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Legal and Institutional Framework for the Regulation and Control of Extractive activities Nigeria: Sand dredging in Perspective

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The extractive industry in Nigeria has for a long time attracted the government's attention and the need to regulate same through diverse governmental institutions. The institutional framework for mining of various minerals (excluding sand and its specifics) in Nigeria has developed through various legal regimes dating back to the early nineteenth century. These institutions have become elastic and expansive as the relevance of the industry increases and greater awareness is geared towards sustainable development. The paper engages the institutions established by the government whose relevance and activities bear on extractive activities, particularly sand mining in present-day Nigeria. The paper finds that because there is no specialised agency of government designated for sand mining, discourse on sand mining is situated within the generic concept of extractive solid minerals. The writers recommend that sand as a mineral resource should be re-defined, removed from the Exclusive Legislative List (and its corresponding Federal High Court exclusive jurisdiction), and be enumerated in the concurrent legislative list as is the case in India and the United States of America.

Keywords: *exclusive legislative list, jurisdiction, concurrent legislative list, sand dredging.*

INTRODUCTION

Nigeria has an abundance of extractive mineral resources. Sand is the most viable, the most available mineral resource, and one that is evenly spread across Nigeria.[1] Unfortunately, the Nigerian Government has not effectively harnessed sand as a major contributor to the country's Gross Domestic Product (GDP).[2] Several institutional frameworks exist to show the government's presence in the mining sector. None of these has adequately met the need for valuable exploration of sand as a mineral resource for sustainable development. This has left this critical sector with a sheer lack of bureaucratic governance resulting in environmental violence.[3]

This work identifies the state institutions bearing on sand dredging in Nigeria. The object of the work is to show among other things that more profit could accrue to the economy and the environment if states and Local Government Councils are given firm and expansive powers to regulate sand mining activities. It also highlights the fact that some of the institutions are unimpactful and so not needful. The work discusses each institution/ministry in distinct headings and exposes how much the functions of these institutions clash with one another in most cases. The writer highlights findings and concludes by making far-reaching recommendations.

OVERVIEW OF SELECTED GOVERNMENT INSTITUTIONAL FRAMEWORKS ON EXTRACTIVE ACTIVITIES IN NIGERIA

Nigeria Extractive Industries Transparency Initiative (NEITI)

[1] *Inventory of Solid Minerals Potentials of Nigeria* (Official Publication of the Ministry of Solid Minerals Development, January 1999) 2

[2] O O David & Ors, 'An Empirical Analysis of the Contribution of Mining Sector to Economic Development in Nigeria,' (2016) 19(1) Khazar Journal of Humanities and Social Sciences 11-12. Over 90% of revenue which accrued to the government in terms of royalties and other fees on minerals comes from quarrying operations

[3] Okungbowa Aiwerie, 'Delta State Government Bans Sand Dredging' (*Dredging Today*, 8 February 2012) <https://www.dredgingtoday.com/2012/02/08/nigeria-delta-state-government-bans-sand-dredging/> accessed 31 May 2021

Crude oil was discovered in commercial quantity in 1957 at Oloibiri now in Bayelsa State, Nigeria.[4] Since 1957, oil multinationals have been engaged in the exploration and production of oil and gas in Nigeria.[5] Nevertheless, most if not all indices of development and economic growth and well-being have continued to elude Nigeria with the majority of its citizens wallowing in abject poverty and lack.[6] Nigeria is reputed to be one of the largest oil-producing countries in the world. It produces some two million barrels of crude oil per day with a proven 600 trillion cubic feet reserve of gas and an estimated 40 billion barrels of reserve of crude oil,[7] yet there is unavailability and inadequacy of the basic infrastructure and social amenities.[8] The majority of Nigerians cannot afford basic requirements of life like food, water, clothing, shelter, and other basic needs. Consequently, Nigeria is ranked among the thirteen poorest countries in the world. [12]

The foregoing state of affairs has been attributed to corruption and a lack of transparency and accountability in the extractive industries, particularly the oil and gas sector in Nigeria. This is because the oil and gas multinationals connive with the political leadership and some of the government agencies to short-change the Nigerian Government.[9] As a result, NEITI was inaugurated in February 2004 when former President Olusegun Obasanjo set up the National Stakeholders Working Group (NSWG) under the leadership of Obiageli Ezekwesili.[10] To give legal backing to the work of NEITI, the Nigeria Extractive Industries Transparency Initiative (NEITI) Act of 2007 (NEITIA) was enacted on May 28, 2007, thereby making Nigeria the first

[4] O Fagbohun, *The Law of Oil Pollution and Environmental Restoration: A Comparative Review* (Odade Publishers 2010) 154
[5] *Ibid*
[6] 'Nigeria at a Glance - 2017 Data' (*The World Bank*) <https://devdata.worldbank.org/AAG/nga_aag.pdf> accessed 12 June 2021
[7] The current status of Nigeria's crude oil reserve stems from a target plan set up in 2003 which set country's growth target at 40 billion barrels of oil and 4 million barrels daily production capacity by 2010; O Fagbohun, *The Law of Oil Pollution and Environmental Restoration, A Comparative Review* (Odade Publishers 2010) 155; V O S Okeke & E T Aniche, 'A Critique of the Enforcement of Nigeria Extractive Industries Transparency Initiative Act, 2007(NEITIA) in the Oil and Gas Sector' (2013) 14(2) British Journal of Arts and Social Sciences 1
[8] U Idemudia & U Ite, 'Demystifying the Niger Delta Conflict: Towards an Integrated Explanation' [2006] Review of African Political Economy (ROAPE) 109
[9] M Abubakar & E Anuforo, 'NEITI Declares N768 Million Oil Revenue Missing' (The Guardian, 14 August 2007) <https://www.theguardian.com/international> accessed 01 May 2021
[10] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007; NEITI started-off as an initiative and metamorphosed into an Act such that as it stands, the initiative has been swallowed up in the Act

Extractive Industry Transparency Initiative (EITI) implementing or compliant country with a statutory strength for its operations.[11] Before the enactment of NEITIA, NEITI had to rely on persuasion, dialogue, and consensus building across relevant institutions to attain its objectives and perform its function.[12] The enactment of NEITIA has changed the implementation of the EITI principles in Nigeria from voluntary to obligatory or mandatory.

The concept of EITI was the brainchild of Tony Blair[13] which he introduced at the World Summit on Sustainable Development (WSSD) held in Durban in 2002.[14] The objective of the EITI Principles is to ensure that huge revenues accruing to the government from payments made by extractive companies are managed transparently to promote or facilitate development as well as reduce poverty, conflict, ignorance, deprivation, and disease.[15] This became most imperative as the Nigerian economy has been largely sustained by the extractive industry since the oil boom in the 1970s.[16] The strategic relevance of the extractive sector, particularly the oil and gas sector, accounts for the huge investment in the oil and gas public-owned enterprises which unfortunately yields less than 10% of the annual returns,[17] leaving almost nothing positive in the standard of living of Nigerians.[18]

The bane of Nigerian society is corruption. NEITI introduces principles that undoubtedly reduce or suppress the tendency and opportunity for corruption which is at the root of the waste of

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[11] 'EITI Validation Grid and Indicator Assessment Tools,' in *Extractive Industries Transparency Initiative Validation Guide* (Department for International Development (DFID) London 2006) 5–6; Starting April 2021, countries will be evaluated according to a revised Validation Model

[12] These institutions include the Ministry of Finance and Economic Planning, the Central Bank of Nigeria, and most recently, the Federal Ministry of Environment

[13] Tony Blair (Anthony Charles Lynton Blair) was the Prime Minister of the United Kingdom from 1997 to 2007

[14] The Conference was held in Paris, France in March 2011

[15] A O Ewere, *NEITI and GOOD GOVERNANCE in Nigerian Oil Industry* (AMBIK Press 2011) 131; *EITI, Extractive Industries Transparency Initiative Validation Guide* (United Kingdom Department for International Development 2006) 5

[16] Civil Society Legislative and Advocacy Centre (CISLAC), *Enhancing Civil Society Organisations (CSOs) Participation in the NEITI Audit Process in Nigeria* (Abuja, Oxfam, GB 2007) 2

[17] National Council on Privatisation, *Privatisation Handbook* (2nd edn, The Presidency, Bureau of Public Enterprises 2000) 4

[18] J Herbst & C Soludo, 'Nigeria,' in S Devarajan & Ors (eds), *Aids and Reforms in Africa* (Washington DC, The World Bank 2001) 647

public funds.[19] With the enactment of the NEITI Act of 2007 (NEITIA), the agency became a government institutional framework in the extractive sector mandated by law to promote transparency and accountability in the management of Nigerian oil and gas as well as mining revenues. The primary objectives of NEITI are set out in the NEITIA as follows:

a) to ensure due process and transparency in the payments made by all extractive industry companies to the Federal Government and Statutory recipients.

b) to monitor and ensure accountability in the revenue receipts of the Federal Government from extractive industry companies.

c) to eliminate all forms of corrupt practices in the determination, payments, receipts, and postings of revenue accruing to the Federal Government from extractive industry companies.

d) to ensure transparency and accountability by the government in the application of resources from payments received from extractive industry companies, and

e) to ensure conformity with the principles of the extractive industry transparency initiative.[20]

The NETIA is a major component of the ongoing anti-corruption reform in Nigeria. NEITI is a national version of the EITI which aims to facilitate sustainable development through open and transparent reporting of what extractive industries pay to their host governments. The EITI slogan is, "publish what you pay" with the corollary of "publish what you receive."[21] To this end, the functions of NEITI are designed to give vent to its objectives.[22]

It is argued that nine out of ten statutory functions assigned to NEITI relate to how monies are received by the Federal Government, what monies are paid, and by which extractive industry

[19] Lilongwe Malawi, *Malawi Extractive Industries Transparency Initiative (EITI) Process and Work Done in the EITI Debate in Malawi* (Publication of Ministry of Finance and Development Cooperation October 2011) 8
[20] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, *s* 2
[21] Publish what you pay Nigeria was launched in 2004 to support effective implementation of EITI principles in Nigeria. See, 'Publish What You Pay Nigeria—Extracting the Truth,' <https://pwypnigeria.org > accessed 21 June 2021
[22] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 3

company. These functions concern the government and the extractive industry players and not the public. The only function of NEITI which imparts to the public is that which requires NEITI to disseminate by way of publication of records, reports, or otherwise any information concerning the revenues received by the Federal Government from all extractive industry companies as it may consider necessary.[23] It is doubtful if NEITI has ever lived up to this demand of the law. It is posited that the wide discretion given to NEITI under the clause "as it may consider necessary" defeats the compulsion with which NEITI is expected to discharge its duties under the law and the EITI principles.

The relevant sections of the Act which are central to the mischief sought to be arrested by the NEITIA are sections 4, 14, and 16. Section 4 of the NEITIA provides for the appointment of independent auditors every fiscal year.[24] This provision is laudable, as it makes for insightful scrutiny of the financial records of the industry players. This gives room for comparison of figures with other governmental agencies for accuracy and transparency.[25] It is also designed for checks and balances in the evaluation chain. The President, National Assembly, and the Auditor-General of the Federation are to routinely receive and assess such independent auditors' reports made under the Act.[26]

The audit exposes how companies report their payments and assess oil prices and how effectively Nigeria's regulatory bodies such as the Nigerian National Petroleum Corporation (NNPC), Department of Petroleum Resources (DPR), and Federal Inland Revenue Services (FIRS) and others monitor and evaluate the sectors' financial and fiscal flows. The 1999-2004

[23] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 3(h)
[24] Sections (5) and (6) of the NEITIA prohibit the appointment of an independent auditor/auditing firm to this end where such has audited any extractive industry company for the year under review. The same auditor/firm shall not also be engaged (for the purpose of *s.* 4, NEITIA) for more than two consecutive years. This approach is to prevent bias and undue influence on the auditor
[25] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 4(1); Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 4(2)
[26] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 4(3); Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 4(4)

audit report made by section 4 of NEITIA by the Hart Group in association with *CMA Limited and SS Afemikhe and Company* is commended as the right step in the right direction.[27]

The audit exposed the hypocrisy of oil companies and lent credence to the agitations in the Niger Delta.[28] The NEITI Audit put forward startling revelations. It revealed that during the period under review, N768 million ($ 6 million) was not remitted to the federal government treasury and without a trace.[29] According to Ladan, there is a lack of transparency and accountability in the management of revenue from the petroleum sector. There are no records of the level of production: how much is produced and by whom, how much is sold at what rate? How much do companies give the government? This opacity has made people distrust the government and believes that it has been squandering national revenue without commensurate outputs.[30]

The Act also provides for disclosure of what is paid to the government.[31] It makes withholding of information or rendering of false information an offence punishable with fines and imprisonment.[32] It is argued that the real purpose of the NEITI is realisable by political will and not by the best of executive institutions and statutory establishments. This is so much so as nobody has been charged or is known to be standing trial for the missing funds or any offences under section 16 of the NETIA. NEITI is seen in some quarters as yet another accounting outfit of the government. The law is only interested in who 'pays' what and who 'receives' what. There is no emphasis on the remediation of the environment, the goose that lays the golden egg.[33] It is

[27] *Ibid*
[28] The most recent of NEITI Audit reports is the 'controversial' NEITI Oil and Gas Audit Report 2019; 'NEITI Oil and Gas Audit Report 2019 Datasets' (*Resource Data*) <https://www.resourcedata.org.> accessed 30 August 2021
[29] Abubakar & Anuforo (n 9)
[30] M T Ladan, 'Environmental Related Legal Framework for Oil, Gas and Mining Sector Development in Nigeria, Paper Presented at A Workshop Organised by UNEP-WCMC Business and Biodiversity Programme, Cambridge, UK in Akosombo, Ghana, 8 October 2015, 10
[31] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 16
[32] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 16(6)
[33] In practice, government is not expected to show how much it spends on remediation or the building of natural capital assets to remain on a sustainable inter-temporal extraction path. See O A Ibu & Ors, 'NEITI and Sustainability of Nigeria's Nature Capital: Status, Prospects and Challenges' in *Dynamics of Natural Resources and Environmental Management in Nigeria: Theory, Practice, Bureaucracy, Advocacy* (Debees Printing and Publishing Company 2019) 267

of great concern that NEITIA in providing for the application of its proceeds of funds engaged the usual bureaucratic expenditure patterns without the slightest reference to the environment.[34]

There is no provision for rents or other payments to individuals/communities whose sorry state empanelled the laudable principles of EITI. It is hoped that while the government utilises the independent audit reports to plug pipes through which public funds are drained, an amendment of the NEITIA to specifically provide for environmental audit reports and remediation is recommended. Furthermore, audits of the extractive industry should give equal attention to the mining sector. The 1999 - 2004 Audit is lopsided and biased in favour of the oil and gas sector.[35] NEITI has made some efforts in giving attention to the mining sector in an attempt to plug revenue leakages. According to the NEITI audit report on the solid minerals industry 2007-2010, over N2, 21 billion was paid as royalty by operators in the mining sector: N51.4 billion as taxes; N173.94 million for ground rents/annual surface rents payments; N122.92 as levies. The Central Bank of Nigeria as reported by NEITI recorded 1,618 export transactions carried out by 86 companies with a total revenue collection of N8.91 billion.[36]

There is presently no mechanism to enforce transparency and accountability in the mining sector which is the other arm of the extractive industry covered by NETIA. This has resulted in government loss of huge revenue annually not only to the illegal miners but to such institutions that receive and collect revenue on behalf of the government.[37] NEITI plans to work with Nigerian Mining Cadastre Office (NMCO) to establish a beneficial ownership register of the

[34] Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 13(1); Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, s 13(2)
[35] Ewere (n 15) 203
[36] NEITI (2013): Solid Minerals Industry Audit Report 2007-2010. NEITI earned N69.47 billion from solid minerals sector in 2018; Solid Minerals 2018 Report, NEITI
[37] For the Lagos reclamation project handled by Julius Berger Nigeria Plc, the company paid N100 and N28.50 per cubic metre to NEITI and Ministry of Solid Minerals and Steel Development respectively amounting to billions of naira; 'Dredging Law: Who Collects Royalty-NIWA or Solid Minerals?' (*Dredging Law*) <https://www.ddhmag.com> accessed 25 May 2021

extractive sector before January 2020 deadline.[38] It is, however, working assiduously to post some gains before 2020, particularly in quarrying operations.[39]

Over 90% of revenue accrued to the government in terms of royalties and other fees on minerals comes from quarrying operations according to the 2016 solid Minerals Audits.[40] Solid minerals contributed N43.2 billion ($162,606,247) to government revenue in 2016. This is irrespective of illegal mining spread across the country which cannot be officially captured in terms of contribution to government revenue.[41] NEITI has not been an unimpeachable success story. It is posited that NEITI is a potentially useful but limited entry point into a difficult area. It is doubtful if it has the *vires* to compel compliance from the government. It is nonetheless a powerful driver of beneficial reform if not a magic bullet to deal with the so-called 'resource curse.[42]

Some schools of thought consider the NEITI concept as a rather meaningless, distracting, box-ticking exercise – in effect little more than a reputational tool for companies, governments, and donor agencies.[43] NEITI has failed to build desirable capacity in the civil society which ought to be the key end-user of its reports. NEITI did not drive reforms in Nigeria. NEITI was allowed to flourish temporarily amid the reformist political climate from 2003-2006 during which time it shaped some of the outcomes-notably the audit report-of process of reform. Again, when measured against the broader goal of fostering better governance and accountability, NEITI has

[38] NEITI has accomplished its beneficial ownership initiative in 2020; 'Beneficial Ownership Roadmaps' (*EITI.Org*) <https://www.eiti.org/beneficial-ownership> accessed 12 June 2021

[39] NEITI needed to be more effective to ensure its revalidation by EITI International. Nigeria's revalidation was announced in 2019

[40] NEITI (2019): Solid Minerals Industry Audit Report 2011-2016

[41] A list is made of some selected illegal mining sites in Nigeria. It is worthy of note that all sites listed against Imo State mined only sand and lateritic soil. The list did not capture Delta State where there would have been more astounding revelations of illegal sand dredging activities

[42] J Peterson, 'The Resource Curse in Nigeria: A Story of Oil and Corruption' (*Researhgate*) <https://www.researchgate.net> accessed 12 June 2021; A J Onyeukwu, 'Resource Curse in Nigeria: Perception and Challenges' (*Open Society Institute*) <https://core.ac.uk> accessed 12 June 2021

[43] N Shaxson, *Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit?* (Chattam House 2009)

not shown impressive results. Its activities have not led to better governance in any way in Nigeria.[44]

THE FEDERAL MINISTRY OF ENVIRONMENT

The Federal Ministry of Environment was created in 1999 at the dawn of Nigeria's current democratic dispensation. It was brought to birth by former President Olusegun Obasanjo who by a presidential directive,[45] assembled relevant departments and units of Federal Ministries to compose the new Federal Ministry of Environment.[46] The Ministry was programmed to meet a constitutional yearning "to protect and improve water, air, and land; forest and wildlife of Nigeria."[47] The Obasanjo civilian administration set the agenda for the Ministry known as Environmental Renewal and Developmental Initiative (ERDI). The agenda targeted environmental damage caused by harnessing natural resources; designing and implementing restoration and remediation programs and other measures planned and aimed at eradicating future degradation of the Nigerian Environment.[48]

It is the primary duty of the Federal Ministry of Environment to articulate and implement the National Policy on Environment with special attention to Niger Delta, the desert-prone zone, coastal gully, and gully erosion flashpoints. The Ministry is the coordinating entity for all the tiers of government in all matters respecting environmental protection. The new Ministry has taken over the supervision and regulation of the Federal Environmental Protection Agency (FEPA) which has metamorphosed into the National Environmental Standards and Regulations

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[44] The function of NEITI to make payment figures public to engender transparency is better realised under the Freedom of Information Act (FOIA) 2011

[45] The ministry did not come into existence by an Act of the National Assembly, but by a Presidential fiat which raises the constitutional question as to whether an Executive fiat can amend or repeal an Act of the National Assembly; I Ehighelua, *Environmental Protection Law* (New Pages Law Publishing Company 2007) 190; however the ministry was created in June 1999. Some scholars have argued that executive fiat cannot confer juristic personality on a ministry. It is however posited that such outfit is a juristic personality where though established by fiat, such fiat complied with the powers of the President under sections 147 (1) and 148 (1) of Constitution of the Federal Republic of Nigeria [as amended] (CFRN)

[46] O G Amokaye, *Environmental Law and Practice in Nigeria* (2nd edn, MIJ Professional Publishers Limited 2014) 130

[47] Constitution of the Federal Republic of Nigeria, s 20

[48] H Adamu, 'Protecting Our Environment and Natural Resources' (*The Guardian*, 16 February 2009) <https://www.theguardian.com/international> accessed 01 June 2021

Enforcement Agency (NESREA).[49] The creation of the Ministry was aimed at ensuring that environmental concerns are adequately infused into all developmental ventures. The Ministry has so far initiated several environmentally driven programmes.[50] Other Agencies under the supervision of the Ministry include National Oil Spill Detection and Response Agency (NOSDRA).[51] The Ministry is the government driver of the National Policy on Environment.[52] Ehighelua posits that the National policy on the environment elaborates on the responsibilities of the Ministry. Consequently, the Ministry has evolved several priority programmes touching several areas including industrial pollution control in oil and gas activities as well as management of mining sites and restoration of derelict lands.[53]

Although the Federal Ministry of Environment was composed by drawing such personnel and departments which hitherto existed under older ministries,[54] its impact on mining activities

[49] National Environmental Standards and Regulations Enforcement Agency 2007, s 36

[50] These include (1) Ogoni Clean up: Remediation of Hydrocarbon Impacted sites in Ogoni and (2) Green Bonds: Fixed income securities issued to finance projects that have a positive impact on the environment and provide solutions to climate change (3) Great Green Wall Programme: A Pan-Africa Initiative conceived to address land degradation and desertification, boost food security and support communities to adapt to climate change in the Sahel Sahara region of Africa (4) Clean Energy Initiatives: Fulfilling Nigeria's United Nation Framework Convention on Climate change. It is to NOSDRA's credit that under the Ogoni clean-up project, 17 polluted sites are completely remedied

[51] National Oil Spill Detection and Response Agency (Establishment) Act Cap N 157 LFN 2010; Forestry Research Institute of Nigeria established by section 1(1) of the Forest Research Institute of Nigeria (Establishment) Act 2018 which came into force on 17 August 2018; National Park Service established under section 1 (1) of the National Park Service Act No. 46, 1999; the National Biodiversity Management Agency (NBMA) established under the National Biosafety Management Agency (NBMA) Act 2015 which came into force on 15 April 2015; National Agency for the Great Green Wall established by the National Agency for the Great Green Wall Act 2015 and the Environmental Health Officers registration Council of Nigeria (EHORECON) established under the Environmental Health Officers (Registration, etc) (EHORECON) Act, No. 11 of 2002

[52] The National Policy on Environment (*NESREA.gov*) <https://www.nesrea.govng.> accessed 25 May 2021

[53] I Ehighelua, 'Looking Back at the Federal Environmental Protection Agency and Forward to the New Ministry of Environment (Chapter 14), in I Ehighelua (ed), *Envirnmental Protection Law* (n 45) 186, 191; The activities of the Ministry respecting oil and gas, and mining are relevant to this work

[54] Such departments/ministries include: Forestry Department (including Wildlife, Forestry Monitoring, Evaluation and Coordinating Unit) (FORMECU) of the Federal Ministry of Agriculture; Environmental Health and Sanitation Unit of the Federal Ministry of Health; Oil and Gas Pollution Control Unit of the Department of Petroleum Resources (DPR) of the Ministry of Petroleum Resources; Coastal Erosion Unit, Environmental Assessment Division, Sanitation Unit of the Federal Ministry of works and Housing; and soil Erosion and Flood Control Department of the ministry of Water Resources; The NESREA Act was amended principally to accommodate the Federal Ministry of Health in the composition of the Agency's governing Council

cannot be appreciated without synergy and collaboration with the Federal Ministry of Mines and Steel Development.

3.1 The Federal Ministry of Environment and its Interventions

3. 1. 2 The Federal Ministry of Environment: the National Environmental Standards and Regulations Enforcement Agency (NESREA).

On 30 July 2007, the Nigerian President assented to the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (the NESREA Act), thus heralding the new law on environmental protection. It is worthy of note that the NESREA Act repealed the Federal Environmental Protection Agency Act (FEPA Act) and also inherited its assets and liabilities.[55] FEPA Act was the Nigerian flagship law on the environment. The NESREA Act established a corporate entity known as the National Environmental Standards and Regulations Enforcement Agency (NESREA).[56] The Act, also, charged the Agency with the enforcement of environmental standards, regulations, rules, laws, policies, and guidelines.[57] Under its responsibilities, it may sue and be sued in its corporate name. However, NESREA may only be sued subject to the Act.[58] NESREA is capable of enforcing its regulations directly by itself under the Act or by the Criminal Code.[59] In practice, it is doubtful to agree with the argument that NESREA can conduct public investigations and prosecute offenders.[60]

NESREA appears to be more suited for other environmental issues than mining, especially, sand mining. This is arguably the reason its impact has not been felt so much in the Niger Delta particularly, Delta State. It is difficult to comprehend the outright removal of the oil and gas

[55] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, s 36
[56] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, s 1(1)
[57] T Okonkwo, *The Law of Environmental Liability* (3rd edn, vol 1, Afrique Environmental Development and Education [AEDE] 2014) 116; NESREA has made several regulations in exercise of its powers in that regard
[58] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, s 32; The requirement of pre-action notice applies
[59] A K Usman, *Environmental Protection Law and Practice* (Malthouse Press Limited 2014) 9; The Nigerian Criminal Code derives from Nigeria Criminal Code Act, 1916 the latest of which version is contained in / published as Nigeria Criminal Code 1990
[60] On the view that NESREA can prosecute offenders; Amokaye (n 46) 134

industry, the most lethal environmental threat to Nigeria from the reach of NESREA.[61] Thus, while the Agency is "technically" allowed to enforce compliance with laws, guidelines, policies, and standards on environmental matters, it is barred from the oil and gas sector in any manner to ascertain the level of compliance by operators.[62] The argument on which government agency should enforce environmental guidelines in the petroleum industry was resolved in favour of the Petroleum Inspectorate Department of the Ministry of Petroleum Resources (PIDPR).[63] It is doubtful how DPR can efficiently be a judge in its case given that one of its members, the Nigeria Petroleum Development Company (NPDC) is at the forefront of environmental pollution in Niger Delta.[64]

FEDERAL MINISTRY OF ENVIRONMENT: THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) EXPERIMENT

The most virile instrument for the regulation of environmental violence in Nigeria is the EIA Act.[65] The Act provides for mandatory study activities and elaborated this provision in its schedule to include cases of[66] Land Reclamation, Mining, and Quarries.[67] Without an EIA requirement, developers and players in the mining sector will only consider cost, technical issues, and profitability. It has therefore become the mechanism for ensuring that the environmental scheme of work is incorporated in developmental industrial activities across the

[61] National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007, s 7
[62] *Ibid*; NESREA (Establishment) (Amendment) Act 2018 which has now deleted the word "oil and gas" from line 3, paragraph C of *s.* 7, NESREA (Parent) Act, 2007; R A Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lesson from Kiobel' (2016) 1(3) Miyetti Quarterly Law Review 110
[63] M T Ladan, 'A Review of the NESREA Act and Regulations 2007-2009: A New Dawn in Environmental Protection in Nigeria' (2010) 6(1) Nigerian Bar Journal 195
[64] It is doubtful if DPR can do justice when NPDC is the violator as aggrieved persons may not get fair hearing. NPDC is the oil and gas production arm of the Nigerian National Petroleum Corporation (NNPC). DPR is also a member of NNPC. NPDC acquired marginal fields hitherto belonging to the Shell Petroleum Development Company (SPDC), an oil major and has always operated as the legitimate government owned oil and gas company with attendant environmental pollution propensities
[65] Environmental Impact Assessment Act Cap E 12 Laws of Federation of Nigeria (LFN) 2010.
[66] Environmental Impact Assessment Act Cap E 12 Laws of Federation of Nigeria (LFN) 2010, s 12; Apart from the mandatory study provisions, *s.* 18(1) provides that all other projects would undergo screening
[67] These items are listed as numbers 4, 11 and 14 respectively

world.[68] The administration of EIA processes in Nigeria is vested in the Federal Ministry of Environment. However, the legal instrument for the regulation of the environmental impact of certain projects in Nigeria may be contained in other statutes. These statutes include the Nigerian Urban and Regional Planning Act, 2004,[69] and other enactments.[70]

Environmental Impact Assessment (EIA) captures the process and procedure by which changes in the environment as a result of development are assessed to measure how beneficial or deleterious the changes might be.[71] The United States of America (USA) was the first to adopt the principles of the EIA.[72] The slightest introduction of the EIA principles in Nigeria was between 1981to1986 when the National Development Plan Guidelines required feasibility studies for all private and public projects to be accompanied by Environmental Impact Statements. The government policy hastened the enactment of the EIA Act 1992.[73] The Act provides that any person, authority, corporate, or incorporate, including the government at all

[68] EIA has been established as a standard requirement in 24 countries in Sub-Saharan Africa. See The Environmental Protection and Pollution Control Act (EIA) Regulations 1182 and 1183 (Gazette 5 September, 1997), 1997. (Zambia); Environmental Management Act of 1996 (Malawi); Environmental Protection Act, 1991 (Mauritius); National Environmental Protection Authority Act, 1992 (Ethiopia); The Environmental Protection Agency Act (No: 490, 1994) and Procedures and Other Matters Pertaining to EIA (26 February, 1999) (Ghana); National Environmental Management Act (No: 13, 1994) (Gambia); 'The Legal and Regulatory Framework for Environmental Impact Assessment in Sub-Saharan Africa' (*World Bank's Law, Justice and Development Series*) <https://www.worldbank.org> accessed 12 June 2021

[69] This Act is mainly applicable to the Federal Capital Territory, Abuja. Some states of the Nigerian Federation have also enacted similar statute which designates certain developmental/ industrial projects for specific areas. See, Lagos State Urban and Regional Planning Law 2010. The Lagos law accounts for why there are limited indiscriminate sand dredging activities in Lagos State. Lagos, unlike Delta State and other states of the federation, has designated places for sand dredging activities in Aja, Lekki Peninsula, Ikorodu and Ojo- Badagry axis

[70] See Regulations 160 and 161 made pursuant to the Nigeria Mining and Minerals Act 2007

[71] Y Omorogbe, 'Regulation of Oil Industry Pollution in Nigeria,' in E Azinge (ed), *New Frontiers in Law* (Benin Publishers 1993) 147, 158; The 1992 Conference on Environment and Development emphasised the need for EIA for sustainable development; See, Principle 17 of Rio Declaration; See the definition of EIA in Decision 14/25 of the Governing Council of the United Nations Environment Programme (UNEP) of 17 June 1997

[72] M F Ivbijaro, 'Environmental Impact Assessment and Environmental Audit Report in Nigeria, An Overview,' in M A Ajomo & O Adewale, *Environmental Law and Sustainable Development in Nigeria* (Nigeria Institute of Advanced Legal Studies [NIALS] 1994) 148 – 149; See, also, United States National Environmental Policy Act (NEPA) 1969 (42 USC, section 4332, [1970]); The concept was received in other jurisdictions: Canada 1973, Australia 1974, Europe Mid 80s; Amokaye (n 46) 805

[73] M T Okorodudu-Fubara, *Law of Environmental Protection: Materials and Text* (Caltop Publications 1998) 187 - 188 L Atsegbua & Ors, *Environmental Law in Nigeria: Theory and Practice* (2nd edn, AMBIK Press 2010) 231 - 232

levels in Nigeria must take cognizance of the significant extent to which its activities or proposed project or undertaking may affect the environment.[74]

Section 7 of the Act gives room for a certain group of individuals to make inputs. It allows concerned persons and critical stakeholders to interrogate the process to bring about a systematic balancing analysis.[75] The independent comment of critical stakeholders has been held to be fundamental and the court may set aside the entire process where this requirement is not complied with. In *Sierra Club v Coleman,*[76] the USA Supreme Court considered among other things the validity of an EIA report to which critical stakeholders were not allowed to comment. The case arose following the plan by the United States Department of Transport and Federal Highway Administration (FHWA) to construct the "DARIEN Gap Highway" through Panama and Colombia to link the Pan American Highway system of South America with the inter-American Highway. The United States National Environmental Policy Act 1969 (NEPA) provided for comments from stakeholders. The plaintiff sought by this action to challenge the final Assessment report issued in December 1974, claiming that the preparation and the issuance of the EIA report satisfied neither the procedural nor the substantive requirements of NEPA. The court observed that the premise/foundation of any EIA statement begins with the recognition that its goal was to provide a detailed discussion. Such discourse must be sufficient to allow the agency decision makers to fully evaluate the possible environmental effects of various alternative paths concerning the project. The court held that the statement was deficient and granted an injunction.

Similarly, in *Oronto Douglas v Shell Petroleum Development Company Limited and Five Others (SPDC),*[77] the plaintiff challenged the defendants' acts to commission the construction of Liquefied Natural Gas (LNG) project without an EIA report to which all critical stakeholders

[74] The EIA Act is now Cap E 12 LFN 2010
[75] s 8 of EIA Act delimits the period/window within which such comments may be allowed
[76] *Sierra Club v Coleman* IV/6 ILM, 1425, (USA)
[77] *Oronto Douglas v Shell Petroleum Development Company Limited & Five Others (SPDC)* [1999] 2 NWLR (Pt 591) 466; Ruling was delivered on 17 February 1997 by Belgore (CJ) (as he then was) of the Federal High Court, Port-Harcourt, Nigeria

like non-governmental organisations and communities likely to be affected by the operations of the proposed Liquified Natural Gas (LNG) project have opportunity to make inputs by the Act.[78]

Plaintiff sought an injunction consequently to restrain the commissioning of the project. The learned trial Chief Judge after reviewing various judicial authorities held that the plaintiff lacked the *locus standi* to institute the suit, has not shown any injuries he suffered, or that he has suffered anything by the report at all more than the generality of the people. The decision has been described as rather unfortunate. Okonkwo[79] argues that the position taken by the Supreme Courts in other Commonwealth jurisdictions where the 'traditional' position on *locus standi* has suffered defeat and is rejected is highly commendable. He makes a strong case for a more liberalised approach to be adopted in Environmental litigations by the Nigeria Courts.[80]

Other aspects of the EIA Act worthy of mention are sections 40 and 41. These sections of the law impose a duty to adopt and implement the mitigation plans captured in the EIA Report. Consequently, the Ministry or any interested party may institute an action in court to compel compliance where the project proponent or a sand dredging company in the case may refuse to implement the mitigation measures as approved in the EIA Report.[81] The Act provides and prescribes a duty for the Federal Environmental Council to determine the appropriate method by which the Agency shall publish its decisions. Such decisions shall reach the interest groups or critical stakeholders.[82] Suggestions/comments obtained from such interested groups are considered to be included in the detailed report of the EIA of the project, the subject matter of the assessment.[83] Other relevant provisions are made for the public to participate in the

[78] EIA Act (n 74); See, also, the mandatory list in s 12 of the Act.
[79] T Okonkwo, *The Law of Environmental Liability* (3rd edn, vol 1, Afrique Environmental Development and Education [AEDE] 2014) 175, 191
[80] *Wildlife Society of Southern Africa & Ors v Minister of Environmental Affair & Tourism & Ors* (South Africa) Case No: 1672/1995; *Oposa v Factoran* GR No: 101083 delivered on 30 July 1993 (Phillipines); *Dr M Farroquo v Bangladesh* Civil Appeal No 24 [1995]; *Sierra Club v Coleman* (n 76)
[81] This Statutory position in Nigeria differs with what obtains in the United States of America where the only duty on the project proponent is to incorporate the measures/plans, not to implement them; *Robertson v Methow Valley Citizen's Council* 490 US 322, 350 (1987)
[82] Environment Impact Assessment Act 1992, s 9(4); Environment Impact Assessment Act 1992, s 21(3)
[83] Environment Impact Assessment Act 1992, s 16(1)(c)

assessment process before review panels by making comments and having unhindered access to information concerning the report.[84]

Participation reduces agitations. In *Oronto Douglas v SPDC*,[85] it is argued that the right to comment is a statutory right that carries with it the standing to apply (or sue) to a court of competent jurisdiction for judicial review. The provisions requiring comments (which must be permitted by the agency) before its final decision is mandatory, not a directory. The schedule of the Act contains projects and activities which require mandatory study activities. These include reclamation, mining, and quarries, to mention a few. Courts have held in favour of challenges against violation of the requirement for mandatory study. Thus, in *Bayside Nigeria Limited v Aderinokun,*[86] the respondent who is a resident association challenged the construction of a petrol filling station by the appellant at Lekki Phase 1, a high brow area of Lagos. The respondent contended that the Appellant failed to undertake EIA as prescribed by the Act and if the appellant carried out any EIA.

Howsoever, the respondent was not consulted or informed to make his impact as required under section 7 of the Act. In resolving the issues, the Court was called upon to determine whether: (1) the project falls within the mandatory list for which EIA is required (2) the project is in a particularly sensitive and valuable location for which EIA is mandatory; and (3) the project is unusually complex and likely to generate the potentially adverse environmental effect. The court of Appeal rejected the respondent's argument and held that since the construction of a petrol filling station has been excluded from the mandatory EIA study under paragraph 12 of the schedule to the Act, it is not considered activity likely to significantly affect the environment" and as such, there is no statutory duty on the appellant to conduct such EIA as argued by the respondent. Suffice it to say that the word "significantly" as used by statute would involve an appreciation of the matrix of changes or transformation of the environment from the *status quo* and the hardcore realities of the impact of the project sought to be embarked upon.

[84] Environment Impact Assessment Act 1992, s 35
[85] *Oronto Douglas* (n 77)
[86] *Bayside Nigeria Limited v Aderinokun* [2014] 4 NWLR (Pt 1396) 162

The standard is whether the proposed project "may significantly impact on some human environmental facts."[87] In *Hanly v Weindeinst* (Hanly 1),[88] the USA Supreme Court found that NEPA included socio-economic impacts, and held that quality of life for city residents was a significant effect to be included in an EIA statement. To this end, a project which seeks to commercialise and open up a village or remote setting would impact the standard of life and living of the residents. Such projects, therefore, require EIA whether listed or not in the mandatory provision. Thus, mining and sand dredging is caught in the web of the statutory mandatory list and the authority of the *Hanly case* to require regulations under the EIA Act. The Court also held[89] that where a government in the process of creating a new satellite town designates a particular area for a specific project or development as in the instant case, there is a presumption that it had taken all necessary environmental considerations into cognizance before designating the area for such project.[90]

In light of the above authorities, it is posited that the law prescribes mandatory EIA exercise for all sand dredging activities in Nigeria for sustainable development. This presupposes that it is illegal and unlawful to embark on sand dredging activities for *industrial use* without an EIA report first had and obtained. The courts must rise to the occasion to enforce the law in this respect whenever the such act of illegality is presented in court. The EIA Act if applied with judicial temerity would bring sanity into the sand mining sector, particularly in Delta State and the other Niger Delta States of Nigeria where sand dredging is still, often, being illegally done with sheer lack of bureaucratic governance and manifest damages to infrastructure.[91]

In *Oyon Pius Magege v DOFE Limited and Another (The Scholars' Case)*,[92] the plaintiff challenged the sand dredging activities of the defendant companies which he alleged had caused the

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[87] *Chesire Country Council v Woodward* [1962] 2 QB 126, 133; *Hanly v Wendeist (Hanly II)* 471 F 2d823 (2nd Cir 1972); Facts to be considered may be socio-economic which must not be too remote or speculative
[88] *Hanly v Weindeinst* (Hanly 1) 460 F 2d 640 (2nd Cir 1972); Amokaye (n 46) 812
[89] *Bayside (Nigeria) Limited* (n 86) 201
[90] The court relied on *s.* 2 (1) of the EIA Act
[91] P Bagchi, 'Unregulated Sand Mining Threatens Indian Rivers' (2010) 21 The Journal India Together 7, 9
[92] *Oyon Pius Magege v DOFE Ltd & Anr* (Unreported) Suit No: HOR/90/2011: Judgment delivered on 19 July 2016 by Honourable Justice TO Uloho at the High Court of Justice, Orerokpe, Delta State; *Seismograph Services Ltd v Onokpasa* [1972] 4 SC 123

collapse of the brick-wall fence of Scholars International Academy, the plaintiff's boarding school at Okuodiete near Oha in Okpe Local Government Area of Delta State. It was stated in evidence that the dredging of sand was done within 30 meters of the plaintiffs' wall fence with attendant industrial vibrations in violation of the extant laws and regulations guiding sand dredging in Nigeria.[93] The defendants further admitted not to have conducted any EIA before the commencement of the dredging activities as required by statute.[94] The High Court relied on the common law principle (instead of statutory provisions) and so missed a grand opportunity to instill environmental discipline by upholding trade standards when it declined to grant an injunction and other reliefs sought by the plaintiff.[95] The High Court held that the plaintiff failed to prove that the act of the defendants and nothing more, caused the damage to the plaintiff's wall.[96]

The High Court adopted the common law doctrine of 'but for'[97] instead of the contemporary doctrines of *implied warranties in environmental litigation*[98] or *the precautionary principle*.[99] The trial

[93] Delta State Government (n 3)

[94] In India, where sand dredging has been conducted in violation of the EIA requirement, the courts have declared the activities illegal and granted the reliefs sought by claimant; *Hanly v Weindeinst* (Hanly 1) (n 88)

[95] Details of the *Scholars' case* show a sharp contrast and departure from the commendable and responsive approach of Nigerian courts in environmental matters as evident in *Gbemre v Shell Petroleum Development Company Limited* [2005] African Human Rights Reports (AHLR) 151; The pro-active and superlative thought pattern adopted by the court to stop gas flaring in Nigeria and to hold an offender accountable is highly commendable. The fundamental Rights of Nigerians to a safe and healthy environment has been upheld by the courts in deserving cases; F Falana, *ECOWAS Court: Law and Practice* (Legaltext Publishing Company Limited 2010) 63; Applying the mischief rule jurisprudence, the court ought to have seen an opportunity to stop environmental rascality which all laws and regulations impacting the environment now seek to achieve. Parliament presumes that the court when considering matters in relation to facts before it should lean towards furthering every aspect of the legislative purpose. It may be necessary to give a strained construction where the facts/ enactment are not expressed in ambiguity; *Jones v Wrotham Park Settled Estates* [1979] 1 ALL ER 286, 289; *Attorney General, Lagos v Attorney General of Federation & Thirty-Five Ors* [2003]12 NWLR (Pt 883)1, 159; G W Keaton, 'Lessons of the Tory Canon English Law Aspect' (1968) 21 Criminal Law Review 84

[96] It does appear that the court adopted the common law principle of 'But For' since the defendants led evidence of heavy rains in the material year which negates the fact that only the dredging activities could have caused the damage. On the 'but for' legal doctrine, see A O Otokhina, 'Environmental Litigation,' in A D Badaiki (ed), *Landmarks in Legal Development Essays in Honour of Justice C.A.R. Momoh, Honourable Chief Judge of Edo State, Nigeria* (Nobility Press Limited 2003) 165; It is argued that this approach is the 'but for' doctrine stretched too far

[97] *Ibid*

[98] A W Reitze, *Environmental Law* (2nd edn, North America International Publications 1972); The doctrine of implied warranties is a pro-active approach to hold defendants accountable. It implies that every activity impacting the environment must comply with the trades best practices whether expressly stipulated or not

[99] This principle has been laid down as part of the concept of Sustainable Development; *Suo Motu Proceedings in Re: Delhi Transport Department* [1998] 9 SCC 250; *A P Pollution Control Board v Prof M V Nayudu* [1999] SCI Case

court would otherwise have found the defendants liable for failure to adopt the trades' best practices particularly, the EIA requirement, in the circumstances if it had adopted the latter contemporary doctrines. The law has moved away from the manacles of the conservative common law principles to the setting of standards that uphold best practices for sustainable development.

FEDERAL MINISTRY OF TRANSPORT: NATIONAL INLAND WATERWAYS AUTHORITY (NIWA)

The Inland Waterways Department (IWD) of the Federal Ministry of Transport, metamorphosed into an Authority under the National Inland Waterways Act.[100] The authority is established with the primary responsibility to improve and develop Nigeria's inland waterways for navigation.

NIWA's statutory roles/functions as enunciated and documented in its enabling statute include:

- undertake capital and maintenance dredging;
- grant permit and licenses for sand dredging, pipeline construction, dredging of slots and crossing of waterways by utility lines, water intake, rock blasting, and removal; and
- subject to the provisions of the Environmental Impact Assessment Act, carry - out an environmental impact assessment of navigation and other dredging activities within the inland water and its right-of-ways.[101]

number 53; In *Vellore Citizen's Welfare Forum* [1996] 5 SCC 647, 658, the Indian Supreme Court, following the definition provided in the Rio Declaration, stated that where there are threats of a serious and irreversible damage, lack of scientific (forensic) uncertainty should not be used as a reason to postpone measures to prevent environmental degradation. It held that state authorities must anticipate, prevent and attack the causes of environmental degradation. This principle was invoked to stop construction within one kilometer of two lakes near Delhi in *M C Mehta (Badkhal and Surajkund Lakes Matter) v Union of India & Ors* [1997] 3 SCC 715; In *Th Majira Singh v Indian Oil Corporation* [1999] All Indian Reports (AIR) J and K 81, the Indian Supreme Court held that the courts have a duty to examine as to whether authorities (operators) have taken all precautionary measures with a view to ensure that the laws dealing with the environment and pollution have been complied with. Precautionary Principle is part of International Customary Law and should apply with equal force to Nigeria as it does in India. In India the Supreme Court had moved a step further to develop the Absolute Liability Principle, allowing no exceptions to apply, to any enterprise enjoyed in hazardous or inherently dangerous activity; *MC Mehta v Union of India* [1987] 1 SCC 395

[100] Cap N 47 Laws of the Federation of Nigeria (LFN) 2004

[101] National Inland Waterways Authority Act 2004, s 9; National Inland Waterways Authority Act 2004, s 10

The most controversial aspect of the authority of NIWA which bears on sand dredging activities is its power to grant permits and licenses for sand dredging, pipeline construction, dredging of slots and crossing of waterways by utility lines, water intake, rock blasting, and removal. Therefore, nobody may obstruct the waterway, or take sand, gravel, or stone from any declared waterway without the written consent, approval, permission, or authorisation of NIWA. This power has come under judicial scrutiny in the light of the express provisions of the Nigeria Mining and Minerals Act, (NMMA) 2007. Section 9 (1) of the NIWA Act 2004 gives NIWA power to grant permits and licences for sand dredging, pipeline construction, dredging of slots, and crossing of waterways by utility lines, water intake, rock blasting, and removal. The Act gave NIWA exclusive control of National Inland Waterways.[102]

It is argued that by section 76 (1) of the NMMA, such ubiquitous powers of NIWA have been divested. It is further argued that the phrase " notwithstanding" in section 76 (1) of the NMMA wrests the expansive powers over sand dredging from NIWA and vests the same on the ministry which now ought to exercise control over the dredging of sand for industrial use.[103] Again, it is contended that the phrase "shall be conducted under a lease or licence granted by the Minister under the Act" in Section 76 (1) of the NMMA makes it only mandatory to obtain the lease or licence of the Minister and no further. No such requirement is provided in section 9 (1) of the NIWA Act.[104] From the unambiguous provisions of section 76 (1) of the NMMA, the law has made a distinction between dredging of sand *simpliciter* and dredging of sand for industrial use.

It appears that the law intends that the Ministry of Mines and Steel Development[105] should regulate the dredging of sand/quarrying for industrial purposes in Nigeria (including Nigeria's inland waters). NIWA may only regulate dredging of sand/quarrying only on the National Waterways which is not for *industrial purposes*. Where dredging exercise is therefore for

[102] Nigeria as a country has a land mass which extends from the Gulf of Guinea in the South to the Sahel (the shore of the Sahara Desert) in the North covering approximately 924, 000 square kilometres. The inland waterways, which is an integral part of Nigeria's land mass, cover an area of 8,575 kilometres (5, 329 miles) comprising Niger and Benue Rivers and smaller rivers and creeks; *Attorney General of the Federation v Attorney General of Abia State & Thirty-Five Ors* [2002] 6 NWLR (Pt 764) 542-905, particularly 649 and 659
[103] Nigeria Mining and Minerals Act 2007, s 76(2); Nigeria Mining and Minerals Act 2007, s 76(3)
[104] National Inland Waterways Authority Act 2004, s 11; National Inland Waterways Authority Act 2004, s 13
[105] National Inland Waterways Authority Act 2004, s 10

industrial purposes,[106] permission or approval of NIWA is of no moment. The permit or lease granted by the Minister confers legitimacy on sand dredging for industrial use.[107] In the resolution of the controversy thrown up by both statutes, it is imperative to note that public policy does not permit double taxation. There is no doubt that there are inconsistencies or conflicts between the applicability or tenor of both statutes.

It is a constitutional rule of interpretation that where a latter provision or statute is inconsistent with an earlier provision or statute,[108] the legal presumption is that the latter has modified or amended the earlier provision or statute.[109] This is the classical doctrine of *repeal by implication*. Hence, in *Chairman, Moro Local Government v Lawal,*[110] the Supreme Court enthused:

> Generally, a statute is definite as to what it repeals by its enactment; and a schedule may recite the existing law repealed.[111] The courts in the performance of their functions as interpreters of the law usually lean against implying the repeal of a law by implication. However, where the provisions of two Acts are repugnant, one to the other position, and demand inconsistent conclusion that effect cannot be given to both at the same time, a repeal of the earlier provision of the law by implication is inevitable.

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[106] *NDIC v Okem Enterprises* [2004] 10 NWLR (Pt 880) 107, 182-183; *Ndaba (Nigeria) Ltd v Union Bank of Nigeria (UBN) Plc* [2009] 13 NWLR (Pt 1158) 256, 304; *Onoche v Odogu* [2006] 6 NWLR (Pt 975) 65, 89; *Enwezor v INEC* [2009] 8 NWLR (Pt 1143) 223, 237; NIWA is under the supervision of the Federal Ministry of Transport

[107] Nigeria Mining and Minerals Act 2007, s 76(2); Nigeria Mining and Minerals Act 2007, s 76(3); such permits once granted may not be withdrawn arbitrarily but by due process. *Federal Government of Nigeria v Zebra Energy Ltd* [2002] FWLR (Pt 92) 1749 (Court of Appeal), [2003] FWLR (Pt 142) 154 (Supreme Court)

[108] *Alhaji Ahmed Umar v NIWA & Anr* FHC/LKJ/CS/62/2011; *River Niger Sand Dealers Multi-Purpose Co-operative Society Ltd, Asaba v Engineer Emmanuel Aguda & Three Ors* FHC/B/CS/15, 259/08

[109] *Leadway Assurance Company Limited v TUC Limited* [2005] 5 NWLR (Pt 919) 559 – 560; *Bamigboye v Administrator-General* [1954] 12 WACA 616

[110] *Chairman, Moro Local Government v Lawal* [2008] All FWLR (Pt 440) 684, 727; *NPASF v FASEL Services Ltd* [2002] FWLR (Pt 97) 719, 736; *Abacha v Fawehinmi* [2000] FWLR [Pt 4] 533, 600; *Umar v NIWA* (n 108)

[111] *s* 36 of the NESREA Act which repeals the Federal Environmental Protection Act Cap F 10 LFN 2004; *s* 161 of the Nigerian Minerals and Mining Act 2007 which repealed the Minerals and mining decree No 34, 1990; See for details on presumption of law on interpretation of statutes, E Malemi, *The Nigeria Legal System Text and Cases* (3rd edn, Princeton Publishing Company 2009) 155 - 160.

Applying the above principle of law, it may be safe to posit that the contentious provisions of the NIWA Act (2004) shall give way to the latter provisions of the NMMA (2007), being a later statute.

In *River Niger Sand Dealers Multi-purpose Co-operative Society Limited, Asaba v Engineer Emmanuel Aguda, and Three Others,*[112] the Federal High Court was called upon to determine which government agency between the National Inland Waterways Authority (NIWA) that is, the Federal Ministry of Transport and the Federal Ministry of Mines and Steel Development has authority to regulate quarrying/sand mining activities in Nigeria upon coming into effect of the NMMA. The Federal High Court had to review the provisions of section 9 (1) of the NIWA Act 1997[113] and the provisions of sections 76 (1), (2), and (3) of the NMMA. Section 9 (1) NIWA Act states that:

> *…other functions and powers of the Authority shall be to grant permits and licences for sand dredging, pipeline construction, dredging of slots and crossing of waterways by utility lines, water intake, rock blasting, and removal.*

Sections 76 (1) and (3) of the NMMA state as follows:

Notwithstanding the provisions of any other enactment, consent or approval provided for under an enactment and in particular sections 9 (1), 29 (1), 10, 11, 12, and 13 of the National Inland Waterways Authority Act, every operation to extract any quarriable minerals from a quarry including sand dredging in the navigable waterways or elsewhere, for industrial use (in this part referred to as a "quarrying operations') shall be conducted under a lease or licence granted by the minister under this Act.

…….

Under Section (1) of this Act, except as provided in this part, no person shall conduct any quarry operation on any land in Nigeria, its contiguous continental shelf, and all rivers, stream, and watercourse

[112] *River Niger Sand Dealers* (n 108)
[113] Cap N 47 LFN 2004, s 9(1)

throughout Nigeria, any area covered by its territorial waters or constituency and the exclusive economic zone, or divert or impound water for that purpose.

After reading through the provisions above, the learned trial High Court Judge agreed with the claimants that NIWA has lost the authority to regulate sand dredging activities in Nigeria and that the prevailing law as to grant licences and leases for dredging is the NMMA.[114] Nnamani J used the opportunity in granting the reliefs sought by the claimant to re-state the age-long principle and of the presumption of law that "where there are two competing Acts of co-ordinate standing, it is the latter that prevails.[115] The trial High Court in so doing followed its own decisions in earlier cases.[116] The trial High Court's reasoning aligned with decided cases[117] that where there are two competing Acts of co-ordinate standing, the latter prevails, and judgment that is last in point of time creates *estoppel*. The trial High Court, therefore, restrained NIWA from further interference with the dredging activities of the plaintiff. Of course, the court above followed the latest decision of the same court sitting in Lagos.[118]

Conversely, in an earlier case of *Celestine Nwachukwu and Two Others v NIWA and Federal Ministry of Solid Minerals*,[119] the Federal High Court Asaba, Delta State Honourable Justice G. O. Kolawole, (J) held that NIWA, the 1st defendant, was the rightful authority to issue permits and collect taxes from sand miners in the inland waterway, an area within NIWA's exclusive statutory authority. The plaintiffs who were dredgers on the Asaba axis of the River Niger inland waterways resisted double taxation and undue exploitation and sought the court's pronouncement on which authority may validly receive payments among various competing authorities.

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[114] *River Niger Sand Dealers* (n 108)
[115] *Cardoso v Daniel* [1986] 2 NWLR (Pt 20) 1, 7; *Ikeagwu v Nwankpa* [1967] NWLR 224
[116] *Ikechukwu Ugbonma and Eleven Ors v Federal Ministry of Solid Mineral Development & Ten Ors* FHC/AWK/C3/290/2007
[117] *Ibid*
[118] *Cardoso v Daniel* (n 115); *Ugbonma* (n 116); See s 35 of NOSDRA Act; Amokaye (n 46) 130
[119] (Unreported) Suit No:FHC/B/CS/63/2003. The suit was filed in Benin City and later transferred to Asaba and judgment was delivered on 21 April 2005 at the Federal High Court, Asaba. However, it needs to be noted that this judgment came before the enactment of the NMMA in 2007

However, in *Alhaji Ahmed Umar v NIWA and Another,*[120] a similar question arose before the court. The claimant had approached the Federal High Court to seek clarification on which of the Federal Government authorities of NIWA and the Federal Ministry of Mines and Steel Development may validly regulate his dredging on River Kaduna. The trial Federal High Court laboured to harmonise both extremes of the case law as to which between NIWA and the Federal Ministry of Mines and Steel Development is the legitimate authority to permit and regulate sand mining on inland waterways in Nigeria.[121] The plaintiff had applied for and obtained leases of the second defendant to quarry sand from River Kaduna. In May 2011, the first defendant (NIWA) wrote to the plaintiff directing him to obtain necessary permits and licences from its office if he must continue the sand mining ventures on the River Kaduna. Plaintiff challenged the first defendant based on Section 76 (1) of the Nigerian Minerals and Mining Act 2007, contending that he had no further need of any more permits having obtained such approvals under the NMMA. The Federal High Court held that a careful reading of the relevant provisions of the laws establishing both defendants revealed that both enactments have contemporaneous applicability. When it comes to sand dredging for industrial use on inland waterways there is, therefore, in the view of the court, a concurrent authority in the navigable waterways between the first and second defendants. Ekwo, (J.) of the Federal High Court Lokoja, after reviewing the case of the parties and laws cited held among other decisions, that:

> It is my opinion therefore that the two statutes that are, NIWA Act and NMMA are to be read together to understand the intention of the lawmaker as it relates to the authority of the 1st and 2nd defendants over dredging of sand for industrial use or inland waterways. My finding after doing so is that there is therefore a concurrent authority over the dredging of sand for industrial use in the navigable waterways between the 1st and 2nd defendants.[122]

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[120] *Alhaji Ahmed Umar v NIWA & Anr* (n 108)

[121] *Ibid*

[122] The learned trial Judge's interpretation is somewhat worrisome; See Malemi (n 115), for details on presumption of law on interpretation of statutes. It has been argued that the learned trial judge adopted the style in the United States of America where the doctrine of Implied Repeal is dis-favoured and courts are rather encouraged to reconcile conflicting statutes by any reasonable interpretation rather than invalidating one against

The above constitutes an attempt at begging the question. The trial Federal High Court was too careful. It neither disagreed nor agreed with earlier decisions of courts of co-ordinate jurisdiction on the same subject matter which were brought to its notice. The trial Federal High Court made frantic efforts to harmonise both extremes of the case law but rather obfuscated the issues. This decision appears to have created unrest in the sand mining sector, as operators may be subjected to double permits and double licences which amount to double taxation. The law forbids double taxation and so it is hoped that appellate courts would have the opportunity to clarify the law on this subject when the time arises. In the light of the foregoing conflicting judgments of courts of co-ordinate jurisdiction, the law is not settled as to who between NIWA and the Federal Ministry of Mines and Steel Development is empowered by law to regulate sand dredging activities on waterways in Nigeria. It is, however, argued that the principle that where there are two decisions on a subject matter by courts of co-ordinate jurisdiction, the later decision is the law on the subject applies to put this decision on a firmer footing with the previous decisions on this subject.[123]

The powers of NIWA to grant permits and licences for sand dredging and to carry out an environmental impact assessment of navigation and other dredging activities within inland water and its right ways are relevant. This is no doubt central to the establishment of the *parastatal*. It is the main attraction and reason for conflict. This has become a greater concern, given the provisions of the NIWA Act and conflicting judgments of the court. The authority of NIWA to grant permits and licenses for sand mining activities on intra- waterway has been constantly challenged. In a later development, there was a conflict of interest between the Lagos State Waterways Authority and the NIWA on who should impose and collect charges by way of permits licences under the Nigerian law on boat operators and sand dredgers in the inland waterways in Lagos State.

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the other particularly where both statutes are capable of concurrent operations; *Penziner v West America Finance Co* 10 Cal 2d 160

[123] *Ibid*

In the *Incorporated Trustees of Association of Tourist Boat Operators and Water Transporters of Nigeria v Lagos State Waterways Authority and Eight Others,*[124] the case was made that Lagos State Waterways Authority is empowered by statute[125] to collect charges similar to that which the Act[126] has also empowered NIWA to collect. The court held that only the Federal Government and its agencies like NIWA and NIMASA can legally and constitutionally regulate the operations of the plaintiffs on the nation's inland waterways. No federating state agent could do so![127] Being dissatisfied, the Lagos State Government appealed to the Court of Appeal. Consequently, in *Lagos State Waterways Authority and Three Others v The Incorporated Trustees of Association of Tourist Boat Operators and Water Transportation in Nigeria and Five Others,*[128] the Court of Appeal set aside the judgment of the Federal High Court, Lagos[129] , and found for the appellant. The Court held that inland waterways within Lagos State are not and cannot by any stretch of imagination be interpreted to be in the exclusive legislative list.[130] It interpreted inland waterways and distinguished between intra-state and inter-state waterways.

This decision of the Court of Appeal has emboldened the Lagos State government and broadened its revenue drive on the one hand and weakened the authority of NIWA on the other hand.[131] However, a careful study shows that all navigable waterway routes in Lagos State are covered by the Act and it is doubtful whether Lagos State can validly legislate on the same, given the settled principle of *covering the field*.[132] It is a known fact that most of the waterways in

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[124] *Incorporated Trustees of Association of Tourist Boat Operators & Water Transporters of Nigeria v Lagos State Waterways Authority & Eight Ors* (Unreported) Suit No FHC/L/CS/543/12

[125] Lagos State Waterways Law 2008, s 4(f); Lagos State Waterways Law 2008, s 4(p)

[126] National Inland Waterways Authority 2004, s 9(f); National Inland Waterways Authority 2004, s 9(i); National Inland Waterways Authority 2004, s 9(p)

[127] The argument as to which between NIWA and Ministry of Solid Minerals Development may regulate sand mining on inland waterways for industrial uses was not canvassed before the Court

[128] *Lagos State Waterways Authority & Three Ors v The Incorporated Trustees of Association of Tourist Boat Operators & Water Transportation in Nigeria & Five Ors* Suit No: CA/S/886/2014; *Lagos State Waterways Authority & 3 Ors v The Incorporated Trustees of Association of Tourist Boat Operators & Water Transportation in Nigeria & Three Ors* [2017] 9 CLRN 1

[129] *Incorporated Trustees of Association* (n 124)

[130] Constitution of the Federal Republic of Nigeria, part 1, schedule 2

[131] National Inland Waterways Authority 2004, schedule 2

[132] *Attorney General of Abia State v Attorney General of the Federation* [2002] 6 NWLR (Pt 763) 264, 389-392 (SC); *INEC v Musa* [2003] 3 NWLR (Pt 806) 72, 204-205; *Ifegwu v Federal Republic of Nigeria* [2001] 13 NWLR (Pt 729) 103, (CA); See, also, the principle of covering the field in *Attorney General of Ogun State v Aberuagba* [2002] 2 WRN 52; For

Lagos where sand-mining and boat businesses thrive derive their origin from or are connected to the Lagos Lagoon. It is therefore argued that this may be one victory for Lagos that may turn *pyrrhic*. The Supreme Court may upturn the decision of the Court of Appeal when the opportunity presents itself for clarification of the status of NIWA or other federal government agencies about sand dredging on intra-state waterways in Nigeria. By and large, NIWA as an institutional framework for extractive activities, particularly quarrying activities, has been so battered that legislative and judicial (Apex Court's) stability is required to salvage its remains.

FEDERAL MINISTRY OF MINES AND STEEL DEVELOPMENT

The Ministry of Mines and Steel Development (MMSD) was created in 1985 to provide an institutional framework for the development and management of all mineral resources in Nigeria. The name was temporarily changed with the return of democracy in 1999 and frequently so according to the fancy of any government in power (especially between 2001 - 2015) until the present administration.[133]

All mineral deposits in Nigeria are the exclusive property of the Federal Government which in turn grants titles to prospective investors to explore, mine, and sell mineral commodities as may be necessary. The Federal Government viewed the solid minerals industry as a profit-oriented sector. It plans to diversify the national economy through solid mineral exploitation among others with the mandate to facilitate full exploration and exploitation of the abundant solid minerals potentials of Nigeria through the MMSD. The core mandate of the Ministry is to generate revenue for the government through the issuance of permits, licenses, leases, and so on and to develop the sector into a wealth-creating sector of the economy. To this end, the Ministry:

- created the Nigeria Mining Cadastre Office (NMCO) charged with transparent administration of mineral titles on a 'first-come first-served and 'use or lose it' basis with

detailed appreciation of the doctrine of covering the field, see FRA Williams, 'The Division of Legislative and Executive Powers between Federal and Regional Government' [1961] Nigeria Bar Journal 26

[133] The Ministry was designated the Ministry of Mines and Steel Development after a Federal Executive Council Meeting (FEC) in August 2016

a resultant increase in mineral title acquisition by both local and international mining concerns;[134]

- motivated the enactment of the Nigerian Minerals and Mining Act, 2007 (NMMA);
- formulated the Nigerian Minerals and Metals Policy, 2008; and
- prescribed the Nigerian Minerals and Mining Regulations, 2011 to complement existing ones needed to regulate mineral exploration and exploitation activities transparently, among other giant strides.

THE NIGERIA MINING CADASTRE OFFICE (NMCO)

The greatest contribution of the Ministry to the mining industry and indeed sand dredging in Nigeria is the establishment of the Nigeria Mining Cadastre Office (NMCO) through the (NMMA). The Nigeria Mining Cadastre Office is a product of the Federal Government's Mining Sector Reforms Programme championed by the Ministry of Mines and Steel Development in collaboration with the World Bank Sustainable Management of Mineral Resources Project. Upon creation, the NMCO became an autonomous Agency of the Federal Government responsible for the management and administration of mineral titles.[135] The NMCO possesses all the authority of the Chief Inspector of Minerals under the Minerals Act of 1946.[136] The NMCO is the beacon, the cornerstone of the mineral rights administrative system in Nigeria. It is saddled with the responsibility to provide and evolve an efficient system for the grant and administration of mining licences and permits in Nigeria.[137] The objective of the NMCO is the generation of appropriate revenue for the government, among other responsibilities.[138] Before 2006, the NMCO operated under the mines department and was not autonomous but was characterised by policy inconsistency.[139] The NMCO is active in confronting the problems facing the mining sector in Nigeria which includes but are not limited to weak regulation and illegal Artisanal

[134] The NMCO is however constrained in its liberty to map out areas and allocate them to applicants for the purpose of mining; Okorodudu-Fubara (n 73) 374 -75
[135] Minerals and Mining Regulations 2011, part II
[136] I Ehighelua (n 45) 118
[137] *Ibid*
[138] Nigeria Mining and Minerals Act 2007, s 10
[139] O Y Ogundipe & Z O Opafunso, 'Effect of Cadastral System on Mining Title Administration in Nigeria' (*Arts and Social Sciences Journal*) <https://www.omicsonline.org> accessed 27 May 2021

Mining.[140] The NMCO is empowered by the Minerals and Mining Regulations to comply and compel compliance with all environmental, health, and safety provisions contained in the Act.[141]

Regulation 20 gives the NMCO power to sanction any operator in contravention of the Regulations or the Act. The penalty for such breach may be the confiscation of the product by the state or monetary reparation (fines) by the Regulation. However, such an operator in contravention may be served with a notice to enable it to remedy the breach failing which its title holdings expire. Upon conviction for contravention of any of the Regulations, the offender may get a fine of up to twenty million nairas by the Federal High Court.[142] This rule permits administrative as well as legal actions to be taken out to ensure compliance with the Act and Regulations.

Regulation 67 specifically provides for the requirement for the application of a quarry lease by any qualified person. A quarry lease application shall specify complete identification and contact information of the applicant, describe the quarry lease area, its size and configuration, (which shall not exceed 5 square kilometers), identify the mineral resource located in the area being applied for, and specify the period of quarry lease duration being applied for if the period is less than 5 years.[143] The NMCO must verify the information supplied in the quarry application and exercise its discretion to approve or deny the same. Where an application is not approved and its denial is communicated to the applicant within 45 days of the exercise of such discretion, the applicant may approach a Federal High Court to challenge the NMCO's discretion.[144]

Regulation 154 requires holders of exploration license, mining lease, quarrying lease, and small-scale mining lease to comply with all environmental obligations and terms contained in the community development agreement during the subsistence of the quarrying/lease operations.

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[140] '10 major problems of mining in Nigeria' (*Infoguidenigeria.com*) <https://www.infoguidenigeria.com> accessed 27 May 2021

[141] Minerals and Mining Regulation 2011, regulation 22(ix)

[142] Minerals and Mining Regulation 2011, regulation 20(6); Minerals and Mining Regulation 2011, regulation 20(7)(1)

[143] Minerals and Mining Regulation 2011, regulation 68(3)(a) – (g)

[144] This is a requirement under *s.* 119 NMMA

Accordingly, the EIA to be submitted and approved must comply with the high standards of the regulatory agencies. There is no lowering of the guard.[145]

The EIA shall be carried out by experienced and qualified multi-disciplinary personnel in compliance with EIA Act[146] and Environmental Impact Assessment guidelines for mining and solid minerals.[147] The EIA report shall contain some information relating to the project justification, that is, the socio-economic and other benefits of the venture, and a review of municipal and international instruments relevant to the environmental status of the venture. The risks associated with the project must be properly and dispassionately evaluated and mitigation plans suggested in the report as well as remediation plans.[148] The Environmental Audit report on quarrying and mining operations is carried out by mandated consultants who are independent but accredited.[149] This is to obviate compromise and undue influence.

Regulation 163 gives vent to sections 19 (3), 98 (2), 108, 120 (2), and 121 (1) of the NMMA. It inaugurates the State Minerals Resources Management Committee in all the States of the Federation and Abuja to oversee and resolve issues arising from disputes in the operations of the title holder with the host community. The composition provides an aggrieved party with a panel (for redress) at first instance and an appellant panel and a further appellate right to the Minister of Mines and Steel Development. It is the duty of the State Minerals Committee (with representatives drawn from State departments who must be of the Director cadre) to facilitate collaboration among all tiers of government and across the divide of relevant stakeholders.[150] This panel is structured in the garb of an arbitral panel though without reference to the

[145] Regulation 157(2) and 158(1)(b) imply that EIA procedure for the Mineral Sector is as contained in the Memorandum of Understanding between the Ministry of Ministry of Mines and Steel Development and Federal Ministry of Environment

[146] T A Yusuf, 'Environmental Impact Assessment (EIA) Regulations and Practice in Nigeria' [2017] Al-Hakim International 96-98

[147] Although the NMMA Part VI, Article 75, 76 and 123 and the Federal Ministry of Environment through the EIA Act appears to have provided for strict control of sand dredging operations, this is not so in practice; T K S Abam & T Oba, 'Recent Case Studies of Sand Mining, Utilisation and Environmental Impacts in the Niger Delta' [2018] Journal of Environmental Geology 64, 66

[148] Minerals and Mining Regulation 2011, regulation 160(2)

[149] Minerals and Mining Regulation 2011, regulation 161

[150] Minerals and Mining Regulation 2011, regulation 163(7)

Arbitration and conciliation Act.[151] It is yet to be seen whether this provision would constitute a bar to instituting actions in court without first exploring the ambits of the provision. It is not clear whether the courts have yet pronounced this provision.[152] Though the Committee is not so named as an arbitral panel, its statutory functions betray such an intendment. Where operators are required to comply with the regulation without less, it is argued that their submission to the panel is the *sine qua non* having formed the basis upon which the license or lease was granted. Such may be a condition precedent for redress in the regular courts.

It is argued that plaintiffs seeking judicial interventions in environmental cases must ensure that only the final action or decisions of the regulatory action/panel are subject to judicial review.[153] Thus, the action must mature for hearing before the court may assume jurisdiction. The ripeness theory/jurisprudence serves to protect the Ministry from judicial interference until an administrative decision is final.[154] To this end, the plaintiff must demonstrate, before securing judicial review that all possible administrative remedies have been exhausted and the issue for which the court's machinery is being activated is not academic, hypothetical, or speculative.[155] However, where the issue of the dispute arises with the host community of some quarrying operations and the community elects to litigate (directly) in court, it is doubtful if the panel can compel their submission. This would be much more so if where the community did not enter into any agreement containing the arbitration clause with any operators. In the circumstances, there would appear to be no privity of contract between such operators and the community. The purport of this provision, therefore, is that the Community Development Agreement (CDA) to be submitted to obtain relevant approvals must in addition contain arbitral clauses.

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[151] Cap A 18 LFN 2004

[152] *Ibid*

[153] Every person has the right to approach the courts to ventilate grievances

[154] Amokaye (n 46) 845; *Faloye v Omoseni [*2001] 9 NWLR (Pt 717) 190; *Adesola v Abidoye* [1999] 14 NWLR (Pt 639) 28

[155] *Global Trans Oceanio SA v Free Enterprises Ltd* [2001] 5 NWLR (Pt 726) 426; *Nwabosi v African Continental Bank* [1995] 6 NWLR (Pt 404) 658; *Fawehinmi v Akilu* [1987] 4 NWLR (Pt 67) 797; *Bamayi v Attorney General of Federation [*2001] 12 NWLR (Pt 727) 468

The CDA is the only way the community may be bound to submit to the jurisdiction of the panel under the doctrine of privity of contracts.[156] In the case of *United Bank for Africa (UBA) v Jagaba,*[157] appellants/defendants denied entering into any agreement with the plaintiff in their notice to defend a suit commenced under the undefended list procedure. The appellants/defendants alleged that they just acted as bankers between Barmani Holdings Nigeria Limited and the plaintiff. They claimed not to be bound by any agreement between the parties. They were third parties as bankers. The trial High Court gave judgment against the appellants/defendants and the Court of Appeal upheld the same. On further appeal to the Supreme Court in its lead judgment by Muhammed, JSC held:

> ...let me observe that the relationship that existed, if any, between the plaintiff and Drury Industries Limited and Barman Holdings Nigeria Limited from the affidavit evidence considered by the learned trial judge, is that as far as the plaintiff is concerned, both Drury Industries Limited and Barman Holdings Nigeria Limited were third parties to the transaction between him and the defendants/appellants. The doctrine of privity of contracts is all about the sanctity of contracts between parties to it. It does not extend to others from outside. The doctrine will not apply to a non-party to the contract to become a shield or scapegoat against the non-performance by one of the parties. Barman Holdings Nigeria Limited is a stranger to the contract between the appellants and the respondents.[158]

The Ministry of Mines and Steel Development by the enactment of the NMMA in 2007 has become a critical stakeholder in the extractive industry. The principal legislation on mining and mineral resources in Nigeria is the NMMA.[159]

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[156] *Dunlop Pneumatic Tyres Company Ltd v Selfridge & Company Ltd* [1915] AC 847, 453; *Ikpeazu v African Continental Bank* [1965] NMLR 374; *Union Bank of Nigeria Plc [UBN] v Sparkling Breweries Ltd & Ors* [1997] 5 NWLR (Pt 505) 304, 363; *Hotlam v Attorney General, Plateau State* [1996] 9 NWLR (Pt 471) 242, 249; G C Nwakoby, 'Arbitration and Conciliation Act Cap A 18 LFN 2004 – Call for Amendment' (2010) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 102

[157] *United Bank for Africa (UBA) v Jagaba* [2007] 11 NWLR (Pt 1045) 247, 266-267

[158] *Ibid*

[159] Nigeria Mining and Minerals Act 2007

The NMMA seeks to repeal the Minerals and Mining Act[160] and enact the Nigerian Minerals and Mining Act 2007 to regulate all aspects of the exploration and exploitation of solid minerals in Nigeria, and for related purposes. The NMMA covers matters relating to ownership and control of minerals, prospecting, mining, and quarrying; small-scale mining, possession, and purchase of minerals, environmental considerations, and rights of host communities; offences and penalties as well as miscellaneous provisions.

The Act defines the term "Mineral Resources or Minerals" to mean any substance whether in solid, liquid, or gaseous form occurring in or on the earth, formed by or subjected to geological processes including occurrences or deposits of rocks, coals, cola bed gases, bituminous shales, tar sands, any substances that may be extracted from coal, shale or tar sands, mineral water, and mineral components in railing and waste piles, but with the exclusion of petroleum and waters without mineral content.[161]

In the Act, the following critical terms have been defined in a specific manner. Thus:

i. "Court" means any duly constituted court, in the Federal Republic of Nigeria, other than a Customary Court or an Area Court.

ii. "Quarry" means a surface working or uncovered excavation used to extract mineral resources for construction.[162]

A critical appraisal of the definitions (*s.* 164) reveals the weakness of the Act from the understanding of the legislature, as expressed in the interpretation section of the Act. From the foregoing, the law-giver intends to take 'Petroleum' away from the reach of the Act and also to give a special place of pride to "Security Minerals".

[160] The Nigerian Minerals and Mining Act came into force on 29 March 2007 and repealed the Minerals and Mining Act No. 34 of 1990, Cap M 12 LFN 2004. Although this law was enacted in 2007, it is contained in the updated version of LFN 2004 and may be cited as such
[161] *Ibid*; *s* 164 on interpretation defines several key terms
[162] *Ibid*; Nigeria Mining and Minerals Act 2007, s 164

Sand as a 'mineral resource' was lumped up with other known extractive minerals such as gold, diamonds, and so on. This underlines the reason why there are no specific regulations made to regulate sand dredging in Nigeria despite the fundamental importance of sand to the mining sector.[163] Sand and gravel are major raw materials in the construction industries. Aromolaran says that mining sand and gravel on agricultural land is one of the alternative livelihood activities of the rural people in Nigeria and has now become an environmental issue.[164]

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) (CFRN) provides for exclusive ownership of all mineral resources in Nigeria by the Federal Government.[165] This exclusive ownership and control are further fortified in one part by the listing of mines and minerals in the Exclusive Legislative List[166] and the enumeration of mines and minerals under the exclusive jurisdiction of the Federal High Court.[167] The confusion caused by the deliberate but unfortunate classification of sand resources as mineral resources by the combined effect of the NMMA and CFRN is immense. This state of affairs has hindered the development of sand resources by critical stakeholders.

It is posited that the removal of sand resources from the ownership and control of other tiers of government contradicts some legislations of equal status[168] as well as settled principles of law.[169]

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[163] S J Williams, 'Sand and Gravel Deposits within The United States Exclusive Economic Zone: Resource Assessment and Uses' (*Offshore Technology Conference, Houston Texas*, 5 May 1986) <https://onepetro.org > accessed 12 June 2021

[164] A K Aromolaran, 'Effects of Sand Mining Activities on Land in Agrarian Communities of Ogun State' (2012) 6(1) Continental Journal of Agricultural Science 41- 49; The writer notes that mining of sand on farms and fallow agricultural lands is common with noticeable impacts on the soil structure, vegetation and wildlife in the impacted areas. The mining of "sharp" sand on farmland (an activity which ought to be allowed only on flowing water) is evidence of failure of appropriate authorities to regulate and control sand mining for sustainable development

[165] Constitution of the Federal Republic of Nigeria, s 44(3)

[166] *Ibid*

[167] Constitution of the Federal Republic of Nigeria, s 251(1)(n)

[168] The Land Use Act Cap L 5 Laws of the Federation of Nigeria (LFN) 2004 (LUA) is one of such laws. The LUA is equal to the CFRN having been made part of the CFRN; Constitution of the Federal Republic of Nigeria, s 315(5); Constitution of the Federal Republic of Nigeria, s 315(b)

[169] This includes the legal principle of *quicquid plantatur solo solo cedit*

The Land Use Act (LUA)[170] vests all land comprised in the territory of each state of the Federation in the Governor of that state who holds such lands in trust and for the common benefit of all Nigerians.[171] It is a settled principle of law that whosoever owns the land owns what is in/above the land.[172] It is therefore argued that the law which gave ownership and control of land, for which sand resources are the major component, could not have intended to exclude whatever is contained in the land with a blanket of mineral resources. This aberration is further highlighted in section 12 of the LUA. The section empowers the Governor to grant a license to any person to enter any land and remove or extract stones, gravel, clay, sand, or other similar substances (not being minerals within the meaning assigned to that term in the NMMA) that may be required for the building or manufacture of building materials.[173]

The purport of section 12 of the LUA is that the law recognizes the Governor's powers over certain stone, gravel, clay, sand, or other similar substances required for building or manufacture of building materials. This section of the law challenges the blanket assertion that sand resources are situated within the confines of the definition of 'quarries' in the NMMA.[174] It may therefore be safe to posit that sand resources (for building) are owned and controlled by the states acting through the Governors (and subject to state laws) safe and except in circumstances where such resources are covered by mining leases or other rights created by the NMMA.[175]

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[170] *Ibid*

[171] Land Use Act 2004, s 1

[172] *Francis v Ibitoye* (1936) 13 NLR 11; See, also, the Latin maxim of "*Cuius est solum, eius est usque ad coelum et ad inferos*" (*the ad coelum doctrine*) which means that the property holder has rights not only to the plot of land itself but to the air above and the ground below down to the depth of the earth

[173] The Governor is precluded from exercising this power where there is an existing certificate of occupancy or mining lease or other rights granted under the NMMA

[174] Nigeria Mining and Minerals Act 2007, s 164

[175] This presupposes that a state like Delta State can control and regulate those sand dredging sites within its territory not captured in the NMCO mining map/ leases. These are prolific sites which have been left to non – governmental control over the years which have wrecked unimaginable havoc on the environment. Any contrary construction would lead to manifest absurdity of law. The courts have been enjoined to avoid constructions that may lead to absurdities; J Olorunfemi & BA Oloworaran, 'Taming the Unruly Horse of Rules of Interpretation: A Review of Marwa & Another v Nyako & Ors' (*Researchgate*) <https://www.researchgate.net> accessed 08 November 2021

The peculiar nature of sand makes it impossible to regulate sand dredging operations with the same statutory instrument as gold and diamonds. Sand requires a distinct definition, designation, and somewhat complex regulatory approach. This is the prevailing practice around the world. Unlike most African countries, and is classified as *a minor mineral* in India. Under the Indian Mines and Minerals (Development and Regulation) (MMDR) Act, 1957, minor minerals are regulated by the States.[176] The failure of the federating states to effectively carry out these functions resulted in a public outcry against illegal and indiscriminate sand mining.

The public outcry made the Indian Ministry of Environment, Forest and Climate Change (a national authority) take over the making, monitoring, and enforcement of the Indian Sustainable and Management Guidelines for Sand Mining, 2016 (as reviewed in 2020).[177] States however must manage, control, and regulates sand mining in India. In South Africa, sand mining is subject to a complex regulatory system that can be distilled from three main areas of law namely: mineral regulation, environmental regulation, and land use planning regulation.[178] In the United States of America (USA), Wisconsin has one of the largest sand deposits.[179] In the States' rather complex regulation of '*frac sand,*' as it is commonly known, every tier of government played a role in ensuring that operators played by the rules, not to the detriment of the health and safety of the environment. The Wisconsin Department of National Resources (DNR) makes rules on sand mining and reclamation activities.

The DNR has solely made rules by the law enumerating various methods that might be adopted to reclaim sand mines and ameliorate their devastating effects on the environment.[180] However,

[176] Mines and Mineral Development Act 1957, s 23(c)
[177] The Indian Ministry of Environment, Forest and Climate Change (a national authority) was established under the Indian Mines and Minerals (Development and Regulation) (MMDR) Act 1957 to take over the making, monitoring and enforcement of the Indian Sustainable and Management Guidelines for Sand Mining, 2016 (as reviewed in 2020); In Kenya, the Environmental Management and Co-ordination Act 1999 was enacted for a similar purpose. The Kenyan Act established the National Environmental Management Authority (NEMA) to drive government's policy on all mining activities, particularly sand mining, as they affect the environment.
[178] Environment Conservation Act 1989; National Environmental Management 1998
[179] Other states which have large sand deposits and sand mines in the USA are California, Texas, Michigan, Ohio, Arizona, Utah, Colorado, New York and Washington; S J Williams (n 163)
[180] Wisconsin Legislative Council Information Memorandum: Regulation of Sand Mining in Wisconsin (IM-2013-04) 2

in *Zweifelhofer v Town of Cooks Valley*,[181] the Wisconsin Supreme Court affirmed that even a town/community can make an Ordinance to impose certain conditions on sand mining. The Indian and Wisconsin approaches are highly commendable for sustainable development. There is no doubt, the law-giver missed the golden opportunity by this Act to define sand mineral in such a manner (as a minor mineral) as to give the control, management, and regulatory powers to the states. The definition of 'court' betrayed this mindset[182] and revealed that sand resources could at best be defined to operate within the Concurrent Legislative List.[183] The legislature is encouraged to take a bold step to amend the law if sand resources are to contribute meaningfully to the economy without uncontrolled violence to the environment.

However, the strength and potency of this Act, particularly in respecting quarries (sand mining) has been a source of controversy among the industry players. However, the exercise of coordinated but parallel authority by the ministry of mines and steel development on dredging operations has forced operators to duplicity/multiplicity of taxes, permits, licences, and so on. This has resulted in a plethora of litigations and the law is yet settled.[184] Given this state of the law, it becomes dicey to identify which of these two government institutions may validly deal with sand dredging operations.

FINDINGS

It is glaring from the foregoing discourse that Nigeria is not in shortage of institutional framework to regulate extractive activities, particularly sand mining. Some specialised institutions monitor remittances to the Federal Government, some others monitor compliance with environmental standards, a few others supervise the licensing processes, and so on. There

[181] *Zweifelhofer v Town of Cooks Valley* [2012] WI 7, SC 1

[182] The 'Court' defined in the statute appears to be every High Court without exclusive reference to the Federal High Court. This implies that the law-giver intended all superior courts of record to have jurisdiction on matters arising from the Act. For this intendment to apply, there is need for constitutional amendment

[183] The appeal by the Federal Government (FG) of Nigeria to the states most recently is distractive, unproductive and merely begs the question. It reveals the Federal Government's realisation that solid minerals, particularly, sand would best be harnessed if states are allowed to participate unhindered; C Unini, 'FG to Governors: Establish Mining Companies to Improve Revenue' (*The Nigeria Lawyer*) <https://www.thenigerialawyer.com> accessed 20 June 2021

[184] These cases have already been discussed

is, however, none specialised in sand dredging monitoring and regulation. This has left the operators to operate without recourse to the trade's best practices.

It is further observed that the lack of effective control and management of sand resources stems from the definition and classification of sand as a mineral resource which takes it out of the reach of the State Governments. This is so because the wide deposit of sand across the country makes it almost impossible for effective centralised control and management. This contrasts sharply with the mining of petroleum resources which is concentrated in some States of the Federation.

RECOMMENDATIONS

Flowing from the findings made above, the researcher strongly recommends as follows:

- The classification of sand as a mineral resource should be qualified. Ownership and control of sand resources should be placed in the Concurrent Legislative List. State High Courts and the High Court of the Federal Capital Territory, Abuja should in turn be given jurisdiction to entertain all matters about sand resources. This would ensure proper monitoring and harnessing of sand resources. This approach is shown to be effective in India and the United States of America. The Nigerian legislature should amend the CFRN to give effect to this suggestion.
- The NEITI should be scrapped and its functions transferred to a specialised department in the Ministry of Finance and Economic Planning or the Central Bank of Nigeria. This is because it has not shown the capacity to compel compliance with its demands by the relevant government personnel.[185]

Nobody has been charged to court for withholding information/ data on extractive activities from NEITI under the enabling Act and so the outfit continues to labour under a dearth of

[185] Lack of capacity for enforcement of its demands has been identified as a major hindrance militating against reforms and implementation of NEITI principles in Nigeria; Ewere (n 15) 226

relevant data.[186] This is not the case with the FOIA.[187] Adequate information should promote proactive explanations rather than reactive rebuttals. The job of collating information is not rocket science in this era of information technology, particularly, under the Freedom of Information Act (FOIA) which has made sharing of permissible data a legal duty.[188]

In *Boniface Okezie v Central Bank of Nigeria (CBN)*,[189]the CBN withheld information sought under the provisions of the FOIA, the trial High court ordered compliance with the Act and held as follows, "The Act is intended to promote transparency and prevent corruption, therefore all public institutions must ensure that they comply with the FOIA in the interest of transparency, justice and development. Similarly, in *FCC v AT&T Inc.*, the Supreme Court of the United States of America has ruled that corporations do not have "personal privacy" Which would prevent them from having to release documents.[190] The entire world is moving in this direction!

NETIA is a general law when contrasted with the FOIA and so should fizzle out in the face of the FOIA. The court has applied the legal principle of *generalities derogant*[191] to hold that (on matters about the requisition and release of information) the FOIA overrides any general law.[192] The EIA Act is a veritable instrument to curtail excesses of sand mining operators. The State Governments should set up specialised agencies to compel compliance and engage the laudable objectives of the EIA Act. Any provisions of the law without implementation, by monitoring, are dead letters.

CONCLUSION

[186] Orji states that NEITI does not know the quantum of production in the petroleum and mining formations and so would not know how much Nigeria is expected to earn. The oil majors and established mining companies are controlled by some foreign interests that cannot protect the Nigerian interest; C Unini, 'We Don't Know Exact Quantity Of Crude Oil Nigeria Produces—NEITI Boss' (*The Nigeria Lawyer*)

[187] Freedom of Information Act 2011 (FOIA) was enacted in Nigeria to enable the public to access certain governmental information, in order to ensure transparency and accountability. This Act supersedes the Official Secrets Act 1911 (OSA); C W Duru & N C Eze, 'Nigeria's Freedom of Information Act: Opportunities and Challenges' [2018] 15 Global Journal of Applied Management and Social Sciences 51-58

[188] Duru & Eze (n 187)

[189] *Boniface Okezie v Central Bank of Nigeria (CBN)* FHC/ CS/ L/ 494/ 12; *PPDC v National Agency for food & Drug Administration & Control* FHC/ABJ/CS/760/13

[190] *FCC v AT&T Inc* 131 US (Supreme Court) 1177 [2011]; *Department of Justice v Tax Analysts* 492 US 136 [1989]

[191] Special things derogate from general things (the specific derogates from the general)

[192] *PPDC v National Agency for Food* (n 189)

Nigeria has shown sufficient signs of establishing institutions to impact sand-dredging activities. This study has identified the institutions whose activities have bearing on sand dredging. It has highlighted the inadequacies of some of the institutions within the legal framework and made far-reaching recommendations, particularly concerning the amendment of the CFRN. Amendment of the CFRN would give powers to the State Governments to legitimately engage sand dredging operators with State apparatus. This would bring sanity to the massively unregulated sector and add value to the environment and Nigeria's Gross Domestic Product.