THE USE OF MEDIATION IN THE RESOLUTION OF DISPUTES BETWEEN HOST COMMUNITIES AND MULTINATIONAL CORPORATIONS OPERATING IN THE NIGER DELTA REGION

By

Okpalaugo Chukwudi*

Abstract

Every civilized nation requires a system of justice in which aggrieved parties can obtain redress through the legal enforcement of their rights. Traditionally, litigation has served this purpose, satisfying the natural inclination of humans to settle disputes only under compulsion, even where dialogue or mutual agreement would serve adequately. This historical bias towards litigation is now giving way to consensual processes, principally mediation, as the first recourse in the settlement of these disputes. Consequently, in the field of environmental law, mediation is emerging on a global scale as a new approach towards the collaborative resolution of disputes over proposed or completed developments that have environmental effects. This paper therefore aims at expounding on the gains of environmental mediation, with the express purpose of advocating its increased adoption in resolving environmental disputes in Nigeria. The objective of this paper is to identify and evaluate the impact of mediation in resolving conflicts between host communities and multinational corporations in the Niger Delta region of Nigeria. The doctrinal research method was adopted in this paper as both the primary and secondary sources of law were relied on. This paper found amongst others that irrespective of the present emergence of mediation, environmental litigation is, to a large extent, still a structurally inadequate option in Nigeria. If properly utilised in settling environmental disputes, particularly those between oil and gas companies, and the local communities hosting them, mediation is bound to reduce the adverse impacts of exploitation of these resources on the human and natural environment of Nigeria. However, mediation is only a means to an end. Much of its success will depend on the particular mediator's skills and repertoire, as much as on the openness of potential disputants to the process. Both findings in this paper, however, converge on the recognition that there is need for environmental mediation to be accorded statutory privilege. Such a move will not only bolster the practice and integrity of environmental mediation, but will also guard the key premise upon which it is founded, and avoid the likely incessant court interference from impeding the growth and viability of the promising new sector.

Keywords: *Mediation, Niger Delta, Multi National Corporations, Dispute Resolutions*

1.0 Introduction

The Niger Delta Region of Nigeria has attracted a great deal of attention over the years. Among the major reasons for this is the rich natural endowment of the region. The Niger Delta is reputed to be one of the world's largest wetlands, having ecosystems comparable to the Sundarbans in Bangladesh, Malaysia, and India.[1] More importantly, it is also rich in crude oil, which has become the mainstay of Nigeria's economy. Another major reason for the popularity of the Niger Delta, unfortunately, is the frequent conflicts

* LL.B (Hons.); BL.; LL.M (in view)

[1] S O Osagie, S I Ibaba, and M Watts, 'Introduction: Reflections on the Nigerian State, Oil Industry and the Niger Delta' (2009) [11](2) *Journal of African Development*; 13.

associated with oil production in the region.[2] In the latter part of the 20th century, Alternative Dispute Resolution (ADR)[3] particularly, mediation has gained prominence in the international business arena in preference to traditional litigation for settling diverse disputes.[4] In Australia,[5] the U.S.A and Canada,[6] mediation is actively advocated. English courts have recently found it appropriate to penalise litigants who failed to make recourse to mediation before approaching the courts.[7] Increasingly, international petroleum contracts in China, Bangladesh and many other Asian countries provide for amicable settlement of disputes through mediation or conciliation.[8] As a result, it is strongly anticipated that the energy/oil and gas industry worldwide, like many other specialized sectors,[9] will follow this trend.[10]

Environmental conflict is an unavoidable aspect of oil and gas development for the simple reason that the industry's activities are intrinsically linked with impacts on the human and natural environment.[11] The adverse effects[12] of exploitation tend to increase with the progress of development operations,[13] often impacting upon a large group of people, and sometimes lasting for a long time after the end of production activities.[14] The oil-bearing regions in Nigeria[15] present the classical case of oil industry-related environmental despoliation. Most of the country's oilfields are located in the sedimentary basins offshore and onshore the Niger River delta.[16] This area[17] is 70,000 square kilometres in size,[18] and inhabited by about 20 million people.[19] The oil it produces accounts for about 90% of Nigeria's foreign exchange earnings, 95% of the national budget and 80% of Gross Domestic Product (GDP).[20] Since the first commercial

[2] *Ibid,* p. 42
[3] Owing to its unquestioned dominance of the field, mediation is commonly interchanged with the collective term "ADR", the definition of which includes negotiation, early neutral evaluation, expert determination, mini trials, and all other non-litigious means of resolving disputes. P I Azubuike, 'Comingling of Arbitration and Litigation in Dispute Resolution: A Worthy Trend or Regrettable Experience' (2019) *SLP Law Journal;* 45
[4] J Macfarlane, *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing 1997) 9
[5] E Clark, 'The Role of Non-Litigious Dispute Resolution Methods in Environmental Disputes' (1995) 2 *The Australian journal of Natural Resources Law and Policy*; 212
[6] J Girard, 'Dispute Resolution in Environmental Conflict: Panacea or Placebo?' (1999) <http://www.cfcj-fcjc.org/full-text/girard.htm> accessed 13 June 2021.
[7] *Dunnett v Railtrack* (2002) EWCA Civ 302.
[8] A F M Maniruzzaman, 'The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward' (2003) 193 *I.E.L.T.R*; 197.
[9] The Information technology and Intellectual property industries are already championing this trend.
[10] A Connerty, 'Dispute Resolution in the Oil and Gas Industries' (2002) 2 *J.E.N.L.R*; 145.
[11] Z Gao, 'Environmental Regulation of the Oil and Gas Industries' (1998) [2](11) *CEPMLP Journal*; 48
[12] Besides these traditional environmental effects, some new issues have recently been raised by natural resources industries particularly those relating to indigenous peoples, socio-economic and cultural impacts, as well as human rights issues.
[13] *Ibid*
[14] O Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria' (2000) 6 Environmental change and Security Project Report. <http://www.ciaonet.org/> accessed 12 August 2021; 23
[15] With proven reserves of 22.5 billion barrels of crude oil and 124 tcf of natural gas, Nigeria is recorded as the world's tenth largest producer of oil and gas. <http://www.mbendi.co.za/indy/oilg/af/ng/p0005.htm> accessed 12 July 2020.
[16] I L Worika, *Environmental Law and Policy of Petroleum Development* (Port Harcourt: Anpez Centre for Environment and Development, 2002) 78.
[17] The Niger Delta Region comprises the following states of Nigeria: Abia, Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, Imo, Ondo, and Rivers; See Part 1 Section 2 (1) Niger-Delta Development Commission Act, No. 2 1999.
[18] O Akpobibibo, 'Sustainable Development as a Strategy for Conflict Prevention: The Case Of the Niger Delta' <http://www.ogele.org/features/features_nigerdelta.html> accessed 22 August 2021
[19] *Ibid* at p. 7
[20] *Ibid* at p. 8

discovery of oil in Nigeria,[21] the region has remained attractive to many of the major multinational Oil and Gas Companies (OGCs) operating in the country, including Shell, Chevron, Elf and AGIP.[22] Like most other resource-rich parts of the developing world, the Niger delta is characterized by gross underdevelopment and acute poverty.[23] Decades of incessant oil spills have damaged the means of subsistence of the communities and the people have had to contend with acid deposits from continuous gas flaring.[24]

Environmental law is rapidly changing on a global and national scale, among other reasons, in response to these grim injustices of natural resources exploitation.[25] Under the new dispensation, the correlation between effective environmental protection and government accountability is well recognised.[26] Active public participation in environmental decision-making is considered a more potent tool than traditional command and control mechanisms, and as a prerequisite for viable environmental protection regimes.[27] The citizen has become entitled to accurate and current environmental information, which must be provided in an unhindered manner.[28] From this metamorphosis, the "human right to a decent environment" is slowly but steadily emerging.[29] States with a developed legal system and a properly functioning, independent judiciary, environmental rights can, in principle, be enforced by litigating in national courts.[30] But enforcement in emerging economies (EEs)[31] meets with serious obstacles, principal among which is *locus standi* (or standing to sue).[32] Lamenting the findings of a post-Aarhus survey of developing countries, the executive director of UNEP states:

> A major challenge confronting these countries is how these consideration(s) are to be given legal effect… Environmental litigation is not yet well developed in Africa. The issue of locus standi has been a hurdle in most countries in obtaining access (to) the courts and in seeking enforcement of environmental law. Furthermore, lack of information networks and lax policy implementation in

[21] Oil was first discovered in Oloibiri, by Shell BP in 1956, after about 50 years of exploration. Available at <http://www.mbendi.co.za/indy/oilg/ogus/af/ng/p0005.htm> accessed 10 May 2021.
[22] *Ibid*
[23] *Ibid*, some explanation has been offered for this "gap syndrome" in resource-rich regions by the World Commission on Dams in its Report: *Dams and Development: A New Framework for Decision Making*; <http://www.dams.org//docs /report/wcdrep ort.pdf> accessed 16 May 2021.
[24] *Ibid*. p. 34
[25] P Jones, 'The Polluter Pays Principle and the EC Proposal on Environmental Liability: Anything New for Protecting the Ecosystems of Europe's International Watercourses?' 1 - 2, where the author recounts that the "Polluter Pays principle" was developed in the 1970's "to distribute the costs of pollution to industry and to the consumer, and in so doing, maintain the environment in an acceptable state".
[26] M Gavouneli, 'Access to Environmental Information: Delimitation of a Right' (1999-2000) 13 *Tul. Envtl .L.J;* 303
[27] *Ibid* p. 303; Convention on Access to Information, Public Participation, in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Adopted June 25, 1998. U.N.Doc.ECE/CEP/43., Art.5 (1)(c)
[28] E Rehbinder, and D Loperena, 'Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation' <http://iceac.sarenet.es/acad_forumenglish/dlrandrehbinder.htm> assessed 16 May 2021.
[29] Gavouneli (n 26) p. 304.
[30] *Ibid*. p. 304.
[31] Used here in the same sense as "developing countries".
[32] Some countries are however making remarkable efforts to relax their *Locus Standi* laws. For the case of India, see B N Kirpal, 'Developments in India Relating to Environmental Justice' <http://www.unep.org/dpdl/symposium/Documents/Country_papers/INDIA%20.doc> accessed 18 May 2021.

several countries has been a hindrance to furtherance of the three[33] considerations in developing countries.[34]

Nigeria exemplifies this stereotype. In 1996, a Nigerian NGO, Social and Economic Rights and Accountability Project (SERAP), and the Centre for Economic and Social Rights, USA, sought to have audience before the African Commission on Human and Peoples‟ Rights regarding alleged violations of human rights by the Nigerian government (through NNPC) and Shell.[35] SERAP highlighted certain reasons for attributing pollution liability to the government and these included:

a. Failure to enact sufficient environmental protection legislation.
b. Failure to monitor operations of oil and gas companies.
c. Failure to provide adequate information to the Ogonis[36] regarding adverse effects of oil and gas exploitation on their environment.
d. Failure to consult the Ogonis in respect of decisions which affected their environment.
e. Placing the country's legal and military powers at the disposal of the OGCs.
f. Failure to investigate attacks and punish perpetrators.[37]

In order to ascertain whether it could grant audience to SERAP, the Commission first determined whether SERAP had exhausted all local remedies. Noting that no application had previously been made to any domestic court by the NGO, it reasoned that this would not necessarily bar the hearing if it was evident that the remedy sought was in fact unobtainable in the local courts. It then found that such a remedy was not available in Nigeria, among other things, because:

a. Many of the rights infringed were not protected under domestic law, and
b. Despite international outrage against the Ogoni incidents, the government had not placed domestic machinery in place to provide remedies.[38]

Close to ten years on, the situation remains virtually the same.[39] This situation may be attributed mainly to the fact that there is a general dearth of environmental litigation in Nigeria.[40] A number of factors are

[33] Referring to the trio of access to information, public participation in decision-making, and access to justice in environmental matters; established as foundations of sustainable development under the Aarhus Convention.
[34] Global Ministerial Forum, Twenty-first Session, Nairobi, 5-9 February 2001; UNEP/GC.21/4. Available at <http://www.unep.org/GC/GC21/Documents/gc-21-04/K0000363.e-gc-21-4.doc,> accessed 9 August 2021.
[35] The Social and Economic Rights Action Center for Economic and Social Rights of Nigeria, Communication No. 155/95, African Commission on Human and Peoples' Rights.
[36] The ethnic group of the well-known poet and environmental rights activist (under the umbrella of MOSOP), Ken Saro-Wiwa, hanged along with eight others, 10 November, 1995 after a trial that seriously breached international due process standards. B Manby, *The Price of Oil - Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch, 1999) 9.
[37] B Manby (n 36) p. 9.
[38] *Ibid* p. 10
[39] M L Uwais, 'Recent Developments in Nigeria: Strengthening Legal and Institutional Framework for Promoting Environmental Management' Paper delivered at the Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, South Africa, 18-20 August, 2002. <http://www.unep.org/dpdl/symposium/Documents/Country_papers/NIGERIA .doc> accessed 29 June 2021 "...apart from environmental agencies, the rest of the machinery needed to deliver "environmental justice" in the new context, have yet to be created, in both human and material dimensions."
[40] *Ibid* p. 3

responsible for this. In the very recent past, a great proportion of the citizenry was oblivious of environmental pollution surrounding them, irrespective of the causes.[41] The costs of legal action, including the cost of obtaining technical evidence, and the remoteness of venues for redress discourage even those who are environmentally knowledgeable.[42] This shortage has also been attributed to the placid nature of remedies which presently exist for environmental damage, and the general sentiment that actions instituted against polluting facilities in which government has an interest, equates to action against government itself.[43]

Alternative dispute resolution techniques, particularly mediation, have attracted global attention as a cheaper, faster and more satisfying way of reconciling and managing environmental conflict situations.[44] What is revealed from a brief examination of mediation's history below is that mediation was not invented as an alternative to litigation. On this point, Lord Denning warns that:

> "… parties cannot contract to oust the ordinary courts from their jurisdiction. They can of course agree to leave questions of law, as well as fact to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of law. They cannot prevent its decision being examined by the courts. If parties should seek by agreement to take the law out of the hands of the courts and put it in the hands of a private tribunal, without recourse at all to the courts in case of error, then the agreement is to that extent contrary to public policy and void."[45]

Nevertheless, law and policy makers, as well as governments in general, are increasingly turning away from adversarial dispute settlement methods in order to embrace mediation,[46] finding in its consensual approach, better opportunities for ensuring integrative environmental decision-making that attains sustainable development while maintaining "best conservation practice".[47] States have found that they can engineer and supervise environmental protection systems without jeopardising attractiveness to foreign investment;[48] but most importantly, communities and individuals can have their environmental needs met without compromising justice.[49]

2.0 What is Mediation

Mediation is negotiation assisted by a third party. Sometimes the disputants are unable to reach a mutually satisfactory agreement, either because they lack good negotiating skills or because they become emotionally attached to their case. In such case, a third party neutral (usually referred to as mediator, conciliator or

[41] A Adegoke, 'The Challenges of Environmental Enforcement in Africa: The Nigerian Experience' (1994) paper delivered at The Third International Conference on Environmental Enforcement, held in Oaxaca, México, 25-28 April, 1994.
[42] *Ibid* p. 1
[43] Uwais (n. 39) p 3
[44] *Ibid* p. 3
[45] *Lee v Showman's Guild of Great Britain* (1959) 1 All E.R. 1175.
[46] Clark (n. 5) p. 1
[47] D. E. Fisher, *Environmental Law* (Sydney: Law Book Company 1993) p. 76
[48] Clark (n. 5) p. 7
[49] It is often argued by opponents of environmental mediation that justice is an alien consideration to the system, but this impression would be shown below to be largely unfounded.

facilitator) may be called in to help them overcome such challenges.[50] Mediation can also expose the true strengths and weaknesses in the positions of the parties and how they contrast to the assumed positions that both parties might believe they have in litigation. The role of the mediator is not to take decisions on issues or to determine right and wrong, but to help disputants resolve their conflict consensually.

Mediation is a response to the financial cost and emotional stress to contractors, owners, developers, design professionals and others who resort to arbitration or litigation to resolve their disputes. Mediation is a confidential process and the parties and their lawyers are required to sign an agreement to that effect. Mediation allows the business executive to minimize legal costs, control the decision-making process, avoid most of the emotional stress as well as maintain business relationships, and provides the most rapid process for full and final resolution of disputes.

3.0 Why Environmental Disputes Between Oil and Gas Companies and Host Communities are Better Resolved Through Mediation?

In most developing countries, the major concern of governments is to provide essential amenities. Until the post-Rio wave of environmental awareness, environmental protection was tantamount to conservation of natural resources, while concerns over hazardous waste management or control of industrial pollution were treated as obscure and an attempt to retard the speed of industrialization.[51] This blasé attitude to environmental protection often requires a strong catalyst to jolt governments and the populace to their responsibilities, such as the illegal dumping in 1988, of toxic wastes originating from Italy, in the small port of Koko, in Nigeria.[52]

It would be utterly simplistic to assert that mediation meets all of the inadequacies of environmental litigation completely. Nevertheless, the relative structural and procedural advantages which it has over litigation recommend it very highly. The best argument for advocating mediation in the oil and gas industry is that contrary to the "battle" of litigation from which a "victor" and a "vanquished" must emerge,[53] the prospect of maintaining ongoing relationships is paramount in mediation.[54] Certain aspects of mediation are particularly congruent with this goal.

The parties enter into the process voluntarily. The mediator manages the negotiations without taking over,[55] and all parties have equal opportunity to make their input or to negotiate certain cherished values.[56] Mediation depends on the principles of reciprocity- ensuring open exchange of information between the

[50] J R Dean, 'The 1811 Nass River Incident: Images of First Conflict on the Intercultural Frontier' (1993) [13](1) *Canadian Journal of Native Studies;* 83 - 103.
[51] A Adegoke, 'The Challenges of Environmental Enforcement in Africa: The Nigerian Experience' (1994) paper delivered at The Third International Conference on Environmental Enforcement, held in Oaxaca, México, 25-28 April, 1994; 43 - 44
[52] *Ibid* p. 43
[53] C Zwetkoff, 'Mediation in Environmental Conflicts: The Belgian Methodology' (1998) 9 *Risk; Health, Safety and Environment*; 361 <http://www.piercelaw.edu/risk/vol9/fall/ Zwetkoff.pdf.> accessed 16 August 2021.
[54] J G Martin, and M S Anshan, *Alternative Dispute Resolution for Oil and Gas Practitioners* (Chicago Illinois: American Bar Association 2001) 5
[55] M Stone, *Representing Clients in Mediation* (London: Butterworths 1998) 24
[56] Girard (n 6)

parties, and rectification- undoing past wrongs by compensating parties for losses suffered.[57] Decision-making and fact-finding are jointly done,[58] turning the outcome into a future-oriented pact of compromises. The relationship-preserving function of mediation however requires engineering by the mediator. He must first establish his trustworthiness beyond doubt before parties can trust him, and then one another, thus approaching the dispute with a truly co-operative, problem solving frame of mind.[59]

Mediation is commonly noted as being faster than litigation[60] in reaching a final resolution. A case which aptly demonstrates the drag of litigation is the leading Nigerian case of *Shell Petroleum Development Company v. Farah* (supra) dealing with compensation for oil pollution damage.[61] This case arose from an oil spill which occurred in one of Shell's oil wells in the Ogoni area of the Niger delta in 1970. The company argued that it had paid out £22,000 in compensation to individual claimants and had rehabilitated the land by 1975, thereby discharging its responsibilities.[62] Plaintiffs contended that there had been no rehabilitation of the polluted land, and provided evidence to show that Shell had entered negotiations with them for a further period after 1975[63] regarding its continuing rehabilitation obligations. Shell declined taking any further action, and in 1989 plaintiffs sued in the high court and got awarded a total of U.S$51,350 compensation in 1991.[64] Shell contested and lost the decision in 1995 at the Court of Appeal. The company has since appealed to the Supreme Court. In all, a period no less than 22years has elapsed since the occurrence of the pollution.

In sharp contrast, the mediation of the Storm King dispute took just a fraction of this time.[65] It concerned the granting of a construction permit by a state authority to the Consolidated Edison Company of New York for the purpose of building a hydroelectric power facility very close to the Hudson River.[66] This project was opposed by some citizen groups concerned about the adverse health impacts which the project might have on them, as well as possible depletion of the river's aquatic life. Consequently, three court cases were instituted which lasted for over ten years, until both the delay and legal expenses overwhelmed the groups.[67] Recourse was then had to mediation and the parties reached an amicable resolution in just one year, and at much less cost.[68]

---

[57] S A Moore, and S Bache, 'Spatial Scale and Environmental Justice in Australian Environmental Dispute Resolution: Does it Matter and to Whom?' (2003) Murdoch School of Environmental Law <http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/bache/home.htm,> accessed 12 May 2021.
[58] K L Leipmann, 'Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?' (1986-1986) 14 *B.C. Envtl. Aff. L. Rev;* 97.
[59] *Ibid*
[60] E Clark, 'The Role of Non-Litigious Dispute Resolution Methods in Environmental Disputes' (1995) 2 *The Australian Journal of Natural Resources Law and Policy;* 230
[61] [1995] 3 NWLR (Pt. 382) 148.
[62] B Manby, *The Price of Oil - Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (New York: Human Rights Watch 1999) 157.
[63] *Ibid* p. 157
[64] *Ibid*. p. 158
[65] M Ryan, 'Alternative Dispute Resolution in Environmental Cases: Friend or Foe?' (1996-1997) 10 *Tul. Envtl. L.J.*; 400 -402
[66] *Ibid* 401
[67] *Ibid* 402
[68] *Ibid*

A comment must, nevertheless be made here regarding the fastness of environmental mediation. It will be seen below that the success of mediation depends on how its goals are articulated.[69] Although it is a fact that environmental mediation can be concluded with relative dispatch, time-efficiency may be a far less pertinent goal in the process. Environmental disputes, especially in the oil industry, are very complicated and time consuming.[70] Because of the enduring nature of the conflicts which often underlie them, ample allowance ought to be made in the process, for parties to calm their ill-feelings of past unfairness and discrimination, in addition to the relatively lengthy time needed to investigate factual or technical issues.[71] Mediators may therefore, consider balancing social justice goals with time-efficiency, for the process to be meaningful. The standards are his to set, and to follow.[72]

Mediation is generally cheaper than litigation.[73] With increasing sophistication of environmental laws and litigation practice, ordinary members of society can hardly afford to litigate their oil pollution cases.[74] In Nigeria, the situation is aggravated by the fact that oil and gas pollution cases have been transferred from the State to the Federal high courts. Worse still, there is evidence to suggest that the OGCs resort to delay tactics to even lengthen such periods or frustrate the case. An illustration would suffice. A claim had been made by members of the Oguta community for N100, 000 in compensation for a 1966 blockade of the plaintiff's Iyi Efi creeks and farmlands by Shell. Negotiations ensued between the parties and in January 1985, Shell agreed to pay the amount, which it did not pay. The community sought to compel Shell in court[75] and Shell filed a motion for an order of dismissal of the suit, instead of a statement of defence, on grounds that the matter was time barred. Strictly interpreting Nigerian law on the point, the trial court upheld Shell's position, justifying that the 6 years stipulated for bringing an action from the date of causation had indeed elapsed. Fortunately, this decision was reversed on appeal. In the appellate court's view, Shell's admission of fault worked to stop time from running for the purposes of calculating the limitation period.[76]

Access to environmental litigation remains a major problem in most developing countries. The enormity of this inadequacy is underscored by the provisions of Principles 10 and 26 of the Rio Declaration[77] which require states to provide effective access to judicial and administrative processes including remedy and redress. Parties seeking to litigate environmental pollution matters are often saddled with the odious task of proving requisite standing to sue (or *Locus standi*), to be heard.[78]

---

[69] T Parker, 'Human Rights Dispute Resolution: Protecting the Public Interest' <http://www.cfcj-fcjc.org/full-text/parker.htm> accessed 18 June 2021.
[70] D Saxe, 'Water Disputes in Ontario: Environmental Dispute Resolution and the Public Interest' in J Macfarlane (ed.), *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Limited 1997) p. 341
[71] *Ibid*
[72] *Ibid*
[73] J G Martin, and M S Anshan, *Alternative Dispute Resolution for Oil and Gas Practitioners* (Chicago Illinois: American Bar Association 2001) 5
[74] Uwais (n 39) 2
[75] *Nwadiaro v Shell Petroleum Dev. Co. Ltd* [1990] 5 NWLR (Pt. 150) 322 at 338-339 paras. H - B. For a similar case of delay tactics, see *Shell Petroleum Development Company v Uzaoru* [1994] 9 NWLR (Pt. 366) 56.
[76] *Ibid*
[77] Gao (n 11)
[78] R Sanford, 'The Politics of Agreement: Local Governments as Innovators in Environmental Management Conflicts' (2000) [4](7) *Journal of Law and Policy*; 122.

The South African courts for instance, have traditionally adopted a narrow approach towards *locus standi*. A plaintiff who wishes to sue for environmental pollution must prove the existence of a right or a recognized interest that is direct and personal to him.[79] However, the need to protect a person's dignity[80] or to avoid potential threat to a person's health[81] has been held to satisfy this requirement. Again, in the mid-90s for example, a multi-million U.S dollar natural gas pipeline, was to be built to transport gas from the Songosongo area of Southern Tanzania to Dares salaam. This was strongly opposed by local inhabitants who feared health hazards among other things. After unsuccessfully negotiating with the government, an indigenous NGO, the Southern Region Development Authority (SRDA), instituted legal proceedings in the High Court of Tanzania. The case was promptly dismissed by the court on the grounds that SRDA had no locus standi, or a recognised legal capacity to bring action.[82]

Had this matter been submitted to mediation, the question of who should participate would have been much better handled. Practitioners and writers generally agree that the key parties affected ought to be involved in the mediation process for it to be successful.[83] Mediation is an open process which recognises the expertise of citizens in their own interests,[84] and though smaller numbers of participants may be desirable,[85] persons and groups are free to define themselves as stakeholders, and be accordingly integrated and empowered during the process.[86] Qualitative experience and prowess of the mediator in this regard cannot be overemphasised.

There is a general assumption that justice is not factored into mediation's equation, and is therefore not attainable therein. This assumption is false and deserves detailed scrutiny. Strict adherence to unbendable laws is a method of achieving justice in litigation. Environmental disputes are often suffused with grey areas, and the appropriate solution is rarely "black or white". For instance, in the Tanzanian illustration above, the strictures of *locus standi* requirements prevented a balanced assessment of the health implications which close proximity to a proposed gas pipeline may indeed have on the concerned citizens. Litigation is a rigid process that emphasises form over substance. Parties are forced to formulate their cases to fit narrow legal definitions, dispensing with "frills" like the historical, social, political and even economic circumstances which place their dispute in its appropriate context. Clearly, this approach does not serve the ends of justice and must be avoided where it can be helped. Mediation, not only considers parties‟ rights and interests, but is also sympathetic to other concerns and individual needs, giving a customised quality to every agreement.[87]

[79] B Milton, 'Procedural Rights' in V Wyk (ed.) *Rights and Constitutionalism* (Capetown: Kenwyn Publications 1994) 421.
[80] *Jacobs & Ors. v Waks & Ors.* [1993] 91 SA 521 (A) pgs. 534-535; *Wood v Ondangwa Tribal Authority* [1975] (2) SA 294 (A) pg. 310; where the right to personal liberty was used successfully to establish *locus standi*.
[81] *Dell v Town Council of Cape Town* [1879] SALR 233
[82] D W Ringia, and S J Porter, 'Access to Environmental Information in Tanzania' *Lawyers Environmental Action Team* (LEAT) (1999) available at <http://www.leat.or.tz/publications/access.to.information/index.php> accessed 12 June 2021.
[83] *Ibid*.
[84] Zwetkoff (n. 53).
[85] T C Bieirle, and J Cayford, 'Evaluating Dispute Resolution as an Approach to Public Participation' <http://www.rff.org/Documents/RFF-DP-01-40.pdf> accessed 12 August 2021.
[86] M Ryan, 'Alternative Dispute Resolution in Environmental Cases: Friend or Foe?' (1996-1997) 395 10 *Tul.Envtl. L.J.*; 399.
[87] Zwetkoff (n 53)

Instructively, a 1996 scientific study which examined the spatial scales for attaining environmental justice disclosed that distributive and procedural forms of justice are more likely to be achieved in regional mediation than at the level of national courts:[88] It found that "The potential for procedural justice is greatest at local and regional scales because all those affected can feasibly be included in decision-making."[89]The learned researchers confirm that participation is an indispensable aspect of environmental justice, and emphasise the need for genuine involvement of parties, including NGOs, who can represent non-human objects (such as the environment itself) and give them a voice.

Another way in which the litigation model aims to achieve justice is through consistency, i.e**.** by applying the same treatment to the same problem across time and space- the doctrine of precedents.[90] While the use of precedents may be suitable for predicting the outcome of cases, and perhaps limiting the time that would have, otherwise, been applied to devising new solutions, the fast pace of development of environmental law and the uniqueness of environmental disputes to their locality mean that what's good for the goose may not necessarily be good for the gander.[91] Besides, many declarations on the environment are not binding in nature but are simply "soft law".[92] They are therefore rarely applied by national courts. Save in the unlikely circumstance that the same mediator subsequently deals with same parties, in respect of identical or similar issues, mediation hardly has any use for precedents.[93] Every case is intricately explored to arrive at an agreement suitable to the parties.

Oil and Gas environmental disputes are often fraught with diverse technical dimensions for which judges possess little training.[94] As a result, courts tend to avoid delving into substantive technical areas, and end up delivering judgements, the equitable nature of which may be questionable.[95] Where parties hire their separate technical experts, the burden is even greater as the courts are saddled with the odious task of wading through a maze of technical jargon to determine which of the experts to believe.[96] But in mediation, technical details are hardly a problem for a number of interrelated reasons.

First, the mediator plays a neutral role, and the parties "own their case". This implies that the parties become the ultimate fact finders and adjudicators, who themselves, more than the mediator, must firmly grasp the technical nitty gritty of their dispute.[97] Through mutual co-operation and exchange of valid information, the parties are able to educate each other regarding their respective positions, each becoming better

[88] Moore and Bache (n 57)
[89] *Ibid*
[90] *Ibid* p. 373
[91] *Ibid*, "…prioritizing the accuracy and appropriateness of the solution to the local context brings satisfaction to parties during mediation".
[92] E Rehbinder, and D Loperena, 'Legal Protection of Environmental Rights: The Role and Experience of the International Court of Environmental Arbitration and Conciliation' <http://iceac.sarenet.es/acad_forumenglish/dlrandrehbinder.htm> accessed 10 September 2021.
[93] *Ibid*
[94] Girard (n 6)
[95] Leipmann (n. 58) p. 102
[96] *Ibid* p. 103
[97] Zwetkoff (n 53)

acquainted with the legitimacy of the other's stance, and therefore more likely and willing to compromise.[98] Nevertheless, where they opt to hire technical expertise for clarification of factual issues mediation offers the advantage that only a single source, to be agreed between the parties, is acceptable. This dispenses with the need for separately hired experts,[99] entailing lesser costs and avoiding possible conflict of findings. Additionally, studies have found that in pollution cases, agreements reached by reliance on jointly obtained expert evidence, prove more acceptable to the wider community who may have been represented at mediation sessions by spokespersons.[100]

Secondly, though technical details of a dispute are generally useful, say in determining the link between an industrial discharge and environmental damage, the mediation approach is particularly beneficial because it recognises that sometimes, the extent of danger posed by environmental pollution cannot be accurately predicted or ascertained, prior to or post-development.[101]

Violent disruptions of development operations and kidnap of both expatriate and indigenous staff of foreign OGCs by youths and other members of local communities have become entrenched as a means of expression of the frustrations of these communities in developing countries.[102] Mediation secures the "social license to operate" for OGCs. "Social License", in the present context, is the formal and informal approval a company requires from stakeholders to carry out it activities.[103] Its acquisition requires that companies develop on-going, positive relationships with the people who are likely to be affected by its activities, in order to enjoy support from them. According to Joyce and Thomson, *"company's performance in the areas of safety, social and environmental management is critical to gain and retain this „social license", and in doing so, the company is better positioned to gain access to new resources, receive regulatory approval to operate, attract higher-quality employees and enjoy support from a wider range of stakeholders."*[104]

Finally, litigation is conducted with the utmost formality within a solemn setting "with a judge dressed in elaborate costume and with long established judicial ritual"[105] The essence is to impress the disputants with the autonomy of justice and with the court's unbending adherence to well recognised and time-honoured rules.[106] Disputants therefore feel a "loss of control" when they turn their cases to the lawyer,[107] becoming so intimidated as to believe they ought not to participate.[108]
On the contrary, meetings in mediation are informal, conducted in simple, everyday language. Parties are rarely inconvenienced since proceedings are generally organised at reasonably convenient times and places,

[98] Leipmann (n 58) p. 102
[99] *Ibid* p. 103
[100] *Ibid*
[101] *Ibid*
[102] *Ibid*
[103] S A Joyce, and I Thomson, 'Two Cultures of Sustainable Development' (2002) [11](7) *CEPMLP Journal*; 1
[104] *Ibid* p. 1
[105] *Ibid* p. 104
[106] S Merry, *Varieties Of Mediation Performance: Replicating Differences* in A. Hutchinson (ed.) *Access to Justice* (New York: Thompson Reuters 1990).
[107] Macfarlane (n 4) 5
[108] W Simon, 'The Ideology of Advocacy: Procedural Justice and Professional Ethics' (1978) 29 *Wisconsin Law Review;* 54.

and within conducive settings.[109] The outcome of mediation is not the ideal but the practical. According to Colman J. in *Dunnet v Railtrack,*[110] "mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties, but rather solutions which are mutually, commercially acceptable at the time of the mediation."[111] The psychology of mediation is that a third party will be able to change the social and power dynamics of the conflict situation between the parties by providing information and knowledge, influencing their differing beliefs and behaviours during negotiations, a process which conquers the communication barriers between them, and ultimately paves the way to resolving the parties" problem.[112]The essence of mediation is the focus on the interests of parties.

Parties are challenged to consider whether they are aggrieved over the apparent subject matter or whether the persisting conflict is in fact, about control, power or authority.[113] The mediation model emphasises the possibility of reconfiguring apparently intractable issues in a manner that permits resolution.[114] The process provides a less traumatic approach to conflict resolution[115] in sharp contrast with the psychological brutality of adversarial litigation.

4.0 Host Communities and Oil Company's Conflicts

Crisis in the Niger Delta has increased in recent times. The key features of these crises as Anikpo,[116] observed can solely be attributed to oil explorations and unequal appropriation of what accrues from oil. It could further involve the acquisition of vast acreage, clearing of sites, and introduction of new cultural patterns into host communities, which go against the traditions of the community. According to Frynas[117] the conflicts started and continued for decades and grew very fast in 1990s with large coverage by international media. According to Frynas, village host community conflicts with the IOCs are important outside academic interest because the Nigerian State is the most densely inhabited and biggest country in Africa. Over half of the government revenue and 95 % the country's dollar proceeds come from oil production.[118]

By interrupting oil operations, the host communities make oil production in Nigeria more difficult and decrease the value of gas and oil investment in Nigeria. Community violence directly endangers economic capability of the biggest country in Africa. Frynas stated categorically that the Nigerian government is facing a major challenge of resolving community violence in Nigeria. The conflict continued even when

[109] E P Fiske, 'Reconceptualising Environmental Conflict Resolution: The Developmental Facilitation Approach' (1998) 7 <http://www.montana.edu/wwwcommd/reconc.html> accessed 12 May 2021
[110] *Ibid*
[111] *Ibid*
[112] G Goodpaster, *A Guide to Negotiation and Mediation* (New York: Transnational Publishers, 1997) 204.
[113] V Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 *Journal of Conflict Resolution*; 26.
[114] M D Bennett and M S G Hermann., *The Art of Mediation* (Notre Dame: National Institute for Trial Advocacy, 1996) 87.
[115] A Milne, 'Mediation – A Promising Alternative for Family Courts' (1991) 42 *Juv. Fam. Ct. J*; 63.
[116] M Anikpo, 'Communal Conflicts in the East Niger Delta: A Cultural Matrix' (1998) 3 *Pan African Social Review*; 112
[117] J G Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (2000) 1 *LIT Verlag Münster*.
[118] Anikpo (n 116) 112

the leader of the Ogoni people was brutally killed by the Nigerian state. The Ogoni struggle reduced but different tribes in the host communities stepped up their protests from 1995 and disrupted oil production with new dimensions in oil facility abduction and kidnapping of oil company personnel and some company staff deaths resulted. Despite the increase in protest and abduction of company facilities, the causes of violence such as host community neglect by oil companies and bad company operating principles were not effectively deal with by the IOCs and the Nigerian government.

Frynas,[119] stated that there were strong suggestions that Shell Oil Company refused to pay for damages in the past with the excuses of sabotage. Shell as a company admitted that six such cases were won against them in Nigerian Courts.[120] Frynas,[121] also stated that there were valid suggestions that the damage oil companies made to the environment in host communities was the major reason why the host communities protested. Shell stated in a reply to Frynas[122] that it will not go back to Ogoni land to produce oil except the people of Ogoni land approve of such intension.[123] Shell has got no choice but to wait for the approval from the people of Ogoni which has not happened for over 23 years now.

5.0 Environmental Mediation as a Workable Option in Nigeria

There is no one formula for predetermining whether any mediation will be successful but some guidance may be had from experiences of environmental mediation professionals. Zwetkoff cites as a reason for recommending environmental mediation in the Belgian scenario, the fact that mediation "rings a bell" to the lay person.[124] This singular factor, he asserts, adds to the legitimacy and effectiveness of environmental mediation and gives the concept an empirical reality stemming from the arguments that citizens develop based on their experiences with mediation in other fields.[125]

The idea that meditation is African in concept and origin is substantially widespread in the continent.[126] Apart from historical accounts which are replete with mediation activity in many regions of Nigeria,[127] recent empirical research has shown that Nigerians prefer to resolve conflicts by informal modes, particularly mediation,[128] and would more readily submit to chiefs, headmen, elders or even religious leaders as appropriate neutrals.[129]

---

[119] *Ibid*
[120] A Detheridge, and N Pepple, 'A Response to Frynas' (1998) [19](3) *Third World Quarterly;* 479 – 486.
[121] Frynas (n 117)
[122] *Ibid*
[123] Detheridge and Pepple (n 120)
[124] Zwetkoff (n 51)
[125] *Ibid*
[126] B Kiplagat, *Africa and Mediation: Is mediation Alien to Africa?* (1998) Ploughshares Monitor.
[127] K Belmont, and A. Reynolds, *The Use of Institutions in the Management of Conflict in Religiously Plural Societies* (1998) University of Notre Dame, Department of Government and International Studies Working Paper 99-9; Paper presented at the American Political Science Association, September 4 1999, Atlanta Georgia. Again, Under S.19(d) of the Constitution of the Federal Republic of Nigeria, (1999), "the seeking of settlement of international disputes by negotiation, mediation, conciliation, arbitration and adjudication" is a foreign policy objective.
[128] A Khaminwa, *Peace Building and Co-existence in Nigeria*, in The Afrobarometer - *Violent Social Conflict Resolution in Nigeria*, Briefing Paper No.2, August 2002.
[129] *Ibid*

More importantly, Nigeria has recently benefited from the global campaign of the United States in advocating structured mediation/ADR[130] Mediation is anticipated to be a kinder, more flexibility and more confidential system than litigation, which will ultimately enhance understanding and communication between disputing parties. This development is seen as long overdue judging by the gross inadequacies of the country's judicial system. The court dockets are notoriously overloaded. There is evidence to show that in Nigeria, **"**it takes an average of four years to conclude a landlord-tenant case; four and a half years to conclude a civil case; and 22 years to conclude a case beginning in a Magistrate court and ending in the Supreme Court!"[131] As a result, not more than 10% of all cases filed in Nigerian Courts ever get to the trial stage as majority are settled out of court or simply abandoned.[132] It is expected that mediation will provide easy access to justice,[133] and avoid the expense of litigation, which is becoming increasingly unaffordable to the common citizen.

What is easily noticeable is the intricate manner in which mediation introduced in Nigeria's depends entirely on the judiciary. The pioneer Lagos Multi-Door Court house (LMDC) established in 2002 is a first fully fledged court-annexed mediation endeavour, first of its kind in Africa. It adopts an all-inclusive approach to ADR in general, comprising three „doors"- ENE, mediation and arbitration. The multi-door concept provides litigants with alternative „doors" for the resolution of their disputes, leaving "door of litigation" as the last resort.[134] Under the Nigeria Rule of Law Assistance Project, which is being funded by the United States Agency for International Development (USAID) the Nigerian government is working to establish three pilot courts the Abuja, Kaduna and Lagos specifically for providing ADR services in those parts of the country.[135] The Magistrate plays a statutorily recognized[136] role in triggering ADR in that he must of his own accord, in appropriate cases, suggest ADR to disputants. Kekere-Ekun justifies this involvement by asserting that from experience, where the court advises disputing parties to explore the possibility of settling amicably out of court, they often explore ADR mechanisms, not previously contemplated, and find them rewarding.[137]

[130] But ADR is not entirely a new concept in Nigeria. The Arbitration and Conciliation Decree (1988), contains broad outlines that are similar to those of ADR; see A. Aku, *Dispensing Justice through Mediation***,** The Daily Trust Newspaper, Tuesday, October 7, 2003.

[131] N Uzuakpundu, *Law And Human Rights: Magistrates And Alternative Dispute Resolution.* Vanguard Newspaper Friday, December 26, 2003. <http://www.vanguardngr.com/articles/2002 /features/fe226122003. htm> accessed 28 June 2021.

[132] I A Sotuminu, Speech delivered on the occasion of the launching of the LMDC at the Lagos High Court on Tuesday June 11, 2002. <http://www.thisdayonline.com rchive/2002/06/18/20020618law05.html> accessed 27 June 2020.

[133] N Uzuakpundu (n 131)

[134] K M O Kekere-Ekun, *Promoting the Use of ADR Processes: The Role of Magistrates in Nigeria*; Paper delivered at an Abuja workshop for magistrates, organised by the National Judicial Institute (NJI) on 26 December, 2003. Available at <http://www.vanguardngr .com/ articles/2002 /features/fe226 122003.htm> accessed 19 June 2021.

[135] N Uzuakpundu (n 131)

[136] Magistrates' Courts Law, Cap. 127 Laws of Lagos State (1994), Section 25: "In civil case, a magistrate shall, so far as there is proper opportunity, promote reconciliation among persons over whom the Magistrate has jurisdiction, and encourage and facilitate the settlement in an amicable way of matters of difference between them;" and Section 26: "In criminal cases a magistrate may encourage and facilitate the settlement in an amicable way of proceedings for common assault or any other offence not amounting to a felony and not aggravated in degree, on terms of payment of compensation or other terms approved by him."

[137] Keker-Ekun (n. 134)

The Chief Judge of the FCT who has applauded the "ADR innovation, among other reasons, because it's confidentiality cannot be denied", has enunciated the roles of the various actors:

> "*The role of the court … includes the active management of cases …and to take preventive and effective judicial control which would facilitate the overriding objective. The counsel's responsibility is to the court and the legal profession. The counsel is … to explore the ADR options in resolving claims or issues before resorting to litigation, give due consideration and support to suggestions,… for amicable settlement; and … accept an advisory role while parties take the lead role in ADR sessions. On the part of the parties, they are expected … to attend ADR sessions in good faith without undue request for adjournments as well as be actively involved and be willing to explore various options towards settlement*"[138]

There is no doubt that the formal introduction of ADR in Nigeria is a clear step in the right direction bound to improve public participation in decision-making and citizens access to justice among other things. Nevertheless, although it is becoming common, e.g. in most contemporary industrialised countries of Asia e.g. Japan, Taiwan and China, for mediation to be done under court supervision,[139] due caution must be applied in judicial involvement with, and regulation of mediation in Nigeria.

The political and social settings obtainable in the U.S.A and Nigeria are quite different. Independence, both political and financial, has scarcely been a selling point of the Nigerian judiciary. Citizens are unlikely to appreciate, albeit earnest, judicial back-up of mediation services, or regard same as genuinely facilitative of neutral dispute resolution. Again even if the scheme eventually engages the support of practicing lawyers, the citizens are bound to regard it as elitist, judging among other factors, from the cosmopolitan nature of the cities chosen for its establishment. It is interesting on this point to note that highly hostile commercial environments, such as the Niger delta, which are more urgently in need of the services, have not been first integrated into Nigeria's map of mediation. The prospect of travelling long distances to take advantage of the mediation services, might prove daunting, and is bound to involve great expense that may negate any cost benefits of mediation.

6.0 Limitations of Environmental Mediation

In spite of the above account, the statistics show that only about 10% of environmental disputes are actually successfully mediated.[140] In general terms, mediation is a better choice when the issues are clearly defined and the disputants perceive that there is a balance of power between them, which demands that the parties negotiate.[141] Sometimes, matters involved in an environmental dispute may be so complex, bearing on broad policy decisions or ideological undertones. In such cases, the principles to be mediated upon might be so crucial that the parties would obviously not compromise them.[142] It may not be wise to mediate such

[138] The learned justice just stops shy of prescribing the mediators roles.
[139] M. Noone, *Mediation* (London: Cavendish Publishing,1996) 6
[140] A R Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (Washington, D.C.: The Conservation Foundation 1983) p. 8 noting that "Private organisations like the Ford foundation and the Andrew W. Mellon Foundation have funded experiments into the use of ADR in resolving environmental disputes"
[141] Leipmann (n. 51) p. 104
[142] *Ibid*

disputes.[143] There are some other circumstances generally recognised as foreclosing the successful use of mediation, for instance where one party wishes to set a precedent in the matter, or where the parties cannot make a long-term commitment.[144]

Government participation in environmental mediation has been seen as playing a "legitimising" role for the process,[145] but it equally poses a serious challenge. It is not desirable for government officials to participate where this would entail giving away power during the process. By and large, the mediators would, in each case have to be alert to the feelings of the parties regarding the appropriateness of mediated settlement, since the parties must have the final say and can, at all times, (as already stated) pull out of negotiations.

7.0 Conclusion

Mediation, though an imperfect art, is a better option for resolving environmental, and related disputes between foreign oil companies and host communities in Nigeria because it seeks amicable agreement, where courts seek verdicts, thereby preserving the relationship between these parties. Even without the emergence of mediation in preference to litigation in the field of environmental dispute resolution, the likely danger exists that these disputes may not be accurately and fairly resolved, owing to the numerous administrative loopholes which attend the judicial settlement of these disputes. Judges lack the time, the know-how, and even the rules (precedents) to enable the proper handling of environmental disputes. Worse still, unavoidable delays caused by incessant adjournments and overloaded court dockets remind of the equitable maxim that justice delayed is justice denied.

The disputes themselves are not suited to the dynamics of litigation as litigable issues often conceal underlying feelings, prejudices, and age-old grievances, none of which would normally be addressed in the course of litigation, or even considered relevant. The situation is aggravated by the technical nature of the issues involved in these disputes, especially where the question relates to the adequacy of, or compensation for environmental damage/pollution resulting from oil and gas activities.

A successful mediation provides the parties with a chance to truly be heard, and to generate innovative solutions to their dispute, in a manner that focuses on the future and not the past. Its key advantages include the control which parties have over the process, especially in selecting their mediator, and avoiding trial. Nevertheless, environmental mediation is not a straight forward or an easy process, and its time-saving advantages are somewhat over-emphasised.

Confidentiality is the key to the success of environmental mediation because, to a large extent, it guarantees the frankness of the negotiating parties and the sincerity of communications they exchange during the mediation process. Emphasis has been made on the point that mediation is not an information gathering exercise. Various mechanisms abound which are particularly aimed at obtaining environmental information.

[143] *Ibid*
[144] *Ibid* p. 105
[145] A B Dotson, 'Who and How: Participation in Environment Negotiation' (1983) 4 *Environmental Impact Assessment Review*; 217.

However, in line with changing trends towards greater environmental accountability and the increasing "human rights" status of environmental rights in international domestic environmental law, mediation advocates are increasingly seeking ways of aligning the practice with the goals of public participation, community empowerment, and most importantly, access to environmental information. Chiefly, wider and more active participation of community members and groups is encouraged in these mediations as a means of ensuring the dispersal and inculcation of the informational benefits of any pollution mediation. Nevertheless, due caution ought to be applied in developing this trend because in the long run, mediation my not thrive if reasonable expectations of confidentiality are not met.

8.0 Recommendations

The following recommendations are hereby suggested:

1. Proper representation/participation of all the parties involved in the process leading to amicable resolution of the dispute is essential as lack of broad participation from across the affected class all too often undermines effective spill recourse. To avoid such issues, an effective mediation process must find ways to engage a broad and diverse set of members of affected communities; such engagement can also ensure culturally sensitive and appropriate interaction. The legitimacy of any party claiming to act in a representative capacity on behalf of a broader class of affected persons should be verified through public on-site community engagement. Participation in ADR can ideally begin with pre-engagement that enables two parties to build a working relationship based on mutual information sharing agreement upon remedies should a dispute arise.
2. Complaints should be provided with an easy means or mode of accessing ADR mechanism without going through rigorous formalities. Certain arrangements can also be put in place to ensure accessible language, assisting illiterates or semi-literate complainants to reduce their complaints to writing and identify evidence they might collect to support their claim. There must be a firewall between those persons providing assistance and the decision makers or neutral mediators and of course assistance should never bar complainants from choosing their own external representations or advocates.
3. There should be structural independence. Most of the time, the mediators of dispute relating to environmental disputes have strong ties to the industries concerned that may affect their ability to be independent of their perceived legitimacy. Indeed, this is a global issue. When BP set up a compensation fund under an Independent Claims Administrator after the 2010 deep water horizon spill affecting the United States Gulf of Mexico, the later discovery that the administrator, Kenneth Feinman was being paid by BP undermined his legitimacy.

   In Nigeria, such concerns include the way multi nationals pay the expenses of JV's and influence the final reports of the JV. Issues around funding of the mechanism, appointment and removal of decision makers, etc. must be thought through carefully so as to safeguard the mechanism's independence. Although it is quite common for funding of a third party grievance to come from the industry that benefits from its operations, there are ways of ensuring such funding without compromising the independence of the structure.

4. With increase use of mediation as environmental dispute resolution mechanism comes an obligation to measure the result of mediation in determining whether investment in the process is paying off. In addition, despite the robust benefit of mediation in resolving environmental disputes, the field can benefit from more empirical research not only to confirm what we have thus far learnt about the cost effectiveness of mediation, but to examine in more detail, other potential benefits such as rates of compliance with Settlement Agreements, environmental outcomes of settlements and broad effect of enforcement programmes and job satisfaction among participants. The importance of additional empirical studies is particularly important to assess mediation in regulatory enforcement cases.

It is expected that if these recommendations are considered and implemented by all the stakeholders in the oil and gas industry, mediation will witness an increase usage and better effectiveness in resolving disputes arising from non-compliance with the legal frameworks governing the petroleum industry in Nigeria.