



UNIVERSITY OF BENIN

JOURNAL OF PRIVATE AND PROPERTY LAW

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THE EFFICACY OF THE LEGAL FRAMEWORK FOR COMBATING CLIMATE CHANGE IN NIGERIA.¹

Abstract:

The purpose of this paper is to examine the efficacy of the legal framework for combating climate change in Nigeria and to investigate issues, main beliefs, and challenges of this legal framework. It will also examine the trends of climate change at the global level and relate them to the trends in Nigeria and analyze the effectiveness of the general principles of regional and international law that regulate climate change and the various mechanisms established for that purpose; also it will analyze the efficacy of the national legal and policy framework for combating climate change in Nigeria in order to identify the challenges to the legal framework for climate change in Nigeria. This work will show that lack of an effective legal framework for combating climate change in Nigeria leads to negative results and all human beings all over the world lose. Finally it will make recommendations on how the legal framework can be improved to effectively combat climate change.

INTRODUCTION

Climate change means a change of climate, which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.² A scientist has predicted that the climate change will have detrimental impacts on, amongst other things, peoples lives and their property.³ It is one of the most fatal environmental and economic threats facing the world at large. This position affects all countries of the world, Nigeria in particular. It is a global long-term problem and involves complex interactions with

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² See article 1 of the *United Nations Framework Convention on Climate Change*, Rio de Janeiro, 9 May 1992, 31 Int'l Leg. Mat. 822 (1992).

³ Michael Kerr, *Tort Based Climate Change Litigation in Australia*. A Discussion Paper Prepared for the Climate Change Litigation Forum London, March 2002 hosted by Friends of the Earth International. http://www.acfonline.org.au/uploads/res_climate_change_litigation.pdf (Accessed on February 16, 2007).

environmental, economic, political, institutional, social and technological processes.⁴ Nigeria has a number of laws that has been put in place for mitigating the effect of climate change, but it is not changing into a Lion that is difficult but holding the tail of a live Lion, having a body of laws is one thing and whether they help to realize the intended objective is quite different. The solution to climate change is still very much evasive.

Human activities, particularly the burning of fossil fuels and clearing of forests, have increased the level of greenhouse gases⁵, the primary contributors to global warming in the atmosphere. This accumulation is changing the Earth's weather patterns, resulting in higher global temperatures, rising sea levels and a potential shift in the distribution of the world's ecosystems. There is a growing need to develop strategies that will reduce current levels of greenhouse gases in the atmosphere and curtail future emissions. The United Nations Framework Convention for Climate Change (UNFCCC) and the Kyoto Protocol represents an international strategy to combat these effects. The Kyoto Protocol establishes emission reduction targets for industrialized countries and incorporates a Clean Development Mechanism (CDM) for trading carbon credits generated by projects implemented in developing countries. Nigeria, as a party to the protocol, has participated in CDM projects especially in the forestry sector.

CONTRIBUTORS TO CLIMATE CHANGE IN NIGERIA

Nigeria is flaring more gas⁶ than any other country in the world: 2.5 million cubic feet per day. This actually corresponds to 40% of the gas

⁴ Bert Metz, Ogunlade Stewart and Jiahua Pan (Eds): *Climate Change 2001 Mitigation Contribution of Working Group III to the Third Assessment Report of the Intergovernmental Panel on Climate Change*. (Cambridge University Press, 2001), p.65.

⁵ Greenhouse gases are a natural part of the atmosphere. It is the increase in the amounts of these gases through human activity that causes global warming. Human activity such as land clearing and burning fossil fuels have increased the concentration of these gases. Humans have had most impact on the enhanced greenhouse effect through increases in the amounts of carbon dioxide, methane and nitrous oxide. See <http://www.greenhouse.gov.au/education/factsheets/what.html>

⁶ Nigeria is also a major oil producer and most oil extraction takes place in the Niger Delta. There, petroleum or crude oil abounds in rock formations. The complex mixture of hydrocarbons and other organic compounds that make up the flammable liquid fossil fuel is extracted from oil wells found in those oil fields. See <http://www.wrm.org.uy/bulletin/136/Nigeria.html>

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which is used in whole of Africa. Because of the contained methane and CO₂ Nigeria's gas flaring contributes more to the global warming than all the other emissions of whole Sub-Saharan-Africa together. Nigeria remains one of the top countries in the world where huge volume of gas is flared, with about 2.5 BCF, flared daily.⁷ According to a new study commissioned by the World Bank in 2007, Nigeria accounts for roughly one-sixth of the world-wide gas flaring which in turn, spews some 400 million tons of carbon dioxide into the atmosphere. However, the World Bank survey has listed Nigeria and 15 other oil producers, as countries that have progressively reduced gas flaring between 1995 and 2006. Until 2008 the gas flaring in Nigeria shall be stopped fully.⁸

A writer⁹ postulated that fluctuations in climate change occur both spatially and temporary, the causes of which are a source of considerable speculation and controversy. According to him, external factors such as solar radiation and internal factors such as adjustments within the earth's atmospheric circulation may either singly or in combination with responsible. He also notes that human activity may contribute to climate change by inadvertently affecting the global carbon cycle. Another one¹⁰ observes that climate change is occurring as the result of human activity having caused higher concentrations of greenhouse gases in the earth's atmosphere leading to increased trapping of infrared radiation. As a result, the lower atmosphere has warmed and continues to warm, changing weather and climate. He argues that the main greenhouse gases increasing in concentration due to human activities are carbon dioxide, methane, nitrous oxide, chlorofluorocarbons (CFCs), and ozone, but that of these gases, carbon dioxide is said to be the biggest contributing factor to climate change and that most of the increase in carbon dioxide comes from the burning of fossil fuels such as oil, coal and natural gas, and from deforestation.¹¹

⁷ *Is The Clean Development Mechanism An Option In Nigeria's Quest To Eliminate Gas Flaring?* See http://www.kas.de/proj/home/pub/33/2/dokument_id-11468/index.html, assessed on the 13 August, 2009.

⁸ http://www.kas.de/proj/home/pub/33/2/dokument_id-11468/index.html. The date has been postponed till 2010.

⁹ A.M Mannion, *Global Environment Change: A Natural and Cultural Environmental History* (United Kingdom, Longman, 1994) p. 22.

¹⁰ Michael Kerr, *Tort Based Climate Change Litigation in Australia*, p.3.

¹¹ Current environmental issues in Nigeria includes periodic droughts soil degradation rapid deforestation (due to uncontrolled logging) desertification air and water pollution oil pollution, oil spills (water, air and soil) industrial pollution, municipal

Also, the current trend of deforestation¹² in Nigeria has put the climate at stake. Trees are known to be a cleaning agent of the atmosphere by absorbing the emitted carbon dioxide through the process of photosynthesis. However, as at 2005, Nigeria has the highest rate of deforestation in the world.¹³ Between 2000 and 2005 the country lost 55.7% of its primary forests, and the rate of forest change increased by 31.2% to 3.12% per annum. Forest has been cleared for logging, timber export, subsistence agriculture and notably the collection of wood for fuel which remains problematic in western Africa.¹⁴

A recent research carried out by the British Council Nigeria in collaboration with British Broadcasting Corporation (BBC) World Service on climate change and perception of Nigerians on the issue revealed that about 250 million people in Africa would be exposed to increased water stress due to climate change by 2020 while yields from rain-fed agriculture could be reduced by up to 50 per cent in some African countries by 2020.¹⁵

Findings from the research indicates that awareness of climate change or global warming as defined by the environmental community is low, climate change terminology currently fails Nigerians, most Nigerians associate climate change with weather and the resulting impacts of the weather on their environment, the associations with weather create a framework dominated by God, which evoked a sense of powerlessness, most Nigerians do not connect local issues such as desertification, coastal flooding, gulley erosion and urbanisation to climate change, with the exception of Jigawa State, there is little evidence of Nigerians taking substantive steps to adapt to the effect of

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- waste generation and urban decay loss of arable land loss of flora and fauna rapid urbanization and population pressure erosion (coastal, marine gully, sheet erosion and land subsidence) flooding (coastal, river and urban flooding) inappropriate agricultural practices destruction of watersheds loss of biodiversity soil-crust formation caused by loss of water climatic change/ozone layer depletion.
- ¹² Nigeria holds 11,700 square kilometers of mangrove forest: the third largest in the world and the largest in Africa. Most of this mangrove is found in the Niger Delta. See <http://www.wrm.org.uy/bulletin/136/Nigeria.html>
- ¹³ According to the Food and Agriculture Organization of the United Nations (FAO). See [News.monabay.com](http://www.monabay.com)
- ¹⁴ See http://en.wikipedia.org/wiki/Deforestation_in_Nigeria#cite_note-1, assessed on the 2nd Sept., 2010.
- ¹⁵ http://www.ngrguardiannews.com/homes_property/article02/indexn2_html?update=090309&ptitle=Nigeria%20most%20vulnerable%20to%20climate%20change,%20says%20study

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climate change, most Nigerians are not empowered to address environmental issues and responsibility for dealing with these problems is often attributed to the government, and Nigerians want practical, local information that is grounded in local examples of how to deal with the environmental challenges they face.¹⁶

Impacts of climate change in Nigeria, include a drastic decline in the amount of rainfall received annually and this has led to prolonged dry seasons. This has not only affected agricultural production, but also the water levels in the lakes leading to even low power generation. There is now strong evidence that climate change has now moved from the realm of specific predictions to a present day reality.

Also, flaring of natural gas¹⁷ associated to oil extraction has been internationally acknowledged as a significant source of greenhouse gas emissions and a major contributor to climate change. In combustion, gaseous hydrocarbons react with atmospheric oxygen to form carbon dioxide (CO₂).

Gas flaring also causes acid rain which acidifies lakes and streams and damages vegetation, produces air pollution, and can lead to leukaemia or asthma and premature death.¹⁸

In its report, the Intergovernmental Panel on Climate Change (the IPCC)¹⁹ states that an increasing body of observation gives a

¹⁶ Ibid.

¹⁷ On Monday, November 14, 2005, the Federal High Court of Nigeria, in Benin City has ordered companies to stop gas flaring in the Nigeria, as it violates guaranteed constitutional rights to life and dignity.

¹⁸ *Nigeria: Gas flaring – major contributor to climate change and human rights abuses.* See <http://www.wrm.org.uy/bulletin/136/Nigeria.html>, assessed on the 10th Sept., 2010.

¹⁹ The IPCC was established to provide the decision-makers and others interested in climate change with an objective source of information about climate change. The IPCC does not conduct any research nor does it monitor climate related data or parameters. Its role is to assess on a comprehensive, objective, open and transparent basis the latest scientific, technical and socio-economic literature produced worldwide relevant to the understanding of the risk of human-induced climate change, its observed and projected impacts and options for adaptation and mitigation. IPCC reports should be neutral with respect to policy, although they need to deal objectively with policy relevant scientific, technical and socio economic factors. They should be of high scientific and technical standards, and aim to reflect a range of views, expertise and wide geographical coverage. See <http://www.ipcc.ch/about/index.htm>

collective picture of a warming world and other changes in the climate system. The IPCC has found that the global average surface temperature has increased over the 20th century by about 0.60C; tide gauge data shows that global average sea level rose between 0.1 and 0.2 metres during the 20th century and snow cover and ice extent have decreased during the 20th century. The IPCC attributes the observed changes in the global climate to the increased concentration of greenhouse gases in the earth's atmosphere resulting from human activity.²⁰

The IPCC predicts that human influence will continue to cause climate change throughout the 21st century at a rate that is without precedent in the last 10,000 years.²¹ Some of the current predictions for the period (1990 to 2100) are as follows: the global averaged surface temperature is projected to increase by 1.40C to 5.80C; global mean sea levels are predicted to rise by 0.09 to 0.88 metres; precipitation will fluctuate and be subject to larger year by year variations. In some areas, overall precipitation will increase and in other areas it will decrease; greater intensity frequency of extreme weather events IPCC Working Group such as droughts, floods and tropical cyclones.²² The climate change predictions and resulting impacts for periods beyond 2100 are even more extreme. For example the IPCC predicts that sea levels will continue to rise for thousands of years even after climate change has stabilized. One IPCC model predicts localized warming over greenland at three times the global average.²³ If this were sustained for millennium, it will lead to virtually a complete melting of the greenland

²⁰ IPCC Working Group 1. *Climate Change 2001, The Scientific Basis, Summary for Policy Makers'*. (2001) p.16.

²¹ Ibid.

²² Ibid.

²³ The IPCC is currently starting to outline its Fifth Assessment Report (AR5) which will be finalized in 2014. As it has been the case in the past, the outline of the AR5 will be developed through a scoping process which involves climate change experts from all relevant disciplines and users of IPCC reports, in particular representatives from governments. As a first step, experts, governments and organizations involved in the Fourth Assessment Report have been asked to submit comments and observations in writing. These submissions are currently being analysed by members of the Bureau. The scoping meeting to define the outline of the AR5 is scheduled in Venice, Italy, for 13-17 July 2009 (attendance is by invitation only). The outline will be submitted to the 31st Session of the IPCC and Sessions of the three Working Groups, which will be held in Bali, Indonesia, 26-29 October 2009. See <http://www.ipcc.ch/>

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ice sheet with a resulting sea level rise of about seven metres.²⁴ The UNCCC²⁵ in Nairobi reported about the menace that one day the city of Lagos might sink completely in the sea. Against this background the efforts or rather non-efforts of Nigeria to deal with these problems have to be examined.

A more insidious cause of the decline in Nigeria's agricultural productivity is desertification which has taken hold of 35% of previously cultivable land in the 11 northern states, its cause being a mix of a warming climate and deforestation for wood fuel, the latter accounting for an alarming 400,000 hectares each year.²⁶

Climate change is unequivocally behind the threat to Nigeria's coastal regions posed by rising sea levels. Ironically the Niger Delta is also the location of the oil reserves but this region's low-lying terrain criss-crossed with waterways makes it extremely vulnerable to flooding. The city of Lagos was cited in a high level report to the Nairobi climate change conference in November 2006, suggesting that as many as 1.3 million people could be affected.²⁷

In fact it has been predicted that 'Nigeria will lose close to \$9 billion as a result of the catastrophe while, at least, 80 per cent of the inhabitants of the Niger Delta will be displaced due to the low level of the oil-rich region. ...'²⁸ A study conducted by Budkyo²⁹ showed that until the year 2050, the climate will be mainly affected by an increase in atmospheric carbon dioxide mass contributing to arise in the mean air temperature near the earth's surface. From the computations made, it was demonstrated that warming could lead by the year 2000 to recession of the polar ice boundary in the arctic by 20 of latitude and in the year 2050 to complete melting. He also speculated that even a comparatively small warming would bring about an increase in the drought frequency in a number of regions of the continents a decrease

²⁴ IPCC Working Group 1. *Climate Change 2001, The Scientific Basis, Summary for Policy Makers'*. (2001) p. 17.

²⁵ United Nations Climate Change Conference - Nairobi 2006

²⁶ See <http://www.foei.org/en/what-we-do/affected-peoples/grassroots-highlights/impacts/nigeria.html>

²⁷ Ibid.

²⁸ http://www.nestinteractive.org/climate_change.htm.. See http://www.nestinteractive.org/climate_change.htm assessed on the 2nd June, 2009.

²⁹ M.I Budyko, *The Earth's Climate: Past, and Future, Academic*, (Orlando Florida, Press Inc. 1980).

in the river run-off and a fall in the levels of many lakes and interior seas.

W. K Ottichilo, *et al*³⁰ observed that Africa is expected to be particularly vulnerable to climate change stresses.³¹ It is a poor continent and most of its people depend on agriculture whose production is dictated to a greater extent by climate patterns. They further observed that the current economic crisis caused by the high rate of population growth, inefficient resource use, weak institutional capacity and the low levels of investment and saving are expected to impair its capacity to effectively respond to disruptions emanating from climate change. According to Wim Sombroek and Rene Gommès the impact of climate change on agriculture in quantitative terms, and deduced that many indirect impacts of climate change on agriculture can be conjectured. That most of these impacts are estimated to be negative and they include sea level rise (40 cm in the coming 100 years) that would submerge some valuable coastal agricultural land, and the current imbalance of food production between cool and temperate regions and tropical and subtropical regions would increase.³²

In the last 15 years the population of Nigeria grew from 89 million to 140 million people. This strongly growing population in combination with the increasing desertification and sahelization threatens the feeding of the people. Natural resources decrease in the north of Nigeria, meanwhile the sea level at her tropical coast in the south is rising. In the long run this may lead to internal migration and conflicts over the shrinking resources (fertile soil, water).³³ Even international conflicts have to be expected, because climate refugees might not to be stopped at inner African borders.³⁴ The effects of

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- ³⁰ W.K Ottichilo, *et al.*, *Weathering the Storm- Climate Change and Investment in Kenya*, (Nairobi, Kenya, ACTS Press 1991), p.2.
- ³¹ The seriousness attached to climate change by African institutions is evidenced by the Climate Information for Development in Africa (ClimDev-Africa) Programme, which is a partnership initiative of the African Union Commission, the United Nations Economic Commission for Africa (UNECA) and the African Development Bank. See <http://www.nigerianbestforum.com/generaltopics/?p=4572>
- ³² Wim Sombroek and Rene Gommès, *The Climate Change Agriculture Conundrum*, in Fakhri Bizzaz and Wim Sombroek (eds), *Global climate Change and Agricultural Production- Direct and Indirect Effects of Changing Hydrological, Pedological and plant Physiological Processes*, (FAO and John Willy & Sons 1996), p.6.
- ³³ See http://www.kas.de/pfoj/home/pub/33/2/dokument_id-11468/index.html
- ³⁴ Some sources already refer to a share of illegal immigrants in South Africa or Nigeria of about 30%. To get an impression: the rise of sea level of only 20cm, would imply a

climate change is a roller coaster, faster than any tsunami, it can never be over-emphasised.

International Law and Climate Change

The United Nations Environment Programme (UNEP)³⁵ discusses the relevancy of international law and its implications to climate change. It observes that the existing customary international law affirms the sovereign right of states to manage their own natural resources although this right is by no means absolute. It observes that customary law prohibits the state from allowing activities on its territory to inflict serious damage on others.

Born into the wider body of international law, the climate regime needs to be understood in light of pre-existing regimes. By drawing on the current debate about fragmentation in international law, this article highlights challenges for international lawyers and policymakers in navigating the relationship between the climate regime and the biodiversity regime, and the relationship between the climate regime and the multilateral trading system.³⁶

Climate change is a global problem not limited to Nigeria, other countries also face it and so any effort towards its mitigation must be collective in nature. More so, because it is a transboundary problem, other countries that may not necessarily be parties or beneficiaries to those activities resulting in climate change may also bear the burden. For instance, in cases of pollution or effluent emissions by developed countries, the developing countries end up suffering the adverse impacts to climate as a result of these emissions, yet they do not benefit at all from the pollution generating activities.

Ben Fisher³⁷ noted that "by using our extensive international networks to develop a range of perspectives, we will help to increase understanding of climate change issues, leading to consensus building

displacement of 740,000 people in Nigeria, a rise of 1m, would lead to 3.7 million and 2m to 10 million homeless people in the country. See http://www.kas.de/proj/home/pub/33/2/dokument_id-11468/index.html

³⁵ The United Nations Environment Programme (UNEP) *Global Environment Monitoring System(GEMS): International Response to Climate Change*, Fact Sheet 202.

³⁶ <http://ecologic.eu/2530>

³⁷ Country director British Council, Mr. Ben Fisher. See http://www.ngrguardiannews.com/homes_property/article02/indexn2_html?pdate=090309&ptitle=Nigeria%20most%20vulnerable%20to%20climate%20change,%20says%20study, assessed on the 15th August, 2010.

about climate actions and solutions. Our programme will not lobby and campaign through activism, it will champion and advocate sustainable adaptation and mitigation actions to address climate change through engagement with young people across the globe." Nigeria is a party to both the Montreal and Kyoto Protocols, where all signatories agreed to combat climate change by participating actively in phasing out all ozone layer depleting substances, and reduce greenhouse gases emissions, through the implementation of corresponding national programmes based on informed policy decisions. So far so good, there is no single legislation directly regulating climate change.

Review of The Relevant Conventions on Climate Change

International law did not address climate change directly until 1992. Since climate change is a incident of extraordinary magnitude and nature, established legal concepts and mechanisms provided by customary law do not suffice. A number of treaties are now in force, notably the United Nations Framework Convention on Climate Change together with the Kyoto Protocol; and the Vienna Convention for the Protection of the Ozone Layer together with the Montreal Protocol on Substances that Deplete the Ozone Layer and most recently, the Copenhghen Accord.³⁸ It is pertinent to take a review of the international legal frameworks to combat climate change, these laws are examined below.

The United Nations Framework Convention on Climate Change (UNFCCC)

The United Nations Framework Convention on Climate Change (UNFCCC) was opened for signature at the 1992 at the United Nations Conference on Environment and Development (UNCED) conference in Rio de Janeiro (known by its popular title, the Earth Summit). The UNFCCC is the Convention designed to regulate the issue of climate change at the international level. The objective of this Convention according to Article 2 is to achieve the stabilization of greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt

³⁸ This a document that delegates at the 15th session of the Conference of Parties (COP 15) to the United Nations Framework Convention on Climate Change agreed to "take note of" at the final plenary on 18 December 2009.

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naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.³⁹ This objective has however been contested and some has argued that it is too vague,⁴⁰ to protect the planet from the serious impact of climate change which the world has already begin to experience. Also, though this provision may be adequate and convenient for some developed countries, its adequacy for developing countries including, climatic needs is questionable. The reason for this is not far-fetched; Article 2 makes room for postponement of measures and does not provide a framework for testing whether the current targets are consistent with preventing dangerous anthropogenic interference with the climate system.⁴¹ As rightly pointed out, 'Waiting will make matters worse in terms of human suffering, economic costs and damage to the ecosystem assets as we prepare for Copenhagen in December 2009, where measures to deal with the global climate challenge will be agreed, we must make sure that the interests of the most vulnerable and least developed countries are not forgotten'.⁴² The state parties to the convention acknowledge that change in the earth's climate and its adverse effects⁴³ are a common concern of humankind.

This concept⁴⁴ was first introduced in a 1988 resolution of the United Nations General Assembly.⁴⁵ It has received the support of

³⁹ Article 2 of the Convention.

⁴⁰ Joyeeta Gupta, *International Law and Climate Change: Joyeeta Gupta, International Law and Climate Change: The Challenges Facing Developing Countries* in Ole Kristian Fauchald & Jacob Werksman (Eds.), *Year Book of International Environmental Law*, (Oxford University Press. vol. 16, 2005), p. 126.

⁴¹ Ibid.

⁴² See *Climate change is a challenge and an opportunity* By Abdoulie Janneh, Stanislas Kamanzi and Andreas Carlgren. Abdoulie Janneh is Executive Secretary of the United Nations Economic Commission for Africa; Stanislas Kamanzi is Minister of the Environment, Rwanda and Andreas Carlgren is Minister of the Environment, Sweden. See <http://www.nigerianbestforum.com/generaltopics/?p=4572>, assessed on the 2nd of Oct., 2010.

⁴³ Adverse effects of climate change is defined in Article 1 (1) of the Convention to mean changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

⁴⁴ Common Concern of Humankind.

⁴⁵ UN General Assembly Resolution 43/53 on the protection of global climate for present and future generations of mankind, 6 December 1988.

several international climate change meetings. The legal problem is that climate change is not (physically) imposed by one state upon another state. As a result, the traditional legal principles governing transboundary pollution (which is imposed by one state upon another) do not apply.⁴⁶ But if the atmosphere is a common concern of humankind, all states have an interest and duty to protect it from serious harm. A state on one side of the globe is thus affected by a state on the other side of globe that is emitting greenhouse gases into the atmosphere.⁴⁷ The parties are also concerned that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that this increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.⁴⁸ The Convention states the precautionary principle and states are under an obligation to take measures to prevent and minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty is not to be used as a reason for postponing such measures.⁴⁹

Scientists are still unsure about the exact timing and nature of climate change impacts, but if efforts to limit net greenhouse gas emissions are not initiated before scientific certainty is achieved, it may be too late to undo the damage.⁵⁰ Therefore, the precautionary principle provides that activities threatening serious or irreversible damage should be restricted or even prohibited before there is absolute scientific certainty about their impact. The climate convention embodies a precautionary approach, since states agreed to take action despite the existing scientific uncertainties about climate change. The parties taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances undertake to develop periodical update, publish and make available to the conference of parties, in accordance with Article 12, national inventories of anthropogenic by sources and removals by sinks of all greenhouse gases not controlled by the Montreal protocol,

⁴⁶ UNEP, Fact Sheet 202.

⁴⁷ Ibid.

⁴⁸ See the preamble of the Convention.

⁴⁹ Article 3.

⁵⁰ Ibid.

using comparable methodologies to be agreed upon by the conference of parties.⁵¹ It is recognized that all states contribute to climate change and that all states may, to different degrees, suffer from it. But the industrialized states developed their economies over the past 150 years in part by treating the atmosphere as a free and unlimited resource, and they continue to generate the greatest quantity of greenhouse gases.⁵²

Meanwhile, developing countries are now attempting to industrialize at a time when the atmosphere is no longer considered as free and unlimited. In addition, they still make a smaller contribution to climate change (although it will increase in the decades to come).⁵³ The principle of common but differentiated responsibilities proposes that, while all states should act to prevent damage to the atmosphere, developed countries should take the lead.⁵⁴ While there is considerable support in the literature for this principle,⁵⁵ others argue that the resultant differential norms of commitment and compliance, reflected in the climate convention⁵⁶, are too differential to developing countries arguments. They argue that although the Northern countries have a historical responsibility and have easier access to finance and technology, many of the developing countries are developing fast and need to be ready to commit themselves to take action if it is to make any sense for the Northern countries to take action.⁵⁷ According to them, these arguments do not improve on the effectiveness of the agreements. Michael Weisslitz⁵⁸ supports absolute and uniform norms since the use of territorial variation as a justification for differential standards ignores the likelihood of transboundary harm and is therefore an insignificant approach.

⁵¹ Article 4 (1) (a).

⁵² UNEP, Fact Sheet 202.

⁵³ Ibid.

⁵⁴ See, e.g. L. Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 R.E.C.I.E.L 120 (2000); R A and, *International Environmental Justice: A North-South Dimension* (2004).

⁵⁵ See, e.g. L. Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 R.E.C.I.E.L 120 (2000); R A and, *International Environmental Justice: A North-South Dimension* (2004).

⁵⁶ The United Nations Framework Convention on Climate Change, 1992.

⁵⁷ Joyeeta Gupta, *International Law and Climate Change*, p.120.

⁵⁸ Michael Weisslitz, *Rethinking the Equitable Principle of Common but Differentiated Responsibility: Differential versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 Colo. J. Int'l Env'tl. L. & Pol'y 473 (2005).

The basis for these arguments is that the potential impact of developing countries on the environment is seen as substantial and that some of these countries are quite developed and should be seen as such and thirdly, large developing countries (such as China and India) renders the whole process ineffective.⁵⁹ As noted above, it is mainly the developed countries that have contributed to climate change. As a result of this, the Convention binds these countries party to it to adopt national policies and take corresponding measures on the mitigation of climate change, by limiting their anthropogenic emission of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs.⁶⁰

The Convention also makes provisions for the developed countries to provide financial assistance to developing countries to meet their obligations under the Convention.⁶¹ Countries, which have focused on providing assistance to developing countries financially and technologically, were articulated in a qualitative language, and the effectiveness of their implementation is thus difficult to monitor.⁶² It is also to be observed that the UNFCCC is not specific as far as reduction targets are concerned. In the Convention, the industrialised nations commit themselves to reduce their greenhouse gas emissions to 1990 levels,⁶³ but there is no specified time period for fulfilling this commitment. The provision may not compel the industrialised countries to take swift actions for the immediate realisation of the Convention objectives. Secondly, there are no such commitments for the developing countries, even though the cost of reducing emissions there may be considerably lower than in the industrialised countries. Nevertheless, it is to be said that the formulation UNFCCC is to a significant degree a positive step towards climate change mitigation as it provides the general regulatory framework.

⁵⁹ Joyeeta Gupta, *International Law and Climate Change*, p.121.

⁶⁰ See article 4 (2) (a).

⁶¹ Article 4 (3). These obligations are contained in article 12 (1). For instance states are required to communicate to the conference of parties through the secretariat, a national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal protocol, to the extent their capabilities permit; a general description of the steps taken by the party in the implementation of the Convention; or any other information that the party considers relevant in the implementation of the convention.

⁶² Joyeeta Gupta, *International Law and Climate Change*, p. 127.

⁶³ Article 4(2) (b).

Kyoto Protocol to the United Nations Framework Convention on Climate Change

This protocol⁶⁴ sets binding numerical targets for the limitation and reduction of greenhouse gas emissions including carbon dioxide, methane, nitrous oxide, hydro-fluorocarbons, perfluorocarbons and sulphur hexafluoride for the industrialised and transition countries during the period 2008-2012.⁶⁵ No numerical targets for the reduction of emissions were set for the developing countries, but they are required to report on their emissions. For the Protocol to enter into force, it must be ratified by 55 Parties⁶⁶ to the Convention, incorporating as many industrialised countries as accounted in total for at least 55 percent of the total carbon dioxide emissions for 1990 of Annex I countries.⁶⁷

Parties included in Annex I⁶⁸, in achieving their quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, are required to implement elaborate policies and measures in accordance with their national circumstances, such as enhancement of energy efficiency in relevant sectors of the national economy; protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal

⁶⁴ The Kyoto Protocol came into force on February 16 2005 pursuant to the United Nations Framework Convention on Climate Change (UNFCCC) signed in June 1992 by 166 signatory countries, which commits member states to curb climate change caused by human activities. The next Conference, The United Nations Climate Change Conference will take place at the Bella Centre in Copenhagen, Denmark, between December 7 and December 18, 2009. The conference includes the 15th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 15) and the 5th Meeting of the Parties to the Kyoto Protocol (COP/MOP 5). According to the Bali roadmap, a framework for climate change mitigation beyond 2012 is to be agreed there. See http://en.wikipedia.org/wiki/2009_United_Nations_Climate_Change_Conference#cite_note-0

⁶⁵ See Article 3 read together with Annex A to the Protocol.

⁶⁶ As at November 2008, 183 State parties have ratified the Kyoto Protocol consisting of 37 industrialised countries and the European Union and 137 developing countries. Under the Kyoto Protocol, projects, which reduce the amount of GHG released to the atmosphere or enhance the amount of GHG removed from the atmosphere, may, qualify for CDM, while projects, which release GHG to the atmosphere, do not. See Article 25 (1) of the Protocol.

⁶⁸ The Brussels Declaration that developed countries (Annex 1 Emitters), should take the lead in mitigating climate change, does not imply that developing countries including Nigeria (Annex 2 Emitters), should fold their hands without getting involved in the earth's conservation projects.

Protocol, taking into account its commitments under relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation; research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies.⁶⁹

Under article 7, each party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties annually. The Kyoto protocol defines three international policy instruments; the so called Kyoto mechanisms: the Clean Development Mechanism (CDM); International Emissions Trading (IET); and Joint Implementation (JI). Each of these international policy instruments provides opportunities for annex 1 parties to fulfil their commitments cost effectively.

Nigeria signed the Kyoto-Protocol as part of the Non-Annex I economies, so it is not committed to take measures, but according to IPPA (Institute for Public Policy Analysis), the co-founder of the "Global Coalition on Climate Change" which consists of 26 NGOs of 23 countries, Nigeria would be better off with own initiatives to handle the climate change. It is interesting that IPPA sees the climate change as an alarmism of interested parties. A lot of suggested policies would rather harm than benefit Nigeria, according to IPPA.

The Vienna Convention for the Protection of the Ozone Layer (1985)⁷⁰
This convention aims towards the protection of human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer; adoption of agreed measures to control human activities found to have adverse effects on the ozone layer; to co-operate in scientific research and systematic observations; and to exchange information in the legal, scientific, and technical fields.⁷¹

It requires parties to take appropriate measures in accordance with its provisions and of those protocols in force to which they are

⁶⁹ See Art.2 (1) of the Protocol.

⁷⁰ Entered into force on 22nd September 1988.

⁷¹ See the Convention summary.

party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer. To this end, the Parties are required, in accordance with the means at their disposal and their capabilities, to cooperate by means of systematic observations, research and information exchange in order to better understand and assess the effects of human activities on the ozone layer and the effects on human health and the environment from modification of the ozone layer; adopt appropriate legislative or administrative measures and co-operate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control should it be found that these activities have or are likely to have adverse effects resulting from modification or likely modification of the ozone layer; and co-operate with competent international bodies to implement effectively this Convention and protocols to which they are party.⁷²

The Montreal Protocol on Substances that Deplete the Ozone Layer.

The Montreal Protocol on Substances that Deplete the Ozone Layer⁷³ deals with atmospheric pollution. The parties to the Protocol recognise that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment and they are conscious of the potential climatic effects of emissions of these substances.⁷⁴ Article 2A of the Protocol controls CFCs. Under the article, each party is required to ensure that for the twelve-month period commencing on the first day of the seventh month following the date of entry into force of this Protocol, and in each twelve-month period thereafter, its calculated level of consumption of the controlled substances in Group I of Annex A does not exceed its calculated level of consumption in 1986.

It is submitted that by reducing the atmospheric pollution through this instrument, the problem of climate change is addressed because the greenhouse gases in the atmosphere are known to be the

⁷² Article 2 (2).

⁷³ The Montreal Protocol on Substances that Deplete the Ozone Layer as either adjusted and/or amended in London 1990, Copenhagen 1992, Vienna 1995, Montreal 1997 and Beijing 1999.

⁷⁴ Ibid. See the Preamble.

leading cause of climate change; therefore any legal measure that targets the reduction of these gases is of great significance in combating climate change. The above climate change related instruments have made a significant contribution to taking the decades-old issue of combating climate change beyond Uganda and turning it into a global policy area which requires a combined force of developed and underdeveloped countries to combat it. The UNFCCC and the Kyoto Protocol for example have helped to strengthen civil society participation in climate change mitigation through its CDM. These Conventions have also brought about a change in people's understanding of the causes of climate change and how to combat it. Prior to this, combating climate change was largely seen as a technical matter.

The main flaw in these instruments nevertheless is that there is lack of clear mechanisms to check compliance with the obligations held by the state parties. Any international or domestic policy instrument can be effective only if accompanied by an ample mechanism of monitoring and enforcement. There is a nexus between compliance enforcement and the quantity of international cooperation that will actually be sustained.⁷⁵ The UNFCCC and the Kyoto Protocol did not provide for specific trade measures in response to non compliance.

The Impact of the National, Legal and Policy Framework For Combating Climate Change.

The general regulations relating to the environment in Nigeria includes,⁷⁶ the Nigerian Constitution, the National Environmental Standards and Regulations Enforcement Agency Act 2007 (NESREA Act); the Environmental Impact Assessment Act (EIA Act); and the National Oil Spill Detection and Response Agency Act 2005 (NOSDRA Act) etc.

The basis of environmental policy in Nigeria can be found in Section 20 of the 1999 Constitution of the Federal Republic of Nigeria which contains provisions for the protection and improvement of the environment and safeguarding of water, air and land, forest and

⁷⁵ Ibid.

⁷⁶ The different States within Nigeria also have the power to make laws to protect the environment within their respective jurisdictions; e.g. in Lagos State, there is the National Environmental Standards and Regulation Enforcement Act, 2007; and in Akwa Ibom State, there is the Environmental Protection and Waste Management Agency Law, Cap 47, Laws of Akwa Ibom State of Nigeria 2000.

wildlife of Nigeria.

There is also the NESREA Act which repealed the Federal Environmental Protection Agency Act (FEPA Act) and established the National Environmental Standards and Regulation Enforcement Agency (NESREA). The Agency has responsibility to enforce compliance with environmental standards, regulations, rules, laws, policies and guidelines. NESREA is also responsible for the protection and development of the environment, biodiversity conservation, sustainable development and the development of environmental technology. Although the NESREA Act repealed the FEPA Act, it nonetheless saved the subsidiary regulations made pursuant to the FEPA Act. The following FEPA regulations are still applicable under the NESREA Act: the National Environmental Protection (NEP) (Effluent Limitation) Regulations; the NEP (Pollution Abatement in Industries and Facilities Generating Waste) Regulations⁷⁷; and the NEP (Management of Solid and Hazardous Waste) Regulations.

The Environmental Impact Assessment Act (EIA) sets out the procedures and methods to ensure prior consideration of environmental impact assessment on certain public or private projects.⁷⁸ The Act also gives specific powers to the National Environmental Standards and Regulation Enforcement Agency (NESREA)⁷⁹ to monitor and certify environmental assessment on projects. The Act stipulates the content of an environmental impact assessment report and the procedure for the conduct of the assessment. The schedule to the EIA Act lists certain activities for which an assessment study is mandatory.⁸⁰ Failure to comply with the provisions of the NESREA Act and the EIA Act gives rise to criminal and civil liabilities.

⁷⁷ Regulation 11 of the National Environment Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations provides that the collection, treatment, transportation and final disposal of waste shall be the responsibility of the industry or facility generating the waste.

⁷⁸ Attached to the EIA Act is a schedule of activities and industries for which environmental impact assessments are mandatory.

⁷⁹ NESREA is a national body established in July 2007, responsible for environmental regulation for the whole of Nigeria. The Act repealed the Federal Environmental Protection Act 1998 (FEPA)

⁸⁰ These include Agriculture, Airport, Drainage and Irrigation, Land Reclamation, Fisheries, Forestry, Housing, Industry, Infrastructure, Ports, Mining, Petroleum, Power Generation and Transmission, Quarries, Railways, Transportation, Resort and Recreational Development, Waste Treatment and Disposal, and Water Supply. See

The Harmful Waste (Special Criminal Provisions, etc) Act was enacted in reaction to the dumping of toxic waste in a Nigerian coastal state in 1988⁸¹. The Act prohibits the carrying, depositing and dumping of harmful waste on any land or territorial water. Such activities attract severe penalties. Civil liabilities are also imposed in respect of damage or loss suffered as a result of such harmful activities.

The NOSDRA Act⁸² established the National Oil Spill Detection and Response Agency. This Agency is responsible for the co-ordination and implementation of the National Oil Spill Contingency Plan for the country. The different states of the federation have also enacted environmental laws that are largely tailored to address their specific environmental challenges.

Also, Section 3 of the Associated Gas Re - Injection Act (AGRA)⁸³ makes it illegal to flare gas without the consent of the Minister of Petroleum, who may issue a certificate if satisfied that it is not feasible to utilise or re-inject the associated gas. The Act further imposes a penalty of ₦10 (about 11.9cents) for every 1000 standard cubic feet of gas flared and the oil field where the gas is being flared, may be shut down.

The above regulations shows clearly that there is no definite positive steps towards the mitigation of the climate change, a lot still needs to be done both in terms of enforcement and implementation⁸⁴. There is no single legislation with direct emphasis on climate change. Ignorance is a major obstacle which had prevented the public from knowing the devastating effect of climate change and hence, there is a lukewarm attitude towards its mitigation. The average Nigeria man equates climate change with change in weather condition. Poor rural people in drought prone western Nigeria, are hardly integrated with emerging structures and mechanisms for mitigating climate change. They have title access to resources and scientific knowledge. Their

⁸¹ popularly referred to as the Koko Port Incident

⁸² The National Oil Spill Detection and Response Agency (NOSDRA) was established in 2004 to administer the National Oil Spill Contingency Plan (NOSCP).
⁸³ Cap A25, Laws of the Federation of Nigeria (LFN) 2004

⁸⁴ See *Combating Desertification And Mitigating The Effects Of Drought In Nigeria*, The Revised National Report on the Implementation of the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (CCD). Submitted to the Secretariat of the UNCCD Bonn, Federal Republic of Germany For The Attention of The Committee for the Review of the Implementation of the Convention (CRIC)) March, 2005

vulnerability and capacity to climate change is being aggravated by the stress associated with subsistence production, small farm holding, poor land tenure, low technology, poor livelihood diversification etc. yet the poor people in this affected areas are left to cope with frequent droughts, heavy flooding, high temperature and extreme weather events.⁸⁵

The Way Forward

These writers would suggest first and foremost, local participation in the fight against climate change, the local people are in the web of this catastrophe called climate change.⁸⁶ For any government effort to be viable, it must be aimed towards the local people and local government. Local Government participation can be strengthened by creating awareness and giving them the necessary incentive to effectively implement climate change policies and legislations.⁸⁷

⁸⁵ National Sustainable Mitigation approach to desertification management through the formulation of national programs, policies and plans include the Green Wall Sahara Program (GWSP), This is an integrated rural development strategy for combating desertification, drought in 25 Sub-Saharan African Countries and enhancing rural livelihoods that was deliberated by African Union leaders in Libya 2005 as a policy for implementation on dry land management. See Andrew I Ayeni, *Climate change mitigation in Dry Land Rural Communities in Nigeria, Old problem: New Challenges and New Opportunities*, IOP Conf. Series: Earth and Environmental Science 6 (2009) 582009.

⁸⁶ For the communities, the effects of gas flaring has been dramatic: continuous noise, rise in temperature in communities close to flare sites, acid rain and retarded crop yield, corroded roofs, respiratory diseases. And the loss of darkness as with the unnatural illumination from gas flares at night. Gas flared in Nigeria, containing high amounts of methane and carbon dioxide-major greenhouse gasses, is also a major contributor to global warming, as it produces emissions that is more than the combined emissions of the rest of sub-Saharan Africa. See <http://www.foei.org/en/what-we-do/affected-peoples/grassroots-highlights/impacts/nigeria.html> assessed on the 14th June, 2009.

⁸⁷ The empowerment of people in local rural communities through training, new governance mechanisms and partnerships to enable them to advocate for supportive public policies is necessary to improve access to and availability of critical knowledge and resources. Information for decision-making must be open, and mechanisms such as participatory research and participatory learning and action allow broad input into decisions about what information is truly needed by communities. In addition to knowledge, communities need capacity building through creating and enhancing rural infrastructure, particularly that needed for local and regional marketing. See www.sdissues.net/SDIN/documents/NGOReviewPaperforCSD-16-FIRSTdraft15Nov075.doc -

Also having glimpse through the legal framework for environmental protection in Nigeria, one can easily assert that there is an urgent need to have a specific law regulating activities that might result in climate change in Nigeria. For instance chairman of the House of Representatives' committee on Climate Change, Eziuche Ubani noted that "The country doesn't have a national policy on climate change. And the reason why there's none is that there's no will in the executive at all. The President has mentioned climate change only once. It's on record. And then he promised international community that he is going to do something about it by creating a commission or institution to ensure climate change governance; after that nothing has happened."⁸⁸

Climate change problems cuts across all sector of the environment and since Nigeria's major source of revenue is generated from the oil and gas sector which is the highest contributor to climate change, there is a need to have a law which would bring about not only sustainable management of this sector but at the same time take in hand the menace of climate change.

Furthermore, public and Non-Governmental Organizations (NGO) participation should be encouraged. Projects that will mitigate the effect of climate change should be encouraged.

It would also be easier to enforce conformity where there is provision for compensation in the event of breach of climate change regulations. This will encourage people/nations to expose the perpetrators of these acts and also ensure better participation by developing countries. In Nigeria efforts of NGO's such as the Climate Change Africa is commendable,⁸⁹ the Green Earth Preservation Charter (GEPC),⁹⁰ Community Research and Development Centre,⁹¹ Building

⁸⁸ Nasidi A. Yahaya, Nigeria: Representatives Flay Yar'Adua Over Climate Change Daily Trust Newspaper, 25 May 2009, at <http://allafrica.com/stories/200905250025.html> Assessed on the 16th June, 2009.

⁸⁹ Climate Change Africa is a Non-Governmental Organization that focuses on the fight against climate change in Africa.

⁹⁰ Green Earth Preservation Charter (GEPC), a Nigerian non-governmental organisation (NGO) dedicated to the promotion of renewable energy development, environmental preservation and management, and climate change mitigation. The objectives of Green Earth Preservation Charter are to monitor, restore and safeguard the Earth - mankind, wildlife, biodiversity and the natural systems on which all life depends, and effectively create maximum awareness of the induced climate change; its impact, vulnerability, adaptation and mitigation. See <http://allafrica.com/stories/200710030312.html>

⁹¹ Community Research and Development Centre (CREDC) is a non-governmental,

Nigeria's Response To Climate Change (BNRCC)⁹² ELRI⁹³ and NEST⁹⁴ to mention a few.

non-profit organization established in March, 2006. CREDC is registered in Nigeria to provide services to ensure that people have access to safe and healthy environment and that environmental resources are managed in the most sustainable way to achieve socio-economic development of our communities. CREDC subscribe to the fact that development cannot be sustainable where information about the environment and environmental resources are lacking; hence CREDC will help to provide up-to-date information on the state of the environment and environmental resources. CREDC will also embark on activities that will bring about infrastructural, socio-economic and human development. See <http://www.reeep.org/485.3080/community-research-and-development-centre.htm>

⁹² The BNRCC project aims to help build informed responses to climate change in Nigeria by enhancing capacity at the community, state and national levels to implement effective adaptation strategies, policies and actions. See <http://www.nigeriaclimatechange.org/>

⁹³ ELRI is an affiliate of Environment and Health in Communities of Africans (ENHICA) International Foundation Inc, an International Development Organization established in the United States since 1998. ENHICA is a non-profit Scientific Organization for research and services in the areas of Environment and Human Health issues in Communities of Africans See <http://www.elri-ng.org/>

⁹⁴ Founded in 1987, the Nigerian Environmental Study/Action Team (NEST) is an independent not-for-profit organization dedicated to research and action on environment and sustainable development. Also, NEST is a non-governmental organization, registered with the Corporate Affairs Commission (RC. 5185), with headquarters in Ibadan, Nigeria. NEST is an active member on Nigeria's Presidential Implementing Committee on the Clean Development Mechanism (CDM), and the Climate Change Coordinating Committee of the FMEHUD; it has maintained close relations with parliamentarians, policy makers, and the Federal Ministry of Environment; it has contributed to discussions on mainstreaming climate change into the NEEDS and will seek to continue this work under NEEDS II. See <http://www.nigeriaclimatechange.org/aboutus.php>