⁶⁶ Adekoya, Jeremiah & Nzor, *supra* note 1063.

¹⁰⁶⁷ John Wilson & Richard Damania, “Corruption, Political Competition and Environmental Policy” (2005) 49(3) *Journal of Environmental Economics and Management* 516 at 516.

¹⁰⁶⁸ M'Gonigle & Takeda, *supra* note 491 at 1007.

¹⁰⁶⁹ Per Fredriksson & Jakob Svensson, “Political Instability, Corruption and Policy Formation: The Case of Environmental Policy” (2003) 87(7-8) *Journal of Public Economics* 1383 at 1385.

connived to embezzle hundreds of millions of dollars.”¹⁰⁷⁰ Diversion of funds to private hands through corruption not only reduces government revenue that ought to have funded environmental initiatives,¹⁰⁷¹ but it also leads to the imposition of higher taxes on taxpayers to make up for the lost revenue¹⁰⁷² and these higher taxes would hurt the already impoverished people and (small) businesses.

Aside from environmental impacts, corruption leads more generally to the perpetuation of discrimination through the dispensation of favors to a select few through government accessibility and this “misallocates talent to rent-seeking activities and distorts sectoral priorities and technology choices.”¹⁰⁷³ Corruption increases the costs of doing business and creates an uncertain business climate,¹⁰⁷⁴ and inevitably leads to the emergence and sustenance of an underground economy which poses significant challenges for regulators.¹⁰⁷⁵ Corruption breeds inefficiency, which in turn produces adverse economic outcomes because it reduces “economic growth by lowering incentives to invest for both domestic and foreign entrepreneurs. Empirical evidence based on cross-country comparisons suggests that corruption has adverse effects on private investments and economic growth.”¹⁰⁷⁶

Ultimately, corruption weakens the legitimacy of a country¹⁰⁷⁷ by sully[ng] “the image of the government, weaken[ing] its credibility and reduc[ing] the effectiveness of the development programs and policies which so far have been formulated.”¹⁰⁷⁸ It seems therefore that corruption has significant negative effects on environmental sustainability. The pervasive impact of corruption on Nigeria’s institutions are huge. The next segment will analyze the effects of corruption on the Nigerian judiciary.

¹⁰⁷⁰ Page, *supra* note 320 at 5.

¹⁰⁷¹ Maina Kiaia & Anthony Kuriab, “The Human Rights Dimensions of Corruption: Linking the Human Rights Paradigm to Combat Corruption” (2008) 4(3) *Journal Global Ethics* 247 at 247 [Kiaia & Kuriab].

¹⁰⁷² Khalil Abdelrahim, “Socio-economic Dimensions, Causes and Curbing Measures of Corruption in Developing Economies with A Special Reference to Jordan” (2013) 3(10) *International Journal of Business and Social Research* 31 [Abdelrahim].

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ Page, *supra* note 320 at 9.

¹⁰⁷⁶ Abdelrahim, *supra* note 1072 at 31.

¹⁰⁷⁷ *Ibid.*

¹⁰⁷⁸ Eaton, *supra* note 66 at 291.

4.5.1.1 The Judiciary and the Fight against Corruption

It seems that the Nigerian judiciary has also not been insulated from corrupt practices. In October 2016, the DSS in a nation-wide crackdown, which was widely condemned because of the manner of execution, arrested several officers, on allegation of corruption,¹⁰⁷⁹ including 6 judicial officers.¹⁰⁸⁰ While some judicial officers were prosecuted and subsequently exonerated, the National Judicial Council (NJC) recommended that Justice Tsamiya; Justice Ademola; and late Justice Umezulike be compulsorily retired from service.¹⁰⁸¹ Justice Tsamiya was recommended for compulsory retirement because “he was guilty of demanding N200 million to influence an appeal case, and other abuses of his office.”¹⁰⁸²

Equally, Justice Umezulike was recommended for compulsory retirement “for accepting N10 million in gifts from individuals on whose case he sat, and for making dishonourable remarks as senior judicial officer, and for abusing his judicial powers in several cases.”¹⁰⁸³ The NJC dismissed Justice Auta from service for “accepting N125 million from a petitioner in a case he was adjudicating. He also accepted N75 million naira through his personal assistant, facilitating communications between a petitioner under his review and the former Chief Justice of Nigeria, and numerous other offences.”¹⁰⁸⁴

As further evidence that the judiciary has not been entirely above board, in June 2022, unprecedented in the history of the judiciary, all 14 justices of the Supreme Court petitioned the former Chief Justice of Nigeria (CJN), the Hon. Justice Mohammed, in what is interpreted as a veiled allegation of corruption. Having exhausted other avenues to amicable resolution, they wrote to the CJN complaining of issues plaguing the Supreme Court. According to them, “we find it strange that despite the upward review of our budgetary allocation, the court cannot cater for our legitimate entitlements. This is unacceptable!”¹⁰⁸⁵ As an example, the justices

¹⁰⁷⁹ Obi Nwakanma, “The DSS Arrest of Judges”, *Vanguard* (16 October 2016) <<https://www.vanguardngr.com/2016/10/dss-arrest-judges/>>.

¹⁰⁸⁰ Unini Chioma, “SSS Clears Supreme Court Justice John Inyang Okoro of Misconduct....Returns Seized \$38,000 to Him” (The Nigeria Lawyer) (December 13, 2019) <<https://thenigerialawyer.com/sss-clears-supreme-court-justice-john-inyang-okoro-of-misconduct-returns-seized-38000-to-him/>>.

¹⁰⁸¹ *Ibid.*

¹⁰⁸² “Justice Auta, Among other Dismissed Judges, to be Prosecuted”, *National Daily Newspaper* (01 October 2016) <<https://nationaldailyng.com/justice-auta-among-other-dismissed-judges-to-be-prosecuted/>>.

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ *Ibid.*

¹⁰⁸⁵ Adejayan Gsong, “Supreme Court Justices Write Protest Letter to CJN”, *Within Nigeria*

complained that monies for their training had not been released, as such, “[w]e DEMAND to know what has become of our training funds, have they been diverted, or is it a plain denial?”¹⁰⁸⁶

The 14 justices warned that if the issues raised were not addressed, they would be compelled to take further steps:

Your Lordship, this is a wakeup call. Your Lordship must take full responsibility as our leader. You must not concession your responsibility to people who have no responsibility or stake in preserving and defending the dignity of the Institution. Your Lordship occupies a position of leadership. We will not wait for the total collapse of the institution. We must not abandon our responsibility to call Your lordship to order in the face of these sad developments that threaten our survival as an institution. We have done our utmost best to send a wakeup call to Your Lordship. A stitch in time saves nine. Finally, Your Lordship the choice is now yours. It is either you quickly and swiftly take responsibility and address these burning issues or we will be compelled to take further steps immediately. May this day never come.¹⁰⁸⁷

A few days after the petition, the former CJN resigned his position citing ill-health,¹⁰⁸⁸ but the Nigerian Bar Association (NBA) opines that the resignation of the former CJN was as a result of the allegation of corruption by all the 14 justices of the Supreme Court against the former CJN. According to the NBA, it “is, however, impossible, to consider His Lordship’s retirement in isolation of the recent unprecedented developments at the Supreme Court where 14 Justices of the Court censured the outgone Chief Justice of Nigeria.”¹⁰⁸⁹ When judicial officers, including Supreme Court justices and the CJN are accused of corruption, it is bound to affect the confidence of the people in the judiciary. Reacting to the events that led to the resignation of the former CJN, the Nigerian Bar Association opined:

Beyond this, there is near universal agreement that public confidence in the Judiciary and, indeed, the legal profession is at an all-time low. There is now more than ever the need for urgent reforms in the judiciary and to rebuild the almost dissipated confidence that Nigerians have in the judiciary and the wider legal profession in Nigeria.¹⁰⁹⁰

(20 June 2022) <<https://www.withinnigeria.com/news/2022/06/20/supreme-court-justices-write-protest-letter-to-cjn/>>.

¹⁰⁸⁶ *Ibid.*

¹⁰⁸⁷ Innocent Anaba et al, “Citing Ill-health, CJN Quits after Row with Supreme Court Justices”, *Vanguard* (28 June 2022) <<https://www.vanguardngr.com/2022/06/citing-ill-health-cjn-quits-after-row-with-supreme-court-justices/>> [Anaba et al].

¹⁰⁸⁸ *Ibid.*

¹⁰⁸⁹ *Ibid.*

¹⁰⁹⁰ *Ibid.*

Also, the NGO Access to Justice argued that “[p]ublic confidence is at low thresholds, and the judiciary’s transparency and accountability has come under increasing question. All this is taking place while the welfare of judges is dwindling, and the independence and autonomy of the judicial department are increasingly undermined by government.”¹⁰⁹¹

Furthermore, there are incidences that may indicate that either the judiciary is unduly lenient with people suspected of mismanaging funds meant for the development of the Niger Delta or the judiciary has not been totally transparent. For example, the EFCC had alleged that Dr. Peter Odili, who was governor of Rivers State in the Niger Delta from 1999 to 2007, had embezzled 100 billion Naira of public funds during his time in office and it prepared 223 draft criminal charges against him.¹⁰⁹²

In anticipation of Dr. Odili’s arraignment in court, the then Rivers State’s Attorney General and Commissioner for Justice, the chief law officer of the State, approached the Federal High Court, Port Harcourt for relief in *Attorney-General for Rivers State v. The EFCC & 3 Others*.¹⁰⁹³ He obtained an order of perpetual injunction restraining the EFCC from proceeding further in respect of the corruption allegations, “claiming that the activities of the EFCC were prejudicial to the smooth running of the Government of Rivers State.”¹⁰⁹⁴ Apart from the seeming impropriety of the perpetual injunction, experts are also struggling to grasp the frustration caused by the efforts by the EFCC to appeal the judgment and vacate the injunction.¹⁰⁹⁵

It is alleged that the Court of Appeal “further frustrated the EFCC by refusing to list its appeal against the initial court order for hearing since 2008, thereby effectively stalling the case since then.”¹⁰⁹⁶ Now fourteen years after the appeal was first lodged, there is still no information on

¹⁰⁹¹ *Ibid.*

¹⁰⁹² Unini Chioma, “Sagay faults Federal High Court Injunction against EFCC on Odili”, *The Nigeria Lawyers* (4 October 2016) <<https://thenigerialawyer.com/sagay-faults-federal-high-court-injunction-against-efcc-on-odili/>> [Chioma].

¹⁰⁹³ Suit No. FHC/PHC/CSI78/2007.

¹⁰⁹⁴ “Peter Odili’s Perpetual Injunction: Justice Buba queried by NJC”, *Sahara Reporters* (6 December 2009) <<http://saharareporters.com/2009/12/06/peter-odilis-perpetual-injunction-justice-buba-queried-njc/>>.

¹⁰⁹⁵ Juliana Taiwo-Obalonye, “Odinkalu: CSOs Accuse Odili of Using Judiciary to Thwart Justice”, *The Sun Newspaper* (12 December 2018) <<https://www.sunnewsonline.com/odinkalu-csos-accuse-odili-of-using-judiciary-to-thwart-justice/>>.

¹⁰⁹⁶ “How Court Has Shielded Ex-Gov Odili From Trial –EFCC”, *Ripples Nigeria* (01 March 2016) <<https://www.ripplesnigeria.com/how-the-court-has-shielded-ex-gov-odili-from-trial-efcc/>>.

the status of the appeal. Efforts by the EFCC have not been successful because of the lack of support from the judiciary. According to the EFCC,

We went to see two Presidents of the Court of Appeal but they never showed interest in the case. It has been eight years that we have been trying to vacate that order to no avail. 'This kind of thing demoralises detectives because evidence may have been compromised, victims or witnesses would have moved on while some of the investigators may have been transferred or retired.'¹⁰⁹⁷

When the judiciary acts in this manner, it is grim for the environment. Gaoussou Diarra and S'ébastien admit that in "a poor legal and judicial system, in which non-compliance and corruption become pervasive and law are not enforced..., environmental degradation is more likely to occur, and progresses towards sustainable development are weakened."¹⁰⁹⁸

The second example would be the pacifist approach by the judiciary to the government's propensity to influence the posting of judges who are handling corruption cases to stop the swift determination of the cases. According to Akume Albert, the "government...has sought to stealthily meddle and discourage the prosecution of some corruption cases using the instrumentality of promotion and unusual transfer of judges at odd moments in the process of some cases."¹⁰⁹⁹ For example, the former Managing Director of the defunct Intercontinental Bank Plc., Mr. Erastus Akingbola, was arraigned by the EFCC before Justice Habeeb Abiru of the Lagos High Court, for theft of the Bank's 49.7 billion Naira (about \$72 million CAD).¹¹⁰⁰ After the conclusion of trial but before the delivery of judgment, the trial judge was unexpectedly elevated to the Court of Appeal, meaning that the case had to start afresh before another judge.¹¹⁰¹

The case was assigned to another court presided over by Justice Adeniji Onigbanjo, who was later transferred to the commercial division of Lagos State High Court and the case was again re-

¹⁰⁹⁷ Chioma, *supra*, note 1092.

¹⁰⁹⁸ Gaoussou Diarra & S'ébastien Marchand, "Environmental Compliance, Corruption and Governance: Theory and Evidence on Forest Stock in Developing Countries" (CERDI Working Papers 201101, 2011) 3 <https://www.researchgate.net/publication/49133383_Environmental_Compliance_and_Governance_Theory_and_Evidence_on_Forest_Stock_in_Developing_Countries/link/5786056f08ae3949cf554411/download>.

¹⁰⁹⁹ Akume Albert, "Combating Corruption in Nigeria and the Constitutional Issues Arising: Are They Facilitators or Inhibitors?" (2016) 23:4 J Fin Crime 700 at 711 [Albert].

¹¹⁰⁰ Suit No. FHC/L/CS/443c/09: State vs. Erastus Akingbola

¹¹⁰¹ Ben Ezeamalu, "Alleged N47 Billion Fraud: Akingbola's Trial Stalled as Lawyers file Fresh Objection", *Premium Times* (24 March 2014) <<https://www.premiumtimesng.com/news/157329-alleged-n47-billion-fraud-akingbolas-trial-stalled-lawyers-file-fresh-objection.html>>.

assigned to Justice Babajide Lawal-Akapo to start afresh.¹¹⁰² Albert opines that these transfers were calculated attempts by the government to frustrate the prosecution of the suspects.¹¹⁰³

The poor transparency record of the judiciary may not be unconnected with the poor remuneration of judicial officers. Indeed, the former CJN – the Hon. Justice Tanko Muhammad – has acknowledged that the judiciary has not been above board.¹¹⁰⁴ To tackle this, wages of both the judicial and non-judicial staff in the judiciary should be raised. Their remuneration, according to the President of the Court of Appeal, is below average in Africa and other Commonwealth countries¹¹⁰⁵ and is not a disincentive to corruption. In October 2021, the House of Representatives had expressed concern over the low wages of judicial officers and passed a resolution recommending to the Revenue Mobilisation Allocation and Fiscal Commission (RMAFC) an upward review of the salaries of judicial officers to reflect the current economic realities.¹¹⁰⁶

The RMAFC should see the need to raise the salaries of judicial officers soon. In chapter 5 of the thesis, which will examine how CERs could widen access to justice to enhance the ability of the Niger Delta to seek and obtain judicial remedies for environmental harms that are occurring in its territory, the thesis will make other recommendations that could strengthen the judiciary to enforce laws in Nigeria which would be to the betterment of the Niger Delta environment, such as new equitable, timely and affordable procedural rules; availability of both substantive and injunctive remedies; overcoming barriers to access to justice (financial barriers, limitation of standing, difficulty in obtaining legal counsel); unclear review procedures; and lack of Awareness within the review bodies.

In addition to not paying living wages to public servants in Nigeria, including judicial officers, another issue which has been cited by experts as indicative of government’s attempt to weaken

¹¹⁰² *Ibid.*

¹¹⁰³ Albert, *supra* note 1099 at 711.

The case eventually proceeded to trial and is on-going. See Dr. Erastus Akingbola vs. F.R.N. & Anor. [2015]10 NWLR, 579 at 583.

¹¹⁰⁴ Sunday Aborishade, “Senate Confirms Muhammad, CJN Admits Corruption in Lower Courts”, *Punch Newspaper* (18 July 2019) <<https://punchng.com/senate-confirms-muhammad-cjn-admits-corruption-in-lower-courts/>>.

¹¹⁰⁵ “Appeal Court President seeks Salary increase for Judges”, *Punch Newspaper* (13 September 2021) <<https://punchng.com/appeal-court-president-seeks-salary-increase-for-judges/>>.

¹¹⁰⁶ Olufunmilola Olukomaiya, “Reps make Case for Judicial Workers”, *PM News* (6 October 2021) <<https://pmnewsnigeria.com/2021/10/06/ reps-make-case-for-judicial-workers/>>.

the judiciary in its anti-corruption effort is the lack of funding of the judiciary. The expectation is that the judiciary will then be subservient to the executive arm of government, and therefore, not able to punish executive infraction. A financially independent judiciary is central to the fight against corruption. Kiaia and Kuriab argue that the “judiciary cannot be effective in controlling corruption unless it is independent.”¹¹⁰⁷

The lack of (financial) independence of the Nigerian judiciary has been widely reported.¹¹⁰⁸ Writing on the impact on the independence of the Judiciary of the shrinking federal allocations to the judiciary by the executive arm, the then CJN, the Hon. Justice Mahmud Mohammed in the 2015 admitted that it is “a source of great concern that in a country where an arm of Government is appropriated with less than one percent of the National Budget, it is difficult to refer to our Judiciary as being truly independent.”¹¹⁰⁹

The courts that are funded by the 36 States fare even worse. A former CJN, the Hon. Justice Walter Onnoghen, complained of delay in the payment of judicial officers’ salaries and allowances and judges being afraid to deliver unfavorable verdicts against the State governments as that could result in being starved of funds. According to him, “proposed reforms including automation of the judicial process remain mere ideals with no fund to implement them.... Many [judges] are under perpetual apprehension. The reality is that many judges are not independent.”¹¹¹⁰ When these budgetary allocations are finally released by the executive arm, it is done in piecemeal, and that affects the planning and implementation of programs by the judiciary. According to Innocent Anaba, aside from the uncertainty that ensues, it “makes planning difficult...Judges in some states sit in decrepit court rooms. Facilities that should make their court rooms comfortable are lacking. Many governors hold their judiciaries to ransom by refusing to release funds to the courts in violation of the constitution.”¹¹¹¹ Commenting on this, experts opine that to “make law enforcement effective against corrupt actors, both inside and

¹¹⁰⁷ Kiaia & Kuriab, *supra* note 1071 at 251.

¹¹⁰⁸ Boyd, *supra* note 28 at 156.

¹¹⁰⁹ Ahuraka Isah, “Poor Budgetary Funding denies Judiciary Independence”, *The Guardian* (8 February 2016) <<https://guardian.ng/features/poor-budgetary-funding-denies-judiciary-independence/>>.

¹¹¹⁰ Innocent Anaba, “Judiciary and Challenge of Funding”, *Vanguard* (20 December 2018) <<https://www.vanguardngr.com/2018/12/judiciary-and-challenge-of-funding/#:~:text=Elucidating%20on%20the%20magnitude%20of%20the%20problem%2C%20Chief,greatest%20challenges%20confronting%20the%20judiciary%20of%20this%20nation.>>>.

¹¹¹¹ *Ibid.*

outside of government, the judges' careers must not depend on pleasing those with political and economic power."¹¹¹² Unfortunately, apart from the judiciary, the government seems to also starve other anti-corruption agencies in Nigeria of funds and an independent environment to thrive. The next segment will analyze the unfavorable environment within which the EFCC presently operates.

4.5.1.2 Issues Inhibiting the EFCC in its Anti-Corruption Drive and Possible Remedies

Nigeria has some anti-corruption agencies, including the Code of Conduct Bureau;¹¹¹³ the AGF/Federal Ministry of Justice;¹¹¹⁴ the Attorney-General of a State/State Ministry of Justice;¹¹¹⁵ the Nigeria Police Force;¹¹¹⁶ the Independent Corrupt Practices and Other Related

¹¹¹² Susan Rose-Ackerman & Bonnie Palifka, "Accountability beyond the Ballot Box" in Susan Rose-Ackerman & Bonnie Palifka, 2nd ed, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 2016) 374 at 382.

¹¹¹³ Section 153 (1) of the 1999 Constitution provides that there "shall be established for the Federation the following bodies, namely: (a) Code of Conduct Bureau."

Section 3 of Part I, Third Schedule to the 1999 Constitution provides that the Bureau "shall have power to— (a) receive declarations by public officers made under paragraph 12 of Part I of the Fifth Schedule to this Constitution; (b) examine the declarations in accordance with the requirements of the Code of Conduct of any law; (c) retain custody of such declarations and make them available for inspection by any citizen of Nigeria on such terms and conditions as the National Assembly may prescribe; (d) ensure compliance with and, where appropriate, enforce the provisions of the Code of Conduct or any law relating thereto; (e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law in relation thereto, investigate the complaint and, where appropriate, refer such matters to the Code of Conduct Tribunal..."

¹¹¹⁴ Section 174 (1) of the 1999 Constitution provides that the Attorney-General of the Federation "shall have power— a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any Act of the National Assembly; b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person..."

Section 174 (2) of the 1999 Constitution provides that the "powers conferred upon the Attorney-General of the Federation under subsection (1) of this section may be exercised by him in person or through officers of his department."

¹¹¹⁵ Section 211 (1) of the 1999 Constitution provides that the Attorney-General of a State "shall have power— (a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court-martial, in respect of any offence created by or under any law of the House of Assembly; (b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person..."

Section 174 (2) of the Constitution provides that the "powers conferred upon the Attorney-General under subsection (1) of this section may be exercised by him in person or through officers of his department."

¹¹¹⁶ *Nigeria Police Act, 2020* <<https://placng.org/i/wp-content/uploads/2020/09/Police-Act-2020.pdf>>.

Section 66 (1) of the Act provides that subject "to the provisions of section 174 and 211 of the Constitution and section 106 of the Administration of the Criminal Justice Act which relates to the powers of the Attorney-General of the Federation and of a State to institute, take over and continue or discontinue criminal proceedings against any person before any court of law in Nigeria, a police officer who is a legal practitioner, may prosecute in person before any court whether or not the information or complaint is laid in his name."

Section 66 (2) of the Act provides that a police officer "may, subject to the provisions of the relevant criminal procedure laws in force at the Federal or State level, prosecution before the courts those offences which non-qualified legal practitioners can prosecute."

Offences Commission (ICPC);¹¹¹⁷ and the EFCC.¹¹¹⁸ However, this segment will only analyze the efforts by the EFCC to curb corruption in Nigeria for 2 reasons: First, the EFCC seems more visible in tackling corruption than other anti-corruption agencies, on account of which it has been described as ‘the most promising effort Nigeria’s government has ever undertaken to fight corruption.’¹¹¹⁹ Second, because Nigeria overwhelmingly depends on the oil resources of the Niger Delta for its economic survival,¹¹²⁰ it could be argued that the bulk of the monies stolen from Nigeria through corrupt practices, come from the Niger Delta. Therefore, the focus in this segment is on EFCC because the EFCC was set up to tackle economic crimes in Nigeria.¹¹²¹ The segment will analyze the effect of corruption in Nigeria, why efforts by EFCC in tackling corruption are floundering and what could be done to reposition the EFCC, and by extension, other agencies of government, to effectively tackle corruption in Nigeria so CERs could better achieve their potentials.

Some of the reasons advanced for the ineffectiveness of Nigeria’s anti-corruption crusade by the EFCC include: (i) selective prosecution of corruption cases; (ii) lack of political will to tackle corruption; (iii) a poorly remunerated workforce; (iv) the constitutional power of the AGF to discontinue criminal proceedings in Nigeria; and (v) the constitutional power to grant presidential pardon to those convicted of crime. An analysis of these issues and recommendations on how they could be tackled are undertaken below.

¹¹¹⁷ *The Corrupt Practices and Other Related Offences Act, 2000* <<https://www.icpc.gov.ng/wp-content/uploads/downloads/2012/09/CORRUPT-PRACTICES-ACT-2010.pdf>>.

Section 3 (1) of the Act provides that “(1) There is hereby established a Commission to be known as the Independent Corrupt Practices and Other Related Offences Commission.”

Section 6 provides that the general duties “of the Commission to receive investigate complaint and prosecute offenders, etc.”

¹¹¹⁸ *The Economic and Financial Crimes Commission (Establishment) Act, 2004*

<https://www.efccnigeria.org/efcc/images/pdfs/establishment_act_2004.pdf> [EFCC Act].

¹¹¹⁹ Lukman Abdulrauf, “Using Specialised Anti-Corruption Agencies to Combat Pervasive Corruption in Nigeria: A Critical Review of the ICPC and EFCC” (2020) 12 *African Journal of Legal Studies* 215 at 222 [Abdulrauf].

¹¹²⁰ M’Gonigle & Takeda, *supra* note 491 at 1027.

¹¹²¹ Section 7 (1) of the EFCC Act provides that the Commission “has power to – (a) cause investigations to be conducted as to whether any person, corporate body or organization has committed any offence under this Act or other law relating to economic and financial crimes (b) cause investigations to be conducted into the properties of any person if it appears to the commission that the person’s lifestyle and extent of the properties are not justified by his source of income.” See EFCC Act, *supra* note 1118.

(i) Selective Prosecution of Corruption Cases

The impression is rife that the EFCC is usually used by successive administrations to hound political opponents while protecting corrupt friends of the government.¹¹²² In 2015, the then National Chairman of the ruling APC, Mr. Adams Oshiomhole, publicly declared in the presence of President Buhari that once any corrupt public officials decamp to the ruling party, their sins are forgiven. This statement has been interpreted to mean that such a person will not be prosecuted for corruption.¹¹²³ Mr. Oshiomhole became a beneficiary of this political forgiveness.

A concerned Nigerian, Bishop Ochie, had petitioned the EFCC to investigate Mr. Oshiomhole for allegedly enriching himself while serving as governor of Edo State in the Niger Delta from the monies meant for the development of his State, which he used to acquire several pieces of real estate in the US, South Africa, Dubai and Nigeria, worth several billion dollars (USD).¹¹²⁴ When the EFCC refused to investigate the allegation, the petitioner approached the FHC in the case of *Bishop Osadolor Ochie v. the EFCC*,¹¹²⁵ seeking an order of the court to compel the EFCC to investigate Mr. Oshiomhole.¹¹²⁶ The EFCC filed an application asking the court to dismiss the suit on the ground that the anti-graft agency “was not under any obligation to report or give account of its investigations to any individual or under a timeline within which to carry out its functions.”¹¹²⁷ The court dismissed the claim as statute-barred.¹¹²⁸

¹¹²² Akume Albert & F.C. Okoli, “EFCC and the Politics of Combating Corruption in Nigeria (2003-2012)” (2016) 23 (4) J.F.C. 725 at 740 [Albert & Okoli].

¹¹²³ Success Nwogu, Theophilus Onojeghen & Adekunle Peter, “ICYMI: Oshiomhole: Once you Join the APC your Sins are Forgiven”, *Punch* (18 January 2019) <<https://punchng.com/oshiomhole-once-you-join-the-apc-your-sins-are-forgiven/>>.

¹¹²⁴ Ikechukwu Nnochiri, “Corruption Allegations: Why We Can’t Arrest Oshiomhole, EFCC Tells Court”, *Vanguard* (18 November 2018) <<https://www.vanguardngr.com/2018/11/corruption-allegations-why-we-cant-arrest-oshiomhole-efcc-tells-court/>> [Nnochiri].

¹¹²⁵ Suit No. FHC/ABJ/CS/628/2018

¹¹²⁶ “Court asked to Compel EFCC to Prosecute Ex-Gov Oshiomhole on Alleged Corruption”, *Vanguard* (14 June 2018) <<https://www.vanguardngr.com/2018/06/court-asked-compel-efcc-prosecute-ex-gov-oshiomhole-alleged-corruption/>>.

¹¹²⁷ Nnochiri, *supra* note 1124.

¹¹²⁸ Ikechukwu Nnochiri, “Corruption Allegations: Court Declines to Order EFCC to Try Oshiomhole”, *Vanguard* (13 May 2019) <<https://www.vanguardngr.com/2019/05/corruption-allegations-court-declines-to-order-efcc-to-try-oshiomhole/>>.

See the *Public Officers Protection Act, 1916* <<https://lawcarenigeria.com/public-officers-protection-act/>>. Section 2 provides that “Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect- (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is

This scenario supports the argument that “political exigencies that exclude some from prosecution has continued to rub-off badly on [EFCC’s] reputation and effort at curbing corruption.”¹¹²⁹ As argued by Lukman Abdulrauf, the EFCC “rarely investigate top politicians without the support and approval of the presidency. [The EFCC], in violation of the law, need to obtain ‘presidential clearance’ to investigate and prosecute such persons.”¹¹³⁰

These scenarios expose the vulnerability of the EFCC to the dictates of the politicians because the President holds the power to hire the chairman and other staff members, subject to the approval of the Senate (section 2 (3) of the EFCC Act)¹¹³¹ and the power to fire them without recourse to any body nor institution (section 3(2)).¹¹³² Because of this, politicians have “been able to influence some cases through the EFCC because the Commission is deeply vulnerable to the whims of the presidency. The Commission’s chairman enjoys no security of tenure and can be removed by the President at will, without any form of consultation or approval from the National Assembly.”¹¹³³

The EFCC should therefore be entrenched in the Constitution and the presidential power to remove its chairman must be subject to the approval of the Senate. This is the procedure adopted in Brazil with respect to the PM (article 128 (II) (§2°)).¹¹³⁴ Also, the chapter recommends that the EFCC should be given the constitutional powers to control its recruitments and postings of staff members as in Brazil regarding the PM (article 127 (§2°)).¹¹³⁵ This would insulate the EFCC from political interference.

commenced within three months next after the act, neglect or default [complained] of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof.”

¹¹²⁹ Albert & Okoli, *supra* note 1122 at 734-735.

¹¹³⁰ Abdulrauf, *supra* note 1119 at 232.

¹¹³¹ Section 2 (3) of the Act provides that the Chairman and staff members of the EFCC “shall be appointed by the President and the appointment shall be subject to confirmation of the Senate.”

¹¹³² Section 3 (2) provides that a “member of the Commission may at any time be removed by the President for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misconduct or if the President is satisfied that it is not in the interest of the Commission or the interest of the public that the member should continue in office.” See EFCC Act, *supra* note 1112.

¹¹³³ Albert & Okoli, *supra* note 1119 at 744.

¹¹³⁴ Article 128 (II) (§2°) provides that the Procurator-General of the Republic “can be removed from office, on the initiative of the President of the Republic, subject to prior authorization of an absolute majority of the Federal Senate.” See Brazil’s Constitution, *supra* note 448.

¹¹³⁵ Article 127 (§2°) provides that the Public Ministry “is assured functional and administrative autonomy, and it may, observing provisions of art. 169, propose to the Legislature creation and abolition of its positions and auxiliary services, filling them through competitive public examinations, or such examinations and comparison of

As argued by Abdulrauf, anti-corruption agencies “are usually designed in such a way as to ensure operational autonomy, and their legal frameworks seek also to shield them from political interference. This does not mean total independence, however, as they are still subject to checks and balances by other institutions such as the legislature and judiciary.”¹¹³⁶ Earlier, the chapter had analyzed the constitutional guarantee of independence of the PM through the recourse to the Brazilian Senate in the removal of the head of the PM and the structural autonomy of the PM to control internal recruitment processes and how these have provided the PM with the impetus to protect the environment. The EFCC could record the same result in its responsibility to tackle corruption in Nigeria and enhance environmental enforcement, if similarly protected by the Constitution.

(ii) Lack of Political Will to tackle Corruption

Abdulrauf posits that the “absence of genuine political will to combat corruption is a major challenge to anti-corruption reform in Nigeria. This certainly has implications for the work of the [EFCC].”¹¹³⁷ This could be seen in the failure by the government to adequately fund the EFCC.¹¹³⁸ It seems that this underfunding is deliberate, to prevent it from effectively tackling corruption. Abdulrauf argues that “starving the [EFCC] of funds is a means for politicians to weaken their work. A further repercussion of their lack of adequate funding is that the [EFCC] rely extensively on funds from donors, which may taint the anti-corruption campaign.”¹¹³⁹

Upset by this premeditated underfunding, the then chairman of the ICPC – EFCC’s sister agency, retired Justice of the Supreme Court Emmanuel Ayoola “pointedly accused the Executive branch and the National Assembly of frustrating the commission’s efforts through inadequate funding. It is an extraordinary situation when the head of agency takes his frustration over under funding public.”¹¹⁴⁰

professional credentials; remuneration policy; and career plans. The law shall provide for its organization and operation.” See Brazil’s Constitution, *supra* note 448.

¹¹³⁶ Abdulrauf, *supra* note 1119 at 217.

¹¹³⁷ *Ibid.*

¹¹³⁸ Albert, *supra* note 1099 at 710.

¹¹³⁹ Abdulrauf, *supra* note 1119 at 237.

¹¹⁴⁰ Eme Okechukwu & Okoh Inya, “The Role of EFCC in Combating Political Corruption” (2011) 1 (3) Arabian Journal of Business and Management Review 45 at 58.

Other limitations in EFCC's work have been attributed to inadequate funding: first, the weakened ability of the EFCC to conduct investigations of corruption because of its inability to recruit experienced investigators and re-training of old staff.¹¹⁴¹ From 2010 to 2019, out of the 73,948 corruption petitions received by the EFCC, it could only investigate 39,970 of the petitions.¹¹⁴²

Second, where the EFCC finally undertakes investigation, it is not done thoroughly because of lack of funds to engage experienced investigators.¹¹⁴³ The EFCC is not able to follow leads which would strengthen cases:

The staff inadequacy has, in part, resolved the lingering question why the Commission's investigation is not thorough enough. This has given the defence counsel legal opportunities to cash-in on, thus resulting in either corruption cases being thrown out or the trial continuing to linger endlessly. One wonders how the EFCC with such an insignificant number of personnel can perform its tasks reasonably well.¹¹⁴⁴

Third, when the EFCC finally investigates, inadequate funding often affects its ability to prosecute.¹¹⁴⁵ Of the 73,948 corruption petitions received by the EFCC between 2010 and 2019, it could only prosecute 5,767.¹¹⁴⁶

Fourth, the EFCC was only able to secure 2,544 convictions out of these 5,767 cases prosecuted because it lacks experienced litigators to successfully handle the cases and is not able to recruit them or outsource the work to experienced external lawyers because of lack of funds. According to Abdulrauf, it is constrained to use the few "in-house lawyers who in most cases do not have the experience to match defence counsels who will employ all and any means to frustrate the proceedings. Moreover, those who embezzle large amounts of money are usually able to hire the best lawyers to help keep them out of prison."¹¹⁴⁷

¹¹⁴¹ Albert & Okoli, *supra* note 1122 at 735.

¹¹⁴² EFCC, "EFCC Operational Statistics (2010 – 2019)" <<https://www.efcc.gov.ng/efcc-operational-statistics1>> [EFCC Operational Statistics].

¹¹⁴³ Albert & Okoli, *supra* note 1122 at 741.

¹¹⁴⁴ *Ibid* at 735.

¹¹⁴⁵ Abdulrauf, *supra* note 1119 at 236.

¹¹⁴⁶ EFCC Operational Statistics, *supra* note 1142.

¹¹⁴⁷ Abdulrauf, *supra* note 1119 at 237.

As of 2016, EFCC's staff strength was 2,000 out of which 706 were on secondment from other government agencies.¹¹⁴⁸ Compared to the staff strength of the Nigeria Police – another anti-corruption agency (which stands at more than 350,000 staff),¹¹⁴⁹ “it is glaring that the EFCC is grossly understaffed.”¹¹⁵⁰

The EFCC needs financial autonomy. Albert proposes that there should be a policy in place where part of the recoveries made by the EFCC should “be re-assigned to the EFCC and its accountability enforced by the government” because “such a gesture will enable the Commission to turn the tide against economic crimes and public official corruption in Nigeria.”¹¹⁵¹ However, any mechanism that does not provide for constitutionally guaranteed financial autonomy for the EFCC would still make it vulnerable to the dictates of politics. As such, the chapter recommends that Nigeria should guarantee financial independence to the EFCC in the Constitution. This would help to insulate the EFCC from political interference with its work, especially from corrupt government officials who are siphoning resources meant for the development of the Niger Delta

(iii) Poorly Remunerated Workforce

Abdulrauf makes the argument for the proper remuneration of EFCC staff members. According to him, first it “makes them more committed to the job. The second is that it serves as a deterrent to corruption by preventing employees from falling into temptation.”¹¹⁵² By the *National Minimum Wage Act, 2019*, Nigeria raised its minimum wage across board to 30, 000 Naira monthly (about \$44 CAD).¹¹⁵³ While not justifying fraudulent behaviours because of poor remuneration, the chapter argues that the minimum wage is grossly inadequate to either motivate anyone to act with integrity or deter anyone from engaging in corrupt practices.

The EFCC has had to contend with fraudulent staff members whose activities sought to compromise investigations of corruption. In 2015, EFCC dismissed one of its staff for engaging

¹¹⁴⁸ Albert & Okoli, *supra* note 1122 at 735.

¹¹⁴⁹ Interpol, “How INTERPOL supports Nigeria to tackle International Crime” <<https://www.interpol.int/Who-we-are/Member-countries/Africa/NIGERIA>>.

¹¹⁵⁰ Albert & Okoli, *supra* note 1122 at 735.

¹¹⁵¹ Albert, *supra* note 1099 at 710.

¹¹⁵² Abdulrauf, *supra* note 1119 at 237.

¹¹⁵³ National Minimum Wage Act, 2019 <<https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/111617/139184/F-42570168/NGA111617%20.pdf>>.

in fraudulent activities.¹¹⁵⁴ In 2017, another EFCC staff member contacted a suspect who was under investigation and “promised to avail the suspect with the original case file on the condition for payment of money. During investigation, a staff of the Commission ...and his girlfriend... were arrested while trying to make an exchange of the said case file.”¹¹⁵⁵

While the motivation of these staff members to engage in fraudulent activities were not linked to poor remuneration, it is possible that poor remuneration played a role, considering the low monthly minimum wage of about \$ 44 CAD. The chapter recommends that Nigeria raise its minimum wage across the board to a level that would minimize the temptation for personal aggrandizement by staff members of the EFCC and other government employees who may be susceptible to bribery and other forms of corruption. Such conduct would compromise anti-corruption efforts, especially against corrupt government officials from the Niger Delta who are diverting resources that ought to go to the development of the Niger Delta for personal gains.

(iv) Constitutional Power of the AGF to Discontinue Criminal Proceedings in Nigeria

By the Constitution, the AGF has the power to institute, takeover or discontinue any criminal proceedings in any court in Nigeria (section 174 (1))¹¹⁵⁶ but such powers shall be exercised in the interest of justice, to promote public interest and prevent the abuse of legal procedure (section 174 (3)).¹¹⁵⁷ Some AGFs have been using these powers for political reasons to discontinue cases of corruption against certain individuals. Transparency International has even alleged that since assuming office 7 years ago, neither the immediate past AGF nor his office has prosecuted any corruption case; rather, the AGF has either watered down or discontinued high profile corruption cases that the government inherited from previous administrations.¹¹⁵⁸

Successive AGF’s have used the constitutional power to takeover and withdraw criminal proceedings in ways that undermine anti-corruption efforts. However, in a rare display of judicial

¹¹⁵⁴ “EFCC issues Statement on its Staff dismissed for Corruption”, *City People Magazine* (17 February 2017) <<https://www.citypeopleonline.com/efcc-issues-statement-staff-dismissed-corruption/>>.

¹¹⁵⁵ Hamilton Nwosa, “Corruption: EFCC Arrests Staff”, *The New Diplomat* <<https://newdiplomatng.com/corruption-efcc-arrests-staff/>>.

¹¹⁵⁶ Section 174 (1) of the 1999 Constitution, *supra* note 797.

¹¹⁵⁷ Section 174 (3) of the 1999 Constitution provides that in “exercising his powers under this section the Attorney-General shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.”

¹¹⁵⁸ Gboyega Akinsanmi, “How AGF Frustrated Malabu, Goje Corruption Cases, Alleges TI”, *ThisDay* <How AGF Frustrated Malabu, Goje Corruption Cases, Alleges TI – THISDAYLIVE>.

courage which is an indication of the role that the judiciary could play in addressing corruption, Justice Pat Ajoku of the FHC, Lagos, in *Fidelis Anosike & Ors.*,¹¹⁵⁹ refused to grant the AGF's application to withdraw charges against the accused persons.

The federal government is prosecuting them for stealing assets of the Daily Times Nigeria valued at 3 billion Naira (about \$4.5 million CAD). The court held that “while it is true that the AGF has power to withdraw a criminal charge against any person under Section 174 (1 and 2) of the 1999 Constitution, that power under subsection 3, must be exercised in public interest and to prevent abuse of legal powers.”¹¹⁶⁰ The trial of the accused is on-going.¹¹⁶¹ Despite this, relying on the courts to curtail the abuse of the constitutional power of the AGF to take over and withdraw criminal proceedings does not hold out much hope, for at least 2 reasons.

First, the position taken by the trial court was an exception and not the norm.¹¹⁶² Second, the premise of Justice Pat Ajoku's refusal to grant the AGF's request to withdraw the charges in *Fidelis Anosike & Ors.* was procedural and not substantive because the AGF did not use the correct procedure in making the application: if the AGF complies with procedural requirements, the charges will not be struck out. From the foregoing, the chapter recommends that the Constitution be amended to expunge the power of the AGF to takeover and withdraw criminal proceedings in court, because the prosecuting anti-corruption agencies themselves have inherent right to withdraw charges that they have filed against accused persons.

(v) Constitutional Power to grant Presidential Pardon to those convicted for Crime

The Constitution allows Nigeria's president to pardon those convicted of crime (section 175 (1) a)),¹¹⁶³ after consulting the Council of State (section 175 (2)).¹¹⁶⁴ President Buhari in April 2022,

¹¹⁵⁹ FHC/L/274C/10.

¹¹⁶⁰ Innocent Anaba, “Daily Times Sale: Anosike's Trial Stalled”, *Vanguard* (01 December 2010)

<<https://www.vanguardngr.com/2010/12/daily-times-sale-anosikes-trial-stalled/>>.

¹¹⁶¹ “Court to try Firm, Others over alleged Theft of Daily Times Property”, *The Nigerian Voice* (26 January 2011)

<<https://www.thenigerianvoice.com/news/44878/court-to-try-firm-others-over-alleged-theft-of-daily-times.html>>.

¹¹⁶² Albert & Okoli, *supra* note 1122 at 744.

¹¹⁶³ Section 175 (1) provides that the President may—(a) grant any person concerned with or convicted of any offence created by an Act of the National Assembly a pardon, either free or subject to lawful conditions.” See Nigeria's 1999 Constitution, *supra* note 797.

¹¹⁶⁴ Section 175 (2) provides that the “powers of the President under subsection (1) of this section shall be exercised by him after consultation with the Council of State.” See Nigeria's 1999 Constitution, *supra* note 797.

granted pardon to 159 convicts,¹¹⁶⁵ including 2 former State governors who were still serving various jail terms, having been prosecuted by the EFCC and convicted for stealing government funds while in office.¹¹⁶⁶

The chapter concedes that there could be a public policy benefit for granting pardons to convicts since pardon “provide a ‘safety net’ for those convicted of criminal offences in a wide range of circumstances especially where some error or oversight by the courts or other miscarriage of justice has occurred or on humanitarian grounds.”¹¹⁶⁷ But pardoning politically exposed persons (PEPs), especially while still serving jail terms, could undermine anti-corruption efforts.¹¹⁶⁸ First, it could demoralize staff of the anti-corruption agencies in the fight against corruption.

According to a staff of the EFCC, it is ‘quite sad that the two former governors could be pardoned despite our sleepless nights to ensure that those people who looted commonwealth didn’t go scot-free. Sincerely, this will definitely affect our zeal to prosecute any PEPs.’¹¹⁶⁹

Second, those convicted of fraud are prohibited from occupying certain offices. For instance, the Nigerian Constitution prohibits permanently those convicted of fraud from occupying the office of a governor and for 10 years from becoming president (sections 182 (1)d) and (e)).¹¹⁷⁰

According to John Hatchard, such provisions have “significant implications for corrupt PEPs as it denies them access to political power at least for a significant period. This is a potentially significant deterrent and is an important part of an anti-corruption/AML strategy.”¹¹⁷¹ However,

¹¹⁶⁵ Idowu Isamotu, “Presidential Pardon: Morale Low in Handling High-Profiled Cases – EFCC, ICPC Prosecutors”, *Daily Trust* (17 April 2022) <<https://dailytrust.com/presidential-pardon-morale-low-in-handling-high-profiled-cases-efcc-icpc-prosecutors>> [Isamotu].

¹¹⁶⁶ Namely, Mr. Joshua Dariye – former governor of Plateau State and Reverend Jolly Nyame - former governor of Taraba State. See Ibrahim Adeyemi, “EFCC, ICPC Officials accuse Buhari of sabotaging fight against Corruption”, *Premium Times* (18 April 2022) <<https://www.premiumtimesng.com/news/headlines/524426-efcc-icpc-officials-accuse-buhari-of-sabotaging-fight-against-corruption.html>>.

¹¹⁶⁷ John Hatchard, *Combating Money Laundering in Africa Dealing with the Problems of PEPs* (UK & USA: Edward Elgar Publishing Limited, 2020) 199 [Hatchard].

¹¹⁶⁸ *Ibid* at 200.

¹¹⁶⁹ Isamotu, *supra* note 1165.

¹¹⁷⁰ Section 182 (1) provides that “No person shall be qualified for election to the office of Governor of a State if...d) he is under ... a sentence of imprisonment or fine for any offence involving dishonesty or fraud (by whatever name called) or for any other offence, imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal; or (e) within a period of less than ten years before the date of the election to the office of President he has been convicted and sentenced for an offence, involving dishonesty or he has been found guilty of the contravention of the Code of Conduct.” See Nigeria’s 1999 constitution, *supra* note 794.

¹¹⁷¹ Hatchard, *supra* note 1167 at 215.

a pardon wipes away the conviction completely, meaning that PEPs who have been granted pardon are no longer under such constitutional limitations to run for those offices.

Third, a pardon could provide PEPs with the incentives to recover previously forfeited proceeds of crimes and this would further undermine anti-corruption efforts:

The power of confiscation/forfeiture is a fundamental tool for taking the profit out of corruption and money laundering... This is a matter of concern as it undermines a key anti-corruption/AML strategy for the forfeiture of the proceeds of corruption is in line with public policy and the interests of victims of crime. This is further supported by the need for criminals to ‘be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them’.¹¹⁷²

Overall, considering the constraints that the EFCC faces, the EFCC has recorded some modest achievements. For example, as of 2016, EFCC had more than 1,500 pending cases in courts on corruption including cases on illegal siphoning of crude oil.¹¹⁷³ From 2018 to 2020, the EFCC has secured 603 convictions against corrupt persons and has recovered about 500 billion Naira (about \$735 million CAD) within that period,¹¹⁷⁴ which indicates that EFCC can play a leading role in ridding Nigeria of corruption if supported through constitutional reforms. If these recommendations are implemented, they would assist in addressing some of the gaps in Nigeria’s anti-corruption efforts. Although the above discussion was based on EFCC’s experience, the recommendation would apply to sister agencies because the issues identified as inhibiting EFCC from recording greater successes in its fight against corruption, may also affect them.

The chapter recommends that the power to pardon not be extended to PEPs or it should be totally expunged from the Constitution because of its discretionary nature, which is subject to abuse. This would strengthen Nigeria’s anti-corruption efforts to stop the frittering away of much-needed funds for the protection of the environment and the overall development of Nigeria.

¹¹⁷² *Ibid* at 217-218.

¹¹⁷³ Albert & Okoli, *supra* note 1122 at 739.

¹¹⁷⁴ Abdulrauf, *supra* note 1119 at 237.

4.5.2 Nigeria's Need for Economic Development Impedes Compliance Monitoring, Implementation and Enforcement of Environmental Norms

Nigeria operates a virtual mono-economy that is crude oil-dependent. Revenue from the exploitation of oil and gas resources is what sustains the Nigerian economy. It has “therefore been noted that as the Nigerian Government mainly depends on oil revenues, it has deliberately neglected to institute a strict legal regime of environmental legislations or actively enforce existing environmental laws to create an enabling setting for the multinational oil and gas companies operating in the Niger Delta region.”¹¹⁷⁵

The Nigerian government fears that if existing environmental laws are strictly implemented, the noose may be tightened around the crude oil exploitation value-chain, and the TNCs may divest their interests and pull out of Nigeria, depriving the government of funds.¹¹⁷⁶ From this fiscal perspective, the government has “direct economic incentives to ensure that environmental regulations are not enforced against the oil companies.”¹¹⁷⁷

The impact of Nigeria's mono-economy on the implementation of environmental norms manifests in various forms. One condition that has been cited as an underlying factor weakening the implementation of environmental regulations in Nigeria is the close collaborative relationship between the government and the TNCs. The government may be reluctant to create any additional pressure points for the TNCs, which could interfere with their bottom line and Nigeria's oil earnings. So, rather than stringent implementation of legislation, the government seems to have significant tolerance for TNCs' non-compliance with legislation protecting the Niger Delta environment. For example, according to Ako, “the frequent amendment of the end date for gas flaring at the behest of oil companies as well as the appointment of ex-Shell staff to sensitive government positions are two of many instances that highlight the unequal relationship between the state and Shell in particular.”¹¹⁷⁸ The following sections will explore this challenge further, specifically by addressing the conflict of interest in the NNPC.

¹¹⁷⁵ Samy et al, *supra* note 2 at 138-139.

¹¹⁷⁶ Eaton, *supra* note 66 at 291.

¹¹⁷⁷ *Ibid.*

¹¹⁷⁸ Ako, *supra* note 143 at 628.

4.5.2.1 Conflicts arising from the Nigerian National Petroleum Corporation's Dual Mandates

One significant institutional problem is that the NNPC is tasked with both regulatory¹¹⁷⁹ and commercial responsibilities in the Nigerian petroleum industry.¹¹⁸⁰ These dual mandates have at least 2 implications for the implementation of environmental laws. First, imposition of sanctions against oil producers will directly affect government revenue as any monetary sanction imposed and paid for reduces the profit margin of the investment in which the government is a joint venture partner.

Experts opine that this was one of the reasons why the federal government was not favorably disposed to enforcing the judgment in Gbemre's case. The implementation of the judgment would require huge financial resources from both the government and the TNCs. According to them, the "complicity of the Federal government might have been motivated by the conflict of interest. The Nigerian government is a joint venture partner with the [TNCs] and any implementation of the decision [in Gbemre case] would also require that the government contribute its share towards ending the harmful practice of gas flaring."¹¹⁸¹ The defunct FEPA found itself in this dilemma when it realized that its implementation of "environmental regulations against the oil industry, fifty-five percent of which is owned by NNPC (i.e., the Nigerian government), would likely decrease these revenues significantly, considering the substantial costs of pollution control and cleanup."¹¹⁸²

Second, sequel to its commercial powers, the NNPC usually enters joint venture contracts (JVCs) with the oil companies, with the NNPC frequently holding controlling shares. For instance, in the tripartite JVC between the NNPC, Texaco Overseas and Chevron, the equity shares are respectively held in a 60:20:20 ratio. This affects the willingness of the NNPC to impose sanctions on these companies where the NNPC itself is the majority shareholder in their operations. This situation not only creates a conflict of interest,¹¹⁸³ but has also hamstrung the NNPC from effectively regulating the oil and gas industry.

¹¹⁷⁹ Section 10 of the Nigerian National Petroleum Corporation Act, cap 320 (L.F.N.), 1990 <<http://www.nigeria-law.org/Nigerian%20National%20Petroleum%20Corporation%20Act.htm>>.

¹¹⁸⁰ *Ibid*, section 5.

¹¹⁸¹ Faturoti, Agbaitoro & Onya. *supra* note 144 at 236.

¹¹⁸² Eaton, *supra* note 66 at 291.

¹¹⁸³ UNEP Report, *supra* note 13 at 138.

Brazil was in a similar situation. Like Nigeria, it “believed that natural resources were a national treasure and belonged to the government. Accordingly, Brazil created a state oil monopoly in 1938.”¹¹⁸⁴ *Law No. 2,004 of 1953* was enacted,¹¹⁸⁵ which nationalized crude oil resources in Brazil (article 1 of Chapter I)¹¹⁸⁶ and created Petrobras as a monopoly on behalf of the Brazilian state (article 2 of Chapter II, articles 5 and 6 of Chapter III).¹¹⁸⁷ But the dual status of Petrobras both as a market player and the regulator of the oil industry created a conflict which meant that environmental laws were not enforced.¹¹⁸⁸ The government did not control and regulate Petrobras effectively¹¹⁸⁹ because Petrobras was the industry regulator.

To address both the conflict of interest and Petrobras’ monopoly, *Law No. 9,478 of 1997* was enacted, repealing *Law No. 2,004 of 1953*.¹¹⁹⁰ The new law broke Petrobras’ monopoly of over 4 decades and opened up of the petroleum industry for competition.¹¹⁹¹ The new law also created a new agency - the National Agency of Petroleum, Natural Gas and Biofuels (ANP) - to regulate the industry in the place of Petrobras (article 7, section I of Chapter IV).¹¹⁹² Petrobras lost its privileged position as a regulator and became another commercial player in the petroleum industry, albeit with the State as its majority shareholder (articles 61 and 62 of Chapter IX).¹¹⁹³

¹¹⁸⁴ Adriana Lieders, "A New Chapter in Brazil's Oil Industry: Opening the Market While Protecting the Environment" (2001) 13 (3) *Geo Int'l Env'tl L Rev* 781 at 783 [Lieders].

¹¹⁸⁵ *Law No. 2,004 of October 3, 1953* <http://www.planalto.gov.br/ccivil_03/LEIS/L2004.htm>.

¹¹⁸⁶ Article 1 of Chapter I provides that the following constitutes “a monopoly of the Union: I – the research and mining of oil and other fluid hydrocarbons and rare gases, existing in the national territory; II - the refining of national or foreign oil; III – the maritime transport of crude oil of national origin or petroleum derivatives produced in the Country, as well as the transport, by means of conduits, of crude oil and its derivatives, as well as rare gases of any origin.”

¹¹⁸⁷ Article 2 of Chapter II provides that the Union “shall exercise the monopoly established in the preceding article: I – through the National Petroleum Council, as a guidance and inspection body; II – through the stock company *Petróleo Brasileiro S.A.* and its subsidiaries, constituted in the form of this Law, as implementing bodies.”

Article 5 of Chapter III provides that the Union “is authorized to constitute, in the form of this law, a stock company, which will be called *Petróleo Brasileiro S.A.* and will use the acronym or abbreviation of Petrobrás.

Article 6 of Chapter III provides that *Petróleo Brasileiro S.A.* “will have as its object the research, mining, refining, trade and transport of oil from well or shale – its derivatives as well as any related or related activities.”

¹¹⁸⁸ Lieders, *supra* note 1184 at 783.

¹¹⁸⁹ *Ibid* at 781.

¹¹⁹⁰ *Law No. 9,478 of August 6, 1997* <http://www.planalto.gov.br/ccivil_03/LEIS/L9478.htm#art77%C2%A71>.

¹¹⁹¹ *Ibid*.

¹¹⁹² Article 7, section I of Chapter IV provides that the National Agency for Petroleum, Natural Gas and Biofuels - ANP, “an entity that is part of the Indirect Federal Administration, is established as a regulatory body of the oil, natural gas, its derivatives and biofuels industry, linked to the Ministry of Mines and Energy.”

¹¹⁹³ Article 61 of chapter IX provides that *Petróleo Brasileiro S.A. - PETROBRÁS* “is a mixed economy company linked to the Ministry of Mines and Energy, which has as its object the research, mining, refining, processing, trade and transportation of oil from wells, shale or other rocks, its derivatives, natural gas and other fluid hydrocarbons, as well as any other related or related activities as defined by law. § 1 - The economic activities referred to in this article will be developed by PETROBRÁS in a matter of free competition with other companies, depending on

The new law had an environmental agenda. It acknowledged environmental protection and conservation of energy; a three-dimensional approach to sustainability (economic, social and environmental) and the mitigation of green house gas/other pollutants (article 1 of chapter I).¹¹⁹⁴

The reforms have emboldened environmental regulatory agencies who are beginning to enforce environmental standards against Petrobras, despite government's continued majority shareholding. Perhaps to test the resolve of the new regulators, in January 2000, shortly after the reforms, an estimated 3.8 million liters of crude oil spilled from a ruptured pipeline of Petrobras' Reduc refinery in Duque de Caxias, Rio de Janeiro and degraded the environment.¹¹⁹⁵ The spill has been described as one of the worst oil spills in Brazil.¹¹⁹⁶

Petrobras accepted responsibility and paid the maximum fine of \$28 million (USD) imposed by Brazil's Environmental Police.¹¹⁹⁷ In addition, Petrobras accepted to clean-up the degraded environment.¹¹⁹⁸ It also agreed to compensate financially those whose livelihoods were affected by the spill. Petrobras "would begin monthly payments of between US\$84 and US \$280 to about 3,000 people who earned their living [through] fishing...the payments would continue as long as the IBAMA [environmental police] prohibits commercial fishing in the bay. Another 2,000 people...who earn their livelihood from tourism, will also receive payments."¹¹⁹⁹ Petrobras spent \$62 million (USD) in related cost as a result the oil spill.¹²⁰⁰

Later, in July of 2000, and in what has been described as the worst oil spill in more than 2 decades, an estimated one million gallon of crude oil spilled from another Petrobras facility and

market conditions, in view of the transition period provided for in Chapter X and the other principles and guidelines of this Law."

Article 62 of chapter IX provides that the Union "will maintain Petrobras' controlling interest with the ownership and ownership of at least fifty percent of the shares, plus one share, of the voting capital."

¹¹⁹⁴ Article 1 of chapter I provides that the national policies "for the rational use of energy sources will aim at the following objectives ...IV - protect the environment and promote energy conservation ... XII - increase, on economic, social and environmental bases, the participation of biofuels in the national energy matrix ... XVIII - mitigate greenhouse gas and pollutant emissions in the energy and transport sectors, including the use of biofuels."

¹¹⁹⁵ Latin America Data Base News and Educational Services, *Brazilian Government Fines PETROBRAS for Major Oil Spill* (University of New Mexico UNM Digital Repository, 2000) 1 at 1

<<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=13735&context=notisur>> [Brazilian Government Fines PETROBRAS].

¹¹⁹⁶ Lieders, *supra* note 1184 at 785.

¹¹⁹⁷ Brazilian Government Fines PETROBRAS, *supra* note 1195 at 1-2.
Petrobras got a discount of 30% for paying the fine in cash.

¹¹⁹⁸ *Ibid* at 2.

¹¹⁹⁹ *Ibid*.

¹²⁰⁰ Lieders, *supra* note 1184 at 785.

degraded the environment.¹²⁰¹ The Environmental Police responded by imposing about \$100 million (USD) fine on Petrobras. The amount was record-breaking because Petrobras was considered a serial offender.¹²⁰² In 2012, yet another crude oil spill occurred from a Petrobras facility. The Environmental Police assessed the damage done to the environment and said “it will apply a fine that could range from \$50,000 reais (\$28,000) to a maximum of 50 million reais (\$28 million).”¹²⁰³

Petrobras took responsibility for the spill and cleaned up the degraded environment.¹²⁰⁴ In “another high-profile case involving environmental damage, the Brazilian state oil company Petrobras had to pay 100 million [reais] (\$26.49 million) for releasing wastewater from oil production into the ocean in February 2018.”¹²⁰⁵

Despite the sometimes-record-breaking fines imposed on Petrobras, some experts argue that the fines are paltry and do not serve as a deterrent, considering the profitability of Petrobras. For instance, Petrobras was fined about \$100 million (USD) for the July 2000 crude oil spill which was the highest fine ever levied.¹²⁰⁶ However, considering government’s previous inability to hold Petrobras to account for environmental degradation, the fact that in addition to the fines, Petrobras usually undertakes the clean up of the degraded environment and pays compensation to the victims, may indicate the effectiveness of the reforms undertaken by Brazil and could serve as a template for Nigeria, for the benefit of the Niger Delta.

Apart from paying the monetary fines, Petrobras has taken advantage of a new law that allows defaulting companies to undertake environmental sustainability projects in lieu of payment of fines and has applied to the Environmental Police for approval “to provide environmental protection services in exchange for wiping out all its fines for environmental offenses.”¹²⁰⁷ Brazil

¹²⁰¹ *Ibid* at 786.

¹²⁰² “Brazil Slaps Petrobras with Record Fine for Oil Spill”, *Marine Link* (2 August 2000) <<https://www.marinelink.com/news/petrobras-brazil-record319953>> [Marine Link].

¹²⁰³ “Petrobras to be fined for Brazil Beach Oil Spill”, *Reuters* (27 January 2012) <<https://news.trust.org/item/20120127195705-macjy>>.

¹²⁰⁴ *Ibid*.

¹²⁰⁵ “Brazilian Mining Company to pay \$66mn fine following deadly Dam Burst”, *RT.COM* (26 January 2019) <<https://www.rt.com/news/449850-brazil-dam-burst-company-fine/>>.

¹²⁰⁶ Marine Link, *supra*, note 1196.

¹²⁰⁷ Marcelo Teixeira, “Petrobras applies to Swap Environmental Fines for Services”, *Reuters* (22 October 2017) <<https://www.reuters.com/article/us-petrobras-environment-idUSKBN1CR0UP>> [Teixeira].

enacted *Federal Decree No. 9,179/2017*¹²⁰⁸ which allows voluntary conversion of environmental fines into environmental projects approved by the Environmental Police.¹²⁰⁹

There are 2 ways to convert – direct and indirect conversion of environmental fines. In a direct conversion method, the defaulting “company will assume the implementation of, by its own means, the preservation, improvement and recovery services for the quality of the environment, whenever applicable in the state in which the damage was caused, in accordance with the guidelines, standards and priorities established.”¹²¹⁰ In the indirect conversion method, the defaulting company would only execute environmental projects chosen by the Environmental Police. Examples of projects allowed by the Environmental Police for execution under the indirect conversion method would be projects “for the water recovery of the São Francisco River basin and adaptation to climate change in the Parnaíba River basin.”¹²¹¹

Conversion is not automatic. There are disqualifying factors which could lead to a rejection of the application to convert. Some of the disqualifying factors include where: (i) the environmental violation led to human fatalities; (ii) employees of the defaulting company are working under conditions akin to slavery; (iii) the defaulting company engages child labor; (iv) the environmental violation was caused as a result of cruelty to animals; (v) the violation was done by a government official exercising the authority of his/her office; (vi) the magnitude of the project sought to be undertaken would not be sufficient deterrence for further violation of the environment; (vii) the project sought to be undertaken is at variance with regulatory plans; and (viii) the project sought to be undertaken is to remedy the original environmental injury caused,

¹²⁰⁸ Paulo Antunes, Vilmar Gonçalves & Bárbara Colaço, “Brazil: New Deadline Established by IBAMA for the Conversion of Environmental Fines”, *Tauil & Chequer Advogados in association with Mayer Brown LLP* (06 September 2018) <<https://www.mondaq.com/brazil/environmental-law/733978/new-deadline-established-by-ibama-for-the-conversion-of-environmental-fines>> [Antunes, Gonçalves & Colaço].

I have searched for the primary source of the Decree, but I have not been able to find it, hence the reliance on secondary sources.

¹²⁰⁹ *Ibid.*

¹²¹⁰ *Ibid.*

¹²¹¹ “Brazil: New Deadline Established by IBAMA for the Conversion of Environmental Fines”, *Mayer Brown* (4 September 2018) <https://www.mayerbrown.com/en/perspectives-events/publications/2018/09/brazil-new-deadline-established-by-ibama-for-the-c?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration>.

since a conversion project ought to be executed, in addition to remedying the original environmental violation.¹²¹²

There are financial incentives for undertaking environmental conversion projects. In the direct conversion method, once the conversion application is approved, the defaulting company gets a 35% discount on the fine that was imposed on it for degrading the environment and in the indirect conversion method, a defaulting company gets a 60% discount on the fine imposed on it for degrading the environment.¹²¹³ However, some experts fault the conversion policy. The argument is that the discount enjoyed by these companies make the supposed punishment a slap on the wrist for the violation of the environment and will not deter them from further violation of the environment.¹²¹⁴

But the government has defended the policy, arguing that “most fines are never paid because companies usually appeal them in court...the decree would lead to increased investment in environmental projects.”¹²¹⁵ For instance, out of \$ 7.24 billion (USD) fines imposed by the Environmental Police for various acts of environmental degradation from 2011 to 2016, only a fraction amounting to 190 million (USD) has been paid because the defaulting companies would rather challenge the fines in court.¹²¹⁶ Also, the conversion project undertaken is in addition to the remediation of the degraded environment.¹²¹⁷ For these reasons, the policy is promising. However, the discount could be lowered so that the fine paid remains sufficient deterrent against environmental degradation.

Overall, the thesis notes the inter-connectivity of the CERs benefits as listed by Boyd and the argument that CERs can and often do, in the right context, provide the impetus for the enactment of stronger environmental laws and policies. As analyzed earlier in chapter 3, CERs have led to the enactment of environmental laws in Brazil, Bolivia, Kenya that otherwise would either not

¹²¹² *Ibid.*

¹²¹³ Antunes, Gonçalves & Colaço, *supra* note 1208.

¹²¹⁴ Teixeira, *supra* note 1201.

¹²¹⁵ *Ibid.*

¹²¹⁶ Lisandra Paraguassu, “Brazil to Swap Environmental Fines for Recovery Works”, *Reuters* (17 August 2017) <<https://ca.finance.yahoo.com/news/brazil-swap-environmental-fines-recovery-014150517.html>>.

¹²¹⁷ Anderson Viegas, “Temer gives Discount of up to 60% in Environmental Fines and allows Exchange for Service Provision”, *Morena* (21 October 2017) <<https://g1.globo.com/mato-grosso-do-sul/noticia/temer-assina-em-ms-decreto-que-transforma-multas-em-prestacao-de-servicos-ambientais.ghtml>>.

have been enacted at the time or at all. Some of the impact of enforcing these laws on the fight against environmental degradation in those countries have also been analyzed.

For instance, as analyzed in this chapter, the Environmental Police in Brazil is becoming assertive in enforcing environmental laws even against Petrobras, the state-run petroleum company in ways not previously seen. Adriana Lieders explores the link between CERs and the Environmental Police (IBAMA) and concludes:

In 1988, Brazil wrote a new Constitution, of which a whole chapter was dedicated to the protection of the environment. The Constitution made clear that the people of Brazil, as well as the government, were responsible for protecting the environment...One of the first steps that the government took was the creation of the Brazilian Institute of Environment and Natural Renewable Resources (IBAMA) by adopting Law No. 7.735 and fusing four existing government agencies into one...in effect [it] made IBAMA responsible for formulating and implementing the country's environmental agenda. IBAMA also became responsible for the enforcement of Brazil's environmental laws.¹²¹⁸

The reforms in Brazil led to the creation of new regulatory agencies and Petrobras became one of many players, a significant change from its previous status as the only player in the petroleum industry. As an example, during its superintendence over Brazil's petroleum industry, 6 out of 11 refineries owned by Petrobras were operating without environmental licenses and it was in one of those 6 (Reduc refinery in Rio de Janeiro) that the worst oil spills in Brazilian history occurred in 2000.¹²¹⁹ The new regulators swung into action, in conjunction with NGOs and municipalities, and developed new preventive strategies including the requirement of a "new assessment of the government licensing procedures, as well as the oil industry's monitoring and prevention systems...The assessment of the licensing procedures is supposed to uncover the reasons why Petrobras was able to continue operating all of its refineries even though the majority of them did not have environmental licenses."¹²²⁰

It remains to be seen whether the reforms have prevented the operation of environmentally unlicensed refineries in Brazil but, at the very least, a new licence procedure was developed which would make it difficult for environmentally unlicensed refineries to operate. From the foregoing, the separation of the Petrobras regulatory and commercial responsibilities seems to

¹²¹⁸ Lieders, *supra* note 1184 at 784.

¹²¹⁹ *Ibid* at 785.

¹²²⁰ *Ibid*.

have eliminated the conflict of interest between the commercial and enforcement function and would result in greater protection of the environment. A change of this nature is desirable. Recent and similar changes resulting from the unbundling of the NNPC in the new PIA are analyzed below.

If Nigeria constitutionalizes environmental rights along with making institutional changes, Nigeria may obtain similar results. Therefore, CERs would be useful in the context of providing the impetus to further unbundle the newly created successor agencies to the NNPC through legislation. This may well be the solution because it would address the obvious conflict of interest that is evident in the current regulatory structure in the petroleum industry. As argued below, these newly created regulatory agencies should be further split such that regulatory and commercial responsibilities are vested in different agencies of government.

4.5.2.2 The PIA and new Regulatory Agencies in Nigeria's Petroleum Industry

Given that institutional change was also necessary to ensure the effectiveness of CERs in Brazil, the thesis will now examine recent regulatory changes in the Nigerian petroleum industry. The 2021 PIA provides a new regulatory framework for Nigeria's petroleum industry. This chapter will review some of the noticeable improvements that the PIA has brought. The PIA establishes an environmental remediation fund, a new successor company to the NNPC and other regulatory agencies to carry out responsibilities that were previously borne by the NNPC. These changes could help with enforcement of environmental laws in Nigeria.

(i) The Nigerian National Petroleum Company Limited (NNPCL)

The PIA creates the NNPCL (section 53(1))¹²²¹ as a successor to the NNPC (section 54(3)).¹²²² Although fully owned by the government (section 53(3)),¹²²³ the NNPCL is to operate

¹²²¹ PIA, *supra* note 307.

Section 53 (1) provides that the Minister “shall within six months from the commencement of this Act, cause to be incorporated under the Companies and Allied Matters Act, a limited liability company, which shall be called Nigerian National Petroleum Company Limited.”

¹²²² Section 54 (3) provides that NNPC “shall cease to exist after its remaining assets, interests and liabilities other than its assets, interests and liabilities transferred to NNPC Limited or its subsidiaries under subsection (1) shall have been extinguished or transferred to the Government.”

¹²²³ Section (3) provides that the ownership “of all shares in NNPC Limited shall be vested in the Government at incorporation and held by the Ministry of Finance Incorporated and the Ministry of Petroleum Incorporated in equal portions on behalf of the Federation and the Ministry of Petroleum Incorporated is incorporated under the provisions of the Eighth Schedule to this Act.”

commercially (section 53(7)).¹²²⁴ Its commercial responsibilities include operating petroleum business (section 64(a)),¹²²⁵ becoming a concessionaire on behalf of the government for the various contracts entered into by the government in the petroleum industry (section 64(b))¹²²⁶ and managing all Joint Venture Contracts on behalf of the government (section 64(g)).¹²²⁷

The major difference between the NNPC and the defunct NNPC is that the former is not the industry regulator, unlike the latter, who was both a government-owned commercial player and a regulator.¹²²⁸ Comparatively, the full commercialization of the NNPC without being hamstrung with regulatory responsibilities seems commendable because it will eliminate some of the conflicts of interest.¹²²⁹ However, government's continued commercial involvement in the petroleum industry through the NNPC means that the old challenge where other regulators were wary to impose sanctions and fines on the NNPC with the knowledge that such will directly affect government's interests and finances has not been sufficiently addressed.¹²³⁰

(ii) The Nigerian Upstream Petroleum Regulatory Commission (Commission)

The PIA creates the Commission (section 4(1))¹²³¹ with the responsibilities to regulate the technical and commercial aspects of the upstream petroleum industry¹²³² in Nigeria (section

¹²²⁴ Section 53 (7) provides that NNPC "and any of its subsidiaries shall conduct their affairs on a commercial basis in a profitable and efficient manner without recourse to government funds and their memorandum and articles of association shall state these restrictions, and NNPC Limited shall operate as a Companies and Allied Matters Act entity, declare dividends to its shareholders and retain 20% of profits as retained earnings to grow its business."

¹²²⁵ Section 64 (a) provides that NNPC shall "carry out petroleum operations on a commercial basis, comparable to private companies in Nigeria carrying out similar activities."

¹²²⁶ Section 64 (b) provides that NNPC is "to be vested as the concessionaire of all Production Sharing Contracts (PSC), Profit Sharing and Risk Service Contracts as the National oil company on behalf of the Federation in line with its competencies."

¹²²⁷ Section 64 (g) provides that one of the objectives of NNPC shall include to carry out "with respect to any joint operating agreement in which NNPC is a party on the effective date assume the working interest held by NNPC irrespective of whether such licence or lease is converted under section 92 of this Act."

¹²²⁸ Section 10 of the Nigerian National Petroleum Corporation Act, cap 320 (L.F.N.), 1990 online: available at <http://www.nigeria-law.org/Nigerian%20National%20Petroleum%20Corporation%20Act.htm> (last accessed September 13, 2019).

¹²²⁹ UNEP Report, *supra* note 13 at 138.

¹²³⁰ Eaton, *supra* note 66 at 291.

¹²³¹ Section 4 (1) provides that there "is established the Nigerian Upstream Petroleum Regulatory Commission."

¹²³² By section 318 of the PIA, upstream petroleum operations include "the exploration for, appraisal of, development of and winning or obtaining of petroleum in Nigeria by or on behalf of a company on its own account for commercial purposes, petroleum exploration operations, the drilling of exploration, appraisal and development wells, all activities upstream of the measurement points, related to the winning of petroleum through wells or mining from petroleum reservoirs, drilling, fracking, completing, treatment and operation of wells producing petroleum..."

4(3)).¹²³³ The Commission is also saddled with environmental enforcement responsibilities in the upstream petroleum industry including ensuring that businesses operate in an ecologically satisfactory and sustainable manner (section 6 (d)),¹²³⁴ ensuring adherence to environmental laws and policies (section 6 (i))¹²³⁵ and implementing environmental standards (section 7 (c)).¹²³⁶

Furthermore, the Commission has the duty to approve the environmental management plan (EMP) submitted by an operator within a “‘year of the effective date’ or 6 months after” obtaining a licence for its operation (section 102(1)).¹²³⁷ The Commission shall approve the EMP if the following conditions are met: the EMP satisfies the provisions of environmental regulations (section 10 (3) a));¹²³⁸ the operator has demonstrated competence in remediating and controlling adverse impacts of its operation on the environment (section 102(3)b));¹²³⁹ and the operator pays the prescribed fee as part of the environmental remediation fund for rehabilitating the environment from adverse effects of the operation (section 103 (1)).¹²⁴⁰

As commendable as these provisions seem, as shown earlier in the chapter, Nigeria struggles to monitor compliance with, implement and enforce environmental norms. Allowing an operator, as

¹²³³ Section 4 (3) provides that the Commission “shall be responsible for the technical and commercial regulation of upstream petroleum operations.”

Section 318 defines *upstream petroleum operations* to include “the exploration for, appraisal of, development of and winning or obtaining of petroleum in Nigeria by or on behalf of a company on its own account for commercial purposes, petroleum exploration operations, the drilling of exploration, appraisal and development wells...”

¹²³⁴ Section 6 (d) provides that the Commission shall “promote healthy, safe, efficient and effective conduct of upstream petroleum operations in an environmentally acceptable and sustainable manner; (i) ensure strict implementation of environmental policies, laws and regulations for upstream petroleum operations.”

¹²³⁵ Section 6 (i) provides that the Commission shall “ensure strict implementation of environmental policies, laws and regulations for upstream petroleum operations.”

¹²³⁶ Section 7 (c) provides that the Commission shall “establish, monitor, regulate and enforce health, safety and environmental measures and standards relating to upstream petroleum operations including— (i) management of petroleum reserves and installations, and (ii) exploration, development and production activities within the onshore, frontier, shallow water and deep offshore acreages of Nigeria.”

¹²³⁷ Section 102 (1) provides that a “licensee or lessee who engages in upstream and midstream petroleum operations shall within— (a) one year of the effective date, or (b) six months after the grant of the applicable licence or lease, submit for approval an environmental management plan in respect of projects which require environmental impact assessment to the Commission or Authority, as the case may be.”

¹²³⁸ Section 102 (3) provides that the Commission or Authority, “shall approve the environmental management plan, where— (a) it complies with relevant environmental Acts.”

¹²³⁹ Section 102 (3) provides that the Commission or Authority, “shall approve the environmental management plan, where...(b) the applicant has the capacity or has provided for the capacity to rehabilitate and manage negative impacts on the environment.”

¹²⁴⁰ Section 103 (1) provides that as “a condition for the grant of a licence or lease and prior to the approval of the environmental management plan by the Commission or Authority, a licensee or lessee shall pay a prescribed financial contribution to an environmental remediation fund established by the Commission or Authority, as the case may be, for the rehabilitation or management of negative environmental impacts with respect to the licence or lease.”

contemplated in section 102(1), to commence business for 6 months or a year before approving the EMP seems short-sighted. It would be strategic if the EMP is approved before the commencement of operation.

(iii) The Nigerian Midstream and Downstream Petroleum Regulatory Authority (Authority)¹²⁴¹

The PIA further creates the Authority (section 29 (1))¹²⁴² with the responsibilities of regulating the technical and commercial sides of the midstream¹²⁴³ and downstream¹²⁴⁴ sectors of the petroleum industry (section 29 (3)).¹²⁴⁵ The Authority is further mandated to put in place measures to monitor compliance with, and implement, environmental standards in the midstream and downstream sectors of Nigeria's petroleum industry (sections sustainable (31 (c))¹²⁴⁶ and 32 (bb)).¹²⁴⁷

¹²⁴¹ By section 318 of the PIA, 'midstream petroleum liquids operations' include activities "...with respect to the construction and operation of facilities for upgrading of heavy oil, construction and operation of lubricant, petrochemical and fertiliser plants, construction and operation of petroleum liquids transport pipelines, including the related pumping stations; acquisition, operation, leasing, rental or chartering of barges, coastal or ocean-going tankers, railcars and trucks for the transport of petroleum liquids, construction, leasing and operation of tank farms and other storage facilities and export terminals for petroleum liquids, construction and operation of refineries, purchase and sale, trading, bartering, marketing of petroleum liquids and related administration and overhead." By section 318 of the PIA, 'downstream petroleum products operations' means "all activities entered into for the purpose of distribution and supply of petroleum products to retail customers, tank farms for distribution of petroleum products, and stations for the distribution, marketing and retailing of petroleum products."

¹²⁴² Section 29 (1) provides that there "is established the Nigerian Midstream and Downstream Petroleum Regulatory Authority."

¹²⁴³ By section 318, *midstream petroleum liquids operations* "means...the construction and operation of petrochemical and fertiliser plants, construction and operation of petroleum liquids transport pipelines, including the related pumping stations; acquisition, operation, leasing, rental or chartering of barges, coastal or ocean-going tankers, railcars and trucks for the transport of petroleum liquids, construction, leasing and operation of tank farms and other storage facilities and export terminals for petroleum liquids, construction and operation of refineries, purchase and sale, trading, bartering, marketing of petroleum liquids and related administration and overhead."

¹²⁴⁴ By section 318, *downstream petroleum operation* has 2 components – the *downstream gas operations* and the *downstream petroleum products operations* components. While *downstream gas operations* "means all activities entered into for the purpose of, distribution and supply of natural gas to retail customers, city gate reception terminals for natural gas, stations for the distribution, marketing and retailing of natural gas", *downstream petroleum products operations* "means all activities entered into for the purpose of distribution and supply of petroleum products to retail customers, tank farms for distribution of petroleum products, and stations for the distribution, marketing and retailing of petroleum products."

¹²⁴⁵ Section 29 (3) provides that the Authority "shall be responsible for the technical and commercial regulation of midstream and downstream petroleum operations in the petroleum industry."

¹²⁴⁶ Section 31 (c) provides that the Authority shall "promote healthy, safe, efficient and effective conduct of midstream and downstream petroleum operations in an environmentally acceptable and sustainable manner."

¹²⁴⁷ Section 32 (bb) provides that the Authority shall "establish, monitor, regulate and enforce technical, health, environmental and safety measures relating to midstream and downstream petroleum operations."

Like the Commission, the Authority is expected to approve an operator's EMP within a “‘year of the effective date’ or 6 months after” obtaining licence for its operation (section 102 (1)),¹²⁴⁸ if the operator satisfies the conditions earlier discussed under the segment on the Commission. The section adopts the same argument earlier made that considering the challenges to compliance monitoring, implementation and enforcement of environmental norms in Nigeria, it seems more strategic to insist that approval of the EMP becomes a pre-condition to be met for the grant of a lease or licence.

From the foregoing, the regime in section 111 (2)(c) is preferable.¹²⁴⁹ It mandates the Authority to grant a licence to an operator only if the following environmental conditions are met: the operator satisfies the environmental standard stipulated by the Authority (section 111 (2)(c)),¹²⁵⁰ the application for licence is accompanied with a satisfactory EMP (section 111 (3)(b));¹²⁵¹ the application for licence is accompanied by both a decommissioning plans and funds (section 111 (3)(c));¹²⁵² and the application for licence contains a plan to eliminate regular natural gas flare (section 111 (3)(d)).¹²⁵³

(iv) The Midstream and Downstream Gas Infrastructure Fund (Fund)

In all the previous chapters, the thesis has consistently highlighted the lack of remediation of the Niger Delta environment that has been ravaged for decades by the petroleum industry. The PIA recognizes this and creates the Fund (section 52(1))¹²⁵⁴ to be managed by the Authority (section

¹²⁴⁸ Section 102 (1) provides that a “licensee or lessee who engages in upstream and midstream petroleum operations shall within— (a) one year of the effective date, or (b) six months after the grant of the applicable licence or lease, submit for approval an environmental management plan in respect of projects which require environmental impact assessment to the Commission or Authority, as the case may be.”

¹²⁴⁹ Section 111 (2)(c) provides that the Authority “shall only grant a licence for midstream or downstream petroleum operations, where...it meets the health, safety and environmental standards, as determined by the Authority.”

¹²⁵⁰ Section 111 (2)(c) provides that the Authority “shall only grant a licence for midstream or downstream petroleum operations, where...it meets the health, safety and environmental standards, as determined by the Authority.”

¹²⁵¹ Section 111 (3)(b) provides that the Authority “shall only grant a licence for midstream petroleum operations where it...includes an acceptable environmental management plan under section 102 of this Act.”

¹²⁵² Section 111 (3)(c) provides that the Authority “shall only grant a licence for midstream petroleum operations where it...includes a decommissioning and abandonment plan and a decommissioning and abandonment fund that complies with sections 232 and 233 of this Act.”

¹²⁵³ Section 111 (3)(d) provides that the Authority “shall only grant a licence for midstream petroleum operations where it...provides for the elimination of routine natural gas flaring.”

¹²⁵⁴ Section 52 (1) provides that there “is established the Midstream and Downstream Gas Infrastructure Fund.”

52(1)(b)).¹²⁵⁵ One of the sources of the Fund is the imposition of penalties for gas flaring which is to be applied to remediate the environment where gas was flared (section 52(7)(d)).¹²⁵⁶

There are additional objectives of the Fund. For instance, it “shall be utilised for midstream and downstream gas infrastructure investment within the Host Community of a designated facility” (section 33 (y)).¹²⁵⁷ Also, the Fund “shall be [used] to make equity investments of Government owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations” (section 52 (10)).¹²⁵⁸ For example, the Fund could finance various climate change adaptation projects in the Niger Delta.

However, these additional investments could open the way for the Fund to engage in business. Because the Fund is managed by the Authority that is vested with commercial, technical and environmental regulation of the midstream and downstream sectors of the petroleum industry, these provisions that enable the Fund to venture into business operations in the same industry will create a new conflict of interest for the Authority and other regulators. This is the same conflict that the defunct NNPC could not extricate itself from and has been identified as one of the challenges to the sustainability of the Niger Delta.¹²⁵⁹

It may be expedient to sever the link between the Authority and the Fund, especially when the Fund is a separate and full-fledged legal entity (section 52 (1))¹²⁶⁰ so that the Fund operates independently of the Authority and manages the funds that accrue to it for the development of

¹²⁵⁵ Section 52 (1)(b) provides that the Fund shall “reside in the Authority as prescribed in accordance with this Act.”

¹²⁵⁶ Section 52 (7)(d) provides that “money received from gas flaring penalties...shall be for the purpose of environmental remediation and relief of the host communities of the settlor on which the penalties are levied.”

¹²⁵⁷ 33 provides that the Authority may make regulations...(y) any other matters as may be determined by the Authority under this Act which includes imposition of gas flare penalty arising from midstream operations which shall be for the credit of the Midstream and Downstream Gas Infrastructure Fund, and shall be utilised for midstream and downstream gas infrastructure investment within the Host Community of a designated facility.”

¹²⁵⁸ Section 52 (10) provides that the “purpose of the Fund shall be to make equity investments of Government owned participating or shareholder interests in infrastructure related to midstream and downstream gas operations aimed at— (a) increasing the domestic consumption of natural gas in Nigeria in projects which are financed in part by private investment ; (b) encouraging private investment through risk sharing by participating initially in selected high risk projects and in such other equity investments that encourage investment in midstream and downstream gas infrastructure ; and (c) reducing or eliminating gas flare.”

¹²⁵⁹ UNEP Report, *supra* note 13 at 138.

¹²⁶⁰ Section 52 (1) provides that there is Fund “which shall be— (a) a body corporate with perpetual succession and a common seal; and (b) reside in the Authority as prescribed in accordance with this Act.”

the Niger Delta. That way, the Authority will not be hamstrung in carrying out its regulatory duties by the business decisions/operations taken by the Fund.

(v) Exclusive Environmental Jurisdiction

The PIA grants both the Commission and Authority exclusive jurisdiction over environmental issues in the petroleum industry, except in matters related to environmental impact assessment which shall continue to be governed by the applicable legislation (section 304 (3)).¹²⁶¹ Besides, the PIA provides that where the provisions of any legislation except the *Nigeria Oil and Gas Industry Content Development Act* conflict with the PIA, the PIA prevails (section 309).¹²⁶² This section vests primacy on all matters including non-petroleum related issues in the PIA.

This superiority in environmental issues could expose the Niger Delta environment to further degradation. For instance, it would exclude the provisions of the *NESREA Act* from applying to the Niger Delta, which, according to its preamble, is the overarching environmental legislation in Nigeria.¹²⁶³ It would also exclude other specialized agencies like the NOSDRA created under the *NOSDRA Act*¹²⁶⁴ (which deals with preparing, detecting and responding to oil spills) from operating in the Niger Delta.

Besides these, there could be situations where the Commission has not been empowered to either address at all, or satisfactorily, environmental issues as adequately done in other legislation, and by other agencies. Furthermore, these environmental agencies excluded from governing in the petroleum industry are also the product of the same NASS, so they should enjoy concurrent jurisdiction.

As noted in chapter 3, one of the challenges that furthers the degradation of the Niger Delta is the scarcity of environmental regulatory agencies. Therefore, excluding the few functional agencies

¹²⁶¹ Section 304 (3) provides that where “matters relate to the environment, the Commission and Authority shall have responsibility over all environmental matters in respect of upstream petroleum operations and midstream and downstream respectively except in relation to environmental impact assessment which shall be in accordance with applicable laws.”

¹²⁶² Section 309 provides that subject “to the Constitution of the Federal Republic of Nigeria, 1999, upon the commencement of this Act, where the provisions of any other enactment or law except the Nigeria Oil and Gas Industry Content Development Act are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in this Act.”

¹²⁶³ *NESREA Act*, *supra* note 342.

¹²⁶⁴ *NOSDRA Act*, *supra* note 682.

from operating in the petroleum industry which is predominantly in the Niger Delta will harm the environment. It would be expedient for the NASS to revisit these highlighted provisions of the PIA.

(vi) Overarching Powers of the Minister of Petroleum

Furthermore, the PIA gives overarching powers to the Federal Minister in charge of Petroleum Resources. For instance, the Minister directs both the Commission and the Authority on issues relating to the operation of Nigeria's petroleum industry and how the 2 institutions ought to relate (section 3(4)).¹²⁶⁵ These seem like normal and innocuous ministerial duties but in Nigeria, where there have been allegations of interference between supervisory political heads and regulatory agencies, this provision could further undermine the environmental regulatory powers of the agencies created by the PIA.

Already, the Senate has remarked on interference from the Presidential Implementation Steering Committee on the PIA with the Commission. The Senate concluded "that the interference from the Steering Committee was not only hindering the Commission but also making it difficult for the PIA to take off...The Senate then said that the repercussion was already manifesting in a growing panic by investors who are not so sure about Nigeria's next line of action."¹²⁶⁶

The lack of independence of the environmental regulatory agencies in Nigeria has been identified as a contributor to the degradation of the Niger Delta environment. Ako and Olawuyi argue that these institutions operating under presidential discretion "lack the independence to effectively perform their functions, especially where they conflict with the economic interests of the state...the environment ministry and agencies lack the requisite level of independence to serve effectively as 'watchdogs' to monitor and report on the sustainability of government operations and policies vis-à-vis the oil industry."¹²⁶⁷

¹²⁶⁵ Section 3 (4) provides that the Minister "shall give general policy directives to the Commission on matters concerning upstream petroleum operations and to the Authority on matters relating to midstream and downstream petroleum operations as well as matters related to co-operation among the two entities in line with the provisions of this Act and the Commission and the Authority shall comply with such directives."

¹²⁶⁶ Henry Umoru, "Anxiety Builds over Poor take off of PIA", *Vanguard Newspaper* (26 January 2022) <<https://www.vanguardngr.com/2022/01/fec-approves-n64-687bn-contracts-for-works-fct-ministries/>>.

¹²⁶⁷ Ako & Olawuyi, *supra* note 10 at 573.

Some level of independence is required for the effective regulation of the environment. It is recommended that the NASS would amend the PIA to accommodate the above noted observations to further strengthen its (environmental) regulatory regimes. Already, the Implementation of the PIA seems to have started on a shaky note. Although the PIA provides for a 6-month transition period, (section 317 (7)),¹²⁶⁸ on August 18, 2021, President Buhari provided an eighteen-month transition period before the full implementation of the PIA.¹²⁶⁹ Before the expiry of the eighteen months, the transition period for the PIA was further extended for another eighteen months. President Buhari is approaching the NASS to postpone the implementation of the PIA throughout the eighteen months' transition period and "stakeholders have tagged the move as another policy summersault. The stakeholders...noted that the development is sending a wrong signal to the investing communities to continue to doubt (sic) implementability of certain laws in the country."¹²⁷⁰

Overall, the PIA seems promising in providing a more robust framework for the regulation of Nigeria's oil industry. The removal of the NNPC as the regulator eliminates the conflict of interest that had bogged it down from enforcing environmental laws that would assist in the sustainability of the Niger Delta environment.

But on their own without CERs, the environmental provisions in the PIA do not seem adequate for addressing environmental injustice in the Niger Delta and the sustainability of the Niger Delta environment. For example, the central thrust of the PIA is premised on a crude oil dependent Nigeria, while the rest of the world is pivoting toward clean energy to protect the environment. The chapter agrees with Kasirim Nwuke who argues that "the PIA is a missed—but not lost—opportunity to position Nigeria to face a future without oil or fossil fuels... Nigeria needs ... to develop new energy sources in the face of climate change and net-zero emissions targets."¹²⁷¹

¹²⁶⁸ Section 317 (7) provides that the Minister "shall set forward a clear transition plan within 60 days of the effective date of the Act to prevent disruptions of the industry operations."

¹²⁶⁹ Ukpe Philip, "PIA Implementation Must Create Value for Oil, Gas Sector- Stakeholders", *The Whistler* (24 September 2021) <<https://thewhistler.ng/pia-implementation-must-create-value-for-oil-gas-sector-stakeholders/>>.

¹²⁷⁰ Jonathan Nda-Isaiah et al, "Buhari Booby-Traps next President, Extends PIA Implementation by 18 Months", *Leadership Newspaper* (26 January 2022) <<https://leadership.ng/buhari-booby-traps-next-president-extends-pia-implementation-by-18-months/>>.

¹²⁷¹ Kasirim Nwuke, "Nigeria's Petroleum Industry Act: Addressing Old Problems, Creating New Ones", *Africa in Focus [BLOG]*, Washington: The Brookings Institution, 2021) 1

Indeed, weaning Nigeria off crude oil dependence may be compelled by the current global movement for transition toward a zero-carbon energy. This would have at least 3 implications for Nigeria, which would make CERs relevant. First, it would mean that the stranglehold by the TNCs on Nigeria's economy, which constitutes a constraint to environmental law-making, compliance monitoring, implementation and enforcement of environmental laws, would ease. This would provide a veritable ground for CERs to thrive. The Managing Director of the NNPC, Mr. Mele Kyari, confirms that the TNCs "are leaving Nigeria and shifting their portfolios to where they can add value to the journey towards carbon net-zero commitment."¹²⁷²

The TNCs in Nigeria, "including Royal Dutch Shell, ExxonMobil, Total and Eni, are cutting billions in spending ... thus shifting money to renewable fuels."¹²⁷³ Specifically, in 2021, Shell "announced its plan to offload onshore Nigerian oil assets in a bid to move to cleaner energy. It said it was discussing with the federal government to sell its onshore oil assets in the country."¹²⁷⁴ With divestment, Nigeria's government would not feel the pressure from the TNCs not to implement and enforce environmental laws.

The second implication is that Nigeria would be forced to also transition to clean energy which would make CERs relevant in the before and after transition. Kasirim Nwuke opines that a "lot has changed in the sector domestically and globally since the reform efforts [on the PIA] began... Concerns over climate change have fueled aggressive efforts to reduce global consumption of fossil fuels—driving divestment from oil and gas by companies, institutions, and countries."¹²⁷⁵ The group managing director of NNPC, Mr. Mele Kyari, shares the same view:

[Nigeria] must have 'the most friendly fuel' in place in the next five to 10 years, while building its ability to use renewables... We understand the necessity for divestment. We understand that this must take place but also that it must be done in such a way that we can deal with issues around decommissioning and also make sure that

<<https://www.proquest.com/docview/2603418392?parentSessionId=H5jt4A9Bq25VjsyXYvCoYaK%2FmwuOYvN%2B9RNaSl%3D&pq-origsite=primo&accountid=14701>> [Nwuke].

¹²⁷² Mary Izuaka, "Why Oil Majors are selling their Assets and leaving Nigeria — Kyari", *Premium Times* (28 February 2022) <<https://www.premiumtimesng.com/news/top-news/514401-why-oil-majors-are-selling-their-assets-and-leaving-nigeria-kyari.html>> [Izuaka].

¹²⁷³ Ibrahim Yusuf, "ICYMI: Why Shell, Chevron, other Oil Majors are Leaving Nigeria", *The Nation* (19 April 2021) <<https://thenationonlineng.net/icymi-why-shell-chevron-other-oil-majors-are-leaving-nigeria/>>.

¹²⁷⁴ Izuaka, *supra* note 1272.

¹²⁷⁵ Nwuke, *supra* note 1271.

whatever arrangement that is put in place ensures that we are also aligned along the energy transition journey that we are going to.¹²⁷⁶

The Nigerian government understands that there could be repercussions if Nigeria refuses to pivot toward a zero-carbon energy. According to the country's Minister of State for Petroleum Resources,

We have seen policies and pronouncements at governmental and corporate levels aimed at discouraging investment in fossil fuels. We have seen decisions by some IOCs to reduce or outrightly stop long-term investments in upstream projects and development of new technologies for exploration, production and processing of crude oil, or servicing the existing technologies. Penalties may soon be put on the production and use of fossil fuels, directly or indirectly.¹²⁷⁷

Thirdly, Nigeria is struggling to attract investment to its petroleum industry because of the transition to clean energy and this could convince Nigeria to move away from petroleum resources and by extension, the further degradation of the Niger Delta environment. According to Kasirim Nwuke,

Importantly, growing global concerns about the adverse consequences of climate change are leading to a decline in investments in oil and gas globally, and Nigeria has not been unaffected ...'only 4 percent of the \$70 billion investment inflows into Africa's oil and gas industry between 2015 and 2019 came to Nigeria even though the country is the continent's biggest producer and the largest reserves.' The declining investment in the sector is also reflected in data from Nigeria's National Bureau of Statistics, which show that the sector accounted for 1.11 percent of aggregate capital importation into the country in 2020.¹²⁷⁸

Felicity Bradstock corroborates and argues that while most countries and the International Energy Agency are pushing "for a green revolution and the movement away from fossil fuels, there is not the same urgency to invest in major oil-producing countries as there once was. While the [PIA] could make investing in Nigerian oil more streamlined, investors are not so willing to bet big on the African state."¹²⁷⁹ This scenario could force Nigeria into transitioning its petroleum industry toward a zero-carbon economy. However, as explained below, CERs would be important to ensure the transition to a post-carbon economy is environmentally just.

¹²⁷⁶ Izuaka, *supra* note 1272.

¹²⁷⁷ Uche Usim, "Nigeria won't ditch Gas Resources to please Energy Transition Crusader — Sylva", *Sun Newspaper* (31 March 2022) <<https://www.sunnewsonline.com/nigeria-wont-ditch-gas-resources-to-please-energy-transition-crusader-sylva/>>.

¹²⁷⁸ Nwuke, *supra* note 1271S.

¹²⁷⁹ Felicity Bradstock, "Nigeria's Oil Industry is Struggling to Win Back Investors", *Oilprice.com* (20 June 2021) <<https://oilprice.com/Energy/Energy-General/Nigerias-Oil-Industry-Is-Struggling-To-Win-Back-Investors.html>>.

In conclusion, Nigeria's petroleum industry is no longer attractive. As argued by Felicity Bradstock, the "once attractive onshore oil business is no longer compatible with the objectives of several international oil firms...Chevron and ExxonMobil, have also reduced their operations in Nigeria in an attempt to move away from certain oil and gas projects to go green."¹²⁸⁰ The divestment could create an opportunity for Nigeria to diversify its economy and move away from crude oil, meaning that government's lack of political will to monitor compliance, implement and enforce environmental laws, since Nigeria depends on proceeds from crude oil to fund its economy, would no longer be fuelled by dependence on a mono-economy. The next segment will analyze in detail, the need for economic diversification of Nigeria and the prospects for CERs in enhancing the sustainability of the Niger Delta environment.

4.6 The Need to Diversify Nigeria's Economy to enhance Compliance Monitoring, Implementation and Enforcement of Environmental Norms

There seems to be a consensus that Nigeria will have to diversify and wean its economy off crude oil, even if for purely economic reasons.¹²⁸¹ Alternatives to crude oil to grow Nigeria's economy have been recommended. But there is no consensus on what to diversify to. Some experts are of the opinion that Nigeria should pivot towards an economy powered by the real estate sector. The argument is that as of 2017, Nigeria's housing deficit was approximately 17 million units,¹²⁸² while Nigeria's population is projected to reach 440 million by 2050 and more than 900 million by 2100.¹²⁸³

Bridging this huge gap by providing housing could steer Nigeria's economy away from crude oil and diversify its economy.¹²⁸⁴ As evidence of the impact of the real estate on the economy, recourse is made to other jurisdictions. For instance, Joel Ifemelunma argues that the real estate sector has been the backbone of 'the economies of many developed and developing nations...contributing between 30 and 70 percent of the GDP in developed countries like the

¹²⁸⁰ *Ibid.*

¹²⁸¹ Abiola Asaleye, Joseph Adama & Joseph Ogunjobi, "Financial Sector and Manufacturing Sector Performance: Evidence from Nigeria" (2018) 15 (3) Investment Management and Financial Innovations 35 at 35 [Asaleye, Adama & Ogunjobi].

¹²⁸² David Olugbenga et al, "Unleashing the Potentials of Housing Sector in Nigeria as Perceived by Users" (2017) 4 (3) International Journal of Built Environment and Sustainability 172 at 172 [Olugbenga et al].

¹²⁸³ Joel Ifemelunma, "Nigeria's Housing Industry Growth to Spur Economic Diversity" (2015) 80 (3) Journal of Property Management 34 at 34 [Ifemelunma].

¹²⁸⁴ Olugbenga et al, *supra* note 1282 at 172.

USA, UK and Canada. Based on these notable contributions, the lands, housing and urban development subsectors are critical tools for transforming the economy of fast growing countries like Nigeria.¹²⁸⁵ The real estate sector could contribute to Nigeria's diversified economy.

However, there are issues inimical to the realization of the promise held by Nigeria's real estate. Until Nigeria addresses these issues which include lack of clarity on land ownership in Nigeria, a floundering mortgage sector, and corruption, it may be difficult for Nigeria to harvest the benefits of the real estate sector to power its economy. The lack of clarity on land ownership in Nigeria is further compounded by the cost of land which is very expensive in all Nigerian cities. The problem is further escalated by bottlenecks in the processing of certificate of occupancy.¹²⁸⁶

In chapter 3 in the segment on *Kenyan Law and Land Use*, the thesis noted the ambiguity in Nigeria's land ownership legal framework as provided by the *Land Use Act, 1979* (LUA)¹²⁸⁷ and made recommendations on how they could be addressed. The chapter adopts those recommendation. Regarding other challenges to a flourishing real estate sector in Nigeria noted above, Ifemelunma argues,

Looking forward, with Nigeria experiencing an explosion in population and economic growth, the delay of development of its housing sector puts it on the verge of crisis. However, with development projects focusing on its underperforming mortgage sector, ambitious building goals and efforts to reduce corruption, Nigeria is paving the way for its housing sector to diversify the economy and contribute real numbers to the GDP.¹²⁸⁸

Some other experts are of the view that the manufacturing sector holds the promise for a diversified Nigerian economy.¹²⁸⁹ But manufacturing depends on key infrastructure which are currently lacking in Nigeria. For instance, manufacturing would depend on steady electricity supply, which is not the case in Nigeria, to power machines.

Some other experts argue that Nigeria should pivot toward agriculture. According to Nina Gavrilova, because of the "fluctuations in oil prices, the need has arisen to diversify the country's exports and reinstate the situation when agricultural goods prevailed in Nigeria's exports... A

¹²⁸⁵ Ifemelunma, *supra* note 1283 at 34.

¹²⁸⁶ Ibimilua Festus & Ibitoye Amos, "Housing Policy in Nigeria: An Overview" (2015) 5 (2) American International Journal of Contemporary Research 53 at 57.

¹²⁸⁷ Cap. L5, Laws of the Federation, 2004 <<https://www.lawyerd.ng/wp-content/uploads/2015/11/LAND-USE-ACT-2004.pdf>>.

¹²⁸⁸ Ifemelunma, *supra*, note 1283 at 35.

¹²⁸⁹ Asaleye, Adama & Ogunjobi, *supra*, note 1281 at 35.

country's dependence on a particular primary good — in Nigeria's case, on hydrocarbons — jeopardizes the stability of its economy.”¹²⁹⁰

There is merit in the argument because until the 1970s when crude oil became the dominant resource, agriculture was the mainstay of Nigeria's economy. Nigeria gradually shifted its focus away from agriculture to crude oil and has not made the kind of investments needed to reposition the latter as a key player in the economy.¹²⁹¹ Despite the neglect, agriculture is still Nigeria's second most important sector after the petroleum industry.¹²⁹²

Nigeria has comparative advantage in agriculture. For instance, “about 82 million hectares of a total 91 million hectares [of land in Nigeria are] found to be arable. Nigeria's agricultural economy is blessed with an enormous proportion of both the agrarian belt and populace.”¹²⁹³ Also, there is a ready market to sell agricultural produces because “products are in demand both on the domestic and foreign markets.”¹²⁹⁴ Each of the sectors analyzed above has the potential to contribute to a diversified Nigerian economy, and a holistic approach where all the sectors contribute toward a diversified economy would be best. The next section explains how CERs would still be relevant in such a scenario.

4.7 The Relevance of CERs in the Nigeria's Post-Carbon Economy

At least 4 issues underscore the relevance of CERs in a post-carbon Nigerian economy. First, CERs would be relevant to post-carbon Nigeria because of the extensive degradation of the Niger Delta environment which needs to be rehabilitated in an environmentally sustainable manner. It is even possible that some components of the Niger Delta environment may have already been damaged forever. According to the UNEP, the “wetlands around Ogoniland [in the Niger Delta] are highly degraded and facing disintegration.”¹²⁹⁵

The complete remediation of whatever is left of the Niger Delta environment or reclamation of lost components of the environment would make CERs relevant as the mediation and

¹²⁹⁰ Nina Gavrilova, “Impediments to the Development of Nigeria's Agricultural Exports” (2020) IOP Conf. Ser.: Earth Environ. 1 at 4 [Gavrilova].

¹²⁹¹ *Ibid* at 1.

¹²⁹² *Ibid* at 2.

¹²⁹³ Oluyemi Fayomi & Braimah Ehiagwina, “Assessing the Migration Dynamics in the Context of Agriculture and Human Development in Nigeria” (2019) AIP Conference Proceedings 2123, 020024 at 2 [Fayomi & Ehiagwina].

¹²⁹⁴ Gavrilova, *supra* note 1290 at 4.

¹²⁹⁵ UNEP Report, *supra* note 13 at 10.

reclamation must be done in environmentally sustainable manners. If done haphazardly, it could lead to further sustainability issues. For instance, in Ogoniland, the UNEP observes that out of 15 sites it investigated for which Shell had carried out ‘comprehensive rehabilitation’, 10 of those sites “still have pollution exceeding [Shell] (and government) remediation closure values. The study found that the contamination at eight of these sites has migrated to the groundwater.”¹²⁹⁶ This could be a serious problem for any transition to real estate as a growth area for the economy.

In other places where no rehabilitation was done, the UNEP recommends that urgent “steps must be taken to prevent existing contaminated sites from being secondary sources of ongoing contamination.”¹²⁹⁷ On the whole, the UNEP opines that “[w]ithout proper rehabilitation [of the Niger Delta environment], former mangrove areas which have been converted to bare ground are being colonized by invasive species such as nipa palm.”¹²⁹⁸ Second, the Niger Delta plays host to huge oil installations and equipment, their decommissioning would need to be done in an environmentally sustainable manner, which makes CERs relevant to a post-carbon Nigeria.¹²⁹⁹

Third, CERs would be relevant to the post-carbon Nigeria because of the length of years that it will take to rehabilitate the environment. For instance, the UNEP “concludes that the environmental restoration of Ogoniland is possible but may take 25 to 30 years. The report contains numerous recommendations that, once implemented, will have an immediate and positive impact on Ogoniland. Further recommendations have longer timelines that will bring lasting improvements for Ogoniland and Nigeria as a whole.”¹³⁰⁰ CERs would be crucial to ensuring environmental rehabilitation in this region.

Fourth, as would be seen in the segment on the diversification of Nigeria’s economy, areas of investments that Nigeria could turn to, to wean itself off oil dependence, have potentials to further degrade the environment, making CERs relevant to post-carbon Nigerian economy. CERs would therefore be relevant to the post-carbon Nigeria because of the nexus between

¹²⁹⁶ *Ibid* at 12.

¹²⁹⁷ *Ibid* at 13.

¹²⁹⁸ *Ibid* at 10.

¹²⁹⁹ Izuaka, *supra* note 1272.

¹³⁰⁰ UNEP Report, *supra* note 13 at 12.

environmental sustainability and expert-recommended alternatives to crude oil in Nigeria's economy.

For example, as argued by experts, the role "that housing plays in the social and economic development of a country cannot be underestimated. Interventions in housing by government are widely acknowledged as one of the ways by which the social aspect of the life of the citizenry can be impacted especially through mass housing otherwise called social housing."¹³⁰¹ This suggests that the effects of real estate sector can affect the 3 pillars of sustainability – social, economic and environmental.

In respect of agriculture, climate change, for instance, poses a challenge which makes CERs relevant in Nigeria's post-crude oil era. Experts observe that climate change affects the quantity and certainty of rainfall¹³⁰² and in Nigeria, "above 90 percent of produced in agriculture is rain-sourced."¹³⁰³ Also, global warming has an "impact on agriculture and this can lead to food insecurity and hunger with migration as the effective survival strategy especially for the most disadvantage households that possesses few or little variable sources of livelihood, with no capital such as land, and characterised by low acquired skills."¹³⁰⁴

In respect to manufacturing, Nigeria's environment is already being degraded as a result of the manufacturing industry and this would only worsen if Nigeria made manufacturing its main industry. For example, Nigeria has been struggling with lead poisoning which has been attributed to Nigeria's manufacturing industry. According to experts, the "extensive industrial use of lead [in Nigeria] has also contributed to environmental contamination."¹³⁰⁵ As seen from above, whether Nigeria switches from crude oil dependence to manufacturing, agriculture or real estate, CERs, and by extensions, environmental laws and policies would still be needed. Nigeria would

¹³⁰¹ Olugbenga et al, *supra* note 1282 at 172.

¹³⁰² Guilio Boccaletti, Martin Stuchtey & Marc van Olst, "Confronting South Africa's water challenge" *McKinsey Quarterly* (June, 2010) 2
<<https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/Confronting%20South%20Africas%20water%20challenge/Confronting%20South%20Africas%20water%20challenge.pdf?shouldIndex=false>>.

¹³⁰³ Fayomi & Ehiagwina, *supra* note 1293 at 2.

¹³⁰⁴ *Ibid* at 3.

¹³⁰⁵ Emmanuel Ugwuja et al, "Blood Lead Levels in Children attending a Tertiary Teaching Hospital in Enugu, South-Eastern Nigeria" (2014) 34(3), *Paediatrics and International Child Health* 216 at 216.

still need to implement and enforce environmental laws and policies to protect the environment, which make CERs relevant to Nigeria's post-carbon economy.

4.8. Conclusion

This chapter examines how CERs could encourage improved monitoring of compliance, implementation and enforcement of existing environmental norms in Nigeria, for the protection of the Niger Delta people and the environment. The literature indicates that these standards are achievable, because the presence of CERs would encourage environmental regulatory agencies to monitor compliance and implement environmental norms with the knowledge that their failures would be challenged in courts against the CERs benchmarks.¹³⁰⁶

On the enforcement of environmental laws, Boyd opines that CERs offer a “major benefit to environmental legislation in that courts appear more likely to defend environmental laws and regulations.”¹³⁰⁷ As previously noted, Nigeria lacks judicial precedents on environmental rights as well. Perhaps CERs are the cure for the ambivalence of the Nigerian courts on environmental rights adjudication.

However, despite CERs, the will of the State may be the ultimate decider of whether CERs could make any impact. The government of Nigeria has been avaricious towards the resources in the Niger Delta, and it may boil down to this – the unbridled desire of the Nigerian government to continue to plunder the resources of the Niger Delta without any regard for the environment. Kotzé agrees, arguing that States are the principal instigators and drivers of effective environmental law and governance, but under the current conception of State sovereignty, “where the primary concern seems to be state-centred and state-driven global environmental governance interests and lethargic governance efforts which are far from effective”,¹³⁰⁸ there is doubt as to the possibility of effective performance of State obligations which include making laws, ensuring compliance with environmental norms, removing hurdles to public participation in environmental governance and providing access to justice.¹³⁰⁹

¹³⁰⁶ Kotzé, *supra* note 30 at 209.

¹³⁰⁷ Boyd, *supra* note 28 at 234.

¹³⁰⁸ Kotzé, *supra* note 30 at 223.

¹³⁰⁹ *Ibid* at 224.

In summary, as seen from examples from Brazil, Argentina and Kenya provided in this chapter, CERs could contribute to the sustainability of the Niger Delta by spurring effective compliance monitoring and implementation of environmental norms by environmental regulatory agencies. It could also encourage the courts to enforce environmental norms since those norms would be supported by constitutional provisions.

However, the realization of these CERs benefits would be dependent on Nigeria addressing the barriers that the chapter has analyzed. Nigeria would have to tackle corruption. If corruption is not tackled effectively, CERs would struggle to make the kinds of impacts in Nigeria that they are making in other countries analyzed above. When corruption is so pervasive such that it is described as “the single greatest obstacle preventing Nigeria from achieving its enormous potential,”¹³¹⁰ it would be difficult for CERs or other interventions to produce positive results, except corruption is effectively tackled. Nigeria must tackle corruption, which compromises regulatory agencies’ resolve to monitor compliance and implement environmental norms that could assist in the sustainability of the Niger Delta.

Addressing corruption effectively in Nigeria will require considerable efforts. What weakens the resolve of the EFCC to tackle corruption include political interference in their work; lack of adequate funding; poor remuneration for its staff; AGF’s power to takeover and withdraw cases filed by the EFCC in court; and the presidential power to grant pardon to those convicted for corruption. The chapter recommends that financial and institutional autonomy for the EFCC be enshrined in the Constitution. This will not only ensure that the EFCC is insulated from outside influence, but it will also guarantee adequate funding for its operation. The chapter notes the poor remuneration of workers in the public service in Nigeria, the judiciary and the EFCC inclusive, and recommends the payment of living wages to staff of Nigeria’s public service, including judges, other staff of the judiciary and staff of the EFCC, to ward off the temptation to compromise their jobs for personal gains.

Furthermore, the chapter recommends that the powers of the AGF to takeover and withdraw criminal proceedings in courts and the power of the President of Nigeria to grant presidential pardon to persons convicted of corruption, especially PEPs, should be expunged from the

¹³¹⁰ Page, *supra* note 320 at 1.

Constitution because these powers have been abused and are used for political gains in Nigeria. These recommendations would strengthen the EFCC, and other anti-corruption agencies in their work to tackle corruption in Nigeria. This would greatly strengthen the willingness and capacity to implement, monitor and enforce CERs in Nigeria.

Also, Nigeria would have to address its political economy which is overly dependent on the petroleum resources from the Niger Delta. This puts the government in a position where it may not be willing to upset the TNCs and reduce its profit margins (since the government is a joint venture partner with the TNCs). This would be the inevitable result of comprehensive compliance monitoring and implementation of environmental norms. The chapter recommends the diversification of Nigeria's economy and a very significant reduction in Nigeria's dependence on petroleum resources from the Niger Delta.

Furthermore, the courts would have to enforce both extant and new environmental legislation that CERs would provoke the legislatures to enact. Yet the literature indicates that the Nigerian judiciary is greatly influenced by the government and is struggling with issues of transparency and inadequate pay. The effectiveness of CERs to galvanize Nigerian regulatory and enforcement institutions into effective compliance monitoring, implementation and enforcement of environmental norms will clearly be dependent on the resolution of these issues.

Overall, the chapter notes the potential of CERs to contribute to effective compliance monitoring, implementation and enforcement of environmental norms. The chapter also notes the challenges in Nigeria which would nullify the effectiveness of CERs to deliver on their promises, if not addressed. The chapter makes recommendations on how these challenges could be addressed.

However, there are openings for Nigeria to adopt and implement CERs. This opening is rather enforced on Nigeria. First, because of the need for energy transition toward a zero-carbon energy, (i) the TNCs who had a stranglehold on Nigeria's economy and legal system are divesting and leaving Nigeria. (ii) Nigerian government has realized that to continue to be relevant, it must align with the rest of the world in the move toward a zero-carbon energy production. CERs will still be essential to achieving environmental justice in the greening of Nigeria. Second, as analyzed in the chapter, potential areas of comparative advantage that a

diversified Nigeria could turn to in the move away from crude oil, such as real estate, agriculture and manufacturing, also have environmental consequences, which make CERs relevant even in a post-carbon Nigeria.

Chapter 5 – Procedural CERs and their Potentials to Create Wider Access to Justice and Range of Remedies for Environmental Harms

5.1. Introduction

It is estimated that 1,500 communities in the Niger Delta host the various petroleum businesses, including TNCs, and their investments. Despite these enormous economic contributions to Nigeria, “the Niger Delta people have continued to suffer deaths, economic losses and bad health due to the reckless exploration and production of crude oil and natural gas, which has resulted in numerous oil spills, uncontrolled gas flaring and irredeemable environmental degradation of the region.”¹³¹¹ To exacerbate the problem, experts allege that the Niger Delta has been marginalized and prevented from being involved in environmental governance in Nigeria and this limits the opportunity for the people to participate in environmental governance as well as to obtain remedies for the environmental harms that they face.¹³¹²

Experts argue that wider access to justice could provide the Niger Delta with one alternative means to seek and obtain redress from these agelong environmental harms because access to justice is the only right that “allows people to enforce their procedural and substantive environmental rights in court.”¹³¹³ With examples from Ecuador, Bolivia, Kenya, the Philippines, Brazil, Colombia, and South Africa, the chapter will examine, through constitutional provisions and decided cases, how CERs have widened access to justice in countries that have adopted enforceable CERs and how a widened access to justice has encouraged environmental litigation. To achieve this, the chapter will examine the influence of CERs on the elements of access to justice: Who can bring a challenge; What can be challenged; Who can hear a challenge; What are the remedies once a challenge is brought; and how can barriers to access to justice be overcome.¹³¹⁴

However, there are many barriers to access to justice in Nigeria including “ignorance and illiteracy, procedural complexity, the cost of legal procedures, the strict interpretation of locus

¹³¹¹ Samy et al, *supra* note 2 at 136.

¹³¹² Francis et al, *supra* note 25 at 37.

¹³¹³ Jona Razzaque, “Information, Public Participation and Access to Justice in Environmental Matters” in Shawkat Alam et al, ed, *Routledge Handbook of International Environmental Law* edited by (London & New York: Routledge, 2013) 137 at 141 [Razzaque].

¹³¹⁴ Aarhus Convention: An Implementation Guide, 1st ed, *supra*, note 588, see the table titled, *Elements of Access to Justice* at 136.

standi [right to be heard] rules, lack of assertiveness by rights holders, corruption, the inefficient administration of justice, and lack of trust in the justice system.”¹³¹⁵ The chapter will also analyze how these barriers could inhibit the ability of CERs to widen access to justice in Nigeria and by extension, stifle environmental litigation; and how those barriers could be overcome.

For reasons that will be explained later in the chapter in the segment on the *Aarhus Convention and Access to Justice*, the chapter will rely heavily in its analysis on the *Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters*, 1998 (Aarhus Convention). Although the Aarhus Convention “adopts a right-based approach to information, participation and justice”,¹³¹⁶ the chapter will focus only on Access to Justice and how a wider access to justice would enhance the ability of the Niger Delta people to seek and obtain remedies in courts for environmental injustices.

The chapter adopts this narrow approach for 2 reasons: First, the current state of the law on both the right to information and public participation in Nigeria have been extensively analyzed by experts, including Uzuazo Etemire.¹³¹⁷ Second, while access to information and the right to public participation are fundamental to obtaining redress from environmental injuries, access to justice provides the “means for affected parties to gain redress and to assist in the implementation and enforcement of legislation related to the environment.”¹³¹⁸ In fact, Access to justice has been described “as the ‘foundation’ of the other ‘access rights’ as it facilitates the public’s ability to enforce their right to participate, to be informed, and to hold regulators and polluters accountable for environmental harm.”¹³¹⁹

¹³¹⁵ Eva Breme & Charles Adekoya, “Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria” (2010) 54(2) J.Afric.L. 258 at 263.

¹³¹⁶ Razzaque, *supra* note 1313 at 141.

¹³¹⁷ Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective*, 1st ed., (London: Routledge, 2015) [Etemire 1].

¹³¹⁸ Governing Council of the United Nations Environment Programme, “Proceedings of the Governing Council/Global Ministerial Environment Forum” (Eleventh special session of the Governing Council/Global Ministerial Environment Forum Bali, Indonesia, 24–26 February 2010), Annex I at 11 <<https://wedocs.unep.org/bitstream/handle/20.500.11822/11333/K1060433-Proceedings-final.pdf?sequence=1&isAllowed=y>>.

¹³¹⁹ Benson Ochieng, “Implementing Principle 10 and the Bali Guidelines in Africa” (Issue Paper to Support UNEP and Other Stakeholders) (February 10, 2015) 3-4 <<https://wedocs.unep.org/bitstream/handle/20.500.11822/13890/Issue%20Paper%20on%20P10%20and%20Bali%20Guidelines%20in%20Africa.pdf?sequence=1&isAllowed=y>>.

5.2. Context

The marginalization of the Niger Delta from participating in environmental governance in Nigeria's petroleum industry has been cited by experts as one of the major reasons behind the environmental degradation of the Niger Delta. According to experts, "there is a relative sense of under-representation among the region's citizens...Lack of inclusive, transparent, and democratic political institutions compound the sense of exclusion in the region...This practice undermines relationships between citizens and the state and deepens a sense of injustice and distrust, further destabilizing the [Niger Delta] region."¹³²⁰ In turn, the protests by the people of the Niger Delta against this marginalization lead to the destruction of oil and gas facilities which empties products (both refined and unrefined) into the Niger Delta immediate environment, thereby worsening the already dire environmental conditions.¹³²¹ Experts argue that CERs could help to arrest the environmental degradation of the Niger Delta, including that caused by destruction of oil and gas facilities by youths protesting the marginalization of the Niger Delta from environmental governance in Nigeria. This would come about by enhancing the availability and accessibility of public involvement mechanisms.¹³²²

Experts argue that another manifestation of the marginalization of the Niger Delta is in the form of unemployment. The unemployment rate in the Niger Delta stands between 50% and 70% making it the highest in Nigeria, causing experts to observe that it "is clear to the most casual observer that youth unemployment and underemployment are serious problems [in the Niger Delta]."¹³²³ The opinion is that the Niger Deltans are denied employment opportunities in the petroleum industry even when they are highly qualified for the positions.

PANDEF observes that whereas "young graduates of the Niger Delta region with degrees in petroleum engineering and allied fields remain jobless, Northerners with degrees in history are working as managers in the NNPC."¹³²⁴ In July 2020, the Itsekiri ethnic nationality in the Niger Delta also complained about exclusion from employment in the NNPC. They alleged that while the NNPC recently laid off some people from the Niger Delta, it employed more from outside

¹³²⁰ Francis et al, *supra* note 25 at 37.

¹³²¹ Zalik, *supra* note 37 at 555.

¹³²² William Murray Tabb, "Public participation in environmental decision making" in Michael Faure, ed, *Elgar Encyclopedia of Environmental Law* (UK & USA: Edward Elgar Publishing Limited, 2016) 324.

¹³²³ Francis et al, *supra* note 25 at 30.

¹³²⁴ PANDEF, *supra* note 53.

the Niger Delta. They demanded that Niger Delta people who were unjustly disengaged be recalled.¹³²⁵ Scenarios like these become springboards for violence by the protesting youths of the Niger Delta.

There is a social dimension to the unemployment in the Niger Delta - a limitation of peoples' opportunities to end the endemic poverty in the region.¹³²⁶ Yet the high unemployment rate in the Niger Delta also has environmental and health dimensions. For instance, to earn a living, youths in the Niger Delta have turned to illegal and unsophisticated refining of crude oil into products like petrol and kerosene, which are then sold to unsuspecting members of the public.¹³²⁷

The unsophisticated refining of petroleum product has health and environmental consequences. Since 2015, black soot has enveloped Port Harcourt, the capital city of Rivers State,¹³²⁸ which is arguably, the foremost city in the Niger Delta with an estimated population of more than 3 million.¹³²⁹ The concentration of the black soot is intense.

There's been a literal cloud hanging over the southeastern city of Port Harcourt, Nigeria. People's clothes have been covered in soot. The streets are covered in soot. Even residents' bed sheets are covered in soot. 'You're wiping your face with a handkerchief and everything is black. You're trying to clean your car and everything is black. Or you look at the soles of your feet and it is just pitch black.'¹³³⁰

The unsophisticated refining of petroleum products by the youth and the attendant destruction of these illegal refineries by the government have been cited as the reason for the black soot.¹³³¹ In 2018, the Federal Ministry of Environment traced the menace of black soot enveloping Port Harcourt "to the operation of illegal oil refineries...and their destruction."¹³³² Experts have voiced their concerns over the environmental and health consequences of the black soot.

¹³²⁵ Francis Efe, "Delta Communities threaten to Stop New NNPC Recruits from Resuming", *Vanguard* (24 July 2020) <<https://www.vanguardngr.com/2020/07/delta-communities-threaten-to-stop-new-nnpc-recruits-from-resuming/>>.

¹³²⁶ Francis et al, *supra* note 25 at 30.

¹³²⁷ Dibia Michael, "Nigeria: Fuel from Illegal Refineries", *Africanews* (9 July 2020) <<https://www.africanews.com/2020/07/09/nigeria-fuel-from-illegal-refineries/>>.

¹³²⁸ "Menace of Soot in Rivers", *ThisDay Newspaper* (24 January 2022) <<https://www.thisdaylive.com/index.php/2022/01/24/menace-of-soot-in-rivers/>> [Menace of Soot in Rivers].

¹³²⁹ World Population Review, 2021, "Port Harcourt Population 2021" <<https://worldpopulationreview.com/world-cities/port-harcourt-population>>.

¹³³⁰ Chris Giles, "Port Harcourt: Why is this Nigerian City covered in a strange Black Soot?", *CNN* (26 April 2018) <<https://www.cnn.com/2018/04/26/africa/nigeria-port-harcourt-soot/index.html>> [Giles].

¹³³¹ "Still on Soot in Rivers", *The Tide* (29 November 2021) <<http://www.thetidenewsonline.com/2021/11/29/still-on-soot-in-rivers/>>.

¹³³² Menace of Soot in Rivers, *supra* note 1321.

Scientists have determined that the soot particles are extremely small and stay in the air for months, stinging the eyes and causing irritation to the nose and throat. The soot particle, according to experts, is 2.5 micron in size and can only be seen through a high-powered microscopic lens. These particles can enter any closed space that air enters, including homes, classrooms, worship places and offices. The soot is inhaled effortlessly by people who do not wear masks. The fine particles of black soot get into the respiratory system triggering or aggravating asthma, bronchitis, pneumonia, heart disease, birth defects and even cancer.¹³³³

Despite these health and environmental issues associated with the black soot which has attracted the attention of the UN and WHO, who have set up a joint mission to investigate the menace,¹³³⁴ the Nigerian government has yet to decisively address the problem, either in the short, medium or long term.¹³³⁵

Experts opine that CERs could help to address the marginalization of the Niger Delta in environmental governance in Nigeria through public involvement, which in turn could tackle the above-mentioned social, health and environmental challenges from their roots. For instance, Boyd is of the view that one way in which CERs could encourage public involvement of marginalized groups in environmental governance is by widening access to justice, and that a wider access to justice would enable the public to access the courts to sue and obtain remedy for environmental degradation. According to him, “[c]onstitutional environmental provisions have substantially increased the public’s role in environmental governance. The right to a healthy environment has been interpreted consistently by legislators, the executive, and the judiciary as including procedural environmental rights – e.g...access to justice. Citizens, in ever-increasing numbers, appear to be using these rights.”¹³³⁶

This chapter will, therefore, examine how CERs have widened access to justice in countries that have enforceable CERs and how a widened access to justice has enhanced the ability to seek and obtain redress in court for environmental injustice in those countries. In the light of barriers to access to justice in Nigeria, the chapter will also examine how enforceable CERs could deliver similar results in Nigeria, if adopted, and what changes would be required to make them most effective.

¹³³³ Menace of Soot in Rivers, *supra* note 1328.

¹³³⁴ Giles, *supra* note 1323.

¹³³⁵ Nwaorgu Faustinus, “Forget Politics, Fight Port Harcourt Soot, APC tells Gov Wike”, *Vanguard* (23 January 2022) <<https://www.vanguardngr.com/2022/01/forget-politics-fight-the-soot-rivers-apc-tells-gov-wike/>>.

¹³³⁶ Boyd, *supra* note 28 at 239.

5.3. Analysis of the Existing Right of Access to Information and Right to Participation in Nigeria

5.3.1. Right of Access to Information in Nigeria

Experts have analyzed Nigeria's main legislation on access to information - the Freedom of Information Act, 2011 (FOI Act)¹³³⁷, especially on how it compares with the Aarhus Convention and conclude that the FOI Act mostly aligns with the Aarhus Convention: First, the FOI Act has a wider coverage. According to Etemire, this "is in line with best practice as the public right to information under the FOI Act covers 'information stored in whatever form, including written, electronic, visual images, sound, audio recording, etc.'"¹³³⁸

Second, to align with best practice, the FOI Act construes any person entitled to access information liberally, "embracing all irrespective of race, gender, nationality or domicile, or other distinguishing factors."¹³³⁹ Third, in accordance with best practice, the applicant for information under the FOI Act need not indicate any specific interest in the requested information. Uchechukwu Nwoke argues that with this provision, "[u]nlike in the past, an applicant can now initiate public-interest litigation or request public information without the fear of confronting an objection based on locus standi [place of standing]."¹³⁴⁰

Fourth, to encourage the disclosure of information by officials, the FOI Act in section 27(2) "seeks to protect serving public officers from the adverse consequences for disclosing certain kinds of official information without authorisation."¹³⁴¹ Section 27(2) offers protection to the public servant if the prohibited information that was disclosed exposes "mismanagement, gross waste of funds, fraud, and abuse of authority; or ... a substantial and specific danger to public health or safety."¹³⁴² Considering the level of corruption in Nigeria, which would constitute a

¹³³⁷ Freedom of Information Act, 2011, online: available at <https://osgf.gov.ng/storage/app/media/pdf/FOIA2011.pdf> (last accessed April 28, 2022).

¹³³⁸ Etemire 1, *supra* note 1317 at 133.

¹³³⁹ *Ibid.*

¹³⁴⁰ Uchechukwu Nwoke, "Access to Information under the Nigerian Freedom of Information Act, 2011: Challenges to Implementation and the Rhetoric of Radical Change" (2019) 63 (3) J.Afric.L. 435 at 443 [Nwoke].

¹³⁴¹ Funmilola Omotayo, The Nigeria Freedom of Information Law: Progress, Implementation Challenges and Prospects" (2015) Library Philosophy and Practice 1 at 4.

¹³⁴² 27 (2) provides that "Nothing contained in the Criminal Code or Official Secrets Act shall prejudicially affect any public officer who, without authorization, discloses to any person, an information which he reasonably believes to show- (b) mismanagement, gross waste of funds, fraud, and abuse of authority; or (c) a substantial and specific

barrier to the effectiveness CERs to tackle the sustainability crisis in the Niger Delta, it is highly desirable for public officials in Nigeria to rely on this provision to disclose information to the public on these areas.

Fifth, the FOI Act anticipates that a request for information will be denied and makes provision for not only a review procedure by the court but in accordance with best practice, gives the court the liberty to provide *adequate and effective remedy* depending on the circumstance of each case.¹³⁴³ Sixth, where request for information is denied and a suit is instituted to compel the release of the requested information, in line with best practice, under the FOI Act, the “presumption of disclosure is in favour of the applicant, while the burden of justifying the non-disclosure of the requested information lies with the public authority. If a request is to be turned down, the public institution must state the reason for doing so.”¹³⁴⁴ Seventh, the FOI Act provides for summary and expeditious resolution of any case instituted regarding the denial of access to information.¹³⁴⁵

Eighth, taking cognizance of Nigeria’s peculiar circumstances, Nwoke observes that the FOI Act has even been innovative in some areas. For instance, considering the high level of illiteracy in Nigeria, the FOI Act extends “the locus standi under the act further, section 3(3) allows an illiterate or disabled applicant to request information through a third party.”¹³⁴⁶ Ninth, to further empower an illiterate applicant, the FOI Act allows the request for information to be made either orally or in writing.¹³⁴⁷ If the request is made orally, the FOI Act enjoins the receiving official to

danger to public health or safety notwithstanding that such information was not disclosed pursuant to the provision of this Act.”

¹³⁴³ Etemire 1, *supra* note 1317 at 162.

Section 25 (2) provides that any “order the Court makes in pursuance of this section may be made subject to such conditions as the Court deems appropriate.”

¹³⁴⁴ Nwoke, *supra* note 1340 at 443.

Section 24 provides that “In any proceeding before the Court arising from an application under Section 20, the burden of establishing that the public institution is authorized to deny an application for information or part thereof shall be on the public institution concerned.”

¹³⁴⁵ Etemire 1, *supra* note 1317 at 162.

Section 21 provides that an “application made under section 20 shall be heard and determined Summarily.”

¹³⁴⁶ Nwoke, *supra* note 1340 at 443.

Section 3 (3) provides that an “Illiterate or disabled applicants who by virtue of their illiteracy or disability are unable to make an application for access to information or record in accordance with the provisions of subsection (1) of this Section, may make that application through a third party.”

¹³⁴⁷ *Ibid.*

reduce the oral application into writing acceptable by the FOI Act, and thereafter, furnish the applicant with a copy of the now written request.¹³⁴⁸

Tenth, the FOI guarantees the right to access information from public institutions and ‘public institution’ is construed liberally to include private entities that are offering public services, carrying out public duties and using public funds, which would include the TNCs.¹³⁴⁹ Finally, in contrast to Aarhus Convention “that excludes ‘bodies or institutions acting in a judicial or legislative capacity’ from its definition of ‘public authority’, the FOI Act does not contain such exclusion in its definition of ‘public institution’”¹³⁵⁰ Considering the lack of transparency in both the judicial and legislative arms of government in Nigeria, as already discussed in both chapters 3 and 4 of this thesis, it could bode well for the Nigerian public if information retained in both the judicial and legislative arms of government are accessible to the general public. Public scrutiny could assist in promoting transparency in these arms of government.

Experts note certain shortcomings of the FOI Act and recommend that these provisions be amended to align with Aarhus Convention and best practice in the following areas: First, unlike the Aarhus Convention, the FOI Act provides that only the court can review the decision to withhold access to information in Nigeria. Providing for “(a usually first tier) alternative access route to justice would have been a major way of reducing the cost of review procedures for the public, many of whom may not be able to access the courts owing to the high costs involved and considering the relatively high level of poverty.”¹³⁵¹ This could be an administrative tribunal or an official with less procedural and formal requirements than a conventional court.

¹³⁴⁸ Section 3 (4) provides that “An authorized official of a government or public institution to whom an applicant makes an oral application for information or record, shall reduce the application into writing in the manner prescribed under subsection (1) of this Section and shall provide a copy of the written application to the applicant.”

¹³⁴⁹ Etemire 1, *supra* note 1317 at 136.

Section (I) provides that notwithstanding “anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established.”

Section 31 provides that public institution means “any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds.”

¹³⁵⁰ Etemire 1, *supra* note 1317 at 139.

¹³⁵¹ *Ibid* at 161.

Section 1(3) provides that any person “entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.”

Second, there are many exceptions to the provision of information to the public in the FOI Act and this could frustrate the accessibility of publicly available information. It is recommended that the FOI Act be amended to remove some of these exceptions. Experts see these many exceptions as the greatest challenge to information accessibility in Nigeria. For instance, Hanspreet Kaur argues that “the biggest obstacle has always been the number of exemption sections and clauses surpassing the sections that grant access to information...only Sections 1 and 3 grant the freedom of access to information to the public but as many as 10 sections deny the access of information to the public.”¹³⁵² In the same vein, Nwoke argues that the

FOI Act contains more exemption sections than sections granting access to information. In this context, only sections 1 and 3 grant access to information, while as many as ten sections (sections 7, 11, 12, 14, 15, 16, 17, 18, 19 and 26) are intended to deny the public access to information... ‘Unfortunately, the exemption clauses in the Act take back almost the entirety of what it gives. Using these exemption provisions, it will be easy for public officials to deny access to information which they do not want to make public.’¹³⁵³

Third, by section 11 (1) of the FOI Act, public officials reserve the right not to disclose information if such information is deemed injurious to the conduct of international affairs and national defence.¹³⁵⁴ But the FOI Act does not define what constitutes the conduct of international affairs and national defence. Although disclosure of certain information could compromise national security and harm the conduct of international affairs, the silence of the FOI Act on what constitutes the conduct of international affairs and national defence could be exploited by Nigerian public officials who may not be willing to make information publicly available. According to Nwoke:

[T]he section has created room for government officials and institutions to hide under the excuse of international affairs or national defence to refuse access to information. What exactly amounts to international affairs? Under what particular circumstances can it be said that a government is defending the country? These are salient points that the [FOI Act] did not specify, thus leaving them within the realm of conjecture and speculation.¹³⁵⁵

One of the implications of the national defence grounds for non-disclosure is the continued lack of transparency by the government in the administration of security votes, which are

¹³⁵² Hanspreet Kaur, “Transparency in Governance: A Comparative Study of Right to Information Legislation in India, Indonesia and Nigeria” (2022) 7(4) Asian Journal of Comparative Politics 1282 at 1289.

¹³⁵³ Nwoke, *supra* note 1340 at 449.

¹³⁵⁴ Section 11 (1) provides that “A public institution may deny an application for any information the disclosure of which may be injurious to the conduct of international Affairs and the defence of the Federal Republic of Nigeria.”

¹³⁵⁵ Nwoke, *supra* note 1340 at 449.

disbursements to States and security agencies to improve security and tackle insecurity in Nigeria.¹³⁵⁶ These monies have become slush funds, especially for the State governments, who spend these monies without public accountability. Nwoke argues that

A good example of this controversy can be found in the appropriation and expenditure of funds identified as ‘security votes’. Public officials hide behind national defence to refuse the disclosure of funds that they have appropriated for security in Nigeria. Yet, it is now common knowledge that the issue of security vote appropriation in Nigeria has become an avenue for government officials to dissipate public funds without examination, analysis or responsibility and without providing ‘security’ for anyone except for the executives’ pockets and bank accounts.¹³⁵⁷

The level of mismanagement of the security votes in Nigeria is so alarming that it has become a campaign issue. The Presidential candidate of the New Nigeria Peoples Party in Nigeria’s presidential election of February, 2023, Alhaji Rabiun Kwankwaso, had promised to abolish the security vote if elected president of Nigeria. According to him, security vote “is a big way of stealing money and that was why I didn’t do it as a governor.... If I have the opportunity again, there will be nothing like the security vote in the presidency.”¹³⁵⁸ Alhaji Kwankwaso should know about mismanagement of security votes on national defence grounds having himself served variously as federal minister for defence and as 2-term (8years) governor of Kano State.¹³⁵⁹

The thesis in chapter 4 made recommendations on how corruption could be tackled in Nigeria, to enhance the ability of CERs to wrestle with the sustainability crisis in the Niger Delta. In addition to those recommendations, which could also tackle the mismanagement of security votes, the thesis recommends that the FOI Act should be amended to define conduct of international affairs and national defence. It is conceded that it may not be possible for legislation to contemplate all the ramifications of these concepts, but at the very least, it would provide guidance on how these concepts could be construed.

On the whole, despite the FOI Act, the Niger Delta people struggles to access environmental information, especially from the TNCs. Because “multinational companies in Nigeria hardly ever

¹³⁵⁶ Juliet Umeh, “Security Vote, Big Way of Stealing Money; I’ll Abolish it if Elected —Kwankwaso”, *Vanguard Newspaper* (15 November 2022) <Security vote, big way of stealing money; I’ll abolish it if elected —Kwankwaso (vanguardngr.com)>.

¹³⁵⁷ Nwoke, *supra* note 1340 at 449.

¹³⁵⁸ Emmanuel Badejo, “Security Vote is a Fraud, says Kwankwaso”, *The Nation Newspaper* (14 November 2022) <thenationonlineng.net>

¹³⁵⁹ *Ibid.*

allow public access to the environmental information they hold; usually, they provide the public with inaccurate environmental information (so as to escape liability or appear responsible), and do not do enough gathering of information about the environmental impact of their activities.”¹³⁶⁰ A constitutional right to environmental information could change this.

5.3.2. Right to Public Participation in Nigeria

The analysis of the right to public participation in Nigeria will be premised on the provisions of Nigeria’s *Environmental Impact Assessment Act, 1992* (EIA Act)¹³⁶¹ “because the EIA Act, apart from regulating the general EIA system in the country, is the flagship law for public participation in environmental decision-making in Nigeria.”¹³⁶²

The EIA Act aligns with the Aarhus Convention and best practice in some areas, including the following: First, the EIA Act requires that the public should be allowed to participate and make input into the EIA report before a final decision is taken by the approving government agency. This provides “reasonable opportunity to participate without restrictions. In addition, the reference to ‘the public’ and any interested group and experts, has the potential to include the public abroad ...and the relevant Nigerian authorities are advised to be guided by the way the counterpart provision in the Aarhus Convention is being interpreted.”¹³⁶³

Second, where a project for which an EIA has been requested has a trans-national dimension, the regulators may set up a review panel to assess the international effect of the project. The regulators are required to notify the affected countries at least 10 days before the setting up of the review panel and this “could be an opportunity for the actual foreign ‘public concerned’ to participate in the review panels assessment in line with the reasoning of the Aarhus Compliance Committee in the Ukrainian case.”¹³⁶⁴

¹³⁶⁰ Etemire 1, *supra* note 1317 at 136.

¹³⁶¹ No. 86 1992 <<https://ngfcp.dpr.gov.ng/media/1061/environmental-impact-assessment-eia-decree-no-86-1992.pdf>>.

¹³⁶² Etemire 1, *supra* note 1317 at 196.

¹³⁶³ *Ibid.*

Section 7 provides that before “the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity.”

¹³⁶⁴ Etemire 1, *supra* note 1317 at 197.

Section 50 (1) provides that where “a project for which an environmental assessment required under section 5 of this Decree is to be carried out in Nigeria or on federal lands and the President, Commander-in Chief of the Armed

Third, the EIA Act contains in its schedule, 19 items for which EIA shall be conducted and according to Etemire, the 19 mandatory items essentially correspond to the items in the mandatory lists for which EIAs are required in Annex I of the Aarhus Convention.¹³⁶⁵ Fourth, in line with best practice, where there is a possibility of adverse impact on the environment regarding any activity, the EIA Act provides that the EIA processes must be activated notwithstanding that such activity ordinarily does not require EIA.¹³⁶⁶

However, experts observe shortcoming in the EIA Act, including the following: First, the EIA Act encourages the regulatory agency to receive inputs from the public before making a final decision on approving the EIA but does not require the regulatory agency to act on such inputs. A mandatory provision requiring that public inputs be taken into consideration by the regulator is required.¹³⁶⁷ Second, despite the potential for significant environmental impact, the EIA Act empowers the President of Nigeria to exclude certain projects from EIA requirements, thereby bypassing public participation. Chukwu Omaka

wonders why a project should be excluded from EIA because its environmental effect is minimal. The fact that the effect of such a project on the environment is minimal at the initial stage of the project does not mean that at the later stage of the project, the effect may not become serious. In any case, the continuous minimal state of the effect of the project on the environment may develop into a complex condition that will endanger the environment. Indeed, what expertise does the President have to know which project will have minimal effect on the environment? Again, that projects should be excluded from EIA during a national emergency is somewhat

Forces is of the opinion that the project is likely to cause serious adverse environmental effects outside Nigeria and those Federal lands, the Agency and the Minister of Foreign Affairs may establish a review panel to conduct an assessment of the international environmental effects of the project.”

Section (2) provides that at least 10 days “before establishing a review panel pursuant to subsection (1) or (2) of this section, the Agency shall give notice of the intention to establish a panel to – (a) the proponent of the project; (b) the governments of any interested States in which the project is to be carried out; and (c) the government of any foreign State in which in the opinion of the Minister of Foreign Affairs, serious adverse environmental effects are likely to occur as a result of the project.”

¹³⁶⁵ Etemire 1, *supra* note 1317 at 201.

The items are agriculture; airport; drainage and irrigation; land reclamation; fisheries; forestry; housing; industry; infrastructure; ports; mining; petroleum; power generation and transmission; quarries; railways; transportation; waste treatments and disposal; and water supply.

¹³⁶⁶ Etemire 1, *supra* note 1317 at 201.

Section 51 (1) provides that where “a project for which an environmental assessment is not required under section 15 of this Decree is to be carried out in Nigeria and the Agency or the President, Commander-in-Chief of the Armed Forces is of the opinion that the project is likely to cause serious adverse environmental effect on Federal Lands or on lands in respect of which a State or Local Government has interests, the Agency or the President may establish a review panel to conduct an assessment of the environmental effects of the project on those lands.”

¹³⁶⁷ Etemire 1, *supra* note 1317 at 217.

Section 8 provides that the Agency “shall not give a decision as to whether a proposed activity should be authorised or undertaken until appropriate period has elapsed to consider comments pursuant to sections 7 and 12 of this Decree.”

nebulous. One wonders if a more serious national emergency will not be created where the projects blatantly destroy the environment.¹³⁶⁸

The exclusion of certain projects from the EIA Act, which would allow such projects to by-pass public consultation and participation requirements is against international best practice.¹³⁶⁹ It is recommended that the EIA Act should be amended to apply to all projects that could potentially impact the environment.

Third, against the provision of article 6(4) of the Aarhus Convention which requires early public participation,¹³⁷⁰ the EIA Act only allows for public participation after the conclusion of the EIA report but before its approval. Analyzing the likely effect of this loophole of the EIA Act, experts opine that

The public are invited to comment on a draft that was prepared without their input, and perhaps even knowledge, as there are no prescribed formal notice requirements. Given the importance of oil and gas and mining projects to the national economy, it is unlikely that all public concerns can be adequately addressed at this stage, for the intent of the government is usually to have the proposed projects developed as quickly as possible in order to raise revenue for the government. But EIAs for oil and gas and mining projects are not activities that can be completed properly without a significant amount of time. A thorough and careful assessment of the short and long term environmental risks and how to prevent or mitigate them requires ample time and an adequate consideration of the views of those to be affected...The lack of meaningful public participation consultation requirements in the Nigeria EIA system seriously undermines the effectiveness of the EIA process in Nigeria.¹³⁷¹

From the foregoing, the thesis recommends the amendment of the EIA Act to provide for mandatory public participation in all the stages of the EIA processes in Nigeria. This will align the EIA Act with the Aarhus Convention and ensure that potential impacts are spotted, addressed and incorporated into project design and implementation as early as possible.

¹³⁶⁸ Chukwu Omaka, "The Concept of Environmental Impact Assessment in Nigeria" (2022) 2 (1) Ebonyi State University Law Journal 65 at 82-83.

¹³⁶⁹ Etemire 1, *supra* note 1317 at 202.

Section 15 (1) provides that an "environmental assessment of project shall not be required where - (a) in the opinion of the Agency the project is in the list of projects which the President, Commander-in-Chief of the Armed Forces or the Council is of the opinion that the environmental effects of the project is likely to be minimal; (b) the project is to be carried out during national emergency for which temporary measures have been taken by the Government; (c) the project is to be carried out in response to circumstances that, in the opinion of the Agency, the project is in the interest of public health or safety."

¹³⁷⁰ Article 6(4) of the Aarhus Convention provides that parties "shall provide for early public participation, when all options are open and effective public participation can take place."

¹³⁷¹ Allan Ingelson & Chilenye Nwapi. "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis." (2014) 10 (1) Law, Environment and Development Journal 1 at 17 [Ingelson & Nwapi].

Fourth, unlike the Aarhus Convention (article 3(2)),¹³⁷² the EIA Act does not provide for any form of assistance to the public to enable them to participate effectively in the EIA processes. Considering the illiteracy and poverty levels, along with other constraints in Nigeria, this could affect public participation.¹³⁷³ Fifth, once the EIA approval has been granted, the EIA Act does not provide for subsequent public participation regarding such a project. This could compromise environmental integrity because there could be a variation of the project and/or its components, and this will be done without public participation.¹³⁷⁴ Apart from project variation, project monitoring is an important component of the EIA process, with the EIA Act not providing for public participation beyond the EIA approval stage, the potential gains and sense of ownership which public participation could bring to project monitoring are lost.

An effective EIA process continues up to the time the project is completed. After the approval of an EIA, it is necessary to monitor whether the proposed mitigation measures are being implemented and, if they are, how they are working. The implementation of a project design may reveal gaps in the EIA that were not previously observed but which need to be addressed.¹³⁷⁵

Moreover, there could be a change in circumstances leading to unanticipated impacts, or some hitherto unanticipated impact becomes obvious only after some phase of the project has started. Further information could become available after the issuance of the EIA approval. All of these would require further public consultations on risk mitigation or adaptation methods. Sixth, the EIA Act does not provide for an EMP.¹³⁷⁶

An EMP is a detailed plan and schedule of measures necessary to address the potential impacts identified through the EIA. Those measures are to be undertaken during the implementation of the project to either eliminate or reduce the adverse effects of the project. An EMP includes the specific actions needed to implement the measures. It should make clear the costs associated with the implementation of the measures, the compensatory measures available should the measures fail to adequately address the adverse effects of the project, and the institutional arrangements available to implement the measures.¹³⁷⁷

It is recommended that the EIA Act be amended to provide for mandatory EMP, to deal with environmental issues that could arise post-EIA.

¹³⁷² Article 3 (2) provides that each party “shall endeavour to ensure that officials and authorities assist and provide guidance to the public ... in facilitating participation in decision-making.”

¹³⁷³ Etemire 1, *supra* note 1317 at 214.

¹³⁷⁴ *Ibid* at 219.

¹³⁷⁵ Ingelson & Nwapi. *supra* note 1371 at 19.

¹³⁷⁶ *Ibid* at 18.

¹³⁷⁷ *Ibid*.

Seventh, section 59 of EIA Act ousts the court's jurisdiction to review any issue under the Act if the complaint is "a defect in form or a technical irregularity."¹³⁷⁸ The import of this is that "the decision of the assessment panel is final even if the affected public that submitted comments to the panel does not agree that the decision was reached judiciously and reasonably in light of the available facts or that due process was followed."¹³⁷⁹ The EIA Act has failed to define what constitutes either "a defect in form or a technical irregularity." As revealed in the thesis, with the scant regard to public participation in Nigeria, coupled with the failure of the EIA Act to define these terms as pointed out above, government could rely on this provision to deny the public the right to participate in the EIA processes in the petroleum sector in Nigeria, even with the narrow window offered by the EIA Act. More generally, the court's power to conduct judicial review on the EIA processes should be unfettered.

The opportunity to appeal environmental decisions is an important component of an effective EIA process. Most scholars agree that effective public input to EIAs requires the provision of '...judicial review procedures in which the adequacy of the environmental review process can be tested'. An appeal avenue is necessary to allow adequate public input to the environmental decision, which leads to a better decision and a sense of community ownership of the decision.¹³⁸⁰

While this chapter will not address this further, it recommends the changes suggested above. I now turn to our main focus, which is access to justice in the court system in Nigeria.

5.4. Conceptualizing Access to Justice

5.4.1. Aarhus Convention and Access to Justice

The chapter examines how access to justice could enhance the ability of the Niger Delta people to seek and obtain remedies domestically for environmental harms. The chapter notes the influence of Multilateral Environmental Agreements (MEAs) on access to justice in the domestic scene. For instance, the *United Nations Conference on Environment and Development*, 1992 (Rio Declaration) mandated states to provide "[e]ffective access to judicial and administrative proceedings, including redress and remedy" (principle 10).¹³⁸¹ *Agenda 21*, 1992 provides the

¹³⁷⁸ Section 59 provides that "An application for judicial review in connection with any matter under this Decree shall be refused when. the sole ground for relief established in the application is a defect in form or a technical irregularity."

¹³⁷⁹ Ingelson & Nwapi. *supra* note 1371 at 18.

¹³⁸⁰ *Ibid.*

¹³⁸¹ Report of the United Nations Conference on Environment and Development Rio de Janeiro, (3-14 June 1992), A/CONF.151/26/Rev.1 (Vol. I) <N9283655.pdf (un.org)>

framework for the implementation of access to justice by calling on governments to “establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest” (article 8.18).¹³⁸²

However, in its analysis the chapter will rely heavily on the Aarhus Convention. Although the Aarhus Convention is not as wide-spread as other MEAs, owing to its limited application because it applies mainly in Europe and Nigeria is not even a party to it,¹³⁸³ the Aarhus Convention is useful for the chapter for the following reasons: (i) the African Union of which Nigeria is a founding and subsisting member, recognizes the Aarhus Convention and is considering negotiating “an African convention similar to the Aarhus Convention on public participation or [adopting] the Aarhus Convention.”¹³⁸⁴

Also, the Aarhus Convention has an international outlook:

Aarhus Convention is a UNECE regional convention. However, it is more than that. It is also a fruit of the wider international environmental and human rights laws considering that it was inspired by, and firmly rooted in a number of such key international initiatives. Apart from recognising the link between public participation and ‘the enjoyment of basic human rights’, the Convention in its preamble makes reference to Principle 1 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 10 of the Rio Declaration (which popularized the three ‘pillars’ of public participation that were adopted in the Aarhus Convention), as well as the World Charter for Nature. It is therefore argued that the Aarhus Convention to a large extent simply serves further to articulate the norms of these international initiatives that apply widely and constitute a standard for many nations across the world, including Nigeria, which has committed itself to them.¹³⁸⁵

The Aarhus Convention also operationalizes the provision of the Rio Declaration on access to justice. Exploring the nexus between the Rio Declaration and the Aarhus Convention, Matthijs van Wolferen and Mariolina Eliantonio argue that the later “aimed to give effect to Principle 10 of the Rio Declaration” which “acknowledges the fact that although the protection of the

¹³⁸² United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21 < Agenda21.doc (un.org)>

¹³⁸³ See the Preamble to the Aarhus Convention.

As of October 2017, the Convention has 47 members. See “Status of Ratification”, online: available at <http://www.unece.org/env/pp/ratification.html> (last accessed January 9, 2019).

¹³⁸⁴ African Union Commission, “Public Participation in African Biosafety Regulations and Policies” (September 2010) at 8 <<https://www.cbd.int/bs/doc/outreach/auc-public-participation-en.pdf>>.

¹³⁸⁵ Etemire 1, *supra* note 1317 at 12-13.

environment had become a full-fledged third-generation human right, it is severely hindered by the way in which it can be invoked in national procedures. To that end, the Aarhus Convention aims ... to create a procedural right for these applicants.”¹³⁸⁶

Lastly, the Aarhus Convention is widely regarded as the most authoritative MEA on access to justice whose provisions are shaping access to justice in the domestic scene.¹³⁸⁷ For this reason, Peter Oliver holds the view that access to justice “is undoubtedly the piece de resistance of the [Aarhus] Convention and the area which gives rise to the most delicate questions.”¹³⁸⁸

In a wider context, Catherine Redgwell argues that the Aarhus Convention “is the first international instrument to address procedural human rights in an environmental context and sets a ‘benchmark for environmental democracy.’”¹³⁸⁹ Furthermore,

the Aarhus Convention...marks another milestone in the development of environmental rights of the public not only in Europe but in fact also globally. Its significance in this respect was appreciated by Kofi Annan, the then Secretary General of the United Nations, who described the Aarhus Convention as ‘the most ambitious venture in the area of “environmental democracy” so far undertaken under the auspices of the United Nations’... It is described as ‘the first multinational environmental agreement that focuses exclusively on obligations of the nations to their citizens and nongovernmental organizations’, and the first binding international instrument attempting to comprehensively and exclusively address issues of citizens’ environmental rights. Furthermore, it is considered to be a ‘driving force for environmental democracy’ in Europe, and ‘at the forefront’ of developing the legal framework in this respect worldwide.¹³⁹⁰

5.4.2. History of Access to Justice

Experts are not in agreement on the origin of access to justice. John Peysner traces the origin of access to justice to Scotland in 1424. According to him,

¹³⁸⁶ Matthijs Wolferen & Mariolina Eliantonio, “Access to Justice in Environmental Matters in the EU: The EU’s Difficult Road towards Non-compliance with the Aarhus Convention” in Marjan Peeters & Mariolina Eliantonio, ed, *Research Handbook on EU Environmental Law: The Challenge of Understanding EU Environmental Law* (UK & USA: Edward Elgar Publishing, 2020) 154 [Wolferen & Eliantonio].

¹³⁸⁷ May 2, *supra* note 126 at 32.

¹³⁸⁸ Peter Oliver, ‘Access to Information and to Justice in EU Environmental Law: The Aarhus Convention’ (2013) 36 *Fordham Int’l L.J.* 1423 at 1442. Piece de resistance could mean ‘the best part.’

¹³⁸⁹ Catherine Redgwell, “Access to Environmental Justice” in Francesco Francioni, ed, *Access to Justice as a Human Right* (UK: Oxford University Press, 2012) at 153-154.

¹³⁹⁰ Jerzy Jendrośka, “Citizen’s Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice” (2012) 9 (1) *JEEPL* 71 at 73.

access to justice has a long history in public policy in the UK. In civil cases Scotland, as is often the case, was well ahead of England, and a 1424 statute had a remarkably modern two-stage ‘legal aid’ test that entitled a poor person with a good cause to be represented by a lawyer free of charge and to be exempt from court fees.¹³⁹¹

But environmental law scholars, May and Daly, trace the origin of access to justice to the *Universal Declaration of Human Rights*, 1948.¹³⁹² Francesco Francioni corroborates by arguing that “access to justice is guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration.”¹³⁹³ On the contrary, Matthijs van Wolferen and Mariolina Eliantonio trace the origin of access to justice to the *Treaty establishing the European Economic Community*, 1957 (Treaty of Rome).¹³⁹⁴ According to them, “access to justice... has developed from the Treaty of Rome [1957] until now.”¹³⁹⁵

5.4.3. Meaning of Access to Justice

Experts are not in agreement on what access to justice means.¹³⁹⁶ One reason may be because the concept is broad,¹³⁹⁷ and therefore, it is challenging for any single definition to capture all of its essence. However, according to some experts, access to justice “implies a (natural) person who accesses some sort of procedure in order to solve a conflict. This procedure is costly.”¹³⁹⁸ There

¹³⁹¹ John Peysner, *Access to Justice a Critical Analysis of Recoverable Conditional Fees and No-Win No-Fee Funding* (UK: Palgrave Macmillan, 2014) 7 [Peysner].

¹³⁹² James May & Erin Daly, *Global Environmental Constitutionalism* (UK & USA: Cambridge University Press, 2015) at 238.

The authors use the words “procedural environmental constitutionalism” instead of access to justice. Many experts agree that access to justice is a component of procedural CERs.

¹³⁹³ Francesco Francioni, “Rights of Access to Justice under Customary International Law” in Francesco Francioni, ed, *Access to Justice as a Human Right* (UK: Oxford University Press, 2012) 2 [Francioni].

See Universal Declaration of Human Rights, 1948, GA Res 217 A (III), UN Doc A/810 (1948) 71

<https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>.

Article 10 provides that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹³⁹⁴ United Nations, *Treaty establishing the European Economic Community (with annexes and Protocols)*. Done at Rome, on 25 March 1957, registered as Treaty No. 4300 on 24 April 1958. See Treaty Series Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations Vol. 298 <<https://treaties.un.org/doc/Publication/UNTS/Volume%20298/v298.pdf>>.

Article 164 of section 4 establishes the Court of Justice who “shall ensure observance of law and justice in the interpretation and application of this Treaty.”

Article 170 of section 4 provides that any member who “considers that another Member State has failed to fulfil any of its obligations under this Treaty may refer the matter to the Court of Justice.”

¹³⁹⁵ Wolferen & Eliantonio, *supra* note 1386 at 148.

¹³⁹⁶ Peysner, *supra*, note 1391 at 13.

¹³⁹⁷ Maurits Barendrecht, José Mulder and Ivo Giesen, *How to Measure the Price and Quality of Access to Justice?* (SSRN, November 2006) at 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=949209> [Barendrecht, Mulder & Giesen]

¹³⁹⁸ *Ibid.*

are at least 2 issues with the definition. First, some Constitutions like those of Brazil (article 129 (III))¹³⁹⁹ and Bolivia (article 34)¹⁴⁰⁰ have given State institutions who are non-natural persons standing to institute proceedings to protect the environment. Second, in some Constitutions like Brazil's (article 5 (LXXIII) and (LXXIV)),¹⁴⁰¹ Ecuador's (article 168 (4))¹⁴⁰² and Bolivia's (section 11 of article III)¹⁴⁰³ legal services are free.

Colin Crawford defines access to justice as “the provision of comprehensive legal services available to all members of a society.”¹⁴⁰⁴ Clearly a lot of people, especially the vulnerable members of the public, are not able to access legal services. In some places, courts and other adjudicatory platforms “only exist in urban, populated areas, leaving the rest of the country without proper access to the formal justice system.”¹⁴⁰⁵

For Mauro Cappelletti, access to justice focuses “on two basic purposes of the legal system – the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.”¹⁴⁰⁶ The definition seems limited because it does not accommodate other fundamentals of access to justice like cost and procedure.

In the same vein, Getman Anatoliy sees access to justice as “a fundamental element of the right to a fair trial and an indisputable condition for the exercise of the rule of law.”¹⁴⁰⁷ Again, the

¹³⁹⁹ Article 129 provides that the “institutional functions of the Public Ministry are... III. to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests.”

¹⁴⁰⁰ Article 34 provides that “Any person, in his own right or on behalf of a collective, is authorized to take legal action in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.”

¹⁴⁰¹ Article 5 (LXXIII) provides that “any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates, to administrative morality, to the environment and to historic and cultural patrimony; except in a case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party's attorneys' fees and costs.” Article 5 (LXXIV) provides that “the State shall provide full and gratuitous legal assistance to anyone who proves that he has insufficient funds.”

¹⁴⁰² Article 168 (4) provides that “Access to the administration of justice shall be free of charge.”

¹⁴⁰³ Section 11 of article III provides that “Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.”

¹⁴⁰⁴ Colin Crawford, “Access to Justice for Four Billion: Urban and Environmental Options and Challenges” (2018) 26:3 NYU Env't LJ 340 at 348.

¹⁴⁰⁵ United States Institute of Peace, “Necessary Condition: Access to Justice” <<https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>> [United States Institute of Peace].

¹⁴⁰⁶ Peysner, *supra* note 1391 at 13.

¹⁴⁰⁷ Getman Anatoliy, “Access to Justice for the Protection of Environmental Rights in Ukraine” (2021) 2(10) Access to Justice in Eastern Europe 118 at 119 [Anatoliy].

definition does not acknowledge other dimensions of access to justice. Francioni opines that access to justice is synonymous with “judicial protection. Thus, from the point of view of the individual, the term would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law.”¹⁴⁰⁸

Francioni acknowledges that, that “definition is obviously a rather restricted one: it is premised on the concept of the rule of law and of the constitutional separation of powers, where courts are independent of the executive and have the power and responsibility to interpret and apply the law independently,” He notes that the “condition, which is typical of the systems of constitutional democracies, might at first sight be considered only a feature of the Western legal tradition, in as much as it does not obtain in the totality of contemporary domestic legal systems.”¹⁴⁰⁹

However, this chapter adopts the definition of access to justice in the Aarhus Convention because it is broad, includes the fundamentals of access to justice and is specifically aimed at environmental disputes. According to it,

Access to justice under the Convention means access for the public to procedures where legal review of alleged violations of the Convention and national laws relating to the environment can be requested. Thereby, the rights and obligations...set out in the Convention, as well as provisions of national law relating to the environment, can be enforced not only by the Parties’ public authorities, but also by individuals and NGOs, as members of the public.¹⁴¹⁰

5.4.4 Elements of Access to Justice

There are different opinions on the elements of access to justice. May identifies 2 elements of access to justice - “standing and remedies.”¹⁴¹¹ Mauro Cappelletti also identifies 2 elements - accessibility and effectiveness. According to him, access to justice ‘serve to focus on two basic purposes of the legal system ... First, the system must be equally accessible to all and, second it must lead to results which are individually and socially just.’¹⁴¹² Anatoliy also identifies 2 elements - “the right to a fair trial and an indisputable condition for the exercise of the rule of

¹⁴⁰⁸ Francioni, *supra* note 1393 at 3.

¹⁴⁰⁹ *Ibid.*

¹⁴¹⁰ United Nations Economic Commission for Europe, *The Aarhus Convention: An implementation guide*, 2nd ed, (United Nations, 2014) 187.

¹⁴¹¹ May 2, *supra* note 126 at 42.

¹⁴¹² Peysner, *supra* note 1391 at 13.

law.”¹⁴¹³ Some other experts identify 5 elements of access to justice: “(i)improving access to legal aid; (ii)public interest law; (iii)informal justice such as mediation (iv)competition policy; and (v) the requirement that organizations create access to justice structures to address the concerns of clients, staff, and other.”¹⁴¹⁴ The US Institute of Peace identifies 6 elements: “normative legal protection, legal awareness, legal aid and counsel, adjudication, enforcement, and civil society oversight.”¹⁴¹⁵

However, for the reasons earlier stated, this chapter will rely on the Aarhus Convention because it has been accepted by most experts as the most authoritative instrument on access to justice in environmental cases.¹⁴¹⁶ This chapter adopts the 5-element access to justice framework of the Aarhus Convention:

Who can bring a challenge? The Convention encourages a broad interpretation of who has ‘standing’ to bring a challenge. *What can be challenged?* The Convention allows decisions, acts and omissions to be challenged. It allows both access to justice in terms of its own provisions and in terms of enforcing national environmental law. *Who can hear a challenge?* An appropriate court or impartial and independent review body as established under national law may hear a challenge under the Convention. *What are the remedies once a challenge is brought?* The Convention requires Parties to provide effective remedies, including injunctions. *How can barriers to access to justice be overcome?* Parties can assist the public to obtain access to justice by removing financial and other barriers.”¹⁴¹⁷

With the focus on these 5 elements, the segment will analyze how CERs could widen access to justice for the Niger Delta and how that could enhance the ability of the people to seek and obtain remedies from court for the environmental injuries they suffer in their territories.

5.4.4.1. Who can Bring a Challenge?

The first element of access to justice identified by the Aarhus Convention is the relaxation of the rules of standing in environmental litigation. The Aarhus Convention therefore “encourages a broad interpretation of who has ‘standing’ to bring a challenge.”¹⁴¹⁸ Boyd argues that CERs

¹⁴¹³ Anatoliy, *supra* note 1407 at 119.

¹⁴¹⁴ Barendrecht, Mulder & Giesen, *supra* note 1397 at 3.

¹⁴¹⁵ United States Institute of Peace, *supra* note 1405.

¹⁴¹⁶ May 2, *supra* note 126 at 32.

¹⁴¹⁷ Aarhus Convention: An Implementation Guide, 1st ed, *supra*, note 588, see the table titled, *Elements of Access to Justice* at 136.

¹⁴¹⁸ *Ibid* at 136.

could widen access to justice by relaxing rules of standing in environmental litigation. According to him,

A key development in terms of access to justice has been the use of the constitutional right to a healthy environment (and legislation implementing this right) to rewrite traditional rules of standing to include collective and diffuse interests. In many nations studied here, administrative processes and courthouse doors are now open to citizens without a traditional economic or personal interest at stake. As a result, the state appears to have lost its monopoly in terms of representing the public interest.¹⁴¹⁹

Some Constitutions have aligned with the Aarhus Convention by enshrining standing provisions for environmental cases which may indicate the value placed on this element in those countries. In Ecuador, standing to sue to protect the environment is extended by the Constitution to individuals, groups, communities, people, nations (article 86 (1))¹⁴²⁰ and government institutions (article 397),¹⁴²¹ either in their personal or representative capacities (article 99).¹⁴²² In Bolivia, individuals, either personally or in a representative capacity, (article 34)¹⁴²³ and certain state institutions have constitutional standing to sue to enforce environmental rights (article 136 (II)).¹⁴²⁴

From the above, this segment will analyze caselaw to show how CERs have altered the traditional rules of standing in some countries, facilitating public environmental litigation. The segment will discuss the current position of the law in Nigeria which does not recognize standing to institute some classes of actions through which many of the Niger Delta environmental grievances would be adjudicated under the current legislative framework. It will compare the Nigerian situation with the law on standing in other countries to see how CERs have led to

¹⁴¹⁹ Boyd, *supra* note 28 at 239.

¹⁴²⁰ Article 86 provides that “Jurisdictional guarantees shall be governed, as a rule, by the following provisions: 1. Any person, group of persons, community, people or nation will be able to propose actions envisaged in the Constitution.”

¹⁴²¹ Article 397 provides that “In case of environmental damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems. In addition to the corresponding sanction, the State shall file against the operator of the activity that produced the damage proceedings for the obligations entailing integral reparation, under the conditions and on the basis of the procedures provided for by law.”

¹⁴²² Article 99 provides that “Citizen action shall be exercised individually or representing the community when a right is infringed and when it is threatened; it shall be submitted to a competent authority, in accordance with the law.”

¹⁴²³ Article 34 provides that “Any person, in his own right or on behalf of a collective, is authorized to take legal action in defense of environmental rights, without prejudice to the obligation of public institutions to act on their own in the face of attacks on the environment.”

¹⁴²⁴ Article 136 (II) provides that “Any person, in his or her individual name or on behalf of a collective, may file this action, and it shall be filed obligatorily by the Public Ministry and the Public Defender (Ministerio Público y el Defensor del Pueblo) when, in the exercise of their functions, they have knowledge of these acts.”

widened access to justice and how that has enhanced the ability to seek and obtain remedies for environmental injuries from court in those countries.

(a) Lack of Standing to Bring Private Actions for Public Nuisance in Nigeria

In Nigeria, monetary compensation is only available for litigants suing under torts. For those suing under public nuisance, for example, unless such a suit is instituted by the Attorney-General (AG) of either a State or the federation, the matter would be struck out for lack of locus standi by the plaintiffs. Yet the AG rarely sues, as government officials do not want to be seen as taking any steps that may affect the interest of the TNCs.¹⁴²⁵

As earlier argued in chapter 4 in the segment on *Monitoring Compliance with Environmental Regulations*, it seems that one way of dealing with the AG's lack of interest would be to insulate the office of the AG from political interference by splitting the office of the AG into 2 – the AG and Minister of Justice – through a constitutional amendment.¹⁴²⁶ If the constitutional amendment is successful, Nigerians may begin to witness environmental litigation in public nuisance because the AG would begin to be more assertive in carrying out constitutional duties since he or she will not be hamstrung by political considerations.

The decision in *Amos & Ors. vs Shell*¹⁴²⁷ underscores the need for wider access to justice in Nigeria. The Plaintiffs sued the defendant for nuisance caused by a 2-month blockade of the Kolo Creek by the defendant for the construction of a dam on the Creek. The plaintiffs relied heavily on the Kolo Creek for their domestic water needs and livelihoods, including fishing and agriculture, which were affected during the blockage. The Supreme Court refused to grant the plaintiffs relief against Shell for causing a flood by the damming of creeks because a creek is 'a public waterway. Blocking it up is a public nuisance. No individual can normally recover damages for a public nuisance.'¹⁴²⁸ By contrast, this barrier of standing was overcome in Kenya, due to CERs.

¹⁴²⁵ Frynas, *supra* note 750 at 126.

¹⁴²⁶ Tsa, *supra* note 898.

¹⁴²⁷ Suit No.: SC. 42/1976

¹⁴²⁸ Frynas, *supra* note 750 at 125.

(b) CERs-Enabled Shift in Rules of Standing in Kenya

Kenya had a similar provision regarding the AG being the only person with standing to institute cases in public nuisance until the enactment of article 19(1) of the CERs-enabled *Environment and Land Court Act (ELCA)* which obviated the need in Kenya for the AG to sue on behalf of the public regarding public nuisance.¹⁴²⁹ In chapter 3, the thesis has already analyzed how CERs influenced the enactment of the *ELCA* which created a specialist environmental court, with its own procedural rules.

2 cases highlight the changed legal landscape in Kenya regarding *locus standi* in public nuisance cases. One was decided before the coming on stream of the 2010 pro-CERs Constitution and the other decided after. In *Wangari Maathai V. Kenya Times Media Trust Ltd.*,¹⁴³⁰ decided in 1989, the plaintiff, on moral and public policy grounds, filed a public nuisance suit, seeking a restraining order against the defendant from constructing a building complex at Uhuru Park on the ground that the land in issue forms part of the green belt, which is a conserved area. The court re-stated the law in pre-2010 Kenya, that it is “well established that only the Attorney General can sue on behalf of the public” and the suit was dismissed for lack of *locus standi* by the plaintiff.¹⁴³¹

However, in the post-2010 constitutional era, the courts in Kenya would have come to a different decision, which may indicate the influence of CERs on Kenya’s environmental litigation. The combined effect of articles 70 (1) and (3) of the Constitution obviates the need to show that the plaintiff has *locus standi* in environmental litigation. While article 70 (1) provides that “If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress,” article 70 (3) adds that an applicant under article 70 (1) “does not have to demonstrate that any person has incurred loss or suffered injury.”

These issues came up for determination in *Safaricom Staff Pension Scheme v. Erdemann Property Limited & Ors.*,¹⁴³² decided in 2017. The court held that it “is now a constitutional

¹⁴²⁹ Bosek, *supra* note 777 at 502.

¹⁴³⁰ [1989] eKLR <<http://kenyalaw.org/caselaw/cases/view/53011/>>.

¹⁴³¹ *Ibid.*

¹⁴³² Petition No. 4 of 2017 <<http://kenyalaw.org/caselaw/cases/view/135893/>>.

requirement that citizens should participate in the conduct of public affairs, and more so where those public affairs affect their rights and fundamental freedoms.”¹⁴³³ Specifically on the EIA, the court held that it “was therefore imperative that before the final EIA Report could be completed, the Petitioner and the Interested Parties be consulted, or at least, the said project be advertised in the local newspapers calling for any objections. That did not happen.”¹⁴³⁴ The court also departed from the precedent on *locus standi* in public nuisance and held that:

Indeed, in a matter where the issue of public interest is raised, it is enough for the Petitioner to simply demonstrate sufficient interest... In the Petition, the Petitioner has alleged that the Respondents have infringed the Petitioner’s constitutional right to a clean and healthy environment by granting the approvals to the 1st Respondent to proceed with the impugned sewer works without due regard to the natural consequences it would have on the environment...an Applicant does not have to demonstrate that any person has incurred loss or suffered injury. In the circumstances, whether or not the Petitioner has suffered any loss or injury or not due to the actions of the Respondents, it has the standing to challenge those actions.¹⁴³⁵

Similar improvements to access to justice have occurred in other countries as well.¹⁴³⁶

(c) Rules of Standing in Environmental Litigation in the Philippines

Like Kenya, the Philippines have relaxed their rules of standing in environmental litigation. The Supreme Court of the Philippines promulgated the *Rules of Procedure for Environmental Cases*, 2010, (RPEC)¹⁴³⁷ which has relaxed the rules on standing in environmental litigation. The RPEC governs “the procedure in civil, criminal and special civil actions before the ...Courts involving enforcement or violations of environmental and other related laws, rules and regulations.”¹⁴³⁸

The defendant began a huge construction of a mall and residential units comprising 2,000 units of both 3- and 2-bedroom apartments. The defendant was also constructing an internal sub-trunk sewer facility on the premises. To link the internal sewer with the public sewer system, the defendant had to block the public road which blocked plaintiff’s access to its own property. Apart from the blockage to its property, the plaintiff sued, complaining that the construction specification of the internal sewer did not meet the regulatory standard and was also too close to the plaintiff’s property. The plaintiff also complained that the public was not invited to participate in the approvals of the defendant’s internal sewage project, including the preparation of the Environmental Impact Assessment (EIA) Report. The plaintiff brought the proceedings to enforce the right to a healthy and clean environment provided for in article 42 of the Constitution.

¹⁴³³ *Ibid* at para. 129.

¹⁴³⁴ *Ibid* at para. 113.

¹⁴³⁵ *Ibid* at paras. 74–79.

¹⁴³⁶ Boyd, *supra*, note 28 at 239.

¹⁴³⁷ *Rules of Procedure for Environmental Cases*, 2010, A.M. No. 09-6-8-SC: Republic of the Philippines Supreme Court Manila, effective April 29, 2010

<https://law.pace.edu/sites/default/files/IJIEA/Rules_of_Procedure_for_Environmental_Cases.pdf> [RPEC].

¹⁴³⁸ Section 2 of the *RPEC*.

The RPEC seeks not only to “introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws”,¹⁴³⁹ but to also “enable the courts to monitor and exact compliance with orders and judgments in environmental cases.”¹⁴⁴⁰

The influence of CERs on the RPEC could be gleaned from some of the objectives of the RPEC which indicates that it was enacted to “protect and advance the constitutional right of the people to a balanced and healthful ecology”,¹⁴⁴¹ and to “provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements.”¹⁴⁴²

In *Segovia et al. vs. The Climate Change Commission, et al.*,¹⁴⁴³ the Court “agrees with the petitioners' position [and held that the] RPEC did liberalize the requirements on standing, allowing the filing of citizen's suit for the enforcement of rights and obligations under environmental laws.”¹⁴⁴⁴ Again, one of the contested issues in *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Angelo Reyes*¹⁴⁴⁵ was whether the petitioners had standing.¹⁴⁴⁶ The petitioners, including 2 individuals and the NGO Central Visayas Fisherfolk Development Center instituted the case as legal guardians and friends of resident marine mammals described as “toothed whales, dolphins, porpoises, and other cetacean species, which inhabit the waters in and around the Tañon Strait.”¹⁴⁴⁷ Seeing that the petitioners instituted this judicial review of a government decision in order to protect resident marine mammals, the respondents argued that the plaintiffs did not have locus standi to institute the case because Rule 3(1) of the *Rules of Court, 1997*, only allows persons (natural and juridical) and entities sanctioned by the law to institute civil cases in courts.¹⁴⁴⁸

¹⁴³⁹ Section 3 (c) of the *RPEC*.

¹⁴⁴⁰ Section 3 (d) of the *RPEC*.

¹⁴⁴¹ Section 3 (a) of the *RPEC*.

¹⁴⁴² Section 3 (b) of the *RPEC*.

¹⁴⁴³ G.R. No. 211010 <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170307_13017_judgment.pdf>.

¹⁴⁴⁴ *Ibid* at 5.

¹⁴⁴⁵ G.R. Nos. 180771 & 181527 <https://elaw.org/system/files/180771_0.pdf> [*Resident Marine Mammals' Case*].

¹⁴⁴⁶ *Ibid* at 11.

¹⁴⁴⁷ *Ibid* at 3.

¹⁴⁴⁸ *Ibid* at 13.

The Court acknowledged that many environmental cases have suffered for failure of the petitioners to show direct injury or that they would be impacted by the outcome of the case. The Court also noted that “in our jurisdiction, locus standi in environmental cases has been given a more liberalized approach...the current trend moves towards simplification of procedures and facilitating court access in environmental cases.”¹⁴⁴⁹

Determined to construe standing in the case liberally, the Court retroactively applied the provisions of the *RPEC* which gives citizens the right to institute environmental litigation in representative capacities (section 5, Rule 2)).¹⁴⁵⁰ It held that

Although this petition was filed in 2007, years before the effectivity of the Rules of Procedure for Environmental Cases, it has been consistently held that rules of procedure “may be retroactively applied to actions pending and undetermined at the time of their passage and will not violate any right of a person who may feel that he is adversely affected.”¹⁴⁵¹

Based on this, the Court rejected the respondents’ challenge to standing and held that the respondents had infringed the Constitution and extant environmental norms in approving the SC-46 and ECC for the purpose of exploiting petroleum resources in the Tañon Strait.¹⁴⁵²

From the foregoing, the literature indicates the positive impact of CERs on standing and how liberalized standing rules are allowing many people to approach the courts to sue and obtain remedies for environmental wrong. As argued in chapter 1 of the thesis, constitutional provisions are not easily abrogated or amended like legislation and policy statements. As such, the chapter recommends that Nigeria should follow the precedents in the countries discussed, and constitutionalize, in addition to CERs, liberalized standing rules to enhance the ability of the public to seek for and obtain remedies from court for environmental harms they suffer. Of course, other barriers to access to justice will remain, and these will be addressed later in the chapter.

Section 1, Rule 3 provides that “Only natural or juridical persons, or entities authorized by law may be parties in a civil action.”

¹⁴⁴⁹ *Ibid* at 15.

¹⁴⁵⁰ Section 5, Rule 2 provides that any Filipino citizen “in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.”

¹⁴⁵¹ *Resident Marine Mammals’ Case*, *supra* note 1445 at 16.

¹⁴⁵² *Ibid* at 33-34.

5.4.4.2. What can be Challenged?

According to the Aarhus Convention, the second element of access to justice “allows decisions, acts and omissions to be challenged. It allows both access to justice with respect to its own provisions and to enforce national environmental law.”¹⁴⁵³ However, as seen in chapter 1, Nigeria does not have enforceable CERs as the right provided in section 20 of the Constitution is not justiciable. Because of this, the Niger Delta people have been struggling to successfully challenge environmental injuries sustained as a result of the oil and gas exploitation in their territory.

One case that captures the challenge that the Niger Delta faces because of the lack of enforceable CERs is the case of *Okpala & Others v. Shell Petroleum Development Company (Shell) & Others*.¹⁴⁵⁴ The applicants instituted a suit against Shell at the FHC under *Nigeria’s Fundamental Rights (Enforcement Procedures) Rules* alleging that Shell’s continued flaring of gas is detrimental to their health. The applicants, apparently on the premise that Nigeria does not have an enforceable right to a healthy environment, brought their substantive claims under the provisions of Article 4, 16 and 24 of the ACHPRs (African Charter).¹⁴⁵⁵ The court dismissed the suit on grounds, among others, that “the rights guaranteed under the African Charter were not covered within the definition of fundamental rights under the scope of section 46(1) of the 1999 Constitution and that the African Charter did not stipulate any special procedure for the enforcement of the rights contained therein.”¹⁴⁵⁶

It is true that Article 45(3) of the African Charter provides that only a state party, the AU itself or an African group recognized by the AU may institute any action before the African Commission on Human and Peoples' Rights (Commission).¹⁴⁵⁷ Therefore it seems the Nigerian court did not have the jurisdiction to try the case. However, the Commission could take a cue from both article

¹⁴⁵³ Aarhus Convention: An Implementation Guide”, 1st ed, *supra* note 588 at 136.

¹⁴⁵⁴ [2006] (Unreported Suit) No. FHC/PHC/C5/518/2006.

¹⁴⁵⁵ The African Charter on Human and Peoples Right, 1986 <<http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>>.

¹⁴⁵⁶ Uchenna Orji, “Right to a Clean Environment – Some Reflections” (2012) 42 E.P. & L. 285 at 289 [Orji].

¹⁴⁵⁷ Article 45 (3) provides that the “functions of the Commission shall be [to]...Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.”

34 the *European Convention on Human Rights, 1950*¹⁴⁵⁸ and article 44 of the *American Convention on Human Rights, 1969*,¹⁴⁵⁹ with expansive standing provisions for individuals and communities who may be suffering from environmental injustices, so that Niger Delta citizens could bring their cases to the African Commission. In addition, if Nigeria had enforceable CERs, the applicants could have sued to enforce these domestically instead of rights under the African Charter and would, at least, have had the opportunity of having their case heard.

5.4.4.3 Who can Hear a Challenge?

According to the Aarhus Convention, the third element of Access to Justice is the existence of an “appropriate court or impartial and independent review body as established under national law [to] hear a challenge under the Convention. The procedure must be fair, equitable and timely and not prohibitively expensive.”¹⁴⁶⁰ This element has 2 components – existence of impartial and independent courts; and just, reasonable, timely and inexpensive procedures for environmental litigation. The section will analyze them separately.

(a) Availability of Court or Impartial and Independent review body

There is a strong presumption that “Nigerian courts are highly influenced by the [executive arm of] government, which in turn is influenced by oil companies.”¹⁴⁶¹ It is now widely recognized that judicial independence connotes 3 things – security of tenure for judges, security of remuneration for judges and total control of the judiciary administrative apparatus by judicial

¹⁴⁵⁸ The European Convention on Human Rights, 1950. Online: available at https://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed May 21, 2021).

Article 34 of the European Court of Human Rights provides that the European Court of Human Rights “may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.”

¹⁴⁵⁹ American Convention on Human Rights: “Pact of San José, Costa Rica”. Signed at San José, Costa Rica, on 22 November 1969 <<https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>>.

Article 44 of the American Convention on Human Rights provides that any “person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.”

¹⁴⁶⁰ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 136.

¹⁴⁶¹ Eferiekose Ukala, “Gas Flaring in Nigeria’s Niger Delta: Failed Promises and Reviving Community Voices”, (2011) 2 Journal of Energy, Climate, and Environment 97 at 98-99 [Ukala].

officers.¹⁴⁶² These conditions that promote judicial independence cannot be guaranteed in Nigeria.

A clear indication would be the suspension and eventual removal from office in 2019 of the now retired CJN, the Hon. Justice Walter Onnoghen, by President Buhari, based on an ex parte order to that effect¹⁴⁶³ that was issued by the Code of Conduct Tribunal for civil service actors.¹⁴⁶⁴ The Hon. Justice Onnoghen was removed from office while his appeal against the decision of the Code of Conduct Tribunal was pending at the Court of Appeal.¹⁴⁶⁵ President Buhari used State machinery to enforce the judgment against Onnoghen. On the orders of the President Buhari, his international passport and that of his wife and daughter were seized by the Nigerian Immigration Service to prevent him from travelling outside Nigeria.¹⁴⁶⁶

President Buhari later swore in, by using the State coercive power, the Hon. Justice Tanko Mohammed as the acting CJN, in total disregard of the law¹⁴⁶⁷ and in violation of the Constitution. For instance, regarding the removal of Hon. Justice Onnoghen from office, section 292 (1) a) (i) of the Constitution provides that the CJN can only be removed “by the President acting on an address supported by two-thirds majority of a Senate.” Regarding the swearing in of the acting CJN, first, the Constitution does not recognize an acting CJN; rather, the Constitution provides for a substantive CJN. Moreover, according to section 231 (1) of the Constitution,¹⁴⁶⁸ the process for selecting the CJN is that the NJC would have to recommend the candidate who

¹⁴⁶² *Ref Re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI* (“*The Provincial Judges Reference*”) [1997] 3 SCR 3 [*Ref Re Remuneration of Judges of the Prov Court of PEI*].

¹⁴⁶³ The Court of Appeal set aside the Ex Parte Order on grounds that the former Chief Justice Onnoghen was not given fair hearing with the Appellate Court describing the process as “made in secret”. See Evelyn Okakwu, “How Appeal Court ruled against Onnoghen three months after reserving Judgment”, *Premium Times* (10 May 2019) <<https://www.premiumtimesng.com/news/top-news/329376-how-appeal-court-ruled-against-onnoghen-three-months-after-reserving-judgment.html>> [Okakwu].

¹⁴⁶⁴ The Nigerian Bar Association describes this as an “attempted coup against the Nigerian Judiciary and evident suspension of the Nigerian Constitution by the Executive arm of the Federal Government.” See Laila Ijeoma, “NBA Releases Statement on CJN Onnoghen’s Suspension” (26 January 2019) <<https://lailasnews.com/nba-releases-statement-on-cjn-onnoghen-s-suspension/>>.

¹⁴⁶⁵ The Court of Appeal has quashed the removal and declared same ultra vires.

¹⁴⁶⁶ Eniola Akinkuotu, “FG bars Onnoghen from Travelling, seizes his Passport”, *Punch Newspaper* (14 December 2019) <<https://punchng.com/fg-bars-onnoghen-from-travelling-seizes-his-passport/>>.

¹⁴⁶⁷ Dennis Erezi, “Quick facts about acting Chief Justice of Nigeria Ibrahim Tanko Mohammed”, *The Guardian Newspaper* (25 January 2019) <<https://guardian.ng/news/quick-facts-about-acting-chief-justice-of-nigeria-ibrahim-tanko-mohammed/>>.

¹⁴⁶⁸ Section 231 (1) provides that the “appointment of a person to the office of a Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate.”

must be confirmed by the Senate before the president can make the appointment.¹⁴⁶⁹ The Court of Appeal subsequently declared the removal of the CJN unconstitutional.

Another example of the limited independence of the Nigerian judiciary exists. The NJC, sequel to their constitutional powers but in what is widely seen as a flawed process, had conducted interviews to fill vacant judicial positions in the High Court of the FCT, Abuja. At the end of the process, the names of 33 nominees were sent by the NJC to Nigeria's President in March 2020, for appointment as judges.¹⁴⁷⁰ Section 256 (2) of the Constitution provides that the "appointment of a person to the office of a Judge of the High Court of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council."¹⁴⁷¹

First, in a series of what may be interpreted as poor judgment calls, President Buhari, on his own initiative and in utter disregard for the clear provisions of the above section of the Constitution, pruned down the list to 11 nominees¹⁴⁷² and, secondly, forwarded the pruned list to the Senate, which does not have any constitutional role to play, for confirmation of the nominees.¹⁴⁷³

Commenting on the unfolding development as regards the implication for the independence of the Nigerian judiciary, Access to Justice rightly observed that:

When the President cherry-picks those he will appoint from a list submitted by the NJC, this raises important concerns of judicial independence, particularly when there are no explanations justifying the selection. Those concerns arise, because of the huge potential for misusing the power to make appointments. That power can be used to blackmail, coerce, extort, or obtain a quid pro quo from the Judiciary, or may otherwise be used illicitly, in a manner that ultimately undermines the independence of the Judiciary...The President's [selection decisions lack transparency, disrespects judiciary and threatens judicial independence.] The President's appointment of a downsized number of Judges for the FCT High Court, and the absence of information justifying the selective appointments, blatantly disrespects the Judiciary; the impression it creates, is that the Executive controls the Judiciary even regarding matters pertaining to the affairs and organisation of the Judiciary.¹⁴⁷⁴

¹⁴⁶⁹ Okakwu, *supra* note 1463.

¹⁴⁷⁰ Access to Justice, "President Buhari must offer Cogent and Justifiable Reasons for Rebuffing NJC List of Judicial Nominees", *ThisDay* (21 July 2020) <<https://www.thisdaylive.com/index.php/2020/07/21/president-buhari-must-offer-cogent-and-justifiable-reasons-for-rebuffing-njc-list-of-judicial-nominees-access-to-justice/>> [Access to Justice].

¹⁴⁷¹ 1999 Constitution of Nigeria

¹⁴⁷² Access to Justice, *supra* note 1470.

¹⁴⁷³ "Senate receives Buhari's request to confirm 11 Judges for FCT High Court, Others", *Channels Television* (7 July 2020) <<https://www.channelstv.com/2020/07/07/senate-receives-buharis-request-to-confirm-11-judges-for-fct-high-court-others/>>.

¹⁴⁷⁴ Access to Justice, *supra* note 1470.

To guarantee judicial impartiality and independence, some countries have enshrined provisions in their Constitutions. The Ecuadorian Constitution not only provides for judicial independence (article 76 (7) k)),¹⁴⁷⁵ but also punishes any attempt to compromise that independence (article 168 (1)).¹⁴⁷⁶ Bolivia has equally constitutionalized judicial independence and it is the responsibility of the state to ensure judicial independence (articles 115 (II) and 178 (I)).¹⁴⁷⁷

As already mentioned, judicial independence connotes 3 things – security of tenure for judges, security of remuneration for judges and total control of the judiciary administrative apparatus by judicial officers.¹⁴⁷⁸ It may not be enough to enshrine the provisions on judicial independence in the Constitution without also constitutionalizing these ingredients to guarantee the actualization of the independence. Again, the Ecuadorian Constitution has provided for these ingredients by guaranteeing “administrative, economic and financial autonomy” for the judiciary (article 168 (2)).¹⁴⁷⁹ The Bolivian Constitution also provides for these ingredients of judicial independence (article 178 (II))¹⁴⁸⁰ and guarantees financial autonomy for the judiciary as one of the means to secure the independence of the judiciary (section 3 of article VIII).¹⁴⁸¹

Judicial independence is crucial to the implementation of CERs since CERs “[involve] courts in not only determining the mandated environmental quality, but also in assessing whether or not

¹⁴⁷⁵ Article 76 (7) provides that in “all processes where rights and obligations of any kind are set forth, the right to due process of law shall be ensured, including the following basic guarantees... 7. The right of persons to defense shall include the following guarantees...k. “To be judged by an independent, impartial and competent judge. No one shall be judged by special courts or by special commissions created for the purpose.”

¹⁴⁷⁶ Article 168 provides that the “administration of justice, in compliance with its duties and in the exercise of its attributions, shall apply the following principles: 1. The bodies of the Judicial Branch shall benefit from both internal and external independence. Any breach of this principle shall entail administrative, civil, and criminal liability, in accordance with the law.”

¹⁴⁷⁷ Article 115 (II) provides that the State “guarantees the right to due process and defense, and to plural, prompt, appropriate, free, and transparent justice without delays.”

Article 178 (I) provides that the “power to impart justice emanates from the Bolivian people and is based on the principles of independence, impartiality, juridical security, publicity, probity, promptness, being free of charge, legal pluralism, being inter-cultural, equity, service to society, citizen participation, social harmony and respect for rights.”

¹⁴⁷⁸ *Ref Re Remuneration of Judges of the Prov Court of PEI, supra* note 1462.

¹⁴⁷⁹ Article 168 provides that the “administration of justice, in compliance with its duties and in the exercise of its attributions, shall apply the following principles ... 2. The Judicial Branch shall benefit from administrative, economic and financial autonomy.”

¹⁴⁸⁰ Article 178 (II) provides that the “guarantees of judicial independence are: 1. The performance of the judges in accordance with a judicial career. 2. The budgetary autonomy of the judicial bodies.”

¹⁴⁸¹ Section 3 of article VIII provides that “the Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released.”

the government has taken the requisite actions to achieve that quality.”¹⁴⁸² How would a judiciary that is controlled by the executive discharge such a role? Empirical research has shown that countries with impartial and independent judiciaries are more inclined to enforce constitutional obligations than those with pliable judiciaries.¹⁴⁸³

The chapter has already discussed the apparent influence of the executive arm of government on the dispensation of justice in Nigeria, which seems to cast doubts on the independence and impartiality of the judiciary. The chapter recommends that Nigeria should emulate Ecuador by adopting not only justiciable conditions for judicial independence and impartiality but also constitutionalized measures to punish derogations from judicial independence. Adoption of these measures in Nigeria could discourage outside interference that seeks to influence the course of environmental justice.

(b) Fair, Equitable, Timely and Inexpensive Procedures

(i) Timely Dispensation of Justice

Nigeria is particularly noted for the slow pace of justice delivery. Some experts opine that possibly “the greatest problem with the Nigerian judiciary is the excruciatingly slow pace of justice.”¹⁴⁸⁴ The World Bank’s opinion is that it could take at least 10 years for the court of first instance to decide on a matter and a longer time for the Court of Appeal and finally, the Supreme Court to determine appeals in Nigeria.¹⁴⁸⁵ While Halima Doma reports that the waiting time between filing and concluding a suit in Nigeria is typically between 7 to 20 years,¹⁴⁸⁶ Okonkwo opines that the turn around time to deliver a case in the high court is up to 29 years.¹⁴⁸⁷

One reason for this could be the high volume of cases filed in courts¹⁴⁸⁸ which might explode with the coming on stream of CERs. The Supreme Court disclosed that between 2007 and 2019

¹⁴⁸² Shelton 2, *supra*, note 109 at 107.

¹⁴⁸³ Elizabeth Kaletskia et al, “Does Constitutionalizing Economic and Social Rights Promote their Fulfillment?” (2016) 15(4) JHR 433 at 448 [Kaletskia et al].

¹⁴⁸⁴ Eva Breme & Charles Adekoya, “Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria” (2010) 54(2) J.Afri.L. 270 [Breme & Adekoya].

¹⁴⁸⁵ World Bank on the Niger Delta, *supra* note 17 at 20.

¹⁴⁸⁶ Halima Doma, “Enhancing Justice Administration in Nigeria through Information and Communications Technology” (2016) 32 (2) J. Marshall J. Info. Tech. & Privacy L. 89 at 95.

¹⁴⁸⁷ Eloamaka Okonkwo, “Assessing the Role of the Courts in Enhancing Access to Environmental Justice in Oil Pollution Matters in Nigeria,” (2020) 28 (2) Afr J Intl Comp L 195 at 203 [Okonkwo 1].

¹⁴⁸⁸ *Ibid.*

alone, an estimated 10 thousand appeals were pending before it.¹⁴⁸⁹ The Court also disclosed on October 8, 2018, that “hearing slots at the apex court are already fully booked for the next three years”,¹⁴⁹⁰ meaning that it was possible that new appeals instituted in October 2018 were not given hearing dates until October 7, 2021.¹⁴⁹¹ It seems the Court is still affected by backlogs because in a move that caused a stir among lawyers, the Court adjourned proceedings in the case of *Attorney-General of Kebbi State & others vs. Alhaji Mustapha Jokolo*¹⁴⁹² on November 29, 2021, to November 23, 2023 – a period of 2 years. This case was instituted in court in 2005 - seventeen years ago¹⁴⁹³ - and is no closer to its final resolution, at least until November 23, 2023.

Different reasons have been advanced as the causes of the delay in dispensing justice in Nigeria. They include cases beginning afresh (*de novo*) before a new judge because of the transfer of the previous judge who initially heard the case; insufficient judges; corruption;¹⁴⁹⁴ the unusually long appellate system (which for some cases, start from the customary court to the magistrate court, then to high court to the Court of Appeal and finally, to the Supreme Court);¹⁴⁹⁵ and lack of diligent prosecution of cases by the Police and lawyers which usually lead to unnecessary adjournments of cases.¹⁴⁹⁶

Strategies that could address some of the challenges plaguing the judiciary, including the delay in justice delivery in Nigeria include asking previous judges to continue to handle cases that they heard in their previous postings until final resolution. This would prevent cases beginning afresh before a new judge. Also, appointment of more judges would reduce the turnaround time in adjudication. Furthermore, timely dispensation of justice “may be facilitated by justice sector

¹⁴⁸⁹ “With 10,000 Pending Appeals, the Supreme Court is Overworked”, *ThisDay* (17 August 2021) <<https://www.thisdaylive.com/index.php/2021/08/17/with-10000-pending-appeals-the-supreme-court-is-overworked/>>.

¹⁴⁹⁰ Ade Adesomoju & Oladimeji Ramon, “CJN says Supreme Court’s Diary Filled till 2021, Lawyers Worry”, *The Punch* (11 October 2018) <<https://punchng.com/cjn-says-supreme-courts-diary-filled-till-2021-lawyers-worry/>> [Adesomoju & Ramon].

¹⁴⁹¹ *Ibid.*

¹⁴⁹² Suit No. SC2/2013

¹⁴⁹³ Godwin Tsa, “Okolo: Lawyers Laments 2 Year Adjournment of Gwandu Emirate Case”, *Sun newspaper* (3 January 2022) <<https://www.sunnewsonline.com/jokolo-lawyers-laments-2-year-adjournment-of-gwandu-emirate-case/>>

¹⁴⁹⁴ Olusegun & Oyelade, *supra* note 584 at 19.

¹⁴⁹⁵ Breme & Adekoya, *supra* note 1484 at 274.

¹⁴⁹⁶ Adesomoju & Ramon, *supra* note 1490.

reforms that would shorten the length of judicial ladders to be climbed in order to exhaust judicial remedies.”¹⁴⁹⁷

Furthermore, the introduction of strict constitutional timelines to adjudicate cases could address the delay in the dispensation of justice in Nigeria caused by lack of diligent prosecution by lawyers. ...In a manner that accords with the provisions of the Aarhus Convention,¹⁴⁹⁸ some countries have introduced timelines in their Constitutions to quicken the pace of justice delivery. Brazil’s Constitution not only guarantees speed in adjudication (Article 5 (LXXVIII)),¹⁴⁹⁹ it also provides for uninterrupted administration of justice by prohibiting collective vacations in the judiciary (article 93 (XII)).¹⁵⁰⁰ Ecuador also provides for speed in adjudication of cases in its Constitution (article 75, 86 (2) and 169).¹⁵⁰¹

Bolivia presents an interesting case. It provides for speed in the dispensation of justice (article 115 (I)),¹⁵⁰² which is extended to judicial, quasi-judicial and administrative proceedings (section 16 of article III).¹⁵⁰³ The Constitution then provides for timelines to complete the adjudication of cases. For all lower courts, cases should be decided within 3 months; for all lower collegiate courts, cases should be dispensed with within twelve months and for the Supreme Court, cases should be adjudicated upon within twenty-four months (section 15 (1) of article VIII).¹⁵⁰⁴

¹⁴⁹⁷ Breme & Adekoya, *supra* note 1484 at 274.

¹⁴⁹⁸ Aarhus Convention: An Implementation Guide, 1st ed, *supra*, note 588 at 136.

¹⁴⁹⁹ Article 5 (LXXVIII) provides that “everyone is assured that judicial and administrative proceedings will end within a reasonable time and the means to guarantee that they will be handled speedily.”

¹⁵⁰⁰ Article 93 (XII) provides that “court functioning shall be uninterrupted, prohibiting collective vacations in the courts and second instance tribunals; on days on which there are no normal court working hours, there shall be judges on continual duty.”

¹⁵⁰¹ Article 75 provides that every person “has the right to ... impartial and expeditious protection of their rights and interests, subject to the principles of immediate and swift enforcement.”

Article 86 (2) provides that “the following rules of procedures shall be applicable: a. The procedure shall be simple, quick and efficient ... e. Procedural rules that tend to delay their efficient processing shall not be applicable.”

Article 169 provides that the “procedural system is a means to carry out justice. The procedural standards shall embody the principles of simplification, consistency, effectiveness, immediacy, swiftness and procedural economy and shall ensure the effectiveness of the guarantees for due process of law.”

¹⁵⁰² Article 115 (I) provides that everyone “shall be protected in the exercise of his or her rights and legitimate interests in a timely and effective manner by the judges and courts.”

¹⁵⁰³ Section 16 of article III provides that all persons “shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.”

¹⁵⁰⁴ Section 15 (1) of article VIII provides that all “cases or matters filed after the effectivity of this Constitution must be decided or resolved within twenty-four months from date of submission for the Supreme Court, and, unless reduced by the Supreme Court, twelve months for all lower collegiate courts, and three months for all other lower courts.”

However, Bolivia seems to be struggling to meet these constitutional requirements. Since Bolivia adopted a new Constitution that was partly intended to usher in a new judicial era, the justice system has remained in disarray.

For example, the number of outstanding cases pending resolution has grown exponentially in recent years...the first-ever popular election of the 28 justices and proxies that preside over the highest courts took place in January 2012. It was intended as the cornerstone of a new justice system. However, the government...failed to follow through with the resources and political will needed to foment real change... The situation has been made worse by a series of corruption scandals involving top judicial members.¹⁵⁰⁵

The above notwithstanding, constitutionalizing provisions offers a more solid foundation for speedy dispensation of justice and other judicial reforms than that offered by legislation and policy because the Constitution is not so easily amended or disobeyed. It is acknowledged that constitutional timelines to dispose of cases could impact negatively on the just dispensation of cases in Nigeria. Meeting constitutionally stipulated timelines to dispose of cases in courts could put undue pressure on the courts, litigants and their lawyers. It could also work injustice because cases that cross the constitutional timelines stand the risk of being struck out for want of jurisdiction.

As such, a long-lasting solution to this challenge would be an efficient, competent and highly resourced and remunerated judiciary where workload is reasonable and where output is periodically reviewed to find efficiencies, improve competency, sanction malpractice, and reward hard work. However, considering the amount of time needed to reform the Nigerian judiciary to such a level, the alternative solution could be the stipulation of timelines in the Constitution to hear and dispose of cases. As such, it is recommended that Nigeria follow the above precedents and constitutionalize timelines for adjudication of cases because “most environmental litigation is to prevent or lessen harm and therefore needs to be determined in a timely manner, which is not the case in Nigeria.”¹⁵⁰⁶ To avoid the potential injustice that this might work, the constitutional provision should also clarify that cases that go beyond the stipulated timelines are still valid for adjudication, and the timeline stipulation only impacts judiciary performance measurement.

¹⁵⁰⁵ Country Report, Bolivia (Economist Intelligence Unit, United Kingdom, 2015) 24 <<https://www-proquest-com.proxy.bib.uottawa.ca/docview/1658561846?pq-origsite=primo>>.

¹⁵⁰⁶ Okonkwo1, *supra* note 1487 at 203.

Nigeria could also follow its own domestic precedents and provide constitutional timelines for the determination of cases. There is precedent in Nigeria on constitutionally stipulated timelines to determine pre-election suits. A pre-election suit was defined by the Supreme Court of Nigeria in the case of *Isah Shuaibu Lau vs. Peoples Democratic Party (PDP) & 3 Others* as a suit filed before an election is held.¹⁵⁰⁷ Before the 4th alteration of the Constitution of Nigeria, pre-election suits would go on for indeterminate periods, sometimes eating into the term of office of elected officials. This was the mischief that the 4th alteration to the Constitution sought to cure.

In the 2007 federal election cycle before the 4th alteration of the Constitution, the case of *Rt. Hon. Rotimi Amaechi vs. Independent National Election Commission (INEC) & 2 Others* stands out. Even though the appellant had instituted proceedings at the FHC on January 26, 2007, challenging his substitution in an election by the People's Democratic Party (PDP), Mr. Omehia was declared the winner of the main election and sworn in as governor of Rivers State in May 29, 2007. The appellant's suit was finally disposed of by the Supreme Court on October 25, 2007, where the Court nullified the substitution of the appellant on grounds that there was no cogent and verifiable reason for it and ordered his swearing in as governor instead.¹⁵⁰⁸ He was sworn in on October 26, 2007, to replace Mr. Omehia who had already spent about 5 months in office. Unfortunately, the appellant did not recover the 5 months that he lost and ended up serving as governor for 3 years and 7 months as against 4 years he should have served because on May 29, 2011, a fresh governorship mandate had begun.¹⁵⁰⁹ In the 2015 federal election cycle, the scenario was repeated in the case of *Hon. (Mrs) Dorathy Mato V. Hon. Iorwase Herman Hember & Others*.¹⁵¹⁰

¹⁵⁰⁷ Suit No. SC.583/2016, Judgement of the Supreme Court delivered on June 23, 2017

<<https://lawcarenigeria.com/isah-shuaibu-lau-v-peoples-democratic-party-pdp-ors2017/>>.

¹⁵⁰⁸ Suit No. S.C. 252/2007, Judgement of the Supreme Court delivered on October 25, 2007 <<http://nigeria-law.org/LawReporting/2008/January%202008/18th%20January%202008/Rt.%20Hon.%20Rotimi%20Chibuike%20Amaechi%20v%20Independent%20National%20Electoral%20Commission%20&%20Ors.htm>>.

¹⁵⁰⁹ Jiti Ogunye, "Revisiting Amaechi's 2007 Mandate", *Premium Times* (4 November 2013)

<<https://www.premiumtimesng.com/opinion/147780-revisiting-amaechis-2007-mandate-jiti-ogunye.html>>.

¹⁵¹⁰ Suit No. SC.733/2016, Judgement of the Supreme Court delivered on June 23, 2017

<<https://lawcarenigeria.com/hon-mrs-dorathy-mato-v-hon-iorwase-herman-hember-ors2017/>>.

The fact of the case was that the appellant contested for the primary election of her party against Hon. Iorwase Hember in December 16, 2014 to represent her federal Constituency in the House of Representatives, Abuja. The appellant alleged that as at December 16, 2014 when the primary election was held, Hon. Hember was a member of another political party and therefore was not qualified to contest the primary election but unfortunately, her party declared Hon. Hember as the winner of the primary election. On March 26, 2015, the appellant had instituted a suit at the FHC challenging the qualification of Hon. Hember to contest the primary election of a party

To remedy the situation, the new section 285(9) of the Constitution provides that a “pre-election suit must be filed within 14 days from the cause of action,” while section 285(10) of the Constitution provides that “a court in every pre-election matter shall deliver its judgment in writing within 180 days from the date of filing of the suit.” In respect of appeal, while the new section 285(11) provides that “an appeal from a decision in a pre- election matter shall be filed within 14 days from the date of delivery of the judgment appealed against,” section 285(12) provides that an “appeal from a decision of a court in a pre-election matter shall be heard and disposed of within 60 days from the date of filing of the appeal.”¹⁵¹¹

As acknowledged by a senior lawyer in Nigeria, it seems that these provisions have remedied the situation as pre-election suits are now being decided within the constitutional timeframe.¹⁵¹²

However, a section of the Nigerian Bar is of the view that these provisions seem to conflict with the constitutionally guaranteed right to a fair hearing because it does not give litigants enough

that he was not yet a member. While the case was pending, the party proceeded to field Hon. Hember as its candidate for the main election which was held in March 28, 2015, he was subsequently declared the winner of the main election and was sworn in as member, representing the Vandeikya/Konshisha federal Constituency in the House of Representatives in June 2015.

However, the FHC struck out the suit on grounds that it did not have jurisdiction to entertain the suit because the suit was not a pre-election matter. It held that in the circumstance, it was the Election Petition Tribunal that had the jurisdiction to hear the suit. The court reached the decision on the basis of the application for leave to serve the parties with the originating processes in the suit which was heard and granted after the date of the conduct of the main election on April 23, 2015. The court deciding that this was the date that the case was finally consummated and not March 26, 2015 when the originating processes were filed. On appeal, the Supreme Court reversed the decision. It decided that the date of filing was different from the date of hearing of the motion for leave. That since the suit was filed before the conduct of the general election, the trial court had jurisdiction to try the case. The Supreme Court instead of remitting the case back to the trial court to be tried again, assumed jurisdiction and heard the substantive suit on grounds that the substance of the suit was at risk of “being dissipated and wiped out, the Court must take the fast lane and do all it takes to give it a speedy trial...the res is the Vandeikya/Konshisha Federal Constituency seat in the House of Representatives from which two years have already been wiped out, remaining two more years.” It nullified the election of Hon. Hember and declared the appellant the winner of the election. On October 3, 2017, after more than 2 years out of office and the corresponding loss of the perks of office for the period, the appellant was sworn in as a member representing Vandeikya/Konshisha Federal Constituency in the House of Representatives, Abuja. See Yemi Itodo, “Dogara Bows to Pressure, Swears in Dorathy Mato as Hembe’s Replacement”, *Daily Post* (3 October 2017) <<https://dailypost.ng/2017/10/03/rep-s-swears-dorathy-mato-replacement-sacked-herman-hembe/>>.

¹⁵¹¹ Mohammed Oyelade, “Pre-Election Dispute in Nigeria: Appraisal of the Fourth (4th) Alteration No 21 Act, 2017 of the 1999 Constitution of the Federal Republic of Nigeria (Part III)”, *Law Axis 360* (29 November 2019) <<https://lawaxis360degree.com/2019/11/29/pre-election-dispute-in-nigeria-appraisal-of-the-fourth-4th-alteration-no-21-act-2017-of-the-1999-constitution-of-the-federal-republic-of-nigeria-part-iii/>>.

¹⁵¹² “Pre-Election Suits: How Constitution’s 4th Alteration Dashed Politicians’ Hope”, *Punch* (28 March 2019) <<https://punchng.com/pre-election-suits-how-constitutions-4th-alteration-dashed-politicians-hope/>>.

time to prepare and conduct their cases.¹⁵¹³ Hopefully soon, the courts will have the opportunity to make pronouncement on the seeming constitutional conflicts but at the moment, the stipulation of constitutional timelines to determine pre-election suits seems to be effective. The chapter proposes that these timelines be extended to include other cases, especially if Nigeria provides for enforceable CERs, because remedying some environmental injuries is time sensitive.

Lastly, the Police play a pivotal role in Nigeria as they have both investigatory and prosecutorial powers over criminal cases in Nigeria.¹⁵¹⁴ But as would be seen below, their conduct contribute to the slow dispensation of justice in Nigeria. The Nigerian Police has consistently been regarded, both home and abroad, as the bastion of corruption. For instance, in the first ever *World Internal Security & Police Index* (WISPI), conducted in 2016, which surveyed the performance of Police organizations in 127 countries of the world across “four domains of internal security: capacity, process, legitimacy, and outcomes”,¹⁵¹⁵ Nigeria ranked last and “was the worst performing country on the WISPI, with a score of 0.255. Nigeria scored poorly across all four domains, and had the worst score of any country in the Index on the process and outcomes domains. All of its domain scores were in the bottom ten countries.”¹⁵¹⁶

While the Institute for Economics and Peace which conducted the WISPI survey may not sound familiar or the survey itself seems dated, having been conducted in 2016, the result of the survey tallies with another survey conducted by the Socio-Economic Rights and Accountability Project (SERAP) – a Nigerian based NGO. The national survey conducted by SERAP “between September and December 2018, covered the police, judiciary, power, education and health sectors to assess the state of corruption in law enforcement and public service provision.”¹⁵¹⁷ The result indicates that the Nigeria Police was the most corrupt of the 5 institutions and that ‘a bribe is paid in 54 per cent of interactions with the police. In fact, there is a 63 per cent probability that

¹⁵¹³ Babatunde Fashola, “Section 285(6) of the 1999 Constitution should go” An abridged speech delivered by the Lagos State Governor, Babatunde Fashola at the Nigerian Bar Association conference in Calabar, Cross River State on 27 August, 2013 <<https://pmnewsnigeria.com/2013/08/29/section-2856-of-the-1999-constitution-should-go/>>.

¹⁵¹⁴ Police Act (section 4), Cap. P.19, Laws of the Federation of Nigeria 2004 <<http://lawsofnigeria.placng.org/laws/P19.pdf>>.

¹⁵¹⁵ Institute for Economics and Peace, “World Internal Security & Police Index, 2016” at 2 <WISPI Report.pdf (ipsa-police.org)> [Police Index, 2016].

¹⁵¹⁶ *Ibid* at 25.

¹⁵¹⁷ “Police Most Corrupt Institution in Nigeria – Survey”, *Premium Times* (26 March 2019), online: available at The Letterman - (AVAILABLE FROM 1ST DECEMBER) (premiumtimesng.com)>.

an average Nigerian would be asked to pay a bribe each time he or she interacted with the police. That is almost two out of three.’¹⁵¹⁸

Not surprising, the judiciary tagged along, According to SERAP, the ‘police and judiciary had the largest proportion of total bribes paid at 33 per cent and 31 per cent respectively.’¹⁵¹⁹ With this, SERAP concludes that corruption in Nigeria ‘remains a significant impediment to law enforcement, access to justice and basic public services ...Several Nigerians have to pay a bribe to access police [and] judiciary...’¹⁵²⁰ SERAP is not alone in making this conclusion as the WISPI survey also concluded that the “[p]olice and judicial system effectiveness is a serious issue in Nigeria.”¹⁵²¹

Like the judiciary, the police have suffered from funding issues.¹⁵²² According to Parry Osayande, the former Chairman, Nigeria’s Police Service Commission, “over 60% of the total Police budget is devoted to the payment of the emoluments of Police personnel, leaving less than a meager 40% for overhead cost and capital expenditure. The implication is that this has been a serious hindrance to effective Policing.”¹⁵²³ In addition, Osayande opines that the police also suffer from piecemeal release or sometimes, non-release of budgetary allocations.¹⁵²⁴ Inadequate funding and non-payment of living wages to Police officers would make the Police susceptible to corruption. It is recommended that the government should adequately fund the police, both in terms of adequate remuneration and provisions of facilities for effective policing.

Also, there is one central police structure in Nigeria. Decentralization of policing responsibilities such that each State of the Nigerian federation will have and operate their own police has been identified as one of the solutions to adequate policing in Nigeria. Those calling for state police in

¹⁵¹⁸ “Police most corrupt institution in Nigeria – Survey” (Premium Times Newspaper) (March 26, 2019) <The Letterman - (AVAILABLE FROM 1ST DECEMBER) (premiumtimesng.com) (last accessed November 25, 2022).

¹⁵¹⁹ *Ibid.*

¹⁵²⁰ *Ibid.*

¹⁵²¹ Police Index, 2016, *supra* note 1508 at 25.

¹⁵²² Tosin Osasona, “Nigeria’s Criminal Justice System in 2017”, *The Guardian* (02 January 2017) <<https://guardian.ng/opinion/nigerias-criminal-justice-system-in-2017/>>.

¹⁵²³ Parry Osayande, “Factors inhibiting Police Performance in Nigeria”, A Paper presented at the Retreat on "Understanding the Mandate and Operations of the Police Service Commission in context of the Rule of Law" (August, 2018) <<https://psc.gov.ng/wp-content/uploads/2017/11/Chairmans-Paper.pdf>>.

¹⁵²⁴ *Ibid.*

Nigeria include former Vice President Yemi Osinbajo, former President Olusegun Obasanjo and State governors in Nigeria.¹⁵²⁵

Second, Nigeria has a history of a decentralized police system. For instance, although section 98 (1) and (4) of the Independence Constitution, 1960, established a centralized police for Nigeria, section 98 (7) allowed the then regional legislatures to enact laws establishing police for their regions and native or local authorities under those regions.¹⁵²⁶ These provisions were re-enacted by the 1963 Republican Constitution (section 105 (1), (4) and (7)).¹⁵²⁷ Under these provisions, Nigeria operated a decentralized police system until February, 1968 when the military government of General Yakubu Gowon unified the police system in Nigeria, and the unified system has continued till date.¹⁵²⁸

The third argument in support of state police is that the present practice (which seems inevitable in centralized police system) where police officers are likely to be posted outside their places of origins and residences, makes it harder for effective policing. .¹⁵²⁹

[S]ince policing is a local function, it is imperative that police personnel be sufficiently familiar with their environment, usually from having lived or gone to school there and knowing the local history, language, culture, and prevalent social practices. The policy of moving police personnel across ethnic, linguistic, and religious boundaries in a country as vast as Nigeria, with hundreds of ethnolinguistic groups, is counterproductive.¹⁵³⁰

¹⁵²⁵ Niyi Akinnaso, “The Argument about State Police”, *The Nation* (17 March 2021) <The argument about state police The Nation Newspaper (thenationonlineng.net)> [Akinnaso].

¹⁵²⁶ Independence Constitution of Nigeria, 1960, *supra* note 327.

Section 98 (1) provides that there “shall be a police force for Nigeria, which shall be styled the Nigeria Police Force.”

Section 98 (4) provides that subject “to the provisions of this section, no police forces other than the Nigeria Police Force shall be established for Nigeria or any part thereof.”

Section 98 (7) provides that nothing “in this section shall prevent the legislature of a Region from making provision for the maintenance by any native authority or local-government authority established for a province or any part of a province of a police force for employment within that province.”

¹⁵²⁷ Republican constitution of Nigeria, 1963, *supra* note 328.

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¹⁵²⁸ Okemuyiwa Adedeji, “State Police in Nigeria: {Issues and Challenges}” (2012) SSRN Electronic Journal at 7 [Adedeji].

¹⁵²⁹ *Ibid* at 11.

¹⁵³⁰ Akinnaso, *supra* note 1525.

However, opponents of state police have support for their argument as well. First, in Nigeria's previous experiment with a decentralized police system, politicians who had control over the police, had used the police to intimidate and suppress political opponents.¹⁵³¹ This was the main reason the military centralized police system in Nigeria.¹⁵³² The disposition of State governors in Nigeria, who do tend to suppress divergent views lends credence to this argument against state police. According to Inwalomhe Donald, Nigerians "have kicked against this idea because of a fear that governors would turn such forces into private armies. The fears are born out of the role the police played under Hassan Katsina in May – July 1966 and under Sam Akintola in 1964. So they are not unfounded fears."¹⁵³³ But the argument could be made either way because the centralized police is still being used by those in power to suppress dissenting views. As argued by Okemuyiwa Adedeji, "experience has shown that the federal police are not immune from the malaise that afflicted the local police while it existed. Corruption, indiscipline, oppression etc, all factors that contributed to the demise of the native police still hinder federal police in the discharge of their constitutional role. it."¹⁵³⁴

Another issue which experts raise as a challenge to the decentralization of police in Nigeria would be the challenges with the various jurisdictional aspects of decentralization. According to Donald,

Also, there will be conflict of jurisdiction. For example, which of the two forces will have the power of arrest, investigation and prosecution? If they both do, what happens when the governor or his party is implicated in unlawful activities? Will they allow the federal police to arrest, investigate and prosecute the suspects or will they use their state police to shield the suspects? Will that not lead to constant conflict between the two police forces?¹⁵³⁵

Contrary to the above, the Constitution could delineate responsibility areas between federal and state police. As an example, Nigeria has federal and state courts, which are operating seamlessly,

¹⁵³¹ Tope Akinyetun, "Policing in Nigeria: A Socioeconomic, Ecological and Sociocultural Analysis of the Performance of the Nigerian Police Force" (2022) 5 (1) *Africa Journal of Public Sector Development and Governance* 196 at 205 [Akinyetun].

¹⁵³² Adedeji, *supra* note 1528 at 6-7.

¹⁵³³ Inwalomhe Donald, "The danger of state police in Nigeria", *The Guardian* (11 June 2021) <The danger of state police in Nigeria | The Guardian Nigeria News - Nigeria and World News — Opinion — The Guardian Nigeria News – Nigeria and World News> [Donald]

¹⁵³⁴ Adedeji, *supra* note 1528 at 11.

¹⁵³⁵ Donald, *supra* note 1533.

and whose areas of overlaps are used as strong points of collaboration. Besides, the court is there to help delineate areas of authority between the federal and state police, if such issues arise.

Furthermore, lack of funding capacity of the state governments has also been cited in the argument against decentralized police.¹⁵³⁶ But the argument could also be made that the federal government is also struggling to adequately fund the centralized police system in Nigeria. For instance, the federal government has not been able “to pay regular salaries to serving police officers; provide kit and accoutrement to the police...If it is difficult...to pay police salaries and provide their mere working uniforms, how is [it] possible for the Federal Government to provide the required modern operational gadgets to keep peace and provide good order for Nigeria?.”¹⁵³⁷ Besides, states governments are already funding the cash-strapped police in their respective states. Reports of state governments “purchasing vehicles and constructing office spaces and housing quarters for the police abound... Besides, states are currently funding one security formation or the other to meet the shortfall in police supply.”¹⁵³⁸

From the foregoing, opinion is divided on what policing system that could work in Nigeria. Okemuyiwa Adedeji acknowledges the challenges confronting the police but opposes decentralization because of Nigeria’s previous experience with native police highlighted above.

Nigeria is definitely at the crossroad. With the abuse and misuse of power of coercion by native police in the first republic would seem to make their return unwelcomed, the federal police is engaged in serious crises of confidence with Nigerians who see them as agent of oppression. Indeed many believe that the difference between the outlawed native police and the Nigeria police force is like that between six and half a dozen. Perhaps the proper thing to do is a complete overhaul of the force so as not to make the mistakes of falling for arguments of protagonists of police decentralization.¹⁵³⁹

For the proponents of decentralization, the argument is that decentralisation of the police will “reflect the federal structure of the country. This will ensure that the [police] cater to the increasing policing demands of a heterogeneous nation like Nigeria. The proposed framework

¹⁵³⁶ Akinnaso, *supra* note 1525.

¹⁵³⁷ Gabriel Oikhala, “The Imperative of Community Policing in Nigeria” (2021) 20 Journal of Public Administration, Finance and Law 130 at 144.

¹⁵³⁸ Akinnaso, *supra* note 1525.

¹⁵³⁹ Adedeji, *supra* note 1528 at 13.

emphasises the creation of state and district police. The state police will reduce the concentration of power to control the police from the centre.”¹⁵⁴⁰

For the reasons provided above, the thesis lends its voice to the decentralization of police in Nigeria. To guide against the use of police by the state governors as an instrument of oppression, the thesis recommends that the decentralized police be modeled after the MP in Brazil. As already analyzed in chapter 4, the constitution of Brazil guarantees the MP financial, institutional and administrative independence. However, it may not be enough to guarantee police financial independence when there is no means of funding the independence.

To provide funding for decentralized police, the thesis re-affirms its recommendation in chapter 2 in the segment on Distributive Environmental Justice that federating units in Nigeria should be made to own and control natural resources found in their territories. This would guarantee a steady flow of financial resources to institutions, including the police. The thesis therefore adopts the recommendation of Niyi Akinnaso who argues that “funding is a genuine fear [decentralized police in Nigeria] ...a comprehensive solution was needed to combat insecurity in the country. Such a solution would include state police, the devolution of powers, resource control, fiscal federalism and reallocation of resources.”¹⁵⁴¹ This may be what is needed to re-position police to not only deliver on its primary mandate of protecting lives and properties, but also to assist in a speedy justice dispensation in Nigeria.

(ii) Fair, Equitable and Inexpensive Procedures

The Aarhus Convention enjoins states to provide for justice delivery, including procedures that are “fair, equitable and timely and not prohibitively expensive.”¹⁵⁴² Boyd argues that procedural inventions have fundamentally improved the capacity of the public to access justice. He opines that “[p]rocedural innovations have radically increased the ability of citizens, communities, and ENGOs to seek judicial protection of their constitutional rights, including the right to a healthy environment. These innovations reducing costs, decreasing delays, and minimizing risks previously associated with pursuing judicial remedies.”¹⁵⁴³

¹⁵⁴⁰ Akinyetun, *supra* note 1531 at 213.

¹⁵⁴¹ Akinnaso, *supra* note 1525.

¹⁵⁴² The Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 136.

¹⁵⁴³ Boyd 2, *supra* note 29 at 190-191.

According to Boyd, these innovations are “[s]implified, expedited actions [including] the *amparo*, *tutela*, *recurso de protección*, direct action of unconstitutionality, popular action, and public civil action...and the Philippines, with its new writ of *Kalikasan* and groundbreaking procedural rules for environmental litigation.”¹⁵⁴⁴ From the foregoing, Boyd lists the following as examples of procedural inventions made possible by CERs which have widened access to justice: (a) *Amparo, Tutela and Recurso de Protección*; (b) direct action of unconstitutionality; (c) popular action; (d) public civil action; (e) writ of *kalikasan*; and (f) the Philippines procedural rules for environmental litigation. In this segment, there will be an analysis, with decided cases, of the opportunities presented by these procedures to widen access to justice. The chapter acknowledges that some of the cases that will be analyzed may straddle more than one theme, but the cases will be discussed where they seem most appropriate.

(a) Amparo, Tutela and Recurso de Protección

Some Constitutions have provided for these procedures. For example, while the Ecuadorian Constitution provides for *Recurso de Protección* styled “protection proceedings” (article 88),¹⁵⁴⁵ its Bolivian counterpart provides for *the right of amparo* (article 129 (1)).¹⁵⁴⁶ Boyd acknowledges that some Constitutions “provide for expedited forms of legal action, known variously as the *amparo*, writ of protection, and *tutela*. While the precise procedure varies, they have in common a relaxation or simplification of the legal process that lowers costs, reduces delays, and dramatically increases access to the judicial system in constitutional cases.”¹⁵⁴⁷

The Ecuadorian *amparo* is a “simple and effective means of obtaining redress for the violation of the fundamental rights of citizens by all sorts of public authorities.”¹⁵⁴⁸ In this way, *amparo* is

¹⁵⁴⁴ Boyd, *supra* note 28 at 239.

¹⁵⁴⁵ Article 88 provides that protection proceedings “shall be aimed at ensuring the direct and efficient safeguard of the rights enshrined in the Constitution and can be filed whenever there is a breach of constitutional rights as a result of deeds or omissions by any non-judiciary public authority against public policies when they involve removing the enjoyment or exercise of constitutional rights; and when the violation proceeds from a particular person, if the violation of the right causes severe damage, if it provides improper public services, if it acts by delegation or concession, or if the affected person is in a status of subordination, defenselessness or discrimination.”

¹⁵⁴⁶ Article 129 (1) provides that the action “for Constitutional Protection shall be presented by the person who believes him or herself affected, by another with sufficient power to act in his or her name, or by the corresponding authority pursuant to the Constitution, to any judge or competent court, provided that there is no other existing means or legal recourse for the immediate protection of the rights and guarantees that have been restricted, suppressed or threatened.”

¹⁵⁴⁷ Boyd, *supra* note 28 at 69.

¹⁵⁴⁸ Héctor Fix-Fierro, “1968: One Year in the Life of the Mexican Federal Judiciary” (2021) 13 (2) Mexican Law Review 3 at 17.

like the *writ of habeas corpus* except that the *amparo* has a wider scope. While a *writ of habeas corpus* is only used to protect human beings against illegal arrest by the authorities, *amparo* “protects men not only against illegal arrest but also against violation of any human rights, and it is also a remedy to the encroachments of the Federal authorities on the jurisdiction of the states, or vice versa.”¹⁵⁴⁹

Procedure-wise, an *amparo* application has 2 stages. The first stage looks to suspend the alleged violation of rights complained about, pending the final decision by the court.¹⁵⁵⁰ In this way, the *amparo* is like an injunction.¹⁵⁵¹ The second stage involves parties providing evidence in support of their cases, the evaluation of the evidence by the court and a final determination.¹⁵⁵² The *tutela*, used in other jurisdictions, is not different from the *amparo*.

According to experts, the *tutela* is “a mechanism for the immediate protection of fundamental rights ... For urgent cases, such as when the patient's life is compromised, the judge can order a provisional measure of immediate compliance.”¹⁵⁵³ The Bolivian Recurso de Protección (remedy of protection) works much the same way except that the procedure is used as the last resort when there is no other option available to protect the right of the person.¹⁵⁵⁴ Each of these is an innovation to improve access to justice and could be useful in the Niger Delta in environmental cases.

The case of *Future Generations v. Ministry of the Environment and Others*¹⁵⁵⁵ decided by the Supreme Court of Colombia highlights how these procedural innovations are enhancing access to justice in that jurisdiction. 25 plaintiffs, ranging in age from 7 to 25 years, filed the suit via *tutela* against the President of Colombia and certain government agencies. They complained that

¹⁵⁴⁹ Carlos Mejorada, "The Writ of Amparo: Mexican Procedure to Protect Human Rights" (1946) 243 (1) *Annals Am.Acad.Pol.& Soc.Sci.* 107 at 107 [Mejorada].

¹⁵⁵⁰ *Ibid.*

¹⁵⁵¹ Allan Brewer-Carías, *Constitutional Protection of Human Rights in Latin America A Comparative Study of Amparo Proceedings* (UK: Cambridge University Press, 2009) 346.

¹⁵⁵² Mejorada, *supra* note 1542 at 107.

¹⁵⁵³ Diego Gómez-Ceballos, Isabel Craveiro & Luzia Gonçalves, “Judicialization of the Right to Health: (Un)Compliance of the Judicial Decisions in Medellin, Colombia” (2019) 34 (4) *The International Journal of Health Planning and Management* 1277 at 1278.

¹⁵⁵⁴ Article 129 (I), *supra*, note 1545.

¹⁵⁵⁵ STC4360-2018: Judgment of the Supreme Court of Colombia of 5 April, 2018 <<https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf>> [*Future Generations v. Ministry of the Environment and Others*].

climate change, alongside the inability of the government to reduce deforestation and meet the government's goal of zero-net deforestation in the Amazon by 2020, derogated from their constitutional right to a healthy environment.¹⁵⁵⁶ The trial court refused to grant the relief because the suit was instituted by way of *tutela*, ruling "that the tutela was not an adequate mechanism to file this particular action because of the collective nature of the problem."¹⁵⁵⁷ On appeal, the Supreme Court rejected the trial court's decision and held that if 4 conditions are met, the *tutela* is appropriate:

a tutela can be filed as long as it i) shows the connection between the violation of collective and fundamental or individual rights, ii) the person filing the tutela is the person directly affected, iii) the violation of a fundamental right is not hypothetical but fully proved, and iv) the judicial order must be oriented towards restoring individual rights, and not collective ones.¹⁵⁵⁸

On the substantive claim, the Supreme Court held that the failure of the government to meet its climate and forest protection target infringed the plaintiffs' right to a healthy environment.

Consequently, it ORDERS that the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, in coordination with the actors of the National Environmental System and the participation of the plaintiffs, the affected communities and interested population in general, to formulate a short, medium, and long term action plan within the next four (4) months from today's notice, to counteract the deforestation rate in the Amazon, tackling climate change impacts. This plan will aim to mitigate the early deforestation warnings issued by the IDEAM. Similarly, it ORDERS the Presidency of the Republic, the Ministry of Environment and Sustainable Development, and the Ministry of Agriculture and Rural Development, to formulate in the five (5) following months from today's notice, with the active participation of the plaintiffs, affected communities, scientific organizations or environmental research groups, and interested population in general, the construction of an 'intergenerational pact for the life of the Colombian Amazon - PIVAC,' to adopt measures aimed at reducing deforestation to zero and greenhouse gas emissions, and has national, regional and

¹⁵⁵⁶ *Ibid* at 2.

Article 79 of the Constitution of Colombia, 2005, provides that every person "has the right to enjoy a healthy environment...It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends."

Article 95 of the Constitution of Colombia, 2005, also provides that the "exercise of the rights and liberties recognized in this Constitution implies responsibilities. Every individual is obliged to obey the Constitution and the laws. The following are duties of the individual and of the citizen...2. To strive in accordance with the principle of social solidarity, responding with humanitarian actions in the face of situations that endanger the life or the health of individuals...4. To defend and propagate human rights as the foundation of peaceful coexistence; 5. To participate in the country's political, civic, and community life...8. To protect the country's cultural and natural resources and to keep watch that a healthy environment is being preserved."

¹⁵⁵⁷ *Future Generations v. Ministry of the Environment and Others*, *supra* note 1555 at 3.

¹⁵⁵⁸ *Ibid*.

local implementation strategies of a preventative, mandatory, corrective, and pedagogical nature, directed towards climate change adaptation.¹⁵⁵⁹

The plaintiffs were able to obtain judgment using the *tutela*. Such a success would not be possible in Nigeria, given similar circumstances, because Nigeria has neither enforceable CERs nor procedural innovations to protect them like the *tutela*. The Colombian Supreme Court attests to the constitutional validity of both the *amparo* and *tutela* by declaring that it is the Court's duty to protect the "'integrity and supremacy of the Constitution'. In such a capacity, it...is also the avant-garde guardian of the fundamental rights of the people, employing the optional review of judicial decisions concerning the protection of their constitutional rights petitioned, throughout the country, through guardianship action, also called the Amparo or Tutela action."¹⁵⁶⁰ Although the Court did not mention any particular constitutional provision from which it drew inspiration, both the *amparo* and *tutela* are derived from article 86 of the Constitution which provides that

Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority. The protection will consist of an order so that whoever solicits such protection may receive it by a judge enjoining others to act or refrain from acting...In no case can more than ten (10) days elapse between the request for protection and its resolution.^{1553b}

But the government has not fully complied with the judgment which has led to further deforestation in the Amazon with the plaintiffs returning to court to seek the enforcement of the judgment.¹⁵⁶¹ Nevertheless, obtaining the judgment, in and of itself, is testament to the availability of avenues to public participation which is the immediate concern of the chapter. This benefit is not available to the Niger Delta. If CERs could ensure similar benefit in Nigeria, the Niger Delta would have additional means to seek judicial redress for environmental degradation of its territory and the oil industry would be less insulated from liability and deterrence.

¹⁵⁵⁹ *Ibid* at 10-11.

¹⁵⁶⁰ Constitutional Court of Colombia, "About the Court" <<https://www.corteconstitucional.gov.co/english/#About>>.

^{1560b} *Ibid*

¹⁵⁶¹ "The Colombian Government has failed to fulfill the Supreme Court's Landmark Order to Protect the Amazon", *Dejusticia* (5 April 2019) <<https://www.dejusticia.org/en/the-colombian-government-has-failed-to-fulfill-the-supreme-courts-landmark-order-to-protect-the-amazon/>>.

(b) Direct Action of Unconstitutionality

This is a unique procedure in certain jurisdictions which allows litigants to institute proceedings against any infraction of constitutional rights provisions including CERs.¹⁵⁶² The direct action of unconstitutionality has already been examined in this thesis in chapter 4 in the segment on *Enforcement of Environmental Laws and Regulations by the Courts* with the analysis of the Kenyan case of *Musyoka & Ors. V. The A.G. & Ors.*¹⁵⁶³ The chapter adopts that earlier discussion. The plaintiffs in that suit commenced proceedings by way of a *constitutional petition*.¹⁵⁶⁴ However, it is worth pointing out that some Constitutions have enacted a *direct action of unconstitutionality* in their provisions. Brazil (articles 103 and 129 (IV))¹⁵⁶⁵ and Ecuador (articles 132 and 222)¹⁵⁶⁶ provide for this procedure in their respective Constitutions. The chapter recommends that Nigeria should also adopt this procedure for the benefit of Nigerians, especially of the Niger Delta.

(c) Popular Action

According to Boyd, this procedural innovation enables the people “to use the courts to defend collective, as opposed to personal, interests.”¹⁵⁶⁷ It is therefore an exception to the rules of standing because it enables “any person to pursue a claim on behalf of the public in cases in which a public delict or wrong might otherwise go unredressed.”¹⁵⁶⁸ However, the “law of

¹⁵⁶² For instance, Rules 4 (1) of Part II of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that where “any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

See Legal Notice No. 117, The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules of June 25, 2013,

<http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/2013/LN117_2013.pdf>.

¹⁵⁶³ *Musyoka & Ors. V. The A.G. & Ors.*, *supra* note 1003.

¹⁵⁶⁴ *Ibid* at 3 (para. 1).

¹⁵⁶⁵ Article 103 provides that a “direct action of unconstitutionality and a declaratory action of constitutionality may be brought by ... VI. the Procurator-General of the Republic.”

Article 129 provides that the “institutional functions of the Public Ministry are... IV. to institute direct actions of unconstitutionality or representation for purposes of intervention by the Union and States, in cases set out in this Constitution.”

¹⁵⁶⁶ Article 132 provides that any “person or collective affected by a juridical norm contrary to the Constitution shall have the right to present an Action for Unconstitutionality (Accion de Inconstitucionalidad), pursuant to the procedures established by law.”

Article 222 provides that the “powers of the Office of the Public Defender, in addition to those established in the Constitution and the law, are the following: 1. To file actions of Unconstitutionality ... without the requirement of having a mandate.”

¹⁵⁶⁷ Boyd, *supra*, note 28 at 128.

¹⁵⁶⁸ James Pfander, “Standing to Sue: Lessons from Scotland's Actio Popularis” (2017) 66(7) Duke L.J. 1493 at 1500.

preclusion barred some public litigation that was truly duplicative - for example, when the same claim was brought for the same reason-while still allowing those with different interests to vindicate their own rights.”¹⁵⁶⁹ Brazil (Article 5 (LXXIII),¹⁵⁷⁰ Bolivia (article 135)¹⁵⁷¹ and Colombia (article 88)¹⁵⁷² have constitutionalized this procedure in their respective Constitutions.

The case of *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Angelo Reyes*,¹⁵⁷³ discussed above in the section on standing, seems apt. In that case, the Supreme Court of the Philippines deemed it proper to determine the case because “the environmental and livelihood issues raised undoubtedly affect the public’s interest.”¹⁵⁷⁴ By way of background, the Tañon Strait “is a narrow passage of water bounded by the islands of Cebu in the East and Negros in the West. It harbors a rich biodiversity of marine life, including endangered species of dolphins and whales.”¹⁵⁷⁵ Because of this, the Tañon Strait was declared a *protected area* by the Philippines’ government via *Proclamation No. 1234*, 1998.¹⁵⁷⁶

The Proclamation was based on the provisions of the *National Integrated Protected Areas System Act*, 1992 (NIPAS Act) which was enacted to establish and administer protected areas in the Philippines (section 2)).¹⁵⁷⁷ NIPAS Act declares protected landscapes and seascapes as

¹⁵⁶⁹ *Ibid* at 1528.

¹⁵⁷⁰ Article 5 (LXXIII) provides that “any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates, to administrative morality, to the environment and to historic and cultural patrimony; except in a case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party's attorneys' fees and costs.”

¹⁵⁷¹ Article 135 provides that the Popular Action (la Accion Popular) “shall proceed against any act or omission by the authorities or individuals or collectives that violates or threatens to violate rights and collective interests related to public patrimony, space, security and health, the environment and other rights of a similar nature that are recognized by this Constitution.”

¹⁵⁷² Article 88 provides that an Act “shall regulate popular actions for the protection of collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and other areas of similar nature defined in it. It shall also regulate the actions stemming from the harm caused to a large number of individuals, without barring appropriate individual action. In the same way, it shall define cases of responsibility of a civil nature for the damage caused to collective rights and interests.”

¹⁵⁷³ *Resident Marine Mammals*, *supra* note 1438.

¹⁵⁷⁴ *Ibid* at 12.

¹⁵⁷⁵ *Ibid* at 28.

¹⁵⁷⁶ Proclamation No. 1234, s. 1998, signed on May 27, 1998,

<<https://www.officialgazette.gov.ph/1998/05/27/proclamation-no-1234-s-1998/>>.

¹⁵⁷⁷ Act No. 7586 of 1992, <https://www.lawphil.net/statutes/repacts/ra1992/ra_7586_1992.html>.

Section 2 provides that “...It is hereby recognized that these areas, although distinct in features, possess common ecological values that may be incorporated into a holistic plan representative of our natural heritage; that effective administration of this area is possible only through cooperation among national government, local government and concerned private organizations; that the use and enjoyment of these protected areas must be consistent with the principles of biological diversity and sustainable development. To this end, there is hereby established a National Integrated Protected Areas System (NIPAS), which shall encompass outstandingly remarkable areas and

protected areas (section 3 (e)).¹⁵⁷⁸ According to NIPAS Act, protected landscapes and seascapes “are areas of national significance which are characterized by the harmonious interaction of man and land while providing opportunities for public enjoyment through the recreation and tourism within the normal lifestyle and economic activity of these areas” (section 4 (9)).¹⁵⁷⁹

Consequently, the NIPAS Act mandates the establishment of individual management plans to protect each of these designated areas (section 9).¹⁵⁸⁰ Activities outside the management plans shall only be considered if an EIA is conducted to ascertain adverse impact of the activities on the protected areas and such activities will only be allowed if an Environmental Compliance Certificate (ECC) is obtained (section 12)).¹⁵⁸¹

The EIA procedure stems from *Presidential Decree*, 1978, which establishes “an Environmental Impact Statement System founded and based on the environmental impact statement required...of all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms and entities, for every proposed project and undertaking which significantly affect the quality of the environment” (section 2).¹⁵⁸² The *Presidential Decree*, 1978 mandates the President of the Philippines, either on their own or on the opinion of the National Environmental Protection Council, to declare certain projects *environmentally critical*, which projects can only proceed

biologically important public lands that are habitats of rare and endangered species of plants and animals, biogeographic zones and related ecosystems, whether terrestrial, wetland or marine, all of which shall be designated as “protected areas.”

¹⁵⁷⁸ Section 3 provides that the “following categories of protected areas are hereby established: a. Strict nature reserve; b. Natural park; c. Natural monument; d. Wildlife sanctuary; e. Protected landscapes and seascapes; f. Resource reserve; g. Natural biotic areas; and h. Other categories established by law, conventions or international agreements which the Philippine Government is a signatory.”

¹⁵⁷⁹ NIPAS Act

¹⁵⁸⁰ Section 9 provides that there “shall be a general management planning strategy to serve as guide in formulating individual plans for each protected area. The management planning strategy shall, at the minimum, promote the adoption and implementation of innovative management techniques including if necessary, the concept of zoning, buffer zone management for multiple use and protection, habitat conservation and rehabilitation, diversity management, community organizing, socioeconomic and scientific researches, site-specific policy development, pest management, and fire control. The management planning strategy shall also provide guidelines for the protection of indigenous cultural communities, other tenured migrant communities and sites for close coordination between and among local agencies of the Government as well as the private sector.”

¹⁵⁸¹ Section 12 provides that proposals “for activities which are outside the scope of the management plan for protected areas shall be subject to an environmental impact assessment as required by law before they are adopted, and the results thereof shall be taken into consideration in the decision-making process. No actual implementation of such activities shall be allowed without the required Environmental Compliance Certificate (ECC) under the Philippine Environmental Impact Assessment (EIA) system.”

¹⁵⁸² No. 1586 of June 11, 1978, <https://www.lawphil.net/statutes/presdecs/pd1978/pd_1586_1978.html>.

after obtaining ECC either directly from the President or their designate (section 4).¹⁵⁸³ Based on this, *Proclamation No. 2146*, 1981¹⁵⁸⁴ was issued by the then President Ferdinand Marcos, designating certain projects including “[p]etroleum and petro-chemical industries including oil and gas” as critical environmental projects within the EIA framework.¹⁵⁸⁵

To further provide clarity on the EIA process, the Department of Environment and Natural Resources (DENR) in 2003, issued the *DENR Administrative Order No. 2003-30*.¹⁵⁸⁶ The administrative Order stipulates that projects critical to the environment with potential to cause substantial adverse environmental impacts, shall undergo EIA and ECC processes (section 4.3 (c)).¹⁵⁸⁷ Procedure-wise, the Supreme Court of the Philippines promulgated the RPEC¹⁵⁸⁸ whose aims include the advancement of the constitutional right to a healthy environment and the provision of a simplified, quick and cost-effective procedure for environmental litigation (section 3, Rule 1). The RPEC creates innovative means including the *writ of continuing mandamus* which the people can use to approach the court to adjudicate on environmental litigation (section 4 (c)).¹⁵⁸⁹

In the case, the Philippines’ government entered a Service Contract (SC-46) with a Japanese company to explore and exploit petroleum resources in the Tañon Strait.¹⁵⁹⁰ The plaintiffs, via the *writ of continuing mandamus*, filed the case seeking the annulment of both SC-46 and the ECC approved by DENR in respect of SC-46 because these documents authorize the exploration

¹⁵⁸³ Section 4 provides that the President of the Philippines “may, on his own initiative or upon recommendation of the National Environmental Protection Council, by proclamation declare certain projects, undertakings or areas in the country as environmentally critical. No person, partnership or corporation shall undertake or operate any such declared environmentally critical project or area without first securing an Environmental Compliance Certificate issued by the President or his duly authorized representative.”

¹⁵⁸⁴ Proclamation No. 2146 of December 14, 1981, <<https://www.officialgazette.gov.ph/1981/12/14/proclamation-no-2146-s-1981/>>.

¹⁵⁸⁵ The preamble provides that “...I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by law, hereby proclaim the following areas and types of projects as environmentally critical and within the scope of the Environmental Impact Statement System; A. Environmentally Critical Projects I. Heavy Industries a. Non-ferrous metal industries b. Iron and steel mills c. Petroleum and petro-chemical industries including oil and gas d. Smelting plants.”

¹⁵⁸⁶ Department of Environment and Natural Resources, Republic of the Philippines, *Administrative Order No. 2003-30*, <<https://emb.gov.ph/wp-content/uploads/2016/06/DAO-2003-30.pdf>>.

¹⁵⁸⁷ Section 4.3 © that the “following are the categories of projects/undertakings under the EIS system: Category A. Environmentally Critical Projects (ECPs) with significant potential to cause negative environmental impacts.”

¹⁵⁸⁸ RPEC, *supra*, note 1437.

¹⁵⁸⁹ Section 4 (c) provides that continuing mandamus “is a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied.”

¹⁵⁹⁰ *Resident Marine Mammals*, *supra* note 1445 at 4.

and extraction of petroleum resources (an environmentally critical project) in the Tañon Strait (a protected area).¹⁵⁹¹ The plaintiffs allege that SC-46 conflicts with section 2, article XII of the Constitution.¹⁵⁹² The plaintiffs further allege that the condition-precedent for the grant of the ECC was not met – which is the conduct of prior public consultation.¹⁵⁹³ The Court declared SC-46 null and void because it conflicts with section 2, article XII of the 1987 Constitution.¹⁵⁹⁴ The decision reinforces the broader argument that the courts may be more willing to enforce constitutional provisions – whether CERs or others – than ordinary legislation.

Besides this, in chapter 4, this thesis examined the ability of CERs to enhance the implementation and enforcement of extant environmental laws. These benefits were highlighted in the case under review as the plaintiffs also contended that the Service Contract offended the provisions of extant environmental legislation and policies highlighted above,¹⁵⁹⁵ including section 27 of the *Wildlife Resources Conservation and Protection Act, 2001*¹⁵⁹⁶ and the *Philippine Fisheries Code, 1998*.¹⁵⁹⁷ The Court took the opportunity to decide on the legality of the Contract in the light of these laws:

Although we have already established above that SC-46 is null and void for being violative of the 1987 Constitution, it is our duty to still rule on the legality of SC-46 vis-à-vis other pertinent laws, to serve as a guide for the Government when executing service contracts involving not only the Tañon Strait, but also other similar areas...thus this Court will concentrate on those laws that pertain particularly to the Tañon Strait as a protected seascape.¹⁵⁹⁸

¹⁵⁹¹ *Ibid* at 3.

¹⁵⁹² *Ibid* at 18.

Section 2, article XII provides that The State “shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens...The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.”

¹⁵⁹³ *Resident Marine Mammals*, *supra* note 1445 at 9.

¹⁵⁹⁴ *Ibid* at 25-26.

¹⁵⁹⁵ *Ibid* at 27.

¹⁵⁹⁶ Act No. 9147 of July 30, 2001, <https://lawphil.net/statutes/repacts/ra2001/ra_9147_2001.html>.

Section 27 provides that “Unless otherwise allowed in accordance with this Act, it shall be unlawful for any person to willfully and knowingly exploit wildlife resources and their habitats...”

¹⁵⁹⁷ Act No. 8550 of February 25, 1998, <<http://spsissuances.da.gov.ph/attachments/article/28/RA8550.pdf>>.

¹⁵⁹⁸ *Resident Marine Mammals*, *supra* note 1445 at 28.

The Court proceeded to hold that the defendants had infringed on extant environmental norms by failing to obtain the required ECC prior to starting petroleum exploration and exploitation in the Tañon Strait:

The public respondents themselves admitted that JAPEX only started to secure an ECC prior to the second sub-phase of SC-46, which required the drilling of an oil exploration well. This means that when the seismic surveys were done in the Tañon Strait, no such environmental impact evaluation was done. Unless seismic surveys are part of the management plan of the Tañon Strait, such surveys were done in violation of Section 12 of the NIPAS Act and Section 4 of Presidential Decree No. 1586...The respondents' subsequent compliance with the EISS for the second sub-phase of SC-46 cannot and will not cure this violation.¹⁵⁹⁹

This decision seems to support Boyd's argument which the thesis highlights in chapter 4 – that the courts would be more willing to enforce environmental legislation backed up by CERs. The Court decided the case based on NIPAS Act but traced its history to the constitutional right to a healthy environment.¹⁶⁰⁰ According to the Court,

True to the constitutional policy that the 'State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature,' Congress enacted the NIPAS Act to secure the perpetual existence of all native plants and animals through the establishment of a comprehensive system of integrated protected areas. These areas possess common ecological values that were incorporated into a holistic plan representative of our natural heritage.¹⁶⁰¹

It is instructive that Nigeria has an equivalent of the *NIPAS Act* - the EIA Act¹⁶⁰² - which provides for the conduct of an environmental impact assessment before any proposed activity, whether by the government or private entities, that could potentially cause harm to the environment, is undertaken (section 1 (a)).¹⁶⁰³ However, unlike the Philippines as seen in the case under review, Nigeria does not have an enforceable right to a healthy environment to support the EIA Act in the manner in which the right to a balanced and healthy environment is

¹⁵⁹⁹ *Ibid* at 33.

¹⁶⁰⁰ Section 16, article II provides that the State "shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."

¹⁶⁰¹ *Resident Marine Mammals*, *supra* note 1445 at 29.

¹⁶⁰² *Environmental Impact Assessment Act*, No. 86 of December 10, 1992, <<https://ngfcp.dpr.gov.ng/media/1061/environmental-impact-assessment-eia-decree-no-86-1992.pdf>>.

¹⁶⁰³ Section 1 provides that the "objectives of any environmental Impact assessment ... shall be – (a) to establish before a decision taken by any person, authority corporate body or unincorporated body including the Government of the Federation, State or Local Government intending to undertake or authorise the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into account."

supporting the *NIPAS Act*. If CERs could produce similar benefits in the Niger Delta by increasing opportunities for members of the public to litigate popular actions of this nature, there would also be enhanced involvement of the Niger Delta in environmental governance in Nigeria through programs such as EIA as well.

(d) Public Civil Action

Brazil (article 129)¹⁶⁰⁴ and Ecuador (article 99)¹⁶⁰⁵ have constitutionalized the public civil action in their respective Constitutions. A public civil action is a case instituted to protect diffuse interests and collective indivisible assets like the environment and groups of consumers.¹⁶⁰⁶ The chapter will not also analyze public civil actions because this has already been done with the analysis of the *Matanza-Riachuelo River Basin case*¹⁶⁰⁷ in chapter 2 in the segment on the *critique of the linkage between Environmental Justice and CERs*. The *Matanza-Riachuelo River Basin case* was instituted based on the right to a healthy environment in Argentina and has brought some succour to about 20% of the Argentine population who live within the river basin.¹⁶⁰⁸ This could serve as precedent for Nigeria to adopt same for the benefits of its people, who would have an additional tool to facilitate involvement in environmental governance.

(e) The Philippine Procedural Rules for Environmental Litigation

The RPEC was established in the Philippines to provide a simplified means to enforce and obtain remedies for the breach of the constitutional right to a healthy environment.¹⁶⁰⁹ Hilario Davide confirms this by opining that what “is especially notable about the new Rules of Procedure for Environmental Cases are the two special civil actions that it adds to the existing rules of court in the Philippines, namely: 1. The writ of Kalikasan or the writ of Nature; and 2. The writ of

¹⁶⁰⁴ Article 129 provides that the “institutional functions of the Public Ministry are... III. to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests.”

¹⁶⁰⁵ Article 99 provides that citizen action “shall be exercised individually or representing the community when a right is infringed and when it is threatened; it shall be submitted to a competent authority, in accordance with the law. The exercise of this action shall not prevent other actions guaranteed by the Constitution and the law.”

¹⁶⁰⁶ Ada Grinover, “Brazil” (2009) 622 *Annals Am.Acad.Pol.& Soc.Sci.* 63 at 64.

¹⁶⁰⁷ The Environment and Natural Resources Foundation, *supra* note 436 at 1.

¹⁶⁰⁸ Boyd 2, *supra* note 29 at 192-193.

¹⁶⁰⁹ RPEC, *supra* note 1437.

Section 3 provides that the “objectives of these Rules are: (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology; (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements; (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.”

Continuing *Mandamus*,¹⁶¹⁰ in addition to previously existing tools such as citizen suits; consent Decrees; Temporary Environmental Protection Orders (TEPO) in cases of threat of serious damage to the environment (or life sources); protection against harassment countersuits (i.e., SLAPP suits—Strategic Lawsuits Against Public Participation); and adoption of the Precautionary Principle.¹⁶¹¹

1. Writ of Kalikasan

One of the simplified and expedited processes provided by the *RPEC* is the *writ of kalikasan*.¹⁶¹² The strong affinity between the writ and the environment is underscored by the fact that in the Philippines, the “word ‘environment’ is inseparable from the concept of nature. In fact, in their language, the word nature is ‘kalikasan.’ Nature (*kalikasan*) and the natural elements of life of land, air, and water are to them interchangeable. They are all the life sources that enable all life to survive and thrive.”¹⁶¹³ According to the *RPEC*,

The writ is a remedy available to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.¹⁶¹⁴

Cases instituted via the writ are filed either directly in the Supreme Court or the Court of Appeal, presupposing that an appeal is either not encouraged or limited,¹⁶¹⁵ and filing is free.¹⁶¹⁶ The writ

¹⁶¹⁰ Davide, *supra* note 469 at 597.

¹⁶¹¹ *RPEC*, *supra* note 1437.

Section 3 provides that the “objectives of these Rules are: (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology; (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements; (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.”

¹⁶¹² Section 11, Rules 7 of Part III provides that “hearing including the preliminary conference shall not extend beyond sixty (60) days and shall be given the same priority as petitions for the writs of habeas corpus, amparo and habeas data.”

¹⁶¹³ Davide, *supra*, note 469 at 593.

¹⁶¹⁴ Section 1, rules 7 of Part III of the *RPEC*.

¹⁶¹⁵ Section 3, rules 7 of Part III of the *RPEC* provides that the “petition shall be filed with the Supreme Court or with any of the stations of the Court of Appeals.”

¹⁶¹⁶ Section 4, rules 7 of Part III of the *RPEC* provides that the “petitioner shall be exempt from the payment of docket fees.”

is issued within 3 days of filing of the case¹⁶¹⁷ and any court official who deliberately undermines either the issuing process of the writ or the service of same on the respondent is liable for contempt of court, in addition to administrative, criminal and civil liabilities.¹⁶¹⁸

Upon service of the writ, the respondent has 10 days to file a response and there is no extension of time to file; defenses not raised by the respondent are deemed waived and a general denial by the respondent is deemed an admission.¹⁶¹⁹ Where the respondent fails to file a defense within 10 days of service, the suit will proceed to trial.¹⁶²⁰ To save time, certain pleadings and motions are not allowed.¹⁶²¹

Cases instituted via the writ of *Kalikasan* are to be concluded within sixty days of commencement and accorded the same priority that would otherwise be accorded cases instituted via other expedited procedures like *habeas corpus*/data and the *amparo* (section 7, rules 7 of Part III).¹⁶²² The Philippine's case of *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*¹⁶²³ provides an example of how the procedure has been deployed for environmental protection. However, the analysis of the case will be done in the segment on remedies as an element of Access to justice.

¹⁶¹⁷ Section 5, rules 7 of Part III of the RPEC provides that within 3 days "from the date of filing of the petition, if the petition is sufficient in form and substance, the court shall give an order: (a) issuing the writ; and (b) requiring the respondent to file a verified return as provided in."

¹⁶¹⁸ Section 7, rules 7 of Part III of the RPEC provides that a "clerk of court who unduly delays or refuses to issue the writ after its allowance or a court officer or deputized person who unduly delays or refuses to serve the same shall be punished by the court for contempt without prejudice to other civil, criminal or administrative actions."

¹⁶¹⁹ Section 8, rules 7 of Part III of the RPEC provides that within "a nonextendible period of ten (10) days after service of the writ, the respondent shall file a verified return which shall contain all defenses to show that respondent did not violate or threaten to violate, or allow the violation of any environmental law, rule or regulation or commit any act resulting to environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces. All defenses not raised in the return shall be deemed waived...A general denial of allegations in the petition shall be considered as an admission thereof."

¹⁶²⁰ Section 10, rules 7 of Part III of the RPEC provides that in "case the respondent fails to file a return, the court shall proceed to hear the petition ex parte."

¹⁶²¹ Section 9, rules 7 of Part III of the RPEC provides that the "following pleadings and motions are prohibited: (a) Motion to dismiss; (b) Motion for extension of time to file return; (c) Motion for postponement; (d) Motion for a bill of particulars; (e) Counterclaim or cross-claim; (f) Third-party complaint; (g) Reply; and (h) Motion to declare respondent in default."

¹⁶²² Section 11, Rules 7 of Part III provides that "hearing including the preliminary conference shall not extend beyond sixty (60) days and shall be given the same priority as petitions for the writs of habeas corpus, amparo and habeas data."

¹⁶²³ *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R., supra* note 468.

2. Writ of Continuing Mandamus

The RPEC describes continuing mandamus as “a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied” (section 4 (c)).¹⁶²⁴ The writ could be filed in the Regional Trial Court, Court of Appeal or the Supreme Court¹⁶²⁵ and a filing fee is not required.¹⁶²⁶ Upon service of the writ, the respondent has 10 days to file a response.¹⁶²⁷

Hearing is summary in nature and shall be concluded within sixty days of the filing of the petition.¹⁶²⁸ The court can make orders, including a TEPO which is an injunction to preserve the substance of the case, pending final judgment.¹⁶²⁹ Upon the delivery of the judgment, the court shall require the respondent to make periodic reports on how the judgment is being implemented, with the court reserving the right, either on its own or through a government agency, to also monitor how the respondent is implementing the judgment. The petitioner is also allowed to submit its observation on the way the judgment is being implemented.¹⁶³⁰ If the court is satisfied

¹⁶²⁴ RPEC, *supra* note 1437.

Section 3 provides that the “objectives of these Rules are: (a) To protect and advance the constitutional right of the people to a balanced and healthful ecology; (b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements; (c) To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.”

¹⁶²⁵ Section 2, Rule 8, Part III of the RPEC provides that the “petition shall be filed with the Regional Trial Court exercising jurisdiction over the territory where the actionable neglect or omission occurred or with the Court of Appeals or the Supreme Court.”

¹⁶²⁶ Section 2, Rule 8, Part III of the RPEC provides that the “petitioner shall be exempt from the payment of docket fees.”

¹⁶²⁷ Section 4, Rule 8, Part III of the RPEC provides that “the court shall issue the writ and require the respondent to comment on the petition within ten (10) days from receipt of a copy thereof.”

¹⁶²⁸ Section 6, Rule 8, Part III of the RPEC provides that after “the comment is filed or the time for the filing thereof has expired, the court may hear the case which shall be summary in nature or require the parties to submit memoranda. The petition shall be resolved without delay within sixty (60) days from the date of the submission of the petition for resolution.”

¹⁶²⁹ Section 5, Rule 8, Part III of the RPEC provides the “court in which the petition is filed may issue such orders to expedite the proceedings, and it may also grant a TEPO for the preservation of the rights of the parties pending such proceedings.”

¹⁶³⁰ Section 7, Rule 8, Part III of the RPEC provides if “warranted, the court shall grant the privilege of the writ of continuing mandamus requiring respondent to perform an act or series of acts until the judgment is fully satisfied and to grant such other reliefs as may be warranted resulting from the wrongful or illegal acts of the respondent. The court shall require the respondent to submit periodic reports detailing the progress and execution of the judgment, and the court may, by itself or through a commissioner or the appropriate government agency, evaluate and monitor compliance. The petitioner may submit its comments or observations on the execution of the judgment.”

that the respondent has fully complied with the judgment, the court shall record its satisfaction in its docket.¹⁶³¹

The case of *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Secretary Angelo Reyes*¹⁶³² which the chapter has already analyzed, and which was commenced by writ of continuing mandamus, indicates how this writ could contribute to the ability of the people to obtain judicial remedy for environmental harm. The case of *ISAAA v. Greenpeace Southeast Asia (Philippines)*¹⁶³³ also used this procedural tool, analysis of this case will be undertaken in the segment on remedies as an element of access to justice.

It is worth pointing out that the writ of mandamus is not available in all cases. It is only available for a plaintiff who has suffered personal environmental injury. In *Segovia et al. vs. The Climate Change Commission, et al.*,¹⁶³⁴ the plaintiffs, who described themselves as those who do not own cars in the Philippines, used a writ of mandamus to sue the various regulatory agencies to enforce their rights to a healthy and balanced ecology. They alleged that the defendants failed to implement various environmental norms, specifying the reduction in the use of fossil fuel, reduction in the emission of air pollutants and implementation of the Road Sharing Principle, and that the failures have led to environmental degradation, which has endangered their lives, health and properties.¹⁶³⁵

The Plaintiffs asked the Court to issue a continuing mandamus to compel the respective agencies to implement these environmental norms to address these issues.¹⁶³⁶ However, the Supreme Court dismissed the suit because the plaintiffs did not show real and threatened violation of their constitutional rights to a healthy and balanced ecology by the defendants.¹⁶³⁷ Specifically on the propriety of commencing the suit via a writ of continuing mandamus, the Supreme Court held

¹⁶³¹ Section 8, Rule 8, Part III of the RPEC provides that the “periodic reports submitted by the respondent detailing compliance with the judgment shall be contained in partial returns of the writ. Upon full satisfaction of the judgment, a final return of the writ shall be made to the court by the respondent. If the court finds that the judgment has been fully implemented, the satisfaction of judgment shall be entered in the court docket.”

¹⁶³² *Resident Marine Mammals*, *supra* note 1445.

¹⁶³³ G.R. No. 20927, Judgment of the Supreme Court of 8 December 2015, <https://elaw.org/system/files/ph.greenpeacesc_1.pdf>

¹⁶³⁴ G.R. No. 211010, Judgment of the Supreme Court of March 7, 2017, <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170307_13017_judgment.pdf>.

¹⁶³⁵ *Ibid* at 3.

¹⁶³⁶ *Ibid* at 8.

¹⁶³⁷ *Ibid* at 9.

that “a petition for the issuance of a writ of continuing mandamus...is only available to one who is personally aggrieved by the unlawful act or omission.”¹⁶³⁸

Despite the decision in *Segovia*, this segment indicates that CERs could encourage the design of innovative procedures to better access justice and obtain remedies for environmental injuries. However, it is not immediately obvious whether CERs would deliver similar results for the marginalized people of the Niger Delta. This chapter will analyze challenges to access to justice in Nigeria which could inhibit the potential of CERs to deliver these benefits in Nigeria, for the good of the Niger Delta. However, first we turn to the availability of adequate remedies in environmental cases.

5.4.4.4 Adequate and Effective Remedies for Environmental Harms

The Aarhus Convention identifies remedies as the fourth element of access to justice and “requires Parties to provide adequate and effective remedies, including injunctions.”¹⁶³⁹ This section will analyze the current state of the law in Nigeria on adequacy of environmental remedies and how compliance with this Aarhus Convention benchmark could improve the availability of adequate and effective remedies for environmental injuries in the Niger Delta.

(a) Remedy of Injunction

The Aarhus Convention defines an injunction as “a remedy designed to prevent or remedy injury. It allows a person to secure an order against another person requiring him or her to do [or refrain from doing] something ... The order issued by the [court or] tribunal is enforceable through other proceedings.”¹⁶⁴⁰ As recommended by the Aarhus Convention, the provision of the law on injunctions should be generalized so that adjudicatory bodies can tailor them to suit specific environmental conditions. The Aarhus Convention provides that in “environmental cases, injunctions, which allow the [court or] tribunal to cause a person to cease a violation or undertake some act, are therefore often more flexible and responsive to the underlying environmental or other problem than other remedies such as monetary damages or criminal sanctions.”¹⁶⁴¹ In response to the Aarhus Convention, some countries have been quite flexible in

¹⁶³⁸ *Ibid* at 5.

¹⁶³⁹ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 136.

¹⁶⁴⁰ *Ibid* at 133.

¹⁶⁴¹ *Ibid*.

constitutionalizing injunctions. For instance, the Ecuadorian Constitution allows the court to impose preventive measures to stop environmental injury (article 87),¹⁶⁴² and in “case of environmental damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems” (article 397).¹⁶⁴³

Unlike Ecuador, because Nigeria does not have enforceable CERs that include a bouquet of constitutional procedural rights and remedies, Nigerians often turn to tort to address environmental harms. But remedies are limited to monetary compensation, while injunctive remedies are rarely, if ever, awarded.¹⁶⁴⁴ The case in point would be *Irou v. Shell-BP*,¹⁶⁴⁵ where the plaintiff farmer sought an injunction against pollution emanating from the defendant’s facilities which affected the land, fishpond and creek. The court refused to grant the relief because to ‘grant the order ... would amount to asking the defendant [Shell-BP] to stop operating in the area.’¹⁶⁴⁶ The knowledge that injunctions are not usually granted may have sent a wrong signal to the TNCs as Shell’s legal manager J. A. Odeleye once declared ‘[t]he law is on our side because in the case of a dispute, we don’t have to stop operations.’¹⁶⁴⁷

This is in direct contrast with the position taken by the courts in the Philippines on similar facts. Section 16 of the Philippines Constitution provides for the right to a healthy environment by mandating the State to “protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”¹⁶⁴⁸ In the Philippine case of *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*,¹⁶⁴⁹ the respondent operated 2 pipelines covering about 117 kilometers. The pipelines were very strategic in that they transported about 60% of refined petroleum products that served Manila, the Philippines’ capital city, and 3 other provinces. There was a leak in 1 of the pipelines which prompted the plaintiff condominium owner to advise its tenants to relocate as a safety precaution. The plaintiff instituted a

¹⁶⁴² Article 87 provides that preventive measures “can be ordered either jointly or independently of the constitutional actions for the protection of rights, for the purpose of avoiding or ceasing the violation or threat of violation of a right.”

¹⁶⁴³ Article 397 provides that in “case of environmental damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems.”

¹⁶⁴⁴ Frynas, *supra* note 750 at 122.

¹⁶⁴⁵ *Irou v. Shell-BP*, *supra* note 749.

¹⁶⁴⁶ Frynas, *supra* note 750 at 122.

¹⁶⁴⁷ *Ibid* at 123.

¹⁶⁴⁸ Section 16 of the Philippines’ Constitution.

¹⁶⁴⁹ *West Tower Condo. Corp. v. First Phil. Indus. Corp., G.R.*, *supra* note 468.

representative action via the *writ of kalikasan*, seeking among others, a TEPO¹⁶⁵⁰ restraining the defendant from operating the pipelines pending the disposition of the case. The court granted the request.¹⁶⁵¹

To obtain a similar result in Nigeria would be difficult without enshrining CERs and provisions enabling the court to impose injunctions to protect the environment. The chapter recommends that Nigeria follows precedent in countries that have enshrined injunctions in their Constitutions for environmental cases, as this will provide the court with additional tools to fashion appropriate environmental remedies to tackle environmental harm in the Niger Delta.

The chapter has shown that a wider access to justice could play an important role in enhancing the ability of the Niger Delta to seek and obtain remedies for the various environmental injuries that they suffer, as a result of the exploitation of petroleum resources in its territory. The chapter has also shown that CERs could widen access to justice which will be even more beneficial to the Niger Delta. However, CERs and a wider access to justice, by themselves, may not guarantee the Niger Delta environmental sustainability because there are barriers to access to justice that would render CERs and a wider access to justice ineffective, if not addressed. The chapter will analyze these issues and make specific recommendations on how they could be addressed, but first we turn to non-injunctive remedies available in environmental cases.

(b) Other Substantive Remedies

The lack of adequate and effective remedies for environmental injuries has been cited as evidence that Nigeria's environmental regulatory framework is not sufficiently robust and is a challenge confronting the Niger Delta people.¹⁶⁵² As argued by Justice Glazebrook, a "right to the environment would also require consideration of specific remedies, both judicial and administrative, for environmental harm or threat of such harm. The remedies should not only address the human cost of any breach but should also provide for restoration and preservation of

¹⁶⁵⁰ See RPEC, *supra*, note 1437.

¹⁶⁵¹ If it appears from the verified complaint with a prayer for the issuance of an Environmental Protection Order (EPO) that the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury, the executive judge of the multiple-sala court before raffle or the presiding judge of a single-sala court as the case may be, may issue ex parte a TEPO effective for only seventy-two (72) hours from date of the receipt of the TEPO by the party or person enjoined. Within said period, the court where the case is assigned, shall conduct a summary hearing to determine whether the TEPO may be extended until the termination of the case.

¹⁶⁵² Oyende, *supra* note 69 at 92-95.

the environment.”¹⁶⁵³ As argued in chapter 3 of the thesis, CERs could, therefore, address some of the inadequacies of effective environmental remedies by becoming solutions by themselves and encouraging the enactment of laws in this area.¹⁶⁵⁴

One case that exposes the lack of adequate and effective remedies against environmental injustice in the Niger Delta is the case of *S.P.D.C.N. Ltd. vs Okeh*.¹⁶⁵⁵ Crude oil from the appellant’s pipeline spilled and damaged the defendant’s properties including landed properties, farmlands, crops and economic trees, causing untold hardship. The victim sued Shell in negligence, claiming both general and special damages for the oil spill. In its defence, Shell admitted the oil spill but claimed that it was caused by an unknown 3rd party who punctured its oil pipeline.¹⁶⁵⁶ The trial court gave judgment in favor of Okeh and awarded damages for his losses. The Court of Appeal allowed the appeal in part. It held that where “the cause of an oil spill is the malicious act of a third party which was not reasonably foreseeable by the defendant so as to provide against it and where there is a finding of fact that the defendant never instigated such an act, the defendant will not be liable.”¹⁶⁵⁷

The decision contrasts with that of the district court of the Hague in *Akpan v. Shell*¹⁶⁵⁸ (discussed in chapter 4 of the thesis in the section on extra-territorial litigation filling the gap for Niger Deltans) which was a suit by another litigant from the Niger Delta on similar issues and against the same defendant. On the defence of sabotage, the district court held that

SPDC should have realized that there was a very high risk that this aboveground Christmas tree¹⁶⁵⁹ would be sabotaged sooner or later. Accordingly, SPDC created a particularly dangerous situation at the IBIBIO-I well and allowed this situation to continue, which could be abused by a third party...SPDC should have foreseen this obvious risk of sabotage and should have taken more and better preventive measures against this risk... In particular the people living in the vicinity who, like Akpan, generated income from land and fish ponds ran a significant risk of damage by sabotage of the aboveground Christmas tree – which was easy to commit. Thus, the District Court is of the opinion that...SPDC could have considerably reduced or ruled

¹⁶⁵³ Glazebrook, *supra* note 156 at 100.

¹⁶⁵⁴ Samy et al, *supra* note 2 at 135.

¹⁶⁵⁵ (2018) 17 NWLR (part 1649) at 420.

¹⁶⁵⁶ *Ibid* at 436 (paras. D G).

¹⁶⁵⁷ *Ibid* at 435 (para. D).

¹⁶⁵⁸ *Akpan & Anor. VS RDS & Anor*, *supra* note 1009.

¹⁶⁵⁹ *Ibid*. In paragraph 2.4 of the Judgment, the court describes a Christmas tree as “a massive steel structure with a number of hollow pipes that are closed and opened with steel slides (valves) used to regulate the outflow of oil and gas from the well, which seal off the oil well in the closed position.”

out the risk of damage by sabotage of the IBIBIO-I well that was easy to commit at relatively low cost by simply sealing off the wellhead using a concrete plug, as was done, in fact, in 2010 following the commencement of these proceedings. Nor did SPDC have insufficient interest in better securing this exploratory well – which had been abandoned since 1959 or 1960 – before 2006 using a concrete plug. This means that the District Court is of the opinion that it is also fair, just and reasonable to rule that in the case at issue, SPDC had a specific duty of care in respect of the people living in the vicinity of the IBIBIO-I well and especially fishermen and farmers like Akpan, to take security measures against sabotage that can be reasonably demanded. It is an established fact that prior to the oil spills of 2006 and 2007, SPDC failed to properly secure the IBIBIO-I well.¹⁶⁶⁰

What these cases indicate is the lack of adequate and effective remedies in Nigeria and their implications for the Niger Delta as the people are left without compensation from environmental injuries that are not their fault, but which cripple their means of survival. It would be a mitigation if the various agencies of government saddled with the responsibilities to regulate the oil industry were up to the task of securing a safe environment for the people, since it is difficult to obtain adequate and effective remedies from the court. Yet as seen in chapter 4, the regulatory agencies are not discharging their duties as efficiently as expected. Indeed, the Supreme Court acknowledged the double predicaments that sufferers of environmental harms in the Niger Delta face. In the case of *Centre for Oil Pollution Watch vs. N.N.P.C.*,¹⁶⁶¹ the Court admitted that

It cannot be denied that there are legislations and agencies specifically put in place to address issues of environmental degradation, such as the National Environmental Standards and Regulation Enforcement Agency (Establishment) Act, 2007 (NESREA Act), which provides, inter alia, for the enforcement of compliance with laws, guidelines, policies and standards on environmental matters, the National Oil Spill Detection and Response Act and the National Oil Spill Detection and Response Agency (NOSDRA) created to detect and respond to oil spillage within the National Territory. There are also State environmental laws and agencies. The issue that arises is what is the remedy of persons affected or likely to be affected by the effect of the environmental degradation where the statutory agencies fail to carry out their responsibilities or where the land belongs to no one in particular, as in this case, but the effect of the pollution extends far beyond the immediate environment?...where a government agency fails to carry out its statutory function in circumstances such as

¹⁶⁶⁰ *Ibid* at 22 (paras. 4.43-4.44).

¹⁶⁶¹ (2019) 5 NWLR (Part 1666) at 518.

The appellant' ENGO instituted the suit against the defendant to restore and remediate the environment of the Niger Delta that was affected by oil spill from the defendant's facility. The trial court struck out the suit on grounds that the appellant was not competent to institute the suit, having not been directly affected by the oil spill. On appeal to the CA, the CA affirmed the trial court's decision. However, on further appeal to the Supreme Court, the Court departed on the narrow position on locus standi in environmental litigation and held that ENGOs have sufficient interest in maintaining environmental integrity of Nigeria sufficient to clothe the appellant with locus standi to sue. The case was remitted back to the trial court to adjudicate on the substance of the case.

this, it is highly unlikely that the government, Federal or State, would institute an action against its own agency. The public would be left without a remedy.¹⁶⁶²

Despite the acknowledgment, Nigerian courts seem handicapped to craft adequate and effective remedies as done in other countries, because Nigeria does not have enforceable CERs that would provide the court with the tools to do that. For instance, Brazilian judges “have significant leeway to fashion creative remedies in environmental cases and are recognized for being relatively insulated from political pressures”¹⁶⁶³ because Brazil has enforceable CERs which provides specific and general guidelines for environmental remedies. For instance, regarding Brazil, Boyd argues that the “constitutional reforms have contributed to ‘the development of a veritable juridical subsystem, whereby new laws are guided by the idea of collective protection of rights.’”¹⁶⁶⁴ Like the Aarhus Convention,¹⁶⁶⁵ Brazil and other countries have provided adequate and effective remedies in their Constitutions, against environmental injustices. The Table below identifies some of these remedies.

S/N.	Country	Nature of Remedy	Constitutional provision
1.	Brazil	Criminal and Administrative Sanctions	Article 225 (§3°) ¹⁶⁶⁶
2.	Brazil	Obligation to repair the damage caused	Article 225 (§3°) ¹⁶⁶⁷
3.	Ecuador	Restoration of the derogated environment	Article 72 ¹⁶⁶⁸

¹⁶⁶² Per *Kekere-Ekun, J.S.C.* at 587 (paras. A–H).

¹⁶⁶³ Kenneth Markowitz & Jo Gerardu, “The Importance of the Judiciary in Environmental Compliance and Enforcement” (2012) 29 (2) *Pace Env'tl.L.Rev.* 538 at 547

¹⁶⁶⁴ Boyd, *supra*, note 28 at 132.

¹⁶⁶⁵ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 136.

¹⁶⁶⁶ Article 225 (§3°) provides that conduct and activities “considered harmful to the environment shall subject the violators, be they individuals or legal entities, to criminal and administrative sanctions, irrespective of the obligation to repair the damages caused.”

¹⁶⁶⁷ Article 225 (§3°) provides that conduct and activities “considered harmful to the environment shall subject the violators, be they individuals or legal entities, to criminal and administrative sanctions, irrespective of the obligation to repair the damages caused.”

¹⁶⁶⁸ Article 72 provides that nature “has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.”

4.	Ecuador	Compensation to individuals and communities affected by environmental degradation	Article 72 ¹⁶⁶⁹
5.	Ecuador	Elimination and mitigation of the harmful environmental consequences	Article 72 ¹⁶⁷⁰
6.	Ecuador	Reparation for environmental injury	Article 86 (3) ¹⁶⁷¹
7.	Ecuador	Sanction corresponding to environmental injury caused	Article 397 ¹⁶⁷²
8.	Ecuador	Prevention of further occurrence of environmental injury	Article 396 ¹⁶⁷³
9.	Ecuador	Maintenance of ongoing environmental monitoring system	Article 396 ¹⁶⁷⁴

¹⁶⁶⁹ Article 72 provides that nature “has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems. In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.”

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¹⁶⁷¹ Article 86 (3) provides that the “judge shall rule on the case by means of a sentence and, if the infringement of rights has been detected, he/she will have to state this, order integral tangible and intangible reparation and specify and individualize the obligations, both positive and negative, aimed at the target of the legal decision issued and the circumstances under which they must be complied with.”

¹⁶⁷² Article 397 provides that in “case of environmental damages, the State shall act immediately and with a subsidiary approach to guarantee the health and restoration of ecosystems. In addition to the corresponding sanction, the State shall file against the operator of the activity that produced the damage proceedings for the obligations entailing integral reparation, under the conditions and on the basis of the procedures provided for by law. The responsibility shall also pertain to the public servants responsible for carrying out environmental monitoring.”

¹⁶⁷³ Article 396 provides that the “...Responsibility for environmental damage is objective. All damage to the environment, in addition to the respective penalties, shall also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities. Each one of the players in the processes of production, distribution, marketing and use of goods or services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system. The legal proceedings to prosecute and punish those responsible for environmental damages shall not be subject to any statute of limitations.”

¹⁶⁷⁴ Article 396 provides that the “...Responsibility for environmental damage is objective. All damage to the environment, in addition to the respective penalties, shall also entail the obligation of integrally restoring the ecosystems and compensating the affected persons and communities. Each one of the players in the processes of production, distribution, marketing and use of goods or services shall accept direct responsibility for preventing any environmental impact, for mitigating and repairing the damages caused, and for maintaining an ongoing environmental monitoring system. The legal proceedings to prosecute and punish those responsible for environmental damages shall not be subject to any statute of limitations.”

10.	Bolivia	Timely indemnification of environmental injury	Article 113 ¹⁶⁷⁵
11.	The Philippines	Exclusive enjoyment of environmental resources by Filipinos	Section 2 of Article XII ¹⁶⁷⁶

Table 5.1: Constitutional remedies against environmental injustice by country

For instance, in the Philippines, the remedy of insisting on public participation in environmental resource management is highlighted by the case of *International Service for the Acquisition of Agri-Biotech Applications, Inc. (ISAAA) v. Greenpeace Southeast Asia (Philippines) & Ors.*¹⁶⁷⁷ which was commenced by writ of continuing mandamus. Here, the benefit of article XII (2) fell for interpretation. By way of background, *Executive Order No. 430, 1990*¹⁶⁷⁸ creates the National Committee on Biosafety of the Philippines (NCBP) (section 1)¹⁶⁷⁹ to regulate the biosafety sector (section 4).¹⁶⁸⁰ *Administrative Order No. 8, 2002* was also promulgated to provide “rules and regulations for the importation and release into the environment of plants and plant products derived from the use of modern biotechnology.”¹⁶⁸¹

¹⁶⁷⁵ Article 113 (I) provides that victims “of violations “of their rights are granted the right to timely indemnification, reparation and compensation for damages and prejudices.”

¹⁶⁷⁶ Section 2 of article XII provides that “...The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.”

¹⁶⁷⁷ G.R. No. 20927, Judgment of the Supreme Court of 8 December 2015, <https://elaw.org/system/files/ph.greenpeace_1.pdf> [*ISAAA v. Greenpeace Southeast Asia (Philippines) & Ors.*].

¹⁶⁷⁸ Executive Order N0. 430 of October 15, 1990, <<https://ncbp.dost.gov.ph/19-guidelines/24-executive-order-no-430-s-1990>>.

¹⁶⁷⁹ Section 1 provides that there “is hereby constituted the National Committee on Biosafety of the Philippines, hereinafter referred to as the NCBP, which shall be attached to the Department of Science and Technology.”

¹⁶⁸⁰ Section 4 provides that the NCBP “shall have the following functions: (a) Identify and evaluate potentials hazards involved in initiating genetic engineering experiments or the introduction of new species and genetically engineered organisms and recommend measures to minimize risks; (b) Formulate and review national policies and guidelines on biosafety, such as the safe conduct of work on genetic engineering, pests and their genetic materials for the protection of public health, environment and personnel and supervise the implementation thereof; (c) Formulate and review national policies and guidelines in risk assessment of work biotechnology, and supervise the implementation thereof; (d) Develop working arrangements with the government quarantine services and institutions in the evaluation, monitoring, and review of projects vis-a-vis adherence to national policies and guidelines on biosafety; (e) Assist in the development of technical expertise, facilities and other resources for quarantine services and risk assessments; (f) Recommend the development and promotion of research programs to establish risk assessment protocols and assessment of long-term environmental effects of biological research covered by these guidelines; (g) Publish the results of internal deliberation and agency reviews of the committee; (h) Hold public deliberations on proposed national policies, guidelines and other biosafety issues; (i) Provide assistance in the formulation, amendment of pertinent laws, rules and regulations; and (j) Call upon the assistance of any government agency, department, office, bureau including government-owned and/or controlled corporations.”

¹⁶⁸¹ Department of Agriculture, “Administrative Order No. 8 of April 3, 2002, <http://biotech.da.gov.ph/upload/DA_AO_8-signed_copy.pdf>. See the preamble.

The Administrative Order empowers the Bureau of Plant Industry (BPI) to decide applications for all field trials to be conducted in the Philippines (section 7 of part III).¹⁶⁸² President Gloria Macapagal-Arroyo further signed *Executive Order No. 514*, 2006, whose preamble establishes the National Biosafety Framework (NBF) and prescribes "guidelines for its implementation, strengthening the national committee on biosafety of the Philippines." The NBF is the overarching regulation on biotechnology in the Philippines (section 2.1).¹⁶⁸³

The ISAAA began collaborative research to develop a genetically modified organism (GMO) called a *Bt talong* or bioengineered eggplant that would be pest resistant.¹⁶⁸⁴ Under the supervision of the NCBP, the contained experiment of *Bt talong* commenced in 2007 and ended in March 2009 with the NCBP issuing a Certificate of Completion of Contained Experiment, indicating that all regulatory measures had been observed during the experiment and that no unfortunate occurrence happened.¹⁶⁸⁵ In accordance with *Administrative Order No. 8*, 2002, on March 16 and June 28, 2010, the BPI granted Biosafety Permits. Consequently, field trials of *Bt talong* were conducted in various locations in the Philippines.¹⁶⁸⁶

The respondents, including Greenpeace Southeast Asia and Magsasaka at Siyentipiko sa Pagpapaunlad ng Agrikultura (a coalition of NGOs, local farmers, scientists) and certain residents of the Philippines sued ISAAA, alleging that the GMO is harmful to the environment and that because an ECC was not obtained before the commencement of field trials of *Bt talong*, the field trial infringed on their constitutional right to a healthy and balanced ecology.¹⁶⁸⁷ They also alleged that the appellants did not comply with the public consultation requirement of the

¹⁶⁸² Section 7 of part III provides that "No regulated article shall be released into the environment for field testing unless: (i) a Permit to Field Test has been secured from the BPI; and (ii) the regulated article has been tested under contained conditions in the Philippines. The containment of a regulated article shall be reduced and the scale of release increased only if based on the risk assessment of the contained use the field testing of the regulated article will pose no significant risks to human health and the environment."

¹⁶⁸³ Section 2.1 provides that the NBF "shall apply to the development, adoption and implementation of all biosafety policies, measures and guidelines and in making biosafety decisions concerning the research, development, handling and use, transboundary movement, release into the environment and management of regulated articles."

¹⁶⁸⁴ The developmental process of the GMO involved the combination of "crystal toxin genes from the soil bacterium *Bacillus thuringiensis* (Bt)" with "the eggplant (talong) genome to produce the protein CryIAc which is toxic to the target insect pests. CryIAc protein is said to be highly specific to lepidopteran larvae such as the fruit and shoot borer (FSB), [which is] the most destructive insect pest of eggplant." See page 8 of the judgment.

¹⁶⁸⁵ *ISAAA v. Greenpeace Southeast Asia (Philippines) & Ors.*, *supra* note 1677 at 8.

¹⁶⁸⁶ *Ibid.*

¹⁶⁸⁷ *Ibid.*

law before commencing field trial of *Bt talong* and that the plaintiffs did not apply the precautionary principle during field trials.¹⁶⁸⁸

The Court of Appeal (CA) gave judgment in favor of Greenpeace and the citizens, permanently prohibiting further conduct of field trials of *Bt talong* and directing ISAAA to “protect, preserve, rehabilitate and restore the environment.”¹⁶⁸⁹ ISAAA appealed the judgment to the Supreme Court and raised various issues for determination, including that there was no proof of environmental damage from the conducted field trials, and that they had complied with legal and procedural requirements including those mandating prior public consultation and the precautionary principle in the conduct of the field trial.¹⁶⁹⁰

On adherence to extant laws and procedures including public consultation before the conduct of field trials, the Court observed,

We find that petitioners simply adhered to the procedures laid down by DAO 08-2002 and no real effort was made to operationalize the principles of the NBF in the conduct of field testing of *Bt talong*. The failure of DAO 08-2002 to accommodate the NBF means that the Department of Agriculture lacks mechanisms to mandate applicants to comply with international biosafety protocols...Significantly, while petitioners repeatedly argued that the subject field trials are not covered by the EIS law, EO 514 clearly mandates that concerned departments and agencies, most particularly petitioners DENR-EMB, BPI and FPA, make a determination whether the EIS system should apply to the release of GMOs into the environment and issue joint guidelines on the matter. The Philippine EIS System (PEISS) is concerned primarily with assessing the direct and indirect impacts of a project on the biophysical and human environment and ensuring that these impacts are addressed by appropriate environmental protection and enhancement measures...There are six stages in the regular EIA process. The proponent initiates the first three stages while the EMB takes the lead in the last three stages. Public participation is enlisted in most stages. Even without the issuance of EO 514, GMO field testing should have at least been considered for EIA under existing regulations of petitioner EMB on new and emerging technologies.¹⁶⁹¹

On the application of the precautionary principle, the Court observed,

When these features — uncertainty, the possibility of irreversible harm, and the possibility of serious harm — coincide, the case for the precautionary principle is strongest. When in doubt, cases must be resolved in favor of the constitutional right

¹⁶⁸⁸ *Ibid* at 9.

¹⁶⁸⁹ *Ibid* at 13.

¹⁶⁹⁰ *Ibid* at 36.

¹⁶⁹¹ *Ibid* at 91.

to a balanced and healthful ecology. Parenthetically, judicial adjudication is one of the strongest fora in which the precautionary principle may find applicability. Assessing the evidence on record, as well as the current state of GMO research worldwide, the Court finds all the three conditions present in this case - uncertainty, the possibility of irreversible harm and the possibility of serious harm. Eggplants (talong) are a staple vegetable in the country and grown by small-scale farmers, majority of whom are poor and marginalized. While the goal of increasing crop yields to raise farm incomes is laudable, independent scientific studies revealed uncertainties due to unfulfilled economic benefits from Bt crops and plants, adverse effects on the environment associated with use of GE technology in agriculture, and serious health hazards from consumption of GM foods. For a biodiversity-rich country like the Philippines, the natural and unforeseen consequences of contamination and genetic pollution would be disastrous and irreversible. Alongside the aforesaid uncertainties, the non-implementation of the NBF in the crucial stages of risk assessment and public consultation, including the determination of the applicability of the EIS requirements to GMO field testing, are compelling reasons for the application of the precautionary principle. There exists a preponderance of evidence that the release of GMOs into the environment threatens to damage our ecosystems and not just the field trial sites, and eventually the health of our people once the Bt eggplants are consumed as food.¹⁶⁹²

Based on the above, the Court affirmed the decision of the CA, annulled *Administrative Order No. 08, 2002*, and as a remedy, permanently prohibited the conduct of field trials for *Bt talong* and suspended the use of GMO pending the promulgation of a new Administrative Order to replace the annulled *Administrative Order No. 08, 2002*.¹⁶⁹³ The Court was persuaded to impose the remedy due to the potential adverse effect of GMO on human health and the environment, which would negate the right to a healthy environment provided by the Constitution.

From the foregoing, this chapter recommends that in addition to CERs, Nigeria should enshrine adequate and effective environmental remedies in the Constitution, especially for the benefit of the Niger Delta people who are bearing the brunt of the environmental degradation due to the exploitation of crude oil in their territory. Examples of the nature of adequate and effective remedies in other jurisdictions have been provided. However, barriers to access to justice in Nigeria could inhibit the ability of the people, especially the in the Niger Delta, to sue for effective remedies for environmental harms. The next segment will examine these barriers and make recommendations on how they could be addressed.

¹⁶⁹² *Ibid* at 100-101.

¹⁶⁹³ *Ibid* at 102.

5.5 Overcoming Barriers to Access to Justice in Environmental Cases in Nigeria

There are barriers to access to justice for victims of environmental injury in Nigeria. Boyd argues that the “prospects for asserting constitutional environmental rights in Nigeria are limited because courts are subject to political interference and adhere to strict rules on standing, procedure, and costs.”¹⁶⁹⁴

Generally, the Aarhus Convention lists the following as possible barriers to access to justice: (a) financial barriers; (b) limitations on standing, (c) difficulty in obtaining legal counsel; (d) unclear review procedures; (e) corruption; (f) lack of awareness within the review bodies; (g) weak enforcement of judgements; and (h) lack of clear environmental standards, clear emissions requirements in permits, and regular monitoring and reporting of emissions data.¹⁶⁹⁵

This chapter will analyze these barriers identified by Aarhus Convention and what could be done to remedy them in Nigeria. However, the chapter will not analyze judicial corruption and weak enforcement of judgments because these barriers have already been discussed in chapter 4 of the thesis. This chapter will not also analyze unclear environmental standards in Nigeria because the thesis has already discussed this in chapter 3 in the segment on the *Potential for CERs’ to have a Cascading Effect on Environmental Law-making* where the thesis exposed the inconsistency between Nigeria’s revised NPCC which commits to end GHGs emissions in Nigeria by 2063¹⁶⁹⁶ and the PIA on the other hand, which is ramping up oil exploitation and legitimizes gas flare in Nigeria (section 107).¹⁶⁹⁷

5.5.1. Financial Barriers to Access Justice

According to experts, “protecting or enforcing one's right in a court of law in Nigeria can be very expensive. Litigants have to bear several costs.”¹⁶⁹⁸ With the majority of Nigerians living below the poverty line,¹⁶⁹⁹ poverty could exacerbate financial barriers to access to justice and constrain

¹⁶⁹⁴ Boyd, *supra* note 28 at 156.

¹⁶⁹⁵ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 135.

¹⁶⁹⁶ National Climate Change Policy for Nigeria, 2021-2030, *supra* note 648 at 13.

¹⁶⁹⁷ Section 107 provides that the Commission or the Authority “may grant a permit to a licensee or lessee to allow the flaring or venting of natural gas for a specific period— (a) where it is required for facility start-up; or (b) for strategic operational reasons, including testing.”

¹⁶⁹⁸ Breme & Adekoya, *supra* note 1484 at 264.

¹⁶⁹⁹ *Ibid* at 265.

litigants.¹⁷⁰⁰ Even if Nigeria makes constitutional environmental rights justiciable, justice affordability may frustrate the efforts of poor Nigerians from the Niger Delta. Recent data released by the World Bank indicates that 12% of the world's extremely poor are Nigerians (people surviving on less than \$1.90 USD per day).¹⁷⁰¹ Poverty is particularly acute in the Niger Delta with the region having the highest poverty rate in the country, estimated at 43%.¹⁷⁰² As such, poverty could affect justice affordability for the Niger Delta.

According to Olaitan Olusegun and Olatunji Oyelade, some access to justice costs includes legal representation, transportation and filing fees.¹⁷⁰³ These costs coincide with the Aarhus Convention which lists the following fees as financial barriers to access to justice: court or filing fees; lawyer's fees; transportation cost for witness; and expert witness fees.¹⁷⁰⁴

On court or filing fees, Okonkwo argues that in Nigeria, "cost is still an impediment to access to environmental justice, especially with the delay in administration of justice in environmental matters. Individuals and NGOs still bear their cost ... but with the possibility of judges awarding costs there is no provision for legal aid in environmental matters."¹⁷⁰⁵ These fees vary depending on the plaintiff's claim, the court involved and the state where the case is filed.

In many states of the federation, the costs of filing fundamental rights enforcement cases are unduly high. In Lagos State High Court, a litigant might pay about N7,500 (approximately \$60) to file an action for a fundamental rights enforcement; to file a simple motion costs N350 (approximately \$3). Federal High Court fees have recently become astronomical: to file a new action may cost about N50,000 (approximately \$400) for a monetary claim, while a simple motion costs about N330 (approximately \$3) ... In appeal cases, the appellant has to contend with various fees. Where a matter being filed includes a claim for a specified sum at the federal level, some State High Courts require that prospective plaintiffs should pay a certain percentage of that amount in addition to the filing fees.¹⁷⁰⁶

¹⁷⁰⁰ Boyd, *supra* note 28 at 146.

¹⁷⁰¹ The World Bank, "Half of the world's poor live in just 5 countries", <<https://blogs.worldbank.org/opendata/half-world-s-poor-live-just-5-countries>> [The World Bank - Half of the world's poor].

¹⁷⁰² Francis et al, *supra* note 25 at 10.

¹⁷⁰³ Olusegun & Oyelade, *supra* note 584 at 17.

¹⁷⁰⁴ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 134.

¹⁷⁰⁵ Okonkwo 1, *supra* note 1487 at 202.

¹⁷⁰⁶ Breme & Adekoya, *supra* note 1484 at 265.

This article was published in 2010 where the exchange rate between USD and Naira was \$1 to 125 Naira. Currently the exchange rate is about \$1 to 900 Naira.

With respect to lawyer fees, Eva Breme and Charles Adekoya opine that contracting “the services of a lawyer in fundamental rights enforcement cases will cost not less than [approximately \$400]. This amount excludes the cost of filing, service and other administrative expenses to be borne by the prospective applicant.”¹⁷⁰⁷ Because many Nigerians cannot afford the services of lawyers, they have become innovative in paying for legal services. In *S.P.D.C.N. Ltd. vs Okeh*, the plaintiff tried to pass on the cost of his lawyer’s fee to the defendant, but this was rejected by the Court of Appeal who held that “[u]nder the Nigerian law, claim to recoup solicitor’s fees paid by a party in a case to his counsel to defend him in that case is (sic) ungrantable under any head. In other words, claim for solicitor’s fees is an unusual claim and difficult to accept in Nigeria.”¹⁷⁰⁸

The federal government recognizes that lawyer’s fees constitute a barrier to access to justice and set up the Legal Aid Council to assist indigent litigants with legal representation. Considering the population of poor Nigerians, this intervention seems inadequate. The chapter will revisit Legal Aid in the segment on *Difficulty in obtaining legal counsel*.

Regarding transportation costs for witnesses, experts allege that in Nigeria:

The cost of attending court sittings, either as a witness for prosecution in criminal matters or as plaintiff in civil matters can be challenging. The Director of Public Prosecutions (DPP) at a state Ministry of Justice stated in an interview with the authors that sometimes she has to pay transportation costs for poor people to attend court to give evidence in matters in which they are the victims. The DPP added that the government has to resort to rendering this financial assistance because victims have been seen to abandon prosecuting crimes owing to their inability to afford the cost of attending court sittings.¹⁷⁰⁹

The Aarhus Convention does not mention transportation costs for litigants themselves when itemizing fees as barriers to access to justice. Yet considering the level of poverty in Nigeria, this is also a barrier. According to experts, an extra cost that “should not be underestimated is that of transportation to and from court ... access to justice can indeed be hindered by the impossibility of physically reaching the court building. The inability of people living in poverty to bear any expense for transport often forces people to walk to the court.”¹⁷¹⁰ This challenge is not only

¹⁷⁰⁷ Breme & Adekoya, *supra* note 1484 at 265.

¹⁷⁰⁸ *S.P.D.C.N. Ltd. vs Okeh*, *supra* note 1648 at 440 (paras. A-B).

¹⁷⁰⁹ Breme & Adekoya, *supra* note 1484 at 264-265.

¹⁷¹⁰ *Ibid* at 264.

exacerbated by poverty but also by the delay in justice delivery due to, for instance, incessant adjournments of cases with parties having to attend courts repeatedly before their cases are finally disposed of.¹⁷¹¹

Lastly, expert witness fees can constitute another barrier to access to justice in Nigeria. For instance, as provided by section 1(1) of Appendix 4 to the *Federal High Court (Civil Procedure) Rules, 2019*, (rules)¹⁷¹² the daily witness allowance in the FHC, for "[professional men[sic], merchants, captains of ships, auctioneers, pilots, mercantile agents, bank, managers, chiefs, surveyors and any other officer of the public service whose salary is not less than grade level 07 [is] 12,000: 00" (about \$17 CAD per day). Also as provided by section 1(2) of Appendix 4 of the same rules, the daily witness allowance in the FHC for "[m]ercantile assistants, other persons and officers in the public service whose salary is less than grade level 07 [is] 5,000: 00" (about \$7 CAD per day).

The following issues may be worth pointing out: First, in a country where the minimum wage is 30, 000 Naira (about \$90 CAD) per month, spending either one-third of the minimum monthly wage on a witness allowance alone is high. This would be particularly challenging for citizens of the Niger Delta where it is estimated that 46% of those in employment earn below 5,000 Naira monthly (less than \$15 CAD).¹⁷¹³ Second, considering the high rate of poverty in the Niger Delta, the current witness allowance has dire implications for the region. The World Bank estimates that one quarter of the households in the Niger Delta "belon[g] to the lowest welfare quintile (the core poor),"¹⁷¹⁴ - surviving on less than \$1.90 USD a day.¹⁷¹⁵ It would be difficult for the people to afford this.

Third, although not substantial, in addition to the daily witness allowance, the rules provide that a witness is also entitled to a transport allowance (section 2 of Appendix 4).¹⁷¹⁶ Fourth, the

¹⁷¹¹ *Ibid* at 270.

¹⁷¹² Federal High Court (Civil Procedure) Rules, 2019, <<https://laws.lawnigeria.com/2020/05/11/federal-high-court-civil-procedure-rules-2019-2/>>.

¹⁷¹³ Master Plan, *supra*, note 1 at 68.

¹⁷¹⁴ The World Bank, *Niger-Delta Social and Conflict Analysis* (The World Bank: Africa's Sustainable Development Department, 2008) at 14 [The World Bank].

¹⁷¹⁵ World Economic Forum, "Three Things Nigeria Must do to End Extreme Poverty", <<https://www.weforum.org/agenda/2019/03/90-million-nigerians-live-in-extreme-poverty-here-are-3-ways-to-bring-them-out/>>

¹⁷¹⁶ Section 2 of Appendix 4 provides the following, "(1) By private car per kilometre 20.00. (2) By private car per kilometre 10.00."

chapter has already discussed the issue of incessant adjournments of cases in Nigeria and how that contributes to the delay in the dispensation of justice in Nigeria. Asking litigants to pay daily witness allowances for cases with incessant adjournments is an added burden on the already financially stressed litigants and could discourage litigation.

Some countries have established measures in their Constitutions to address financial barriers to access to justice. These measures could manifest by way of the state paying all the fees incidental to justice delivery. For instance, in Brazil, the state bears the entire cost of litigation in all cases, including plaintiff's and opposing party's cost and the opposing party's lawyer's fee (Article 5 (LXXIII)), except where the case was instituted in bad faith.¹⁷¹⁷ In Bolivia, the Constitution provides for free legal access to justice and adequate legal assistance in all cases (section 11 of article III).¹⁷¹⁸ In Ecuador, not only is everything in the justice delivery value chain free (article 168 (4)),¹⁷¹⁹ free access to justice in all cases is also a fundamental right (article 75).¹⁷²⁰

Another constitutional means of addressing the barrier posed by fees for accessing justice is the constitutional mandate that government agencies institute and try cases to protect the environment and this obviates the need for the victims themselves to go to court to sue. In Brazil (article 129 (III))¹⁷²¹ and Bolivia (article 136 (II)),¹⁷²² the respective Constitutions establish state institutions with the responsibility to institute civil cases to protect the environment.

A further constitutional means to address the financial barriers to access to justice is the mandate of the State to give assistance to the victims to assist them to litigate cases in court. The

¹⁷¹⁷ Article 5 (LXXIII) provides that "any citizen has standing to bring a popular action to annul an act injurious to the public patrimony or to the patrimony of an entity in which the State participates, to administrative morality, to the environment and to historic and cultural patrimony; except in a case of proven bad faith, the plaintiff is exempt from court costs and from the burden of paying the prevailing party's attorneys' fees and costs."

¹⁷¹⁸ Section 11 of article III provides that "Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty."

¹⁷¹⁹ Article 168 (4) provides that "Access to the administration of justice shall be free of charge."

¹⁷²⁰ Article 75 provides that "Every person has the right to free access to justice."

¹⁷²¹ Article 129 provides that the "institutional functions of the Public Ministry are... III. to institute civil investigations and public civil actions to protect the public and social patrimony, the environment and other diffuse and collective interests."

¹⁷²² Article 136 (II) provides that "Any person, in his or her individual name or on behalf of a collective, may file this action, and it shall be filed obligatorily by the Public Ministry and the Public Defender (Ministerio Público y el Defensor del Pueblo) when, in the exercise of their functions, they have knowledge of these acts."

Constitution of Ecuador mandates state institutions to support litigants (article 191).¹⁷²³ In Brazil, the state has the duty to provide unconditional legal assistance to poor litigants (Article 5 (LXXIV)).¹⁷²⁴

Because of the high level of poverty and exorbitant fees associated with access to justice in Nigeria, the chapter recommends that Nigeria adopt in its Constitution, legal assistance to poor litigants. The chapter has provided some examples of countries that have taken proactive constitutional steps to address this issue, which include the removal of filing fees when instituting all civil cases, including environmental litigation, eliminating the award of costs by the courts in environmental litigation cases, irrespective of the outcome, appointment of state-funded officials to institute civil cases, including environmental litigation on behalf of the people and state-funded legal representation in respect of all civil cases, including environmental litigation. These may be highly desirable in Nigeria.¹⁷²⁵

However, as observed in chapter 4 in the segment on *challenges to compliance monitoring, implementation and enforcement of environmental norm*, corruption has frustrated past social intervention efforts by the Nigerian state. For example, in chapter 4, the thesis analyzed how corruption is impeding the NDDC from delivering on its mandate to protect the Niger Delta. If corruption is not addressed as recommended in chapter 4, government officials and private sector collaborators would be the profiteers from constitutional interventions targeting legal assistance to poor litigants in Nigeria. Therefore, these multiple challenges all need to be addressed.

5.5.2. Other Procedural Barriers: Limitation Periods, Formalism and Horizontal Application of CERs

Other issues that constitute a barrier to access to justice in Nigeria include limitation periods in civil cases; formalism; and horizontal application of CERs. The chapter will proceed to analyze each of these limitations and how to overcome them.

¹⁷²³ Article 191 provides that the Office of the Attorney for the Defense of the People “...shall provide technical, timely, efficient, effective and free-of-charge legal services to support and legally advise the rights of persons in all matters and institutions.”

¹⁷²⁴ Article 5 (LXXIV) provides that “the State shall provide full and gratuitous legal assistance to anyone who proves that he has insufficient funds.”

¹⁷²⁵ Boyd, *supra*, note 28 at 69.

5.5.2.1. *Limitation Periods in Civil Cases*

A procedural hurdle that Nigeria is still using to deny plaintiffs compensation in environmental litigation in the Niger Delta is the strict requirements of limitation periods for instituting proceedings against public institutions and officials. For instance, section 12 (1) of the *NNPC Act, 1977* provides for a limitation period of 12 months within which to institute proceedings against the NNPC, its board member or an employee for a wrong committed by these entities.¹⁷²⁶

In *Eboigbe v. NNPC*,¹⁷²⁷ the plaintiff alleged that he had moved from Nigeria to Northern Ireland in 1979 and remained there until 1983 when he returned to Nigeria. Upon his return, he discovered that the NNPC had pulled down a considerable part of his family farm in 1979, while constructing oil pipelines. He alleged that all his 5 brothers who were in Nigeria at the time were illiterate and so did not know how to pursue their family rights. He sued but the NNPC urged the court to dismiss the suit because it was filed more than 12 months after the cause of action arose. The matter ended in the Supreme Court which dismissed the suit on the grounds that ‘time begins to run from the date that the cause of action accrues.’¹⁷²⁸ Commenting on this judgment of the Supreme Court, and making a postscript on limitation periods in Nigeria and how they perpetuate injustice in the Niger Delta, Frynas argues:

If a plaintiff is illiterate or if there is no nearby court, a lawsuit may be delayed for a long time until he or she receives correct legal advice or collects the necessary funds to file a suit. In the meantime, the lawsuit may become statute barred. Even if the plaintiffs have enough funds and are aware of their legal rights, a legal claim may become statute barred because of the latency period. The full effects of oil operations are not always immediately apparent. Damage such as long-term soil degradation requires a latency period for its development. The injury may not be immediately visible or may go undiscovered for a period of time. Conducting proper scientific studies may take many years to assess changes.¹⁷²⁹

¹⁷²⁶ The Nigerian National Petroleum Corporation Act (No. 33 of 1977), <<https://nlipw.com/nigerian-national-petroleum-corporation-act/>>. Section 12 (1) provides that “Notwithstanding anything in any other enactment, no suit against the Corporation, a member of the Board or any employee of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof.”

¹⁷²⁷ (1994) 10 KLR (Pt. 22) 68.

¹⁷²⁸ Frynas, *supra* note 750 at 129.

¹⁷²⁹ *Ibid.*

In Nigeria any environmental litigation instituted after 12 months, no matter the magnitude of damage to the environment, or the time of discovery by the plaintiffs, is likely to be dismissed by the courts.

Elsewhere, this barrier has been overcome. For example, in Ecuador, article 396 of the Constitution, 2008 provides that “legal proceedings to prosecute and punish those responsible for environmental damages shall not be subject to any statute of limitations.” This is supported by article 88 of the same Constitution which provides that “[p]rotection proceedings shall be aimed at ensuring the direct and efficient safeguard of the rights enshrined in the Constitution and can be filed whenever there is a breach of constitutional rights as a result of deeds or omissions.”

This chapter recommends that Nigeria adopt similar provisions in its Constitution which would abolish the practice of limitation periods in cases of environmental harm and ensure greater access to justice for Nigerians, particularly the Niger Delta people. Alternatively, a change could be implemented to the law in Nigeria so that time only begins to run whenever the damage is discovered or reasonably discoverable. This would be particularly useful in cases of long-term, latent harms or where people do not have the sophistication to realize that oil has been spilled or that certain damage has occurred to their environment.

5.5.2.2. Formalism

Article 169 of the Constitution of Ecuador provides that justice “shall not be sacrificed because of the sole omission of formalities.” As there are no similar provisions in the Nigerian Constitution, Nigerian courts often seem to rely on formalities to deny Environmental Justice in the Niger Delta.

The case of *Shell v. Isaiah*¹⁷³⁰ is an example of this. It was alleged that in 1988, a tree fell on and destroyed the appellant’s oil pipeline in the Niger Delta. The impact led to the escape of crude oil from the pipeline which spilled over and damaged the respondents’ farmlands, streams, fishponds and forest swamps. The respondents successfully sued the appellant at the high court and obtained judgment; the appellant unsuccessfully appealed to the Court of Appeal. A further appeal to the Supreme Court was successful. It turned out that in 1993, while the hearing of the matter was ongoing, the then federal military government promulgated the *Constitution*

¹⁷³⁰ (2001) 5 S.C. (Pt. 11) 1.

*(Suspension and Modification) Decree, 1993*¹⁷³¹ which retroactively robbed the trial High Court of its earlier jurisdiction in respect of the matter, and this was now vested in the Federal High Court.

The Supreme Court consequently reversed the decisions of the two courts before it and held that “although the Decree was an amendment to the Federal Constitution, from the moment the Decree (now Act) was signed, the jurisdiction of the trial court was ousted.”¹⁷³² It did not weigh on the mind of the Supreme Court that the Federal High Court has concurrent jurisdiction with the trial Court as a result of the Decree.

Again, Kenya presents an example of what is possible with CERs. It is safe to assume that on similar facts, the courts in Kenya would have arrived at a different conclusion on the basis of article 13(3) of the *ELCA* which provides that “[n]othing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.” These scenarios indicate that CERs could have an important role to play in reducing procedural hurdles in litigating against the environmental degradation in the Niger Delta.

5.5.2.3. Horizontal Application of CERs

While vertical application of rights is when the rights apply “between the state and private persons,” horizontal application of rights, on the other hand, is when the rights also apply “between private persons.”¹⁷³³ Constitutional rights only apply vertically and not horizontally in Nigeria. The effect of this is that those suffering in the Niger Delta are not able to proceed in court against individuals and private entities, including the TNCs and obtain relief, for the various disruptions to their lives and sources of livelihoods due to the exploitation of resources in their territory. Because Nigeria does not have enforceable CERs, there is no certainty on the horizontal application of CERs in Nigeria.

¹⁷³¹ Decree No. 107 of 1993. See “Chronology of Nigerian Decrees” <<https://www.abfrco.com/1993n.htm>>.

¹⁷³² Oyende, *supra* note 69 at 94.

¹⁷³³ Brian Sang, “Horizontal Application of Constitutional Rights in Kenya: A Comparative Critique of the Emerging Jurisprudence” (2018) 26 (1) *Afr J Intl Comp L*. 1 at 2.

However, the chapter will speculate on what the position of the law would be by drawing an analogy from the decisions of the courts on the horizontal application of the constitutionally guaranteed right to life in Nigeria.¹⁷³⁴ Right to life is relevant because in the absence of enforceable CERs, people seem to rely on the expansive interpretation of the right to life to enforce their environmental rights, as was attempted in the Nigerian case of *Gbemre vs. Shell*.¹⁷³⁵

The position of the law in Nigeria is that the fundamental right to life does not apply horizontally. In *Agbeniga vs. Adejimiroye & Anor.*,¹⁷³⁶ the applicant approached the court to enforce her right to life against the respondents who, after allegedly beating her with cutlass and horsewhip such that she was in a coma and was only resuscitated after 2 days by medical experts, were further threatening her life. The Court of Appeal, relying on its earlier decision in *Kelvin Peterside Vs. International Bank (Nig.) Ltd.*,¹⁷³⁷ held that “the provision of Section 33 of the Constitution cannot be enforced against individuals because there is a sanction prescribed in the Criminal Code for whosoever threatened the life of another, the right to life is only enforceable against the State or any of its agencies.”¹⁷³⁸

The position of the law in pre-2010 Kenya was like Nigeria - that constitutionally guaranteed rights could only apply vertically (against government actors) and not horizontally (against private actors). The case in point is *Charles Lekuyen Nabori & 9 Others Vs. The Honourable Attorney General & 3 Ors.*, decided in 2007.¹⁷³⁹ The Food and Agricultural Organization in 1983-1984, in partnership with other respondents, initiated the cultivation of 2 plants - *prosopis juliflora* and *prosopis Braziliansis* - to tackle deforestation in the Lake Baringo basin in Kenya. Within 20 years, the plants had exponentially increased in and expanded into neighboring areas, became invasive species, and jeopardized the environment of these areas. The residents of the affected areas sued the government, alleging that it had allowed the introduction of the invasive

¹⁷³⁴ Section 33 (1) of the Nigerian Constitution provides that “Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.”

¹⁷³⁵ *Gbemre v. Shell*, *supra* note 139.

¹⁷³⁶ Suit No. CA/AK/67/2013 <<https://lawcarenigeria.com/mrs-olayiwola-rachael-agbeniga-v-chief-abraham-adejimiroye-anor-2016/>> [*Agbeniga vs. Adejimiroye & Anor.*].

¹⁷³⁷ (1993) 2 NWLR (Pt.278) 712.

¹⁷³⁸ *Agbeniga vs. Adejimiroye & Anor.*, *supra* note 1736.

¹⁷³⁹ Petition 466 of 2006, <<http://kenyalaw.org/caselaw/cases/view/41547/>>.

plants, which degraded the environment, thereby derogating from the right to live in a clean and healthy environment - a necessary component of their constitutional right to life.

Although the court found that the government was involved in the introduction of the plants, it dismissed the case on grounds that there was no evidence that the invasion had affected the petitioners' right to life. On the horizontal application of human rights, the court held that

[U]nder the constitution it is the Government which protects and guarantees the fundamental rights and freedoms of its people. These rights are vertical not horizontal and the correct party to join even in the case of the Government is the Attorney-General. No other individuals should be made a party thereon. In that case joining the 3rd and 4th respondents to this petition was a misjoinder of parties and is an abuse of the Court process.¹⁷⁴⁰

However, with the introduction of CERs in Kenya, the court was able to expand CERs to apply horizontally as well. In *Abdalla Rhova Hiribae & 3 Others Vs. The Hon Attorney General & 6 Others*,¹⁷⁴¹ the petitioners had alleged that government had approved various projects, including the extraction of titanium in the Tana Delta Wetlands, without carrying out any comprehensive Environmental Impact Assessments to study the effects of the projects on the environment and on the lives of the people living within the area who would be affected. They argued that this constituted an infringement of their constitutional right to a clean and healthy environment.¹⁷⁴² Tana Delta is among the 6 Kenyan sites recognized by the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), 1971*.¹⁷⁴³

The court held that the respondents had complied with all their statutory duties in respect of the projects and therefore did not breach the petitioners' right to a clean and healthy environment.¹⁷⁴⁴ However, the 2nd respondent (the National Environmental Management Authority), relying on precedents based on the repealed 1963 Constitution, objected to being joined as a party to the suit, on grounds that constitutionally guaranteed rights do not apply horizontally but only vertically against the government. The court overruled the previous position of the law and held that:

¹⁷⁴⁰ *Ibid* at 43.

¹⁷⁴¹ *Hiribae Vs. AG*, *supra* note 638.

¹⁷⁴² *Ibid* at paras. 1, 3 & 38.

¹⁷⁴³ The United Nations, "The *Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), 1971*" <<https://treaties.un.org/doc/Publication/UNTS/Volume%20996/volume-996-I-14583-English.pdf>>.

¹⁷⁴⁴ *Hiribae Vs. AG*, *supra*, note 638 at para. 64.

The 2nd respondent is correct that, at the time the decisions it has relied on were made, the constitution then in force limited the application of constitutional rights to the state, and an action for violation of a constitutional right could not be maintained against private individuals or entities; that there was only vertical, and not horizontal, application of the Bill of Rights. However, the Constitution of Kenya 2010 has changed the situation, and the Bill of Rights is binding on both state and non-state actors. Article 2 of the Constitution provides that '*This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*' (Emphasis added) At Article 20, the Constitution provides that '*The Bill of Rights applies to all law and binds all State organs and all persons.*' (Emphasis added) To my mind, the express constitutional provision that the Constitution in general and the Bill of Rights in particular applies to and binds all persons represents a radical departure from the position under the former constitution where only the state could be held liable for violation or infringement of constitutional rights. In my view, where the facts so demonstrate, an individual or corporate person such as the 2nd, 3rd, 4th, 6th and 7th respondents can be held to have violated another person's constitutional rights, and appropriate orders or declarations issued.¹⁷⁴⁵

In South Africa, at first it appeared that constitutionally guaranteed rights including CERs did not apply horizontally. This was the import of the judgment of the Constitutional Court in the case of *Du Plessis and Others v De Klerk and Another*.¹⁷⁴⁶ The respondents sued the appellants who were a media house and its staff for defamation. Although the case was filed before the coming into effect of the Interim Constitution of South Africa, 1993 (IC), it was not resolved when the IC came into force, so the appellants amended their processes and relied on the provisions of section 15 (freedom of expression) of the IC as their defence. They argued that section 15 of the IC allowed them to publish the said defamatory article.¹⁷⁴⁷

The Court dismissed the appeal and held that section 15 did not apply horizontally to protect the appellants:¹⁷⁴⁸ "section 15 is not capable of application to any relationship other than that between persons and legislative or executive organs of the state at all levels of government."¹⁷⁴⁹ But a few months later, the Court reversed itself in *Certification of the Constitution of the*

¹⁷⁴⁵ *Ibid* at paras. 45–47.

¹⁷⁴⁶ (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850 <<http://www.saflii.org/za/cases/ZACC/1996/10.html>> [*Du Plessis and Others v De Klerk and Another*].

¹⁷⁴⁷ The Interim Constitution of South Africa came into force in April 27, 1994, <<https://www.peaceagreements.org/viewmasterdocument/407>> [Interim Constitution of South Africa]. Section 15 provides that "(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research. (2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion."

¹⁷⁴⁸ *Du Plessis and Others v De Klerk and Another*, *supra* note 1746.

¹⁷⁴⁹ *Ibid* at para. 67.

Republic of South Africa.¹⁷⁵⁰ The IC of South Africa was meant to operate until the coming into force of a new Constitution (NC), now the Constitution of South Africa, 1996. Section 68 of the IC created a Constituent Assembly (CA) to draft the NC.¹⁷⁵¹ To be effective, as provided in section 71 of the IC, the Chairperson of the CA was meant to forward the draft NC to the Constitutional Court for certification that every provision of the NC conforms with specific principles outlined in the IC.¹⁷⁵² The case arose over compliance with the mandatory certification process outlined in section 71 of the IC.¹⁷⁵³ Specifically, section 8 (2) of the NC provided for the horizontal application of rights, including CERs.¹⁷⁵⁴ The Court had to pronounce on section 8(2) of the NC. After hearing arguments, the Court concluded that rights apply horizontally in South Africa:

Objection was taken to this provision on the ground that it would impose obligations upon persons other than organs of state, ...[on the ground that] ...the effect of horizontality is to permit the courts to encroach upon the proper terrain of the legislature, in that it permits the courts to alter legislation and, in particular, the common law...The argument, then, that a “horizontal” application of the Bill of Rights will inevitably involve the courts in the business of the legislature to an extent

¹⁷⁵⁰ (CCT 23/96) [1996] ZACC 2 <<http://www.saflii.org/za/cases/ZACC/1996/26.html>> [*Certification of the Constitution of the Republic of South Africa*].

¹⁷⁵¹ Interim constitution of South Africa, *supra*, note 1740.

Section 68 of the IC provides that “(1) The National Assembly and the Senate, sitting jointly for the purposes of this Chapter, shall be the Constitutional Assembly. (2) The Constitutional Assembly shall draft and adopt a new constitutional text in accordance with this Chapter. (3)(a) The first sitting of the Constitutional Assembly shall be convened by the President of the Senate not later than seven days as from the first sitting of the Senate under this Constitution. (b) Any subsequent sittings of the Constitutional Assembly shall be convened by the Chairperson of the Constitutional Assembly after consultation with the Speaker and the President of the Senate. (4) Subject to the rules and orders contemplated in Section 70 and save where clearly inappropriate, Sections 55 and 56 and the provisions of this Constitution with regard to joint sittings of the National Assembly and the Senate shall apply mutatis mutandis in respect of the Constitutional Assembly.”

¹⁷⁵² *Ibid.*

Section 71 of the IC provides that “(1) A new constitutional text shall: (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter. (2) The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles referred to in Subsection (1)(a). (3) A decision of the Constitutional Court in terms of Subsection (2) certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof. (4) During the course of the proceedings of the Constitutional Assembly any proposed draft of the constitutional text before the Constitutional Assembly, or any part or provision of such text, shall be referred to the Constitutional Court by the Chairperson if petitioned to do so by at least one fifth of all the members of the Constitutional Assembly, in order to obtain an opinion from the Court as to whether such proposed text, or part or provision thereof, would, if passed by the Constitutional Assembly, comply with the Constitutional Principles.”

¹⁷⁵³ *Certification of the Constitution of the Republic of South Africa*, *supra* note 1750 at para. 483.

¹⁷⁵⁴ Interim Constitution of South Africa, *supra*, note 1740. Section 8 (2) provides that “A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.”

that they would not be involved were the Bill of Rights to operate only “vertically”, is misconceived..¹⁷⁵⁵

There are at least 2 important lessons that can be drawn from the analysis of the horizontal application of CERs. First, the debate as to whether rights should apply horizontally has polarized opinion among legal experts both in South Africa and around the world. The Constitutional Court accepted this fact in *Du Plessis and Others v De Klerk and Another*.¹⁷⁵⁶ The Court gave 2 reasons for the lack of unanimity by noting that a “comparative examination shows at once that there is no universal answer to the problem of vertical or horizontal application of a Bill of Rights. Further, it shows that the simple vertical/horizontal dichotomy can be misleading.”¹⁷⁵⁷ Perhaps because of the first reason above, it is apparent that some countries do not embrace the horizontal application of rights. In *Du Plessis*, the Constitutional Court observed that it “appears that there are several jurisdictions which reject the horizontal application, or at least the direct horizontal application of constitutional rights.”¹⁷⁵⁸ However, as seen in the Kenyan experience, especially with the decision in *Abdalla Rhova Hiribae & 3 Others Vs. The Hon Attorney General & 6 Others*,¹⁷⁵⁹ the horizontal application of CERs could be useful in furthering environmental sustainability.

As shown in this thesis and especially in chapter 2, one recurring theme is the unassailable fact that the unsustainable practices and activities of the TNCs are major contributors to the environmental degradation of the Niger Delta. Also, as shown in chapter 4 of this thesis, the Nigerian government and courts do not adequately enforce the few environmental laws and regulations in Nigeria and this laxity seems to have emboldened the TNCs to continue to pollute the Niger Delta environment. In that sense, and as done in Kenya, the chapter recommends that Nigeria constitutionalize CERs that are both vertically and horizontally binding. The horizontal application of CERs would prove a useful tool in the hands of the Niger Delta people in pressurizing the TNCs to operate in an environmentally sustainable manner by proceeding against them in courts. In addition, the Niger Delta people, like their Kenyan counterparts in

¹⁷⁵⁵ *Certification of the Constitution of the Republic of South Africa*, *supra* note 1750 at paras. 53-55.

¹⁷⁵⁶ *Du Plessis and Others v De Klerk and Another*, *supra* note 1746 at para. 8.

¹⁷⁵⁷ *Ibid* at para. 33.

¹⁷⁵⁸ *Ibid* at para. 36.

¹⁷⁵⁹ *Hiribae Vs. AG*, *supra* note 638.

Abdalla Rhova Hiribae,¹⁷⁶⁰ would be able to approach the courts to seek compensation and an order compelling the TNCs to clean up the degraded Niger Delta environment.

5.5.2.4. Difficulty in obtaining Legal Counsel

The Aarhus Convention recognizes that difficulties exist in obtaining legal counsel and this constitutes a barrier to access to justice.¹⁷⁶¹ This is evident in Nigeria because of the high rate of poverty in the country. In recognition of this, the federal government enacted the *Legal Aid Council Act, 2011* (LACA),¹⁷⁶² to create a “legal aid and access to justice fund by means of which financial assistance would be made available to ... indigent citizens to prosecute their claims” and to also “empower the existing Legal Aid Council to be responsible for the operation of a scheme for the granting of legal aid and access to justice in certain matters or proceedings to persons with inadequate resources” (the preamble).

Section 1(1) of LACA establishes the Legal Aid Council (Council) with the responsibility “of assisting indigent persons to access such advice, assistance, and representation in court where the interest of justice demands, to secure, defend, enforce, protect or otherwise exercise any right, obligation, duty, privilege interest or service to which that person is ordinarily entitled under the Nigerian legal system” (section 8(4)). The nature of legal aid could be by way of assisting a private legal practitioner who is representing the indigent litigant; the provision of legal representation from the Council to the indigent person; and the provision of any additional assistance as may be recommended by the Council (section 8(5)).¹⁷⁶³ Therefore, Nigeria already recognizes the problem of cost as a barrier to accessing justice and has taken steps to address it.

However, there are challenges that, if not addressed, could limit the ability of the Council to provide legal services to a large segment of the people. First, although exceptions could be made

¹⁷⁶⁰ *Ibid.*

¹⁷⁶¹ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 135.

¹⁷⁶² Legal Aid Act, 2011, <<https://lawpadi.com/wp-content/uploads/2015/08/Legal-Aid-Act-2011.pdf>> [Legal Aid Act, 2011].

¹⁷⁶³ Section 8 (5) provides that legal Aid “shall consist, on terms provided by this Act, of- (a) the assistance of a legal practitioner including all such assistance as is usually given to by a private legal practitioner in the steps preliminary or incidental to any proceeding; (b) representation by a legal practitioner including all such assistance as is usually given to by a private legal practitioner before any court; and (c) such additional aid (including advice) as may be prescribed.”

in exceptional circumstances (section 10 (2)),¹⁷⁶⁴ generally legal aid is granted to persons whose income does not exceed the national minimum wage (section 10 (1)).¹⁷⁶⁵ In a country where litigation is very expensive – as was analyzed in the segment on financial barriers to access to justice above - using the national minimum wage which is currently 30,000 Naira (about \$44 CAD) as the baseline would cut off other struggling people from legal assistance offered by the Council because even those with higher incomes still cannot afford justice in the courts.

Second, despite meeting the minimum wage threshold, selection for legal aid is not automatic but at the discretion of the Council (section 8 (6)).¹⁷⁶⁶ The chapter argues that when the selection process moves to the realm of discretion, it becomes subjective and is susceptible to corruption, nepotism and cronyism.

Third, indigent people may have difficulty reaching the Council. Although the Council has offices in all the 36 States of the federation¹⁷⁶⁷ there are 774 Local Government Areas¹⁷⁶⁸ and most indigent people are resident in the local areas and can barely afford to get to the local government headquarters, much less the state capital.¹⁷⁶⁹ The chapter recommends that the Council should establish offices in all the local government areas in Nigeria, so that indigent Nigerians can avail themselves of legal aid rendered by the Council with greater proximity to them. The Council could also have travelling officers to offer services to persons in the hinterland with limited access to local government capital towns.

Fourth, the LACA only grants legal assistance to persons, and not communities and NGOs. As shown in chapter 3 in the segment on *Extraterritorial Litigation*, NGOs are becoming increasingly involved in the protection of the Niger Delta environment, therefore extending legal

¹⁷⁶⁴ Section 10 (2) provides that notwithstanding “the provision of subsection (1), the Board may, in exceptional circumstance, grant legal aid service to a person whose earning exceeds the national minimum wage.”

¹⁷⁶⁵ Section 10 (1) provides that legal aid “shall only be granted to a person whose income does not exceed the national minimum wage.”

¹⁷⁶⁶ Section 8 (6) provides that where “regulations made provide for Legal aid, provision shall be made therein to the effect that persons shall not be given legal aid in connection with any such proceeding unless he shows to the satisfaction of the Director-General or other person authorized by the Council that he has reasonable grounds for taking, defending or being a party Scope of legal Aid and access to Justice. Second Schedule thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case.”

¹⁷⁶⁷ Legal Aid Council, “Offices”, <<https://legalaidcouncil.gov.ng/#>>.

¹⁷⁶⁸ Part I of the First Schedule to the 1999 Constitution. Local Government Areas are the third tier of government in Nigeria.

¹⁷⁶⁹ Francis et al, *supra*, note 25 at 40.

aid to all financially struggling NGOs could only improve their contribution to the sustainability of the Niger Delta.

Fifth, the Council “lacks sufficient lawyers, especially those that are experienced, which has the consequence of limited expertise while handling cases as well as the stress experienced by available lawyers who cannot met up with the several demands of clients.”¹⁷⁷⁰ The chapter recommends that the Council should recruit sufficient lawyers to offer legal services for the teaming Nigerians who need affordable legal services.

Sixth, the administrative cost “of running a legal aid scheme is high and the government does not invest sufficient resources for the smooth and effective operations of the Council.”¹⁷⁷¹ The chapter recommends that government could mandate companies operating in Nigeria, especially the TNCs, to set aside a percentage of their annual profits to fund the Council. Nigeria already has a precedent with the enactment of the *Education Tax Act, 1993*, which mandates companies operating in Nigeria to set aside 2 % of their annual profits to fund education in Nigeria (subsections (1) and (2) of section 1).¹⁷⁷² A similar legislation could be enacted to fund the Council. Seventh, because of the high illiteracy rate, many poor people do not even know about the existence of legal aid, and therefore do not benefit from the services.¹⁷⁷³

The level of illiteracy in the Niger Delta is very high.¹⁷⁷⁴ The situation is worsening by the day because of lack of investments in these areas. For instance, a single primary school serves 3,700 pupils or in the alternative “an area of 14 square kilometers, while one secondary school serves 14,679 people...The quality of education received by these children has also been declining...mainly due to a serious shortage of quality teachers, the lack of basic teaching materials, and the disrepair of school facilities.”¹⁷⁷⁵ The result is that 3 out of 5 “schoolchildren in rural communities of the Niger Delta cannot read as a result of severely understaffed schools.

¹⁷⁷⁰ Olusegun & Oyelade, *supra* note 584 at 18.

¹⁷⁷¹ *Ibid.*

¹⁷⁷² No. 7 of 1993, <<https://lawcarenigeria.com/education-tax-act/?msclkid=e04325fbd03611ec8a8b391ccbacb243>>. Section 1 (1) provides that as “from the commencement of this Act, there shall be charged and payable an annual education tax which shall be assessed, collected and administered in accordance with the provisions of this Act.” Section 1 (2) provides that the “tax, which shall be at the rate of two per cent, shall be charged on the assessable profit of a company registered in Nigeria.”

¹⁷⁷³ Olusegun & Oyelade, *supra* note 584 at 20.

¹⁷⁷⁴ StartSomeGood, “Educate 1000 Schoolchildren in Rural Niger Delta”, <<https://startsomegood.com/educate-children-in-rural-niger-delta>> [StartSomeGood].

¹⁷⁷⁵ Francis et al, *supra* note 25 at 40.

This means that in a few years, there will be more illiterates than ever in the region.”¹⁷⁷⁶ How would these people become aware of legal aid?

This re-enforces the need to allow ENGOs and communities to access legal services offered by the Council on behalf of the people because these social groups are more adept at exploring and utilizing (government) facilities to aid their pursuit. This could eliminate the barrier to access to justice posed by the difficulty in obtaining legal services and would have greater impact than what LACA offers.

Lastly, the NBA could create a section to handle cases pro bono (free of charge) to indigent people who may not be able to pay for legal services.¹⁷⁷⁷ The NBA has been offering pro bono cases in an ad hoc basis. One of such was in 2020, in the wake of what is now known as the #ENDSARS protest. Nigerian youths had demonstrated and demanded the disbandment of the notorious police unit – the Special Anti-Robbery Squad (SARS) and to end police brutality generally. This peaceful demonstration snowballed into violent scenes when on October 20, 2020, at the Lekki Toll Gate in Lagos State, these protesting “law abiding and unarmed citizens were fired with live ammunitions by people reported to be personnel of the Nigerian military leaving several persons with different degrees of gunshot injuries, and many reportedly dead.”¹⁷⁷⁸

One of the initiatives by the NBA was to set up a "pro bono scheme...to provide legal support to peaceful protesters across the country; [and] ... the commitment to providing free legal aid to, and representing victims of, human rights violations before the various Judicial Panels of Inquiry established by State Governments across the country” to investigate Police brutality in Nigeria.¹⁷⁷⁹ Considering the high incidences of poverty and illiteracy in Nigeria, coupled with the state of resourcing of the Legal Aid Council, the offering of permanent pro bono services by the NBA would compliment government’s effort through the legal aid program. This however is

¹⁷⁷⁶ StartSomeGood, *supra* note 1774.

¹⁷⁷⁷ Presently, the NBA has 3 sections: Section on Public Interest and Development Law; Section on Business Law; and Section on Legal Practice. See Nigerian Bar Association, “Sections”, <SECTION/FORA | Nigeria Bar Association (nigerianbar.org.ng)>.

¹⁷⁷⁸ NEC Bundle Dec 2020, “Communique Issued at the End of the Emergency Meeting of the National Executive Committee of the Nigerian Bar Association” (22 October 2020) at 41 <NEC REPORTS | Nigeria Bar Association (nigerianbar.org.ng)>.

¹⁷⁷⁹ *Ibid* at 59.

arguably, a moral duty of the NBA and not an obligation that can be legally enforced as the NBA does not owe any legal duty to the public not being the holder of any public mandate.

5.5.2.5. *Unclear Review Procedures*

The Aarhus Convention observes that unclear review procedures are a barrier to access to justice.¹⁷⁸⁰ Uncertain review procedures hardly inspire confidence and litigants would be wary to approach the court when procedure is not clear. This may explain why the decision in *Gbemre's* case is yet to become a reference point for the Niger Delta.

As already analyzed in chapter 1 in the segment on *Expansive interpretation of HRs in Nigeria*, *Gbemre v. Shell & Others*¹⁷⁸¹ highlights the vagueness of judicial procedure to address gas flaring in the Niger Delta. Using the *Fundamental Right Enforcement Procedure Rules*, *Gbemre* sued Shell on behalf of himself and his community. He alleged that the sustained gas flaring by the defendant during the exploitation of crude oil, as allowed by section 3(2) (a) and (b) of the *AGRA*,¹⁷⁸² is a violation of the right to a safe environment provided for by article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. The court agreed and gave judgment in his favor.¹⁷⁸³

However, in *Okpala & Others v. Shell & Others*,¹⁷⁸⁴ a case with facts like *Gbemre's case*, which was earlier analyzed by the chapter in the segment on *What to Challenge*, the same FHC (though in another judicial division) refused to follow the precedent in *Gbemre*. The court instead dismissed the suit because “the rights guaranteed under the African Charter were not covered within the definition of fundamental rights under the scope of section 46(1) of the 1999 Constitution and that the African Charter did not stipulate any special procedure for the enforcement of the rights contained therein.”¹⁷⁸⁵

Contrary to the precedent in *Gbemre*, this decision means that the *Fundamental Right Enforcement Procedure Rules* cannot be used to enforce the rights provided for in the African Charter in Nigerian courts. The adoption of CERs in Nigeria would address the confusion and

¹⁷⁸⁰ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 135.

¹⁷⁸¹ *Gbemre v. Shell*, *supra* note 139.

¹⁷⁸² Cap A25 Vol. 1, L.F.N., 2004

¹⁷⁸³ *Gbemre v. Shell*, *supra* note 139 at para. 5 (3).

¹⁷⁸⁴ [2006] (Unreported Suit) No. FHC/PHC/C5/518/2006.

¹⁷⁸⁵ Orji, *supra* note 1456 at 289.

provide clarity on who has jurisdiction to address the violation of the right to a safe environment through the continued gas flaring in the Niger Delta. The chapter recommends that Nigeria should enshrine enforceable CERs in order to provide a clear process for upholding the rights of its people, including Niger Deltans.

5.5.2.6. Lack of Awareness within the Review Bodies

The Aarhus Convention notes that lack of awareness within courts and other adjudicatory bodies is a barrier to access to justice.¹⁷⁸⁶ The Nigerian judiciary has not overcome this challenge. For instance, in December 2021, the NJC which is saddled with the constitutional duty to discipline judicial officers (section 21 (b) of Part I to the Third Schedule to the 1999 constitution)¹⁷⁸⁷ barred from promotion, 3 High Court judges of coordinate jurisdictions who gave contradictory *ex parte* orders in cases involving the same subject and parties.”¹⁷⁸⁸

Interestingly, the judges were not accused of corruption or misconduct in granting the orders. According to the NJC, there was “no written petition, allegations of corruption or impropriety against the subject Judges, Council nevertheless, initiated investigation pursuant to its inherent disciplinary powers ... to unravel the circumstances that led to the spate of *Exparte* Orders granted by these Courts of coordinate jurisdiction over matters bearing same parties and subject matter.”¹⁷⁸⁹

Analysis of the basis of the disciplinary measures taken by the NJC would reveal the lack of appreciation of legal rules and principles. 1 of the judges was disciplined because “he failed to exercise due diligence in granting the *Exparte* Order ... as there was no real urgency, in the circumstances of the matter, that would have required an *Exparte* Order.”¹⁷⁹⁰ Another was disciplined because the NJC “found fundamental defects and non-compliance with the law in

¹⁷⁸⁶ Aarhus Convention: An Implementation Guide, 1st ed, *supra* note 588 at 135, see the table titled, *Elements of Access to Justice*.

¹⁷⁸⁷ Section 21 (b) of Part I to the Third Schedule provides that the National Judicial Council “shall have power to...(b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over such officers.”

¹⁷⁸⁸ National Judicial Council, “Press Release: Conflicting *Exparte* Orders: NJC Bars Erring Judges from Promotion • issues them with Warning Letters • Appoints Nine (9) Heads of Court and Fifty-Four (54) Judges for 16 States” (15 December 2021), <<https://njc.gov.ng/46/news-details>>.

¹⁷⁸⁹ *Ibid.*

¹⁷⁹⁰ *Ibid.*

granting the Exparte Order.”¹⁷⁹¹ The third judge was disciplined “for allowing himself to be used as a tool for ‘forum shopping’ and abuse of Court process ... as it was evident that, in granting the Exparte Order, he was seised of earlier Orders of [other] High Courts ... of coordinate jurisdiction with his.”¹⁷⁹²

In March 2022, 3 months after the previous disciplinary actions were taken, 2 other judges were disciplined by the NJC for lack of appreciation of legal rules. 1 of the judges was issued a warning letter and placed on NJC’s watch list for 1 year “for signing the Writ of Possession for execution on the same day he delivered judgement ... The Suit was for recovery of demised property... his action was in contravention of ... High Court of the Federal Capital Territory Civil Procedure Rules 2018 and ... the Judgement Enforcement Rules 2004.”¹⁷⁹³ The second judge was issued with a warning letter for signing “the Writ of Attachment while the Garnishee Order Nisi was pending.”¹⁷⁹⁴

Discipline of judges is commendable because it will send a message to other judges, but it may not give litigants much hope to continue to seek judicial redress for legal challenges that they may face. That judges were reprimanded may indicate that the judgments delivered by them were not sound in law and the party who got the unfavorable judgment may have to go on appeal to get the judgment set aside. Considering the barriers to access to justice that the appellant overcame at the trial court, indigent litigants caught in these situations may not have the wherewithal to prosecute the appeal and may have to live with the unfavorable judgment. Perhaps because of this, Okonkwo opines that to “help in justice delivery [in Nigeria], there is a need to inform and equip the judges with the necessary skills, information and material.”¹⁷⁹⁵

Although Nigeria has a scheme to train its judges generally, it is debatable if this general training is enough to equip judges with the skillsets needed to adjudicate on environmental law and policy. In fact, it was not until 1988 that environmental law was taught in Nigerian law schools

¹⁷⁹¹ *Ibid.*

¹⁷⁹² *Ibid.*

¹⁷⁹³ National Judicial Council, “Press Release: Njc Issues Warning Letters To Two Judicial Officers And Placed One Of Them On ‘Watch List’ · Recommends Appointment Of Six Heads Of Court And Nine Judicial Officers For The Federal And State High Courts, Sharia Court And Customary Court Of Appeal” (March 16, 2022) <<https://njc.gov.ng/48/news-details>>.

¹⁷⁹⁴ *Ibid.*

¹⁷⁹⁵ Okonkwo 1, *supra* note 1487 at 206.

for the first time.¹⁷⁹⁶ It was not also until 1991 that Nigeria established the National Judicial Institute (NJI) through the National Judicial Institute Act (section 1), with the responsibility to equip judges with skillsets required to deliver on their mandates (section 3).¹⁷⁹⁷ Sequel to this, the NJI has been organizing trainings, seminars, workshops and conferences for judges in Nigeria, but specifically on environmental law, the NJI has only organized training workshops twice - in 2006 and 2007 in collaboration with UNEP.¹⁷⁹⁸

Regarding HRs generally, the NJI, in conjunction with a Nigerian-based NGO – Civil Liberties Organization, the National Human Rights Commission and the Danish Center for Human Rights, Denmark, organized workshops for judges on HRs twice - in 1998 and 2001.¹⁷⁹⁹ In respect to oil and gas, the NJI, in conjunction with Shell, organized seminars for judges twice - in 1998 and 2002.¹⁸⁰⁰ Apart from the obvious inadequacy of trainings of judges in areas relative to the environment in the 1990s and early 2000s - which seems quite dated now, the collaboration of NJI with Shell - a TNC whose complicity in the sustainability crisis in the Niger Delta has been well-documented in this thesis, could explain why the confidence of the public in the judiciary to deliver judgements unfavourable to TNCs is not particularly strong.¹⁸⁰¹

Ecuador has realized that constant professional development in the judiciary will promote judicial efficiency and deepen access to justice. It therefore provides in its Constitution for

¹⁷⁹⁶ Okorodudu-Fubara, *supra* note 60 at 1.

¹⁷⁹⁷ National Judicial Institute Act, 1991, L.F.N., 2004, <(placng.org)>.

Section 1 provides that there “is hereby established a body to be known as the National Judicial Institute.” Section 3 provides that “(I) The Institute shall serve as the principal focal point of judicial activities relating to the promotion of efficiency, uniformity and improvement in the quality of judicial services in the superior and inferior courts. (2) For the purposes of subsection (I) of this section, the Institute is hereby empowered to-- (a) conduct courses for all categories of judicial officers and their supporting staff with a view to expanding and improving their overall knowledge and performance in their different sections of service; (b) provide continuing education for all categories of judicial officers by undertaking, organising, conducting and facilitating study courses, lectures, seminars, workshops, conferences and other programmes related to judicial education; (c) organise once in two years a conference for all Nigerian Judges of superior and inferior courts respectively; (d) disseminate by way of publication of books, journals, records, reports or other means of information about any part of its activities, to the extent deemed justified by the Board and generally as a contribution towards knowledge; and (e) promote or undertake any other activity which in the opinion of the Board is calculated to help achieve the purpose for which the Institute was established.”

¹⁷⁹⁸ National Judicial Institute, “Activities of NJI”, <Activities of NJI – National Judicial Institute>.

¹⁷⁹⁹ *Ibid.*

¹⁸⁰⁰ *Ibid.*

¹⁸⁰¹ Innocent Anaba et al, “Citing Ill-health, CJN Quits after Row with Supreme Court Justices”, *Vanguard* (28 June 2022) <<https://www.vanguardngr.com/2022/06/citing-ill-health-cjn-quits-after-row-with-supreme-court-justices/>> [Anaba et al].

continuous training and regular assessment of judicial officers (article 170).¹⁸⁰² If Nigeria adopts enforceable CERs, specialized training of judges in environmental sustainability would be crucial to the ability of the judiciary to enforce CERs. According to May and Daly, “countries have adopted or amended constitutions to entrench fundamental environmental rights. This extension of constitutionalism has the potential to transform the conversation about environmental rights, responsibilities, and regulation. That potential is a function of judicial openness to efforts to vindicate emerging constitutional environmental rights in new and unknown ways.”¹⁸⁰³

Therefore, the need for judicial education for the effective enforcement of environmental regulations cannot be over-emphasized.¹⁸⁰⁴ Research has established that the lack of specialized judges impacts the implementation of CERs, with Shelton even expressing doubts about “whether legally trained, nontechnical judges are the appropriate arbiters of a clean and healthy environment.”¹⁸⁰⁵ Because of these issues, this Chapter recommends that Nigeria adopts the Ecuadorian example and enshrine in the Constitution constant professional development and evaluation of judicial officers, especially in environmental law. This would affect the quality of judgements of courts and tribunals, which could in turn eliminate extra cost that litigants would have expended on appeal to set aside unfavorable judgements that were decided *per incuriam*.

5.6. Conclusion

This chapter has analyzed how CERs could widen access to justice and how wider access to justice could encourage environmental litigation by those impacted by environmental harm in the Niger Delta. This would come about through the relaxation of the rules of standing to institute proceedings; the availability of constitutional and legislative environmental rights whose violations would be acted upon by the court; impartial and independent adjudicatory mechanisms to enforce constitutional and legislative environmental laws when violated; and availability of remedies, including injunctions to redress environmental injuries.

¹⁸⁰² Article 170 provides that “...Professional development shall be guaranteed by continuous training and periodic evaluation of the performance of public servants of the judiciary, as indispensable conditions for promotion and permanence in the judiciary career stream.”

¹⁸⁰³ May & Daly 2, *supra* note 99 at 366.

¹⁸⁰⁴ Ukala, *supra* note 1461 at 98-99.

¹⁸⁰⁵ Shelton 2, *supra* note 109 at 119.

However, reaping the CERs benefits which a wider access to justice could produce would depend on the judiciary who is primarily saddled with the responsibility of administering justice in Nigeria. For instance, the Nigerian judiciary has been described as conservative,¹⁸⁰⁶ which presupposes a resistance to change. This could limit the realization of the benefits of CERs through public involvement in environmental litigation for the betterment of the Niger Delta. Furthermore, there is the presumption that Nigerian “courts are highly influenced by the [executive] government, which in turn is influenced by oil companies.”¹⁸⁰⁷ With the TNCs implicated in the degradation of the Niger Delta environment, this could inhibit the potential of CERs to enhance public participation through a wider access to justice.

The chapter has also analyzed potential barriers to access to justice in Nigeria, including financial barriers; difficulty in obtaining legal counsel; unclear review procedures; and lack of awareness of legal rules and principles within the review bodies. The chapter has made recommendations on how these barriers could be addressed. Without addressing these fundamentals, constitutionalizing environmental rights may just have a cosmetic effect. Empirical research conducted by Elizabeth Kaletskia et al have shown that adopting enforceable CERs “leads to the creation of rules, formal and informal, to which politicians must adhere. It can further potentially force policymakers to enact laws and regulations specifically aimed at improving the quality of” the environment.¹⁸⁰⁸ A good starting point would be to carefully craft constitutional provisions and laws to address these underlying factors that militate against access to justice in Nigeria.

The chapter has already analyzed some of the constitutional, legislative and policy measures that have been adopted by other countries and their effectiveness. However, if the necessary broader systemic changes are not implemented, CERs may not in fact be able to reach the potential in Nigeria that they have in other countries.

¹⁸⁰⁶ Frynas, *supra* note 750 at 123.

¹⁸⁰⁷ Ukala, *supra* note 1461 at 98-99.

¹⁸⁰⁸ Kaletskia et al, *supra* note 1483 at 434.

Chapter 6 – Conclusion

6.1. Conclusions

Nigeria overwhelmingly depends on the petroleum resources of the Niger Delta for its economic survival. As outlined in chapter 4, as of 2013, petroleum resources “[constituted] 90-95% of the state’s total budget revenues.”¹⁸⁰⁹ In 2017, it constituted an estimated 97 percent of state revenues.¹⁸¹⁰ In 2019, while it “accounted for about 5.8 percent of Nigeria’s real GDP, it was responsible for 95 percent of Nigeria’s foreign exchange earnings and 80 percent of its budget revenues.”¹⁸¹¹ In 2020, it accounted for an estimated 10 percent of Nigeria’s GDP and 86 percent of state’s export revenues.¹⁸¹²

The implication, as explained in chapter 4, is that “the Nigerian government has been willing to take extreme measures to protect the interests of the oil industry.”¹⁸¹³ The government fears that if environmental norms are effectively applied, the operators in Nigeria’s petroleum industry, especially the TNCs, could pull out of Nigeria, leaving the government without the much needed petroleum revenues.¹⁸¹⁴ Within this fiscal context, the government has “direct economic incentives to ensure that environmental regulations are not enforced against the oil companies.”¹⁸¹⁵

One of the downsides of the failure to implement environmental norms in Nigeria is that government is losing revenues that ought to have been channeled into developmental projects and programs. By “the 1990s, a World Bank report estimated that Nigeria was losing about US\$5.1 billion per annum to environmental degradation, in the face of poor mitigation measures and initiatives.”¹⁸¹⁶ The 1990’s may be 3 decades ago, but current statistics does not inspire confidence either. It “is estimated that wasting flared gas costs Nigeria between \$1 billion and \$2.5 billion a year in lost revenue. According to the [defunct] Nigerian National Petroleum

¹⁸⁰⁹ M’Gonigle & Takeda, *supra* note 491 at 1027.

¹⁸¹⁰ Tochukwu Okoli, “The Relationship between Oil Price Volatility and Macroeconomic Variables in Nigeria: A Vector Autoregressive (VAR) Approach” (2017) vol. 9 (6) Journal of Economics and Behavioral Studies 237 at 237.

¹⁸¹¹ Nwuke, *supra* note 1340.

¹⁸¹² Gbemi Onakoya & Oyinkanso Agunbiade, “Oil Sector Performance and Nigerian Macroeconomic Variables” (2020) Vol 28 (1) International Journal of Economics, Management and Accounting 35 at 35.

¹⁸¹³ M’Gonigle & Takeda, *supra* note 491 at 1027.

¹⁸¹⁴ Eaton, *supra* note 66 at 291.

¹⁸¹⁵ *Ibid* at 291.

¹⁸¹⁶ Federal Ministry of Environment, “National Policy on the Environment (Revised 2016) at 7 <<http://extwprlegs1.fao.org/docs/pdf/nig176320.pdf>>.

Corporation, Nigeria flared 32% (an average of 127 bcf) of associated gas in the first quarter of 2010.”¹⁸¹⁷

Another downside of the failure to implement environmental norms in Nigeria is the sustainability crisis in the Niger Delta. As presented in chapter 1, an estimated revenue of \$1 trillion USD has been realized by the government from the petroleum resources,¹⁸¹⁸ beginning from 1956 when petroleum was discovered in the Niger Delta.¹⁸¹⁹ Unfortunately, the Niger Delta environment has been bearing the brunt of government’s failure to implement environmental norms. According to the Department of Petroleum Resources, “approximately 31,121,909.80 barrels of oil were spilled in the [Niger Delta] ecosystem in around 9,107 events between 1976 and 2005.”¹⁸²⁰ Experts view the numbers by the government to be very conservative as they alleged that over “the last 7 decades, the Niger Delta has suffered from significant oil spillages with an estimated 7,950,000,000 l having been released in the region”.¹⁸²¹

Gas flaring has been another source of degradation of the Niger Delta environment. About 75% of associated gas in the crude oil value chain in the Niger Delta is flared and released into the environment.¹⁸²² With this, gas flaring in the Niger Delta is “the world’s second largest after Russia, accounting for at least 10% of the world total. More greenhouse gases are emitted in Nigeria than from all other sources in Sub-Saharan Africa combined.”¹⁸²³

The implications of the sustainability crisis in the Niger Delta on the people are dire. For instance, the peoples’ sources of livelihoods which are “based on fishing and farming, have also been completely destroyed or undermined by the oil industry.”¹⁸²⁴ Regarding fishing, the UNEP observes that in the Niger Delta, oil pollution “in many intertidal creeks has left mangroves denuded of leaves and stems, leaving roots coated in a bitumen-like substance sometimes 1 cm

¹⁸¹⁷ Francis et al, *supra* note 25 at 42.

¹⁸¹⁸ Ako & Olawuyi, *supra* note 10 at 567.

¹⁸¹⁹ Ebegbulem, Ekpe & Adejumo, *supra*, note 11 at 280.

¹⁸²⁰ A. Ikhumetse et al, “A Critical Review of Oil Spills in the Niger Delta Aquatic Environment: Causes, Impacts, and Bioremediation Assessment” (2022) 194:816 *Environ Monit Assess* 1 at 5.

¹⁸²¹ Christopher Obida et al, “Counting the Cost of the Niger Delta's Largest Oil Spills: Satellite Remote Sensing Reveals Extensive Environmental Damage with >1 Million People in the Impact Zone” (2021) 775 *The Science of the Total Environment* 1 at 2.

¹⁸²² Master Plan, *supra* note 1 at 72.

¹⁸²³ Francis et al, *supra* note 25 at 42.

¹⁸²⁴ Fact finding mission to the Niger-Delta, *supra* note 12 at 3-4.

or more thick. Mangroves are spawning areas for fish and nurseries for juvenile fish and the extensive pollution of these areas is impacting the fish life-cycle.”¹⁸²⁵

On fish farming, UNEP also notes that “a number of entrepreneurs had set up fish farms in or close to the creeks, their businesses have been ruined by an ever-present layer of floating oil.”¹⁸²⁶ On farming, the UNEP opines that when crude “oil reaches the root zone, crops and other plants begin to experience stress and can die, and this is a routine observation in Ogoniland [in the Niger Delta]. At one site ... the study found heavy contamination present 40 years after an oil spill occurred, despite repeated clean-up attempts.”¹⁸²⁷

Furthermore, UNEP observes that any “crops in areas directly impacted by oil spills will be damaged, and root crops, such as cassava, will become unusable. When farming recommences, plants generally show signs of stress and yields are reportedly lower than in non-impacted areas.”¹⁸²⁸ An estimated 44% of the people of the Niger Delta depends on agriculture, forestry and/or fishing for their livelihoods,¹⁸²⁹ because these occupations are environmentally dependent, and this could explain the high incidence of poverty in the Niger Delta. The World Bank estimates that ¼ of the households in the Niger Delta “belongs to the lowest welfare quintile (the core poor),”¹⁸³⁰ meaning that 1 out of 4 households in the Niger Delta are surviving on less than \$1.90 USD a day.¹⁸³¹

The degradation of the Niger Delta environment has also resulted in the falling health standards of the people. In some communities there, UNEP detected benzene “in all air samples at concentrations ranging from 0.155 to 48.2 µg/m³. Approximately 10 per cent of detected benzene concentrations in Ogoniland were higher than the concentrations WHO and the USEPA report as corresponding to a 1 in 10,000 cancer risk.”¹⁸³² UNEP also found unacceptable levels of exposure of the people of the Niger Delta “to petroleum hydrocarbons in outdoor air and

¹⁸²⁵ UNEP Report, *supra* note 13 at 10.

¹⁸²⁶ *Ibid.*

¹⁸²⁷ *Ibid* at 9.

¹⁸²⁸ *Ibid* at 10.

¹⁸²⁹ UNDP Report, *supra* note 16 at 25.

¹⁸³⁰ The World Bank, *supra* note 1714 at 14.

¹⁸³¹ World Economic Forum, “Three things Nigeria must do to end Extreme Poverty”, <<https://www.weforum.org/agenda/2019/03/90-million-nigerians-live-in-extreme-poverty-here-are-3-ways-to-bring-them-out/>>

¹⁸³² UNEP Report, *supra* note 13 at 11.

drinking water, sometimes at elevated concentrations. They are also exposed through dermal contacts from contaminated soil, sediments and surface water.”¹⁸³³ The health challenges are complicated by serious infrastructure deficit. For instance, approximately 80% of the Niger Delta people living in the rural areas and estimated 55% of their counterparts in urban centers lack access to safe drinking water.¹⁸³⁴ Because of near absence of potable water, people in some communities in the Niger Delta “are drinking water from wells that is contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) guideline.”¹⁸³⁵

Exploring the nexus between gas flaring and the health of the people, experts argue that gas flares “are a significant source of particulate matter emissions, exposing communities to sulfur dioxide, nitrogen dioxides, and more than 250 other toxins and carcinogenic substances. It is widely accepted that these pollutants are linked to significant health and environmental problems throughout the Niger Delta.”¹⁸³⁶ UNEP corroborates that in some communities in the Niger Delta, there is “evidence of a relationship between exposure to spilled oils and acute physical and psychological effects, as well as possible genotoxic and endocrine effects.”¹⁸³⁷

The appalling evidence of this can be gleaned from the World Bank reports that infant mortality in the Niger Delta stands at 120 per thousand as against the national average of 100 per thousand.¹⁸³⁸ Life expectancy in the Niger Delta has also deteriorated – from 60 years in the 1970s to 46.8 years in 2000¹⁸³⁹ and to 40 years in 2015 even below the national average of between 53 and 55 years.¹⁸⁴⁰ With this, UNEP concludes that since “average life expectancy in Nigeria is less than 50 years, it is a fair assumption that most members of the current Ogoniland community [in the Niger Delta] have lived with chronic oil pollution throughout their lives.”¹⁸⁴¹

¹⁸³³ *Ibid* at 10.

¹⁸³⁴ Master Plan, *supra* note 1 at 77.

¹⁸³⁵ UNEP Report, *supra* note 13 at 11.

¹⁸³⁶ Francis et al, *supra* note 25 at 42.

¹⁸³⁷ UNEP Report, *supra* note 13 at 9.

¹⁸³⁸ Francis et al, *supra* note 25. See table 1:1 at 10 & 11.

¹⁸³⁹ Master Plan, *supra* note 1 at 59.

¹⁸⁴⁰ The WHO, “Oil, Pollution, and Lives Cut Short: Health in the Niger Delta” <<http://www.sustainability-international.org/oil-pollution-and-lives-cut-short-health-in-the-niger-delta/>>

¹⁸⁴¹ UNEP Report, *supra* note 13 at 10.

To complicate the situation, there is an institutionalized inequitable policy of resource distribution in Nigeria which is skewed against the Niger Delta, and this prevents the Niger Delta from benefitting from resources extracted from its territory. This exclusion limits the opportunity of the people to benefit from economic and social interventions. For instance, an estimated 73% of the people rely on firewood as their primary energy source.¹⁸⁴² Also, an estimated 72 % of households in the Niger Delta do not have access to the national power grid meaning that without private alternatives, they do not have electricity.¹⁸⁴³

The resilience of the Niger Delta environment cannot be guaranteed in the face of sustained degradation. It is even possible that some components of the Niger Delta environment may have been damaged in a manner that make remedial efforts difficult. This a position taken by UNEP when it observed that in the Niger Delta, when “an oil spill occurs on land, fires often break out, killing vegetation and creating a crust over the land, making remediation or revegetation difficult.”¹⁸⁴⁴ It is equally possible that some components of the Niger Delta environment may have already been damaged forever. According to the UNEP, the “wetlands around Ogoniland [in the Niger Delta] are highly degraded and facing disintegration.”¹⁸⁴⁵

The grim picture painted above calls for concerted efforts to arrest these negative trends. As such, the goal of this thesis is to explore pathways to environmental sustainability for the Niger Delta. One such pathway, as canvassed by experts such as Boyd, is through CERs.¹⁸⁴⁶ Boyd’s research indicates that in many countries which have adopted CERs, CERs have wrought benefits which are useful in resolving the environmental sustainability crisis.

The thesis, through the lens of Boyd’s CERs research as the analytical framework, has investigated the potential of CERs to contribute to the sustainability of the Niger Delta. Boyd’s research inspired the analysis of the potential of CERs to contribute to the sustainability of the Niger Delta in 3 critical areas: incentivizing the enactment of environmental laws in Nigeria for the benefit of the Niger Delta; prompting the effective implementation of existing environmental laws; and widening access to justice to enhance the ability of the Niger Delta people to obtain

¹⁸⁴² UNDP Report, *supra* note 16 at 29.

¹⁸⁴³ Master Plan, *supra* note 1 at 95.

¹⁸⁴⁴ UNEP Report, *supra* note 13 at 10.

¹⁸⁴⁵ *Ibid.*

¹⁸⁴⁶ Boyd, *supra* note 28.

remedies for environmental harms that they suffer as a result of resource extraction in their territory.¹⁸⁴⁷ The main contribution of the thesis lies in the very specific and detailed case study of how CERs may, or may not, work in Nigeria to tackle the environmental crisis in the Niger Delta, and the conclusion or recommendations on what is needed to greatly improve the prospects of CERs.

The research also makes a significant contribution through its use of Environmental Justice as its theoretical framework, which offered an opportunity to delve deeply into the root causes of the Niger Delta crisis, and fully address the impact of policies and processes on the Niger Delta people as the crisis is viewed from a different, more holistic context. As analyzed in chapter 2, Environmental Justice exposes the underlying causes of the environmental degradation in the Niger Delta¹⁸⁴⁸.

Also, Environmental Justice explained why the impact of the environmental degradation in the Niger Delta is severely felt by the poor since Environmental Justice epistemology has established that the most vulnerable segments of society disproportionately bear the burden of environmental costs.¹⁸⁴⁹ Environmental Justice also allowed me to explore both substantive and procedural CERs as tools to achieve justice for the Niger Delta people.

Chapter 3 shows that Nigeria does not have adequate environmental laws that could assist in resolving the sustainability crisis in the Niger Delta.¹⁸⁵⁰ With examples from Brazil, Kenya, and Bolivia, the chapter also indicates that CERs could provoke a change by instigating the legislature to enact environmental laws. However, the chapter also examines the conflicting interests of Nigerian legislators and the dynamic of Nigerian politics as potential barriers preventing CERs from producing these benefits in Nigeria as they have in some other countries.

Also, the thesis in chapter 4 reveals that the laxity in the implementation of existing environmental laws in Nigeria further contributes to the sustainability crisis in the Niger Delta but with precedents from Brazil, Argentina, and Kenya, CERs could provoke the enforcement of environmental laws, which would lead to improvements in the environmental conditions

¹⁸⁴⁷ *Ibid* at 28-32 and 233-244.

¹⁸⁴⁸ Gonzalez 3, *supra* note 223 at 84.

¹⁸⁴⁹ *Ibid* at 84 & 85.

¹⁸⁵⁰ Oyende, *supra* note 69 at 63.

there.¹⁸⁵¹ Nevertheless, because of corruption and economic realities, as the Nigerian economy is majorly dependent on the petroleum resources from the Niger Delta, CERs may not be able to galvanize government and regulators to implement existing environmental laws in Nigeria.

Lastly, drawing from the experiences in Ecuador, Bolivia, Kenya, the Philippines, Brazil, Colombia, and South Africa, chapter 5 indicates that CERs could widen access to justice, and this would enhance the ability of Niger Deltans to sue and prevent, or at least obtain remedies for, environmental harms that result from the extraction of resources in its territory. However, there are barriers to access to justice in Nigeria, which include lack of other substantive environmental provisions upon which environmental litigation could be predicated; restricted rules of standing to institute environmental litigation; a shortage of impartial and independent adjudicatory fora to hear and decide environmental litigation; inadequate and effective remedies for environmental harms; and lack of public assistance towards overcoming financial and other barriers to access to justice. These barriers would affect the ability CERs to enhance access to justice for the people of the Niger Delta. The thesis also analyzed some of the constitutional, legislative and policy measures that have been adopted by other countries to further environmental sustainability and their effectiveness. However, if the necessary broader systemic changes recommended in the thesis are not implemented, CERs may not in fact be able to reach the potential in Nigeria that they have in other countries.

6.2. Recommendations

CERs have the potentials to contribute to the environmental sustainability of the Niger Delta as the prevailing statutory and common law frameworks are not adequate to protect the Niger Delta from the resultant effects on the environment from the exploitation of natural resources on its territory. May argues that in many countries with similar experiences to Nigeria, where “constitutional, statutory, and common law legal architectures... do not protect an individual's right to a clean and healthy environment... constituting [CERs] provides a ‘safety net’ for addressing environmental issues...and can be the last best hope for protecting both basic human rights and biodiversity.”¹⁸⁵²

¹⁸⁵¹ Eaton, *supra* note 66 at 271.

¹⁸⁵² May, *supra* note 93 at 124.

As such, the thesis recommended in chapter 1 that Nigeria should adopt the following CERs: the right to healthy environment, the right to water, the right to environmental information, the right to public participation in environmental governance and access to justice. These are the CERs adopted by the African Union of which Nigeria is a founding and subsisting member in Africa's foremost MEA¹⁸⁵³ – the revised Convention of Nature, 2017,¹⁸⁵⁴ to which Nigeria is a signatory.¹⁸⁵⁵

In chapter 1, the thesis analyzed the 3 different procedures available to provide for enforceable CERs in Nigeria. The first would be by making the limited and unenforceable content of section 20 of the Constitution justiciable. The second would be through an amendment of the Constitution to provide for environmental rights in a separate Chapter without merging them with the rights in Chapter IV. The third would be the inclusion of environmental rights in Chapter IV of the Constitution which contains other fundamental human rights. The first procedure will require the amendment of section 6 (6) (C) of the Constitution to make section 20 of the Constitution justiciable.

A Bill to amend section 6 (6) (C) must be approved by at least two-third of the members of each chamber of the NASS (the Senate and the House of Representatives). The approved Bill shall then be approved by at least two-thirds of the 36 State Houses of Assembly.¹⁸⁵⁶ These are the same requirements if the second procedure is adopted. However, the third procedure will require the approval of the Bill by at least four-fifths of the members of each of the 2 chambers of the NASS and thereafter, approved by at least two-thirds of the 36 States Houses of Assembly.¹⁸⁵⁷ This is a more onerous task. From the analysis, adding CERs to the Constitution in a separate Chapter as against putting them Chapter IV is the least cumbersome and more rewarding

¹⁸⁵³ Civil Society Legislative Advocacy Centre, *supra* note 102.

¹⁸⁵⁴ Africa's Revised Conservation Convention, *supra* note 100.

¹⁸⁵⁵ List of Signatories, *supra* note 101.

¹⁸⁵⁶ Section 9 (2) provides that "An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States."

¹⁸⁵⁷ Section 9 (3) provides that "An Act of the National Assembly for the purpose of altering the provisions of this section, section 8, or Chapter IV of this Constitution shall not be passed by either House of the National Assembly unless the proposal is approved by the votes of not less than four-fifths majority of all the members of each House, and also approved by a resolution of the House of Assembly of not less than two-thirds of all the States."

approach because it will require a smaller number of legislators to make the constitutional amendment.

As shown in chapter 2, there seems to be an institutionalized inequitable policy of resource distribution in Nigeria which is skewed against the people of the Niger Delta, and this bars them from the benefits of resource extraction in their territory. And the agitation by the Niger Delta youths for a fair share of the benefits of resource extraction in their territory often lead to the destruction of oil and gas facilities, thereby contributing to the environmental sustainability crisis in the Niger Delta. For example, the resource ownership structure in Nigeria which is enshrined in the Constitution places resource ownership and control in the federal government, which takes the decisions on resource allocation and distribution.¹⁸⁵⁸ Presently, the Niger Delta receives only 13%¹⁸⁵⁹ of the revenue from petroleum resources extracted in its territory while the federal government keeps the remaining 87%.¹⁸⁶⁰

As analyzed in chapter 2, CERs could help by entrenching distribution principles in the Constitution that ensure that the Niger Delta gets a share of the oil revenues commensurate with its contribution to the national revenues. The thesis recommends that federating units in Nigeria should own, and control natural resources found in their territories. The Niger Delta has been advocating for this since the discovery of oil in commercial quantity in Oloibiri in 1956 in the present day Bayelsa State, but the federal government has been resisting this change in the resource ownership structure with the agitations often turning into violent conflicts.¹⁸⁶¹ Ownership of resources by the federating units aligns with the principles of federalism which Nigeria professes to practice and could guarantee availability of financial resources to develop the Niger Delta and also ensure peace.¹⁸⁶²

In chapter 2, the thesis also examined the *Land Use Decree, 1978*¹⁸⁶³ which abolished individual ownership of land and created the present centralized land ownership structure. The effect of the

¹⁸⁵⁸ Item 39 of the 2nd Schedule to the *Constitution of the Federal Republic of Nigeria*, 1999.

¹⁸⁵⁹ Section 162(2) of the *Constitution of the Federal Republic of Nigeria*, 1999.

¹⁸⁶⁰ Section 162(1) of the *Constitution of the Federal Republic of Nigeria*, 1999.

¹⁸⁶¹ Celestine Onah, Ikechukwu Asadu & Benjamin Amujiri, “Dynamics of the Politico-Administrative Conflicts of Resource Control in Nigeria: Exploring the Oil Politics of Who gets What, When, and How” (2022) 46(2) *Natural Resources Forum* 245 at 250.

¹⁸⁶² Daniel Béland, Catarina Segatto & André Lecours, “The Fiscal Politics of Resource Revenue: Federalism, Oil Ownership and Territorial Conflict in Brazil and Canada” (2020) 8 (5) *Territory, Politics, Governance* 676 at 667.

¹⁸⁶³ Section 1 of the *Land Use Decree, 1978*

law is that the people of the Niger Delta have been divested of ownership of land and can no longer negotiate with the TNCs for compensation for land use and access nor lay claim to royalties from oil and gas mining. Chapter 2 indicated that CERS could also entrench distribution principles that recognize the Niger Delta and its people as the primary victims of environmental damage and as primary beneficiaries of whatever compensation schemes have been devised for environmental degradation. The thesis, therefore, recommends the amendment of the law to recognize individual and communal ownership of land in Nigeria.

As also shown in chapter 2, another indication of lack of fairness in the distribution of environmental benefits in Nigeria is the fact that the federal government is the entity entitled to receive compensation for environmental harms to the exclusion of the Niger Delta people who bear the brunt of the activities.¹⁸⁶⁴ For instance, before its repeal by the *Petroleum Industry Act, 2021* (PIA),¹⁸⁶⁵ section 3(2)c) of the defunct *Associated Gas Re-injection Act, 1979*,¹⁸⁶⁶ provided that any fine payable for gas flare “shall be made in the same manner and be subject to the same procedure as for the payment of royalties to the federal government by companies engaged in the production of oil.”¹⁸⁶⁷ Arguably, there has been a shift with the enactment of the PIA. Although the federal government still receives compensation for gas flare (section 104 (1) and (2)),¹⁸⁶⁸ the money received is now to be applied “for the purpose of environmental remediation and relief of the host communities of the settlers on which the penalties are levied” (section 104 (4)).¹⁸⁶⁹ The new regime established by the PIA regarding the penalty for gas flare is that a federal agency – the Nigerian Midstream and Downstream Petroleum Regulatory Authority determines the

¹⁸⁶⁴ Samy et al, *supra*, note 2 at 135.

¹⁸⁶⁵ No. 6 of 2021, online: available at <https://hrpib.org.ng/wp-content/uploads/2021/09/Petroleum-Industry-Act-2021-pdf.pdf> (last accessed November 8, 2021).

Section 310 (1) of the PIA provides that “From the effective date of this Act the following enactments and regulations are repealed—(a) Associated Gas Reinjection Act, 1979, Cap. A25, Laws of the Federation of Nigeria, 2004, and its Amendments.”

¹⁸⁶⁶ *The Associated Gas Re-Injection Decree, 1979*.

¹⁸⁶⁷ *Ibid*.

¹⁸⁶⁸ Section 104 provides that “(1) A licensee, lessee or marginal field operator that flares or vents natural gas, except —(a) in the case of an emergency, (b) pursuant to an exemption granted by the Commission, or (c) as an acceptable safety practice under established regulations, commits an offence under this Act and is liable to a fine as prescribed by the Commission in regulations under this Act. (2) A fine due under this section shall be paid in the same manner and be subject to the same procedure for the payment of royalties to the Government by companies engaged in the production of petroleum.”

¹⁸⁶⁹ Section 104 (4) provides that “Money received from gas flaring penalties by the Commission under this section, shall be for the purpose of environmental remediation and relief of the host communities of the settlers on which the penalties are levied.”

penalty for gas flare, while another federal agency - the Midstream and Downstream Gas Infrastructure Fund - now receives and administers the penalty “for midstream and downstream gas infrastructure investment within the Host Community of a designated facility” (section 33).¹⁸⁷⁰

However, considering the high level of public sector corruption in Nigeria which the thesis has analyzed in both chapters 4 and 5, which could frustrate the effective utilization of the compensation for the benefit of the Niger Delta,¹⁸⁷¹ an amendment of this law to make that compensation directly payable to the communities affected by the gas flares would enable the Niger Delta communities to directly receive and administer compensation for gas flare, since they bear the harmful effect of it, and would assist in assuaging the angst in the Niger Delta.¹⁸⁷² Beyond the payment of compensation for gas flare, considering the effect of gas flare on the Niger Delta environment, a permanent solution would be a complete elimination of gas flare in the Niger Delta, yet the PIA permits gas flare by oil and gas companies operating in Nigeria, including the Niger Delta (section 107).¹⁸⁷³

As an example of the deleterious effect of gas flare on the Niger Delta environment, in Ogoniland, UNEP detected benzene – a known carcinogenic hydrocarbon substance – “in all air samples at concentrations ranging from 0.155 to 48.2 µg/m³. Approximately 10 per cent of detected benzene concentrations in Ogoniland were higher than the concentrations WHO and the United States Environmental Protection Agency (USEPA) report as corresponding to a 1 in 10,000 cancer risk.”¹⁸⁷⁴ From this perspective, it seems that the PIA re-enforces the sustainability crisis in the Niger Delta instead of ameliorating same. It may be expedient to amend the provision allowing for gas flare in Nigeria.

¹⁸⁷⁰ Section 33 of the PIA provides that “Subject to section 216 of this Act, the Authority may make regulations [in respect of]... (y) any other matters as may be determined by the Authority under this Act which includes imposition of gas flare penalty arising from midstream operations which shall be for the credit of the Midstream and Downstream Gas Infrastructure Fund, and shall be utilised for midstream and downstream gas infrastructure investment within the Host Community of a designated facility.”

¹⁸⁷¹ Page, *supra*, note 320 at 1.

¹⁸⁷² Amaize, *supra*, note 321.

¹⁸⁷³ Section 107 provides that the Commission/Authority “may grant a permit to a licensee or lessee to allow the flaring or venting of natural gas for a specific period—(a) where it is required for facility start-up; or (b) for strategic operational reasons, including testing.”

¹⁸⁷⁴ UNEP Report, *supra*, note 13 at 11.

As indicated in chapter 3, CERs could influence the enactment of environmental legislation in Nigeria, which is highly desirable. Chapter 3 examined how this might happen. First, CERs could supply the legislature with the much-needed impetus to enact environmental laws to fulfil CERs. Second, CERs could serve as protection against the enactment of new anti-environmental legislation. Third, CERs could act as bulwark against rollback on existing environmental laws and policies.

However, research has shown that CERs by themselves cannot guarantee environmental sustainability since “in addition to resource constraints, other things influence whether or not constitutional commitments are taken seriously or are even necessary.”¹⁸⁷⁵ As argued in chapter 3, for CERs to influence the enactment of environmental legislation in Nigeria, the conflicting interest of Nigeria’s legislators who are highly influenced by the TNCs and the underrepresentation of the Niger Delta in the legislature should be addressed.

To address these issues, Boyd acknowledges the power of the TNCs¹⁸⁷⁶ but argues that CERs could offset the TNCs’ influence over the legislature since the legislators would be aware that their decisions could be tested in, and invalidated by, a court if they conflict with CER provisions.¹⁸⁷⁷ Also, it is recommended that Nigeria should adopt a just model of distribution of seats in the legislature, which is presently skewed against the Niger Delta.

Beyond the fair distribution of seats in the legislature, as indicated in chapter 3, the Nigeria’s 1999 Constitution makes population one of the bases for allocation of seats in the NASS (section 73 (2)).¹⁸⁷⁸ Owing to this, census-taking in Nigeria has become a “tense political activity”¹⁸⁷⁹ with the return of bogus numbers seen as reward for more legislative seats.¹⁸⁸⁰ Because the Constitution recognizes population as the basis for the distribution of political seats, and census is the only constitutional means to determine Nigeria’s population, Nigeria may continue to

¹⁸⁷⁵ Kaletskia et al, *supra*, note 1483 at 434.

¹⁸⁷⁶ Boyd, *supra* note 28 at 42.

¹⁸⁷⁷ *Ibid* at 29.

¹⁸⁷⁸ Section 73 (2) provides that notwithstanding “subsection (1) of this section, the Independent National Electoral Commission may at any time carry out such a review and alter the districts or constituencies in accordance with the provisions of this section to such extent as it considers necessary, in consequence of any amendment to section 3 of this Constitution or any provision replacing that section, or by reason of the holding of a census of the population, or pursuant to an Act of the National Assembly.”

¹⁸⁷⁹ Oka Obono & Elizabeth Omoluabi, “Technical and Political Aspects of the 2006 Nigerian Population and Housing Census” (2014) 27 (2) African Population Studies 249 at 249 [Obono & Omoluabi].

¹⁸⁸⁰ Olorunfemi & Fashagba, *supra* note 813 at 362.

witness bogus census figures which has impugned the integrity of all the censuses, leading to the cancellation of the 1962 and 1973 censuses.¹⁸⁸¹

Going forward, it would be strategic if Nigeria embraced technology in the conduct of censuses because the enumeration process is largely manual and this creates risks of error and manipulation.¹⁸⁸² Technology could mitigate some of the error and manipulation risks.¹⁸⁸³ Also, legislation could be enacted to criminalize all forms of official and private activities that are aimed at the manipulation of census figures.¹⁸⁸⁴ These could contribute towards ensuring the achievement of accurate census figures in Nigeria.

As outlined in chapter 4, in other countries, CERs have led to effective implementation and enforcement of environmental laws by prompting environmental regulatory agencies to monitor compliance with environmental regulations; by supplying the environmental regulatory agencies with the impetus to implement environmental regulation; and by giving the courts greater impetus to enforce environmental laws and regulations. However, in Nigeria there are systemic challenges to law enforcement even if CERs are adopted. One such challenge is the over-reliance of Nigeria on the petroleum resources from the Niger Delta for its economic survival.

It is recommended that Nigeria diversify its economy and wean itself off its disproportionate dependence on petroleum resources from the Niger Delta. Already, and as noted in chapter 4, the current international effort to achieve zero-carbon energy transition has led to the divestment of the TNCs from Nigeria's petroleum industry, which makes economic diversification for Nigeria seems imperative. Shell BP and Exxon Mobil are the early pacesetters and are selling off their Nigerian petroleum investments to meet their net-zero carbon energy commitments. Discussion by other operators in the Nigerian petroleum industry with, including the efforts of the Nigerian government to divest itself from participation in the industry for the same reason, is ongoing. However, CERs will still be very important in ensuring that a green transition respects environmental rights and is achieved in a way compatible with Environmental Justice.

¹⁸⁸¹ Obono & Omoluabi, *supra*, note 1879 at 249.

¹⁸⁸² Olorunfemi & Fashagba, *supra* note 813 at 359-360.

¹⁸⁸³ Final Draft of the Conference Report, 2014, *supra*, note 819 at 108 (para. 5.2.1.(u)).

¹⁸⁸⁴ *Ibid* at 109 (para. 5.2.1. (v)).

Another challenge to effective implementation and enforcement of environmental laws in Nigeria is corruption. If corruption is not tackled effectively, CERs will struggle to make the kinds of impacts in Nigeria that they are making in other countries. Nigeria must tackle corruption. A corruption free legal system would strengthen the resolve of regulatory agencies to monitor and enforce compliance with environmental regulation that could boost the sustainability profile of the Niger Delta. Significant effort required to tackle corruption would include addressing political interference in the work of anti-corruption and law enforcement agencies.

The thesis recommends constitutionalizing financial and institutional autonomy for the anti-corruption agencies such as the EFCC. This would help to insulate these agencies from outside influence and could also provide adequate operational funding for them. Chapter 4 remarked on the poor remuneration of Nigerian public service workers, the judiciary and the anti-corruption agencies and recommended the payment of living wages to staff of the Nigerian public service. This would reduce the temptation to compromise their jobs for personal gains.

The thesis also recommends the removal from the Constitution of the AGF's power to takeover and withdraw criminal proceedings in courts and the presidential power to grant pardon to persons convicted of corruption because these powers have been abused for political expediency in Nigeria. Beyond the curbing of the AGF's power to takeover and withdraw criminal proceedings involving corruption, the chapter indicated that the AGF is answerable to the President who appointed him. It is unlikely that the AGF and the Ministry of Justice that the AGF superintends would be able to resist political interference in prosecuting corruption cases. It is recommended that Nigeria should make the office of the AGF financially, structurally and administratively independent in order to make the AGF loyal to the Constitution rather than the President.

Furthermore, Nigeria is not funding the environment sub-sector adequately. Because of this, the regulatory agencies sometimes rely on the TNCs to provide logistics and fundings for the carrying out of regulatory duties and oversight. This will not only compromise regulatory standards, but it could also relax the agencies' resolve to impose strict compliance with regulations. It is recommended that Nigeria should adequately fund the environmental regulatory agencies to insulate them from outside interference.

Chapter 4 also indicated that CERs could provide the courts with added impetus to enforce environmental laws and regulations but this cannot be guaranteed in Nigeria because of the strong presumption that “Nigerian courts are highly influenced by the [executive arm of] government, which in turn is influenced by oil companies.”¹⁸⁸⁵ It is now widely recognized that judicial independence connotes 3 things – security of tenure for judges, security of remuneration for judges and total control of the judiciary administrative apparatus by judicial officers.¹⁸⁸⁶ The chapter recommended that Nigeria should enshrine in its Constitution these conditions that promote judicial independence. Adoption of these measures in Nigeria could discourage outside interference that seeks to influence the course of justice in environmental cases.

In addition, the chapter noted that one of the reasons why environmental norms were and are still not effectively implemented in Nigeria is that the NNPC was both a commercial player (who entered JVCs with the operators in Nigeria’s petroleum industry on behalf of the government) and an environmental regulator of the petroleum industry. These dual roles created an obvious conflict of interest. The recent PIA unbundled the NNPC and created different successor companies out of the NNPC.

Unfortunately, the conflict of interest that bogged down the NNPC may well hamstring these successor agencies because they are still saddled with both commercial and environmental regulatory responsibilities. The chapter recommended a further unbundling of these new regulatory agencies in ways that would ensure that these agencies are not vested with both commercial and environmental regulatory responsibilities. This will address the conflict of interest and assist in the implementation of environmental norms. If implemented, these recommendations would strengthen the anti-corruption agencies in their work to tackle corruption in Nigeria, including in the environmental governance of the oil and gas sector in the Niger Delta.

The Niger Delta is excluded from participating in environmental governance of the resources exploited from its territory and this reduces the opportunity of the people to benefit from resource exploitation from its territory and reduces avenues to obtain redress for environmental injustices occasioned by resource exploitation. Chapter 5 established that procedural CERs could

¹⁸⁸⁵ Ukala, *supra*, note 1461 at 98-99.

¹⁸⁸⁶ *Ref Re Remuneration of Judges of the Prov Court of PEI*, *supra*, note 1462.

improve access to justice, which could provide the Niger Delta with alternative means to seek and obtain redress from these agelong environmental injustices since only access to justice “allows people to enforce their procedural and substantive environmental rights in court.”¹⁸⁸⁷

Chapter 5 analyzed how CERs could widen access to justice and how wider access to justice could encourage environmental litigation by those impacted by environmental harm in the Niger Delta, based on selected success stories in other countries that have adopted CERs. However, reaping these CERs benefits would be dependent on the elimination of barriers to access to justice in Nigeria. This would come about through the availability of CERs and other environmental legislation whose violations would be acted upon by the court; impartial and independent adjudicatory mechanisms to enforce CERs and environmental laws when violated; the relaxation of the rules of standing to institute proceedings; and availability of remedies, including injunctions to prevent and redress environmental injuries.

Chapter 5 also analyzed other barriers to access to justice in Nigeria, including financial barriers; difficulty in obtaining legal counsel; unclear review procedures; and lack of awareness of legal rules and principles within review bodies. The chapter made specific recommendations on how these barriers could be addressed. Chapter 5 indicated that CERs could encourage the relaxation of the rules on standing so that people affected by environmental injustices could sue and obtain remedies for public nuisance. The chapter recommended that Nigeria should constitutionalize liberalized standing rules to enhance the ability of the public to seek for and obtain remedies from court for environmental harms they suffer.

The chapter has also shown that the pace of justice delivery in Nigeria is slow, which could worsen with a potential explosion in cases due to CERs and that CERs could encourage the development of laws and policies aimed towards quicker dispensation of justice in Nigeria. The chapter recommended adopting the following strategies: (1) asking previous judges to continue to handle cases that they heard in their previous postings until final resolution (this would prevent cases beginning afresh before a new judge); (2) appointing more judges (to reduce the turnaround time in adjudication); (3) reducing the numbers of appellate courts in the judicial ladder (to shorten the timeframe to dispose of appellate matters); (4) introducing strict

¹⁸⁸⁷ Razzaque, *supra*, note 1313 at 141.

constitutional timelines to adjudicate on cases (leading to early conclusions of cases); and (5) considering the prosecutorial powers of the Nigerian police amidst the high incidences of corruption, ineptitude and inefficiency of the Nigerian police, coupled with the poor state of funding resourcing and centralized command structure of the Nigerian police under the Inspector-General (which is unwieldy), which contribute to the slow dispensation of justice in Nigeria, the thesis recommends the decentralisation of the police to reflect Nigeria's federal structure.

This will ensure that the [police] cater to the increasing policing demands of a heterogeneous nation like Nigeria. The proposed framework emphasises the creation of state and district police. The state police will reduce the concentration of power to control the police by the federal government of Nigeria.¹⁸⁸⁸ To guide against the use of police by the state governors as instrument of oppression, the thesis recommends that the decentralized police be modeled after the MP in Brazil.

As already analyzed in chapter 4, the Constitution of Brazil guarantees the MP financial, institutional and administrative independence. However, it may not be enough to guarantee police financial independence when there is no means of funding the independence. To provide funding for decentralized police, the thesis re-affirms its recommendation in chapter 2 in the segment on Distributive Environmental Justice that federating units in Nigeria should be made to own and control natural resources found in their territories. This would guarantee a steady flow of financial resources to institutions, including the police. The thesis therefore adopts the recommendation of Niyi Akinnaso who argues that "funding is a genuine fear [decentralized police in Nigeria] ...a comprehensive solution was needed to combat insecurity in the country. Such a solution would include state police, the devolution of powers, resource control, fiscal federalism and reallocation of resources."¹⁸⁸⁹ This may be what is needed to re-position police to not only deliver on its primary mandate of protecting lives and properties, but also to assist in a speedy justice dispensation in Nigeria.

Chapter 5 also explained that equitable, fair, timely and cheap procedures for litigation are not adequately available in Nigeria and that this lack could impede access to justice for people of the

¹⁸⁸⁸ Akinyetun, *supra*, note 1524 at 213.

¹⁸⁸⁹ Akinnaso, *supra*, 1518.

Niger Delta in particular. The chapter analyzed some of these procedures created in other countries to improve access to justice in litigating CERs including the *amparo*, *tutela*, *recurso de protección*, direct action of unconstitutionality, popular action, public civil action, writ of *Kalikasan* and writ of continuous mandamus. The chapter recommended that Nigeria adopt these innovations because they would improve access to justice for the people of the Niger Delta, many of whom are poor and lack access to lawyers and legal information about their environmental concerns.

Moreover, even if these cases get to court, Nigeria lacks adequate and effective remedies for environmental harms, including substantive injunctive relief. The chapter indicated that CERs usually come with a bouquet of adequate and effective remedies, including injunctions. The chapter recommended that in addition to substantive CERs, Nigeria should enshrine adequate and effective environmental remedies, including injunctions, in the Constitution, as this will provide the court with additional tools to fashion appropriate environmental remedies to tackle environmental harm in the Niger Delta.

Furthermore, as outlined in chapter 5, financial barriers (which include court or filing fees; lawyer's fees; transportation cost for witnesses; and expert witness fees) could inhibit the ability of litigants to access justice. In addition, the chapter established that the difficulty in obtaining legal counsel in Nigeria could adversely affect the ability of the Niger Delta people to access justice. This is further complicated by the unacceptably high level of poverty in the Niger Delta which is estimated at 43% and higher than the national average.¹⁸⁹⁰

The government acknowledged this financial limitation and enacted the *Legal Aid Council Act, 2011* (LACA) to offer financial assistance to poor litigants in Nigeria.¹⁸⁹¹ As commendable as this is, the chapter outlined some shortcomings with LACA which could affect the ability of indigent litigants to obtain legal aid. First, legal aid is granted to persons whose income does not exceed the national minimum wage (section 10 (1)).¹⁸⁹² In a country where litigation is very expensive, using the national minimum wage which is currently 30,000 Naira (about \$44 CAD)

¹⁸⁹⁰ Francis et al, *supra*, note 25 at 10.

¹⁸⁹¹ Legal Aid Act, 2011, *supra*, note 1762.

¹⁸⁹² Section 10 (1) provides that legal aid "shall only be granted to a person whose income does not exceed the national minimum wage."

as the baseline would cut off other struggling people from legal assistance. Moreover, despite meeting the minimum wage threshold, selection for legal aid is not automatic but at the discretion of the Council (section 8 (6)).¹⁸⁹³ When the selection process moves to the realm of discretion, it becomes subjective and is susceptible to corruption, nepotism and cronyism.

The chapter recommended that every struggling litigant should be able access legal aid: once a litigant can prove indigence, legal aid should be automatic. Also, indigent people may have difficulty reaching the Council that administers the legal aid. Although the Council has offices in all the 36 States of the federation¹⁸⁹⁴ there are 774 Local Government Areas¹⁸⁹⁵ and most indigent people are resident in the local areas and can barely afford to get to the local government headquarters, much less the state capital.¹⁸⁹⁶ The chapter recommended that the Council should establish offices in all the local government areas in Nigeria, so that indigent Nigerians can avail themselves of legal aid rendered by the Council with greater proximity to them. The Council could also have travelling officers to offer services to persons in the hinterland with limited access to local government capital towns.

Furthermore, the LACA only grants legal assistance to persons, and not communities and NGOs. Communities and NGOs are becoming increasingly involved in the protection of the Niger Delta environment, therefore extending legal aid to all financially struggling NGOs and communities could improve their contribution to the sustainability of the Niger Delta. Relatedly, because of the high illiteracy rate, especially in the Niger Delta which is estimated at 60% in some communities,¹⁸⁹⁷ many poor people do not even know about the existence of legal aid, and therefore do not benefit from the services.¹⁸⁹⁸ This re-enforces the need to allow ENGOs and communities to access legal services offered by the Council on behalf of the people because these social groups are more adept at exploring and utilizing (government) facilities to aid their

¹⁸⁹³ Section 8 (6) provides that where “regulations made provide for Legal aid, provision shall be made therein to the effect that persons shall not be given legal aid in connection with any such proceeding unless he shows to the satisfaction of the Director-General or other person authorized by the Council that he has reasonable grounds for taking, defending or being a party Scope of legal Aid and access to Justice. Second Schedule thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case.”

¹⁸⁹⁴ Legal Aid Council, “Offices”, <<https://legalaidcouncil.gov.ng/#>>.

¹⁸⁹⁵ Part I of the First Schedule to the 1999 Constitution. Local Government Areas are the third tier of government in Nigeria.

¹⁸⁹⁶ Francis et al, *supra*, note 25 at 40.

¹⁸⁹⁷ StartSomeGood, *supra*, note 1774.

¹⁸⁹⁸ Olusegun & Oyelade, *supra*, note 584 at 20.

pursuit. This could eliminate both financial barriers and the difficulty in obtaining private legal counsel.

Lastly, the Council “lacks sufficient lawyers, especially those that are experienced, which has the consequence of limited expertise while handling cases as well as the stress experienced by available lawyers who cannot meet up with the several demands of clients.”¹⁸⁹⁹ The chapter recommended that the Council should recruit sufficient lawyers to offer legal services for the teeming Nigerians who need affordable legal services. In addition, the administrative cost “of running a legal aid scheme is high and the government does not invest sufficient resources for the smooth and effective operations of the Council.”¹⁹⁰⁰ The chapter recommended that government could mandate companies operating in Nigeria, especially the TNCs, to set aside a percentage of their annual profits to fund the Council. In addition to these recommendations that could strengthen the administration of legal aid, the chapter recommended that Nigeria adopt in its Constitution, legal assistance to poor litigants, because presently, legal aid is a derivative of a law which could be repealed easily unlike the Constitution, and that would further leave the impoverished litigants without any legal assistance.

Another procedural hurdle in Nigeria which limits access to justice is the strict requirements of limitation periods for instituting proceedings against public institutions and officials. Any environmental litigation instituted after 12 months, no matter the magnitude of damage to the environment, or the time of discovery by the plaintiffs, is likely to be dismissed by the court. Chapter 5 recommended a change in the law in Nigeria so that time only begins to run whenever the damage is discovered or reasonably discoverable. This would be particularly useful in cases of long-term, latent harms or where people do not have the sophistication to realize that oil has been spilled or that certain damage has occurred to their environment. Similarly, the chapter observed that Nigerian courts seem to rely on formalities to deny Environmental Justice in the Niger Delta by striking out cases on technical grounds without considering their merits and this could limit access to justice. The chapter recommended that Nigeria could take a cue from article 169 of the Constitution of Ecuador which provides that justice “shall not be sacrificed because of

¹⁸⁹⁹ *Ibid* at 18.

¹⁹⁰⁰ *Ibid*.

the sole omission of formalities” and abolish formalism. This would ensure that cases are decided on their merits.

Relatedly, constitutional rights in Nigeria only apply vertically and not horizontally, meaning that the suffering Niger Delta are not able to proceed in court against individuals and private entities, including the TNCs, and obtain relief for the various disruptions to their lives and sources of livelihoods due to the exploitation of resources from its territory. The chapter recommended that Nigeria constitutionalize CERs that are both vertically and horizontally binding. The horizontal application of CERs would prove a useful tool in the hands of the Niger Delta in pressurizing the TNCs to operate in an environmentally sustainable manner by proceeding against them in court.

Moreover, as analyzed in chapter 5, unclear review procedures are a barrier to access to justice and Nigeria is noted for this. Uncertain review procedures hardly inspire confidence and litigants would be wary to approach the court when procedure is not clear. The chapter indicated that CERs could provide clarity on who has jurisdiction to address the violation of the right to a safe environment through, for example, the continued gas flaring in the Niger Delta. As such, the chapter recommended that Nigeria should enshrine enforceable CERs in order to provide a clear process for upholding the rights of its people, including Niger Deltans.

Lastly, chapter 5 established that lack of awareness within courts and other adjudicatory bodies is a barrier to access to justice and that the Nigerian judiciary has not overcome this challenge. If Nigeria adopts enforceable CERs, ongoing professional development of judges in environmental sustainability would be crucial to the ability of the judiciary to enforce CERs. Nigeria does not have a scheme to train its judges in environmental law and policy. Ecuador has realized that constant professional development in the judiciary will promote judicial efficiency and deepen access to justice. It therefore provides in its Constitution for continuous training and regular assessment of judicial officers (article 170). The chapter recommended that Nigeria follow the Ecuadorian example and adopt in the Constitution constant professional development and regular assessment of judicial officers, especially in environmental sustainability. This would affect the quality of judgements of courts on environmental issues. A good starting point would be to strategically craft constitutional provisions and laws to address these underlying factors that

would limit the effectiveness of CERs in Nigeria. Without addressing these fundamentals, constitutionalizing environmental rights is unlikely to have the desired effects in Nigeria.

6.3. Future Research

This thesis has done a very focused study of the sustainability of the oil and gas industry in the Niger Delta. It examines how national circumstances contribute to and exacerbate the sustainability crisis in the Niger Delta. It focuses on 3 areas within the domestic legal system of Nigeria that have been identified by experts as the major causes of the sustainability crisis in the Niger Delta: the dearth of environmental laws; the lack of implementation and enforcement of existing environmental laws; and limited access to justice (which does not encourage environmental litigation by the Niger Delta people to sue and obtain remedies for environmental harms that its people suffer due to the extraction of resources in its territory).

The thesis has analyzed how CERs could contribute to reversing the environmental degradation of the Niger Delta in these 3 key areas by ensuring the enactment of more and stronger environmental laws; ensuring the implementation and enforcement of existing environmental laws; and removing barriers to access to justice in Nigeria. Within this framework, the research has set a template on how CERs could contribute to tackling the sustainability crisis in the Niger Delta. However, the thesis suggests 3 areas for future research.

First, the thesis focuses primarily on the role of the public sector in the degradation of the Niger Delta environment. With that, the activities of oil industry players like the TNCs have not been the immediate but incidental focus. Research has indicated that TNCs contribute significantly to the environmental degradation and human rights abuse in the Niger Delta. The failure of the TNCs “to adopt best practices in their business operations in Nigeria – ranging from implementing environmentally friendly operations to effective delivery of corporate social responsibility objectives – has put them in the category of propagators of environmental injustices.”¹⁹⁰¹ Future research is needed to more deeply examine the specific roles played by the TNCs in the environmental degradation in the Niger Delta and whether, and how, CERs could offset these.

¹⁹⁰¹ Ako & Olawuyi, *supra*, note 10 at 569.

Second, although the thesis focuses on the domestic scene, with globalization and international trade only discussed marginally, the influences of globalization and international trade on environmental sustainability of the Niger Delta are enormous, as revealed by the thesis. Future research could look specifically at the ability of CERs, or other mechanism, to wrestle with the forces of globalization and international trade regarding the sustainability crisis in the Niger Delta.

Third, the thesis is not claiming that CERs are the only possible solution to the Niger Delta sustainability crisis. As such, future research could investigate alternative or concurrent mechanisms to CERs that could further the sustainability of the Niger Delta.

6.4. Final Words

The thesis adds to the CERs literature by undertaking a specific case study on the possible impact of CERs on the Niger Delta and a detailed and specific analysis of what would be required in terms of political and legal change to ensure that CERs could contribute to the sustainability of the Niger Delta as much as they have in other countries. Within this space, the research has made specific recommendations for changes in Nigerian law, policy and institutions. The analysis took a critical and specific approach to assessing what is needed for CERs to make a significant impact on the Niger Delta.

The thesis also contributes to the development of environmental law by building on the existing scholarship in the area of CERs. It brings fresh insights and deepens existing insights into the practical implications of constitutionalizing environmental rights in Nigeria by examining the prospects offered by CERs with the Niger Delta in focus. It thus expands the limited literature on the Niger Delta crisis within the context of CERs, since research is limited on the Niger Delta that seeks to harness and apply Boyd's CERs framework to the Niger Delta situation in order to propose a new legal framework for mitigating the Niger Delta environmental crisis. The thesis undertook this specific study and in addition, investigated the conclusions drawn by the various pro-CERs advocates such as Boyd by specifically and meticulously applying it to the context of the Niger Delta.

This demanded a focus on the skewed power relations between the federal government and the people, limited access to justice and limited judicial remedies, and the economic implications of

an oil-bearing region on whose shoulders the economic burden of the entire nation rests as well as the legal and regulatory structure for regulating an industry that is the economic backbone of a nation. The thesis also adds to the literature on Environmental Justice by providing this focused case study. Through this research, conclusions and recommendations can be drawn to inform policies and decisions on the environmental crisis plaguing the Niger Delta. It is hoped that this work and approach can also be used to investigate the potential of CERs in other regions and communities with similar challenges to those faced by the people of the Niger Delta.

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