EXPANDING THE FRONTIERS OF COMPENSATORY RIGHTS OF VICTIMS OF ENVIRONMENTAL POLLUTION IN NIGERIA: A PERSPECTIVE OF SPDC V. AGBARA

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Abstract

Compensation in environmental pollution claims has been impaired over the years by a whole lot of factors in Nigeria. The impediments among other things include the dispositions of the courts as well as the uncooperative attitudes of multinational oil companies (MNOCs) concerned. Most environmental pollution cases that went to courts in the past failed due to one reason or the other. Lately certain developments have been made in that regard. This paper aims at assessing development in the area of environmental pollution claims in Nigeria with specific reference to the courts' decision in SPDC v. Agbara. It discusses the emerging doctrine of transnational jurisdiction in environmental pollution claims in the world and its overall implications on environmental pollution victims as well as the MNOCs business. Analytical research method is employed in the study. The paper finds that certain legal requirements, lack of judicial activisms and boldness in the past; MNOCs attitudes of avoiding responsibility, institutional weakness, lack of political will, lack of

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awareness etc., have impaired access to compensation in Nigeria. The paper therefore concludes that the current trends of decisiveness and judicial activism in environmental pollution claims are a welcome development and should be sustained.

1.0 Introduction

Since the discovery of oil in commercial quantities in Nigeria, environmental pollution became one of the major challenges facing members of most host communities in the country.[1] The environment of some of the host communities has been devastated and badly polluted with reckless abandon. In most of these communities watercourses have been dangerously polluted and rendered unfit for human consumption. Not only that, their farmlands had also been destroyed that crops hardly make good yields. Even their atmosphere had been altered through the release of fumes, toxics and carbon emissions by MNOCs operating in the region.[2]

The worst of it all is the fact that members of the host communities were hardly compensated for their losses. Efforts made by some of them most times to get compensations from MNOCs were abortive. It does appear that is in the nature of MNOCs to avoid responsibility for their actions. They will rather put all at their disposal, get the best lawyers just to ensure that the poor victims of their oil operation lose

[1] Bosede Remilekun Adeuti, 'Analysis of Environmental Pollution in Developing Countries' [2020] (65) (1) *American Scientific Research Journal for Engineering, Technology and Sciences (ASRJETS)* 39

[2] SP Ejeh and OA. U Uche, 'Effect of Crude Oil Spill on Compressive Strength of Concrete Materials' [2009] (5) (10) *Journal of Applied Sciences Research* 1756

out in any action against them. This very attitude of MNOCs was demonstrated by Chevron after it was ordered to pay compensation to victims that suffered from pollution resulting from its activities in Ecuador.[3] Oil companies prefer making profits at the expense of the wellbeing of the host communities' dwellers in Niger Delta. In all of this, the government remained indifferent to the pains of the environmental pollution victims.[4] Government is rather concerned about the benefits accruing to it from the business of the MNOCs.

On the other hands, Nigeria courts in the past did not help matters too. Many environmental pollution victims were denied access to remedies sought on several occasions based on different reasons which in most times premised on technicalities. This state of affairs held sway for decades of years. However the recent case of SPDC v. Agbara had reared a sign of hope to host communities in Nigeria. The decision in the case re-presented judiciary as the last hope of the common man in a society. The decision also signaled a serious warning to MNOCs indicating that the era of business as usual had gone.[5] To sustain the development so far made on access to compensation resulting from oil pollution, Nigeria courts need to be consistent, bold, decisive and also

[3] Sharon Lerner, Law Students Denounce Chevron's Law Firm over Steven Donziger Case' <https://www.theintercept.com/2021/04/07 chevron-steven-donziger-law gibson-dunn-boycott> accessed 27 April 2021

[4] Evelyn M Hyavyor and Thomas Tyau and Terungwa, 'Environmental Pollution in Nigeria: the Need for Awareness Creation for Sustainable Development [2012] (4) (2) *Journal of Research in Forestry, Wildlife and Environment.* 1

[5] Cleverline T. Brown and Nlerum S. Okogbule, 'Redressing Harmful Environmental Practices in Nigeria Petroleum Industry through the Criminal Justice Approach' [2020] (11) (1) *Journal of Sustainable Development Law and Policy* 18

to sacrifice technical justice in the alter of substantiality. This no doubt will engender the spirit of live and let live between MNOCs and host communities in Nigeria.

2.0 **Overview of SPDC v. Agbara**[6]

The facts are as follows: the respondents (claimants) were representatives of the Ejama-Ebubu community in Rivers State who complained that a major crude oil blow out and spill involving over 2,000, 000 barrels of oil had occurred from the appellants (Shell and others) oil installations and facilities in Ejama in Ebubu Eleme flooded the Ochani Stream and permeated the soil of their lands at a point of saturation and that appellants failed to clear up the spill. It was their claim that the surface and ground waters had been rendered unfit for human consumption. They claimed damages in excess of 17 billion Naira for the general inconvenience resulting from acts of the appellants. The appellants on its own side denied responsibility stating that it is ready and willing to contest the claim in court.

At the trial court after exchanging pleadings the appellants made several frantic and unsuccessful efforts to delay and frustrate the hearing of the case but the learned trial judge Buba J resisted the moves by refusing several frivolous applications for adjournments made by the appellants. The court after dismissing several frivolous motions filed by appellants ordered them to proceed with the case and when they refused the court foreclosed them. Thereafter the appellants further made various efforts for the trial judge to be

[6] [2015] LPELR-25987 (SC)

removed from handling the suit but that effort was unsuccessful too. In 2010 the trial court at the conclusion of the case founded for the respondents and awarded damages in excess of 17 billion Naira. Dissatisfied with the decision of the trial court the appellants appealed to the Court of Appeal. Two Notices of Appeal were filed, the first one was dated and filed on 14/06/2010 while the second Notice of Appeal was dated and filed on 8/9/2010.

After assessment by the Registry of the trial court, the appellants paid a total sum of #800 in respect of the Notice of Appeal filed 08/09/2010. On the 26/11/2012, the appellants as applicants filed a motion on notice for leave to amend their Notice of Appeal dated 8/9/2010. A ruling was delivered by the court allowing the appellants to amend their Notice of Appeal dated 8/9/2010 and that the amended Notice of Appeal to be filed within 7 days. The appellants filed their amended Notice of Appeal on 5/12/2012 and claimed to have paid #1000 for filing the amended Notice of Appeal as stipulated under 3rd Schedule of the Court of Appeal Rules. The appellants further paid an additional amount of #4,500 in respect of the original Notice of Appeal although amended with leave of court. On the other hand, the respondents' counsel filed a preliminary objection challenging the competence of the appellants' appeal on the sole ground that the filing fee paid by them was less than the sum required. The Court of Appeal heard argument on Preliminary Objection and gave bench Ruling striking out appellants' appeal. Dissatisfied with the ruling of the Court of Appeal, the appellants appealed to the Supreme Court which allowed the appeal and set aside the order of striking out made by the

Court of Appeal. The appellants were ordered to take steps to remedy the defect in their Notice of Appeal filed on 8/9/2010.

Despite the 2015 ruling of the Supreme Court that allowed appellants to fill a competent appeal against the decision of the trial court at the Court of Appeal, they failed to do so; rather they brought another application before the Court of Appeal for "extension of time to seek leave to appeal on grounds other than law". The Court of Appeal in its ruling on June 6 2017 refused the application, the appellants then appealed again to the Supreme Court, which also refused the application in a decision delivered on January 11 2019. By implication validated the Court of Appeal's decision of 2017. The appellants (shell) in their usual attitude in late 2019 filed a fresh application in the Supreme Court seeking for leave of the court to appeal the substantive judgment of the trial court awarding damages against them. They also filed another application asking the Supreme Court to set aside its ruling of 11th January 2019. On the application for review, the respondent counsel in his submissions urged the Supreme Court to award exemplary cost against the senior counsel to the appellants to deter such frivolous application in the future. After hearing arguments on the applications the court in 2020 dismissed the appellants' applications and reaffirmed the award of damages made against them by the trail court in 2010.[7]

[7] Abel Ejikeme, 'Nigerian's Supreme Court Dismisses Shell's Request to Review $45 million Ogoni Judgment'<www.arise TV News> accessed 27 December 2020.

3.0 Legal Framework on Compensation in Nigeria

There are many environmental laws in Nigeria but only a few that makes provisions for payment of compensation in the event of oil spills. This paper will focus on laws that make provisions for compensation. The laws on payment of compensation in relation to environment in Nigeria include:

Oil Pipelines Act[8], section 11 of the Act provides that a holder of license shall pay compensation to persons whose land or interest in land is injuriously affected by the exercise of the right conferred by the license. The Act exempted damages arising from act of sabotage and malice. Under the Act where amount payable as compensation cannot be agreed between the victims and the licensee, it can be fixed by a court in accordance with the relevant provisions of the Act. Section 20 of the Act gives latitudes to the court to award compensation as it deems fit based on certain indexes listed thereto. In assessing what is payable the Act makes reference to Land Use Act. Section 20 (5) of the Act provides that in determining compensation in accordance with the provisions of this section the court shall apply the provisions of Land Use Act that is not in conflict with the provisions of the Act.

Land Use Act 1978, the Act makes provisions for payment of compensation upon revocation of title to land by the government. The Act does not directly regulate payment of compensation resulting from oil spill. Rather it sets compensation assessments standards to be followed in assessing what is payable in any case of revocation.

[8] Cap 145 LFN 1990

Section 29 of the Act provides for calculation of compensation in this manner:[9]

(i) For land, an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked.

(ii) For building, installation or improvement thereon, the amount of the replacement cost of the building, installation or improvement, that is to say, such cost may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer.

(iii) For crops on land apart from any building, installation or improvement thereon, an amount equal to the value prescribed and determined by the appropriate officer.

Petroleum (Drilling and Production) Regulations, 1969. The regulation is another important piece of legislation as it concerns compensations in oil industry. The Regulations require licensee and leasee of oil operation to adopt all practicable and up to date equipment to prevent pollution of the environments. Section 23 of the Regulations provide that if the licensee or leasee exercises the right

[9] Adekunbi Imosemi and Nzeribe Abangwu, 'Compensation of oil Spill Victims in Nigeria: the more the Oil, the more the Blood' [2013] (2) (3) *Singaporean Journal of Business, Economics and Management Studies.* 30

conferred by the license or lease in such a manner unreasonable with the exercise of any fishing right, shall pay adequate compensation.

Liability for compensation/damages can also arise under the rule in Rylands v. Fletcher.[10] The principle in the case is an aged long one that had been applied by courts in many jurisdictions to hold a keeper of anything such as crude oil that is capable of doing mischief if it escapes.[11]

By all standards the above discussed statutes are obsolete as at today. Looking at the years the statutes were enacted a lot has changed due to passage of time making the laws out of touch with the existing realities.[12] There is no reason why Nigeria should still be using of laws as old as that. Besides, the provisions of the laws are so vague in nature and even narrow in applications. For instance, the compensation mentioned by the Regulation relates only to right of fishing so what happens to the rights to other aspects of environment. The Regulation stated that adequate compensation shall be paid. The question is who is to determine what is adequate in individual cases? Assuming the parties do not resort to litigation. The Regulation created more problems than it attempts to solve. Moreover, the assessment standards stipulated in the Land Use Act are such that if followed strictly the victims of pollution may get little compensation compare to the injury they suffered. With the state of the present laws the

[10] (1866) L.R 1EX 265

[11] Umudje v. Shell BP Nig Ltd [1975] 9-11 S.C 115

[12] Kato Gogo Kingston, Management, Remediation and Compensation in Cases of Crude Oil Spills in Nigeria: An Appraisal' [2018] (8) (1) *Journal of Mineral Resources Law.* 24

interest of victims of environmental pollution is not well protected. The situation therefore, calls for a serious legal reform in the area of compensation in the country. This requires an enactment of a comprehensive legislation on payment of compensation to victims who suffer oil spills in Nigeria. The law is to set out a clear procedure to be followed in assessing amount to be paid. It should also specify what the victims need to do and also it must address the long term effect of oil spill on environment.

4.0 **MNOCs' Business Interest versus Payment of Compensation over Environmental Harms**

One common denominator among MNOCs is that they abhor payment of compensation to victims suffered from their operations even when the alleged pollution is obvious.[13] They will rather engage in protracted litigations over a clear case of pollution than to redress the grievances of victims who suffered from their business activities. And when the dispute finally goes to court MNOCs will engage litany of best lawyers in the country where the dispute arose to represent them in the case and if need be intimidate both the victims and the court. MNOCs will prefer to pay the legal fees of the high profile lawyers that may run into billions of Naira depending the currency of the country in question than pay the victims of their activities. For instance, in the Agbara's case the application filed by the appellants asking the Supreme Court to review its earlier decision. Their legal team was made up of reputable legal practitioners namely Chief Wole

[13] Olufemi O Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States [2008] (52) (1) *Journal of African Law.* 89

Olanipekun (SAN), Lateef Fagbami (SAN), Chief Kanu Agabi (SAN), Dr. Wale Babalakin (SAN) and Wale Akoni (SAN). These are almost the best lawyers in the country at present.

No doubt that if the legal team had requested for more lawyers appellants may have done so and still pay for more legal fees. It is not a bad idea to engage the services of best lawyers or engage as many lawyers as possible just to file one frivolous application or another but the question is whether such act is in the best interest of the business objective of MNOCs? In the light of the fact that the victims of oil spills in most cases are the host of MNOCs. Even when they defeat the victims in courts for one reason or the other they still go back to their communities to carry on with their business. Sometimes, this kind of attitudes is usually the remote cause of attacks on the installations of MNOCs overtimes. Beyond payment of the legal fees of their legal team, what about time wasted pursuing one case from trial court to the Supreme Court and sometimes they return back to the Supreme Court asking the court to review its earlier judgment just as they did in the instant case. Like was rightly pointed out the instant case lasted for 36 years in court. As a result of the delay caused by the appellants some of the victims of the eco-disaster as claimants died without any form of remediation or compensation since the appeal was still pending at the time they died.

This very attitude of trying to avoid payment of compensation is not just peculiar to shell alone rather it is a common practice for all the MNOCs. For example, consider what Chevron did in an action

involving oil spill from its installations in Ecuador.[14] In that case Chevron also engaged the services of one of the leading lawyers in that country to represent it in the action. At the end of the day judgment was given against Chevron and after it appealed unsuccessfully up to Supreme Court. The next thing Chevron did was to evacuate its installations out of the country making it difficult for the judgment creditors to execute the judgment. Chevron did not stop at that, it went further and connived with a judge to incriminate the lawyer that represented the victims of the oil spill. The lawyer had been placed under house arrest for long period waiting to be charged but had finally be charged to court.[15]

There is no doubt, that MNOCs have their business interest to protect but such interest protection should not be done at the expense of the victims of their own activities. These victims in most cases lose everything due to pollution. There is no sense trying to prove a point when an alleged pollution is obvious. It is even part of the social responsibilities of MNOCs to balance their business interest with the environmental rights of members of the host communities. Since, spillage is in most cases inevitable in oil operations MNOCs should be more responsible in the event of its occurrence and opt for amicable settlement. It is prudence for them to always engage the victims in round table talk rather than go through marathon litigations in the

[14] Aldo Orellana Lopez, 'Chevron Vs Ecuador: International Arbitration and Corporate Impunity' [27 March 2019] <www.opendemocracy.net> accessed 12 May 2021

[15] Sebastien Malo, 'Lawyer who sued Chevron over Ecuador Pollution Faces N. Y. Contempt Trial' [10 May 2021] <https://www.reuters.com> accessed 12 May 2021

event of oil spills. Unless by their own calculation it is cheaper to engage in legal battle than to resolve the dispute amicably. The host communities should also be open to discussion and be amenable to settlement. They should take into consideration the fact that there is no guarantee that they must win at all times if they go to court.

4.0 Emerging Concept of Transnational Jurisdiction in Environmental Pollution Claims

In recent times certain developments have been made in relations to environmental pollution claims world over. The development serves as hope for future victims of environmental pollution who may want to seek remedy in courts. There is now an emerging transnational jurisdiction in oil spillage claim against MNOCs. The first case on this was that of Lungowe v. Vedanta Resources PLC[16]. In that case Zambian villagers in 2015 filed a claim in UK's court against UK based copper mining giant Vedanta Resources alleging that toxic discharged by the company poisoned water sources and destroyed farmlands. The issue that went up to the UK's Supreme Court has to do with jurisdiction.[17] The question was whether the action is maintainable in UK in view of the fact that the alleged pollution took place in Zambia. In a landmark ruling the apex court held that the case could be fought in the UK's court. It noted that the company owed the villagers a duty of care in carrying on their business. The court agreed with the claimants that they may not get justice in Zambian courts.

[16] [2019] UK 20 (SC)

[17] Samuel Varvastian and Felicity Kalunga, 'Transnational Corporate Liability for Environmental Damages and Climate Change: Reassessing Access to Justice after Vedanta v. Lungowe' [2020] (9) (2) *Transnational Environmental Law* 323 <https://www.cambrige.org/core/terms> accessed 12 May 2021

After the ruling the company opted for out of court settlement. The parties did settle and the claimants fully compensated by the company.[18]

The second in line was the case of Okpabi & Ors v. Royal Dutch Shell PLC & Anor.[19] In the case farmers and fishermen of Ogale and Bille communities in Rivers State through their representative sued Shell and Royal Dutch firm in UK's court. The claimants alleged that shell through its operations in Nigeria had severally polluted their farmlands and waters making it unfit for drinking, irrigation, washing. That Shell does nothing to clean up the polluted land. Upon service of the processes of the suit on the defendants, the 1st defendant raised an objection on the jurisdiction of the court to hear the suit. It partly contended that the alleged pollution took place in Nigeria and that it is only a Nigerian court that has jurisdiction over the matter. It was further argued by Royal Dutch that if there was any incidence of pollution that it is Shell its subsidiary in Nigeria that should be liable. However, the claimants were able to show that apart from being the parent company that the 1st defendant has effective control over the operations and standard guidelines of the 2nd defendant (Shell) and to that extent owes the claimants duty of care. The trial court ruled in favour of the claimants, the defendants being dissatisfied with the decision of the court appealed to Court of Appeal that set aside the judgment of the trial court. Being dissatisfied the claimants appealed

[18] BBC, 'Vedanta Mine Settles Zambians Villagers Pollution Claim' (19 January 2021) <https://www.BBC.com> accessed 28 April 2021

[19] [2021] UKSC3 (12 February 2021)<http://www.bailii.org/uk/cases/uksc/2021-html

to the Supreme Court in allowing the appeal the apex court held that the action could be maintained in UK's courts provided the parent company is based in UK pointing out that the claimants may not get justice in Nigeria. The court further held that 1st defendant being a parent company of the 2nd defendant (Shell) owes a duty of care to people who are likely to suffer damage from the operations of its subsidiary in another country. As pointed out by the lead counsel to the claimants that Shell in the case did not deny responsibility over alleged pollution.

The authorities of the two cases established that a parent company owes a duty of case to whoever is likely and actually suffered injury resulting from the operations of its subsidiaries. On the basis of duty of care victims of such injury can maintain an action against the parent company in another country other than the country where the injury occurred provided the parent company is based in the country where the action is instituted or pending. Interestingly, the courts in the two cases observed and rightly so, that the victims may not get justice if they are to maintain the actions in their home countries. The implication of this observation is to the fact that the influential tendencies of MNOCs particularly Shell is recognized world over. It signifies that MNOCs could use their financial muscles to pervert justice. It is also suggestive that African courts particularly Nigeria has certain limitations preventing it from doing justice in matters before it especially when a giant party such as Shell is involved. It has been said that the judgment in the case spells the end of long chapter of impunity for Shell and for other multinationals who commit human rights abuses overseas. It gave hope to victims of environmental

hazards that they can get justice if not in Nigeria then elsewhere. The judgment in the case has come to liberate victims of environmental pollution in Nigeria. Their assurance is doubled now, meaning that if they cannot get justice in Nigerian courts due to one reason or the other they can approach foreign courts where justice will be served. Still on development in the field of environmental pollution claims. It will be recalled that locus standi used to be a serious hindrance to victims of oil spills in accessing damages in Nigerian courts in the past.[20] A good number of cases were thrown out by the courts on the basis that claimant(s) lacks locus to initiate the action in the first place. The insistence that a claimant must have a locus standi was so serious that parties adjudged not having same went home without a remedy while the oil mogul that perpetrated the environmental harms on the parties went home celebrating their impunities.[21] Then the position was that any party that does not have sufficient interest over the complained oil spillage cannot maintain an action for himself or on behalf of others. The requirement shut out human rights activists including non-governmental organizations from maintaining actions on behalf of the poor oil spills victims.[22]

The undue insistence on sufficient interest (locus standi) on subject matter of dispute is now a thing of the past as the Supreme Court of Nigeria in a recent landmark decision in the case of Centre for Oil

[20] S. A Fagbemi and A. R Akpanke, 'Environmental Litigation in Nigeria: the Role of the Judiciary [2019] (10) (2) *NAUJILJ.* 26

[21] Elendu v. Ekwoata (1995)3 NWLR (Pt 8)522

[22] Emmanuel U. Onyeabor, Expanding the Scope of Locus Standi in Environmental Litigation [2010] (7) (1) *Unizik Law Journal* 1

Pollution Watch v. Nigerian National Petroleum Corporation.[23] In that case the appellant was an NGO incorporated under CAMA with objects to ensure reinstatement, restoration and remediation of environments impaired by oil spillages. The appellant filed an action against the respondent in the Federal High Court Lagos in respect of oil spillage at Acha Autonomous Community of Isukuato Local Government Area of Abia State of Nigeria allegedly caused by the respondent. While the suit was pending the respondent challenged its competence alleging that the appellant being an NGO does not have locus standi to initiate the action against the respondent. After hearing arguments for and against by the trial judge, the court in a considered ruling dismissed the suit. Appellant appeal to Court of Appeal was also dismissed.

On further appeal to the Supreme Court, the apex court invited some Senior Advocate of Nigeria (SANs) as amicus curiae (friends of the court) to assist the court in arriving at a just determination of the appeal. The court after hearing arguments from both sides including the invited amicus on the issue allowed the appeal and set aside the judgment of the Court of Appeal. The court held that in environmental pollution claims as the present case NGOs such as the appellant have the requisite locus standi to sue. The court reiterated that the appeal being a public interest litigation is instituted in the interest of the general public and in an action brought for the benefit of a group or class of persons who have suffered a general wrong or about to so suffer as a result of the activities of other persons usually corporate institutions, governments for political, religious or economics gains.

[23] [2019]5 NWLR (Pt. 1666) 518

It was the view of the court that the responsibility of the state to protect the environment is now a well-accepted notion in all countries. The court observed that the provisions of the Constitution and African Charter on Human and Peoples' Right to which Nigeria is a signatory, recognize fundamental rights of citizenry to a clean and healthy environment to sustain life.

The relevance of the above case to Nigerian jurisprudence is the liberation of victims of environmental pollution from the legal impediment of locus standi which has hitherto denied many of judicial remedies in the past.[24] The case has now clothed NGOs with locus standi in environmental matters. The implication is that NGOs will no longer be regarded as interlopers in bringing class actions involving environmental pollutions in the country. This was not the position in the past where the few NGOs that initiated legal actions on behalf of certain classes of persons were dismissed by the court on the basis of lack of locus standi. Now the coast is clear for environmental based activists and NGOs to assist the poor members of host communities to get justice over age long environmental degradation caused by MNOCs in Nigeria particularly in Niger Delta areas of the country.[25]

[24] Oronto Douglas v. Shell (1999) 2 NWLR (Pt. 591) 466 (SC)

[25] Miriam Chinyere Anozie and Emmanuel Onyedi Wingate, NGO Standing in Petroleum Pollution Litigation in Nigeria-Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation [2020] (13) (5-6) *Journal of World Energy Law and Business.*490

5.0 Relevance of Agbara's Case to Business and Human Rights (BHR)

Profit making is the most valuable considerations, if not the only objective of multinational oil companies (MNOCs) operating everywhere in the world particularly Sub-Saharan Africa. Over the years, Shell has paid almost all attention to profit making at the expense of the victims of environmental pollution resulting from its exploration activities in the Niger-Delta. It has always been the attitude of Shell to do anything possible to avoid payment of compensation for environmental pollution in Nigeria.[26] It had in most environmental pollution actions instituted against it exploited loopholes in existing legislations to evade responsibility or payment of compensation to the victims. In the case of Agbara Shell was ordered by the trial Federal Court to pay compensation to the claimants who were the victims of environmental pollution that resulted from its oil production activities. Shell appealed the decision of the trial court up to the Supreme Court unsuccessfully. It first appeal to the Supreme Court was determined sometimes in 2015. Shell as usual later went for another second missionary journey over the same suit. It appealed again from Court of Appeal to the Supreme. As if that was not enough Shell in an application dated July 24, 2019 urged the apex court to set aside its earlier decision of January 11 2019. But the Supreme Court after hearing argument dismissed the application as being "unmeritorious. This has further explicated the antics of multinational enterprises like Shell in exonerating itself from

[26] MA Saleh, MA Ashiru and others, 'Risk and Environmental Implications of Oil Spillage in Nigeria (Niger Delta Region)' [2017](3) (2) *International Journal of Geography and Environmental Management.* 1

paying compensation to the victims of environmental harms caused by it in Niger-Delta.

The case under review holds a lot for business and human rights. As noted earlier, the case calls the attention of MNOCs to the fact that in carrying out their oil operations they should as much as possible balance their business interest with the environmental rights of the host communities.[27] The decision is a signal to MNOCs that the era of business as usual has gone. Like in the past when the only focus of MNOCs was their business interest and profit making at the expense of the lives of the members of host communities. They are now required to be more responsible in their operational activities in the host areas. To achieve this they have to do everything humanly possible to avoid polluting the environment with oil spills. This suggests the deployment of best technologies to ensure that oil does not spill into the environment. Failure to be more circumspect in their activities will render them liable to remedy those whose environmental rights have been violated by their activities. It emphasized the need for MNOCs to take responsibility for their action rather than shift blames.

The five main responsibilities of businesses specifically related to climate change are to reduce greenhouse gas emissions from their own

[27] Kato Gogo Kingston, 'Shell Oil Company in Nigeria: Impediment or Catalyst of Socio-Economic Development [2011] (1) (1) *African Journal of Social Sciences.* 15

activities and their subsidiaries.[28] Reduce greenhouse gas emissions from their products and services; minimize greenhouse gas emissions from their suppliers; publicly disclose their emissions, climate vulnerability and the risk of stranded assets; and ensure that people affected by business-related human rights violations have access to effective remedies. In addition, businesses should support, rather than oppose, public policies intended to effectively address climate change. MNOCs had over the years failed to comply with these directives in carrying out their operations. They can go to any lent to distort judicial process just to make sure that victims of their actions do not succeed in claiming compensations against them. They flare gases in reckless abandon in their operation.[29]

The case on the other hand is a hope raiser. It has demonstrated that MNOCs can be held accountable over environmental harms caused by them. The case has smoothing access to compensation over environmental rights infraction by MNOCs while carrying on their business operations. Environmental pollution victims will now be more courageous to approach the courts for the redress of their rights. They do not have to be scared due to the financial muscle of MNOCs while approaching the courts. Once their claim is genuine they are free to go to court. Especially when they have exploited other alternative dispute resolution options and it fails.

[28] Philip Alston, 'Climate Change and Poverty UN doc A/HRC/41/39' (25 June 2019) <digitallibrary.un.org> accessed 27 April 2021

[29] David Birchall, 'Corporate Power over Human Rights: An Analytical Framework' [2020] 5:1 *Business and Human Rights Journal* 1, 8-12, 17-20. doi:10.1017/bhj.2020.23.

6.0 Challenges of Accessing Compensations by Victims of Corporate Environmental Harm in Nigeria

The saying that where there is a wrong there must be a remedy may be alien to environmental pollution cases in Nigeria. In most host states inclusive of Nigeria, victims of environmental pollution find it difficult if not impossible to access remedy from MNOCs responsible for the wrongs suffered. A lot of factors are responsible for lack of easy access to judicial remedies by victims of environmental pollution resulting from the activities of oil companies.

To start with, most MNOCs, such as Shell attach high premium to profit they make from their business. They are ready to sacrifice human rights and even lives just to make profit. This explains the reason why Shell in the Agbara's case made every effort not only to frustrate the hearing of the case but also to ensure the claimants go home without any form of compensations. That was the least Shell could do in avoiding payment of compensation to the victims of their actions. Such attitudinal indifferent by MNOCs had intimidated many victims into accepting whatever injuries they suffered as their fate. Some of the victims may not put up any form of protestation in the event of pollution because to them such action is a waste of time.[30]

There is a problem of institutional weakness and failure in the country. In Nigeria for instance there is no functional institution charged with the responsibility of ensuring that victims of environmental harms are

[30] A.A Obafemi, O. S Eludoyin and B. M Akinbosola, 'Public Perception of Environmental Pollution in Warri, Nigeria' [2012] (16) (2) *Journal of Applied Sciences Environmental Management* 233

adequately compensation from those whose activities caused the harms. Agencies of environmental protection have little or no interest in ensuring that victims of such harms get compensated. Many factors are responsible for such lack of interest on the part of environmental agencies. One of such problems is corruption.[31] Some members of the agencies may be more interested on what they will get for MNOCs than to do their jobs. MNOCs will prefer to bribe the agencies for them not to carry out their jobs than pay compensation to oil spills' victims. Once the agency is bribed, the losses suffered by the victims stop being a concern to them. Their statutory functions and duties will be kept aside.

Again another challenge is the luck-warmness attitude of Nigerian government over the welfares of environmental pollution victims especially when it results from oil spills.[32] This challenge is regarded as conspiracy theory. The theory is a school of thought that sees government as partner in crime over oil spills in the country. According to the school, the reason why government pays nonchalant attitude to its citizens suffering oil spills is because of its invested interest in oil productions in the country.[33] Simply put, while MNOCs pay attention to profit making from oil operations, Nigerian government is interested in royalties and monies accruing to it from

[31] Zephaniah Osuyi Edo, 'the Challenges of Effective Environmental Enforcement and Compliance in the Niger Delta Region of Nigeria' [2012] (14) (6) *Journal of Sustainable Development in Africa* 1

[32] Theophilus Chinonyerem Nwokedi, Moses Ntor-Ue and others, 'Economic Implications of Marine Oil Spill to Nigeria: A Case for Improvement in Coastal Pipeline Management and Surveillance Practices' [2017] (2) (3) *International Journal of Economy, Energy and Environment. 40*

[33] ibid

the operations of the oil companies, leaving the victims of environmental harms to their fate.

The government hardly issues strong statement condemning oil spillage whenever it occurs in the country and even when it does so, it is usually lips service. This attitude of government over oil spills is a determining factor of the negative responses by the oil companies in the event of any call to pay compensation. The answer is simple; no multinational company will care more about the welfares of the masses of host states than the government of that country. Therefore, since the government is only interested in what it gets from oil operations, MNOCs will then be more concerned in maximizing profit. Over the years Nigerian government had shown total inability to address the issue of environmental pollutions and degradations resulting from oil explorations in the country. The political will to deal with the issue has not been demonstrated by the government. This had from time to time occasioned restiveness between the companies and members of the communities in oil producing states in the country. With it resultant violence, killings, vandalization of oil pipelines, kidnapping of expatriates working in oil companies and other nefarious activities in those areas.[34]

There is a challenge of lack of judicial activism and over-dwelling on mere technicality by Nigerian courts in handling environmental pollution cases. This also impairs access to compensations by the victims of environmental pollutions. Appraisal of incidences of

[34] Ilufoye Sarafa Ogundiya, 'Domestic Terrorism and Security Threats in the Niger Delta Region of Nigeria [2009] (20) (1) *Journal of Social Sciences* 1

environmental pollution from oil spills that went to courts in Nigeria were visited with unfavourable disposition by courts on the part of the victims.[35] To start with, some of judges lack courage and boldness to do justice without fear or favour. Many reasons account for this ugly situations. Majorly is the issue of corruption in Nigeria judicial system. Corruption in the system has several causes. The poor remuneration of judges in Nigeria leaves much to be desired.[36] This poor remuneration makes some of them susceptible to bribery. Besides poor remuneration is the issue of the parties involved. It is already a known fact that MNOCs are very influential and powerful. They could make offers that most judges in the country will not turn down. Once the offer is accepted the case will be compromised to the detriment of the victims. The offer will definitely affect the outcome of case.[37] Court facilities in Nigeria are hopelessly over-crowded, poorly equipped and under-funded. All this makes corruption practices easier in Nigerian legal system, leaving victims of oil spills worst for it.

Legal technicality as mentioned earlier is another clog in the wheel of justice in Nigeria.[38] In addition, there are also problems of certain legal requirements. For instance, the requirement of expert witness to

[35] Amos v. Shell (1977) 6 S.C 109

[36] Rufus Akpofurere Mmada, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel [2013] (2) (1) *Afe Babalola University Journal of Sustainable Development Law and Policies*. 150

[37] Wilson Uchechukwu Nwosu, 'The Impact of Corruption on the Administration of Justice in Nigeria' [2018](4) (1) *Journal of Good Governance and Sustainable Development in Africa* 1

[38] SPDC V. Otoko [1990] 6 NWLR (Pt. 156) 693 (SC)

prove actually that pollution if any resulted from oil spills and that the company in question was negligent in carrying out its operations. Some of the claimants in environmental harms cases may not afford the financial implication of procuring an expert witness.[39] Failure to do so in some cases will lead to the case of such victims to be thrown out for want of proves.[40] Production of expert witnesses would not a problem to MNOCs. MNOCs can procure as many expert witnesses as required just to avert responsibility. Host of other procedural peculiarities exist within the context of Nigerian jurisprudence that further complicate environmental related cases. Some of them include jurisdiction of the trial court, legal standing of an individual to bring suit, misjoinder and non-joinder of parties. No matter how skinny any of these issues may look but once raised by defendant and ruled by the court an aggrieved party can appeal the ruling up to Supreme Court just on interlocutory basis.

Legal standing otherwise known as locus standi has been a great impediment in environmental pollution cases in the past. Legal standing is usually assessed by the court on a case by case basis. The prevailing doctrinal position in Nigerian courts with regards to standing is that a litigant must have a personal interest in the matter. Such personal interest has been interpreted to mean one over and above that of the general public. The implication in the past was that nongovernmental organizations (NGOs) and human rights activists

[39] Odong Nsakan-Abasi, 'Burden of Proof: Real Burden in Environmental Litigation for the Niger-Delta of Nigeria' [2020] (35) *Journal of Environmental Law and Litigation.* 195

[40] Ogiale v. Shell [1997]1 NWLR (Pt. 148)182 (SC)

had no locus to sue on behalf of the injured groups. As a result, so many oil pollution incidences in the past were not taken to the court as the victims were either not aware of their environmental rights or were very poor to have engaged in legal battle with financial giants like MNOCs.[41]

Another challenge is the enforcement of court judgment against MNOCs in Nigeria. In most environmental pollution actions against MNOCs, Nigerian National Petroleum Corporation (NNPC) is usually joined as a party. Since it has equity share in all oil exploration contracts with MNOCs. When judgment is given against MNOCs and NNPC by the courts enforcing the decision is usually a problem. For instance, there is a requirement for the consent of the Attorney General of the Federation whenever judgment is to be enforced against the Federal Government assets.[42] The practice is that AG will usually withhold consent for whatever it worth, just to frustrate the judgment creditors. Once this is done, the victorious party has a judgment that he cannot enforce. The only option left for such a party is to go behind doors and have an understanding with the AG as per his share in the judgment sum just for him to give approval which ordinarily is his duty to comply. Besides, uncooperative manner of AG is the attitude of MNOCs against orders of courts. MNOCs would rather prefer to

[41] Toyosi Olugbenga Samson Owolabi and Eloamaka Okonkwo, 'Compensation for Environmental Pollution and Justice Procurement in the Niger Delta Area of Nigeria: the Mass Media Role' [2014] (16) (7) *Journal of Sustainable Development in Africa.* 35

[42] Section 84 (1) Sheriffs and Civil Processes Act; Akwa Ibom State v. Powercom Nigeria Ltd [2004] 16 NWLR (Pt. 868) 202; Onjewu v. K.S.M.C.I [2003] 10 NWLR (Pt. 827) 40 see also CBN v. Interstella Communications Ltd [2017] ALL FWLR (Pt. 930)443.

stay in court for thousand years than to comply with the order of court. Even when a matter has proceeded up to Supreme Court and the outcome is against MNOCs, in their usual character they will go back to court to argue one point or the other just to defeat course of justice.[43] Sometimes they end up abusing the court process with their financial muscles.

Lastly, is the problem of lack of awareness among members of host communities. Greater number of oil operations takes place in rural areas where the dwellers are dominantly illiterate that cannot differentiate between environmental pollution resulting from oil operation and that from natural causes.[44] Some can barely know when it is said that the environment has been polluted. In addition, most of the rural dwellers are suffering from abject poverty that even when they are aware of pollution occurrence they can hardly do anything. Because they lack the means to engage oil companies in a legal battle. They will rather chicken out and shed off any idea of making the company concerned to account. Even when they take the option of legal action they can hardly afford the services of lawyers that will match the competency and standard of the ones to be engaged by the oil companies. This lack of awareness and means are the reasons why most of the pollution cases do not go to court.

[43] P Luke Kaananwi and Nuleera A Duson, 'Practical Challenges to the Enforcement of Judgments in Nigeria' [2020] (8) (2) *International Journal of Innovative Legal and Political Studies 1*

[44] Zephaniah Osuyi Edo, n19

7.0 Recommendations

In the light of the identified challenges hindering access to compensation by victims of environmental harms resulting from oil spillages in Nigeria, the paper makes the following recommendations:

i. **Judicial Reforms:** judicial reform is the way to go in addressing the issue of corruption and bribery that have bedeviled judiciary lately. An enduring reform must require a full financial autonomy for judiciary. It is sad that up till date the issue of financial autonomy is still be dragged over between the judiciary and executive arms in the country. The autonomy issue has brought about serial industrial actions embarked upon by the members of Judicial Staff Union of Nigeria (JUSUN). It is surprising that despite clear provisions of the Constitution guaranteeing financial autonomy for judiciary, the politicians are still making all sort of argument just to keep violating the Constitution.[45]It is clear the politicians are doing this to keep the judiciary subservient to them so that judicial officers will always do their bidden whenever the need arises.

   Without mincing words, the enduring solution to judicial corruption is financial autonomy. The autonomy will guarantee adequate remuneration for judicial officers and reduce quest for bribery. The scripture had said it all, that money answers to all things.[46]The implication of that scripture is that with enough

[45] Constitution of the Federal Republic of Nigeria 1999 (as amended) ss 81 (3) (c) and 162 (9)

[46] The New King James Version, Red Letter Edition, Ecclesiastes 10 : 19

money in the hands of judicial officers bribery will not be an option to them.

With the judicial autonomy the courts will be well equipped. The judges will be in the right frame of mind to do their jobs effectively and to dispense justice without fear or favour even if MNOCs are involved in a case before them. As part of the reform, Nigerian courts need to brace-up with the current international best practices in relation to environmental rights.[47] It should be part of legal system's functions to condition both MNOCs and government to adopt practices that encourage healthy environment. Environment devoid of oil spills, pollution and greenhouse emissions. Above all to hold government responsible for failure to respect all international treaties on environment entered into by it. As done in civilized climes where MNOCs and national governments are held by courts to account for environmental harms caused by their inactions on the masses.[48] In addition judges should reinvigorate the spirit of boldness and activism so as to have the courage to play down technicalities in the interest of substantial justice in environmental pollution cases. Such as was demonstrated in both recent cases of Agbara and NNPC that have earned people's endorsement. When this is in place victims of

[47] Meiriman v. Fringal County Council [2017] 1 EHC 695; Friends of the Irish Environment v. The Govt of Ireland & Ors [2020] 1 ESC 49 see also The State of the Netherlands v. Urgenda [2019] ECLI: NL: HR

[48] Juliana v. United State [2016] 217, supp. 3rd 1224, 7233; Ashgar-Leghan v. Federation of Pakistan [2015] WPZ 25501/201 (pak.) Climate Case Chart <https:// perma. Cc/8uf-845A> accessed 10 May 2021

environmental harms in well deserving cases will go home victorious while the MNOCs will come to know that time for business as usual is over. Not only that, victims of environmental pollution will be confident in approaching the court to seek redress over environmental harms.

As part of the reform, an enactment of legal framework that would shift burden of proof in environmental pollution cases to the MNOCs that usually have the custody all material evidence concerning the spillages. The installations and equipment used for the oil operation are under their control. They should have the burden to proof why they should not be held liable over a particular oil spill. Shifting of legal burden of proof to the MNOCs is almost becoming standard practice in international law. Therefore, legal reform is needed to reflect the current position of the law as obtainable in international rearm in Nigeria. Once this is done it will go a long way to ease the financial burden on the victims of environmental pollution in Nigeria and make access to compensation lighter for them.

ii. **Creation of Oil Spills Anticipation Fund Deposit**: To make the burden of environmental pollution victims lighter, there is a need to insert a clause in all contracts to be signed by the government and oil companies requiring the latter to deposit a specified huge sum of money with the Central Bank of Nigeria (CBN). Such deposit is to be made on or before commencement of oil operations by the company concerned. The money so deposited is to be used to compensate victims who suffer

environmental pollution resulting from oil operation of the company. To make this arrangement effective a tripartite committee is to be created. The committee is to be made up of representatives of the government, the Oil Company concerned and the host communities respectively. Once incidence of oil spill occurs the committee members will come in and investigate the allegation and if found to be true. They will then examine the extent of the damage caused, take the inventory of victims that actually suffered from the spillage. Upon ascertainment of this, part of the deposited money will be pooled for the compensation of the victims without the need to go through the hug of litigation except in extreme cases.

However, if at the end of the oil production contract entered into by the parties and there is no incidence of oil spills from the company's operations and installations, the money deposited will be refunded to the oil company. Creation of this fund has two effects. Firstly on the part of the company, it will employ all sense of serious and reasonable care in its operations knowing that if oil spills occurs due to any negligence on its part the deposited money will be forfeited. On the other part, members of the host communities will be rest assured that in the event they suffer any damage from oil spill they have something to fall back on. The overall implication of will be the existence of harmony will between the host communities and the oil company.

iii. **Environmental Victims Support Funds**: To assist victims of environmental pollution special fund pool needs to be created by nongovernmental organizations (NGOs) in Nigeria. Freewill donation is to be encouraged from world donors and philanthropies to contribute to the pool. The aim of the pool is to assist victims of oil spills in the event that any oil spill dispute proceeds to court. For instance, part of the fund is to be used to engage the services of lawyers whose competency will match the legal teams of Oil Company. From the fund expert witnesses could be procured when required. Procurement of expert witness is usually above the reach of average claimants in environmental pollution claims. Of course, creation of this fund will place environmental harm victims in the same footing with the oil companies. MNOCs knowledge of the fact that members of their host communities now have the financial muscle to engage them in legal battle to any level will make them trade with caution in carrying on their business. In the event of oil spill the company will be ready to payment compensation to avoid being dragged to court.

iv. **Establishment of Special Court:** Due to delay of cases as a result of overcrowded nature of Nigerian courts. It will be a good idea if a special court is created with original jurisdiction to try environmental pollution cases. Lawyers with special knowledge of oil and environmental laws are to be appointed to preside in the court. Provision is to be made to enable the court to procure the services of neutral expert witnesses. The duty of the expert witnesses is to assist the court to arrival at just

determination of cases before the court. The identities of the experts are to be kept secret. They could testify in camera just to keep their identities undisclosed to the public. This will ensure the neutrality of the witnesses. The establishing law of the court will specify the timeframe within which to conclude a case brought before it. The period to be specified should not exceed six months calculating from the date of filing of the case. Appeals from the decisions of the court will lie to the Court of Appeal, up to Supreme Court. The enabling law of the court will also state periods within which appeals emanating from the court should be determined. Again such periods to be specified should not be in the excess of three months. The law should in clear terms remove all legal clogs such as locus standi, statute bar, pre-action notice among other hosts of technicalities from applying in environmental pollution based actions.

v. **Easing Enforcement:** In the course of discussion, the paper identified two judgment enforcement challenges in Nigeria. First, is the attitude of MNOCs that do not like paying compensations to the victims of their business activity? Second, is the requirement for the Attorney General's consent to execute judgment against government asset. In addressing the first issue, since it has become a common practice for the oil companies to go on appeal over every issue particularly when the final decision is against it. Once judgment is given against MNOCs and damages awarded, they will usually apply for stay of execution. The courts then have to develop a practice of ordering the company to pay the sum awarded into an interest yielding

account as a condition for granting a stay. Once the sum is paid and the appeal turned out not be successful at the end of the day, executing the judgment becomes easier. Even if the company in question decides to relocate its assets out of the country as they sometimes do, such decision is of no moment since the judgment sum is intact. Not only that, the sum deposited must have accumulated serious interest. On the issue of AG's consent, what the claimant who sues NNPC or any other government agency alongside oil company should do is to join AG in the suit as well. Once the AG is joined his consent is no longer required to execute judgment over government assets, on the authority of CBN v. Interstella Communications Ltd (supra).

vi. **Encouragement of Public Interest Litigations:** The motto of Nigerian Bar Association (NBA) is to promote rule of law in the country. Rule of law is not promoted in a vacuum. Therefore, as a responsible organization NBA has much to do in relation to environmental pollutions resulting from oil spills. Since, it has been shown that most members of host communities are poor and unaware. It beholds the NBA to assist them in certain deserving cases. NBA can do this by initiating litigations against MNOCs in the event of oil spills on behalf of the victims. It can do so by working in synergy with NGOs that has environmental interest. The primary duty of the NGOs will be to monitor and detects oil spills in the country. Once oil spill is identified anywhere by the NGO the duty is on them to bring it to the knowledge of NBA. NBA leadership can then take any action they consider to be for the best interest of the victims.

It is a good thing that NBA has created public interest litigation committee but is not enough to stop at just creating the committee. The committee must be made functional. That is by making sure that it serves the public. Funds should be made available to encourage the committee to take up actions on behalf of the oppressed masses. NBA should reassume its former position in the society. In the past, the fear of NBA was the beginning of wisdom. But that respect seems to have gone due to unhealthy compromises by the past leadership. The idea of jostling for government and corporate attentions should be a thing of the past by now. NBA is expected to be the foot soldiers of the masses and not government extension. This is the time to get it right once again or never. NGOs that are financially up to do can also assist NBA in this project. It has to be a collaborative undertaking. The NGOs can make funds available as part of their own contribution to achieve justice for the victims of oil spills.

vii. **Creation of Awareness and Enlightenment:** Since it has been shown that the local dweller in oil host communities are mostly unaware people. Creation of awareness and enlightenment is nonnegotiable. Therefore, environmental based NGOs have a serious job to do. They are to educate the masses about their environmental rights. Members of host communities should be made to know that is their right to have unpolluted and clean environment free from oil spills. Clean water, air and lands that will make good yield. They should be encouraged to report

every act of oil spill noticed around them. They have to be educated to detect oil spills whenever it occurs. This enlightenment can take place in public arena, churches, mosques; town halls etc, the help of jingles can be employed in mass media.

8.0 Conclusion

To increase access to judicial remedies in relation to environmental pollution the attitude of courts is central factor which must not be overlooked. The more realistic and activismic the courts are the more accessible compensations over environmental pollution claims will become in Nigeria. Recent developments have shown that courts in the country are becoming environmental rights friendly unlike in the past. Unarguably, this trend needs to be sustained for the citizens to have clean and healthy environments good enough for the fulfillment of their destinies. This consciousness and boldness of the courts need to be extended against inactions of the government over environment. That is, government failure to respect several treaties it signed to protect the environment and reduce activities that affect it. To ensure that government complies with its obligations under both national and international instruments on reducing environmental hazards in the country. Nigerian courts must as a matter of urgency, adopt the global trend on environmental rights liberations. Recently records are bound of national courts holding their governments responsible for failing to comply with their legal obligations to save the environments, in foreign climes.

In commending the boldness of Nigeria courts in recent times by expanding the horizon of accessing judicial remedies over environmental

harms, the courts are encouraged to do more by playing down technicalities and other legal impediments that had hitherto defeated course of justice in that regards. The war against environmental impunities cannot be won, if the courts do not take a second look at the nature of damages (compensation) it awards against environmental violators. The damages sometimes are so paltry in nature that it does not in anywhere commensurate with the injuries suffered by the victims not to talk of time and money wasted in the course of protracted litigations. Apart from the courts, civil society groups like NBA should be on the watch and as well lay a supporting hand to ensure that the environment is liberated from all forms of pollution.