

**PROGRESSIVE DEVELOPMENT IN INTERNATIONAL
ENVIRONMENTAL LAW: THE ROLE OF COURTS AND
TRIBUNALS IN LITIGATING ENVIRONMENTAL DISPUTES**

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Abstract

The development of environmental litigation is one that has been fraught with challenges and problems. The role of courts and tribunals in the development of environmental law cannot be over-emphasised, yet the current legal order of environmental litigation has had a negative effect on the progressive development of environmental litigation. The study examines the role of courts and tribunals in the development of environmental law. The study also examines the problems of litigating environmental disputes. The study relies on primary and secondary sources of information. The information obtained through these sources was subjected to content analysis. The study found that there is no particular international court with jurisdiction over environmental disputes where parties can ventilate their grievances. The study recommended the need to modify the existing courts and tribunals and improve the legal framework so that the task of adjudicating environmental disputes would be hitch-free. The study also recommended the establishment of special environmental courts.

Introduction

Environmental litigation is not an entirely new concept. It could be seen as an environmental dispute, which has resulted in one or more parties commencing legal proceedings in the civil or administrative courts.^[1] With the globalisation of modern environmental law, facilitated by international agreements such as the Stockholm and Rio Declarations, environmental litigation has become increasingly common in a range of jurisdictions. The development of environmental litigation is one that has been fraught with challenges and problems. The role of courts and tribunals in the development of environmental law cannot be over-emphasised, yet the current legal order of environmental litigation has had a negative effect on the progressive development of environmental litigation. The study examines the role of courts and tribunals in the development of environmental law. The study also examines the problems of litigating environmental disputes with a view to improving the legal framework on adjudicating environmental disputes in Nigeria.

Role of Courts and Tribunals in the Development of International Environmental Law

Courts and Tribunals play major roles in the development of international environmental law. These courts and tribunals are the International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), Dispute Settlement Bodies of the World Trade Organization, European Court of Justice (ECJ), European Court of Human Rights (ECHR), African Court on Human Rights, International Criminal Court (ICC), Permanent

Court of Arbitration, World Bank Inspection Panel and International Centre for the Settlement of Investment Disputes.

(i) International Court of Justice (ICJ)

International Court of Justice (ICJ) is the judicial organ of the United Nations and has jurisdiction on any international law issue, including environmental issues. The Statute of the Court includes many conservative procedural provisions, such as the ability of each State to determine whether it chooses to be subject to the decisions of the Court. Each State also has the option to accept ICJ jurisdiction based on some limitations and conditions. In addition, only states can represent their interests before the court, and non-state actors therefore have no standing before the Court.^[2] In its decisions, like the *Corfu Channel case*, *Pulp Mill case* and *Gabchikovo-Nagiramos case*, the ICJ has reaffirmed the principles of international environmental law, such as Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. However, the judgments of the Court did not adopt progressive legal interpretations that might have led to important developments of the body of international environmental law and regulation of critical environmental issues.

(ii) International Tribunal for the Law of the Sea (ITLOS)

The UN Convention of the Law of the Sea (LOS Convention) of 1982 established the International Tribunal for the Law of the Sea. The Tribunal was initiated in Hamburg in October 1996.^[3] It is an independent judicial body that maintains a close relationship with the UN. According to Article 20 of its Statute, the parties to the LOS Convention can submit disputes to

the Tribunal concerning the interpretation and implementation of the provisions of the Convention. The Tribunal is also able to address environmental issues beyond the scope of the Convention because it is authorized to adjudicate cases arising under several other international instruments related to the world's oceans.

The Tribunal is one of the few international judicial bodies that has compulsory jurisdiction over cases arising under the provisions of its establishing Convention. Although the Tribunal is not the exclusive dispute settlement mechanism available to the parties to the convention^[4] (cases may be submitted to the ICJ or other arbitration bodies), it has compulsory jurisdiction over specific disputes arising under the articles of the Convention and over cases that are not submitted to other dispute resolution mechanisms.^[5]

Despite the number of avenues available for dispute settlement under the LOS Convention, the Tribunal is expected to hear a large number of cases. Its procedures are relatively fast and flexible. The expertise of the judges is also one of the main advantages of the Tribunal. The Tribunal's Sea-bed Disputes Chamber also has jurisdiction to hear cases brought by "entities other than states", including individual contractors and prospective contractors with the International Seabed Authority.

These procedural rules provide the Tribunal with the ability to respond effectively to environmental cases. In the eleven cases^[6] that the Tribunal has decided, it has discussed environmental issues and has adopted a protective stance towards the protection of the environment.

(iii) Dispute Settlement Bodies of the World Trade Organization

Dispute settlement is identified as a principle function of the World Trade Organization (WTO).^[7] The WTO dispute settlement process begins with consultations and proceeds with GATT conciliation or mediation services. A party may request that the dispute be heard by a panel, which receives submissions from all interested parties and issues a report. The Dispute Settlement Body (DSB) adopts the panel's report unless there is joint opposition to such adoption. Any of the parties to the dispute may appeal the panel's decision to the Appellate Body, a standing body of seven members. Parties are required to implement the panel ruling within a "reasonable period of time." If ruling is not implemented, the injured party may be compensated and retaliatory measures may be undertaken.

Several steps were undertaken during the Uruguay Round to improve the effectiveness of the dispute settlement process. However, these steps did not respond to existing environmental concerns. First, the dispute settlement procedures are open to WTO members and not individuals or environmental NGOs. Second, the panel proceedings are closed to the public at large. Third, the WTO panels are composed of trade experts, who do not necessarily have the expertise to make sound decisions on environmental matters. Finally, the WTO panels are not required to take into consideration international law regimes such as international environmental agreements and the customary international law. WTO agreements have created a "self-contained and self-referential" regime.^[8] Despite efforts to achieve consistency between existing multilateral environmental agreements and the trade regime, these two have not been

adequately integrated. In *Shrimp/Turtle I*,^[9] a dispute resolution panel and the Appellate Body ruled that Section 609 of the Public Law 101-162, an amendment to the Endangered Species Act and the United States Original Guidelines which required foreign nations to have sea turtle conservation programmes that were essentially the same as the U.S. Regulations violated Article XI of the GATT because they barred the importation of goods. Article XI prohibits restrictions on the importation of goods. They also ruled that the Original Guidelines could not be justified under the environmental exceptions of Article XX of the GATT. As a result, the U.S. revised its regulations and in *Shrimp/Turtle II*, the Appellate Body upheld the Revised Guidelines. The implication of this later ruling appears to open the door for trade restrictions to protect natural resources.^[10]

(iv) European Court of Justice (ECJ)

The European Court of Justice (ECJ) plays an essential and meaningful role within the European Community (EC). National courts and governments tend to respect its decisions. While it is not a specialized environmental court, the ECJ is authorized to hear environmental cases on grounds of non-compliance of a Member State with the European Community's environmental laws. The ECJ is also authorized to render preliminary rulings on the interpretation of primary or secondary European Law, including environmental law. The ECJ structure does not provide for a specialized chamber on environmental issues. However, due to the complexity of environmental cases, there is a de facto specialization among the Advocates General.^[11] Access to the court is open to the Commission, European Union institutions, Member States, and natural or legal persons

directly subject to European laws. Based on these procedural requirements, non-governmental organizations have been excluded from the ECJ.

The ECJ has contributed to the protection of the natural environment in the European region. It has accepted more than 150 environmental cases and has rendered important environmental jurisprudence. It was the first Court to acknowledge many principles of international environmental law such as the precautionary principle. As national courts have funnelled preliminary questions to the ECJ, it has succeeded in clarifying environmental rules and has influenced both the harmonization of the application of EC environmental law and the development of national environmental law. In addition, ECJ, as a multi-issue court, has been able to evaluate and balance environmental protection in conjunction with other public interests such as economic development.^[12] One of these cases is the *Walloon Waste case*.^[13] Wallonia, a region of Belgium, imposed a ban on the tipping and dumping of waste imported from other regions and member states because it faced an abnormal large-scale inflow of waste from other regions. The Court decided that the ban was legal as far as general waste was concerned, but illegal as far as it banned the import of hazardous waste, as it violated the free movement of goods guaranteed in Article 34 TFEU. This case has been criticised from an environmental point of view in the sense that the decision seems to provide a fertile ground for the export of dangerous waste like nuclear waste to Wallonia, while general waste cannot be exported.^[14]

(v) European Court of Human Rights (ECHR)

The European Court of Human Rights (ECHR) was established under the auspices of the Council of Europe in 1950, and is entrusted with monitoring state-party compliance with the European Convention on Human Rights and Fundamental Freedoms (the Rome Convention). The ECHR has developed progressive interpretations of legal documents for the protection of human rights and is a very successful example of a regional judicial body. However, the ECHR is restricted in its environmental role because the Court examines violations of human rights as they are identified in the Rome Convention and its additional Protocols. Neither the Convention nor the Protocols provide for a human right to a clean environment. In the past, the court has been very flexible and innovative in interpreting the existing articles. It has attributed compensation to individuals suffering from environmental harm or noise pollution through application of Article 8 (protection of private life and family life). In *Dubetska and Ors V. Ukraine*^[15] the two Applicants had their residences in close proximity to a coal mine and a coal processing factory in the Ukraine and two spoils heaps created by these industrial facilities. The applicants claimed that their right to respect for private and family life as provided in Article 8 was violated as a result of prolonged environmental pollution from a state-owned mine and factory. The Court held that Article 8 was applicable and as such by failing to relocate the applicants or put in place a functioning policy dealing with environmental risks, the Ukraine had failed to strike a balance between the interests of the individuals concerned and the society as a whole. The Court then awarded EUR 32,000 and EUR 33,000 in non-pecuniary damages to the families respectively on the basis of the Article 8.^[16] However, in the *Kyrtatos case*^[17] the court was unable to provide

comprehensive environmental protection due to the limits of the Convention and its additional Protocols.

(vi) African Court on Human Rights

The African Commission is the only functioning international regional body with power to “promote” and “protect” rights and “interpret” provisions of the African Charter on Human and People’s Rights on the African continent.^[18] In response to criticisms of the inability of the African Commission to stop the massive and systematic violations of human rights on the continent, in June 1998, the Organization of African Unity – now the African Union (AU) – adopted the Protocol to the African Charter on Human and People’s Rights on the Establishment of the African Court of Human and People’s Rights.^[19]

The Protocol establishing the Court has not yet come into force because it lacks the necessary number of ratifications. The Court will have jurisdiction over any case concerning the interpretation and the application of the African Charter, as well as any human rights instruments ratified by the parties. States, intergovernmental organizations, NGOs, and individuals will have access to the Court and will be able to file claims against any state. Access to the Court by NGOs and individuals is, however, constrained by the requirement that the case be urgent, serious, or relating to massive violations of human rights. The African Charter explicitly recognizes a human right to a satisfactory environment under its Article 24.^[20]

(vii) International Criminal Court (ICC)

The Charter of the International Criminal Court was signed in Rome on July 17, 1998, and came into force on July 1, 2002.^[21] According to Article 5, the ICC has jurisdiction over the most serious international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression. The Charter grants partial protection to the environment: **Article 8** identifies as a war crime the intentional launch of “an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”^[22] In addition, the ICC has jurisdiction only over individuals and not over states, which further limits the degree of environmental protection that the Court is able to offer. The court has so far publicly indicted 39 individuals on serious international crimes.^[23]

(viii) Permanent Court of Arbitration

The Permanent Court of Arbitration was created in 1899 to assist international dispute resolution through arbitration and other peaceful means such as conciliation and mediation. It is not a court in the strict sense of the word but consists of a panel of some 265 jurists, nominated by the eighty-five parties, from among whom the parties to a dispute can choose, if they wish, the person(s) to whom they will entrust the task of settling their dispute. In contrast to the ICJ, the PCA has, in addition to the power to resolve disputes between states, the authority to settle disputes between states and private parties and those involving intergovernmental organisations. For a case to come before the PCA there has to be mutual

agreement between the parties to the dispute. A working group was established in 1996 to work on the preparation of draft environmental procedure rules for the PCA. The working group came up with the PCA's Environmental Arbitration Rules and Conciliation rules. They provide a unique forum where states can resolve all their environmental disputes peacefully.^[24]

The *Iron Rhine case* is one of the cases decided by the PCA. In that case the Kingdom of Belgium and the Netherlands agreed to submit a dispute concerning the reactivation of the Iron Rhine railway linking the port of Antwerp, Belgium, to the Rhine basin in Germany, via the Dutch provinces to an arbitral tribunal in 2003 established under the Permanent Court of Arbitration. The reactivation of the Iron Rhine railway was not contested so much, but the two countries differed, among other things, over the entitlement of Belgium to establish the plan for the reactivation and the entitlement of the Netherlands to insist on conditions specified under Dutch law for such a reactivation. The Tribunal in its award held that Belgium had the right to establish track specifications for the Iron Rhine railway line in the Netherlands and that Dutch legislation may be applied to its reactivation, provided certain conditions were fulfilled.^[25]

(ix) World Bank Inspection Panel

The World Bank Inspection Panel was established in 1993, becoming operational in late 1994. It is authorised to receive requests for inspection from a party which claims to be affected by a World Bank project, including claims in respect of environmental injuries. The Panel, which consist of three members, may make a recommendation to the Executive

Directors as to whether a matter complained of should be investigated; if the investigation goes ahead, one or more Panel members conducts it and reports back, first to the Panel, and then to the Executive Directors, on whether the Bank has complied with its relevant policies and procedures. To date, the Panel has received a number of applications from NGOs that raise issues of general international environmental law, in particular environmental impact assessments.^[26] One of these instances was when the World Bank cancelled its participation in the *Arun III Hydroelectric Project in Nepal* after the World Bank Inspection Panel declared that the Bank had violated its own policies with respect to indigenous people and environmental assessment in approving the project. This project was the first case brought before the Panel. The World Bank Inspection Panel found in its formal investigation report that the Nepalese government and the World Bank had not provided for adequate land compensation and resettlement for the local and indigenous people affected by the project. Furthermore, the Bank had not undertaken an adequate environmental assessment.

(x) International Centre for the Settlement of Investment Disputes

The International Centre for the Settlement of Investment Disputes (ICSID) was established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which came into force that year.^[27] It hosts arbitrations to resolve disputes between investors and states that are alleged to have interfered with investments. Recourse to ICSID conciliation and arbitration is entirely voluntary, but once the parties have consented to arbitration, neither can

unilaterally withdraw.^[28] All ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognise and enforce arbitral awards. Advance consent by governments to submit investment disputes to ICSID arbitration is specified in about twenty investment laws and in over 900 bilateral investment treaties. ICSID arbitration is one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties, including the North American Free Trade Agreement and the Energy Charter Treaty.

The number of cases submitted to the Centre has increased significantly in recent years and now typically concern claims over such events as civil strife in the state, alleged expropriation or denials of justice by it, and actions of its political subdivisions. A number of arbitrations currently before ICSID raise serious issues of international environmental law.^[29] One of such is the ongoing case between *Perenco Ecuador Limited v. Republic of Ecuador*.^[30] Perenco Ecuador Limited (Perenco)—a French-owned oil and gas company—and the Republic of Ecuador have been involved in arbitration since 2008 under the France-Ecuador bilateral investment treaty (BIT) and certain concession contracts. In April 2008, Perenco filed with ICSID a request for arbitration against Ecuador and Petroecuador. Ecuador's December 2011 counter-memorial alleged that Perenco's activities had resulted in significant environmental damage (environmental counterclaim) and amounted to a failure to properly maintain the blocks' infrastructure in good working condition (infrastructure counterclaim). After reviewing the evidence, the tribunal in its interim decision held that it was satisfied that there was at least some

contamination for which Perenco would likely be held liable. However, it also noted that each of the parties' expert witnesses was "attempting to achieve the best result for the party by whom they were instructed, and that they crossed the boundary between professional objective analysis and party representation."^[31]

Effects of Environmental Cases on the Development of International Environmental Law

Some of the cases that have contributed to the development of international environmental law are the *Corfu Channel case*, *Bering Sea dispute*, *Trail Smelter case*, *Lac Lanoux case* and *Pulp Mill case*.

(i) Corfu Channel Case

The *Corfu Channel case* was decided by the International Court of Justice (ICJ) between 1947 and 1949, concerning state responsibility for damages at sea, and the doctrine of innocent passage. It was the first case to be heard by the ICJ after its establishment in 1945.^[32]

As a result of series of disputes from May to November 1946 in the Corfu Channel between the United Kingdom and the Republic of Albania, one of which resulted in damage to two Royal Navy ships and significant loss of life—the United Kingdom brought suit in the ICJ seeking reparations. After an initial ruling on jurisdiction in 1948, the ICJ issued separate merits and compensation judgments in 1949. The Court awarded the United Kingdom £843,947. In 1996, Albania and the United Kingdom settled the judgment along with Albania's outstanding claim to the gold.^[33]

Corfu Channel has had a monumental influence on the practice of international law, especially the law of the sea. The concept of innocent passage used by the Court was ultimately adopted in a number of important laws of the sea conventions. The stance taken by the Court on use of force has been of importance in subsequent decisions, such as *Nicaragua v. United States*. Additionally, the case served to set a number of procedural trends followed in subsequent ICJ proceedings.^[34] The relevance of this case to environmental law stems from the fact that it provided a factual background allowing for the principles initially asserted in the *Trail Smelter case* to be confirmed and linked to general international law.^[35]

(ii) Bering Sea Dispute

The Bering Sea Dispute involved a controversy between the United States on one side and Great Britain and Canada on the other side over the international status of the Bering Sea. The dispute was generated over the U.S. assertion that it controlled the Bering Sea and all seal hunting off the coast of Alaska. The dispute, which led to the seizure of a number of Canadian ships by the United States, was finally resolved by an international Arbitration in 1893.^[36]

The Bering Sea is the northernmost part of the Pacific Ocean. After the United States purchased Alaska from Russia in 1867, it assumed the right of control over the Bering Sea that had been held by Russia. The dispute arose after the Alaska Commercial Company, a U.S. business that had a Monopoly on killing seals for their furs; found that Canadian hunters were killing seals as they swam through the ocean each spring toward their summer homes in the Pribilof Islands. The Pribilof Islands were part of the

U.S. Alaskan territories. Fearing that the herds would be killed off by pelagic (open-sea) sealing, the U.S. government seized several Canadian sealing vessels in 1886 and instituted condemnation proceedings in an Alaskan court. The proceeds were given to the Alaskan Commercial Company as compensation.^[37]

The seizures outraged the Canadian and British governments, who disputed the U.S. claim that it controlled not just the three-miles of sea bordering the Pribilof Islands but the entire Bering Sea. After several years of tensions and additional vessel seizures, the three countries agreed to arbitration by an international tribunal in Paris. The tribunal issued its decision in 1893. It rejected the U.S. claim of total control of the Bering Sea and awarded the Canadian owners of the seized ships \$473,000 in damages. The tribunal also imposed restrictions on pelagic sealing, but it failed to control the problem. In 1911 the United States, Great Britain, Russia, and Japan signed a treaty that prohibited pelagic sealing for a period of time and then placed limits on how many seals could be hunted. The agreement was an important step in seeking international consensus on environmental matters.^[38]

(iii) Trail Smelter Case

The United States took Canada to court for violating their sovereignty as a nation and the resulting decision of the court established fundamental principles for international environmental law. During the early 20th century a Canadian smelter company was operating in Trail, British Columbia along the Columbia River which flows from Canada across the border to Washington State in the United States of American.^[39] Here a

rural community of farmers existed who claimed damages from the waste emitted by the smelter. The Canadian company that smelted zinc and lead was emitting sulphur dioxide which caused injury to plant life, forest trees, soil, and crop yields in Washington State. The United States charged Canada for these injuries and the case was referred to the International Joint Commission, a bilateral tribunal that oversees issues regarding the two countries.^[40] The decision made by the Tribunal established the concept of Trans Boundary Harm and the principle of the “polluter pays” to ensure sovereignty.^[41]

This case was truly a landmark case in term of international law. The Tribunal attempted to find a balanced solution. The smelter was able to continue operations and the farmers were no longer harmed by the smoke and received appropriate compensation. The final decision of the Tribunal held that the Dominion of Canada was responsible in international law for the actions of the smelter. The Tribunal declared that “no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of *serious* consequence”. A state can pollute its own land as much as it wants as long as it abides by law. Once that pollution crosses an international boundary though, and is of serious consequence, the state has violated the sovereignty principle of international law.^[42]

There are two principles that are often discussed in light of this case. The first was established in the provision above, that a state has an obligation to prevent transboundary harm. The second is referred to as the polluter

pays principle. The Tribunal used previous United States Supreme Court decisions to help decide what route to take in deciding this case. The Tribunal used the principle set up in *United States Supreme Court in Story Parchment Company v. Paterson Parchment Paper Company* (1931) that relief must be provided for the injured person and there must be accountability by the wrongdoer. In terms of the Trail Smelter arbitration the relief that must be provided came in the form of monetary compensation. In order to establish justice for the farmers Consolidated was made to pay for the serious damage it had done to the farmers land. Hence the principle was established that the polluter pays.

(iv) Lac Lanoux Case

Lake Lanoux is a lake situated in southern France near the border of Spain. The lake is fed by many streams that originated in France.^[43] Water flows out of the lake in a single stream that joins the Carol River before crossing into Spain. In the 1950's, France began developing a plan to divert water from Lake Lanoux over a 789 meter drop to generate hydroelectric energy. Even though France promised to return the diverted water to the Carol River, Spain pressed France to arbitrate the dispute because Spain believed the plan would violate its water rights under a series of treaties signed in 1866.^[44] The arbitration tribunal issued an award in 1957, which rejected Spain's arguments because the French plan promised not to alter the volume of water entering Spain through the Carol River. Although France would not have been allowed to unilaterally promote its legitimate interests at the expense or injury of neighbouring states, the tribunal did not identify a foreseeable injury to Spain. Further, the Tribunal stated that the 1866

treaties did not constitute a reason to subjugate the general rule that standing and flowing waters are subject to the sovereignty of the state where they are located.^[45]

(v) Gabčíkovo-Nagymaros Project (Hungary/Slovakia)

This is a dispute between Hungary and Slovakia. In 1977, Hungary and Czechoslovakia signed a Treaty for the construction of dams and other projects along the Danube River that bordered both nations. Czechoslovakia began work on damming the river in its territory when Hungary stopped working on the project and negotiation could not resolve the matter which led Hungary to terminate the Treaty. Hungary based its action on the fact that the damming of the river had been agreed to only on the ground of a joint operation and sharing of benefits associated with the project, to which Czechoslovakia had unlawfully unilaterally assumed control of a shared resource.^[46]

The issue that came up for determination was whether watercourse States are expected to participate in the use, development and protection of an international watercourse in an equitable and reasonable manner? The ICJ held that Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Hungary was deprived of its rights to an equitable and reasonable share of the natural resources of the Danube by Czechoslovakia and also failed to respect the proportionality that is required by international law. Cooperative administration must be re-established by the parties of what remains of the project.^[47]

(vi) Pulp Mill Case

The *Pulp Mills case* is the latest in a series of environmental cases to come before the ICJ. Pulp Mills contributes to the development of international environmental law by confirming that transboundary Environmental Impact Assessment is part and parcel of general international law. It is true that deficiencies remain in connection with the nature, scope and content of the EIA (including public consultation). However, states planning projects that pose risks of significant transboundary environmental harm (or threaten shared natural resources) shoulder a significant obligation of due diligence to ensure the environment or resources are protected from harm.^[48]

Constraints of International Courts and Tribunals

International Environmental Courts and Tribunals have made a tremendous contribution to environmental law. However, in spite of these laudable achievements, international Courts and Tribunals have come under intense criticisms owing to some constraints and problems affecting their operations. The problems include and are not limited to: Lack of international structured system, No synergy between International Courts and National Courts, Standing of Plaintiff(s), Attitude of States to international adjudication, Congestion of cases, No enforcement mechanism, Limited jurisdiction, Inadequate expertise, Burden of proof and Damages and Remedies,

(i) Lack of Structured International Adjudicatory System

One of the problems of international environmental litigation is the lack of a well-defined and unified system for the settlement of international environmental disputes. There appears to be no particular international court with jurisdiction over environmental disputes where parties can ventilate their grievances. If the case is not connected with the law of the sea, trade violations, human rights violations, or specific criminal behaviour, the parties might find no forum available for the adjudication of their case.^[49]

(ii) Disconnect between International Courts and National Courts

There appears to be no synergy between the international judicial system and the national Courts. This is evident in the operations of both Courts. There is no modality for the exercise of appellate jurisdiction from national courts to international courts. This disorganised arrangement has had a monumental effect on the development of international environmental law.^[50]

(iii) Standing

The concept of standing under the intentional law connotes the capacity to bring an action. Standing under international law has become a vexed issue with respect to its applicability. The procedural rules of international courts impose obstacles in presenting environmental disputes by interested parties.^[51] Private persons or individuals are effectively prohibited from bringing cases before the courts. In environmental cases, a plaintiff may not necessarily be legally injured in the traditional sense by an act of environmental destruction to impair his livelihood. For example, plaintiffs

cannot recover damages for fish killed by pollution because they lack standing, despite the obvious economic loss they suffered. While the destruction of natural aesthetic beauty is a moral outrage that indirectly harms all citizens, under traditional legal standing no person would have standing to sue.^[52] Standing under environmental laws is hotly contested in the U.S.^[53] The U.S. has put citizens' suit provisions into almost all of its environmental laws. Plaintiffs are required to show (1) an injury in fact, (2) causation between the injury and the defendant's actions, and (3) redress ability in court. NGOs can sue upon showing that any of their members would have had standing to sue. The focus is not on the injury to the environment, but rather the injury to the plaintiff or NGO representing him.^[54]

(iv) Attitude of States to International Adjudication

The growing trend under international law appears to be that States, being the major subject of international law, are showing hesitation in referring environmental disputes to international adjudication. The fact is that while States want international adjudicatory mechanisms; they do not seem to want those that apply a contentious and conflictual procedure to environmental matters. So, for example, in the field of ozone depletion, and soon also in other areas such as climate change and sulphur pollution, States have put in place non-contentious procedures that are characterized by having more of an administrative function. This system exists as a sort of international alternative dispute resolution.^[55]

(v) Congestion of Cases

In many countries, including Nigeria, courts are overburdened with cases. The reality is that irreversible damage to ecosystems can occur much more quickly than the many years it may take the court system to resolve a case. It has been noted that the environment cannot wait for the court system.^[56] The fact is that most environmental cases are complex and large-scale, and the slow process of Courts and Tribunal decisions is unable to address environmental degradation that requires immediate response.^[57]

(vi) Enforcement Power

International Courts and Tribunals are faced with the difficult task of enforcing their decisions. The power of the courts to adjudicate suffers from a lack of enforcement power. State parties to the dispute are responsible for complying with court decisions.^[58] However, in a case of non-compliance, only the ICJ, the WTO dispute settlement bodies, and the ECJ have enforcement mechanisms.^[59]

(vii) Limited Jurisdiction

Many of the international courts and tribunals were established in order to serve a specific treaty or international organization, and they are limited in their subject matter jurisdiction. The courts are obliged to deal with environmental issues only in relation to other fields of international law or while seeking to serve different purposes, such as the promotion of free trade or the protection of human rights.^[60] Other areas include trade agreements in the WTO context, human rights norms before human rights courts, and issues of general international law, such as the relationships between treaty and custom, or the law of the environment and the law of

State responsibility. This combination suggests most strongly that an international tribunal composed solely of experts in international environmental law might not fare well in attracting cases. Therefore, what is needed is a body of judges with a mix of general and specialized expertise. This also explains why no cases thus far have been presented to the ICJ's Environment Chamber, and in my view, why none may ever do so: no two States will agree that a given dispute is essentially "environmental".^[61]

(viii) Inadequate Expertise

One striking feature of environmental disputes is that international courts are always called upon to interpret issues with scientific components. Judges must decide questions of science as well as law in order to dispose of most environmental cases. And for the fact that most international courts are not structured to judge environmental cases, the judges lack the expertise to adjudicate on environmental issues. The reality is that non-specialised international judges are often unable to apply the complex, vague and incomplete norms of international environmental law.^[62] This lack of competence manifested in the ICJ in the case of *Gabcikovo-Nagymaros*. The ICJ admitted that the application of the international environmental law is not an easy task. In that case, the ICJ judges had to be educated in the environmental and scientific aspects of the dispute before they judged the case.^[63]

(ix) Damages and Remedies

Many have criticised the courts' attitude when it comes to awarding damages against environmental violators. The reality is that even if a plaintiff or prosecution wins its case, most of the time the true costs of the defendant's actions will not be reflected in the judgment or award. Damages in civil cases and punishments in criminal cases generally capture the costs of any suffering caused to humans, not animals or plants. While some settlements may include forcing a defendant to install pollution-control equipment or contribute money to conservation programs, this still likely does not recoup the full extent of damage to the environment. It is difficult to regenerate a natural forest, or populations of endangered animals.^[64]

(x) Burden of Proof

In environmental cases, there may be no line of direct evidence from the perpetrator to the harm. In pollution cases it is often impossible to prove that the plaintiff's harm was caused by his exposure to the toxic material. The traditional burden of proof standards, preponderance for civil cases and beyond a reasonable doubt for criminal, may prove to be prohibitively high.^[65] Applying the usual civil or criminal standards might not be productive because it is difficult to have direct evidence linking the perpetrator to the harm done. What is needed in suits under environmental law is that a plaintiff only needs to show that the law was violated, not prove fault or any actual or threatened harm, without regard to *mens rea*.^[66]

The Nigerian Experience

Litigating environmental disputes in Nigeria is not a straight-forward affair. Environmental litigation in Nigeria has remained as dicey as the law underlining its existence.^[67] The reality is that Chapter IV of the Nigerian Constitution does not provide for an express right to environment among its fundamental rights.^[68] While the 1999 Constitution made provision for the environment, it did not deal with environmental protection as such. Although environment was given constitutional status, its provision only betrays Nigeria as a country that is environmentally unconscious of environmental problems.^[69]

The boldest attempt to recognise the protection of environmental right under the Constitution is provided for in section 20.^[70] Section 20 of the Constitution provides “That the State shall protect and improve the environment and safeguard, the water, air and land, forest and wildlife in Nigeria” Section 20 of the Constitution is provided for under Chapter II as one of the “Fundamental Objectives and Directive Principles of State Policy”. This brings a new dimension to state responsibility by obliging the state to protect and improve the environment for the good of the society as a whole.^[71] It laid down the basic foundation for environmental legislation and the governments’ responsibility in Nigeria.^[72]

It has been argued that going by the tenor of the law, Section 20 of the Constitution places a mandatory duty on the State to direct its policies towards environmental protection but it does not place such legal right on the citizens to enforce such provision.^[73] Curiously, the same Constitution in section 6(6)(c)^[74] provides that the provision of section 20 of the Constitution is not justiciable. This is akin to the eyes denying the

existence of the nose in the same body. It then means that section 6(6)(c) has swept the carpet off the feet of section 20 of the Constitution. This has had a monumental negative effect on the success of environmental litigation in the country as litigants become disinterested in challenging environmental disputes in court. The judicial attitude to the provisions of Chapter II has been that of helplessness. And what is more, the environment has been the major victim of this Constitutionally-backed precarious situation.

However, the Courts in *Gbemre V. Shell*^[75] adopted a liberal interpretation to the meaning of environmental rights. The Gbemre's case marked the beginning of a radical departure in the attitude of the Courts in the interpretation of environmental rights. The order of a Nigerian federal high court on the 14th of November 2005 marked an important watershed in the struggle by local communities in the Niger Delta of Nigeria to protect their health, environment and their farmlands, and to bring an end to gas flaring. Gbemre in a representative capacity for himself and for each and every member of the Iwehereken community in Delta State Nigeria file a suit against Shell Nigeria, Nigerian National Petroleum Corporation (NNPC) and the Attorney General of the Federation, praying for a declaration that the constitutionally guaranteed right to life and human dignity includes the right to a clean, poison-free, pollution-free and healthy environment.^[76] The court declared that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicant's community was a violation of their fundamental right to life (including healthy environment) and dignity of human persons guaranteed by the Constitution and the African Charter.

The court further restrained the 1st and 2nd Respondents, Shell Nigeria and NNPC from further flaring of gas in the applicant's community and to take immediate steps to stop the further flaring of gas in the applicant's community.^[77]

Gbemre v. Shell is a precedent setting case in Nigeria, it is the first judicial authority to declare that gas flaring is illegal, unconstitutional, a breach of the fundamental human right to life.^[78] The basis of the court's decision is that an endangered environment constitutes a threat to the fundamental right to life and dignity of a human person and as such protecting the environment is the most potent means to securing the right to life and dignity.

Apart from the *Gbemre*'s position, the African Charter on Human and Peoples Rights in article 24 – which is a Nigerian legislation having been domesticated in accordance with section 12 of the Constitution – recognised the right to a secure environment as a human right. For the avoidance of doubt, the Article provides that “All peoples shall have the right to a general satisfactory environment favourable to their development.”

Not only that, the Fundamental Rights (Enforcement Procedure) Rules, 2009 which was made pursuant to the provision of section 46(3) of the Constitution recognised and considered the rights under the African Charter as fundamental rights^[79] capable of being enforced with equal footing as the fundamental rights in Chapter IV of the Constitution. It is therefore submitted that Article 24 of the African Charter has provided the legal framework underlining the existence of environmental right in

Nigeria. An Applicant or any other person or group of persons^[80] can invoke the provision of Article 24 of the African Charter to maintain a fundamental right to enforcement action in the Court. This development has no doubt led to the progressive development of environmental law in Nigeria.

It is important to note that Courts in some instances have allowed technical justice to take precedence over substantial justice. For instance the people of Rumuekpe Eremah, Akala-Olu, Idama Communities instituted an action against SPDC, Total, Agip, Cheveron and NNPC in the High Court of Port Harcourt. The judge held that constitutional rights were innately connected to individuals and that claims of violations of these rights cannot be brought in a representative capacity (ie, by the individual communities).^[81] Also in *Oronto-Douglas v. Shell Petroleum Development Company Ltd and 5 others*,^[82] the plaintiff, an environmental activist sought to compel the respondents to comply with provisions of the Environmental Impacts Assessment (EIA) Act before commissioning their project (production of liquefied natural gas) in the volatile and ecologically sensitive Niger Delta region of Nigeria. The Federal High Court dismissed the suit on the grounds *inter alia* that the plaintiff had shown no legal standing to prosecute the action.^[83]

It is important to point out that in some instances Nigerian courts have tended to give precedence to economic consideration over the legitimate interest of a community to protect its environmental resources.^[84] In *Allan Irou v. Shell BP*^[85] the court refused to grant an injunction in favour of the plaintiff whose land, fish pond and creek had been polluted by the activities of the

defendant. This is unlike what is obtainable in India where environmental concerns are not considered secondary to the interest of private investors. In *Indian of Rural Litigation and Entitlement Kendra v. Utlar Pardesh*^[86] the Petitioner alleged that unauthorized mining in the Dehra Dun area adversely affected the ecology and environment. The court upheld the right to live in a healthy environment and issued an order to cease mining operations notwithstanding the significant investment of money and time by the company.^[87]

In what is a major achievement in environmental litigation in Nigeria, A Dutch Appeals Court in Hague ruled that four Nigerian farmers and fishermen could sue Shell in a Dutch court for pollution caused by oil spills in the African country.^[88] The four Nigerian farmers and fishermen first filed this lawsuit in the Netherlands in 2008, with the help of the Dutch branch of an environmental group, Friends of the Earth. The farmers wanted Shell to clean up the oil spills in four much polluted villages in the Niger Delta, prevent future spills and pay compensation. Shell wanted the judges to scrap Dutch jurisdiction on cases involving Nigeria and declare the farmers' appeal inadmissible. In January 2013 a lower Dutch court ruled mostly in Shell's favour, ruling that Shell had to pay compensation in only one of the four cases. The Appeals Court in The Hague decided differently and rejected all Shell's appeals.^[89] The court specifically held that "The Dutch court and this court consider it has jurisdiction in the case against Shell and its subsidiary in Nigeria".

The judgment sets a massive precedent, which means that Dutch courts can make judgments about Dutch companies in other countries.^[90] This case

has brought to the fore the inadequacy of Nigerian laws and an indictment of the country's courts. It showed that Nigerian nationals have lost confidence in the country's judicial system with regards to protection of the environment. One would expect that Nigerian courts would be at the forefront in the struggle for the protection of the Nigerian environment.

Recommendations

The role of courts and tribunals in the development of environmental law cannot be underestimated. However, in view of the problems and challenges of environmental litigation, it becomes necessary to make some policy recommendations.

- a) International courts and tribunals need to collaborate and have a working relationship with national courts for the purpose of sharing of ideas and information. Within this understanding, National courts should be able to refer disputes to international courts on issues they are not competent to decide.
- b) There is the need to modify or amend the rules and procedures of the existing institutional framework to give unrestricted access to non-state actors like private bodies or individuals. In other words, the concept of standing should be relaxed to accommodate private litigation.
- c) The adjudicatory process of the existing courts and tribunals need to be liberalised. This is necessary in order to increase participation of States in the existing framework. In a

deserving situation, alternative dispute resolution should be adopted.

- d) There is the need to build more courts and tribunals and employ judicial officers to complement the work of the existing institutions. Environmental dispute by its nature requires expedient adjudication because it has to do with security of lives and human dignity.
- e) The existing political order where States are at liberty to comply with the decisions of international courts and tribunals need to change. A mechanism should be put in place to enforce their decisions. Defaulting States should be sanctioned by the United Nations.
- f) Since environmental disputes are usually intertwined with other fields or subject matters, there is the need to ensure that the composition of judges in the existing courts and tribunals reflect this diversity because an international tribunal composed solely of experts in international environmental law might not fare well in attracting cases.
- g) There is the need to recognise environmental rights as fundamental rights under the international law and the Constitution of States. This would encourage private individuals to activate the relevant provision of the law to ventilate their grievances. The provision of non-justiciability should be removed.

- h) Due to the unique nature and complexity of environmental disputes, where judges are called to evaluate scientific findings, it is suggested that existing courts and tribunals should be staffed by judges who are environmental experts who would be able to deploy their expertise to resolve technical or scientific issues.
- i) The attitude of courts and tribunal with respect to awarding damages need to change. In deserving situations, courts should not be reluctant in awarding damages against a state or private institution whose activities constitute a threat to environmental safety. This is the basis of the principle of “polluters-pay” under the international environmental law. The courts should not be timid in granting relief of damages to a successful litigant.
- j) There is the need to relax the standard of proof required in environmental litigation. Applying the traditional standards applicable in criminal and civil cases has been a major problem to environmental litigation. What is needed in suits under environmental law is that a plaintiff only needs to show that the law was violated, not prove fault or any actual or threatened harm.

Conclusion

The paper examined the meaning of environmental litigation and dispute. The paper also considered the roles of courts and tribunals to the

development of environmental law. An attempt was made to consider cases that have positively impacted on environmental law. The feasibility of a special international court for environmental court was considered and that the existing structure should be maintained though there is need for a reform.

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[³] The UN Convention for the Law of the Sea (UNCLOS) opened for signature on Dec. 10, 1982 and entered into force on Nov. 16, 1994.

[⁴] See UNCLOS art. 287.

[⁵] UNCLOS Art. 292, 290 para. 5, 288 para. 2 and ITLOS Statute art. 21. 6.

[⁶] See Southern Blue Fin Tuna brought by New Zealand against Japan, and MOX Plant case brought by Ireland challenging the United Kingdom’s authorization of a new nuclear facility at Sellafield.

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^[17] Application No. 41666/98 (decided in May, 2003).

^[18] See Article 24 of the African Charter.

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^[20] See Article 24 of the African Charter on Human and Peoples Rights.

^[21] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1980).

^[22] The provision criminalizes the “long-term and severe environmental damage” only if such damage will be “clearly excessive in relation to the... military advantage anticipated”. The “long-term and severe damage” itself is not criminalized by the Charter of the ICC and does not constitute a war crime, unless it is disproportionate in relation with the military advantage that the part which initiated the attack wishes and has anticipated.

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[74] Section 6 (6) (c) 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 11 of this Constitution” see *Okogie (Trustees of Roman Catholic Schools) and other v. Attorney-General, Lagos State* (1981) 2 NCLR 337, *Adewale v. Jakande* (1981) 1 NCLR 152, *Attorney-General, Ondo State v. Attorney-General, Federal Republic of Nigeria* (2002) 9 NSC.

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