Chapter 8

Energy law and policy in Nigeria with reflection on the International Energy Charter and domestication of the African Charter

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1 Introduction

The aim of this chapter is to examine the benefits of the International Energy Charter (IEC) to signatory countries with a view to illustrating its future relevance and potential influence in respect of energy laws and policies in Nigeria. The intended outcome of the chapter is to highlight the critical role of the IEC in global energy governance and its impact on Nigeria. Moreover, it will discuss how the IEC has contributed to the ability of signatory countries to enhance international cooperation aimed at addressing common energy challenges while enabling them to harness their full energy resource potential. The research question sought to be answered is whether the IEC has the requisite elements to transform Nigeria's energy laws and policies so as to bring about positive outcomes in the country's energy sector. The chapter argues that lessons can be gleaned from the successful domestication and implementation of the African Charter on Human and Peoples' Rights (African Charter) in Nigeria in this regard.

In May 2015 states representing up to one-half of the United Nations (UN) membership gathered at a ministerial conference in The Hague to unveil the International Energy Charter (IEC). It was a political declaration hosted by the government of The Netherlands that was formally signed and adopted by participating countries. This document, signed by 64 out of the 74 participating countries, mapped out common principles for international cooperation and common areas of cooperation in the field of energy amongst the signatories.[1] The basis for the conference, among others, was to create a platform to discuss possible ways that will enable

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1 Energy Charter Secretariat, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_faq_/energy_charter_faq_en.pdf (accessed 2 January 2019).

signatory countries harness their full energy resource potentials with the necessary influx of investment that is required and to initiate effective international cooperation in tackling and addressing energy problems. For Nigeria, in particular, it is argued that the availability of significant amount of energy is crucial to its national economic development.[2] As a result, this underscores the importance of signing and adopting the IEC, which is considered as an added value to her domestic energy investment and sustainable development strategy, principles of predictability, transparency, regulatory stability and cooperation, market confidence, the rule of law and investment facilitation.[3] Remarkably, the IEC plays an important role as part of an international effort to build a legal foundation for energy security based on the principles of open, competitive markets and sustainable development,[4] although for this to be realised in Nigeria, the domestication of the IEC through legislative process as provided in the Nigerian Constitution must be activated.[5] The significance of the IEC lies in the fact that it articulates strong political will among signatory countries to reduce transaction costs, create the necessary order and most importantly, mitigate the negative externalities of the energy sector.[6] For the West African sub-region particularly, the International Energy Charter's provisions on access to capital, the removal of barriers to and protection of investments, together with the creation of a viable legal framework for foreign investments in the energy sector are significant in order to improve energy access, develop new sources of energy and promote economic growth.[7] A key feature of the IEC is the comprehensive structure it has to sufficiently address complex nature of international energy governance in four distinct but relevant areas of (i) resource development, infrastructure

2 G Agbaitoro 'Is having a robust energy mix a panacea for resolving the energy crisis in Nigeria?' (2017) 7 *Renewable Energy Law and Policy Review* 7.

3 NA Georgiou 'Promoting a favourable investment climate through the rule of law and global energy governance: The International Energy Charter and West African oil and gas developments' OGEL 1 (2017), www.ogel.org.

4 The Energy Charter Treaty, http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (accessed 30 August 2018); E Bonafe & A Piebalgs 'The new International Energy Charter: Sustainable development and market regulation' (2017) 1, http://fsr.eui.eu/publications/new-international-energy-charter-sustainable-energy-transition-investment-dispute-resolution-market-regulation/ (accessed 30 August 2018): 'At the same time, the overwhelming success of the 2015 International Energy Charter in attracting countries and regions across the world shows long-term political commitment to comply with international standards.' Hence, the development of the International Energy Charter has enhanced the international energy governance. Also, generally see S Bruce & S Stephenson 'SDG 7 on Sustainable Energy for All: Contributions of international law, policy and governance' (2016) Issue Brief, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2824835 (accessed 30 August 2018). Also see S de Jong 'The International Energy Charter: A new impetus for global energy governance?' in R Leal-Arcas & J Wouter (eds) *Research handbook on EU energy law and policy* (2017) 179.

5 Sec 12 of the 1999 Constitution of Nigeria (as amended) provides that no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly (Parliament). This theme will be further explored in the chapter.

6 P Aalto 'The new International Energy Charter: Instrumental or incremental progress in governance?' (2016) 11 *Energy Research and Social Science* 92.

7 D Nochevnik 'International Energy Charter: The emergence of the new global energy governance architecture' *European Energy Review* 5 June 2015.

and technology; (ii) cost, finance, business models and markets; (iii) institutions; and (iv) ecological and climate change mitigation.[8] In light of the above, arguments could be made that Nigeria stands to benefit from the signing and adoption of the IEC which will indubitably create some form of sustainable and effective international cooperation that may possibly influence the introduction of effective policies for energy sufficiency in the country. However, it will be difficult to successfully gauge how the IEC will benefit Nigeria. For example, if the IEC births prospective policies for Nigeria, does that naturally translate into full implementation of these prospective policies?[9] This theme will be explored further in a later part of this chapter.

The chapter is divided into six parts. Following this introduction, part 2 of the chapter provides a brief summary of the current energy resource status and policy in Nigeria with a view to establishing the basis for the signing of the IEC. Part 3 traces the evolution of the Energy Charter process. Further, it examines the development of the Energy Charter process, which birthed the 1991 European Energy Charter and the 1994 Energy Charter Treaty. Part 4 discusses possible contributions of the IEC to Nigeria's energy sector and points out areas where significant improvement may be possible. This is done with a view to understanding the relevance of the IEC to Nigeria's energy laws and policies particularly through the mechanism of international energy governance and cooperation which are fundamental features of the IEC. It further considers the overall benefits that the IEC offers to Nigeria and argues that the signing and adoption of the IEC may be one of the key factors needed to address the deficiencies in the country's energy sector. Part 5 of the chapter highlights the possible barriers to the successful implementation of the IEC in Nigeria; also, the possible lessons arising from the domestication and implementation of the African Charter on the successful implementation of IEC in Nigeria will be highlighted. Part 6 is the conclusion.

2 Current status of energy resources and policy in Nigeria

Nigeria is a country endowed with huge potentials of conventional and renewable energy resources such as oil and natural gas, hydro, solar, wind,

8 Aalto (n 6).

9 Furthermore, Nigeria has participated in the Energy Investment Risk Assessment (EIRA) under the auspices of the Energy Charter Secretariat. The EIRA 'is a publication of the Energy Charter Secretariat that evaluates specific risks affecting energy investment ... that can be mitigated through adjustments to policy, legal and regulatory frameworks. It aims to identify policy gaps, provide learning opportunities, and stimulate reforms which make the investment climate of countries more robust and reduce the risk of investor-state disputes.' Generally, see the International Energy Charter website https://energycharter.org/what-we-do/investment/energy-investment-risk-assessment-eira/ (accessed 2 January 2019). In the latest EIRA 2018 report, Nigeria's overall risk level against the assessed areas is moderate.

coal, and so forth.[10] The country is often said to be energy surplus in theory given the range of available energy options.[11] For instance, in terms of both oil and natural gas resources, Nigeria is ranked as the tenth and seventh largest world producer of oil and gas respectively.[12] With the availability of an estimated 36,5 billion barrels of oil reserves,[13] and approximately 187 trillion cubic feet of gas reserves[14] in the country, it would appear that Nigeria stands in a strong position from an international perspective. Furthermore, Nigeria is also rich in renewable energy resources (for example, solar and wind, among others). With the presence of large-scale hydropower potential put at 10 000MW and small-scale at 734MW,[15] it may be argued that Nigeria possesses huge potential energy resources that could help transform the country's energy sector if properly harnessed. In terms of solar radiation and wind energy potentials, they are estimated at 3,5-7.0KW hours per square metre per day and 150 000 terrajoules per year respectively.[16]

Nigeria is also said to be rich in coal and lignite, with reserves of 4 billion metric tonnes.[17] Coal energy resources initially were utilised for the production of electricity and the country's industrialisation before the discovery of crude oil.[18] Regrettably, coal energy resources have become insignificant and currently are not utilised for the generation of energy in Nigeria. This is due largely to too much focus on oil and gas resources for generating energy in the country.

Nigeria's energy status in respect of availability and security appears to be very poor as the country has been unable to translate its energy abundance into socio-economic development.[19] Just as many other countries on the continent of Africa, Nigeria is also faced with a key energy security issue bothering on the necessity to expand energy systems (particularly energy infrastructures) to support economic growth and development.[20] Consequently, the severe shortage of essential energy has undermined efforts to achieve rapid social and economic development

10 Y Oke 'Beyond power sector reforms: The need for decentralised energy options (DEOPs) for electricity governance in Nigeria' (2012) 18 *Nigerian Journal of Contemporary Law* 67 68-71.
11 Oke (n 10).
12 National Planning Commission (NPC) 'Report of the Vision 2020 national technical working group on energy sector' (2009) 12.
13 NPC (n 12) 18.
14 As above.
15 NPC (n 12) 13.
16 NPC (n 12) 20.
17 As above.
18 GO Odularu & C Okonkwo 'Does energy consumption contribute to economic performance? Empirical evidence from Nigeria' (2009) 12 *East-West Journal of Economics and Business* 43 46.
19 Oke (n 10).
20 O Edenhofer et al (eds) 'Climate Change 2014: Mitigation of climate (Working Group III Contribution to the Fifth Assessment Report on the Intergovernmental Panel on Climate Change)' (2014).

in the country,[21] and this deficiency has been a source of concern for the government, private sector and the citizens in general for over three decades.[22]

As part of concerted efforts from the federal government to address the above challenges, huge but realisable targets for the energy sector in the country were set out with expectations which includes (i) ensuring a system of generation, transmission, distribution and marketing that is efficient safe and affordable and cost-effective throughout the country; (ii) ensuring that the energy sector attracts private investment both from Nigeria and from overseas; (iii) developing a transparent and effective regulatory framework for the energy sector; and (iv) ensuring minimum adverse environmental impact.[23] Despite several regulatory policies introduced in the energy sector to improve the availability of energy, not much success has been recorded either in the realisation of the targets or the transformation of the country's energy sector. At best, the priority remains the introduction of different energy policies, coupled with enormous sums which has already been spent, yet without much to show for it.[24]

As regards energy policies introduced in the sector, not much success has also been recorded in terms of improvement in the energy sector. Arguably, this is owing to the nature of the policies that have been introduced so far. Traditionally, the responsibility of formulating and implementing energy policy and strategy lies with the government.[25] This is in tandem with one of its obligation to the citizens, which is to ensure the availability of sufficient energy for national development as well as the security of its supply and reliability.[26] Energy policy in Nigeria has for the most part appeared to be focused on ensuring availability of energy without much consideration on developing strategies on how it should first be generated. Apparently, this has consistently occupied the minds of those saddled with the responsibility of strategising for the provision of energy for the entire country.

3 Development of the Energy Charter process

Development of the Energy Charter began in the early 1990s as a political

21 An African Energy Industry Report 2018, https://www.futureenergyafrica.com/media/1751/1-mir-africa-mir-18-2-es_685804715-05-2018.pdf (accessed 30 August 2018).

22 The Energy, Environment and Climate Change Department (ONEC) Report 'Nigerian Power Sector Privatisation Programme Appraisal Report'. Partial Risk Guarantee in Support of the Power Sector Privatisation Programme, African Development Fund (2013).

23 Y Oke 'The pathway to energy liberation in Nigeria: Lessons for Namibia' in OC Ruppel & B Althusmann (eds) *Perspective on energy security and renewable energies in sub-Saharan Africa: Practical opportunities and regulatory challenges* (2015) 93.

24 S Odunfa 'BBC News Africa viewpoint', http://www.bbc.co.uk/news/world-africa-11142072 (accessed 30 August 2018).

25 S Dow 'Primer on Downstream Energy Law and Policy' CEPMLP (2009).

26 As above.

initiative launched in Europe after the end of the Cold War.[27] Following that initiative, the European Energy Charter (EEC) Declaration was signed in 1991 after a proposal from the Dutch Prime Minister at the meeting of the European Council in Dublin in June 1990. It is recorded that the emergence of the EEC was as a result of the collapse of the Union of Soviet Socialist Republics, with clear prospects for mutually-beneficial corporation to facilitate and expedite transnational trade cooperation in the energy sector.

As highlighted above, in December 1991 the Energy Charter Declaration (also known as the European Energy Charter) was signed in The Hague, The Netherlands. This document provides a platform for the take-off of the political foundation for the Energy Charter Process. In 1994 the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) were signed in Lisbon, Portugal. The Energy Charter Treaty (ECT) is a concise expression of the principles that should underpin international energy cooperation, based on a shared interest in securing energy supply and sustainable economic development.[28] The Energy Charter Treaty is a tool for the promotion of international cooperation in the energy sector.[29] Following that, in May 2015 the International Energy Charter, which is a declaration of political intention aiming at strengthening energy cooperation between the signatory states without any legal binding obligation or financial commitment, was initiated. One of the major goals of the IEC 'is to enhance the rule of law at a global level in order to mobilise energy investment that is necessary to tackle global challenges, such as the UN Sustainable Development Goals and the United Framework Convention on Climate Change (UNFCC) Paris Agreement on climate change'.[30]

27 The Energy Charter website, http://www.encharter.org/ (accessed 30 August 2018).
28 Consolidated Version of the Energy Charter Treaty with Related Documents; The Energy Charter Process, http://www.energycharter.org/process/overview (accessed 30 August 2018).
29 N Bernasconi-Osterwalder & J Haas 'When Climate Leaders protect Dirty Investments' 9 November 2017, https://www.iisd.org/blog/when-climate-leaders-protect-dirty-investments (accessed 30 August 2018).
30 E Bonafe 'A new International Energy Charter open to Africa' April 2017, https://energycharter.org/fileadmin/DocumentsMedia/News/20170410_-_Africa_paper_Ernesto.pdf (accessed 30 August 2018).

Key Dates in the Development of the International Energy Charter

25 June 1990 – Dutch Prime Minister Ruud Lubbers launches the proposal for a European Energy Community at a European Council meeting in Dublin.

17 December 1991 – The European Energy Charter is signed in The Hague.

17 December 1994 – The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) are signed in Lisbon.

16 April 1998 – The Energy Charter Treaty enters into full legal force, following completion of the 30th ratification.

23-24 April 1998 – The Trade Amendment to the Treaty's trade provisions is adopted, bringing them into line with present WTO rules.

February 2000 – Negotiations on the Energy Charter Protocol on Transit are started.

December 2002 – The multilateral phase of negotiations on the Energy Charter Protocol on Transit is completed (three outstanding issues are to be primarily finalised in Russia-EU bilateral consultations).

May 2015 – The International Energy Charter is adopted.

4 Possible contributions of IEC to Nigeria as a signatory country

In March 2017 Nigeria signed up to the IEC. The Attorney-General of Nigeria in a speech given during the signing ceremony of the IEC in Abuja, Nigeria stated that 'Nigeria stands to gain enormously from this Charter as it provides the opportunity to attract investment, ensure that clean energy is available to all Nigerians, increase the level of renewable energy that is available to the public and support the implementation of the sustainable development goals'.[31]

The IEC represents a modern-day instrument which is believed to be an incremental progress in international energy governance.[32] The contributions of the IEC since inception may be seen in light of certain key features that have been introduced and utilised by the signatory members. These features and possible implications for Nigeria are analysed. These are discussed below.

31 Address by Mr Abubakar Malami, SAN Attorney-General of the Federation and Minister of Justice at the signing ceremony of the International Energy Charter (IEC) by Nigeria 7 March 2017, https://energycharter.org/media/news/article/nigeria-signs-the-international-energy-charter/ (accessed 30 August 2018).

32 Aalto (n 6) 95.

4.1 Foreign direct investments

One major advantage of the IEC to signatory countries is the opportunity it has created for governments and private companies in those countries to address the challenge of insufficient energy infrastructures through the mechanism of foreign direct investments (FDI). The signing and adoption of the IEC has helped signatory countries to send political message to the international community that they share some international energy principles on trade, investment, transit and efficiency in their energy sector. In addition, investment protection is assured in the IEC. Nigeria actively encourages foreign direct investments into the country.[33] Arguably, implementing the IEC in Nigeria will lead to more FDI coming into the country. As a result, Daniel has argued that to achieve efficient and cheap energy access in East Africa:[34]

> There is a need for the governments and private companies to address the challenges of energy infrastructure. In this era of globalisation, foreign direct investments (FDI) play a crucial role both in infrastructure capacity building and macroeconomic growth. It is essential for developing countries to guarantee stability on the market and clear rules for investments flows.

As one of the authors has argued elsewhere, the existing laws on FDI in Nigeria are unable to 'address the trade and development needs' of the country.[35] Hence, new energy specific or IEC-compliant laws should be enacted in the country to enhance FDI potentials accruing to the energy sector. This is in tandem with one of the provisions of the IEC which is to create an enabling environment for the introduction of policies that will lead to stable regulatory framework for signatory countries.

Furthermore, the federal government of Nigeria is actively seeking FDI for the energy sector. In a speech by Dr Urban Rusnák, the Secretary-General of the Energy Charter Secretariat during the International Energy Charter's signing ceremony in Nigeria stated:[36]

> Attracting private capital is key in meeting energy needs in Nigeria and Africa. At a time of decreasing investment flows, budgetary constraints and uncertain oil prices, governments have limited recourse to public finance to spur investments … The role of the International Energy Charter is precisely to enhance the principles of stability and transparency to create a level playing field and bring confidence into energy markets.

33 For an overview of the legal regime of FDI in Nigeria, see EO Ekhator & L Anyiwe 'Foreign direct investment and the law in Nigeria: A legal assessment' (2016) 58 *International Journal of Law and Management* 126.

34 TN Daniel 'International Energy Charter 2015 and its relevance and possible influence in respect of energy law and policy in the East African region' (2017) 15 *Oil, Gas and Energy Law Journal (OGEL)* 2.

35 Ekhator & Anyiwe (n 33) 142.

36 U Rusnák 'Opening remarks by the Secretary-General of the International Energy Charter signing ceremony State House Banquet Hall, Abuja, Nigeria, 7 March 2017, https://energycharter.org/media/news/article/nigeria-signs-the-international-energy-charter/ (accessed 30 August 2018).

4.2 Open energy markets

The IEC 'supports the development of trade in energy consistent with major relevant multilateral agreements such as the WTO Agreement and its related instruments, where applicable, and nuclear non-proliferation obligations and undertakings'.[37] Here, African countries are expected to benefit from the international experiences created by the IEC and to play major roles in the burgeoning global energy framework accentuated by the IEC.[38] Arguably, Nigeria should be no exception. Also, it has been suggested that the Energy Charter Secretariat as part of its capacity building programmes should invite civil servants from African countries to the Secretariat on secondment to enrich or engage African countries participation in the international energy policy reforms.[39]

4.3 Regional integration

The IEC implores countries to strengthen and integrate its regional economic markets. Nigeria is a major actor in the Economic Community of West African States (ECOWAS) energy framework. For example, the West African Gas Pipeline (WAGP) project emanated from 'the Treaty of the West African Gas Pipeline Project of 31 January 2003, signed between the Republic of Benin, Ghana, Togo and Nigeria'.[40] The key components of the ECOWAS energy framework include the ECOWAS Energy Protocol, the West African Power Pool (WAPP) Agreement, and West African Gas Pipeline (WAGP) Treaty.[41]

According to Urban Rusnák, the Secretary-General of the Energy Charter Secretariat, the added value for Nigeria and other African countries from the IEC includes:[42]

- first, addressing the legal and regulatory obstacles and barriers to realise the investment necessary to achieve energy access for all;
- second, sharing experiences and lessons learned on the promotion of renewable energy sources, particularly in the conciliation of the right to

37 Daniel (n 34) 3.
38 Bonafe (n 30).
39 As above. Recently, the Energy Charter Secretariat has engaged in activities to deepen capacity building of Nigerian officials. Eg, in February 2018 the Nigerian delegation participated in the 'first subgroup meeting on modernisation that attracted a host of representatives from all around the world to discuss the next steps forward in the Energy Charter Process'; see The Energy Charter website 'Nigeria and the International Energy Charter deepening cooperation in 2018' 7 February 2018. Also, in October 2018 the Energy Commission of Nigeria in collaboration with the Energy Charter Secretariat 'hosted the high-level Nigeria Energy and Climate Change Summit at Abuja'. See The Energy Charter website 'Nigerian government hosts officials from the Energy Charter Secretariat' (15 October 2018).
40 M Ogwezzy 'Legal framework for the implementation of ECOWAS energy programmes: The Energy Protocol, WAPP Agreement and WAGP Treaty' (2017) 15 *Oil, Gas and Energy Law Journal (OGEL)* 1.
41 See Ogwezzy (n 40) for an overview of the ECOWAS energy framework.
42 Rusnák (n 36).

regulate of states and the legitimate expectations of investors;
- third, promoting and protecting foreign investments by providing stable and transparent legal frameworks at national and regional level;
- fourth, promoting exchanges of technological development, research, innovation and dissemination.

Thus, the IEC is expected to play an indispensable role in the integrating energy polices in the ECOWAS sub-region and Africa. Nigeria is said to be a major player in this paradigm.

4.4 Energy security, energy efficiency and environmental protection

As in the case of the ECT, the IEC also presents itself as one of the best available instruments for improving international energy security. According to Konoplyanik, 'energy security is best understood to mean the continuous assurance of an adequate, reliable supply of energy at a reasonable cost at any given moment of time in the short and long run'.[43] Article 3 of the IEC provides for 'energy efficiency and environmental protection'. Also, energy security under the IEC accentuates the 'diversification of energy sources and supply routes'.[44] This is especially so in respect of the significance of producing, transit and consuming countries to the global energy governance.[45] Nigeria is an important energy producing country and has 'seen the merits to engage with a multilateral platform to contribute to efficient functioning of energy markets on the basis of dialogue, mutual assistance and respect in a quickly changing environment'.[46]

However, it may be contended that the IEC conflicts with some local legislation in Nigeria. Some of these local statutes include the National Environmental Standards and Regulatory Agency (NESREA) Act, the Environmental Impact Assessment Act[47] and the Nigerian Oil and Gas Content Act 2010 (otherwise known as the Local Content Act) among others. This chapter will briefly highlight the possible implication of the IEC on local content law in Nigeria.

The Local Content Act in Nigeria provides that Nigerian or indigenous companies must be the major actors in the issuance of oil fields, licences and in any subsisting contract in the Nigerian oil and gas

43 A Konoplyanik 'Energy security and the development of international energy markets' in B Barton et al (eds) *Energy security: Managing risk in a dynamic legal and regulatory environment* (2004).
44 Rusnak (n 36) 4.
45 As above.
46 As above.
47 Environmental Impact Assessment Act (2004) Cap (E12), Laws of the Federation of Nigeria (LFN).

sector.[48] The Act establishes the Nigerian Content Development Agency (NCDA) which has 'the responsibility of putting in place a framework for continuous growth of Nigerian content in the Nigerian economy through a balanced programme of planning, target setting, monitoring, stimulating employment, improving contractor capability.'[49] Arguably, the provisions of the Nigerian local content law go against the tenets of the IEC. For example, a key aspect of the IEC is liberalisation of trade in energy. Here, the IEC states that 'in order to develop and diversify trade in energy, the signatories decide progressively to remove the barriers to such trade with each other in energy products, equipment and services in a manner consistent with provisions of the WTO Agreement and its related instruments, where applicable, and nuclear non-proliferation obligations and undertakings'. However, in 2018 the Energy Charter Secretariat created the Investment Promotion Centre.[50] The aim of this Centre is 'to assist countries in improving their investment promotion and facilitation activities in the energy sector'.[51] States are expected to approach the Centre to take part in the 'Energy Investment Risk Assessment or to gain assistance in implementing the non-binding guidelines of the Investment Facilitation Toolbox'.[52]

Furthermore, the IEC promotes energy efficiency and environmental protection in its provisions. Here, countries are supposed to create adequate measures and conditions for using energy in an economically and efficient manner. The IEC also encourages countries to utilise renewable energy and efficient use of fossil fuels, among other measures. Nigeria is blessed with a diverse range of renewable energy sources including solar, hydropower, wind, nuclear, ocean and biomass.[53] Hence, 'long-term investments in renewable energies have the potential to contribute significantly to the electricity deficiency in Nigeria'.[54] However, the oil and gas industry (including the energy sector) in Nigeria is beset by many institutional ills including a lack of political will by regulators to enforce laws and regulations, environmental degradation in the Niger Delta and

48 E Ekhator 'Public regulation of the oil and gas sector in Nigeria: An evaluation' (2016) 21 *Annual Survey of International and Comparative Law* 43 88; UJ Orji 'The Nigerian oil and gas local content regime and its (non)-compliance with the TRIMS Agreement' (2018) 9 *Journal of Sustainable Development Law and Policy* 152 states: 'The Act establishes a comprehensive local content regime that enshrines legal measures in the Nigerian oil and gas sector.'

49 M Ladan 'Access to environmental justice in oil pollution and gas flaring cases as a human right issue in Nigeria' Paper presented at A training workshop for Federal Ministry of Justice lawyers organised by the Institute for Oil and Gas Law in Abuja Nigeria 28-30 November 2011 1 39.

50 International Energy Charter Annual Report 2018, https://energycharter.org/media/news/article/the-international-energy-charter-2018-annual-report/ (accessed 28 July 2019).

51 International Energy Charter Annual Report (n 49) 15.

52 Also, 'as part of the accession process to the Energy Charter Treaty, a state is requested to elaborate and approve three accession reports, one of them being a report on investment climate and exceptions to national treatment. In 2018 The Gambia, Nigeria and Uganda have each developed these investment accession reports.' See International Energy Charter Annual Report 2018 (n 49).

53 Agbaitoro (n 2).

54 Agbaitoro (n 2) 17.

an inadequate compensation regime, among others.[55] Arguably, if the IEC is properly implemented in Nigeria, this will lead to or enhance the utility of renewable energy sources in the country.[56]

5 Barriers militating against the successful implementation of the International Energy Charter in Nigeria

Notwithstanding the fact that the Nigerian government has signed and ratified the International Energy Charter, there are some barriers that, if not addressed, will negatively affect the successful implementation of the IEC in Nigeria. The energy sector of Nigeria is said to be one of the most inefficient in meeting the needs of its consumers globally.[57] This is evident in the 'persistent disequilibrium in the markets for electricity and petroleum products, especially kerosene and diesel'.[58] Arguably, the Nigerian energy sector is inadequately regulated. As a result, many reforms have been suggested and adopted in meeting the energy needs of the consumers and enhancing diversification in the industry.[59] These reforms have been largely unsuccessful. For example, Oniemola has argued that 'the legal framework in the Nigerian power sector does not provide the enabling environment for investors to explore renewable energy'.[60] Some of the challenges militating against development of sustainable renewable energy reforms in Nigeria include lack of political will by the government, multiple taxation and lack of adequate economic incentives.[61] At the time of writing, the President of Nigeria refused to sign the Petroleum Industry Governance Bill (PIGB) into law. The PIGB was developed to 'update the outdated Petroleum Act and replace its provisions with a more comprehensive and current legal framework that aligned with global standards'.[62]

Nigeria is yet to sign and ratify the Energy Charter Treaty. Presently, there are 53 signatories and contracting parties to the ECT.[63] In May

55 Generally, see E Ekhator (n 48).
56 Also, see CN Nwedu 'The prospective roles of the 2015 International Energy Charter to the MENA region with influence in its energy laws and policies' (2017) 3 *Oil, Gas and Energy Law Intelligence (OGEL) Journal*, www.ogel.org for similar views on the prospective impacts of the IEC on the Middle East and North Africa (MENA) region.
57 A Iwayemi 'Nigeria's dual energy problems: Policy issues and challenges' (2008) 53 *International Association for Energy Economics* 17.
58 Iwayemi (n 57).
59 PK Oniemola 'Powering Nigeria through renewable electricity investments: Legal framework for progressive realisation' (2015) 6 *Journal of Sustainable Development Law and Policy* 83.
60 Oniemola (n 59).
61 OO Ajayi & OO Ajayi 'Nigeria's energy policy: Inferences, analysis and legal ethics toward RE development' (2013) 60 *Energy Policy* 61.
62 B Udo 'Why Buhari withheld assent to PIGB – Presidential aide' *Premium Times* Nigeria 29 August 2018, https://www.premiumtimesng.com/news/top-news/281790-why-buhari-withheld-assent-to-pigb-presidential-aide.html (accessed 30 August 2018).
63 Energy Charter process (n 4). Also, Nigeria has expressed willingness to accede to the ECT.

2015 signatories to the 1994 ECT and more than a dozen countries and organisations joined or signed the IEC.[64] The major difference between the ECT and IEC is that the former is an international instrument containing 'investment treaty-style provisions, which allows both states and investors of a state party to bring a claim against a state party hosting the investment, the 2015 IEC is a non-binding political declaration aimed at strengthening energy cooperation between signatories'.[65] It is said that joining the IEC is a step by countries towards joining the ECT. This is especially relevant because many countries which have signed the ECT are seeking to enter new markets.[66] Thus, it has been contended that the countries who are in the forefront of the fight against climate change 'continue to support and protect investment in fossil-fuel exploration, extraction, and transportation'.[67]

Arguably, countries joining the ECT now will have no opportunity in renegotiating the treaty.[68] The ECT is a legally-binding instrument accentuated by a dispute settlement mechanism, and contracting parties to the ECT are bound by its provisions.[69] As a result, the ECT, similar to the prevalent investor-state dispute settlement (ISDS) is said to favour foreign investors to the detriment of state's sovereignty 'restricting its ability to regulate in the national interest'.[70] This goes against the tenor of the many regional and bilateral investment agreements African countries are currently negotiating.[71] Due to the criticisms or weaknesses in the ECT, Russia and Italy have withdrawn from it.[72] Thus, Bernasconi-Osterwalder and Haas have argued:[73]

> Governments should start by overhauling or exiting the Energy Charter Treaty, the world's only energy-specific investment pact. The ECT's investment protections and lack of climate provisions are no longer appropriate. Since its inception, the ECT has served as the basis for more than 100 claims by energy firms against host countries, with some challenging national environmental policies, such as the nuclear phase-out in Germany.

Due to the weaknesses inherent in the ECT, this chapter contends that

64 N Bernasconi-Osterwalder 'Expansion of the Energy Charter to Africa and Asia: Undoing reform in international investment law? June 2017, https://www.iisd.org/itn/2017/06/12/expansion-energy-charter-ect-africa-asia-undoing-reform-international-investment-law-nathalie-bernasconi-osterwalder/ (accessed 30 August 2018).
65 As above.
66 As above.
67 Bernasconi-Osterwalder & Haas (n 29).
68 Bernasconi-Osterwalder (n 64).
69 Georgiou (n 3).
70 MO Dickson 'Rebalancing international investment agreements in favour of host states: Is it time for a regional investment court?' (2018) 60 *International Journal of Law and Management* 452 453. 'At the time when the treaty was negotiated, countries in transition did not yet have a sufficiently developed domestic judicial system. There were concerns about the neutrality, professional competence and efficiency of domestic courts in these countries. The ECT thus included a full system of international dispute resolution.' Also see Bonafe & Piebalgs (n 4) 6.
71 Bernasconi-Osterwalder (n 64).
72 Bernasconi-Osterwalder & Haas (n 29).
73 As above.

Nigeria should not be in a hurry to ratify or sign up to the ECT. Arguably, in the future, depending on the will of the contracting parties to the ECT, it can be renegotiated and reviewed.[74] However, the ECT was the inspiration for the adoption of the ECOWAS Energy Protocol in 2003.[75] Furthermore, the ECOWAS, the East African Community (EAC), the Economic Community of Central African States and the G5 Sahel have all signed the IEC.[76]

On the other hand, it has been argued that the resounding success of the IEC in attracting countries and regions across the globe implies long-term consensus by states to comply with international rules or standards.[77] Here, the IEC is said to be a compromise between 'international cooperation, investment frameworks, and market reform, on the one hand, and national security and natural sovereignty over natural resources, on the other'.[78] However, successful implementation of the tenets of the IEC in the Nigeria might be challenging.

5.1 The implementation of the International Energy Charter in Nigeria and lessons to be drawn from the African Charter

The IEC is a political declaration, except that it is embedded into Nigerian law, arguably it would be of no effect. Nigeria is notorious for ratifying international measures and using the mechanisms as a means of achieving credibility and legitimacy in the eyes of the international community.[79] Also, notwithstanding the fact that IEC is not an international treaty, the Nigerian government should domesticate IEC into national laws for it be more effective in the energy sector. Nigeria operates a dualist system wherein treaties are not applied domestically unless incorporated through domestic legislation.[80] This is by virtue of section 12(1) of the Nigerian Constitution 1999 (as amended), which states that '[n]o treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. For example, Nigeria has domesticated the African Charter on Human and Peoples' Rights (African Charter) by ratifying it and domesticating it via the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter A9 Laws

74 Bonafe & Piebalgs (n 4).
75 As above.
76 As above.
77 As above.
78 Bonafe & Piebalgs (n 4) 2.
79 For similar arguments on the Extractive Industries Transparency Initiative in Nigeria, see EO Ekhator 'The roles of civil society organisations in the extractive industries transparency initiative in Nigeria' (2014) 16 *International Journal of Not-for-Profit Law* 47 52.
80 EO Ekhator 'Improving access to environmental justice under the African Charter on Human and Peoples' Rights: The roles of NGOs in Nigeria' (2014) 22 *African Journal of International and Comparative Law* 63.

of the Federation of Nigeria 2004). The African Charter is an example of a domesticated treaty that has impacted positively on Nigerian law. To a great extent, some scholars[81] have argued that the African Charter has had direct and positive impacts on women's rights, environmental justice, civil and political rights and the regulation of multinational corporations in Nigeria. Arguably, if the IEC is domesticated, it will have a more direct impact on the energy sector in Nigeria.

It is worth noting that there is no right to energy in international law.[82] However, there are some international mechanisms that promote issues relating to energy. For example, 'the Convention on Elimination of All Forms of Discrimination against Women expressly requires parties, in the context of rural development, to ensure that women have the right to adequate housing including electricity'.[83]

Also, the Sustainable Development Goals (SDGs) 2015 Framework avers that the 'SDGs are grounded in both the Universal Declaration on Human Rights and "international human rights treaties" and is "informed" by the declaration on the Right to Development while it does not indicate how human rights interact with issues related to energy'.[84]

Furthermore, Goal 7 of the SDGs enjoins countries to 'ensure access to affordable, reliable, sustainable and modern energy for all'. According to the Secretary-General of the Energy Charter Secretariat, Dr Urban Rusnak, '[t]his is the first time that international community adopts a specific universal goal on energy and sets a time limit (2030) for achieving those targets. The Secretary-General also notes that Goals 9, 13 and 17 are of relevance to the mandate of the Energy Charter.'[85] The IEC does not explicitly promote human rights in its provisions. However, it may be argued that human rights promotion is implicit in the IEC because it is said to promote the SDGs framework. Hence, domesticating the IEC in Nigeria will enhance human rights (for example, access to energy services) in the energy sector and give life to Goal 7 of the SDGs in the

81 F Viljoen *International human rights law in Africa* (2012); EO Ekhator 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253.

82 Bruce & Stephenson (n 4) 5.

83 As above.

84 As above. The 193-member United Nations General Assembly formally adopted the 2030 Agenda for Sustainable Development on 25 September 2015, along with a set of bold new Sustainable Development Goals (SDGs) which the former Secretary-General, Ban Ki-moon, hailed as a universal, integrated and transformative vision for a better world. Generally, see SDGs website, https://sustainabledevelopment.un.org/ (assessed 2 January 2019). Similarly, S Atapattu 'The Paris Agreement and human rights: Is sustainable development the "new human right?"' (2018) 9 *Journal of Human Rights and the Environment* 68 avers in respect of the recent Paris Agreement 2015: 'Sustainable development includes human rights and, therefore, by implication, the Paris Agreement should be interpreted as including human rights that are encompassed in the social pillar of sustainable development.'

85 Energy Charter website, 'Energy Charter welcomes adoption of Sustainable Development Goals', https://energycharter.org/media/news/article/energy-charter-welcomes-adoption-of-sustainable-development-goals/ (accessed 2 January 2019).

country (and other relevant goals in the SDG framework).

Furthermore, the Nigerian government can incorporate the provisions of the IEC in new laws to be developed for the energy sector in the country. This is what happens in the implementation of international environmental conventions in Nigeria. Nigeria has ratified many environmental conventions and some of its environmental laws and policies are premised on such conventions. Nigeria is major player in the international environmental paradigm having ratified several international environmental conventions or mechanisms such as the Rio Declaration, the United Nations Convention on the Law of the Sea and the Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal, among others,[86] notwithstanding the fact that section 12(1) of the Constitution of Nigeria states that no 'treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'. Also, international environmental conventions have been localised into some recent environmental regulations in Nigeria via subsidiary legislation.[87] For example, by virtue of section 34(c) of the National Environmental Standards and Regulatory Enforcement Agency (NESREA) Act, the Minister of Environment can make regulations for ensuring the sustenance of the Act. As a result, in 2009 and 2011 some environmental regulations were made by the Minister in pursuance of the above objectives.[88] The NESREA regulations are based on international environmental conventions and it is an avenue of domesticating such conventions (to which Nigeria is a party) into Nigerian law. Thus, according to Okorodudu-Fubara:[89]

> A strategy of subsidiary legislation through regulation under the principal statute is informed by the comparative advantage inherent in the process of 'subsidiary legislation' law-making, namely, avoiding the delay/long process of passage of bills through the national legislature. The new regulations reveal clearly that there is now more cohesion and coherence in the country's environmental regulation.

Arguably, a similar strategy can be used to incorporate or localise the IEC into domestic laws in Nigerian energy sector. It may be contended that IEC has placed a financial obligation on Nigeria especially such that was not budgeted since the IEC is not self-executing in Nigeria. The IEC is

86 For the full list of International Environmental Conventions which Nigeria has signed and ratified, see M Okorodudu-Fubara 'Country report: Nigeria. Legal developments, 2009-2011' (2012) 1 *IUCN Academy of Environmental Law e-Journal* 170.

87 Okorodudu-Fubara (n 86).

88 For an overview of the NESREA Environmental regulations, see EO Ekhator 'Environmental protection in the oil and gas industry in Nigeria: The roles of governmental agencies' (2013) 5 *International Energy Law Review* 196. Some environmental regulations were also created in 2013 and 2014. See the NESREA website https://www.nesrea.gov.ng/publications-downloads/laws-regulations/ (accessed 3 January 2019).

89 Okorodudu-Fubara (n 86) 175.

an example of soft law.[90] Recently, the Vice-President of Nigeria, Yemi Osinbajo, stated that it will require $1 trillion to modernise Nigeria's energy infrastructure in 29 years.[91] The huge financial costs of implementing the IEC in Nigeria will be a major barrier militating against the successful implementation of the IEC in the country. For example, as highlighted above, section 12 of the 1999 Constitution of Nigeria (as amended) provides that no treaty between the federation and any other country have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. Just as environmental protection or rights, third generation rights under chapter II of the Nigerian Constitution, are generally not enforceable because they are directive principles of the state policies, the government could argue also that it is not duty-bound to implement the IEC in the country. Due to the domestication of the African Charter in Nigeria, it may be contended that the African Charter provides a pathway in enforcing environmental rights in Nigeria. Article 24 of the African Charter encapsulates the right to healthy and clean environment in its provisions. Article 24 of the African Charter states that '[a]ll peoples shall have the right to a generally satisfactory environment favourable to their development'. By domesticating the African Charter, Nigeria has made the African Charter provisions part of its laws and given effect to operate locally.[92] In *Abacha v Fawehinmi*[93] the Nigerian Supreme Court held that where a treaty is domesticated or enacted into law by the National Assembly, it becomes effective and binding in the country.[94] However, some scholars have argued that the right to environment is not enforceable and justiciable in Nigeria as the Constitution is the 'supreme law in the country and it does not provide for the right to a healthy environment'.[95] Notwithstanding the above views on the non-justiciability of right to environment in Nigeria, this chapter supports the position that the African Charter has made the right to environment justiciable and enforceable in Nigeria.[96] Furthermore, by virtue of section 19(d) of the Constitution of Nigeria (as amended) 'respect for international law' is one of the foreign policy objectives of the Nigerian government enunciated in the constitution. Hence, there is an obligation on the Nigerian government

90 Shelton states that soft law 'usually refers to any international instruments other than a treaty containing principles, norms, standards or other statements of expected behaviour'. D Shelton 'International law and relative normativity' in MD Evans (ed) *International law* (2006) 166.

91 'Nigeria requires $1trn to modernise energy infrastructure – Osinbajo' Premium Times 11 October 2018, https://www.premiumtimesng.com/news/top-news/289827-nigeria-requires-1trn-to-modernise-energy-infrastructure-osinbajo.html (accessed 3 January 2019).

92 O Anaebo & EO Ekhator 'Realising substantive rights to healthy environment in Nigeria: A case for constitutionalisation' (2015) 17 *Environmental Law Review* 82.

93 (1997) SC 45.

94 Anaebo & Ekhator (n 92).

95 As above; see G Ogbodo 'Environmental protection in Nigeria: Two decades after the Koko incident' (2009) 15 *Annual Survey of International and Comparative Law* 1; LA Atsegbua et al *Environmental law in Nigeria: Theory and practice* (2004) 143.

96 See R Ako et al 'Overcoming the (non)-justiciable conundrum: The doctrine of harmonius construction and the interpretation of the right to a healthy environment in Nigeria' in A Diver & J Miller (eds) *Justiciability of human rights law in domestic jurisdictions* (2016) 123.

to respect and enforce its international obligations or commitments. Thus, the IEC should be respected and enforced in the country by the government.

6 Conclusion

This chapter has focused on the burgeoning international energy governance architecture as exemplified by the IEC. Nigeria has signed the IEC and the country is expected to play an important role in the successful implementation of the Charter locally, regionally and globally. Also, the chapter articulates the benefits presented to Nigeria as a result of the signing and adoption of the IEC. However, there are some barriers that will potentially militate against the successful implementation of the IEC in Nigeria and this chapter has proffered some suggestions to minimise these limitations.

Notwithstanding the criticisms of the IEC and its implementation in Nigeria, this chapter aligns with the views expressed by Bonafe and Piebalgs who stated:[97]

> With regard to energy trade, it relates to the development of efficient energy markets and the promotion of investment. All countries, developed and emerging ones, regardless of whether they are mostly energy producing, transit or consuming countries, or pursuing universal energy access, will need to cooperate to ensure secure, affordable and sustainable energy. At the same time, rights over the use of natural resources, the energy mix and national energy strategies will remain under the sovereignty of each country.

Finally, recently the federal government of Nigeria averred that it has developed some mechanisms to enhance the implementation of the IEC in Nigeria.[98] These initiatives include the Open Government Partnership signed by the President in July 2016 (which provides an avenue for citizen participation with the government to enhance transparency and accountability) and first project under the Charter titled 'Annual Energy Summit'.[99] However, it may be argued that it is too early to gauge the success of these recent initiatives developed by the Nigerian government. Nevertheless, it is a step in the right direction.

97 Bonafe & Piebalgs (n 4).
98 Malami (n 31).
99 As above, the International Energy Secretariat in conjunction with the Nigerian government and the EU organised a high-level National Energy and Climate Change Summit in Abuja in October 2018.