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Environmental Impact Assessment for Oil and Gas Projects: A Comparative Evaluation of Canadian and Nigerian Laws

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

Environmental Impact Assessment (EIA) is a tool mandated by regulatory authorities to prevent environmental degradation and foster a sustainable environment. Procedural rights to access information and participate in decision-making are understood as key components of good environmental governance. This research compares the EIA laws in Nigeria and Canada and identifies areas of improvement in the EIA processes of both countries with regards to oil and gas activities, in light of existing international norms and, with a focus on public participation and climate change.

The research reveals that Canada, a developed country, has a more rigorous and effective public participation process in EIA than Nigeria, a developing country. This research further reveals that while the Canadian legal framework for EIA increasingly integrates consideration of climate change impacts, this is not the case in Nigeria.

This study concludes that there is much room for improvement in both the Nigerian and Canadian EIA processes, especially with regard to public participation and climate change issues in order to bridge the gap between international and domestic environmental standards.

Keywords

Environmental Impact Assessment, Nigeria, Canada, Climate Change, Public Participation, International norms, Oil and Gas

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List of Abbreviations

| | |
|---------|---|
| BSR | Business for Social Responsibility |
| CEAA | Canadian Environmental Assessment Act |
| CEI | Cantox Environmental Incorporation |
| CFRN | Constitution of the Federal Republic of Nigeria |
| CNSC | Canadian Nuclear Safety Commission |
| DPR | Department of Petroleum Resources |
| EA | Environmental Assessment |
| EIA | Environmental Impact Assessment |
| EGASPIN | Environmental Guidelines and Standards for the Petroleum Industry in Nigeria |
| ENGO | Environmental Non-governmental Organizations |
| GIC | Governor in Counsel |
| HRIA | Human Rights Impact Assessment |
| ICJ | International Court of Justice |
| ILO | International Labour Organization |
| NEB | National Energy Board |
| NEPA | National Environmental Policy Act |
| NGOs | Non-governmental Organizations |
| OECD | Organization for Economic Co-operation and Development |
| SEA | Strategic Environmental Assessment |

| | |
|--------|---|
| SIA | Sustainability Impact Assessment |
| UN | United Nations |
| UNEP | United Nations Environment Program |
| UNFCCC | United Nations Framework Convention on Climate Change |

Chapter 1

Introduction

The aim of this thesis is to examine the legal and institutional framework of the Environmental Impact Assessment ('EIA') systems in Nigeria and Canada as they relate to oil and gas activities. The environmental impacts of oil and gas activities are a primary concern facing our world. These impacts include oil spillage, which has further led to displacement of local communities from their ancestral homes, water pollution, loss of business profits, loss of fertile land, and, on a global perspective, climate change and transboundary pollution.

This research will engage in a comparative analysis of the strengths and weaknesses of the EIA system in both countries, identifying what lessons Nigeria can learn and adopt from Canada's EIA system and vice versa. This thesis will focus on the EIA process at the federal level in Canada, and also focus on the Niger Delta area in Nigeria and on the province of Alberta in Canada as examples from which to discuss the environmental impacts of oil and gas activities. This work will compare these two jurisdictions because of the existence of oil and gas resources in these two countries and also because these oil and gas activities have led to negative impacts on people and the environment in both countries. Furthermore, the focus of this thesis is on oil and gas projects because these projects have in numerous ways threatened current and future generations.

This thesis will first introduce the concept of environmental impact assessment, and explore its importance through an examination of international legal sources. Next, the thesis will focus on public participation in the EIA process as a channel through which the public can legitimately voice their concerns and needs in respect of developmental projects that will

potentially affect them. Contributions from the public can influence decision-makers in approving or offering alternatives to oil and gas projects. Participation in decision-making can promote a peaceful co-existence among the public, governments and oil and gas companies.

It is important to note that the terminology Environmental Assessment (“EA”) will be used to refer to Canada’s EIA process primarily because this is the applicable term in Canada when referring to the EIA process generally.¹

1.1. Factual Background: Nature of the Problem in the Niger Delta and Alberta

1.1.1. Environmental Issues in the Niger-Delta

The Niger Delta region of Nigeria will be used as a case study when discussing the effects of oil and gas activities on the Nigerian environment because a significant proportion of Nigeria’s oil deposits are located there, and also, many oil exploration activities are been carried out in the region. The Niger Delta is home to approximately 20 million people grouped into several distinct nations and ethnic groups, amongst which are the Ogoni.² In particular, as Damilola Olawuyi notes, the “people in these areas depend on these resources (which includes

¹ See Christopher Wood, *Environmental Impact Assessment: A Comparative Review* 2nd ed (England: Pearson Education Ltd, 2003) at 5 [Wood]; Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Canada: LexisNexis Canada Inc, 2008) at 2 [Doelle].

² The Ogoni, “a minority ethnic group in Nigeria are a people of approximately 500,000 who live in Ogoni, a region in Rivers State, Nigeria. The extraordinary fertility of the Niger Delta has historically allowed the Ogoni to make a good living as subsistence farmers and fishing people. However, this was threatened as the once beautiful Ogoni land is no more a source of fresh air and green vegetation. This threat to the Ogoni land started when Shell discovered oil there in 1958 and since then, the Ogoni land has become a shadow of itself. The Ogoni is specifically singled out of the many ethnic groups in the Niger Delta because of the environmental disasters which occurred in the area. Environmental disasters such as oil spills, gas flares burning 24 hours a day (burning for the past 30 years) were situated near Ogoni villages. The villagers have to live with the constant noise of the flare, and the area is covered in thick soot, which contaminates water supply when it rains. Air pollution from the flares results in acid rain and respiratory problems in the surrounding community. Also, Shell pipelines pass above ground through villages and over what was once agricultural land.” See “Factsheet on the Ogoni Struggle” online: <http://www.ratical.org/corporations/OgoniFactS.html> ; Yinka Omorogbe, “The Legal Framework for Public Participation in Decision-Making on Mining & Energy Development in Nigeria: Giving Voice to the Voiceless” in Donald Zillman, Alastair Lucas & George (Rock) Pring eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining & Energy Resources* (New York: Oxford University Press, 2002) 549 at 558 [Omorogbe].

the freshwater resources with diverse vegetation) for medicinal purposes, domestic use, and as raw materials for construction of furniture, gums, rubber, dyes, fibers, starch and to earn a livelihood.”³ However, it is sad to note that “in spite of vast amounts of oil-generated revenue from the Niger Delta, it is among the most underdeveloped and environmentally degraded regions in Nigeria.”⁴ Over five decades of oil exploration and production activities have left the Niger Delta’s environment severely degraded in what has been described by Alkelegbe in 2001 as “ecological warfare” against the Niger Delta.⁵ Scholars have also noted that “despite the abundance of natural resources situated within the Niger Delta region, the economic and social development of the communities have been impeded for decades, and this is due to the activities of oil and gas companies operating within the communities.”⁶

Another major environmental problem in the Niger Delta is oil spillage.⁷ Olawuyi noted that “in the period between 1993 and 2007, there were 35 reports of incidences of oil spills; this is aside from the unnoticed slicks and unreported cases of oil spills”.⁸ On December 21, 2011, Shell Nigeria announced “what it describes as its worst oil spillage in a decade in the Niger Delta area.”⁹ Over 40,000 barrels of crude oil were spilled in one day. A 2011 report of the United Nations (UN) reported that “many of the environmental and social consequences of oil spillage

³ Damilola Olawuyi, *The Principles of Nigerian Environmental Law (Ukraine: Business Perspectives, 2013)* at 144-145. [Olawuyi]

⁴ See Enogbo Emeseh, “Limitations of Law in Promoting Synergy between Environment and Development Policies in Developing Countries: A Case study of the Petroleum Industry in Nigeria” (2006) 24 *Journal of Energy, Natural Resources and Environmental Law* 574 at 576. [Emeseh]

⁵ Augustine Alkelegbe, “Civil Society, Oil and Conflict in the Niger Delta: Ramifications of Civil Society for a Regional Resource Struggle” (2001) 39 *Journal of Modern African Studies* 441 at 442. [Alkelegbe]

⁶ Charles Udosen, Abasi-Ifreke S. Etok & I.N. George, “Fifty Years of Oil Exploration in Nigeria: The Paradox of Plenty” (2009) 8 *Global Journal of Social Sciences* 37 at 38.

⁷ Olawuyi, *supra* note 3 at 149.

⁸ *Ibid.*

⁹ J. Vidal, “Nigeria on alert as Shell announces worst oil spill in a decade” *Guardian* (22 December, 2011) online: <http://www.guardian.co.uk/environment/2011/dec/22/nigerian-shell-oil-spill>

in the Niger Delta are now irreversible.”¹⁰ As a result of the high occurrence of oil spills in the Niger Delta, a number of local communities have been destroyed, which has resulted in 200,000 Niger Deltans being forcibly separated from their homes;¹¹ drinking water has been contaminated, which has led to the death of over 3,000 Niger Deltans;¹² and, crops have been damaged, thereby reducing the supply of food.

The impact of oil spillage is not limited to the environment but also extends to societies. Socio-environmental problems affect people’s livelihood and invariably leads to loss of business profits and subsistence rights, especially for those in the fishing business.¹³ Closely related to the loss of subsistence rights is the damage to property caused by oil spills. The effect of oil spills causes a lot of damage to residential and commercial properties located in the Niger Delta area where major oil spills occur. Consequently, this has led to forced displacements and relocation for individuals. The African Court on Human Rights upheld the right to property in the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAC) v. Nigeria*¹⁴ where the court found the government of Nigeria in violation of the right to property of the Ogoni people in Nigeria’s Niger Delta due to its condoning and facilitating the operations of oil corporations in Ogoniland, which resulted in the destruction of houses and forceful displacements of residents from their ancestral homes.

¹⁰ United Nations Environment Programme (UNEP), “Environmental Assessment of Ogoni Land” (4 August, 2011) at 9-12 online: <http://www.unep.org/nigeria>

¹¹ Olawuyi, *supra* note 3 at 151.

¹² See Greenpeace International, “Shell Shocked: The Environmental and Social Costs of Living with Shell in Nigeria” (1994), available at <http://archive.greenpeace.org/comms/ken/hell.html> ; Adati Kadafa, “Oil Exploration & Spillage in the Niger Delta of Nigeria” (2012) 2 *Civil & Environmental Research* at 1 online: <http://www.google.ca/url?q=http://pakacademicsearch.com/pdf-files/>

¹³ Olawuyi, *supra* note 3 at 151.

¹⁴ See the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* [2001] African Commission on Human and People’s Rights Comm. No. 155/96. [SERAC] The details of this case will be discussed later in the thesis.

1.1.2. Environmental Issues in Alberta

Much like the Niger Delta region is to Nigeria; Alberta is Canada's largest producer of oil and gas.¹⁵ Alberta is particularly known for its oil sands, which have contributed positively to Canada's economy, but have caused environmental degradation.¹⁶ Oil sands have been defined as "deposits of solid state petroleum called bitumen which are found underground intermingled with sand, clay and water".¹⁷ Advocacy groups have alleged that "oil sand irreversibly destroys landscapes, threatens the health of whole watersheds, negatively affects human communities and accelerates climate change through greenhouse gas emissions and deforestation."¹⁸ The oil sands are known to contain 1.63 trillion barrels of oil, 170 billion barrels of which is currently recoverable. These 170 barrels are capable of releasing 22 billion metric tons of carbon dioxide into the atmosphere, thereby polluting the air and causing a threat to human lives.¹⁹ Moreover, "for every barrel of oil produced at the mines, an average of three barrels of water is sucked out of the Athabasca River."²⁰ Advocacy groups have also alleged that "in communities downstream that have seen spikes in environmental red-flags such as mutations in wildlife and rare cancers among humans, the once pure Athabasca River is now considered poisonous and off-limits to drinking."²¹

¹⁵ Canadian Association of Petroleum Producers, "Alberta", (2014) online:

<http://www.capp.ca/canadaIndustry/industryAcrossCanada/Pages/Alberta.aspx>

¹⁶ Canadian Association of Petroleum Producers, *Crude Oil: Forecast, Markets and Transportation* (Calgary: CAPP, 2014), Executive summary and Chapter 2, online: <http://www.capp.ca/getdoc.aspx?DocID=247759&DT=NTV>

¹⁷ Tar sands- Portland Rising Tide online: <https://portlandrisingtide.org/campaigns/tar-sands-oil-exports/tar-sands-faq-at-1> [Tar Sands]; Paul Muldoon et al *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery Publications Ltd, 2015) at 182 [Muldoon].

¹⁸ Tar Sands *supra* note 17 at 2.

¹⁹ *Ibid* at 4.

²⁰ See World Wildlife Fund-Canada, "Scraping the bottom of the barrel?" (2008) online: http://www.co-operative.coop/upload/ToxicFuels/docs/WWF_CFS_Unconventionals_report.pdf at 27-29.

²¹ Tar Sands *supra* note 17 at 4; see also Kelsey Jensen "Environmental Impact of the Oil & Gas Industry's Consumption of Water from the Athabasca River During the Predicted Water Shortage for Canada's Western Prairie Provinces" ENSC 501: Environmental Studies Independent Study (2008) online:

The oil sands in northern Alberta have been accorded quite a lot of attention in recent years²² because of the environmental and health issues attached to it.²³ These issues have attracted the attention of local, national, and international media and environmental groups. For example, a 2009 article in *National Geographic* brought oil sands development to the attention of an international audience.²⁴

Oil sands can impact both the environment and individuals. “Oil sands projects have the capacity to cause adverse health effects at the individual and community levels.”²⁵ Studies have also shown that oil sand projects can be linked to physical health. Exposure to high levels of contaminants from oil extraction increases the rates of serious chronic diseases such as cancers, respiratory or cardiovascular diseases, or infectious diseases.²⁶

At the request of Alberta Health and Wellness, the lifetime cancer risks to Aboriginal people living in the Wood Buffalo region (a municipality in Alberta, Canada) from exposure to inorganic arsenic were examined.²⁷ An analysis carried out by Cantox Environmental Inc (CEI) for a proposed oil sands development (the Suncor Voyageur project), indicated that “local Aboriginal people may be exposed to an incremental lifetime cancer risk (ILCR) attributable to

www.queensu.ca/ensc/sites/webpublish.queensu.ca.enscwww/files/files/501/Jensen.pdf; Mathieu Lebel, Tony Maas & Robert Powell, “Securing Environmental Flows in the Athabasca River” (2011) WWF Report online: https://www.google.ca/url?q=http://assets.wwf.ca/downloads/wwf_canada_athabasca_report.pdf

²² Royal Society of Canada, *The Royal Society of Canada Expert Panel: Environmental and Health Impacts of Canada’s Oil Sands Industry* (Ottawa: RSC, 2010) at 1, online:

<http://rsc.ca/sites/default/files/pdf/RSC%20Oil&20Sands%20Panel%20Main%20Report%20Oct%202012.pdf> [Royal Society of Canada]

²³ *Ibid.*

²⁴ Robert Kunzig, “Scraping Bottom” *National Geographic* 215 (3 March 2009): 34-59.

²⁵ Royal Society of Canada, *supra* note 22 at 197.

²⁶ *Ibid.*

²⁷ “Assessment of the Potential Lifetime Cancer Risks Associated with Exposure to Inorganic Arsenic among Indigenous People living in the Wood Buffalo Region of Alberta” (Report) prepared by Cantox Environmental Inc. Edmonton, Alberta: Alberta Health and Wellness. (March 1st, 2007) online: <http://www.health.alberta.ca/documents/Wood-Bufferalo-Arsenic-2007.pdf>

arsenic exposure of approximately 450 extra cases of cancer for an exposed population of 100,000 people.”²⁸

According to the CEI analysis, “indigenous people living in the Wood Buffalo region had exposures to inorganic arsenic, notably by the consumption of drinking water and the consumption of sport fish, which contributed up to 27% and up to 31% of the total combined predicted exposure, respectively”.²⁹ Similarly, “mercury contamination in fish is another risk, because when the wetlands which originally covered the oil sands are drained, high concentrations of mercury can be released into the surrounding water bodies.”³⁰

The most sensitive group identified as being vulnerable is the Aboriginal population living in the oil sands area. For decades, Aboriginal people in northern Alberta have raised concerns about ongoing and escalating impacts of oil sands development on a wide range of issues including potential health effects, water quality, water diversions, impacts to wildlife populations and air quality.³¹ Aboriginal communities are both surrounded and affected by oil sands development in northern Alberta. In this region, these communities rely on the land, water and wildlife for hunting, fishing, harvesting, recreational and domestic uses such as bathing, cooking and drinking. An example is the Aboriginal community of Fort Chipewyan which consists of 1,200 people, living downstream from the oil sands projects. In 2006, a local

²⁸ Royal Society of Canada, *supra* note 22 at 223.

²⁹ *Ibid* at 224.

³⁰ *Ibid*.

³¹ Also affected are caribou populations located in the oil sand region with their population threatened by developmental projects. According to a report by the Alberta Biodiversity Monitoring Institute, about six herds of caribou have suffered annual rates of decline from 4.6% to 15.2% covering the period from 1993 to 2012. See Chester Dawson, “Caribou Population Shrinking in Canada’s oil sands” *The Wall Street Journal* (17 June, 2014) online: <http://www.wsj.com/articles/caribou-population-shrinking-in-canadas-oil-sands-1403022042>

physician diagnosed six cases of rare cancers of the bile duct (also called cholangiocarcinoma).³² The 2006 analysis revealed the health status of Fort Chipewyan residents, which indicated that residents have elevated prevalence rates of type 2 diabetes, hypertension, renal failure, and lupus.³³ Timoney and Lee have argued that, “although no study has been able to prove the cause-effect relationship between exposure and specific health effects in the case of Fort Chipewyan, the exposure to environmental contaminants such as arsenic and mercury, in particular in local food, is a plausible factor”.³⁴ They point to the high levels of these contaminants detected in local fish, consumed in particular by the Aboriginal population of Fort Chipewyan.³⁵

1.1.3. Climate Change and Environmental Impact Assessment

Article 4(1) (f) of the 1992 *United Nations Framework Convention on Climate Change*³⁶ (UNFCCC) encourages its parties to:

...take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example *impact assessments* [emphasis added], formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the

³² See Kelly Cryderman “Oil-sands link to health concerns” *The Globe and Mail* (1 April 2014), online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/oil-sands-link-to-health-concerns-report-says/article17751916> . “The Mikisew Cree First Nation has long argued that water pollution from oil sands development may be linked to an increased incidence of cancers found in the population of Fort Chipewyan located directly downstream from the most intensive oil sands development. In 2006, these concerns were brought into the public eye when Dr John O’Connor reported a high number of cases of unusual cancers, particularly a rare form of bile duct cancer- cholangiocarcinoma. In February 2009, the Alberta Cancer Board released a study responding to community class for further investigation. While the report determined the number of cases of cholangiocarcinoma was within the expected range, the report did find the overall cancer rate was approximately 30% higher than expected.” See Andrew Nikiforuk, “Alberta Health Board fires Doctor who raised cancer alarms (John O’Connor)” *TheTyee.ca* (11 May 2015), online: <http://oilsandstruth.org/alberta-health-board-fires-doctor-who-raised-cancer-alarms-john-oconnor>

³³ Alberta Health and Wellness (2006), Fort Chipewyan Health Data Analysis, Edmonton: Alberta Health and Wellness 2006.

³⁴ Timoney, K.P and P. Lee, “Does the Alberta tar sands industry pollute? The Scientific evidence” (2009) 3 *The Open Conservation Biology Journal* 65 at 70.

³⁵ *Ibid* at 70.

³⁶ The *United Nations Framework Convention on Climate Change* (Adopted 9 May 1992, in force March 21 1994) 1771 UNTS 107.

quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.

In 2014, the United Nations (UN) Special Rapporteur on Human Rights and the Environment, Professor John Knox, together with other special procedures mandate holders of the UN Human Rights Council, concluded:

Climate change is one of the greatest challenges of our generation with consequences that transform life on earth and adversely impact the livelihood of many people. It poses great risks and threats to the environment, human health, accessibility and inclusion, access to water, sanitation and food, security, and economic and social development. These impacts of climate change interfere with the effective enjoyment of human rights. In particular, climate change has a disproportionate effect on many disadvantaged, marginalized, excluded and vulnerable individuals and groups, including those whose ways of life are inextricably linked to the environment.³⁷

In a 2016 Report on climate change, Professor Knox noted that assessments of major activities are important with respect to actions designed to alleviate the effects of climate change.³⁸ He noted further that States should be geared towards assessing the climate effects of major projects such as large fossil fuel power plants within their jurisdiction, and wherever possible, such assessments should include the transboundary effects of such projects.³⁹ Knox further identified that “assessments are an important method of clarifying impacts, especially on vulnerable communities, and thereby providing a basis for adaptation planning.”⁴⁰

³⁷ Statement of the UN Special Procedures Mandate Holders on the occasion of Human Rights Day, “Climate Change and Human Rights”, (*Office of the United Nations High Commissioner for Human Rights*, 10 December 2014) online: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E

³⁸ John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report* UNHRC (1 February, 2016) UN Doc A/HRC/31/52 at 13 online: <http://ssrn.com/abstract=2729611> [Climate Change Report]

³⁹ *Ibid* at 14.

⁴⁰ *Ibid*.

The problem of climate change presents a greater need for the EIA process to minimize the adverse effects of oil and gas projects on the environment as one of the major causes of climate change is the emission of greenhouse gases (GHGs) from the burning of fossil fuels. Climate change poses an immediate threat to people and their surrounding environment around the world.⁴¹ In recent decades, changes in climate will cause impacts on natural and human systems on all continents and across the oceans.⁴² Some impacts on human systems have also been attributed to climate change, with a major or minor contribution of climate change distinguishable from other influences.⁴³ For example in many regions, changing precipitation or melting snow and ice are altering hydrological systems, affecting water resources in terms of quantity and quality.⁴⁴ In addition, many terrestrial, freshwater, and marine species have shifted their geographic ranges, seasonal activities, migration patterns, abundances, and species interactions in response to ongoing climate change.⁴⁵ It has been argued that the social, economic and environmental effects of climate change will be hardest on poor and vulnerable groups all over the world.⁴⁶ Vulnerable groups include women, children, racial and ethnic minorities, migrants and non-citizens, refugees, indigenous peoples, and those living in extreme poverty.⁴⁷

⁴¹ Evidence of climate-change impacts is the strongest and most comprehensive for natural systems.

⁴² See the Intergovernmental Panel on Climate Change (IPCC): Impacts, Adaptation, and Vulnerability, Contribution of the Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2014) at 4 which provides a detailed picture of how climatic changes will adversely affect millions of people and the ecosystems, natural resources, and physical infrastructure upon which they depend on. [IPCC Report]

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ United Nations Human Rights Council, *Human rights and the environment: Resolution/Adopted by the Human Rights Council*, (12 April 2011), UN Doc A/HRC/RES/16/11 stating in its preamble that: "Recognizing that, while these implications affect individuals and communities around the world, environmental damage is felt most acutely by those segments of the population already in vulnerable situations."

⁴⁷ According to the Report of Independent Expert on human rights and poverty, due to discrimination, "groups such as women, children, racial and ethnic minorities, migrants and non-citizens, refugees, indigenous peoples, persons with disabilities and older persons, encounter greater challenges accessing income, assets and services and are thus particularly vulnerable to poverty. Having fallen into poverty, they are exposed to systematic stigmatization and discrimination on the grounds of their poverty which perpetuates their situation." See

Consequently, if unmitigated, climate change will result in food shortages, energy insecurity, exacerbate poverty, result in massive displacements and worsen living conditions in poor and vulnerable communities, regions and countries.⁴⁸

EIA can help to mitigate some of these varying concerns. As mentioned earlier, EIA as a proactive regulatory tool seeks to prevent or reduce the environmental impacts of proposed oil and gas projects, and also projects that exacerbate the adverse effects of climate change. Having the EIA process in place at the planning stage of such projects will aid in evaluating the likely effects a particular project will have on the people and the surrounding environment and also help in identifying projects that will result in increasing the adverse effects of climate change. To this end, an EIA process could help to integrate sustainable measures and guiding principles into the development and execution of oil and gas projects with the end goal of minimizing the impacts of climate change on people and their surrounding environment.

1.1.4. Preliminary Conclusions

All of the problems highlighted above are reasons why there is a need for proper environmental planning in proposing or situating oil and gas development projects. One of the ways in which environmental planning can be conducted is through an Environmental Impact Assessment (EIA) process. An EIA process would provide decision-makers with relevant information about the likely environmental implications of a project. Employing EIA as a tool should help to prevent or reduce the environmental impacts of proposed oil and gas activities. The effects of the environmental problems identified above could have been minimized if such

Magdalena Sepulveda Carmona, Report of the Independent Expert on the question of human rights and extreme poverty, on the draft guiding principles on extreme poverty and human rights, UNHRC (6 August, 2010) UN Doc A/HRC/15/41 para 22.

⁴⁸ See the IPCC Report *supra* note 42 at 4.

projects had gone through a thorough EIA process (an EIA process that is transparent and participatory in nature), which would have aided in identifying and considering the impacts of such proposed projects on the environment and on people living within the environment.

By evaluating the effects likely to arise from a particular project, EIA can be regarded as a proactive and preventive tool for environmental management and protection. This thesis argues, therefore, that EIA helps to reduce environmental degradations brought about by oil activities in the Niger Delta region of Nigeria and Alberta in Canada. In summary, it is a useful solution because it enables the anticipation and minimization of the negative effects of oil and gas projects.

This thesis examines the following research questions:

- 1) What is the role of EIA as a preventive tool in ensuring oil and gas activities in the Niger Delta region of Nigeria and Alberta in Canada are environmentally safe?
- 2) What is the role of public participation in the EIA process in Canada and Nigeria? Does this reflect the international legal framework on public participation?
- 3) In what ways do the EIA laws of both countries compare, and how could they be improved to meet international standards?

1.2. Research Methodology

The research questions identified above will be answered using an analytical approach which gives insight into the general nature and scope of the EIA legislation in Nigeria and Canada. Furthermore, this thesis will review the EIA laws in both jurisdictions to better understand whether and how their implementation has delivered cogent sustainability gains to local communities and citizens. In comparing both jurisdictions, the EIA laws will be evaluated

in light of whether they are in compliance with the international norms relating to the content of EIA and the role of public participation in EIA. This thesis will use a comparative law method in order to consider and examine the differences between Canada and Nigeria's experience with the EIA process. Comparative law has been argued by Mathias Siems to have an "intrinsic purpose,"⁴⁹ as it provides knowledge of foreign law thereby making lawyers and law students reflect on their own laws.⁵⁰ The comparative law method provides a framework as to how different sets of legal rules work in addressing a particular problem. In essence, as Siems notes- "the lawyer exposed to foreign experiences may develop a deeper and potentially more critical, perspective of her own law and the choices its legislators and courts have made."⁵¹ So therefore, given the extent to which comparative law exposes a lawyer and law students to foreign experiences, it can be argued that comparative law helps to broaden the understanding of how legal rules work in context.

This methodology will be carried out with the aid of primary and secondary legal sources that is, case law, statutes (domestic), articles and textbooks. In addition, reference will be made to the sources of international law as contained in Article 38 (1) of the Statute of the International Court of Justice which includes international conventions, international custom, the general principles of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations.⁵²

⁴⁹ Mathias Siems, *Comparative Law* (United Kingdom: Cambridge Press, 2014) at 2.

⁵⁰ *Ibid.*

⁵¹ *Ibid* at 3.

⁵² See United Nations, *Statute of the International Court of Justice*, 18 April 1946, International Court of Justice, Art 38(1), online: <http://www.icj-cij.org/documents/?p1=4&p2=2>

1.3. Literature Review

Quite a number of scholars have written on the EIA process. For example, a comparative review of EIA in seven different jurisdictions, the United States, United Kingdom, Netherlands, Canada, Commonwealth of Australia, New Zealand and South Africa, has been carried out.⁵³ Another example is the comparative analysis between Nigeria and South Africa,⁵⁴ while other scholars have limited their research to just one jurisdiction, that is, the Nigerian EIA Process,⁵⁵ or the Canadian EIA process.⁵⁶ Also, some scholars have written on the relationship between EIA and public participation,⁵⁷ the relationship between oil and gas and EIA,⁵⁸ and, lastly, the tripartite relationship of international law, public participation and EIA.⁵⁹

⁵³ Wood *supra* note 1.

⁵⁴ Omorogbe *supra* note 2 at 549.

⁵⁵ Allan Ingelson and Chilenye Nwapi, "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis" (2014) 10 *Law, Environment and Development Journal*, 35 [Ingelson and Nwapi]; Olusegun Ogunba, "EIA Systems in Nigeria: Evolution, Current Practice and Shortcomings" (2004) 24 *Environmental Impact Assessment Review* 643 [Ogunba]; Femi Olokesusi, "Legal and Institutional Framework of Environmental Impact Assessment in Nigeria: An Initial Assessment" (1998) 18 *Environmental Impact Assessment Review* 159 [Olokesusi]; Nerry Echefu & E. Akpofure, "Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework" (1998) UNEP EIA Training Resource Manual online: [http://www.unep.ch/etu/publications/14\)%2063%20to%2074.pdf](http://www.unep.ch/etu/publications/14)%2063%20to%2074.pdf) [Echefu and Akpofure].

⁵⁶ Denis Kirchhoff, Holly Gardner, Leonard Tsuji, "The Canadian Environmental Assessment Act, 2012 and Associated Policy: Implications for Aboriginal Peoples" (2013) 4 *The International Indigenous Policy Journal* at 5; Rod Northey, *Guide to the Canadian Environmental Assessment Act* (Canada: LexisNexis, 2015) [Kirchhoff]; Doelle *supra* note 1; Robert Gibson & Kevin Hanna, "Progress and Uncertainty: The Evolution of Federal Environmental Assessment in Canada" in Kevin S. Hanna ed, *Environmental Impact Assessment: Participation and Practice 2nd* ed (Toronto: Oxford University Press, 2009) at 18-36.

⁵⁷ Chilenye Nwapi, "A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria" (2010) 54 *Journal of African Law* 184 [Nwapi]; Alastair R. Lucas, "Canadian Participatory Rights in Mining and Energy Resource Development: The Bridges to Empowerment?" in Donald Zillman, Alastair Lucas and George (Rock) Pring eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. (New York: Oxford University Press, 2002) 305 [Lucas].

⁵⁸ Ingelson and Nwapi *supra* note 55.

⁵⁹ George R. Pring and Susan Y. Noe "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development" in Donald Zillman, Alastair Lucas and George (Rock) Pring eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. (New York: Oxford University Press, 2002) 11 [Pring and Noe]; Neil Craik *The International Law of Environmental Impact Assessment* (New York: Cambridge University Press, 2008) [Craik]; Kal Raustiala, "The Participatory Revolution in International Environmental Law, (1997) 21 *Harvard Environmental Law Review*, 537 [Raustiala].

With regard to the climate change dimension, there is no scholarly article about EIA and climate change in Nigeria. Notwithstanding this, there are legal articles on Nigeria and climate change more generally. For instance, Peter Odjugo investigated the regional evidence of climate change in Nigeria with the available data from the Nigerian Meteorological Agency Lagos (1901-1935, 1936-1970 and 1971-2005).⁶⁰ The result of this investigation showed that the rate of temperature increase is higher in the semi-arid region than the coastal area of Nigeria.⁶¹ Also, scholars like Etiosa Uyigue and Matthew Agho have identified the climatic and environmental changes that have occurred in the Niger Delta region of Nigeria, thereby showing how these changes have resulted in poverty in the region. Their study also examined the various strategies that have been used by the Niger Deltans and also suggested ways to strengthen the existing capacity of Niger Deltans to adapt to climate change and adverse environmental changes in their region.⁶² Also, Damilola Olawuyi, in a recent International Bar Association (IBA) paper on climate justice, evaluates the key contributions of the IBA Report in assessing the legal obligations of private actors in integrating human rights principles into the design, financing and implementation of climate projects (clean development mechanism and REDD+ projects).⁶³ Lastly, Damilola Olawuyi and Idowu Ajibade have also examined the impacts of climate change on housing and property rights in Nigeria and Panama.⁶⁴

⁶⁰ Peter Odjugo, "Regional Evidence of Climate Change in Nigeria" (2010) 3 *Journal of Geography and Regional Planning* 142-150.

⁶¹ *Ibid.*

⁶² Etiosa Uyigue & Matthew Agho, "Coping with Climate Change and Environmental Degradation in the Niger Delta of Southern Nigeria" 2007 online: http://priceofoil.org/content/uploads/2007/06/07.06.11-Climite_Niger_Delta.pdf

⁶³ Damilola Olawuyi, "Climate Justice and Corporate Responsibility: Taking Human Rights seriously in Climate Actions and Projects" (2016) 34 *Journal of Energy and Natural Resources Law* 1-32 ; see International Bar Association, Climate Change Justice and Human Rights Task Force Report, *Achieving Justice and Human Rights in an Era of Climate Disruption* (International Bar Association 2014) 147-153.

⁶⁴ Damilola Olawuyi & Idowu Ajibade, "Climate Change Impacts on Housing and Property Rights in Nigeria and Panama: Toward a Rights-Based Approach to Adaptation and Mitigation" in Dominic Stucker and Elena Lopez-Gunn

In Canada, scholars have written quite a number of articles on the relationship between environmental assessment and climate change. In addition, there have been some judicial decisions establishing this relationship. Toby Kruger has examined the importance of “significance” in the Canadian assessment process and how this term can be further objectified under the current regulatory framework.⁶⁵ The article examines the absence of a yardstick by which to measure the “significance” of the emission of greenhouse gases and how this absence has affected the environmental process in Canada.⁶⁶ Shi-Ling Hsu and Robin Elliot proposed the use of the *Canadian Environmental Assessment Act (CEAA)*⁶⁷ to consider the greenhouse gas implications of projects before approval, thereby including greenhouse gas emissions in the list of environmental concerns to be considered by panels established under the CEAA.⁶⁸ Albert Koehl, examining the mitigation of climate change in the EA process in Canada, addressed the failure of the CEAA to effectively address the mitigation of greenhouse gas (GHG) emissions for new projects.⁶⁹ Koehl further suggests ways in which CEAA could effectively operate in addressing climate change.⁷⁰ Takafumi Ohsawa and Peter Duinker examined how recent EAs in Canada have responded to the issue of GHG emissions when evaluating and approving projects which contribute to climate change.⁷¹ To this effect, twelve EAs carried out under the EA

eds, *Adaptation to Climate Change through Water Resources Management: Capacity, Equity and Sustainability* (New York: Routledge, 2014).

⁶⁵ Toby Kruger, “The Canadian Environmental Assessment Act and Global Climate Change: Rethinking Significance” (2009) 47 *Alberta Law Review* 161-183.

⁶⁶ *Ibid.*

⁶⁷ *Canadian Environmental Assessment Act* S.C. 1992, c.37 available online at:

<https://www.canlii.org/en/ca/laws/stat/sc-1992-c-37/latest/sc-1992-c-37.html> [CEAA 1992].

⁶⁸ Shi-Ling Hsu & Robin Elliot, “Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions” (2009) 54 *McGill Law Journal*.

⁶⁹ Albert Koehl, “Environmental Assessment and Climate Change Mitigation” (2010) 21 *Journal of Environmental Law and Practice* 181.

⁷⁰ *Ibid.*

⁷¹ Takafumi Ohsawa and Peter Duinker, “Climate Change Mitigation in Canadian Environmental Impact Assessments” (2014) 32 *Impact Assessment and Project Appraisal* 222. [Ohsawa and Duinker]

legislation in Canada were analyzed to carry out the study.⁷² Lastly, Mark Friedman provides a recent discussion on this subject where he examines whether EA legislation in Canada provides regulatory authorities with the requisite tools to assess the impacts an oil sands project has on the environment, while being cognizant of the contribution of such projects to greenhouse gas emissions.⁷³

The relationship between environmental assessment and climate change was also considered in *Pembina Institute v. Canada (Attorney General)*⁷⁴ where the court held that the joint review panel failed to adequately address the environmental effects of the greenhouse gas emissions which had occurred as a result of the proposed Kearsley oil sands project.

No one else has done a comparative analysis of the EIA processes in Nigeria and Canada with a focus on public participation, nor has anyone considered climate change as part of the analysis. This research seeks to contribute to the existing knowledge in this field by examining both jurisdictions and the way forward in ensuring a transparent and effective EIA process that prioritizes public participation and also aims to reduce the impacts of climate change.

As the contextual material provided earlier in this chapter establishes, both Nigeria, especially the Niger Delta area, and Canada, especially Alberta, share many similarities that suggest a comparative analysis would be useful; but it is also important to recognize that the countries are very different when it comes to their economic development status. This leads to the assumption that Canada is likely to have a more rigorous and well resourced public

⁷² See Ohsawa and Duinker *supra* note 71.

⁷³ Mark Friedman, "Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative (in) Action?" (2016) 6 *UWO Journal of Legal Studies* 5.

⁷⁴ 2008 FC 302.

participation process in EIA than Nigeria, and more likely to integrate consideration of climate change.

1.4. Objectives of the Research

The specific objectives of this research are as follows:

- a) To review the environmental impacts of oil and gas activities in Nigeria, (Niger Delta region) and Canada (Alberta);
- b) To review the current EIA laws of both countries⁷⁵ –Nigeria (*EIA Act of 1992*)⁷⁶ and Canada (federal) (The old *Canadian Environmental Assessment Act of 1995*⁷⁷ and the new *Canadian Environmental Assessment Act of 2012*);⁷⁸
- c) To discover the role of public participation and to analyze the role of the various stakeholders in the EIA process in both countries, and review the international legal framework on public participation;
- d) To review the international framework of the EIA process with reference to specific treaties and principles that support environmental assessment, and also the relationship between climate change and the EIA process;

⁷⁵ The law's capacity to anticipate, regulate, prevent, and resolve environmental problems might be limited due to the fact that the environment is abstract in nature and as such it is difficult to feel and prove any harm done to it. Further elaborating on why environmental problems are ill-suited to legal resolution, Adamu Usman noted that "environmental harm often does not manifest itself in apparent and vivid terms like harm to the human person; thus an act causing environmental harm may be committed today, but the harm to the environment may not manifest immediately, and as such, proving such harm if a suit is filed immediately after the commission of the act becomes a problem." See Adam Usman, *Environmental Protection Law and Practice* (Ibadan: Ababa Press Ltd, 2012) at 228.

⁷⁶ *Environmental Impact Assessment Act of 1992*, Laws of the Federation of Nigeria 2004, c E.12 [EIA Act].

⁷⁷ CEAA 1992 *supra* note 67.

⁷⁸ *Canadian Environmental Assessment Act 2012* S.C. 2012, c.19 available online at: <http://laws-lois-justice.gc.ca/eng/acts/c-15.21/index.html> [CEAA 2012].

- e) To discover what lessons Nigeria could draw upon from Canada's EIA legislation and implementation, and also identify areas of improvement in Nigeria's and Canada's (in particular at the Federal level) EIA processes relative to international standards.

1.5. Organization of Chapters

This chapter examines the factual background of the environmental problems in Nigeria (Niger Delta as a case study) and Canada (Alberta as a case study). It sets out the problems, research questions and objectives of this thesis.

Chapter 2 provides the background to, and an overview of EIA. It examines the nature of EIA from the international perspective by engaging in a brief discussion of some international sources that support the EIA process. Chapter 3 examines the concept of "public participation" by identifying the categories of stakeholders entitled to participate under the international EIA legal framework. It discusses the international law on public participation, the role of the public in the EIA process, and the underlying rationale for public participation in environmental matters.

Chapter 4 examines the EIA process in Nigeria with reference to the *EIA Act* of 1992. It examines the evolution of the EIA Act of 1992, the EIA procedure in Nigeria, participatory rights in the EIA process in Nigeria, and examines the application and implementation of international environmental law in Nigeria.

Chapter 5 examines the environmental assessment legal framework in Canada. Reference will be made to the old *Canadian Environmental Assessment Act of 1992*⁷⁹ and the present

⁷⁹ CEAA 1992 *supra* note 67.

legislation, which is the *Canadian Environmental Assessment Act of 2012*.⁸⁰ This thesis focuses on the changes made to the new Act, as well as recent policy changes. It discusses the participatory rights under the EIA process in Canada, and the application and implementation of international environmental law in Canada.

Chapter 6 draws together the main threads of the earlier chapters and engages in the comparative analysis of Nigeria's and Canada's EIA systems with the aim of identifying the strength and weaknesses of both systems. It concludes by suggesting a number of recommendations for improving the EIA systems of both countries.

⁸⁰ CEAA 2012 *supra* note 78.

Chapter 2

Overview of Environmental Impact Assessment (EIA)

2.1. Introduction

Environmental Impact Assessment can be defined as a process “for analyzing the positive and negative effects a proposed project, plan or activity has on the environment.”⁸¹ Its purpose has been clearly stated by a legal scholar Damilola Olawuyi: “to provide decision makers with information, which will allow them to introduce environmental protection considerations into the decision-making process prior to approval, rejection or modification of proposed projects, plans or activities.”⁸² EIA is the starting point to solving the various environmental challenges caused by oil and gas exploration in Nigeria, Canada and other parts of the world. It is regarded as a solution because it provides information about the environmental effects of a proposed project. By doing so, it helps to identify and predict the impact a proposed project would have on the environment and on health and well-being. EIA is thus recognized as a tool for better environmental protection and management. Furthermore, it can also be argued that EIA is an effective mechanism for enhancing sustainable development through environmental protection.

This chapter will examine the evolution and scope of EIA, contrast EIA with other types of impact assessment, and examine various international sources that identify the importance of EIA.

⁸¹Olawuyi *supra* note 3 at 177.

⁸²*Ibid.*

2.2. Evolution of Environmental Impact Assessment (EIA)

The last three decades have recorded a remarkable growth of interest in environmental issues particularly as it relates to sustainability.⁸³ Olawuyi explained that “the need for EIAs arose out of the raised environmental awareness in the 1950s and 1960s, when it became evident that industrial and other development projects were producing undesirable consequences on the environment.”⁸⁴ These undesirable consequences led the international community and national governments to realize the need for a structure to ensure that the environmental consequences of projects were reviewed before being approved for execution and implementation.⁸⁵ Since the passage of the *National Environmental Policy Act* by the United States of America (USA) in 1969,⁸⁶ over 100 countries including Nigeria and Canada have followed in the footsteps of the USA. For example, Canada first implemented EIA in 1973, Nigeria in 1992, Australia in 1974, West Germany in 1975, and France in 1976 and later also in the less developed countries.⁸⁷ It has been argued that the introduction of NEPA brought about an awareness and response to the negative impacts of developmental projects on the environment.⁸⁸ The introduction and development of EIA principles by other States in both their domestic and international decision-making processes has also been influenced by general principles of international environmental law, such as the principle of nondiscrimination, the duty to prevent transboundary harm and the duty to cooperate with other States to preserve and protect the natural environment.⁸⁹

⁸³ John Glasson et al *Introduction to Environmental Impact Assessment* 3rd ed (New York: Routledge, 2005) at 3. [Glasson]

⁸⁴ Olawuyi *supra* note 3 at 178.

⁸⁵ *Ibid.*

⁸⁶ United States *National Environmental Policy Act* 1969 42 USC SS 4321[NEPA].

⁸⁷ Glasson, *supra* note 83 at 36.

⁸⁸ Craik *supra* note 59 at 20; Glasson *supra* note 83 at 36.

⁸⁹ *Ibid* at 23.

2.3. Types of Impact Assessments

Development actions may have impacts not only on the physical environment but also on the social and economic environment, and also threaten the human rights of persons affected by such projects. Consequently, EIA must be seen in the context of other tools which seek the best interest of the environment, protection of human rights and ensuring a sustainable environment. The discussion of these types of impact assessments will be limited to: strategic environmental assessment; sustainability impact assessment; and human rights impact assessment.

2.3.1 Strategic Environmental Assessment (SEA)

There is no internationally agreed definition of SEA, but the interpretation offered by Sadler and Verheem is among those which are widely quoted:

SEA is a systematic process for evaluating the environmental consequences of proposed policy, plan, or programme initiatives in order to ensure they are fully included and appropriately addressed at the earliest appropriate stage of decision-making on par with economic and social considerations.⁹⁰

Over a period of time, SEA has emerged as a tool that complements project-based environmental assessments and other planning tools.⁹¹ The rationale behind this statement is that there is a limitation to project-based environmental assessment processes which are not well suited to dealing with a consideration of broader policy issues.⁹²

⁹⁰ Barry Sadler & Rob Varheem, *SEA: Status, Challenges and Future Directions*. Ministry of Housing, Spatial Planning and the Environment, the Netherlands, and the International Study of Effectiveness of EA; Report 53 (1996).

⁹¹ Meinhard Doelle, Nigel Bankes & Louie Porta, "Using Strategic Environmental Assessments to Guide Oil and Gas Exploration Decisions: Applying Lessons Learned from Atlantic Canada to the Beaufort Sea" (2013) 22 *Review of European Community & International Environmental Law* 103 [Doelle et al].

⁹² *Ibid* at 103.

There is a remarkable growth with the use of SEA around the world.⁹³ Dalal-Clayton and Sadler provide a detailed review of SEA experience in developed nations, international institutions, economies in transition, and developing nations.⁹⁴ SEA practice is starting to expand dramatically within the European Union (EU) as a result of its 2001 directive on SEA.⁹⁵ In the United States, experience with SEA goes back to the early days of NEPA; however, its use has been limited.⁹⁶ Other developed nations, including Canada, Australia, New Zealand and Japan, have also utilized SEA in the evaluation of policies.⁹⁷ In Canada, “SEA has been introduced as a relatively separate, distinct process- typically as an extension of EIA”; with the introduction of the “assessment of policies, plans and programs in the EARP Guidelines Order.”⁹⁸ In addition, “SEAs have been used as a key ingredient of the oil and gas rights issuance process for exploration in the waters of Nova Scotia and Newfoundland-Labrador since 2002. Since then, the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB) and the Canada-Nova Scotia Offshore Petroleum Board (C-NSOPB) have conducted eight SEAs.”⁹⁹

Nigeria has not applied SEA in evaluating policies in relation to the environment.

⁹³ Doelle *supra* note 1 at 194.

⁹⁴ Barry Dalal-Clayton & Barry Sadler, *Strategic Environmental Assessment: A Sourcebook and Reference Guide to International Experience* (London: Earthscan, 2005) at 36, 128, 180 and 237, respectively. [Clayton and Sadler]

⁹⁵ EC, Council Directive 01/42 of June 27, 2001 on the assessment of the effects of certain plans and programs on the environment, [2001] O.J.L. 197/30.

⁹⁶ Clayton and Sadler *supra* note 94 at 102.

⁹⁷ *Ibid* at 54, 88 and 109, respectively.

⁹⁸ See Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials* 2nd ed (Toronto: Thomson Reuters, 2013) at 577 [Doelle and Tollefson]; Doelle et al *supra* note 91 at 103.

⁹⁹ *Ibid*.

2.3.2. Sustainability Impact Assessment (SIA)

Sustainability in SIA means that all three sustainable development aspects are fully integrated into the assessment which includes the economic, environmental and social aspects.¹⁰⁰ This is not the case with other types of impact assessments such as EIA. SIA can be defined as a process for exploring and assessing the combined economic, environmental and social impacts of a range of proposed projects, policies, programs, strategies and action plans.¹⁰¹ The Organization for Economic Co-operation and Development (OECD) compiled a guideline on SIA which offers a general introduction to SIA and also aims to help policy makers increase their understanding of the basic elements, processes and multi-dimensional nature of SIA.¹⁰²

In particular, the big question is, does the proposed project contribute to sustainability? There are instances where it is possible for an SIA to be integrated into an EIA process. For example, the *Canadian Environmental Assessment Act*¹⁰³ applied SIA in two review panels, the Voisey's Bay nickel mine/mill case and the Red Hill Valley Expressway case (now suspended). The two review panels in this case interpreted their goal as having to adopt sustainability as the criterion for making decisions.¹⁰⁴ It is important to note that "both panel issued guidelines for environmental impact statements requiring the proponents involved to show that their

¹⁰⁰ See Sustainability Impact Assessment: An Introduction, Guidance on Sustainability Impact Assessment (OECD 2010) at 6 online: <http://www.oecd.org/.../46530443.pdf> [SIA Guidance]

¹⁰¹ *Ibid.*

¹⁰² The "OECD is a unique forum where the governments of 31 democracies work together to address the economic, social and environmental challenges of globalization. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organization provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies." See SIA Guidance *supra* note 100.

¹⁰³ CEAA 1992 *supra* note 67.

¹⁰⁴ Robert Gibson, "Proposed Improvements to Bill C-19, an Act to amend the *Canadian Environmental Assessment Act*" (Presentation delivered at the House of Commons Standing Committee on Environment and Sustainable Development Hon. Charles Caccia, Chair, 9 April 2002) at 3 online: www.nben.ca/index.php/fr/ressources/bibliotheque-de-references/category/268-evaluation-environmentale-canadienne?download=3623:proposed-improvements-to-bill-c-19-an-act-to-amend-the-canadian-environmental-assessment-act-robert-b-gibson-9-april-2002 [Gibson]

undertakings would make a positive contribution to sustainability and respect the precautionary principle.”¹⁰⁵

2.3.3. Human Rights Impact Assessment (HRIA)

The United Nations Guiding Principles on Business and Human Rights have emerged as the global standard for companies’ management of their human rights impacts.¹⁰⁶ Under the UN Guiding Principles, companies are expected to ‘know and show’ that they do not infringe on any human rights principle through their operations or business relationships, and “human rights impact assessments represent a key first step in meeting this expectation.”¹⁰⁷ The Business for Social Responsibility provides a detailed report on HRIA which captures key lessons learned from BSR’s work in conducting HRIA and outlines their approach to corporate, country, site and product-level HRIAs using eight guidelines. The report outlines a framework that should be in conformity with a company’s unique risk profile and its scope of operation.¹⁰⁸

Through an HRIA, project proponents could systematically identify, anticipate and respond to the potential human rights impact of a project on vulnerable groups.¹⁰⁹ An HRIA aims

¹⁰⁵ Gibson *supra* note 104 at 3.

¹⁰⁶ UN *Guiding Principles on Business and Human Rights- Implementing the United Nations “Protect, Respect and Remedy” Framework*, OHCHR, UN Doc HR/PUB/11/04, (2011) at 14-27 online: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁰⁷ Faris Natour, Jessica Davis Pluess “Conducting an Effective Human Rights Impact Assessment: Guidelines, Steps and Examples” Business for Social Responsibility (BSR) Report (March 2013) at 5 online: www.bsr.org/reports/BSR_Human_Rights_Impact_Assessments.pdf [BSR Report]

¹⁰⁸ “A leader in corporate responsibility since 1992, BSR works with its global network of nearly 300 member companies to develop sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. With offices in Asia, Europe, North and South America, BSR uses its expertise in the environment, human rights, economic development and governance and accountability to guide global companies toward creating a just and sustainable world”. See BSR Report *supra* note 107 at 3.

¹⁰⁹ Vulnerable groups include women, children, racial and ethnic minorities, migrants and non-citizens, refugees, indigenous people and those living in extreme poverty. See John Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Health and Sustainable Environment*, John Knox: Mapping Report, UNHRC, (30 December, 2013) UN Doc A/HRC/25/53 at para 36 online: United Nations Mandate on Human Rights and the Environment <http://ieenvironment.org>. This mapping report was presented to the UN Human Rights Council in March 2014. [Mapping Report]

to simplify the “complexity of managing human rights by providing companies with a consistent, efficient, and systematic way to identify, prioritize, and address human rights risks and opportunities at a corporate, country, site or product level.”¹¹⁰ The BSR report identifies ways in which companies are already prioritizing and addressing relevant human rights issues, such as “by enacting nondiscrimination policies, enforcing supplier codes of conduct and factory audits, conducting site-level social impact assessments, and engaging with communities”.¹¹¹ When a corporation engages in all of this, it helps to strengthen their reputation, prevent legal or financial risk, and also demonstrate their leadership and management standards. HRIA to date has not been implemented in legislation in either Canada or Nigeria.

2.3.4. Conclusion

EIA may be used for all projects but there are other tools that may be used for the integration of broader policy issues in environmental matters, including sustainability and human rights concerns. EIA is primarily focused on environmental protection, and these other tools have to date been less internalized into decision-making procedures and legislation than EIA. However, they can be regarded as complementary tools to EIA.

2.4. International Framework on Environmental Impact Assessment

Article 38(1) of the Statute of the International Court of Justice lists the sources of international law and by extension the sources of international environmental law. These includes: international conventions, international customs, general principles of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations.¹¹²

¹¹⁰ BSR Report, *supra* note 107 at 5.

¹¹¹ *Ibid.*

¹¹² See United Nations, *Statute of the International Court of Justice*, 18 April 1946, International Court of Justice, Art 38 (1), online: <http://www.icj-cij.org/documents/?p1=4&p2=2>

These sources are regarded as “hard law”, which means they are legally binding.¹¹³ However, it should be noted that general principles derive their legitimacy from their recognition by States and also, judicial decisions and teachings of highly qualified publicists are mostly regarded as subsidiary sources and are only referred to when treaties, customary rule of international law and applicable general principles do not provide the full answer.¹¹⁴ Another category of international law is referred to as “soft law” which indicates that this category of law is not legally binding until States intend it to be.¹¹⁵ However, soft law can over time transform into hard law through practice and acceptance by States.¹¹⁶ Examples of soft law include: resolutions, declarations, principles, agendas, articles, and guidelines.¹¹⁷

EIA concepts are supported at the international level and are enshrined in a number of sources of international law. In the mid-1980s, the environmental assessment process “was recognized globally as an important tool for sustainable development.”¹¹⁸ Indeed, it was one of eight proposed general principles, rights and responsibilities contained in Annex 1 of the 1987 Brundtland Report.¹¹⁹ The Brundtland Report is important because it presented a novel concept—sustainable development which shaped the attitude of the international community, national

¹¹³ See Ved Nanda & George (Rock) Pring, *International Environmental Law for the 21st Century* 2.2.1. (Transnational Publishers, forthcoming 2002) as cited in George R. Pring and Susan Y. Noe “The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development” in Donald Zillman, Alastair Lucas and George (Rock) Pring eds, *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources*. (New York: Oxford University Press, 2002) 11 at 27.

¹¹⁴ See Olawuyi, *supra* note 3 at 62.

¹¹⁵ Pring and Noe *supra* note 59 at 27.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Doelle *supra* note 1 at 39.

¹¹⁹ G. Brundtland, ed, *Our Common Future: Report of the World Commission on Environment and Development* (Oxford University Press, 1987) at Annex 1, Principle 5 at 348.

governments and businesses in giving priority to economic, social and environmental development.¹²⁰

2.4.1. 1987 United Nations Environment Program Goals and Principles of Environmental Impact Assessments¹²¹

In 1987, the governing council of the UNEP adopted certain guidelines and principles via its resolution 14/25-Environmental Impact Assessment and recommended them to be considered as a basis for environmental impact assessments.¹²² These were later endorsed by the United Nations General Assembly. One of the goals as provided in the UNEP resolution is to “ensure that before competent authorities undertake or authorize any activities that are likely to significantly affect the environment, they fully take the environmental effects of the activities into account.”¹²³

2.4.2. 1991 Espoo Convention

The *1991 Convention on Environmental Impact Assessment in a Transboundary Context*¹²⁴ focuses on environmental impacts across national borders. The Convention is the most comprehensive international agreement on EIA, by laying down the general obligation of States to notify and consult each other on all major projects under consideration that are likely to have a significant adverse environmental impact across boundaries.¹²⁵

¹²⁰ Kaj Barlund, “Sustainable Development- Concept and Action” (2004) United Nations Economic Commission online: http://www.unece.org/oes/nutshell/2004-2005/focus_sustainable_development.html ; M-C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004).

¹²¹ United Nations Environment Programme (UNEP), Guidelines of 1987 on Goals and Principles of Environmental Impact Assessment, UN Doc UNEP/Z/SER.A/9 (1987) online: <http://www.unep.org/regionalseas/publications/reports/RSRS/pdfs/rsrs122.pdf>

¹²² Olawuyi, *supra* note 3 at 181.

¹²³ *Ibid.*

¹²⁴ See the Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991 U.N.T.S 309, online: http://www.unece.org/env/eia/about/eia_text.html [Espoo Convention].

¹²⁵ *Ibid.*

The context for the Convention is a general commitment by member States to “take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”¹²⁶ Article 2(2) of the Convention establishes the trigger for a transboundary EIA process. It requires Parties to carry out an EIA process for projects listed in Appendix 1 of the Act that are likely to cause significant adverse transboundary impacts.¹²⁷ Such projects include: crude oil refineries, oil and gas pipelines, storage facilities for oil, gas and chemicals amongst other things.¹²⁸ Once it is clear that the EIA process under the Convention is triggered, the following procedural requirements apply. The Convention places an obligation to notify other Parties affected by providing some basic information about the proposed activity, the potential transboundary environmental impacts, the EIA process, and the decision under consideration.¹²⁹ The Convention requires individual Parties to inform its citizens of the process.¹³⁰

The Espoo Convention was amended at the second meeting of the Parties held on February 27, 2001 in Sofia, Bulgaria. As a result of the amendment, countries outside the United Nations Economic Commission for Europe (UNECE) region were allowed to become parties to the Convention.¹³¹ Canada became a party to the *Espoo Convention* on 13 May, 1998 but Nigeria is not a party.¹³²

¹²⁶ Espoo Convention *supra* note 124, Article 2(1).

¹²⁷ *Ibid*, Article 2(2).

¹²⁸ *Ibid*, Appendix 1 of the *Espoo Convention*.

¹²⁹ Doelle, *supra* note 1 at 42.

¹³⁰ Espoo Convention *supra* note 124, Article 3.

¹³¹ Olawuyi *supra* note 3 at 185.

¹³² See the United Nations Economic Commission for Europe (UNECE) Treaty Handbook online: <http://www.unece.org/env/eia/ratification.html>

2.4.3. 1992 Rio Declaration on Environment and Development

The *1992 Rio Declaration on Environment and Development* (“Rio Declaration”)¹³³ is an important declaration that clearly spells out the rights of people to be involved in developing and safeguarding their environment. Principle 17 of the Rio Declaration states that “environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.” Both Nigeria and Canada have endorsed the *Rio Declaration*.¹³⁴

In addition to recognizing the importance of the EIA process, the Rio Declaration affirmed a number of principles that have become central to the EIA process generally.¹³⁵ For example, Principle 10 provides for the participatory principle (access to information, right to participate and effective access to judicial proceedings in environmental issues) which will be discussed in the next chapter. Principle 15 of the Rio Declaration acknowledges the importance of the precautionary principle by providing:

In order to protect the environment, the precautionary principle shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹³⁶

The nexus between this principle and the EIA process is that both are focused on prevention. The precautionary principle and the EIA process aim to prepare for potential threats

¹³³ See the United National General Assembly, Annex 1, Report of the United Nations Conference on Environment and Development, UNEP, UN Doc A/CONF.151/26 9 Vol 1), (1992), online: <http://www.un.org/documents/ga/conf15126-1annex1.htm> [The Rio Declaration]

¹³⁴ *Ibid.*

¹³⁵ Doelle *supra* note 1 at 39-40.

¹³⁶ The precautionary principle is mostly applied when environmental problems “are difficult to define due to scientific uncertainty.” See Olawuyi *supra* note 3 at 227.

that may affect human beings and the environment as a result of developmental projects most especially oil and gas projects.

2.4.4. 1992 Convention on Biological Diversity

The *Convention on Biological Diversity* (“CBD”) also requires States to carry out environmental impact assessments in specified circumstances.¹³⁷ Article 14 of the Convention requires parties to introduce appropriate procedures requiring environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures. The Convention also places an obligation on “parties to introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.”¹³⁸

The Convention establishes certain guidelines which specifically describe the EIA process as a process “of evaluating the likely environmental impacts of a proposed project or development, taking into account inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.”¹³⁹ Nigeria and Canada are parties to the Convention.¹⁴⁰

2.4.5. 1992 United Nations Framework Convention on Climate Change¹⁴¹ (UNFCCC)

As identified in Chapter 1, the UNFCCC also requires an impact assessment of the measures been taken to mitigate or adapt to climate change. To this effect, it requires parties to:

¹³⁷ See Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79, 31 I.L.M 818 available online: <http://www.cbd.int/convention/text/> [Convention on Biological Diversity]

¹³⁸ Olawuyi, *supra* note 3 at 180.

¹³⁹ *Impact Assessment: Voluntary Guidelines on Biodiversity-inclusive Impact Assessment*, UNEP/CBD/COP/8/28, online: CBD <http://www.cbd.int/decisions/cop-08.shtml?m=cop-08> at para 5.

¹⁴⁰ Convention on Biological Diversity *supra* note 137 online: <https://www.cbd.int/information/parties.shtml>

¹⁴¹ *1992 United Nations Framework Convention on Climate Change* (Adopted 9 May 1992, came into force 21 March 1994) 1771 UNTS 107 [UNFCCC].

take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.¹⁴²

2.5. International Judicial Decisions

International Courts have also considered the importance of EIA specifically in transboundary matters. This section will briefly examine international decisions that have established general obligations concerning EIA of projects. In *Nicaragua v. Costa Rica*,¹⁴³ Costa Rica alleged that Nicaragua breached its obligation to carry out an adequate transboundary EIA taking account all potential significant adverse impacts on the territory of Costa Rica in the construction of a road in Costa Rica along the San Juan River. The International Court of Justice (ICJ) after carefully considering the evidence, including reports and testimony given by experts concluded that the dredging programme would not lead to significant transboundary harm, and therefore, would not require a transboundary EIA to be carried out by Nicaragua.¹⁴⁴ In arriving at its decision in this case, the ICJ made reference to the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*¹⁴⁵ where it emphasized that

It may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial

¹⁴² UNFCCC *supra* note 141, Article 4 (1) (f).

¹⁴³ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* 2015 ICJ Nos 150 and 152 [*Nicaragua v. Costa Rica*].

¹⁴⁴ *Ibid* at 46.

¹⁴⁵ ICJ Reports 2010 (1), p.83, para. 204.

activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.¹⁴⁶

Although the language used in the decision refers to industrial activities, it is to be noted that this principle applies generally to projects which may significantly have adverse impact in a transboundary context.¹⁴⁷ To this effect, a State has the obligation to notify the potential affected State and carry out appropriate measures to mitigate the harm before embarking on an activity that has the potential to adversely affect the environment of the affected States.

The above decisions show the commitment of the international community in ensuring that EIAs for projects with a risk of transboundary harm have been carried out. However, in order for this commitment to attain its effectiveness, this thesis argues that the ICJ and international tribunal need to impose stringent punishments on States who fail to meet this obligation. To this effect, Philippe Sands et al acknowledged that there is the urgent need for “acceptable international guidelines that specify the content of any assessment that is to be carried out in advance of a project that might cause significant transboundary effects.”¹⁴⁸

2.6. Conclusion

The international sources as discussed above specifically have had an impact on the EIA process in different countries. For example Doelle noted that the *Espoo Convention* was directly responsible for sections 46 to 48 of the *Canadian Environmental Assessment Act of 1995*.¹⁴⁹ The international perspective is important as it serves as a useful interpretive aid in helping to

¹⁴⁶ ICJ Reports 2010 (1), p.83, para. 204.

¹⁴⁷ *Ibid.*

¹⁴⁸ Philippe Sands and Jacqueline Peel, with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental law* 3rd ed (New York: Cambridge University Press, 2012) at 622.

¹⁴⁹ CEAA 1992 *supra* note 67; Doelle *supra* note 1 at 46.

understand differing domestic laws.¹⁵⁰ In addition, as Doelle noted, “international law can offer guidance on how to design or implement EA processes effectively;”¹⁵¹ and, “EA is potentially a powerful tool for the implementation and compliance with international environmental obligations.”¹⁵² In summary, the international framework on EIA provides lessons and principles which Nigeria and Canada can draw upon to improve their EIA systems.

¹⁵⁰ Doelle, *supra* note 1 at 47.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

Chapter 3

Public Participation: An Overview

3.1. Introduction

The growth of public participation law and practice is one the most significant occurrences in oil and gas development in the 21st century. Participation begins with informing the public about a proposed activity which may likely have impacts on their environment. The information is meant to enable the public to prepare themselves to participate effectively during the decision-making process. Public participation has proven to be successful to enhancing the sustainability of natural resources by achieving an effective environmental impact assessment process.¹⁵³ The role of the public in achieving environmental protection and sustainable development has become increasingly recognized among governments at both the domestic and international levels owing to the fact that people are seeking to be informed about matters that affect them and there is also the urge to participate and influence decisions that affect them.

Public participation is a key element in the environmental impact assessment (EIA) process, as incorporating public knowledge improves the quality of decisions.¹⁵⁴ Although much has been said on the positive benefits of public participation, there are some scholars (and of course some governments and development interests) who argue against it. For example, one legal scholar has identified the following criticisms that have been leveled against public participation in environmental decision-making:

- (a) “the public is emotional and ill-equipped to deal with technical matters; (b) participation programmes demand large amounts of time and administrative

¹⁵³ Pring & Noe *supra* note 59 at 12.

¹⁵⁴ *Ibid*; The terms ‘public consultation’ and ‘public participation’ will be used interchangeably in this thesis to discuss the role of the government to consult the public in environmental matters, and also to examine the right of the public to participate in environmental matters.

resources; (c) environmental decisions require the compilation of enormous amounts of data which can overwhelm lay participants; (d) special interest groups promoting views that are opposed to public opinion on environmental matters are particularly powerful; (e) public interest groups can create a ‘free-rider problem’, reducing the amount of direct participation by individuals who choose to pay membership dues and allow organized groups to participate on their behalf; (f) participants tend to be from upper socio-economic classes, leading to charges of elitism; (g) public participation can lead to citizen frustration and increase distrust of the government, especially if participants do not achieve their goals’.¹⁵⁵

However, this thesis argues that irrespective of the criticisms leveled against public participation, on a large scale, it has yielded a positive outcome whenever it has been utilized thereby outweighing its drawbacks or criticisms.

This chapter will examine public participation from two approaches: the international law approach, and the stakeholder approach. Section 3.2 of this chapter examines the international framework with respect to public participation requirements relevant to the EIA process, most significantly the *Aarhus Convention*.¹⁵⁶ Section 3.3 examines the relationship between public participation and human rights; section 3.4 examines the term “public” from the international perspective which includes categories of persons such as Environmental NGOs, women and youth. Section 3.5 concludes by arguing that though it is generally agreed that public participation is important, more still needs to be done in terms of achieving an effective public involvement in the EIA process. It lays out the challenges that weakens the effective participation of the public in the EIA process and stresses that there is a need for government, the private sector and the public to work together in ensuring environmental protection and

¹⁵⁵ Nancy Spyke, “Public Participation in Environmental Decision-Making at the New Millennium: Structuring New Spheres of Public Influence” (1999) 26 *Boston College Environmental Affairs Law Review* 263 at 273-75, 292-94.

¹⁵⁶ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, (28 June 1998), 2161 UNTS 447, online: <<http://www.unece.org/env/pp/treatytext.htm>> [Aarhus Convention].

management. Identifying and involving an appropriate range of stakeholders is crucial to the success of the EIA process.

3.2. International Framework on Public Participation

Prior to the mid-1970s, it was rare for members of the public to have any input in decisions affecting their environment or communities. However, public participation provisions were widely incorporated into EIA between the early 1970s and early 1990s.

Public Participation concepts are given recognition at the international level and are enshrined in a number of treaties and agreements. As a consequence, the public has an opportunity to participate in decisions internationally, not just domestically that affect their living conditions. Some of the most prominent instruments embodying Public Participation include the *1972 Stockholm Declaration on the Human Environment*,¹⁵⁷ *1982 World Charter for Nature*,¹⁵⁸ the *1991 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*,¹⁵⁹ the *1992 Rio Declaration on Environment and Development*,¹⁶⁰ and the *Aarhus Convention*.¹⁶¹ These international instruments will be briefly examined, with the aim of identifying how the international framework has improved over the years in recognizing and giving support to public participation in environmental matters.

¹⁵⁷ See the Stockholm Declaration on the Human Environment, UN Doc A/CONF48/Rev.1, (1972) online: UNEP <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503> [The Stockholm Declaration].

¹⁵⁸ See the World Charter for Nature, GA res 37/7 (annex), UN GAOR, 37th sess, supp no 51 at 17, UN doc A/37/51 (1982), 22 ILM 455 (1983), arts 16 and 23, online: unchr.org <http://www.unhcr.org/refworld/docid/3b00f22a10.html> [World Charter for Nature].

¹⁵⁹ Espoo Convention *supra* note 124.

¹⁶⁰ Rio Declaration *supra* note 133.

¹⁶¹ Aarhus Convention *supra* note 156.

3.2.1. The 1972 Stockholm Declaration

Public Participation was yet to gain recognition at this period of time and consequently the *Stockholm Declaration* recognizes public involvement only in its preambles.¹⁶² The preamble to the *Stockholm Declaration* provides that

To defend and improve the human environment for present and future generations has become an imperative goal for mankind...To achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields...will shape the world environment for the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action....¹⁶³

It further emphasizes in its Principle 1, the *Stockholm Declaration* provides that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and wellbeing”.¹⁶⁴

3.2.2. 1982 World Charter for Nature (“WCN 1982”)

The year 1982 can be described as a “watershed year for public participation in environmental issues”, as there was an evolution from the term ‘should’ to ‘shall’ which clearly made public participation a mandatory requirement in the *World Charter for Nature*.¹⁶⁵ By the 1980s, public participation became more widely accepted and acknowledged. The *World Charter for Nature* was adopted widely by the UN General Assembly¹⁶⁶ and it can be regarded as one of the earliest mandatory requirements for public participation in environmental decision-making:

¹⁶²Pring & Noe *supra* note 59 at 39.

¹⁶³ Stockholm Declaration *supra* note 157, 6th and 7th preambles.

¹⁶⁴ *Ibid*, Principle 1.

¹⁶⁵ Pring & Noe *supra* note 59 at 39.

¹⁶⁶ *Ibid*.

All planning **shall** include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements **shall** be disclosed to the public by appropriate means in time to permit effective consultation and participation [emphasis added].¹⁶⁷

Also, Article 23 “provides for the right of persons to have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation”.¹⁶⁸

3.2.3. 1991 Espoo Convention

The Espoo Convention is also of importance in this discussion because it provides for rights of public participation which are transboundary in nature thereby giving opportunity to the public in the potentially affected State to participate and influence decisions about activities proposed to be conducted in the host State.¹⁶⁹

The Party of origin **shall** provide...an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and **shall** ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin [emphasis added].¹⁷⁰

3.2.4. 1992 Rio Declaration on Environment and Development

Principle 1 of the *Rio Declaration* provides that “human beings are at the centre of concerns for sustainable development, and are entitled to a healthy and productive life in

¹⁶⁷ World Charter for Nature *supra* note 158, art. 16.

¹⁶⁸ *Ibid*, Article 23.

¹⁶⁹ Pring & Noe, *supra* note 59 at 41.

¹⁷⁰ Espoo Convention, *supra* note 124, art 2(6).

harmony with nature.”¹⁷¹ The important acknowledgement and endorsement of public participation is contained in Principle 10 of the *Rio Declaration* which provides that “environmental issues are best handled with participation of all concerned citizens, at the relevant level and at the national level, each individual **shall** [emphasis added] have the opportunity to participate in decision-making processes.”¹⁷² This entails “appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”¹⁷³ The Declaration also provides that States are to facilitate and encourage public awareness and participation by making information widely available.¹⁷⁴

3.2.5. 1998 Aarhus Convention

The virtues of public participation were further reflected in the *1998 Aarhus Convention* which is regarded as the most far-reaching and detailed environmental treaty on public participation to date. This Convention recognizes that improved access to information and public participation in decision-making “enhances the quality and implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns.”¹⁷⁵ The aim of the *Aarhus Convention*, “to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment”¹⁷⁶, reflect other intended positive consequences of increased public participation.

¹⁷¹ Rio Declaration *supra* note 133.

¹⁷² *Ibid*, principle 10.

¹⁷³ Olawuyi *supra* note 3 at 212.

¹⁷⁴ Rio Declaration *supra* note 133, Principle 10.

¹⁷⁵ Aarhus convention, *supra* note 156, 9th preamble.

¹⁷⁶ *Ibid*, 10th preamble.

The *Aarhus Convention* was adopted under the auspices of the United Nations Economic Commission for Europe in 1998. It has its foundation in Principle 10 of the *Rio Declaration* and Principle 1 of the *Stockholm Declaration*.¹⁷⁷ It covers the rights of the public to take part in decision-making and to influence the final decision on whether an activity or project should move ahead.¹⁷⁸ It further emphasizes the rights of citizens to participate in environmental issues and obliges States parties to collect and publicly disseminate information on policies relating to the environment.¹⁷⁹

Article 3(9) provides that “the public **shall** [emphasis added] have the opportunity to participate in decision-making ‘without discrimination as to citizenship, nationality or domicile and in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities’”. The public concerned is defined as those “affected or likely to be affected by, or having an interest in, the environmental decision-making”¹⁸⁰ Significantly, environmental NGOs are automatically deemed to have an interest in any environmental decision-making.¹⁸¹ Article 7 also provides that each Party to the Convention “**shall** [emphasis added] make appropriate practical provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public”.¹⁸²

The consequence of the Convention is that States are required to provide for public participation before any decisions have been made,¹⁸³ encourage prospective applicants to engage in dialogue with the public even before applying for a permit from the body in charge of

¹⁷⁷ Olawuyi, *supra* note 3 at 212.

¹⁷⁸ Aarhus Convention *supra* note 156, Article 3 (9).

¹⁷⁹ *Ibid*, Article 6.

¹⁸⁰ *Ibid*, art 2(5).

¹⁸¹ *Ibid*.

¹⁸² *Ibid*.

¹⁸³ *Ibid*, art 6(4).

issuing such permits,¹⁸⁴ provide the public with relevant information,¹⁸⁵ and allow the public to submit comments, information, analyses, and opinions, either in writing or at a public hearing or inquiry.¹⁸⁶

3.2.6. Conclusion

From the above discussion on the international framework on public participation, it can be seen that there has been a significant development in recognizing the rights of the public to participate in matters that pertain to their environment. Nigeria and Canada have both endorsed the *Stockholm Declaration*,¹⁸⁷ *World Charter for Nature*¹⁸⁸ and the *Rio Declaration*.¹⁸⁹ Canada is a party to the *Espoo Convention* but Nigeria is not a party.¹⁹⁰ It is quite sad to note that neither country is a party to the *Aarhus Convention* which contains the broadest and most detailed requirements to date for public participation.¹⁹¹

The international legal framework on public participation provides a platform for Nigeria and Canada to develop a viable legislative framework for public participation. Focusing on international prescriptions helps to identify gaps in existing domestic laws as well as alternatives. As Nwapi argues, “in a world that is becoming increasingly interconnected, domestic laws, however well-informed, may be based solely on parochial interests to the detriment of other

¹⁸⁴ Aarhus Convention *supra* note 156, art 6(5).

¹⁸⁵ *Ibid*, art 6(6).

¹⁸⁶ *Ibid*, art 6(7).

¹⁸⁷ See UNEP, Stockholm Declaration online:

<http://chm.pops.int/Countries/StatusofRatifications/PartiesandSignatories/tabid/4500/Default.aspx>

¹⁸⁸ World Charter for Nature *supra* note 158.

¹⁸⁹ Rio Declaration *supra* note 133.

¹⁹⁰ See the United Nations Economic Commission for Europe (UNECE) Treaty Handbook online:

<http://www.unece.org/env/eia/ratification.html>

¹⁹¹ Aarhus Convention *supra* note 156.

countries and the international community as a whole, if they fail to reckon with international standards.”¹⁹²

3.3. The Relationship between Public Participation and Human Rights

From the human right perspective, “all human beings depend on the environment and are entitled to a safe, clean, healthy and sustainable environment.”¹⁹³ There is a link between a clean and healthy environment and the basic human rights of persons such as right to life and right to health; and as such if the environment is not adequately taken care of, such basic human rights would be threatened. The opportunity given to people to learn and participate in decisions that will invariably affect them will have the effect of ensuring that such decisions clearly reflect the people’s need for a sustainable environment.¹⁹⁴ The international human rights law instruments that support participatory rights in decision-making are the *Universal Declaration of Human Rights* (Article 21)¹⁹⁵ and the *International Covenant on Civil and Political Rights* (Article 25).¹⁹⁶

¹⁹² Nwapi *supra* note 57 at 186.

¹⁹³ United Nations, Human Rights Office of the High Commissioner online: <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx>

¹⁹⁴ *Ibid.*

¹⁹⁵ (a) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives

(b) Everyone has the right to equal access to public service in his country

(c) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. See Article 21 of the *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

¹⁹⁶ Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country. See Article 25 of the *International Covenant on Civil and Political Rights*, UN General Assembly, 16 December 1966, United Nations Treaty Series, vol. 999, p.171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

Consequently, the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, healthy and Sustainable Environment, Professor John Knox provided an authoritative mapping of environmental rights which dealt extensively with procedural and participatory rights with respect to certain groups of people who are vulnerable to environmental harm.¹⁹⁷ The Independent Expert noted that human rights law imposes certain procedural obligations on States in relation to environmental protection. They include “duties (a) to assess environmental impacts and make environmental information public; (b) to facilitate public participation in environmental decision-making, including by protecting the rights of expression and association; and (c) to provide access to remedies for harm.”¹⁹⁸ Furthermore, Knox noted that in 2012, in *The Future We Want*, the outcome document of the United Nations Conference on Sustainable Development, States recognized that “opportunities for people to influence their lives and future, participate in decision-making and voice their concerns are fundamental for sustainable development”.¹⁹⁹

The process of public participation also has a baseline in the efforts aimed at minimizing the adverse effects of climate change. It can be argued that the public has a right to participate in the climate process primarily because the outcomes of such processes are largely felt by them. Similarly, Article 6 (a) of the UNFCCC requires its parties to promote and facilitate public participation, and the UN General Assembly has recognized “the need to engage a broad range of stakeholders at the global, regional, national and local levels, including national, sub-national and local governments, private businesses and civil society, and including youth and persons

¹⁹⁷ See Mapping Report *supra* note 109 at para 36.

¹⁹⁸ *Ibid* at para 29 ; Professor John Knox was first appointed in August 2012 as the Independent Expert on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. He was later appointed in March 2015 as a Special Rapporteur, a position which he currently holds.

¹⁹⁹ See the *Report of the United Nations Conference on Sustainable Development A/CONF.216/16*, Rio de Janeiro, Brazil 20-22 June 2012 online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/461/64/PDF/N1246164.pdf?OpenElement>

with disabilities, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change”.²⁰⁰ To this effect, Knox argues that “all States should ensure that their laws provide for effective public participation in climate and other environmental decision-making, including by marginalized and vulnerable groups, and that they fully implement their laws in this respect”.²⁰¹ Thus, decisions on climate mitigation must not be taken without giving a huge consideration to the views of the people who would be affected by such projects thereby adhering to an informed participation process.

To be effective, the public participation process must include the provision of vital information to the affected public in a manner that enables them to understand and respond to the situation. Such process could include detailed information about the project, the likely effects the project will have on their environment and also their livelihood, alternatives to such projects, and in relation to climate mitigation, ways in which such adaptation processes will be carried out and its attendant effects. Vital information must not only be provided to the public but also real opportunities for their views to be heard and to influence the decision-making process must be provided. In furtherance of this, Knox in 2016 climate report argues that “to try to repress persons trying to express their views on a climate-related policy or project, whether they are acting individually or together with others, is a violation of their human rights.”²⁰²

In ensuring that public participation attains its full potentiality, local institutions need to be given the requisite capacity to function. In furtherance of this, the *International Labour*

²⁰⁰ General Assembly resolution 67/210, para 12.

²⁰¹ See Climate Change Report *supra* note 38 at 15.

²⁰² *Ibid* at 16.

*Organization (ILO) Convention 169*²⁰³ recognizes that effective participation requires the strengthening of local institutions. This is based on the notion that the aim of public participation will not be achieved if local institutions lack the requisite ability to function due to lack of funds and resources. The process of public participation requires a lot of funds in terms of setting up a venue, arranging logistics amongst other things; to this effect, local institutions need to be financially empowered in order to achieve a successful public participation process. Thus, the ILO Convention obliges States to establish means by which indigenous institutions can be strengthened and, in appropriate cases, to provide the necessary resources.²⁰⁴ The existence of the ‘participant funding’²⁰⁵ scheme is a direct effect of this provision.²⁰⁶ Such a scheme is designed to “redress the financial imbalance among parties and support full and effective public participation,²⁰⁷ and help financially challenged affected parties have access to the participation mechanism.”²⁰⁸ The rationale behind this scheme is that indigenous and local people are often the poorest of society and, without some form of financial assistance or incentive, many of them will be unable to adequately make good use of participation opportunities offered to them.

3.4. Definition of the “Public”²⁰⁹

This next section briefly addresses *who constitutes the categories of stakeholders entitled to participate* in the EIA process. An analysis of international legal instruments indicates that there are five possible broad categories of stakeholders: (1) indigenous people; (2) local

²⁰³ See the International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), 27 June 1989, 72 ILO Official Bulletin 59, 48 ILM 1389 (1989). [ILO Convention]

²⁰⁴ *Ibid*, art 6 (1) (c).

²⁰⁵ Participant funding provides an avenue for the public to be financially empowered in terms of their cost of transportation, their feeding and other expenses that might inhibit their full participation in the EIA process. This will in turn greatly produce an effective EIA process.

²⁰⁶ Nwapi, *supra* note 57 at 201.

²⁰⁷ Lucas *supra* note 57 at 322.

²⁰⁸ *Ibid*.

²⁰⁹ For the purpose of this chapter, the word “stakeholders” will be used to refer to “the public”.

communities; (3) women (4) youths and (5) environmental non-governmental organizations (ENGOs).²¹⁰ The rationale for specifically including these marginalized groups, as Michael Anderson argues, “is the moral view that marginalized groups should have a say in environmental decision-making because they suffer most from environmental degradation”.²¹¹ John Knox also noted that “environmental damage is felt most acutely by those segments of the population already in vulnerable situations”.²¹² Each of these groups will be briefly discussed.

a) Indigenous peoples

Their close relationship with the environment makes indigenous people particularly vulnerable to impairment of their rights through environmental harm. As the former Special Rapporteur (James Anaya) on the rights of indigenous peoples has stated, “the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide and possibly also the most pervasive source of the challenges to the full exercise of their rights.”²¹³ In his report, the Special Rapporteur described in detail the duties of States to protect the rights of indigenous people. However, only a few of the main points will be outlined here.

Firstly, States have a duty to recognize the rights of indigenous peoples with respect to the territory that they have traditionally occupied, including the natural resources on which they rely. Secondly, States are obliged to facilitate the participation of indigenous peoples in decisions that concern them. The Special Rapporteur has stated that the general rule is that “extractive activities should not take place within the territories of indigenous peoples without their free,

²¹⁰ Nwapi, *supra* note 57 at 194.

²¹¹ MR Anderson, “Human Rights Approaches to Environmental Protection: An Overview” in AE Boyle and MR Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 1 at 9.

²¹² See Mapping Report *supra* note 109 at 7.

²¹³ See the United Nations Human Rights Council, *UN Human Rights Council: Report of the Special Rapporteur on the Rights of Indigenous Peoples*, 11 July 2011, A/HRC/18/35, para. 57 online at: http://www.ohchr.org/.../A-HRC-18-35_en.pdf [Indigenous Peoples Report]

prior and informed consent,” subject only to narrowly defined exceptions.²¹⁴ Thirdly, before development activities on indigenous lands are allowed to proceed, States must provide for an assessment of the activities’ environmental impacts. Fourthly, States must guarantee that the indigenous community affected receives a reasonable benefit from any such development. Finally, States must provide access to remedies, including compensation, for harm caused by the activities.

Principle 22 of the *Rio Declaration* recognizes the participatory right of indigenous people and provides:

Indigenous people and their communities and other local communities have a vital role to play in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.²¹⁵

The World Bank²¹⁶ notes that in the past indigenous peoples “have often been on the losing end of the development processes”.²¹⁷ In many instances, development of mineral, energy, and other resources on lands occupied by indigenous peoples has resulted in devastating environmental and social impacts for them²¹⁸, “while the financial benefits of such development have gone to others.”²¹⁹ Even in cases in which “development has been designed specifically to

²¹⁴Indigenous Peoples Report *supra* note 213 at para. 27.

²¹⁵ See Rio Declaration *supra* note 133, principle 22.

²¹⁶ This is a relevant institution in this discussion because it plays a significant role in financing developmental projects that inadvertently affect the environment. The World Bank provides loans and development assistance to middle-income countries and creditworthy poorer countries.

²¹⁷ See THE WORLD BANK PARTICIPATION SOURCEBOOK (1995). Environment Department papers; no. 19.

Participation series. Washington, DC: World Bank, available online: http://www-wds.worldbank.org/servlet/WDSContentServer/IW3P/IB/1996/02/01/000009265_3961214175537/Rendered/PDF/multi_page.pdf [World Bank].

²¹⁸ Examples of such environmental impacts ranges from pollution of waters, destruction of aquaculture, vegetation and agricultural land during petroleum operations with no concerned effort by the government and oil operators to control environmental problems associated with the industry.

²¹⁹ World Bank, *supra* note 217 at 251.

improve the situation of indigenous peoples, for example by the creation of jobs, the paternalistic approach typically used, seeking the cultural assimilation of indigenous peoples and ignoring their knowledge and interest, has often served to worsen, rather than improve, their economic, social and cultural well-being.”²²⁰

Consequently, it can be argued that the participation of indigenous peoples provides a means of improving the quality of projects and also serves to avoid many potentially costly problems later on such as project opposition and development-site protests, reputational damage of the oil company, loss of financing and insurance, and potentially successful litigation.

b) Local Communities

Local communities have also been accorded recognition for the significant role they play in the EIA process.²²¹ The rationale behind this recognition is that federal governments (and even local governments) have often operated unilaterally without engaging or considering the interests of local communities.²²² Often times, “nationally approved mineral and energy projects, pipelines, timber contracts and dams have displaced local agriculturalists, wood cutters, subsistence hunters, nomads, even whole communities.”²²³ Local communities possess requisite knowledge of their environment that is vital to the conservation and sustainable use of resources and in the long run facilitates local adaptability.²²⁴ They, therefore, have a critical role to play in natural resource and environmental management and development.²²⁵

²²⁰ World Bank, *supra* note 217 at 251.

²²¹ This is because of the valuable knowledge which they possess as it pertains to the nature of land which they have been in possession of over the years.

²²² World Bank, *supra* note 217 at 251.

²²³ Pring & Noe, *supra* note 59 at 65. For example, in Nigeria over 200,000 Niger Deltans have been forcefully displaced from their homes due to oil spillage. See SERAC case *supra* note 14.

²²⁴ Nwapi, *supra* note 57 at 196.

²²⁵ *Ibid.*

Principle 22 of the *Rio Declaration* joins ‘other local communities’ with ‘indigenous people’ as equally worthy of being given a participatory role in environmental management and development. Notably, Article 8 (j) of the *Convention on Biological Diversity*²²⁶ provides that parties to the Convention should “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities....” This section reiterates the importance of involving local communities in environmental matters and also applying the knowledge of local communities.

c) Women

According to the World Bank, “experience in participatory development has made clear that, unless specific steps are taken to ensure the equal participation of men and women, women are often excluded”.²²⁷ The result of this is that certain projects will fail to meet the particular needs and interests of women. Furthermore, in construing the *Convention on the Elimination of All Forms of Discrimination against Women*²²⁸, the Committee on the Elimination of Discrimination (“the Committee”) against Women has emphasized that States should ensure that public participation in environmental decision-making, including with respect to climate policy, includes the concerns and participation of women.²²⁹ Taking into cognizance the substantive obligations to develop and implement policies to protect human rights from environmental harm, the Committee has called on States to ensure that the policies are aimed at protecting the rights of women to health, to poverty and to development.²³⁰ In addition, it urges States to conduct research on the adverse effects of environmental contamination on women, and to provide sex-

²²⁶ See *Convention on Biological Diversity supra* note 137.

²²⁷ THE World Bank, *supra* note 217 at 239.

²²⁸ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p.13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [CEDAW].

²²⁹ *Ibid*, sect. III.A.1.

²³⁰ Mapping Report, *supra* note 109 at 19.

disaggregated data on the effects.²³¹ The Committee also places an obligation on States to adopt and implement programmes accordingly where environmental harm has disproportionate effects on women.²³² Notably, some groups of women are particularly vulnerable to environmental harm for various reasons because they are poor, older, disabled and because of their minority status, which may give rise to the need for additional protection.²³³ For example, in its general recommendation No.27 (2010) on older women and protection of their human rights, the Committee found that they are particularly vulnerable to natural disasters and climate change (para.25), and stated that “States parties should ensure that climate change and disaster risk-reduction measures are gender-responsive and sensitive to the needs and vulnerabilities of older women.”²³⁴

The participation of women in environmental decision-making was strongly emphasized in the documents emerging from the Rio Summit. Principle 20 of the *Rio Declaration* provides that “women have a vital role in environmental management and development.”²³⁵ In a study of Nasarawa State, for example, Akwa Labaris has argued that “women, through their roles as farmers and as collectors of water and firewood, have a close connection with their local environment and often suffer most directly from environmental problems”.²³⁶ Labaris further noted that women’s close connection with their local environment has invariably produced their

²³¹ See CEDAW *supra* note 228, sect III.A.2 AND III B.

²³² Mapping Report, *supra* note 109 at 19.

²³³ *Ibid.*

²³⁴ See for example the recent legal petition filed by more than 450 women aged 65 and older enforcing the Swiss government to take stronger actions and steps on climate change policies. Jennifer Morgan, “Silver Power: Swiss Grannies challenge Government’s weak climate policies” (25 October, 2016) *Greenpeace International* (blog) online: <http://m.greenpeace.org/international/en/high/news/Blogs/makingwaves/swiss-grannies-challenge-government-on-climate/blog/57825/>

²³⁵ See Rio Declaration *supra* note 133, Principle 20.

²³⁶ Akwa Labaris, “Women Involvement in Environmental Protection and Management: A Case of Nasarawa State”, (2009) 10 *Journal of Sustainable Development in Africa* 179 at 179-180 [Labaris].

deep knowledge about the environment.²³⁷ Thus, women have served as agriculturalists²³⁸, water resources managers²³⁹, and traditional scientist, among others.²⁴⁰

In a Chinese study, the importance of women's role in environmental matters was traced to "their roles as home managers and their role in reproduction."²⁴¹ Chelala argues that "the reproductive system of pregnant women is especially vulnerable to environmental contaminants;"²⁴² and as such, toxic substances in the environment can alter every step in the reproductive process which may result in the increase rate of abortion, birth defects, fetal growth retardation and perinatal death.²⁴³ The effect of environmental changes on women was further reiterated by M. Ann Phillips. She explained that "while pollution and chemical exposure pose risks to the health of all people, it is likely that the ways in which women are exposed to environmental contaminants, and the effects of those exposures, differ from those of men".²⁴⁴

d) Youth

Principle 21 of the *Rio Declaration* recognizes the "creativity, ideals and courage of the youth of the world" and urges that those factors "should be mobilized to forge a global partnership" to achieve sustainable development.²⁴⁵ However, this provision does not urge

²³⁷ Labaris *supra* note 236 at 180.

²³⁸ "Women contribute to agricultural production as they produce more than half of all the food that is grown. In Asia, they provide fifty to ninety per cent of the labor force for rice cultivation. Women's roles in agriculture include: production and distribution, planting and cultivation, weeding, hoeing, harvesting and storage, marketing and home preparation and distribution of foods. In addition, 80% of African food is produced by women; 50% is planted by women, and 70% of the weeding and hoeing is done by women". See Labaris, *supra* note 236 at 182.

²³⁹ At the communal level, women are in charge of the control and management of communal taps or water points. At times they lock the taps to prevent children from damaging the water pipes. At the household level, the burden of fetching water for cooking and washing falls on the women and girls, while men control the water trade. See Labaris, *supra* note 236 at 181.

²⁴⁰ *Ibid* at 180.

²⁴¹ Cesar Chelala, "Women's role key to saving environment" *China Daily* (18 November 2011), online: http://www.chinadaily.com.cn/opinion/2011-10/18/content_13921111.htm [Chelala].

²⁴² *Ibid*.

²⁴³ *Ibid*.

²⁴⁴ M. Ann Phillips, "Wonderings on Pollution and Women's Health" in Dayna Nadine Scott ed, *Our Chemical Selves: Gender, Toxics, and Environmental Health*. (Vancouver: UBC Press, 2015) 31 at 40. [Phillips].

²⁴⁵ *Rio Declaration supra* note 133, Principle 21.

youths' participation in decision-making, as it does for citizens, women and indigenous peoples.²⁴⁶ Agenda 21²⁴⁷ is more explicit in recognizing and supporting youth participation in decisions that would affect their present and future lives, especially as it concerns their environment. Therefore, it devotes an entire chapter to 'Children and Youth in Sustainable Development' and does advocate for their participation:

It is imperative that youth from all parts of the world participate actively in all relevant levels of decision-making processes because it affects their lives today and has implications for their futures. In addition to their intellectual contribution and their ability to mobilize support, they bring unique perspectives that need to be taken into account.²⁴⁸

Recently, twenty-one (21) young people between the ages of 8-20 took the United States government to court over the failure to tackle climate change. The young people say they have a constitutional right to life, liberty and property and this is being violated because of the federal government's support of fossil fuels. If this suit is successful, it would be a stunning acknowledgement of the rights of young people to a clean environment in the future.²⁴⁹

e) Environmental Non-Governmental Organizations (ENGOS)

ENGOS are also significant participants in environmental and resource development-related decision-making.²⁵⁰ To this effect, it is important to note that international, regional, national, and even local organizations advocating for environmental, social and human rights, indigenous interests, local community values, property rights, good government, labour, safety,

²⁴⁶ *Rio Declaration supra* note 133, Principle 21.

²⁴⁷ AGENDA 21, 23.2 (1992). Approved by the UN Conference on Environment and Development (UNCED) at Rio De Janeiro, June 13, 1992. UN Doc. A/CONF.151/26 (vols I-III) (1992) available online: <http://sustainabledevelopment.un.org/index.php?page=view&nr=23&type=400&menu=35>

²⁴⁸ *Ibid*, ch.25.2.

²⁴⁹ Matthew Berger, "Teens Challenge US Government for not Protecting them from Climate Change" *THE GUARDIAN* (March 10 2016) online: <http://www.theguardian.com/us-news/2016/mar/09/climate-change-teens-sue-us-government-failing-protect>

²⁵⁰ George Pring, James Otto & Koh Naito, "Trends in International Environmental Law Affecting the Minerals Industry" (1999) 17 *Journal of Energy and National Resources Law*, 39 at 42.

and other viewpoints are now active or potential participants in energy and resource developments worldwide.²⁵¹ The degree of NGO influence and their role particularly in EIA process can be seen, for example, in Canada: *Pembina Institute for Appropriate Development v. Canada (Attorney General)*,²⁵² *Alberta Wilderness Association v. Cardinal River Coals Ltd.*²⁵³ and in Nigeria: *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*,²⁵⁴ *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*.²⁵⁵ Another cited example of the influence ENGOs have is how they contributed to drafting the *United Nations Framework Convention on Climate Change (UNFCCC)* at the Rio Earth Summit in 1992 by participating in government delegations, lobbying, building public pressure and contributing to content and structure of the negotiation text.²⁵⁶

The roles of ENGOs are not limited to serving as co-participants in decision-making; they also provide technical and legal capacity-building and other services which are aimed at increasing the participation of groups and most especially developing nations.²⁵⁷ An example is the Center for Science in Public Participation (CSPP), which provides appropriate training and technical advice to grassroots groups on matters of water pollution and development of natural resources, especially in the mining context.²⁵⁸ In addition to acting as participants in domestic environmental decision-making and policy-making processes, “ENGOs now often play a role in the making and implementing of international environmental law.”²⁵⁹ Kal Raustiala argues that

²⁵¹ Pring & Noe, *supra* note 59 at 68-69.

²⁵² 2008 FC 302.

²⁵³ 1999 CarswellNat 511(Fed. T.D.).

²⁵⁴ 2001 African Commission on Human and Peoples’ Rights Comm. No. 155/96.

²⁵⁵ 2010 African Commission on Human and Peoples’ Rights Comm. No. 338/07.

²⁵⁶ Edith Weiss, “The Rise or the Fall of International Law” (2000) 69 *Fordham Law Review* 345 at 350.

²⁵⁷ Pring & Noe, *supra* note 59 at 69.

²⁵⁸ See The Center for Science in Public Participation, available at <http://www.csp2.org>

²⁵⁹ Pring & Noe, *supra* note 59 at 69.

in recent years there have been a dramatic increase in the participation of ENGOs in the negotiation and implementation of international environmental agreements, “with ENGOs performing functions such as monitoring negotiations, distributing negotiation-related materials, providing technical data, drafting proposed treaty language, lobbying negotiators, acting as observers at treaty-related meetings, and monitoring treaty compliance”.²⁶⁰ This increase in ENGO involvement in international law-making and implementation has, in the words of one commentator, “changed the face of international environmental law”.²⁶¹

One argument in favour of increased ENGOs’ involvement in international environmental law-making and implementing is “supported by the fact that they are the only actors able to perform a crucial guardianship role, especially with respect to interest of the global commons and interest of future generations”.²⁶² The expectation as observed by Raustiala is that “ENGOs act as a voice for the voiceless and propel the substance of environmental law” in a more inclusive manner.²⁶³ To this effect, it can be argued that the role of ENGOs in EIA process cannot be sidelined.

3.5. Businesses as Stakeholders

Oil companies have a role to play in the EIA process as project proponents. Such roles include, notifying the other participants of the proposed project, duration of the project, health implications of the project and benefits the project would have on the community. By notifying the other participants, it helps participants to prepare adequately for upcoming consultation and also prevents conflicts between oil companies and local communities.

²⁶⁰ See Raustiala *supra* note 59 at 567.

²⁶¹ David Tolbert, “Global Climate Change and the Role of International Non-Governmental Organizations” in Robin Churchill & David Freestone eds, *INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE* (London: Graham & Trotman/Martinus Nijhoff, 1991) 95 at 108.

²⁶² Raustiala, *supra* note 59 at 567.

²⁶³ *Ibid.*

Oil companies are largely responsible for causing environmental degradation through oil spillage and gas flaring. Examples of such oil companies include Shell, Chevron, and Mobil. Notwithstanding this, oil and gas companies have also responded to the needs of local communities in a number of ways. Examples include: creation of employment which in turn improves the economy of the community and the nation at large; providing business opportunities, and contributing to common infrastructure. To this effect, multinational oil companies have entered into impact-benefit agreements with local communities. One of such agreements is the 2005 Global Memorandum of Understanding ('GMOU') executed by Chevron Nigeria Limited and host communities in the Niger Delta region of Nigeria where the company committed itself to providing benefits to local communities. The Shell Petroleum Development Company (Nigeria) has also followed this model.²⁶⁴ Corporations in Canada have also adopted this model. Examples include the Collaboration Agreement between the Northern Village of Pinehouse and Kineepik Metis Local Incorporation and Cameco Corporation and Areva Resources Canada Incorporation and also the Mary River Project Inuit Impact and Benefit Agreement.²⁶⁵ While these agreements create benefits for local communities, companies however, still engage in the act of degrading the environment through their activities which invariably undervalue the importance and strength of such benefit agreements.²⁶⁶ Commenting

²⁶⁴ See Ibronke Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of a Multi-Actor Investments Contract Framework" (2014) 15 *Melbourne Journal of International Law* 1 at 2 [Odumosu]; Chevron, "2012 Corporate Responsibility Report: Chevron in Nigeria" (Report, Chevron, 2012) 16 online: http://www.chevron.com/documents/pdf/2012_NigeriaCR_Report.pdf; Shell, "Shell in Nigeria: Global Memorandum of Understanding" (Memorandum of Understanding, Shell, April 2012) online: <http://s06.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/201bnotes/gmou-2012.pdf>

²⁶⁵ See Odumosu, *supra* note 264 at 18; see also Collaboration Agreement between the Northern Village of Pinehouse and Kineepik Metis Local Incorporation and Cameco Corporation and Areva Resources Canada Incorporation (signed and entered into force 12 December 2012) art 7; The Mary River Project Inuit Impact and Benefit Agreement between Qikiqtani Inuit Association and Baffinland Iron Mines Corporation (entered into pursuant to Art 26 of the Nunavut Land Claims Agreement) signed 2013, arts 2.7, 21.

²⁶⁶ See Odumosu *supra* note 264 at 7.

on the challenges that affect the effectiveness of benefits agreements, Idemudia and Ite noted that:

The failure of oil companies to observe the moral minimum or demonstrate that they are doing all they can do within their power to observe this moral minimum has helped to reinforce community perceptions of oil companies as adversaries to be confronted and tamed. This is because no amount of road or bridge construction, provision of electricity or the award of scholarships can compensate for 24 hours of daylight resulting from gas flaring by the oil companies.²⁶⁷

On the other hand, companies have a duty to respect human rights principles in the carrying out of their activities. Assessing the impacts a particular project will have on the environment will help oil companies to proactively establish a strategic approach to human rights based on the risks and opportunities that are likely to occur. The 2013 Business for Social Responsibility (BSR Report) provides that a Human Rights Impact Assessment (HRIA) should be “part of every company’s responsibility to treat all human beings with respect and dignity”.²⁶⁸ There is a significant value associated with company’s respecting human rights in the carrying out of their projects. These include helping to build the internal capacity of such companies, strengthening stakeholder relations and yielding important insights into the effectiveness of existing company policies, processes, and tools²⁶⁹; and most importantly, helping to build a strong reputation for the company. Lastly, it is important to build awareness within the company as to the importance attached to respecting human rights. Thus, every staff within the company should be aware that they have a responsibility to ensure that their operations do not have adverse effects on human rights.

²⁶⁷ See Uwafiokun Idemudia and Uwem Ite, “Corporate-Community Relations in Nigeria’s Oil Industry: Challenges and Imperatives” (2006) 13 *Corporate Social Responsibility and Environmental Management* 194 at 202.

²⁶⁸ BSR Report *supra* note 107 at 6.

²⁶⁹ *Ibid* at 7.

For there to be a peaceful coexistence of different stakeholders in the EIA process and in order to achieve an effective EIA process, there is a need for oil companies to be accountable to the local communities, specifically they need to be accountable for their actions relating to oil and gas management. Furthermore, promoting the participation of local communities in oil and gas management, supporting participatory development and avoiding environmental degradation need to be recognized and respected by oil companies in order to have a peaceful operating atmosphere.

Also, it is important to consider the interests of private businesses that may or may not align with the needs and interests of oil and gas companies. Examples of private businesses could include local, small-scale fisheries, charter boat operators, owners of hotels, tourist management agencies and other businesses in affected areas. The impacts of oil spillage can result in “loss of income and means of subsistence for individuals and companies in the commercial fishing, shrimp, and oyster industries.”²⁷⁰ Also businesses that rely upon the tourism industry can be affected by oil and gas activities as is seen in the recent proposed fracking by oil and gas companies in the Gros Morne region in Newfoundland Canada based on the amount of shale rock in the area.²⁷¹ The Gros Morne National Park is likely to be affected by this development and the United Nations Educational, Scientific & Cultural Organization (UNESCO) has voiced its concerns regarding the proposed hydraulic fracturing near the Park. If this operation is

²⁷⁰ See Olawuyi *supra* note 3 at 151.

²⁷¹ See “Hydraulic Fracturing (fracking) near Gros Morne National Park”, Hospitality Newfoundland & Labrador online: <https://hnl.ca/advocacy/policy-priorities/fracking/>; see Sue Bailey, “UNESCO Draft Decision again urges Industrial Buffer around Gros Morne National Park” *The Canadian Press* (27 May 2016), online: <http://www.cbc.ca/beta/news/canada/newfoundland-labrador/unesco-gros-morne-industrial-buffer-1.3603972>

allowed to proceed, it will jeopardize the Parks use as a tourism site and also affect the Parks mandate to protect natural areas.²⁷²

3.6. Conclusion

This chapter has established the different groups of stakeholders and their role in the public participation and EIA process. It has identified the importance of ensuring that all stakeholders participate in the EIA process, and also the need for oil companies to be accountable for their actions relating to oil and gas activities.

Having examined the importance of public participation, it is important to identify the challenges of public participation which have impeded the accomplishment of an effective EIA process. These challenges range from corruption,²⁷³ lack of awareness vis-à-vis location of the participation hearing, lack of adequate and transparent information on the positive and negative impacts of the proposed project, the lack of transparency on the part of the government and oil companies in the conduct of the EIA process, and lack of finance to aid the public in their participation.²⁷⁴ The use of technical language in EIA reports poses a difficulty to local people who find it difficult to understand such technical words thereby inhibiting their full participation.²⁷⁵

²⁷² Also, see the example of the Wood Buffalo Park region threatened by the planned Site C Hydroelectric Dam and the existing oil sand projects in the Athabasca region. See UNESCO, Reactive Monitoring Mission to take place at Wood Buffalo National Park World Heritage Property (Canada) (16 September, 2016) online: <http://whc.unesco.org/en/news/1554>

²⁷³ An example of how corruption affects public participation is portrayed in the manner in which community leaders are paid huge sum of money to speed up projects at the expense of a genuine public participation process. See Hakeem Ijaiya, "Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems" (2015) 13 *Nigerian Juridical Review* 83 at 87-88; 93-94.

²⁷⁴ See Kirchhoff *supra* note 56 at 8; Annie Booth and Norman Skelton, "Improving First Nations' Participation in Environmental Assessment Process: Recommendations from the Field" (2011) 29 *Impact Assessment and Project Appraisal* 49 at 53-56.

²⁷⁵ *Ibid.*

In order to ensure that an effective participation hearing is carried out, special consideration should be given to how activities might impact the rights of indigenous peoples. EIA should be made to effectively monitor the evolving impacts of extractive operations, and most importantly, should be carried out by competent and independent third parties. If the EIA process is to be effective, regulatory authorities in both Canada and Nigeria have to ensure that public concerns are not only heard when presented, but also encouraged and implemented; then addressed and incorporated into project approvals and other decisions throughout the lifecycle of the project.

Chapter 4

Review of Environmental Impact Assessment in Nigeria

4.1. Introduction

Nigeria is a large, developing country consisting of 36 States and the federal capital territory of Abuja. It is the world's thirteenth largest producer of crude oil.²⁷⁶ With a population of about 180 million people,²⁷⁷ it consists of more than 250 ethnic groups.²⁷⁸ Nigeria enjoys abundant natural resources; however, this blessing has its downside which is the problem of environmental degradation.

This chapter will examine the EIA process in Nigeria with reference to the evolution of the *Environmental Impact Assessment Act 1992* (EIA Act),²⁷⁹ its forerunner, the *Federal Environmental Protection Agency Decree No.58 of 1988*²⁸⁰(FEPA Act) and the *National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007* (NESREA Act) which is currently Nigeria's principal legislation on environmental protection. This chapter will examine how the *NESREA Act* exempts the oil and gas sector from its sphere of operation; and how the Department of Petroleum Resources (DPR) via its *Environmental Guidelines and Standards*²⁸¹ (EGASPIN) enforces environmental standards and regulations in the oil and gas sector.

²⁷⁶ United States Energy Information Administration, "Top World Producers 2014" available online at <http://www.eia.gov/countries/index.cfm>. at 1.

²⁷⁷ Central Intelligence Agency (CIA), *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html>. at 1.

²⁷⁸ *Ibid* at 1.

²⁷⁹ See EIA Act *supra* note 76.

²⁸⁰ The *Federal Environmental Protection Agency Act*, Laws of the Federation of Nigeria 2004, c. F 10 (Now repealed). [FEPA Act]

²⁸¹ *The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria* (Lagos: Department of Petroleum Resources, 1991, Revised in 2002 [EGASPIN].

This chapter also examines the Niger Delta; a significant region in Nigeria affected by oil and gas activities and; examines the participatory rights of the Niger Deltans in the EIA process. Lastly, it examines the application and implementation of international environmental law in Nigerian law and also, *The African Charter on Human and Peoples Rights*²⁸² (African Charter) and its implications for enforcing the right to a healthy environment in Nigeria.

4.2. Background Context

Nigeria gained its independence on October 1, 1960 after being under the colonization of the British.²⁸³ At this time, Nigeria became a federation consisting of 36 states including the federal capital territory of Abuja.²⁸⁴ Thus, there are federal, state as well as local governments. Ownership of oil and gas resides within the federal government²⁸⁵ and as such other tiers of government like the state and local governments have no legal right to oil and gas resources.²⁸⁶ Of importance is the EIA Act of 1992, a federal Act that applies to all federal and State projects. Accordingly, States do not have their own differing EIA law. Also important in this context is the killing of the famous Ogoni leader and activist, Ken Saro-Wiwa and his colleagues in 1995 by the military government of General Sani Abacha. Saro-Wiwa was falsely accused of killing four Ogoni chiefs who were in opposition to the Movement for the Survival of Ogoni People (MOSOP), a movement initiated by Saro-Wiwa to protest environmental degradation in the

²⁸² African Charter Human and Peoples Rights (adopted 27 June 1981, entered into force 21 October 1981) OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982) [African Charter].

²⁸³ See Omorogbe *supra* note 2 at 558.

²⁸⁴ Ingelson and Nwapi *supra* note 55 at 38.

²⁸⁵ See *Constitution of the Federal Republic of Nigeria, 1999* LFN 2004, c 2 at section 44 (3): "The entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria's shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly."

²⁸⁶ Ingelson and Nwapi *supra* note 55 at 39.

Ogoni area.²⁸⁷ Saro-Wiwa and his colleagues were found guilty and sentenced to death by hanging primarily because Saro-Wiwa took a strong stand in fighting for the rights of the Ogoni people and opposed Shell's long history of environmental damage and human rights abuse in the Ogoni region.²⁸⁸

The *1999 Constitution of the Federal Republic of Nigeria*²⁸⁹ (CFRN 1999) recognizes the right to a healthy environment. Section 20 of the CFRN 1999 provides that the State has a duty to “protect and improve the environment and safeguard the water, air and land, forest and wildlife of the country.”²⁹⁰ However, this right is included in the non-justiciable section of the Constitution (Chapter II of the Constitution). This right is non-justiciable by virtue of section 6 (6) (c) of the CFRN 1999 which provides that the powers of the judiciary shall not extend to “any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.” To this effect, the provisions of this chapter cannot be compelled in any court in Nigeria. This point will be further dealt with at the end of this chapter, examining the relationship of the non-justiciable constitutional right to a healthy environment, with regional protections and international law.

²⁸⁷ See “Shell lawsuit (re Nigeria- Kiobel & Wiwa)” Business & Human Rights Resource Centre online: <https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa> on the outcome of the Shell case where the parties agreed to a settlement of \$15.5 million and also an establishment of the Kiisi Trust, provided to benefit the Ogoni people especially in areas of education, women's programmes, adult literacy and small enterprise support ; See also Sara Seck, “Kiobel & The E-word: Reflections on Transnational Environmental Responsibility in an Interconnected World” (5 July 2013), *Law at the End of the Day (Blog)*, online: <http://lbackerblog.blogspot.ca/2013/07/sara-seck-on-kiobel-and-e-word.html?m=1>

²⁸⁸ See “Shell lawsuit (re Nigeria- Kiobel & Wiwa)” Business & Human Rights Resource Centre online: <https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>

²⁸⁹ *Constitution of the Federal Republic of Nigeria* 1999, c23 Laws of the Federation of Nigeria 2004.

²⁹⁰ *Ibid.*

4.3. Evolution of Environmental Impact Assessment in Nigeria

In response to the negative environmental impacts of oil and gas developments in Nigeria, the federal government of Nigeria acknowledged that the oil and gas industry needed close environmental scrutiny; and consequently, the idea of EIAs evolved as a tool for better environmental protection and management.²⁹¹ It has been found that “although oil exploration activities in Nigeria began in 1908 and production started in the 1950s, it was not until the early 1990s that environmental planning considerations through EIAs became part of the decision-making process in the development of Nigeria’s oil and gas resources”.²⁹² Scholars such as Ingelson and Nwapi argue that “the same operators in the Nigerian oil and gas industry, who operated during the first four decades after the discovery of oil in Nigeria without carrying out EIAs, were the same operators who were carrying out EIAs in their home countries to avoid or mitigate the adverse environmental impacts of their operations.”²⁹³ This can be attributed to the lack of sufficient regulatory requirements in Nigeria at this time. However, the existence of EIA procedure in the operators home countries (mostly operators from the United Kingdom and United States of America) should have led them to adopt the same standards when carrying out EIA in Nigeria.²⁹⁴

The first attempt to require EIA in Nigeria can be seen in the Fourth National Development Plan (1981-1985). This plan was aimed at developing an environmental impact

²⁹¹ Ogunba *supra* note 55 at 647.

²⁹² Ingelson & Nwapi *supra* note 55 at 44; For example oil companies like Royal Dutch Shell and Chevron (having their major base of operation in the United States) who have been in existence in Nigeria for over 40 years have been allegedly accused by the Ogoni people as being responsible for ruling the Niger Delta region through the continuous occurrence of oil spills and gas flaring without paying due consideration to environmental and health concerns. See Douglas Oronto & Ike Okonta *Where Vultures Feast: Shell, Human Rights & Oil in the Niger Delta* (San Francisco: Sierra Club Books, 2003).

²⁹³ Ingelson & Nwapi *supra* note 55 at 44.

²⁹⁴ *Ibid.*

statement (EIS) in feasibility studies for all projects with the end goal of providing adequate plans to mitigate the adverse environmental effects of a project.²⁹⁵

As stated earlier, the FEPA Act was regarded as the forerunner of the EIA Act. The FEPA Act established the agency called the Federal Environmental Protection Agency (“the FEPA Agency”) which had overall responsibility for the comprehensive system of environmental management in Nigeria.²⁹⁶ Section 5 of the FEPA Act charged the FEPA Agency with the following responsibilities: (1) environmental protection and management; (2) setting environmental guidelines and standards, and (3) monitoring and enforcement of compliance with environmental measures. In summary, the FEPA Act “accorded the FEPA Agency virtually unlimited powers and functions for the protection of the Nigerian environment.”²⁹⁷

Following the repeal of the FEPA Act in 1999 by the NESREA Act of 2007, these functions have been vested in the agency created under the NESREA Act, the National Environmental Standards and Regulations Enforcement Agency (“the NESREA Agency”).²⁹⁸ The NESREA Agency is tasked with regulating and enforcing environmental standards, regulations, laws, policies and guidelines in Nigeria. The NESREA Agency’s key mandate includes the protection and development of the environment, and sustainable development of Nigeria’s natural resources. The broad functions and powers of the NESREA Agency as outlined in sections 7 and 8 include enforcing compliance with environmental regulations and standards on air and land among others. Section 7 provides authority to ensure compliance with environmental laws, local and international, on environmental sanitation and pollution prevention and control through monitory and regulatory measures. However, it is important to

²⁹⁵ Olokesusi *supra* note 55 at 160.

²⁹⁶ See FEPA Act *supra* note 280 at s.1.

²⁹⁷ *Ibid.*

²⁹⁸ See the *National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007*, Laws of the Federation of Nigeria 2004, c N164, ss 1,2 [NESREA Act].

note that “these regulatory functions come with a monumental exception; none of them extend to the oil and gas sector.”²⁹⁹ The NESREA Act “exempts the oil and gas sector from its sphere of operation or regulation.”³⁰⁰ However, this area of exemption is dealt with by EGASPIN which will be discussed later in this chapter.

Nigeria entered the league of EIA nations in 1992 following the enactment of its EIA Act.³⁰¹ The law establishes EIA as a tool for environmental protection and also empowers the Nigerian Environmental Protection Agency (“the Agency”) as the principal regulator of the EIA process in Nigeria.³⁰² The Agency is responsible to: “issue guidelines and codes of practice to assist in conducting assessment of the environmental effects of projects; establish research and advisory bodies; prescribing a list of projects or classes for which an EIA is not required, or for which mandatory study is required, or projects for which an EIA should not be conducted for reasons of national security.”³⁰³ Apart from the Agency, there are other regulatory bodies with identical roles in the EIA process.³⁰⁴ Examples are the Federal Ministry of Environment, the Department of Petroleum Resources, the Federal (and State) Ministry of Lands, the National Emergency Management Agency, and the Nigerian Maritime Administration and Safety

²⁹⁹ Olawuyi, *supra* note 3 at 34.

³⁰⁰ See section 7 *NESREA Act supra* note 298 and more specifically, sections 7 (g), (h), (j), (k) and (l)
 7(g) enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector;
 7(h) enforce through compliance monitoring, the environmental regulations and standards on noise, air, and seas, oceans and other water bodies other than in the oil and gas sector;
 7(j) enforce environmental control measures through registration, licensing and permitting systems other than in the oil and gas sector;
 7(k) conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector
 7(l) create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations other than in the oil and gas sector and publish general scientific or other data resulting from the performance of its functions.

³⁰¹ See EIA Act *supra* note 76.

³⁰² *Ibid at s. 61(1)*.

³⁰³ See sections 58& 59 *EIA Act supra* note 76.

³⁰⁴ These regulatory bodies are created by separate laws which confer them with powers.

Agency.³⁰⁵ According to Ingelson and Nwapi, the existence of this multiplicity of regulators in the EIA process has led to certain problems associated with the EIA process in Nigeria.³⁰⁶ These problems range from overlapping of functions, delay in the EIA process in Nigeria to the overall non-effectiveness of the EIA process in Nigeria.

The EIA Act sets out the general principles, procedures and methods to enable the prior consideration of EIA on certain public or private projects. Section 1 of the EIA Act sets out the objectives of the Act to include

establishing the activities that may likely, or to a significant extent affect the environment before a decision is taken by any person, authority, corporate body intending to undertake or authorize the undertaking of any activity; promoting the implementation of appropriate policy in all Federal, State and local government lands consistent with all environmental impact assessment laws and decision-making processes; and encouraging the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant trans-boundary environmental effects.

Under the only schedule to the EIA Act, nineteen projects are listed as requiring a mandatory environmental impact assessment.³⁰⁷ The listed projects relevant to this thesis are petroleum projects which involve oil and gas field development, construction of off-shore pipelines, construction of oil refineries and construction of product depots for petrol, gas or diesel. Section 4 of the EIA Act sets out the contents of an EIA report to include:

a description of the proposed activities; a description of the potential affected environment, including specific information necessary to identify and assess the environmental effect of the proposed activities; an assessment of the likely or potential

³⁰⁵ Ingelson & Nwapi *supra* note 55 at 54.

³⁰⁶ *Ibid.*

³⁰⁷ See section 13(1) of the EIA Act *supra* note 76.

environmental impacts of the proposed activity and the alternatives, including the direct or indirect, cumulative, short and long-term effects; an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and assessment of those measures; an indication of whether the proposed activity or its alternative will have transboundary environmental effects; and finally, a brief and non-technical summary of all the information provided above.

4.4. Procedure of EIA under the Environmental Impact Assessment Act Of 1992

Section 15 of the EIA Act sets out the environmental assessment process to include: “a screening or mandatory study and the preparation of a screening report; a mandatory study or assessment by a review panel and the preparation of a report; the design and implementation of a follow-up program.”

The EIA procedure in Nigeria consists of seven stages: (1) project proposal, (2) screening, (3) scoping, (4) draft EIA report and review process, (5) final EIA report, (6) decision-making, and (7) project implementation. The first stage requires the project proponent to submit a project proposal to the Federal Ministry of Environment (Ministry).³⁰⁸ This stage requires that a land use map and vital information about the project be submitted to the Ministry whereupon the Ministry is then required to issue guidelines to the proponent that will facilitate the EIA process.³⁰⁹ The next stage (the screening stage) involves a project examination by the Ministry “for the purpose of determining whether the project is one in which an EIA is mandatorily required, is exempted, or one in which an EIA may not be carried out”.³¹⁰ This process is expected to be completed within twenty days of receipt of the project proposal by the Ministry. Following this, if the Ministry decides that an EIA is required, or may not be of a

³⁰⁸ Ingelson & Nwapi, *supra* note 55 at 46; see sections 4,15,18,21,39&40 EIA Act *supra* note 76.

³⁰⁹ Olokesusi, *supra* note 55 at 168.

³¹⁰ Ingelson & Nwapi, *supra* note 55 at 46.

necessity (or even if not required should be carried out in the circumstances), the project proponent is required to map out the scope of the intended project.³¹¹ This will usually involve an identification of the potential impacts of the project in order to qualify those impacts as beneficial or as adverse.³¹² The project proponent will then submit the result of the scoping exercise to the Ministry and, “depending on its outcome and the degree of public interest in the project; the Ministry may require the project proponent to undertake further studies of the project and may arrange a public hearing”.³¹³ In light of this, the project proponent is required to conduct an EIA complying with terms of reference agreed to by the Ministry.³¹⁴ On the completion of the EIA, section 21 sets out the steps which the Agency is required to take in moving forward with the project or the alternative.³¹⁵

A recent case which examined the 2nd stage of the EIA process in Nigeria (screening) in determining whether the project was one in which an EIA was mandatorily required is the case of *Baytide Nigeria Limited v. Aderinokun & Ors.*³¹⁶ One of the issues raised by the respondent at the trial court was whether the claimant complied with the EIA Act in obtaining its approval to build a petrol station. The respondents also alleged that the views of the public and residents of the affected area were never considered. In giving his judgment at page 462 of the record of appeal, B.O. Shitta-Bey J. observed: “...the sole issue formulated therefore is, whether or not the Agency complied with the express provisions of section 7 of the *Environmental Impact Assessment Act 1992* now Cap E12 Laws of the Federation of Nigeria 2004.” The Court further “found that the failure to give the respondents or any other interest groups the opportunity to

³¹¹ Ingelson & Nwapi, *supra* note 55 at 46.

³¹² See M.A. Akintunde & Akin Olajide “Environmental Impact Assessment of NNPC Awka Mega Station” (2011) 2 *American Journal of Scientific and Industrial Research* 511 at 518.

³¹³ Ingelson & Nwapi, *supra* note 55 at 46-47; see section 18 EIA Act *supra* note 76.

³¹⁴ Olokesusi, *supra* note 55 at 168.

³¹⁵ See section 21 (1) (b) (i) & (ii) & (c) EIA Act *supra* note 76.

³¹⁶ [2013] LPELR-19956 (CA).

comment on the EIA Report prepared by the Appellant in respect of the construction of the petrol station rendered invalid and ineffectual any approval given by any authority to construct the petrol station on the said parcel of land.”³¹⁷ The Appellant further appealed this case and one of the issues raised on appeal was “whether the provision of section 7 of the EIA Act is applicable and relevant and is a mandatory condition precedent to the grant of approval to construct a petrol station?”³¹⁸ Justice Chinwe Iyizoba JCA delivering the lead judgment held that by the exclusion of petrol station in the schedule to section 12 of the EIA Act which provides for the projects requiring mandatory EIA, it was clear that an EIA process was not required to be carried out and consequently there was no need for compliance with section 7 of the EIA Act.³¹⁹

The fourth stage consists of the project proponent’s submitting the draft EIA report to the Ministry which will usually require the Ministry’s review of the report. Accordingly, the Ministry shall inform the project proponent of the review method to be engaged. Under section 16, the review panel in deciding whether or not the project will be carried out or not, is to take into consideration:

the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project, the significance or , seriousness of those effects; comments received from the public concerning those effects³²⁰; measures that are technically and economically feasible and

³¹⁷ [2013] LPELR-19956 (CA) see para A page 9.

³¹⁸ See Issue No.2 para B page 18 *Ibid*; section 7 of the EIA Act *supra* note 76 provides: “Before the Agency gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity.”

³¹⁹ *Ibid*, para E page 27; paras A-E page 29.

³²⁰ “At the panel review, oil and gas operators make presentations on the technical aspects of the report as well as environmental, social and health issues addressed in the report. Stakeholder communities are given opportunities to express their concerns and observation to the panel review meeting.” See Charley Anyadiegwu “Overview of

that would mitigate any significant or any serious adverse environmental effects of the project; in addition to the factors set out above, every mandatory study of a project and every mediation or assessment by a review panel shall include a consideration of the purpose of the project; alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means; the need for and the requirements of any follow-up programme in respect of the project; the short-term or long-term capacity for regeneration of renewal resources that are likely to be significantly or, seriously affected by the project; and any other matter that the Agency or the Council may require.³²¹

An example of an oil and gas project subjected to this process is the EIA of Nigerian National Petroleum Corporation (NNPC) Awka Mega Station.³²² The review process may include site visits, public hearing, or mediation depending on the category of project that is been reviewed.³²³ Within 60 days of receipt of the project proponent's submissions, the Ministry is expected to communicate its feedbacks to the project, which may require some amendments to the project.³²⁴

The fifth stage requires the project proponent to submit the final EIA report. It is expected that the report is to be submitted by the project proponent's within six months of receiving the Ministry's feedback on the initial draft.³²⁵ After submission, the final EIA report will be due for approval; the approving authority is a technical committee of the Ministry.³²⁶ The EIA Act requires the Agency to seek the public input at this stage: "Before the Agency gives a

Environmental Impact Assessment of Oil & Gas projects in Nigeria" (2012) 1 *AFRREV STECH: An International Journal of Science & Technology* 66 at 73.

³²¹ The "Council" is the Federal Environmental Protection Council established by the Federal Environmental Protection Agency Act. This Act is now repealed so this will be the council established under section 3 of the NESREA Act *supra* note 298.

³²² See M.A. Akintunde & Akin Olajide "Environmental Impact Assessment of NNPC Awka Mega Station" (2011) 2 *American Journal of Scientific and Industrial Research* 511-520.

³²³ Ingelson & Nwapi, *supra* note 55 at 47.

³²⁴ Olokesusi, *supra* note 55 at 168; see section 36 EIA Act *supra* note 76.

³²⁵ See Section 4 of the EIA Act *supra* note 76 for the contents of a detailed EIA report.

³²⁶ Ingelson & Nwapi *supra* note 55 at 47.

decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the environmental impact assessment of the activity.”³²⁷

The final stage in the EIA procedure is the project implementation stage. At the conclusion of the review process, and the Ministry certifying the commencement of the project undergoing the EIA process, the project proponent is required to implement the project in accordance with the EIA report.³²⁸ Furthermore, the Agency is “required to monitor the progress of the project to ensure that the project proponent complies with the stipulated conditions, including measures required to mitigate the adverse impacts from the project.”³²⁹

4.5. The Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (“EGASPIN”)³³⁰

As mentioned earlier, the NESREA is the principal regulator of environmental protection in Nigeria. However, the NESREA Act excludes the regulation of oil and gas sector from the scope and mandate of NESREA. Consequently, the Department of Petroleum Resources (“DPR”) remains the principal regulator of environmental guidelines and standards in the petroleum sector. Its EIA procedures are contained in the EGASPIN.³³¹ The DPR conduct EIA in the oil and gas sector in accordance with its regulations- EGASPIN. It is important to note the relationship between the EIA Act and EGASPIN. The EIA Act is usually applied when the proponent of a project seeks the approval of a project, that is, at the beginning stage when the

³²⁷ See Section 7 of the EIA Act 1992 *supra* note 76.

³²⁸ Ingelson & Nwapi *supra* note 55 at 48.

³²⁹ Olokesusi, *supra* note 55 at 169.

³³⁰ See EGASPIN *supra* note 281.

³³¹ *Ibid.*

project is yet to be executed and is required to go through the EIA process. Consequently, when the project is approved for operations to commence, the EGASPIN is then applied by the DPR to conduct and regulate the operations of such project specifically when it is an oil and gas project, for example, oil exploration or drilling of pipes.³³² To this extent, the DPR operates independently to ensure that an effective EIA process is carried out most especially for oil and gas projects. Thus, it is important to examine the EGASPIN, particularly in light of the exclusion of the oil and gas related pollution from the regulatory ambits of the NESREA Act.

The EGASPIN is made pursuant to Section 8(i) (b) (iii) of the *Petroleum Act of 1969*³³³, which gives the Minister of Petroleum power to make regulations for the prevention of pollution of watercourses and the atmosphere. The EGASPIN specifically deals with the control of pollutants and pollution from the various aspects of petroleum operations and regulates the environmental aspects of petroleum operations. It prescribes flare distances; appropriate burn technology, allowable heat radiation, and noise levels during gas flaring amongst other things.

With regards to the exploration of oil activities, the EGASPIN “sets out the procedure of the treatment and control of wastes connected” with the oil exploration process.³³⁴ It also provides that in order to “preserve, restore and maintain the chemical, physical and biological integrity of Nigeria’s waters, oil and gas installation operators are to ensure that their levels of pollution control are in line with the best practicable control technology currently available.”³³⁵

³³² Source: Telephone Conversation with Dr Damilola Olawuyi, the Deputy Director of International Environmental Law, Center for International Governance Innovation (CIGI), International Law Research Program (ILRP) and an Expert on Nigerian Environmental Law on the 17th of August, 2016.

³³³ See the *Petroleum Act of 1969*, Laws of the Federation of Nigeria 2004. C P10.

³³⁴ Olawuyi, *supra* note 3 at 164.

³³⁵ *Ibid.*

Environmental management under the EGASPIN is set out in part VIII generally. It employs EIA, as well as an Evaluation (post-impact) Report (“EER”) as appropriate tools.³³⁶ On the one hand, “the EIA assess all actions that will result in physical, chemical, biological, cultural and social modification of the environment as a result of the project/development.”³³⁷ The EGASPIN sets out the process for an EIA study in relation to oil and gas projects. The first stage requires an initial assessment or environmental screening of significant areas to be carried out by the proponent and the DPR.³³⁸ The completion of the first stage leads to production of an environmental screening report (ESR) which is reviewed with the DPR. After this, a preliminary assessment is conducted by the proponent, DPR and other stakeholders to determine the “potential significant and adverse environmental effects” of the oil and gas project; after which a preliminary EIA report is prepared for approval by the DPR.³³⁹ If no significant impact on the environment is identified the project is allowed to proceed. However, if the preliminary EIA report identifies significant impacts on the environment, the proponent is obligated to conduct a detailed EIA study and a draft EIA report which is to be submitted to the DPR for review.³⁴⁰ In preparing impact assessment reports, EGASPIN provides methodologies which are aimed at making such reports “less formidable and more meaningful.”³⁴¹ One of such methodologies is the provision of a “mechanism for public involvement in the interpretation of impact significance.”³⁴² It also provides that “workshops and/or public forum by experts shall be

³³⁶ Olawuyi *supra* note 3 at 192.

³³⁷ *Ibid.*

³³⁸ See Tominiyi Owolabi et al, “Oil & Gas Regulation in Nigeria: Overview” para 16 online: <http://ca.practicallaw.com/5-523-4794?source=relatedcontent> [Owolabi]

³³⁹ EGASPIN, *supra* note 281 part VIII, 3.1.2, p.179.

³⁴⁰ See Owolabi *supra* note 338 at para 16; EGASPIN *supra* note 281, part VIII, 3.1.2.2, p.179.

³⁴¹ EGASPIN *supra* note 281, part VIII, 7.1, p.189.

³⁴² *Ibid* at 7.1.4.1, p.189-190.

conducted by the proponent to consider the EIA report prior to obtaining an approval or environmental permit at the discretion of the Director of Petroleum Resources.”³⁴³

An EER evaluates already ‘polluted or impacted’ environments to assist the government in accessing the state of the environment, so as to decide and design strategies for protection and restoration.³⁴⁴ It provides generally for most of the operations regulated under the EGASPIN that “licensees and operators are to institute planned and integrated environmental management practices aimed at ensuring that unforeseen, identified and unidentified environmental issues are contained and brought to an acceptable minimum”.³⁴⁵ In light of its importance, “it makes an environmental impact assessment mandatory, and in some cases, and for evaluation (post-impact) report for the following activities: all seismic operations, oil and gas field development onshore, near shore, offshore and deep shore, construction of crude oil production tank farm, oil refineries, dredging activities.”³⁴⁶

4.6. Public Participatory Rights in Nigeria’s EIA Process

Every citizen in Nigeria has been a victim to environmental degradation; however, the Niger Delta, an important region for oil and gas development in Nigeria, will be used as a case study in this thesis primarily because the Niger Delta is the main oil producing region in Nigeria, and therefore, has countless times been victim to and suffered drastically due to continuing oil spills and environmental degradation.

Section 7 of the EIA Act provides that before the Agency “gives a decision on an activity to which an environmental assessment has been produced, the Agency shall give opportunity to

³⁴³ EGASPIN *supra* note 281 at part VIII, 7.1.4.2 p.190.

³⁴⁴ *Ibid* at 132.

³⁴⁵ Olawuyi, *supra* note 3 at 192.

³⁴⁶ *Ibid*.

government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on the EIA of the activity.”³⁴⁷ Also noteworthy is section 36 (b) of the EIA Act where the review panel in its assessment process is required to “hold hearing in a manner that offers the public an opportunity to participate in the assessment.” These sections form the basis for public participation in Nigeria’s EIA process.

As discussed in the introduction, over five decades of oil exploration and production activities have left the Niger Delta’s environment severely degraded in what has been described as “ecological warfare” against the Niger Delta.³⁴⁸ Other issues which have raised concerns and which “emerge from the natural resource exploration in the Niger Delta include insecurity, political instability, loss of traditional lands and aspects of culture, loss of social amenities, and a wanton violation of human rights by state authorities.”³⁴⁹ The emergence and exploration of oil in the Niger Delta region led to a number of protests on the basis that the existing framework for exploiting the resources would not foster development in the region. Over the years, the Niger Deltans have “protested against environmental degradation, their non-participation in the development and management of the resources, the non-payment of compensation or inadequate compensation for oil operation damage, and underdevelopment of their area, despite huge revenues accruing from the resources.”³⁵⁰ However, Nwapi argues that “although protests in the Niger Delta pre-dated the discovery of oil (the pre-oil protests were seen as ethnic/minority struggles), the discovery of oil gave the Niger Deltans a new twist and brought into the public

³⁴⁷ See EIA Act *supra* note 76.

³⁴⁸ Alkelegbe *supra* note 5 at 442.

³⁴⁹ Olawuyi, *supra* note 3 at 146.

³⁵⁰ KSA Ebeku “Appraising Nigeria’s Niger Delta Development Commission Act 2000” (2004) 25 *Statute Law Review* 85 at 85.

sphere a cacophony of local voices that otherwise might have remained marginal and unheard.”³⁵¹

A notable case that demonstrates the participatory rights and the agitations of the Niger Deltans is the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (SERAC.)*³⁵² This case in the form of a communication was brought to the African Commission on Human and People’s Rights by the SERAC on behalf of the people of Ogoni land in 1996. The plaintiffs alleged violations of articles 2, 4, 16, 18 (1), 21 and 24 of the African Charter³⁵³

resulting from several abuses occasioned the government’s stake in oil exploration activities in the area *inter alia* that the oil development operations in the area caused environmental degradation and health problems resulting from the contamination of the environment; that the oil consortium disposed toxic wastes into the environment and local waterways in violation of applicable international environmental standards; that the consortium also neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages thus resulting in contamination of water, soil and air, which has had serious short and long-term health impacts.³⁵⁴ They alleged that the Nigerian Government has condoned and facilitated these violations by placing the legal and military powers of the State at the disposal of the oil companies.³⁵⁵

In addition, SERAC also alleged that the Nigerian government had neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry, and also withheld information on the dangers created by oil activities.³⁵⁶ Unfortunately, the Government of Nigeria did not require oil companies or its own agencies to

³⁵¹ Nwapi *supra* note 57 at 190; see Ken Saro-Wiwa’s case as earlier discussed in the beginning of the chapter.

³⁵² [2001] African Commission on Human and Peoples Rights Comm. No. 155/96.

³⁵³ See African Charter *supra* note 282.

³⁵⁴ Olawuyi, *supra* note 3 at 73; see SERAC case *supra* note 14.

³⁵⁵ Olawuyi *supra* note 3 at 73.

³⁵⁶ *Ibid.*

produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoniland, and additionally refused to permit external monitoring of the situation by scientists and environmental organizations.³⁵⁷ SERAC also alleged that the Nigeria government did not require oil companies to consult communities before beginning operations, even where the operations posed direct threats to community or individual lands. They also alleged that over the years, the Nigerian government and security forces attacked, burned and destroyed several Ogoni villages and homes which in turn affected Ogoni food sources through a variety of means, resulting in malnutrition and starvation.³⁵⁸

In its decision, the Commission found that the Federal Republic of Nigeria was in violation of Articles 2, 4, 14, 16, 18 (1), 21 and 24 of the African Charter; and appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

- (1) stopping all attacks on their communities and leaders and permitting citizens and independent investigators free access to the territory;
- (2) conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, and relevant agencies involved in human rights violations;
- (3) ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
- (4) ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective

³⁵⁷ It is noteworthy that during the deliberations by the African Commission on human rights, a new civilian administration came into power, which amongst other things established the Federal Ministry of Environment to address environmental related issues prevalent in Nigeria and enacted the *Niger Delta Development Commission Act*, Laws of the Federation of Nigeria 2004, c N86- see Olawuyi, *supra* note 3 at 74.

³⁵⁸ See SERAC case *supra* note 14.

and independent oversight bodies for the petroleum industry³⁵⁹; and (5) providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.³⁶⁰

All of these economic, social and environmental impacts on the Niger Delta community call for urgent legal and strategic actions to be taken. However, “despite the overwhelming evidence of unsustainable oil production practices by many multinational oil companies operating in the Niger Delta, successive Nigerian governments have either looked the other way or have in most cases colluded with these companies to lower sustainability standards, in return for illegal gains and corrupt gratifications.”³⁶¹

The above discussion on the environmental degradation in the Niger Delta region thus forms the basis for the Niger Deltans participation and also, why they are in a best position to participate and decide which developmental projects should be approved or rejected in their area, in order to minimize the degradation of the ecological and biological systems in the Niger Delta. Summarily, they should be accorded priority *vis-à-vis* public participation in the EIA process in Nigeria.

4.7. Application of International Environmental Law in Nigerian Law

This section will be divided into the discussion of (a) the relationship of the African Charter to Nigerian law; and (b) an analysis of the EIA Act with regard to compliance with international standards on participation opportunities and climate change.

³⁵⁹ This is in compliance with Articles 16 & 24 of the African Charter *supra* note 278 which reads:

Article 16: “Every individual shall have the right to enjoy the best attainable state of physical and mental health

Article 24: “All people shall have the right to a general satisfactory environment favourable to their development.”

³⁶⁰ Olawuyi, *supra* note 3 at 73-74.

³⁶¹ *Ibid* at 175-176.

Article 24 of African Charter recognizes the right of all people to a healthy environment. It provides that:

All people shall have the right to a general satisfactory environment favourable to their development and States shall have the duty individually or collectively to ensure the exercise of the right to development

As earlier identified, the CFRN 1999 in section 20 recognizes the right of all citizens to a healthy environment. However, this right falls under the non-justiciable section of the constitution. Notwithstanding the non-justiciability of this right, Nigerians can lay a claim to environmental rights by relying on international and regional instruments, which Nigeria is a signatory to and has ratified accordingly. An example is the African Charter which has been domesticated and included into Nigeria law by virtue of the African Charter on Human and People's Right (Ratification and Enforcement) Act.³⁶²

Section 1 of the African Charter on Human and People's Right (Ratification and Enforcement) Act provides

As from the commencement of this Act, the provisions of the African Charter on Human and People's Right which are set out in the Schedule of this Act shall, subject as thereunder provided have force of law in Nigeria and shall be given full recognition and effect and shall be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria.³⁶³

³⁶² Cap A9 LFN 2004.

³⁶³ The right to a healthy environment in the African Charter has been invoked in two notable Nigeria cases which are: (1) *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (2001) Comm. No. 155/96 (see the discussion above for the details of this case); (2) *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria* (2010) Comm. No. 338/07 where the complainant lodged a complaint with the African Commission on Human and People's Rights alleging that the respondent violated articles 2, 4, 5, 14, 16, 20 and 24 as a result of a pipeline explosion in Abule Egba in Lagos State, Nigeria which resulted in loss of lives, destruction of properties, environmental degradation and other human rights violations.

Furthermore in the case of *Abacha v. Fawehinmi*³⁶⁴, the Supreme Court held that the Nigeria Government is obliged to respect its obligations under the African Charter which has been incorporated into domestic law through legislation. The Court further pointed out that the Act being a statute with international recognition, where there is a conflict between it and another statute, its provisions will prevail over those of the other statute for there is a presumption that the legislature does not intend to breach an international obligation.³⁶⁵

Honourable Justice Ejiwunmi observed as follows:

The African Charter on Human and People's Right having been passed into our municipal law, our domestic Court certainly have the jurisdiction to construe or apply the treaty. It follows then that anyone who felt that his right has guaranteed or protected by the Charter have been violated could well resort to its provisions to obtain redress in our Domestic court

However, despite this notable pronouncement, it was held further in the case that the African Charter is not superior to the Constitution and to this effect chapter II of the Constitution still remains non-justiciable and as such it is doubtful if any argument in favour of the justiciability of the African Charter provisions will succeed.³⁶⁶ Consequently, the solution to this which has also been proposed by scholars is for the Constitution to be amended to make chapter 2 justiciable in view of the supremacy of the constitution.³⁶⁷

³⁶⁴ (2000) 77 Law Reports of Courts of Nigeria 1254-1401.

³⁶⁵ *Ibid.*

³⁶⁶ See Section 1 (1) and (3) of the *Constitution of the Federal Republic of Nigeria 1999*, Laws of the Federation of Nigeria, c23 which provides that "this Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal of Republic"; "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."

³⁶⁷ See Ogugua Ikpeze, "Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development" (2015) 5 *Developing Country Studies* 18 online: <http://www.iiste.org/Journals/index.php/DCS/article/download/25478/26416> ; Nnamdi Ikpeze, "Selective Justiciability as Injustice: An Examination of Citizens Rights to a Healthy Environment under the Constitution of the

Nigeria adopts the dualist school of thought in the application of international treaties. To this effect, treaties are not part of the sources of Nigerian law³⁶⁸ and as such a domestic legislation has to be enacted by the legislative making body for the implementation of treaties in Nigeria.³⁶⁹ This position has been judicially pronounced by the Supreme Court in the case of *Abacha v. Fawehinmi*³⁷⁰ where it was held that no international treaty can be said to come into effect in Nigeria unless the provisions of such treaty have been enacted into law by the Nigerian National Assembly. According to Uwaifo JSC:

...when we have an international treaty of this nature, it only becomes binding when enacted into law by our National Assembly...it is such law that breathes life into it in Nigeria.³⁷¹

Although Nigeria is a party to a number of international treaties that are environmentally focused as identified in Chapter 2 of this thesis, implementation of these treaties domestically have not been fully achieved.³⁷² However, despite the weak implementation of these treaties, Nigeria has to an extent showed a level of commitment on some of these environmental

Federal Republic of Nigeria 1999 (as amended) (2013) 6 *Confluence Journal of Jurisprudence and International Law* 76-83; Enonbong Akpambang, "Promoting the right to a Healthy Environment through Constitutionalism in Nigeria" (2016) 4 *International Journal of Environment and Pollution Research* 40-61; Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades after the Koko Incident" (2009) 15 *Annual Survey of International and Comparative Law* 1-18; and A.B. Abdulkadir and A.O. Sambo, "Human Rights and Environmental Protection: The Nigerian Constitution Examined" (2009) 2 *Journal of Food, Drug and Health Law* 61-73 .

³⁶⁸ Sources of Nigeria law are the Constitution, Nigerian legislation, judicial decisions, customary law and Received English law. International law is impliedly excluded. For a detailed study of Sources of Nigeria law see A.O. Obilade *Nigerian Legal System* (London, Sweet & Maxwell, 1963).

³⁶⁹ See section 12 (1) of the *Constitution of the Federal Republic of Nigeria 1999* which 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"; See Babatunde Olutoyin, "Treaty Making and its Application under Nigerian Law: The Journey So Far" (2014) 3 *International Journal of Business and Management Invention* 7 at 8.

³⁷⁰ [2000] 77 Law Reports of Courts of Nigeria, 1254-1401.

³⁷¹ *Ibid.*

³⁷² Olawuyi *supra* note 3 at 273.

instruments. This is shown in the passage of relevant domestic legislations and establishing relevant agencies in facilitating the implementation of such treaties.³⁷³

In addition, for example, the NESREA Act³⁷⁴ which is the principal legislation on environmental protection in Nigeria has as one of its responsibilities the protection of the ozone layer which includes the enforcement of compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including convention on climate change, ozone depletion amongst others.³⁷⁵ Furthermore, the EIA Act in one of its objectives provides that: “to encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental transboundary effects.”³⁷⁶

As identified earlier, sections 7 and 36 (b) of the EIA Act provides opportunity for the public to participate in the EIA process in Nigeria. However, these sections have failed in defining the public and specifying the categories of the public entitled to participate. On the other hand, international instruments are explicit in specifying the categories of the public and their

³⁷³ For example Olawuyi in examining the commitment of Nigeria to its international treaties made reference to the draft bill which is before the National Assembly to “establish a Climate Change Commission, which will be responsible for managing and controlling matters related to climate change.” See *The National Climate Change Commission Bill 2011*, Bill HB-30, *A Bill for an Act to Establish the National Climate Change Commission and for other Matters connected therewith of 2011* online: <http://www.nassnig.org/nass2/legislation.php> ; See Olawuyi *supra* note 3 at 99. Also, the existence of the *National Environmental Standards Regulatory and Enforcement Agency (Establishment) Act of 2007* , the creation of the National Environmental Standards Regulatory and Enforcement Agency (charged with the responsibility of ensuring Nigeria complies with environmental laws both local and international) and the passage of several regulations by this Agency which have all incorporated provisions of international conventions to which Nigeria is a party to; are all evidences to show Nigeria’s commitment. Lastly, another evidence of Nigeria’s commitment to its international treaties (Convention on Biological Diversity) is shown in the National Policy on Environment Document where “integrating biodiversity considerations into environmental impact assessment studies” is listed as one of the strategies to be taken by the Nigerian government in ensuring the sustainable management of biodiversity. See National Policy on the Environment, 1999 online: <http://environment.gov.ng/index.php/downloads/6-national-policy-on-environment/> at 21.

³⁷⁴ Laws of the Federation of Nigeria, 2004, c N164.

³⁷⁵ See section 7 (c) of the *NESREA Act supra* note 298.

³⁷⁶ See section 1 (c) *EIA Act supra* note 76.

different roles and the fact that States should recognize and support their effective participation in the achievement of a sustainable environment as identified in chapter 3.

Although the EIA Act provides for public opportunities in the EIA process, the exercise of this right has been weakened by the problem of *locus standi*. For example, in the case of *Oronto Douglas v. Shell Petroleum Development Company Ltd and 5 others*,³⁷⁷ the plaintiff alleged that the respondents failed to fully comply with the EIA Act; however, this case was later dismissed due to the plaintiff's lack of standing. This case demonstrates the problem of *locus standi* (that is, who can sue, and which court has jurisdiction) that often arises in environmental litigation.

In *Oronto*, the plaintiff was a native of the Niger Delta who was an environmental activist and actively involved in the protection of environmental rights. The plaintiff sought the court to compel the respondents to comply with provisions of the EIA Act before commissioning their project in the volatile and ecologically sensitive Niger Delta region.³⁷⁸ The Federal High Court (per Belgore, CJ, as he then was) dismissed the suit on the grounds that the plaintiff had shown no *locus standi* to prosecute the action.³⁷⁹ The Court of Appeal set aside this decision and ordered a retrial before a different judge on the grounds that the Federal High Court had breached a number of procedural rules.³⁸⁰ However, the retrial did not proceed as ordered by the Appellate Court because the project had been completed by the time the Appellate Court delivered its decision. A significant consequence of this decision is that environmental activists

³⁷⁷ Unreported Suit No FHC.CS/573/93 (Delivered 17 February 1997).

³⁷⁸ Emeka Amaechi, "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation" (2010) 6 *Law, Environment & Development Journal* 322 at 330 [Amaechi].

³⁷⁹ *Ibid.*

³⁸⁰ See *Douglas v. Shell*, Unreported Suit No CA/L/143/97 in the Court of Appeal.

have resorted to sponsoring victims of environmental abuses to bring such actions.³⁸¹ This is founded on the basis that many victims are unlikely to prosecute such cases to the end as they are induced financially to discontinue the suit by the polluters.³⁸²

However, the issue of standing has now been liberalized with the amendment of the Fundamental Rights Enforcement Procedure Rules in 2009, which mandates the Court to “proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.”³⁸³ Also, the Rules have widened the categories of persons that can institute an action in instances where human rights have been violated. These include “anyone acting in his own interest; anyone acting on behalf of another person; anyone acting as a member of, or in the interest of a group or class of persons; anyone acting in the public interest, and association acting in the interest of its members or other individuals or groups.”³⁸⁴ Hence, “the rule explicitly grants human rights activists, advocates or groups as well as any non-governmental organizations, to institute human rights application on behalf of any potential applicant.”³⁸⁵ Thus, these provisions have strengthened the role of the courts in environmental protection in Nigeria and also improved access to judicial remedies in Nigeria courts as courts can no longer dismiss a case for want of

³⁸¹ Amaechi *supra* note 378 at 330. For example, *Gbemre v. Shell* Unreported Suit No FHC/B/CS/53/05 was sponsored by Environmental Rights Action/Friends of the Earth Nigeria, with scientific and legal support from E-LAW U.S.

³⁸² The rationale behind this can be attributed to the fact that such victims are mostly concerned about their basic necessities in life and consider a safe and clean environment as of secondary importance. Umeh & Uchegbu noted that “when people cannot feed, clothe, provide good accommodation for their families or good education for their children, how can you come and tell them to be properly concerned for the environment? When you resolve developmental issues and the basic needs of the people then we can begin to talk about the environment properly”. See L.C. Umeh & S.N. Uchegbu, *Principles and Procedures of Environmental Impact Assessment (EIA)* (Lagos: Computer Edge Publishers, 1997) at 510.

³⁸³ See para 3 (d) of the Fundamental Rights (Enforcement Procedure) Rules, 2009, entered into force on 1 December 2009, online: <http://www.accesstojustice-ng.org/articles/New%20FREPP%20Rules%20.pdf> [Enforcement Rules].

³⁸⁴ *Ibid* at para 3 (e).

³⁸⁵ Ingelson & Nwapi *supra* note 55 at 44.

locus standi and victims of actual or threatened environmental degradation can now rely on the provisions of the Rules in enforcing their right to a healthy environment in Nigeria.

In addition, by ensuring access to judicial remedies for not only victims, but also, NGOs and any other person interested in the protection of the environment in Nigeria, Amaechi argued “that the adoption of the Rules may be the single most important factor in kick-starting environmental activism within the legal arena; and in turn translate to the fostering of an extensive and innovative jurisprudence on environmental rights as presently being experienced in other developing countries such as India, Pakistan, Kenya, and South Africa.”³⁸⁶ While the victims of environmental degradation can now rely on the Rules in enforcing their right to a healthy environment, the question is whether, seven years later, there is evidence that litigants are employing the Rules in seeking greater participatory rights in EIA, or in environmental decision-making more generally (including raising concerns over climate impacts)? This question is difficult to answer because to date there is no evidence of victims, lawyers, or NGOs interested in the protection of the environment effectively utilizing the provisions of these Rules. Amaechi speculates that this is because “there is still a general lack of knowledge of the legal means of protecting the environment in the country.”³⁸⁷ Also, the non-justiciability of the provisions of chapter 2 of the Nigeria constitution have further led to the public view that there is no justiciable right to a healthy environment notwithstanding the existence of the *African Charter Ratification Act* in Nigeria. To this effect, there is the urgent need for the judiciary, universities and colleges, media, NGOs to bring to the awareness of the general public, including judges and lawyers, the importance of enforcing their right to a healthy environment and informing them of the various legal means of enforcing their fundamental right to a healthy

³⁸⁶ Amaechi *supra* note 378 at 333.

³⁸⁷ *Ibid.*

environment in Nigeria.³⁸⁸ The failure of doing this as Amaechi identifies is that “the provisions of the Rules may go untapped for a long period in relation to enforcing the right to a healthy environment in Nigeria.”³⁸⁹

The urgent need for a more stringent approach in involving the public in the EIA process is further reflected in the global issue of climate change. As was identified in chapter 3, the public especially local communities are conversant with their environment than anyone else which makes them qualified to participate and also raise up issues that pose as risks in the proposed project that would further increase climate impacts. Furthermore, section 4 (g) of the EIA Act provides that an EIA shall include “an indication of whether the environment of any other State or local government area or areas outside Nigeria is likely to be affected by the proposed activity or its alternatives.” This provision goes to show that impacts that are not merely local should be considered in approving oil and gas projects and also reiterates the need for involving the public of both the host and affected countries in the EIA process in order to seek alternatives and minimize the impacts of such projects on their wellbeing and their environment.

4.8. Conclusion

This chapter has examined EIA law in Nigeria with a focus on establishing when opportunities for public participation in decision-making are available, and for whom. It is clear that Nigeria needs to comply with its international commitment to ensuring all stakeholders (local communities, indigenous people, women, youths, and NGOs) can participate in the EIA process, and that the EIA Act should be amended to require the consideration of climate impacts

³⁸⁸ Amaechi *supra* note 378 at 333.

³⁸⁹ *Ibid.*

before a project is been approved. These steps should be taken with the end goal of ensuring a sustainable environment for the present and future generations.

CHAPTER 5

Review of Environmental Assessment in Canada³⁹⁰

5.1. Introduction and Evolution of Canadian Environmental Assessment Act 1992

Canada is a vast country covering nearly 10 million square kilometers, with a population of about 36 million,³⁹¹ most of who live within 150 kilometers of the US border.³⁹² The northern part of Canada, due to its fragile nature as a result of oil sand activities, has often times fallen victim to the negative impacts of ill-considered logging, mining or mega-projects such as huge hydroelectric power stations.³⁹³ This and many other instances of environmental degradation as identified in Chapter 1 led to the need for an environmental assessment legal framework in Canada.

This chapter will examine the EA legal framework in Canada. First, it will examine the history of EA in Canada with reference to the *EARP Guidelines*³⁹⁴ which can be regarded as the forerunner of EIA legislation in Canada as well as the *Canadian Environmental Assessment Act 1992*³⁹⁵ (CEAA 1992). Secondly, it will examine the *Canadian Environmental Assessment Act of 2012*³⁹⁶ (CEAA 2012), which will be the focus of this chapter. Here, the changes made to the legal framework of EA at the federal level and the effect of these changes on Canada's EA process will be identified. Thirdly, it considers whether stakeholders identified in chapter 3 have

³⁹⁰ The terminology "environmental assessment" (EA) will be used in this chapter majorly because this is the applicable term in Canada when referring to the EIA process generally.

³⁹¹ Statistics Canada: Canada's national statistical agency available at <http://www.statcan.gc.ca/start-debut-eng.html>

³⁹² Wood *supra* note 1 at 68.

³⁹³ *Ibid* at 70.

³⁹⁴ Environmental Assessment and Review Process Guidelines Order.(1984), June) P.C. 1984-2132 31.

³⁹⁵ CEAA 1992 *supra* note 67.

³⁹⁶ CEAA 2012 *supra* note 78.

the opportunity to participate in Canada's EA process. Lastly, it examines whether international law on EIA is implemented in Canadian law.

5.2. Background Context

Canada operates within the spheres of federalism, that is, Canada is divided into two levels of government: the federal and provincial governments.³⁹⁷ Neither the federal or provincial government has exclusive power over the environment as there is no provision in the *Constitution Act of 1867* establishing 'environment' as an independent matter. According to La Forest J (as he then was) of the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*:³⁹⁸

I agree that the *Constitution Act 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.³⁹⁹

³⁹⁷ Jay Makarenko, "Federalism in Canada: Basic Framework and Operation" January 11, 2008 online: <http://mapleleafweb.com/features/federalism-canada-basic-framework-and-operation> ; There are ten provinces in Canada which includes: British Columbia, Alberta, Ontario, Newfoundland and Labrador, Quebec, Manitoba, Prince Edward Island, Nova Scotia, New Brunswick and Saskatchewan (including the existence of three territories having its regional government: the Yukon, the Northwest Territories, and Nunavut) with each having its own provincial government and the constitutional power to enact laws with the exception of the territories which are not constitutionally recognized. See sections 91, 92, 93, 95 and 132 of Canada's *Constitution Act 1867*.

³⁹⁸ 1992 1 S.C.R 3; See also Jamie Benidickson, *Environmental Law* 4th ed (Toronto: Irwin Law, 2013) at 31-32 ; Doelle and Tollefson *supra* note 98 at 184-185.

³⁹⁹ *Ibid* at para 86.

To this effect, both the federal and provincial governments may and do pass EA laws.⁴⁰⁰ This has resulted in conflict over the years when both provincial and federal processes apply to the same project.⁴⁰¹ One of the earlier cases reflecting the purpose of EA in Canada, which also dealt with the relationship between federal and provincial joint powers in the EA process, was the *Alberta Wilderness Association v. Cardinal River Coals Ltd.*⁴⁰² This is often referred to as the ‘Cheviot case.’ The sufficiency of an EA carried out by a review panel established under the old CEAA was challenged by the Alberta Wilderness Association (AWA).⁴⁰³ The proposed project was an open pit coal mine that Cardinal River Coals Ltd “planned to construct and operate near the eastern boundary of Jasper National Park”.⁴⁰⁴ The lifespan of the mine was estimated to be 20 years and to this effect, the AWA argued that the mine would invariably result to significant continuing environmental effects on the surrounding environment and on people within the surrounding.⁴⁰⁵ Since an environmental review was also required under the Alberta legislation, the federal Minister of Environment and the Alberta Energy and Utilities Board (“EUB”) agreed to hold a joint federal and provincial review as is provided for under CEAA, and, to that end, signed the “Agreement for the Cheviot Coal Project”, dated October 24, 1996 (“Joint Panel Agreement”).⁴⁰⁶ The Honourable Justice Campbell in his judgment stated that:

“...it is clear that the project cannot proceed until the Joint Review Panel’s environmental assessment is conducted in compliance with CEAA. Therefore in my opinion the Minister has authority and responsibility to direct the Joint Review Panel to reconvene

⁴⁰⁰ See for example the Alberta EIA law: *Environmental Protection and Enhancement Act* 2000 chapter E-12 online <https://www.qp.alberta.ca/documents/.../E12.pdf>

⁴⁰¹ See the discussion below on Harmonization between federal and provincial EA process.

⁴⁰² [1999] CarswellNat 511 (Fed. T.D).

⁴⁰³ Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials* 1st ed (Toronto: Thomson Reuters, 2013) at 325. [Doelle and Tollefson]

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

and, having regard to my findings, direct that it do what is necessary to make adjustments to the Joint Review Panel Report so that the environmental assessment conducted can be found in compliance with CEAA”.⁴⁰⁷

The right to a healthy environment as earlier identified in the Nigerian chapter is not recognized under Canada’s Charter. However, the Canadian constitution does recognize and protect Aboriginal rights as provided under section 35 of the Constitution and has also recently endorsed the *UN Declaration on Rights of Indigenous People (UNDRIP)*,⁴⁰⁸ declaring its intentions to “adopt and implement the declaration in accordance with the Canadian Constitution.”⁴⁰⁹ It is important to make reference to the concept of free, prior, and informed consent provided in article 32 (2) of the UN Declaration:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources.

To this effect, although there is no express right to a healthy environment in Canada’s constitution, Aboriginals could rely on section 35 and these international provisions to enforce their right to a healthy environment.⁴¹⁰ This is because section 35 provides the constitutional basis for the recognition and protection of Aboriginals rights which includes the right to hunt,⁴¹¹

⁴⁰⁷ Doelle & Tollefson *supra* note 98 at 535.

⁴⁰⁸ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html>

⁴⁰⁹ Tim Fontaine “Canada Officially adopts UN Declaration on Rights of Indigenous Peoples” *CBC News* (2 August, 2016), online: <http://www.cbc.ca/beta/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272> [Fontaine].

⁴¹⁰ See the discussion below on section 35 of the Constitution on Aboriginal rights.

⁴¹¹ *R v. Powley* 2001 53 OR (3d) 35 (CA).

right to fish⁴¹² and also the right to exclusive use and occupation of land for a variety of purposes.⁴¹³ The execution of an oil and gas project which undermines and threatens a safe and healthy environment will in turn affect the exercise of Aboriginals rights. In effect, the environment has to be safe and healthy enough for Aboriginals to exercise their various rights as provided by the *Constitution Act of 1867*.

Notwithstanding the fact that Canada's Constitution does not reflect the right to a healthy environment, it is important to acknowledge the debate on this topic. One school of thought holds the view that there is a need to amend the constitution to entrench the right to a healthy environment;⁴¹⁴ while the other school of thought holds the view that existing rights contained in the constitution for example, the right to life, liberty and security of the person as contained in section 7, can be understood as including the right to a healthy environment.⁴¹⁵ Addressing this issue, David Boyd holds the strong view that the right to a healthy environment falls among the category of fundamental human rights and as such "should enjoy the strongest legal protection available in today's society- constitutional protection- to ensure that they are respected and fulfilled."⁴¹⁶ Boyd further argues that the constitutional entrenchment of the right to a healthy environment especially in Canada's constitution will "contribute to stronger laws, increased

⁴¹² *R v. Sparrow* 1990 1 S.C.R. 1075.

⁴¹³ *Delgamuukw v. British Columbia* 1997 3 S.C.R. 1010.

⁴¹⁴ David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Canada: UBC Press, 2012) [Boyd]; C.P. Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21 *Osgoode Hall Law Journal* 390-421; C.F Cranor, *Toxic Torts: Science, Law and the Possibility of Justice* (Cambridge: Cambridge University Press, 2006).

⁴¹⁵ Lynda Collins "Safeguarding the Longue Duree: Environmental Rights in the Canadian Constitution" (2015) 71 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 519-539; D. Anton & D. Shelton, *Environmental Protection and Human Rights* (Cambridge: Cambridge University Press, 2011); Lynda Collins "Are We There Yet? The Right to Environment in International and European Law" (2007) 3 *McGill International Journal Sustainable Development Law & Policy* 119; Lynda Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2009) 26 *Windsor Review of Legal and Social Issues* 7.

⁴¹⁶ Boyd *supra* note 414 at 3.

enforcement, an enhanced role for citizens, and improved environmental performance.”⁴¹⁷ Boyd’s argument is based on empirical evidence and on the experiences of more than a hundred nations. To this effect, he argues that the omission of this right is a “fundamental defect that must be rectified.”⁴¹⁸

The compulsory need for an EA process was first considered and given priority to with the establishment of the federal Environmental Assessment and Review Process (EARP) on 20 December 1973.⁴¹⁹ The EARP was amended by a second decision in 1977 and the responsibility of the federal Minister of the Environment for the EA of federal projects, programmes and activities was reaffirmed in the Government Organization Act 1979.⁴²⁰ It was not until 1984 that there was a legal document (*Environmental Assessment and Review Process Guidelines Order* Government of Canada, 1984)⁴²¹ which contained provisions clarifying the roles and responsibilities of the participants in the EARP procedures.⁴²² The purpose of the EARP Guidelines was to ensure that the environmental consequences of proposals for which the federal government had decision-making authority were adequately assessed.⁴²³ However, in 1990 there was a change in the EA legal framework with the federal government introduction of the Canadian Environmental Assessment Bill which was thereafter given Royal Assent in June 1992. The CEAA was later proclaimed in force early in 1995.⁴²⁴ The Act provided the necessary legal framework to hold decision-makers obligated to integrate environmental considerations in all its decisions relating to projects (but not to policies, plan and programmes, to which EARP, in

⁴¹⁷ Boyd *supra* note 414 at 3.

⁴¹⁸ *Ibid* at 4.

⁴¹⁹ Wood *supra* note 1 at 70.

⁴²⁰ *Ibid*.

⁴²¹ Environmental Assessment and Review Process Guidelines Order.(1984), 1984-2132 31.June) P.C.

⁴²² Wood, *supra* note 1 at 70.

⁴²³ *Ibid*.

⁴²⁴ CEAA 1992 *supra* note 67.

principle applied).⁴²⁵ As Christopher Wood, a legal scholar argued, “the Act was part of a package intended not only to reduce the uncertainties associated with EARP but to make the environmental assessment process more efficient, effective, fair and open”.⁴²⁶

CEAA 1992 had some notable features which Muldoon and his co-authors identify as follows: “it’s quite broad application (although only to projects), mandatory attention to cumulative effects, some funding for public participation in major assessment reviews, and encouragement of follow-up monitoring”.⁴²⁷ However, the discretionary powers inherent in CEAA 1992 was a major stumbling block for the Act to reach its full potential primarily because while the law allowed authorities to provide for alternatives to the project, and respond to environmental considerations, use of these powers was discretionary and was often times initiated too late to influence early planning of projects.⁴²⁸ Thus, the result as Muldoon et al argues was that the “application of some of the most advanced aspects of CEAA 1992 was uncertain or less effective than it could have been.”⁴²⁹ Another major criticism of the 1992 law by project proponents was that the federal EA process was unnecessarily delaying desirable development.⁴³⁰ The reason behind this is not farfetched as it has been argued that the exercise of discretion by responsible authorities in determining the scope of a project probably did contribute to delays.⁴³¹ A number of litigations arose as a result of the use of discretion by responsible authorities in determining the scope of a particular project as provided under section

⁴²⁵ Wood *supra* note 1 at 71.

⁴²⁶ *Ibid.*

⁴²⁷ Muldoon *supra* note 17 at 234.

⁴²⁸ *Ibid.*; Doelle *supra* note 1 at 34.

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.* at 34; Kirchoff *supra* note 56 at 5; Robert Gibson, “In full Retreat: The Canadian Government’s New Environmental Assessment Law undoes Decades of Progress (2012) 30 *Impact Assessment and Project Appraisal* 179 at 179 [Gibson].

⁴³¹ Gibson *supra* note 430 at 179.

15 and also in the area of assessment of a project under section 16.⁴³² Another major criticism was the focus on the “apparent duplication of effort where individual projects were subject to both federal and provincial assessment requirements and the complainants’ favoured reliance on provincial processes alone.”⁴³³ Although, inefficiencies were associated with some of these criticisms, the underlying problem was not the existence of duplication between federal and provincial EA process; “but overlap between different but interconnected areas of federal and provincial responsibility, and these areas could not be abandoned without creating serious assessment gaps.”⁴³⁴

As a result of the criticism associated with the CEAA 1992, the Federal Government of Canada on April 26, 2012 released a budget bill to effect certain changes to the CEAA 1992 which later resulted in an updated version of the Act called the CEAA 2012 which officially came into force on July 6 2012.⁴³⁵ This development had a downside to it as pointed out by Muldoon who noted that “the new law’s most dramatic component was the elimination of ‘screenings’- the modest reviews of small projects that had constituted well over 90 percent of assessments under the old law.”⁴³⁶ Some of the new features associated with this new law were that it “focuses more narrowly on matters of exclusive federal jurisdiction, consolidates decision

⁴³² See *Alberta Wilderness Association v. Cardinal River Coals Ltd* 1999 3 FC 425; *Friends of the West Country Association v. Canada (Minister of Fisheries & Oceans)* 1999 FCA 9379; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)* 2006 FCA 31; *Mining-watch Canada v. Canada (Minister of Fisheries & Oceans)* 2010 SCC 2.

⁴³³ Muldoon *supra* note 17 at 234; Gibson *supra* note 430 at 180.

⁴³⁴ Muldoon *supra* note 17 at 234-235.

⁴³⁵ Canadian Environmental Assessment Act 2012, S.C. 2012, c.19 available online at: <http://laws-lois-justice.gc.ca/eng/acts/c-15.21/index.html>; Muldoon *supra* note 17 at 235; Gibson *supra* note 430 at 180.

⁴³⁶ Muldoon, *supra* note 17 at 235; See Andrew Gage, “Who is silenced under Canada’s new Environmental Assessment Act?” (2012) online: West Coast Environmental Law Website <http://wcel.org/resources/environmental-law-alert/who-silenced-under-canada%E2%80%99s-new-environmental-assessment-act>; Jeff Gailus, “An Act of Deception” (2012) 38 *Alternatives Journal* online: <http://www.alternativesjournal.ca/energy-and-reosurces/act-deception>; Meinhard Doelle, “EA Summit Reflections” (5 May 2016), Environmental Law News (blog) online: <https://blogs.dal.ca/melaw/2016/05/05/ea-summit-reflections/>

authority in three agencies,⁴³⁷ specifies time limits for particular review process components, and provides for the substitution of provincial processes.”⁴³⁸ In addition, the new law added “new provisions for the exercise of ministerial discretion and, consequently, new openings for process uncertainties.”⁴³⁹ However, the CEAA 2012 strengthened the federal environmental assessment by introducing an enforceable decision in which conditions of approval may be specified.⁴⁴⁰ Also, CEAA 2012 retains some of the important provisions of the CEAA 1992 which includes participant funding, a useful public registry, and a formal purpose to promote sustainable development.⁴⁴¹

This thesis will focus on the new changes made to the legal framework of environmental assessment at the federal level with the introduction of the “CEAA 2012”. The next section will examine the scope of the new Act and its new features.

5.3. Overview of Canadian Environmental Assessment Act 2012

The primary purpose of CEAA 2012 is to focus on assessing the significance of adverse environmental effects on people (especially local communities) and their surrounding environment.⁴⁴² Where the Act is appropriately triggered, the environmental assessment process involves “detailed requirements and public procedures to determine what effects are significant, what significant effects may be mitigated, and what projects causing significant effects are

⁴³⁷ Under the CEAA 2012, s.15, the three authorities are the Canadian Environmental Assessment Agency, the National Energy Board, and the Canadian Nuclear Safety Commission; see sections 32,33,34 & 38(1) CEAA 2012.

⁴³⁸ Muldoon *supra* note 17 at 235.

⁴³⁹ *Ibid.*

⁴⁴⁰ CEAA 2012 *supra* note 78, ss. 31,54,97-102; Muldoon *supra* note 17 at 235; Rod Northey, *Guide to the Canadian Environmental Assessment Act* (Canada: LexisNexis, 2015) at 7 [Northey].

⁴⁴¹ *Ibid.*, s. 4(1)(h); Muldoon *supra* note 17 at 235.

⁴⁴² Northey *supra* note 440 at 5; Section 4 (1) (b) of CEAA 2012 provides:

To ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects.

justified in the circumstances and which may further proceed.”⁴⁴³ However, Rod Northey noted that the new law “has narrowed federal environmental assessment so that it no longer applies to most green or renewable energy projects that have important environmental benefits and limited adverse environmental effects.”⁴⁴⁴ CEAA 2012 thus “applies EA exclusively to the other end of the environmental spectrum-projects that threaten to cause significant harm to the environment.”⁴⁴⁵ Accordingly, CEAA 2012 does not have the purpose of using EA to make good projects great; rather its purpose is to prevent projects (big and small) from causing significant environmental harm.⁴⁴⁶

5.3.1. New Features of CEAA 2012

CEAA 2012 has several new important features namely:

5.3.1.1. Triggering Process

The new Act abridges the requirements to trigger federal EA. To this effect, federal EA is now applied to designated projects which are provided for in regulations.⁴⁴⁷ Moreover as Northey notes “the present designated project list resembles the ‘comprehensive study list’ under

⁴⁴³ Northey *supra* note 440 at 5.

⁴⁴⁴ *Ibid* at 7.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Ibid*.

⁴⁴⁷ See sections 14&15 CEAA 2012; Northey *supra* note 440 at 10. For example, see section 15 (a)-(d) which establishes a link between a responsible authority and designated projects which are provided for in regulations:

For the purposes of this Act, the responsible authority with respect to a designated project that is subject to an environmental assessment is:

- (a) The Canadian Nuclear Safety Commission, in the case of a designated project that includes activities that are regulated under the *Nuclear Safety and Control Act* and that are linked to the Canadian Nuclear Safety Commission as specified in the regulations made under paragraph 84(a)
- (b) The National Energy Board, in the case of a designated project that includes activities that are regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act* and that are linked to the National Energy Board as specified in the regulations made under paragraph 84(a).
- (c) The federal authority that performs regulatory functions that may hold public hearings and that is prescribed by regulations made under paragraph 83(b)....
- (d) The Agency, in the case of a designated project that includes activities that are linked to the Agency as specified in the regulations made under paragraph 84(a).

CEAA 1992.”⁴⁴⁸ Under CEAA 2012, a project on the designated projects list is directly subject to the Act. By contrast, the CEAA 1992, applied to projects on the comprehensive study list only where the project required a federal decision such as a regulatory approval.⁴⁴⁹

5.3.1.2. Scope of Environmental Effects

The Act reforms the scope of environmental effects for the determination of ‘significance’ under the Act.⁴⁵⁰ The CEAA 2012 provides for a narrow definition of environmental effects for any project that triggers the CEAA 2012, and does not require any other federal regulatory approval.⁴⁵¹ The definition of environmental effect is limited to seven topics: “fish and fish habitat; aquatic endangered species; migratory birds; federal lands; interprovincial effects; international effects; and certain effects on Aboriginal peoples that result from a change to the environment.”⁴⁵² It can be argued that international effects extend to transboundary harm. On addressing the issue of ‘significant adverse environmental effects’ under the CEAA 2012; the case of *Peace Valley Landowner Association v Canada (Attorney General)*⁴⁵³ provides a good example. This case was instituted based on an application for a judicial review of the Governor in Counsel (GIC) decision that the construction of the site C Clean Energy project (the Project) on the Peace River in British Columbia resulting in significant adverse environmental effects was justified given the circumstances. Section 54 of CEAA 2012 empowers the Minister to determine whether a project will result in significant adverse environmental effects under section 52 (1) of CEAA 2012.⁴⁵⁴ The challenge to the GIC’s

⁴⁴⁸ Northey, *supra* note 440 at 10.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ See section 5 CEAA 2012 *supra* note 78; See *Gitxaala Nation v. Canada* 2016 FCA 187 para 109.

⁴⁵¹ Northey, *supra* note 440 at 11; See *Courtoreille v. Canada (Aboriginal Affairs & Northern Development)* 2014 FC 1244 para 94,95 & 96.

⁴⁵² See section 5 CEAA 2012; Northey *supra* note 440 at 11.

⁴⁵³ 2015 FC 1027.

⁴⁵⁴ *Ibid* at para 1.

decision on judicial review was brought by the Doig River First Nation and other First Nations.⁴⁵⁵ In considering the GIC's decision, the Honourable Justice argued that

A balancing of interests necessarily involves weighing competing interests of the parties. While the Applicant insists the GIC focused solely on the adequacy of Aboriginal consultation, the penultimate paragraph of the impugned decision produced above states otherwise. The 'social, economic, policy and broader public interest' were considered in deciding that the significant adverse environmental effects are justified;⁴⁵⁶ there is no basis to find that the GIC's justification decision was either taken without regard for the purpose of the CEAA 2012, or that economic considerations were not taken into account, or that the decision was not reasonable on the facts.⁴⁵⁷

The application for judicial review was dismissed given the fact that the GIC's decision was made within the bounds of CEAA 2012. This case goes to show the power and discretion the Minister has to determine whether a project will cause significant adverse environmental effects or not.⁴⁵⁸

5.3.1.3. Process Options and Features

CEAA 1992 involved four process options: screenings, comprehensive studies, mediation, and panel reviews. Screenings and comprehensive studies were regarded as "alternative forms of self-assessment, whereas mediation and panel reviews could either replace or follow the screening or comprehensive study process."⁴⁵⁹ However, this is not the present case as what is required under CEAA 2012 entails two process options: "one is referred to as a

⁴⁵⁵ 2015 FC 1027 at para 2.

⁴⁵⁶ *Ibid* at para 62.

⁴⁵⁷ *Ibid* at para 68.

⁴⁵⁸ This case was further appealed to the British Columbia Court of Appeal- *Peace Valley Landowner Association v. British Columbia (Environment)* 2016 BCCA 377 where Peace Valley contended that the provincial approval of this project was made in error (see para. 23 of this appeal). The appeal was dismissed.

⁴⁵⁹ Doelle & Tollefson *supra* note 98 at 512; see section 14 CEAA 1992 *supra* note 67.

standard ‘environmental assessment’; the other is the ‘panel review’ option.”⁴⁶⁰ Accordingly, “comprehensive studies and mediation have been eliminated as process options under CEAA 2012, thus leading to a general “EA process and the option to refer EAs to a panel review.”⁴⁶¹

5.3.1.4. The Standard EA Process

The standard process under CEAA 2012 is expected to proceed as follows. The process commences when a proponent undergoes registering its proposed project with the Canadian Environmental Assessment Agency (‘the Agency’).⁴⁶² The Act provides that the proponent of a project is prohibited from taking steps in executing a project that would have impact on the environmental effects as listed under section 5 of the Act unless the Agency is satisfied that no EA is required or the proponent has taken steps in complying with the conditions stipulated for the EA process.⁴⁶³

The timeframe from registration to the decision made in respect of the triggering process are very close as it requires that upon receiving the registration documents from the proponent, the Agency has ten days to decide if it requires more necessary information about the project from the proponent.⁴⁶⁴ The CEAA 2012 provides that the Agency having been satisfied that the description of the designated project includes all of the required information is obligated to post notices to the public on an electronic registry, allowing twenty days for comments from the public, and make its decision within forty-five days of posting the notice.⁴⁶⁵ Within the forty-five days timeline, the Agency is also expected to seek “input from expert federal departments to inform its decision; a notice of the Agency’s decision at the end of this forty-five day period is

⁴⁶⁰ Doelle & Tollefson *supra* note 98 at 512; see sections 8, 13, 21 and 38 of CEAA 2012.

⁴⁶¹ *Ibid.*

⁴⁶² See section 8 CEAA 2012; Doelle & Tollefson *supra* note 98 at 512.

⁴⁶³ See section 6 CEAA 2012; *Ibid.*

⁴⁶⁴ See section 8(2) CEAA 2012; *Ibid.*

⁴⁶⁵ See sections 9&10 CEAA 2012.

required to be posted on the electronic registry”.⁴⁶⁶ To this effect if the Agency issues a decision which requires an environmental assessment to be carried out under the Act, a notice of commencement has to be posted on the electronic registry.⁴⁶⁷ The responsible authority assumes its responsibility at this stage. Section 15 provides for the National Energy Board (NEB), the Canadian Nuclear Safety Commission (CNSC), or some other regulatory agencies which are regarded as responsible authorities and have been assigned as the respective designated regulatory agencies responsible for the EA process.⁴⁶⁸ For projects having no regulatory agency assigned to it for the EA process, the Agency is tasked with the responsibility of carrying out the EA process.⁴⁶⁹

5.3.1.5. Panel Reviews

Under the CEAA 2012, the Minister of Environment has sixty days from the notice of commencement of the EA process to decide whether it is necessary to conduct a panel review EA or not.⁴⁷⁰ This is a significant change in comparison with the provisions of the CEAA 1992, where the Minister previously had the discretion to determine the suitability of a panel review EA process.⁴⁷¹ Doelle and Tollefson both argue that “sixty days is a short time frame both for the public to gain sufficient understanding of the proposed project and voice their concerns and for the Minister to make a final process decision.”⁴⁷²

Another major change to the panel review process is that “one-person panels are now permitted, whereas previously a minimum of three panel members was required” for the review

⁴⁶⁶ Section 12 CEAA 2012; Doelle & Tollefson *supra* note 98 at 513.

⁴⁶⁷ Doelle & Tollefson *supra* note 98 at 513.

⁴⁶⁸ See section 15 CEAA 2012 *supra* note 78.

⁴⁶⁹ *Ibid*; Doelle & Tollefson *supra* note 98 at 513.

⁴⁷⁰ See section 38(1) CEAA 2012 *supra* note 78.

⁴⁷¹ Doelle & Tollefson *supra* note 98 at 513.

⁴⁷² Doelle & Tollefson *supra* note 98 at 513; See *Courtoreille v. Canada (Aboriginal Affairs & Northern Development)* 2014 FC 1244 para 55.

process.⁴⁷³ To conclusively say this will be a positive change will depend on varying factors as Doelle & Tollefson both argue that “there is potential for this to be a positive change, but only if one-person panels are to be used where comprehensive studies were used under CEAA 1992”.⁴⁷⁴ If, however, “one-person panels are used for large projects that previously were subject to a three-person panel, the ability to appoint one-person panel could signify a further step backward for the panel review process”.⁴⁷⁵ Whether or not the option to appoint one-person panels is a positive or negative step largely depends on whether it provides the opportunities for more panel reviews to be carried out or not.⁴⁷⁶

5.3.1.6. Harmonization with Provincial EAs

One of the notable features of the CEAA 2012 is that it makes efforts to ensure that the federal process will not apply whenever there is a likelihood of an overlap with a provincial EA process.⁴⁷⁷ One of the ways by which the issue of overlap is addressed is by selecting “one jurisdiction to carry out an EIA process, with no direct involvement by the other level of government and few other safeguards to ensure that the EA will provide a solid basis for decision-making at all relevant levels of government”.⁴⁷⁸ This method helps in avoiding any form of interference or overlap that may occur in the course of carrying out the process.

Another way by which the CEAA 2012 addressed the issue of overlap is the discretionary process of deciding on a case by case basis whether a designated project requires a federal EA under CEAA 2012, and whether it should undergo a standard EA process or a panel review. This method has been argued by Doelle & Tollefson as a “powerful tool to limit the application of the

⁴⁷³ See section 42(1) CEAA 2012; Doelle & Tollefson *supra* note 98 at 514.

⁴⁷⁴ Doelle & Tollefson *supra* note 98 at 514.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.*

federal EA process and to avoid an actual or perceived duplication with provincial EA processes.”⁴⁷⁹ This basically favors the provincial EA process rather than the federal EA and as such, the federal EA may not be applied. Furthermore, taking into cognizance that the federal EA process is narrow in scope further reduces any risk of duplication with provincial EAs, “as the nature of the federal process has shifted from an environmental assessment process to a process of gathering limited information already required for regulatory decision-making”.⁴⁸⁰

Furthermore, in order to provide opportunities for harmonization, CEAA 2012 includes options for substitution and equivalency.⁴⁸¹ The process of substitution to the provincial EA process is made mandatory and linked to a request by a province, “while substitution to federal and Aboriginal processes is framed in more permissive language”.⁴⁸² However, the issue with this process as Doelle and Tollefson identifies is that “substitution is dependent on the Minister forming an opinion that the process in question would be an appropriate substitute.”⁴⁸³ This problem further reflects the discretionary power residing with the Minister deciding the appropriateness of the substitution. Section 34(1) of CEAA 2012 provides six minimum conditions for the Minister to approve a substitution. These conditions are: (a) the process to be substituted will include consideration of the factors set out in subsection 19(1) of CEAA 2012; (b) the public will be given an opportunity to participate in the assessment; (c) the public will have access to records related to the assessment to enable their “meaningful” participation; (d) the assessment will conclude with a report submitted to the CEAA 2012 responsible authority;

⁴⁷⁹ Doelle & Tollefson *supra* note 98 at 514.

⁴⁸⁰ *Ibid* at 518.

⁴⁸¹ See section 32, 33 & 34 CEAA 2012. It is important to note that the potential for substitution arises only for certain designated projects, namely those projects having the Agency or a Schedule 1 body as the lead responsible authority: see section 33(a).

⁴⁸² Doelle & Tollefson, *supra* note 98 at 518.

⁴⁸³ *Ibid*.

(e) the EA report will be made available to the public; and (f) any other conditions that the Minister establishes are or will be met.⁴⁸⁴

It is important to note that substitution is not to be considered for the panel review process or for EAs carried out by the NEB or the CNSC; substitution is only applied in EAs carried out by the Canadian Environmental Assessment Agency.⁴⁸⁵ A cursory look at the jurisdiction of the CNSC and NEB indicates at least some components of exclusive federal authority. Therefore, it would be constitutionally inappropriate for the Minister to conclude that any of such substitution would be appropriate in the circumstance. Subsequently, upon approval of the substitution process, the process is presumed to have met the EA requirements under CEAA.⁴⁸⁶ The responsible authority or the Minister as the case may be is then obligated to make a decision on the project based on the final report prepared at the conclusion of the substitution process.⁴⁸⁷

In summary, when it comes to harmonization, the method by which one jurisdiction is selected to carry out the EA process without any form of interference, the process of substitution on request by a provincial government and the discretionary process by which it is determined whether designated projects require a federal EA process or not all encourage one comprehensive EA process, giving opportunities to provinces to take part in the process with the end goal of narrowing the involvement of federal EA process and also avoiding duplication among the various jurisdictions.⁴⁸⁸

⁴⁸⁴ See section 19(1) CEAA 2012 *supra* note 78.

⁴⁸⁵ Doelle & Tollefson *supra* note 98 at 518.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid* at 519.

5.3.1.7. Public Engagement in the EA Process

Doelle & Tollefson argue that the approach in CEAA 2012 “is a further step backward in the effort to actively engage members of the public in the planning stage of project development and to provide meaningful opportunities for mutual learning.”⁴⁸⁹ A careful observation of the new legislation shows that the CEAA 2012 has few legislative requirements regarding public participation when compared to the comprehensive study process under CEAA 1995. Strict timelines tend to put members of the public at a disadvantage.⁴⁹⁰ Consequently, “from an Aboriginal perspective, the streamlining changes made to the CEAA 1995 have substantial implications especially in terms of how effectively Aboriginal people can participate in the environmental assessment and review process of new projects that may affect their traditional lands.”⁴⁹¹ For example, Kirchhoff argues that “the drastic reduction in the number of projects that undergo an environmental assessment in turn greatly reduces opportunities for Aboriginal involvement.”⁴⁹² Doelle also argues that the implemented changes are so drastic that the Canadian federal environmental assessment process will essentially be a process of gathering information rather than “a true planning process that engages governments and the public (including Aboriginal peoples in the early stages of project planning and design.”⁴⁹³

Public engagement is also reduced through the new triggering process. By commencing the CEAA 2012 process with the filing of the registration document by the proponent seeking to

⁴⁸⁹ Doelle & Tollefson *supra* note 98 at 519.

⁴⁹⁰ For example, under CEAA 2012, a maximum of 365 days for environmental assessment by the Canadian Environmental Assessment Agency, and a maximum of 24 months for a review panel environmental assessment will make it more difficult for remote and isolated Aboriginal communities to fully participate in the environmental assessment process due to logistical constraints such as money, expertise and time to review technical documentation produced during the assessment process.

⁴⁹¹ Kirchhoff *supra* note 56 at 5-6.

⁴⁹² *Ibid* at 6.

⁴⁹³ Meinhard Doelle, “The End of Federal Environmental Assessment as we know it” (2012) 24 *Journal of Environmental Law and Practice* 1 at 8. [Doelle]

convince the federal decision-makers that the project does not necessarily require an EA, the “proponent is encouraged to complete and defend the project design before the EA process starts.”⁴⁹⁴ To this effect, “the public is thereby essentially excluded from the project planning process which also minimizes the value of the process by pushing it further to the technical regulatory stage, and further away from an EA planning process.”⁴⁹⁵

In addition, the concept of “interested party” has the probability of reducing public engagement in the EA process. “CEAA 2012 has the potential to create two classes of the public, those with a direct interest who will be full participants, and those who do not qualify as having a direct interest, who will be excluded from some parts of the federal EA process.”⁴⁹⁶ To understand this better, reference will be made to the definition of “interested party” in subsection 2(1) of the Act. Notably, the criteria for determining who is an interested party is not clear in the definition, but is however left to the NEB’s discretion or the review panel as the case may be under subsection 2(2) to decide who an interested party is.⁴⁹⁷ The result is that for review panels and for EAs carried out by the NEB, it is important whether a member of the public is considered to be an interested party or not.⁴⁹⁸ Paragraph 19(1) (c) and paragraph 43 (1) (c) also makes reference to the term interested party, thereby reiterating the two classes of members of the public which are created. The significance of this is that everyone will get the requisite notice

⁴⁹⁴ Doelle & Tollefson *supra* note 98 at 519.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*; See *Forest Ethics Advocacy v. National Energy Board* 2014 FCA 245 where it was established that Forest Ethics “does not have direct standing to bring an application for judicial review and invoke the Charter against the Board’s decision” in the suit as it was not “directly affected” by the Board’s decision (see paras 29-34).

and will be able to participate in the EA process; however, only interested parties will have the right and opportunity to fully participate in the NEB environmental assessment process.⁴⁹⁹

Furthermore, it is important to consider section 43 in this regard. The review panel is required to hold hearings in a manner that only interested parties are opportune to participate. This then leads to the presumption that members of the public who do not fall under the categories of interested party can be excluded from the EA process.⁵⁰⁰ Due to the fact that subsection 2(2) provides that the panel has the power of determining who is an interested party, “CEAA 2012 clearly puts panels in a position of determining who will be permitted to participate in hearings and who will not.”⁵⁰¹ At first, “this may seem harmless given the independence of panels;” however, a cursory look at it “when taken in combination with strict timelines offered to panels in their terms of reference, it is clear that this will put panels in a position of limiting participation in order to meet the timelines imposed, or face having the panel review process terminated and completed by the Canadian Environmental Assessment Agency.”⁵⁰² In addition, this section might have undesirable consequences on certain categories of persons for example, people that cannot prove that their lands are being affected by pipeline projects. So therefore, the government or the review panel will not be open to their complaints unless the pipeline goes through their property or they are directly affected by the project.

5.3.1.8. Prohibition

It is an offence to contravene certain provisions of the CEAA 2012; in particular, it is an offence to go ahead with a designated project without complying with the relevant provisions of

⁴⁹⁹ Doelle & Tollefson *supra* note 98 at 519.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

CEAA 2012. Also, providing false information in the EA process is regarded as an offence.⁵⁰³ Failure to comply with this can trigger substantial fines; notably “no previous federal EA regime has included any offences.”⁵⁰⁴

5.4. Recent Developments in Canadian Environmental Assessment Legislation

The introduction of CEAA 2012 has been criticized by scholars, proponents, the public for “not having preliminary proposals and for being pushed too quickly through the legislative process with no debate about the implications of proposed changes.”⁵⁰⁵ It only took two months for the CEAA 2012 to be passed as part of the 2012 Budget Implementation Bill, Bill C-38.⁵⁰⁶ In contrast, it took years to consult and draft the CEAA 1992, and well over two years to guide it through Parliament in the 1990s.⁵⁰⁷ In this regard, Doelle addressing this issue noted that “as a result of the changes made between 2010 and 2012, the federal EA process (largely under CEAA 2012) has suffered greatly in terms of the number of projects assessed, the scope of the assessment carried out, the engagement of the public in the assessment process, and the transparency of project decision making.”⁵⁰⁸ The result “has been an erosion of public confidence in federal decision-making on proposed new projects.”⁵⁰⁹

⁵⁰³ Northey *supra* note 440 at 10; See sections 6, 98, 99 & 100 CEAA 2012 *supra* note 78.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ Kirchhoff *supra* note 56 at 6; See Andrew Gage, “Who is silenced under Canada’s new Environmental Assessment Act?” (2012) online: West Coast Environmental Law Website <http://wcel.org/resources/environmental-law-alert/who-silenced-under-canada%E2%80%99s-new-environmental-assessment-act> ; Jeff Gailus, “An Act of Deception” (2012) 38 *Alternatives Journal* online: <http://www.alternativesjournal.ca/energy-and-reosurces/act-deception>

⁵⁰⁶ Kirchhoff, *supra* note 56 at 6.

⁵⁰⁷ Doelle *supra* note 493 at 9.

⁵⁰⁸ Meinhard Doelle, “EA Summit Reflections” (5 May 2016), Environmental Law News (blog) online: <https://blogs.dal.ca/melaw/2016/05/05/ea-summit-reflections/>

⁵⁰⁹ *Ibid.*

In response to the critique of scholars, ENGOs and Aboriginal groups, the Liberal government has undertaken to review the CEAA 2012.⁵¹⁰ This review will be undertaken in partnership with Aboriginal groups who have “criticized existing EA principles and the Crown’s lack of enforcement over delegating procedural aspects of EA consultation to project proponents”, alleging that their “communities are consulted too late” and after decisions concerning the project have been made.⁵¹¹ Remarkably, in an effort to restore the public confidence in the environmental assessment process, on January 27 2016, the government of Canada announced interim guidelines to guide the EA process.⁵¹² In particular, these guidelines will apply to proposed projects under the jurisdiction of the NEB and the Canadian Environmental Assessment Agency, and will mark the beginning of what is likely to be a monumental change by the Liberal government “based on a suite of campaign promises, some of which have the potential to impact Aboriginal and public consultation on new resource development projects.”⁵¹³ The principles are:

- a) No project proponent will be asked to return to the starting line, project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards.
- b) Decisions will be based on science, traditional knowledge of indigenous peoples and other relevant evidence
- c) The views of the public and affected communities will be sought and considered
- d) Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated

⁵¹⁰ Chelsea Clark, “Government of Canada Policy Implications to the EA Process” (4 February 2016) online: <http://communica.ca/government-of-canada-policy-implications-to-the-ea-process> [Clark]

⁵¹¹ *Ibid*

⁵¹² *Ibid*

⁵¹³ *Ibid*

- e) Direct and upstream greenhouse gas emissions linked to projects under review will be assessed.⁵¹⁴

This is a remarkable step which in the long run may restore public trust in Canada's environmental assessment process and ensure a transparent and effective process.

5.5. Public Participatory Rights In Canada's Environmental Assessment Process

Every citizen in Canada is affected by environmental degradation; however, a significant group which has often fallen victim to environmental problems including those arising from the development of oil and gas projects are Aboriginals (indigenous people). Projects in Canada are often constructed on indigenous peoples' traditional lands which make them vulnerable,⁵¹⁵ and there is a strong likelihood that projects will infringe on their rights as guaranteed by the *1982 Constitution Act of Canada*.⁵¹⁶

Section 24 of the *CEAA 2012*⁵¹⁷ provides that the responsible authority⁵¹⁸ must ensure that the public is provided with an opportunity to participate in the environmental assessment of a designated project. This section forms the basis for public participation in Canada's federal EA

⁵¹⁴ Clark *supra* note 510.

⁵¹⁵ For example, the Northern Gateway oil project affected 36 First Nations in British Columbia and Alberta, the Keystone XL oil project affected more than 12 First Nations in Alberta and Saskatchewan- see Major Project Management Office (MPMO)-Project List, Government of Canada 2012 online: www.2.mpmo-bggp.gc.ca/MPTTracker/projectlist-listedeproject.aspx ; Also, approximately 23,000 indigenous people live in the oil sands areas, with 18 First Nations and 6 Métis settlements located in the region. See Oil Sands: A Strategic Resource for Canada, North America and the Global Market Canada, Department of Natural Resources (NRCAN) 2013 online: www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/oilsands-sablesbitumineux/14-0696%20Oil%20Sands%20-%20Indigenous%20Peoples_e.pdf ; Aboriginal Participation in Major Resource Development prepared by Policy and Coordination Branch, Lands and Economic Development Sector, Aboriginal Affairs and Northern Development Canada May 31, 2012 online: https://www.pforum.ca/sites/default/files/Background%20Document%20-%20Calgary%20-%20June%208th_3.pdf

⁵¹⁶ See section 35 of the *Constitution Act, 1982* Schedule B to the Canada Act 1982 (UK), 1982, c11.

⁵¹⁷ *CEAA 2012 supra* note 78.

⁵¹⁸ The definition of Responsible Authority under the Act includes: (1) The Canadian Nuclear Safety Commission in case of designated projects listed under the *Nuclear Safety and Control Act* (2) The National Energy Board in case of designated projects listed under the *National Energy Board Act* (3) The Canadian Environmental Assessment Agency in the case of designated projects that includes activities that are linked to the Agency. See Section 15 of the *CEAA 2012 supra* note 78.

process. Although the term ‘public’ is not defined under the CEAA 2012, by making reference to sections 5 (1) (c) and 19 (3), it can be inferred that the Act acknowledges the rights and role of Aboriginals in the EA process. The Supreme Court of Canada has made it quite clear that the federal Crown has a duty to consult Aboriginal peoples before making decisions that have the potential to interfere with aboriginal rights or title, whether fully recognized or not.⁵¹⁹ The duty to consult was also explained by Chief Justice Lamer (as he then was) in the Supreme Court of Canada’s decision in *Delgamuuku v. British Columbia*,⁵²⁰

This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples whose lands are at issue.⁵²¹

⁵¹⁹ See *R v. Sparrow* (1990) 1 S.C.R. 1075 for the test related to the infringement of aboriginal rights.

⁵²⁰ (1997), 153 D.L.R. (4th) 193 (S.C.R.).

⁵²¹ (1997), 153 D.L.R (4th) 193 (S.C.R) para. 168. See also the following cases on duty to consult: *Taku River Tlingit First Nation v. BC (Project Assessment Director)* (2004) 3 S.C.R 550; *Haida First Nation v. British Columbia (Minister of Forests)* (2004) 3 S.C.R 511; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2005) 3 S.C.R 388; *R v. Sappier* (2006) 2 S.C.R 686; *Dene Tha’ First Nation v. Canada (Minister of Environment)* (2006) F.C.J No. 1677.

Presently in Canada, the duty to consult aboriginals is a legislative and constitutional requirement thereby automatically making their participation and consultation mandatory.⁵²² Section 35 of the *Constitution Act*⁵²³ is central to understanding Aboriginal rights in the context of the federal environmental assessment process in Canada. It reads:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Beyond Canadian constitutional protections, the *UN Declaration on Rights of Indigenous People*⁵²⁴ (UNDRIP) provides in a number of its articles that States are to respect and promote the rights of Aboriginal peoples especially their involvement in decision-making processes that affect their traditional lands.⁵²⁵ Taken together, Aboriginal peoples clearly have a right to sit at the table during consultation processes in order to utilize their historical knowledge and the cultural commitment they have with their lands to make decisions that impact them, their communities, their plants, animals and lands. Aboriginal consultation in Canada is of immense importance because they bring traditional and ecological knowledge to the EA process. Section 19 of the CEAA 2012 makes provision of some factors which the environmental assessment of a

⁵²² Chongatera Godfred Tigawuve, *Environmental Assessment through Comprehensive Studies and Review Panel Process Options under the Canadian Environmental Assessment Act: A Comparative Review of Public Influence in the EIA Process* (LL.M. Thesis, Dalhousie University, 2012) at 29 [unpublished] [Tigawuve]

⁵²³ The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁵²⁴ UNDRIP *supra* note 408.

⁵²⁵ See Kirchoff *supra* note 56 at 8.

designated project ought to take into consideration.⁵²⁶ One of such factors is that the environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge. This clearly conveys the essential recognition of the role of aboriginal people in the CEAA which governs the conduct of EA at the federal level.

It is important to take into cognizance that the federal government of Canada consults with aboriginal peoples for a number of reasons which includes “statutory and contractual obligations, policy and good governance, building effective relationships with aboriginal groups and the constitutional duty to consult”.⁵²⁷ By consulting them, it helps to contemplate actions that may adversely impact the exercise of their rights that are recognized under the constitution.

The role of Aboriginal peoples in the federal environmental assessment process has evolved significantly over time, and the process is still developing.⁵²⁸ When CEAA 1992 came into effect,⁵²⁹ “it contemplated Aboriginal involvement mainly through projects affecting reserves or areas subject to land claims or self-government agreements.”⁵³⁰

As briefly noted above, CEAA 2012 includes a number of provisions dealing with Aboriginal issues in the federal EA process. For example, the Purpose section of the Act makes reference to the promotion of “communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment.”⁵³¹ Also, the definition of ‘environmental effect’ includes “with respect to Aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on health and socio-economic conditions; physical and cultural heritage; the current use of lands and resources for traditional

⁵²⁶ CEAA 2012 *supra* note 78.

⁵²⁷ See Aboriginal Consultation & Environmental Assessment Handout CEAA November 2014 online: <http://www.ceaa.gc.ca/default.asp?lang=en&n=ED06FC83-1>

⁵²⁸ Doelle *supra* note 1 at 102.

⁵²⁹ CEAA 2012 *supra* note 78.

⁵³⁰ Doelle, *supra* note 1 at 102.

⁵³¹ See section 4 (d) CEAA 2012 *supra* note 78; Doelle, *supra* note 1 at 104.

purposes and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.”⁵³² Section 19 (3) further provides for the consideration of aboriginal traditional knowledge in the EA process. A combination of these provisions clearly brings aboriginal issues within the ambit of the EA process under CEAA 2012.

A recent case on the Crown’s duty to consult Aboriginals in the EA process is *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*⁵³³ in which one of the issues raised was whether the Crown’s duty to consult with the Inuit in regard to the project was adequately fulfilled. In May 2011, TGS-NOPEC Geophysical company ASA (TGS), Petroleum Geo-Services Inc and Multi Klient Invest as (MKI) alongside with the proponents applied to the National Energy Board for a Geophysical Operations Authorization (GOA) to undertake a two-dimensional offshore seismic survey program in Baffin Bay and the Davis Strait (project).⁵³⁴ For generations, the people of Clyde River have depended upon the harvest of marine mammals in Baffin Bay and the adjoining Davis Strait for their food security and their economic, cultural and spiritual well-being.⁵³⁵ The project was to be conducted in the open water season for up to five years. On June 26, 2014, the National Energy Board (NEB) issued a GOA to the proponents stating certain terms and conditions that are to be complied with. One of such conditions includes the preparation of an environmental assessment report to be prepared by a member of the NEB on its behalf. On addressing the issue of whether the Crown’s duty to consult the Inuit was adequately fulfilled, Honourable Justice Dawson J.A noted as follows:

When consultation duties lie at the low end of the consultation spectrum, the claim to title is weak, the Aboriginal interest is limited or the potential infringement is minor. In such a

⁵³² Doelle, *supra* note 1 at 104, section 5 (1) (c).

⁵³³ 2015 FCA 179. An application to appeal this judgment was granted on 10th March, 2016- *Hamlet of Clyde River, et al v. Petroleum Geo-Services Inc. (PGS), et al* 2016 SCC 36692 indicating that the Supreme Court will further address pending questions on the role of tribunals and boards on the duty to consult.

⁵³⁴ *Ibid* at para 4.

⁵³⁵ *Ibid* at para 2.

case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information, and discuss any issues raised in response to the notice. Where the duty of consultation lies at the high end of the spectrum, a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In this type of case, while the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and the provision of written reasons which show that Aboriginal concerns were considered and how those concerns impacted on the decision. The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of their claim. Nor does consultation equate to a duty to agree; what is required is a commitment to a meaningful process of consultation....⁵³⁶

Owing to the fact that the scope of the consultation owed to Aboriginals was at the mid-range of the consultative spectrum and that the Crown in fulfilling its duty to consult relied on the consultative efforts of the proponents and their agents, Dawson J.A. argued that the concerns of Aboriginals people were adequately assessed as the EA report reflected how their concerns were addressed and he noted that "...I am satisfied that to date the Board's process afforded meaningful consultation sufficient that the Crown may rely upon it to fulfill its duty to consult."⁵³⁷ This case clearly explained what the duty to consult should entail and further reiterates the necessity of Aboriginal's participation in decision-making processes as it affects their land and environment.

Also, provincial boards such as the Alberta Energy and Utilities Board ("The Board") have embraced public participation policy. For example, the Board engages in a process for

⁵³⁶ 2015 FCA 179, para 42 p 2.

⁵³⁷ *Ibid* at para 100 p 16 online: <http://canlii.ca/t/gkctc2>

mediated negotiation of energy project approval applications that can give participants significant roles in decision-making specifically in environmental matters.⁵³⁸

5.6. Application of International Environmental Law in Canada's Law

Canada also subscribes to the dualist school of thought and to this effect, a treaty can only become binding when it has been signed, ratified and given life by a specific domestic legislation.⁵³⁹ Canada is committed to a number of customary and international obligations relating to environmental protection which portrays Canada's interest in having a sustainable environment.⁵⁴⁰ As Charles-Emmanuel Cote noted, "these international obligations can be applied as sources of positive law or as interpretive sources for Canadian environmental law".⁵⁴¹

As identified earlier in Chapter 2 of this thesis, Canada is a party to a number of international treaties that are environmentally focused and to some extent, implementation of these treaties domestically has been quite laudable in comparison with the *status quo* in Nigeria. In a number of biodiversity cases, judges use the *Migratory Birds Convention* with the aim of interpreting the *Migratory Birds Convention Act*.⁵⁴² In *Animal Alliance of Canada v. Canada (A.G.)*,⁵⁴³ Justice Gibson considered both the Convention and the Act in an application for judicial review of the *Regulations Amending the Migratory Birds Regulations*.⁵⁴⁴ Justice Gibson "discussed the relevant principles of statutory interpretation with clarity and precision".⁵⁴⁵ In

⁵³⁸ Lucas *supra* note 57 at 316.

⁵³⁹ Charles-Emmanuel Cote, "Applying International Law to Canadian Environmental Law", A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, March 23-24 2012 at 1 online: https://cirf.ca/files/cirf/Charles-emmanuel_cote-en.pdf

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Migratory Birds Convention Act*, 1994 S.C. 1994, c.22.

⁵⁴³ [1999] 4 F.C. 72, 168 F.T.R. 114 (T.D.) [Animal Alliance].

⁵⁴⁴ S.O.R./99-147 [Regulations].

⁵⁴⁵ Natasha Affolder, "Domesticating the Exotic Species: International Biodiversity Law in Canada", (2006) 51 *McGill Law Journal* 217 at 231 [Affolder].

doing so, he considered “the substantive language of the Convention in detail, noting the authority of courts to look at the international convention underlying implementing legislation to assist interpretation, even in the absence of ambiguity on the face of the legislation.”⁵⁴⁶ Justice Gibson’s decision in *Animal Alliance*, according to Natasha Affolder, therefore “stands as a rare example of a considered and clear use of international law sources in statutory interpretation.”⁵⁴⁷ Also, in a number of treaties that are environmentally related, the Canadian Parliament has successfully enacted specific legislations which clearly show a positive attitude in implementing and approving these treaties. For example, in *R v. Crown Zellerbach Canada Ltd.*,⁵⁴⁸ the Supreme Court of Canada linked the *Ocean Dumping Control Act* to the implementation of Canada’s obligations under the *London Convention on the Prevention of Marine Pollution by Dumping*. Another example which shows Canada’s commitment to its international obligations, is shown in the positive measures been taken by the Canadian Government in implementing the *Montreal Protocol on Substances that Deplete the Ozone Layer*.⁵⁴⁹ Canada has signed and ratified this Protocol and its amendments thereby committing itself to requisite deadlines for the clearing out of several substances.⁵⁵⁰ The viewpoint taken by the federal government is that since Canada signed the Protocol, it has gone ahead in adopting certain regulations that commensurate its commitment to the Protocol.⁵⁵¹ Further evidence of this is shown in the various regulations and policies been established by Canada for dealing with ozone-depleting substances which further goes to show the Parliament’s intention to implement provisions of the Montreal Protocol.⁵⁵²

⁵⁴⁶ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 397.

⁵⁴⁷ Affolder *supra* note 545 at 231.

⁵⁴⁸ [1988] 1 S.C.R. 401.

⁵⁴⁹ 1522 UNTS 3; 26 ILM 1550 (1987).

⁵⁵⁰ Doelle and Tollefson *supra* note 403 at 13.

⁵⁵¹ *Ibid.*

⁵⁵² *Ibid.*

Canada has signed and ratified the *Convention on Biological Diversity*; however, it is yet to fully implement the provisions of this Convention through legislation.⁵⁵³ Notably, Canada has shown its intention to implement this Convention vis-à-vis domestic policy and measures which is reflected in the practice of government.⁵⁵⁴ For example, the Canadian Government “has used a range of non-statutory instruments to meet most of its obligations under the Convention, such as the Canadian Biodiversity Strategy and eight sectoral policies, and has repeatedly expressed its firm commitment to it.”⁵⁵⁵ These policies and measures are in conformity with the provisions of the Convention and to that extent it can be argued that Canada has partially implemented the Convention.

Elaborating on the need for the application of international principles and treaties especially in the CEAA, Doelle argued that the “ambiguities in the Act as well as discretionary provisions can be interpreted by courts in light of international commitments.”⁵⁵⁶ For example, the exercise of discretion under CEAA may be inappropriate if the court considers it to be in violation of Canada’s international commitment.⁵⁵⁷ To this effect, “if two interpretations of a provision of CEAA are shown to be plausible, the court may prefer the interpretation that is consistent with Canada’s international obligations.”⁵⁵⁸

As earlier identified in this chapter, section 24 of CEAA 2012 mandates the responsible authority to involve the public in the EA process. Although, the term ‘public’ is not clearly defined under this provision an analysis of sections 5 (1) (c) and 19 (3) of CEAA 2012 reveals

⁵⁵³ The *Species at Risk Act* and some parks and protected areas legislation does implement the requirements of this Convention through legislation, while other parts are implemented through policy.

⁵⁵⁴ Doelle and Tollefson *supra* note 403 at 14.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Doelle *supra* note 1 at 48.

⁵⁵⁷ *Ibid* at 48-49.

⁵⁵⁸ *Ibid* at 49.

that the Act acknowledges the right and role of Aboriginals in the EA process. Having established that CEAA provides for participation opportunities, the question is, whether there is any evidence that Aboriginals are effectively participating in the EA process?

To a large extent, this question can be answered in the affirmative (notwithstanding the fact that the concept of ‘interested party’ introduced in CEAA 2012 poses as a stumbling block to actualizing an effective public participation process in the EA process) as is reflected in the various litigations Aboriginal peoples have been involved in which are geared towards having a voice in the EA process.⁵⁵⁹ Also, the existence of the participant funding scheme which provides financial support for Aboriginal communities and NGOs in participating in the federal EA has also proved to have a positive effect in improving and developing the participatory rights of Aboriginals in the EA process.⁵⁶⁰

However, there is still room for improvement in terms of Canada’s international commitments. International instruments on this subject matter have been explicit in specifying the categories of the public and their different roles and the fact that States should recognize and support their effective participation in the achievement of a sustainable environment as seen in chapter 3 of this thesis. To this effect, CEAA 2012 needs to be amended to define and specify the various categories of public (indigenous people, local communities, women, youths, NGOs) and their roles as appropriate stakeholders in the EA process in Canada.

Furthermore, on considering transboundary impacts of projects executed in Canada, section 5 (1) (b) (ii) in stating the environmental effects that are to be taken into account in

⁵⁵⁹ See *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)* 2015 FCA 179; *Mining-Watch Canada v. Canada (Minister of Fisheries & Oceans)* 2007 FC 955; *Dene Tha’ First Nation v. Canada (Minister of Environment)* 2006 FCJ No. 1677; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCJ No.71; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCJ No. 69; *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCJ No.70.

⁵⁶⁰ See Canadian Environmental Assessment Agency, *Participant Funding Program Guide* (National Energy Board,2014).

relation to a designated project provides that “a change that may be caused to the environment that would occur outside Canada.” This provision goes to show that impacts that are not merely local should be considered in approving any designated project especially oil and gas projects. However, section 5 in defining environmental effects failed to include climate change as one of the factors to be taken into account in the execution of a project. To this effect, this thesis argues that considering the various climate impacts on natural and human systems on all continents and across the oceans, there is the urgent need for the federal EA process in Canada to include climate impacts as one of the environmental effects to be considered before a project is been approved for execution. It is important to note that Canada is taking positive steps in addressing climate issues in its EA process. Reference will be made to the interim guidelines published by the government on January 27, 2016 to guide the EA process. One of the guidelines provides that “direct and upstream greenhouse gas emissions linked to projects under review will be assessed.”⁵⁶¹ This suggest that Canada is moving in the right direction although they are not yet there as much more is required by the government to show its full commitment in addressing climate issues.

5.7. Conclusion

This chapter has examined EA law in Canada with a focus on establishing when opportunities for public participation in decision-making are available, and for whom. It is clear that Aboriginal peoples’ involvement in the EA process is important because it provides an opportunity for Aboriginals to comment on the impacts of a project on potential or established Aboriginal or Treaty rights; and provides information about the proposed project, and the EA process.

⁵⁶¹ Clark *supra* note 510.

CHAPTER 6

6. Comparative Review and Conclusion

6.1. Introduction

This thesis has examined in detail the EIA legal frameworks of Nigeria and Canada independently with the aim of assessing how the process works differently in both countries. It has also dealt with the public participation process, an important tool in the EIA process. This final chapter draws together the main threads of the earlier chapters by engaging in a comparison of the Nigerian and Canadian EIA processes with the aim of identifying the strength and weaknesses of both systems. Furthermore, several suggestions and recommendations for improving both countries EIA systems have been identified. These suggestions derive from the analysis of the comparison between both countries EIA systems and also from the international legal framework perspective presented in Chapters 2 and 3.

6.2. Comparative Review

A comparison of Nigeria and Canada's EIA legal framework and system reveals several insights.

6.2.1. Recognition of Aboriginal Rights

As noted in Chapter 5, consulting Aboriginal peoples in Canada is of immense importance because of the traditional and ecological knowledge they bring to the EA process.⁵⁶² In Canada, Aboriginal consultation is a legislative and Constitutional requirement thereby making their participation and consultation mandatory. Section 35 of the *Constitution Act* is

⁵⁶² Peter Usher, "Traditional Ecological Knowledge in Environmental Assessment and Management" (2000) 53 Arctic 183.

important to understanding the rights of Aboriginal people in the federal EA process.⁵⁶³ Interestingly, CEAA 2012 has notable provisions which seek to ensure not only that Aboriginal people are consulted or entitled to participate in the EA process, but that their role in general is essential and thereby engaged to foster the process.⁵⁶⁴ Firstly, the purpose section of CEAA 2012 specifically indicates the promotion of “communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment.”⁵⁶⁵ Other sections that touch on Aboriginal involvement are the definition sections. For example, the definition of environmental effect includes the effects of biophysical changes on “physical and cultural heritage,” on “the current use of lands and resources for transitional purposes by Aboriginal persons,” and “any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.”⁵⁶⁶ Furthermore, section 19 (3) enjoins proponents to consider Aboriginal traditional knowledge in conducting an environmental assessment. All of these provisions clearly convey the essential recognition of the role of Aboriginal peoples and their rights in CEAA 2012, which governs the conduct of EA at the federal level. Moreover, the recent step taken by the Canadian government in endorsing the UNDRIP,⁵⁶⁷ by declaring its intentions to “adopt and implement the declaration in accordance with the Canadian Constitution”⁵⁶⁸ further reflects the commitment of the Canadian government to recognizing and respecting the rights of indigenous people.

⁵⁶³ The *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), c 11.

⁵⁶⁴ Tigawuve *supra* note 522 at 29.

⁵⁶⁵ See Section 4 of CEAA 2012 *supra* note 78.

⁵⁶⁶ *Ibid*, Section 5(1)(c).

⁵⁶⁷ UNDRIP *supra* note 408.

⁵⁶⁸ Fontaine *supra* note 409.

While Canada in its Constitution recognizes and respects Aboriginal rights, the Nigerian Constitution⁵⁶⁹ on the other hand is not favourably disposed towards the recognition of community or group rights.⁵⁷⁰ The rationale behind this is that “giving recognition to community or group rights would not only be a source of discrimination among the citizenry, but also a setback to the efforts for nation-building, and may eventually be a recipe for the disintegration of the country along ethnic divides.”⁵⁷¹ Rather the Constitution has opted for the provision and protection of strong individual rights such that individual citizens would feel secure enough not to require any special protection through ethnic cleavages.⁵⁷² Therefore, the Nigerian government owes no specific fiduciary obligation to local communities, most importantly the Niger Deltans who are directly affected by oil activities, either to respect or protect their rights. However, this thesis argues that the recognition of Niger Delta communities’ participatory rights does not in any way threaten the unity of the country. Rather it demonstrates the government’s willingness and recognition of the Niger Deltans as groups of people having interests different from others. Their interest is solely seeking the protection of their communities from oil spillage, gas flaring, and unjust military actions, amongst other unfavorable conducts.

To support this argument, reference will be made to Article 24 of The African Charter⁵⁷³ which recognizes the right of all people to a healthy environment. This provision

⁵⁶⁹ Constitution of the Federal Republic of Nigeria (CFRN), 1999, 29 May 1999, available online at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

⁵⁷⁰ For instance Section 15(4) of the CFRN states that: “the state shall foster a feeling of belonging and of involvement among the various peoples of the federation, to the end that loyalty to the nation shall override sectional loyalties.”

⁵⁷¹ Nasirdeen Usman, *The Rights of Indigenous Peoples and Mineral Resource Development: Global Trends and the Nigerian Question* (Phd Thesis, University of Dundee, Centre for Energy, Petroleum and Mineral Law and Policy, 2003) at 142 [unpublished].

⁵⁷² See Chapter IV *Constitution of the Federal Republic of Nigeria* Act No.24, 5 May 1999 online: <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm>

⁵⁷³ African Charter *supra* note 282. Article 24 provides:

All people shall have the right to a general satisfactory environment favourable to their development and State shall have the duty individually or collectively to ensure the exercise of the right to development.

further reiterates the importance of recognizing and protecting the rights of all people to an environment free from oil spillage as well as greenhouse gas emissions, amongst other unfavourable environmental conditions.

6.2.2. Legislation

In Canada, the *modus operandi* is the existence of the federal CEAA 2012 and provinces having their own different environmental legislations governing the environmental assessment process. This situation has sometimes presented overlapping issues (see Chapter 5) which has delayed the EIA process. In Nigeria, the reverse is the case as there is just one EIA legislation in existence which governs the federal and state EIA process (the EIA Act of 1992).⁵⁷⁴ It might be argued that the fact that there is one law governing the EIA process in Nigeria creates the probability that the EIA process will be more reliable, stable and structured. However, this is not the case as the problem of different regulatory institutions plagues the EIA process in Nigeria. Thus, Nigeria needs to ensure that these regulatory bodies in the execution of their functions are coordinated and Canada also needs to ensure that there is a proper harmonization of federal and provincial laws in the carrying out of the EIA process.

6.2.3. Independent Bodies in Charge of EIA

In Canada, certain regulatory bodies are referred to as responsible authorities under section 15 of the CEAA 2012. These bodies include: (1) the Canadian Nuclear Safety Commission (CNSC); (2) the National Energy Board (NEB); and (3) the Canadian Environmental Assessment Agency, all of which have their respective functions as it relates to a proposed project. None of these functions overlap as it has been clearly provided for in the Act.

⁵⁷⁴ Reference is also made to the EGASPIN which enforces environmental standards and regulations in the execution of oil and gas activities.

However, scholars have identified certain problems with the introduction of the NEB and the CNSC as regulatory bodies empowered to regulate the EIA of projects under their jurisdiction. The question is, are the NEB and CNSC appropriately positioned to conduct the EIA process? In answering this question, reference will be made to Doelle who argues that:

experience over the years has often shown that regulatory agencies are more focused on technical issues, and less interested in the big picture planning issues so fundamental to effective EAs. There are also legitimate concerns that some regulators may be captured by their industry, making it difficult for them to consider whether the industry sector they regulate offers the most sustainable long-term solution to the need or purpose being pursued with the proposed project.⁵⁷⁵

However, in Nigeria, the reverse is the case as the Department of Petroleum Resources (DPR) which is the regulator responsible for issuing exploration and production license is equally saddled with the responsibility of regulating environmental issues relating to the oil and gas industry in Nigeria.⁵⁷⁶ This situation creates room for possible bias as there is likelihood that the DPR will be more disposed to granting oil licenses which will stimulate economic growth at the expense of the environment. Thus, this thesis argues that there is a need for a separate body to be given the responsibility to administer EIA and general environmental issues relating to the oil and gas industry.

The EIA process in Nigeria is also associated with a major problem which is the issue of multiplicity of regulators. A review of the various statutes and the framework for the EIA process in Nigeria and in particular the entire environmental regulatory process in general reveals that many of the statutes are at variance with regard to the execution of functions. Scholars such as Echefu and Akpofure have both argued that “there is duplication of functions

⁵⁷⁵ Doelle *supra* note 493 at 5.

⁵⁷⁶ See Olawuyi *supra* note 3 at 173-174; 191-192.

and overlapping responsibilities in the processes and procedures guiding the execution of the various impact assessment tasks; consequently, serious bottlenecks and bureaucratic confusion are created in the process; the result is a waste of resources, financially and materially.”⁵⁷⁷ Furthermore, Nwapi argues that “a multiplicity of regulatory bodies with similar or identical roles in the EIA process is one of the factors militating against the conduct of effective EIAs in Nigeria; there is for instance, the Federal Ministry of Environment, the DPR, the Federal (and State) Ministry of Lands, the Nigerian Environmental Protection Agency, the National Emergency Management Agency, and the Nigerian Maritime Administration and Safety Agency among others.”⁵⁷⁸ These considerable overlaps amongst the functions of the various agencies in the EIA system is further reflected in the delay process associated with Nigeria’s EIA process and the overall non-effectiveness of the Nigeria’s EIA process.

Accordingly, this thesis argues that there is an urgent need for regulatory institutions to be more coordinated in the execution of their functions as this will avoid delays in the execution of EIAs in Nigeria. These various responsibilities can be streamlined through a reorganization of the regulatory environmental assessment framework. This can be done by empowering the Nigerian Environmental Protection Agency which is the principal regulator of the EIA process in Nigeria (this can be related to the point that was mentioned earlier with regard to establishing an independent body to be in charge of the EIA process in Nigeria) with the all inclusive power of environmental protection. Also, this body should be better supported for effective compliance (compliance should be tied to renewal of licenses and consents) and enforcement and as such, stiffer sanctions and penalties should be prescribed and strictly adhered to. Consequently,

⁵⁷⁷ Echefu and Akpofure *supra* note 55 at 64.

⁵⁷⁸ Ingelson & Nwapi *supra* note 55 at 54.

environmental requirements will be met and maintained subject to adequate funding for enforcement.

6.2.4. Establishment of an Internet Site

Section 79 of CEAA 2012 provides for an internet site in the EIA process in Canada which gives opportunities for the public to be constantly aware of the EIA process. It also provides for a description of the factors to be taken into account in the EA process, the report with respect to the EA that is taken into account by the responsible authority and any other information that the responsible authority considers appropriate.⁵⁷⁹ The internet site also provides for the application process and also the criteria for eligibility for participant funding in the EIA process.⁵⁸⁰

In contrast, Nigeria does not have this kind of opportunity in existence. The EIA Act has a provision which is similar to section 79 of CEAA 2012. Section 38 of the EIA Act provides that “on receiving a report submitted by a mediator or a review panel, the Agency shall make the report available to the public in any manner the Council considers appropriate and shall advise the public that the report is available.”⁵⁸¹ However, this thesis argues that this provision is a vague provision when compared to section 79 of CEAA 2012. Unfortunately, this section does not provide clarity as to what means the report will be available to the public, whether via the internet or posted in designated locations. In essence, there is a need for an internet site to provide easy accessibility to the public on information regarding the EIA process of projects in Nigeria.

⁵⁷⁹ See section 79 of CEAA 2012 *supra* note 78.

⁵⁸⁰ See Canadian Environmental Assessment Agency: Participant Funding Application for an Environmental Assessment online: www.ceaa.gc.ca/default.asp?lang=en&n=E33AE9FB-1

⁵⁸¹ See section 38 EIA Act *supra* note 76.

6.2.5. Participant Funding Scheme

The importance for financial support for aiding public involvement in the EIA process has long been established since the 1990s.⁵⁸² Englehart and Trebilcock have argued that without participant funding, “the cost associated with public participation would prohibit many potential publics from getting involved in the process.”⁵⁸³ This view has been supported by other scholars who hold the view that participant funding “provides support to large diffused groups and minority groups whose voices are not effectively heard in a representative system based on political and economic rather than environmental constituencies.”⁵⁸⁴ To this effect, without this scheme in place, it would inhibit many potential publics (in particular, minority individuals and groups) from getting involved in the EIA process.

In Canada, a participant funding scheme seeks to redress the financial imbalance among parties and support full and effective public involvement. Sections 57 and 58 of CEAA 2012⁵⁸⁵ require the Canadian Environmental Assessment Agency to establish a Participant funding program to facilitate the participation of individuals, ENGOs and Aboriginal groups in the EIA process. Thus, the Canadian government through this scheme provides financial support for expenses incurred by Aboriginal communities and ENGOs participating in federal environmental assessment. It is important to note that ENGOs in Canada have championed for this cause. For

⁵⁸² See Raj Anand & Ian G. Scott “Financing Public Participation” (1982) 66 *Canadian Bar Review* 81; Joan B. Aron “Citizen Participation at Government Expense” (1979) 39 *Public Administration Review* 477; Robert Gibson *Environmental Assessment Design: Lessons from the Canadian Experience* (1993) 15 *Environmental Professional* 12; Wood *supra* note 1 at 33.

⁵⁸³ Kenneth G. Englehart and M.J. Trebilcock, *Public Participation in the Regulatory Process: The Issue of Funding* (Working Paper No.17, Economic Council of Canada, 1981) at 18 as cited in *Beaufort Sea Environmental Assessment and Review Process: Intervenor Funding Comparative Study Final Report Background Paper*, Evaluation Branch, Department of Indian Affairs and Northern Development (Ottawa, Ontario, 1985) at 12.

⁵⁸⁴ Judith Cooper, *Public Participation in the Environmental Assessment and Review Process: The Role of Intervenors Funding* (MSC. Thesis, University of British Columbia, 1988) at 24 [unpublished] as cited in Tigawuve *supra* note 522 at 33; Lucas *supra* note 57 at 322.

⁵⁸⁵ CEAA 2012 *supra* note 78.

example, it was argued by the Canadian Environmental Network that for participation to be effective there is the need for funding to be provided to the public.⁵⁸⁶

However, in Nigeria, this scheme is not in existence which assumedly accounts for why there have been a lot of problems associated with public involvement in the EIA process. Thus, this thesis argues that Nigeria needs to adopt this scheme into its EIA process thereby providing funding to local communities most especially the Niger Deltans in order to ensure their full and effective participation. This can be achieved with the establishment of an independent and transparent funding body with the goal of providing adequate financial assistance that would promote public participation in all stages of the EIA process. Notably, assistance need not be restricted to monetary; it might include “provision of information by way of free photocopying” as suggested by Doelle and Sinclair⁵⁸⁷ and it might also include ready access to transportation for public meetings. This will further help to reduce the disparity in resource levels between project proponents and the public which is largely in existence in Nigeria as a nation. Thus, if financial assistance is adequately and timely provided in the EIA process in Nigeria, it will have the full effect of empowering participants to prepare and participate in meetings, public hearings, review draft assessment guidelines and participate in other EIA process. Furthermore, where “funding is provided for participants, it paves the way for them to get involved in deliberations” which has the long term effect of making their participation significant.

⁵⁸⁶ Canadian Environmental Network, *Environmental Planning and Assessment Caucus: A Federal Environmental Assessment Process, The Core Elements* (Ottawa: Canadian Environmental Network, Environmental Planning and Assessment Caucus, 1988).

⁵⁸⁷ Meinhard Doelle & John Sinclair, “Time for a New Approach to Environmental Assessments: Promoting Cooperation and Consensus for Sustainability” (2005) *Environmental Impact Assessment Review* 2 at 14.

6.3. Recommendations

The environmental impacts of oil and gas activities pose serious threats to both current and future generations. These threat ranges from oil spillage, gas flaring, and climate change, to health risks and, forceful displacements. EIA is understood as an important regulatory tool for addressing environmental and related social issues at the planning stage of oil and gas projects, before irreversible decisions are made and steps are taken towards the project. Furthermore, EIA is a proactive tool as it seeks to prevent and reduce environmental impacts of proposed new activities by providing alternatives or mechanisms to mitigate the impacts of such projects.

The EIA process also considers the views and contributions of individuals, communities and groups who are likely to be affected by oil and gas projects. This is called public participation. This is an integral part of an effective EIA process in every country that has the EIA system, including Nigeria and Canada which are the focus of this thesis. Chapter 3 which dealt with this subject extensively noted that public participation provides a channel through which public concerns, views, criticism and values are identified prior to making decisions that affect their environment and their livelihoods. The public cannot be sidelined in an effective EIA process because a failure to consider their input automatically leads to conflicts amongst the relevant stakeholders which will in the long run affect the carrying on of the project.

6.3.1. Categories of Stakeholders

One of the aims of this thesis is to identify areas of improvement in the Nigerian and Canadian EIA process relative to international standards. The review of international legal instruments undertaken in Chapter 3 shows that there are five categories of stakeholders who are essential in any process that pertains to the environment. Such people include: (1) local communities, (2) Indigenous people, (3) Environmental NGOs, (4) Women and (5) Youth. It is

established that the international instruments identified these certain groups because of the different roles they play in the environment and the relationship they have with the environment. The international instruments have been able to link a poor and unsafe environment to the enjoyment of their inalienable rights which includes the right to life, good health and the right to a safe and clean environment. However, it is of interest to note that neither the EIA Act (Nigeria) nor the CEAA 2012 (Canada)⁵⁸⁸ recognize and identify these categories of people as appropriate stakeholders in the EIA process, and as such do not reflect the appropriate international standard on public participation. These legislations make reference to the involvement of the public in their EIA process albeit in the most oblique way as the definition of the 'public' was lacking. The international legal instruments on environmental matters can be praised for clearly identifying these stakeholders and their different roles and the fact that States should recognize and support their effective participation in the achievement of a sustainable environment.

This thesis therefore argues that both Nigeria and Canada need to work towards bridging the gap between the international and domestic framework on this subject matter. It is beyond the scope of this thesis to provide detailed recommendations with regards on how to amend both countries EIA laws to provide greater specific participation opportunities for each of the identified stakeholders groups. Having said this, this thesis argues that more opportunities should be provided for women to participate at the local, regional, national and international levels on environmental issues. To make a significant impact on decision making, "women should be present in equal numbers to men or at least on a 40:60 proportional split of genders."⁵⁸⁹ For participation to be meaningful there is need for policies and national guidelines, strategies' and

⁵⁸⁸ With the exception of aboriginal rights in CEAA 2012.

⁵⁸⁹ Chelala, *supra* note 241 at 1.

plans in order to achieve equality in all aspects of society. Such policies must be aimed at promoting women's literacy, education, training and their participation in environmental management, particularly as it pertains to their access to resources.⁵⁹⁰

Most importantly, the fact that Agenda 21⁵⁹¹ recognizes Youths as relevant stakeholders in environmental matters symbolizes that the future generations have a right to participate, to be heard and for their views to be positively implemented. In the long run, the overall protection of the environment is to ensure that future generations can find a safe and healthy place to live in free of pollution and threats.

6.3.2. Climate Change

As it was identified in Chapter 1 of this thesis, the impacts of climate change on the environment and the threat it poses to human health and life calls for strategic actions to be taken. EIA was identified as a tool for evaluating the likely effects a project would cause and also to help in minimizing such effects on the environment and on people. This thesis recommends that urgent steps be taken in Nigeria and Canada in order to carry out the above task. This can be actualized by including climate change as one of the criteria a project proponent has to fulfill before the project is approved for execution. In essence, regulatory authorities must be satisfied that proposed oil and gas projects do not in any way or only minimally contribute to climate change before such project is been approved for execution. In so doing, the goal of sustainable development can be achieved, consistent with the 2015 Sustainable

⁵⁹⁰ See AGENDA 21, 24.2 (f) (1992). Approved by the UN Conference on Environment and Development (UNCED) at Rio De Janeiro, June 13, 1992. UN Doc. A/CONF.151/26 (vols I-III) (1992) available online:

<http://sustainabledevelopment.un.org/index.php?page=view&nr=23&type=400&menu=35>

⁵⁹¹ *Ibid.*

Development Goals.⁵⁹² According to goal 13 of the Sustainable Development Goals, the international community has identified the need to take urgent steps to combat climate change and its impacts. It is important to note that Canada is already taking positive steps to address climate issues in its EA process. Reference was made in Chapter 5 to the interim guidelines published by the government on January 27, 2016 to guide the EA process. One of the guidelines provides that “direct and upstream greenhouse gas emissions linked to projects under review will be assessed.”⁵⁹³ Beyond this, Doelle, in examining the integration of climate change into Canada’s EA legislation, has suggested certain areas where climate change should be considered in the EA process.⁵⁹⁴ One of such areas is at the decision-making stage of the EA process where it is determined whether proposed projects are permitted to proceed or not. He calls for a decision-making process which will consider “all viable alternatives to any project that hinders Canada’s transition to GHG emissions neutrality, full transparency about the GHG emissions performance of approved projects during the full cycle of the project, and clear rules that hold proponents accountable for any negative GHG emission consequences of approved projects....”⁵⁹⁵ A consideration of these recommendations by responsible authorities in the EA process will further reflect Canada’s commitment and transition to GHG neutrality.

6.3.3. Right to a Healthy Environment

Also of concern is the right to a healthy environment which is yet to gain a ground in Nigeria and Canada. As was identified in Chapters 4 and 5 of this thesis, Nigeria has this right included in its Constitution although it has been included in the non-justiciable section of the

⁵⁹² See United Nations, Sustainable Development Goals online:

<http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

⁵⁹³ Clark *supra* note 510.

⁵⁹⁴ Meinhard Doelle, “Integrating Climate Change into EA: Thoughts on Federal Law Reform” (October 18, 2016) online: <https://ssrn.com/abstract=2854522> [Doelle].

⁵⁹⁵ *Ibid* at 7-8.

Constitution. On the other hand, this right is absent from Canada's Constitution. The importance of this right cannot be over emphasized as it is directly linked to the right to life. To this effect, Nigeria and Canada need to learn from other countries that have taken the positive step in recognizing this right in their Constitutions. Thus this thesis recommends that Nigeria and Canada should recognize the importance of including and enforcing this right in their Constitutions and also making it justiciable with the end goal of preserving lives and ensuring a safe environment both for present and future generations. This is an idea which scholars have advocated for both in Canada and Nigeria but it is beyond the scope of this thesis to engage in a detailed analysis of how this might be achieved.⁵⁹⁶

6.3.4. Improvement of the Public Participation Process

On the issue of public participation, an examination of both countries indicates that while Canada has the upper hand, there are still areas for improvement in the process. For example, Canada has adopted a participant funding scheme, and recently adopted UNDRIP, both of which support and motivate effective participation in Canada's EIA process. Both countries need to be cognizant of involving the public as it can be argued that the only way oil and gas activities can be peacefully carried out is if all those with an interest in the land have a voice in the process of development of oil and gas projects. Regulatory authorities must endeavor to recognize and respect the relationship local communities, especially Aboriginal peoples and Niger Deltans, have with their lands, including beliefs in sacred forests and species. The construction of oil and gas projects on such lands and killing of such animals is a failure by the governments of both

⁵⁹⁶ See David Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Canada: UBC Press, 2012); C.P. Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21 *Osgoode Hall Law Journal* 390-421; C.F Cranor, *Toxic Torts: Science, Law and the Possibility of Justice* (Cambridge: Cambridge University Press, 2006); Enonbong Akpambang, "Promoting the Right to a Healthy Environment through Constitutionalism in Nigeria" (2016) 4 *International Journal of Environment and Pollution Research* 40-61; Damilola Olawuyi, *The Principles of Nigerian Environmental Law* (Ukraine: Business Perspectives, 2013).

countries to respect such values and beliefs, and leads to displacement of people living on such lands.

The failure of both Nigeria and Canada to become parties to the *Aarhus Convention*⁵⁹⁷ represents a lack of commitment on the part of both countries to fully implement the highest environmental standards on public participation. This thesis argues that it is high time both countries consider becoming state parties and ratify this Convention. This will restore the public's confidence and directly strengthen the public participation process as each country fulfills its international obligations by adhering to the provisions of the *Aarhus Convention*.

Overall, the attitude of most national governments interpreting public involvement as, 'holding up development, or at least delaying it' needs to be changed. Public engagement should not be seen as an impediment to an efficient EIA process, rather it should be viewed as an essential element for an effective and efficient EIA process. National governments need to understand that the purpose of involving the public in the EIA process is to assist the development process and not to undermine it, by making sure the outcome benefits both the community and government thereby fostering peace between both parties. The public are the ones conversant with their local environment and will be able to identify key areas of concern. Those concerns and fears may, in some cases, prove to be based on weak evidence, but if they are not identified at the earliest opportunity and addressed, they may arise at a later stage when they are more likely to lead to conflict. Consequently, by involving the public as early as possible, issues may be identified which regulatory authorities, the government, and proponents of projects (oil companies) might not have considered important. A related point is that the public must be understood broadly, rather than limited to directly "interested parties" as was the

⁵⁹⁷ Aarhus Convention *supra* note 156.

case under CEAA 2012, or as issues of *locus standi* have inhibited environmental litigation in Nigeria.⁵⁹⁸ Furthermore, Canada needs to take positive steps to implement the UNDRIP domestically, which will have the effect of strengthening consultation with Aboriginal peoples and help to reduce disputes among the various stakeholders.

Much is left to be done. Environmental problems cannot be effectively solved by governments alone. Protecting the environment requires the joint effort of the government and the public. For this principle to be practical in nature, it has to be integrated into the workings of governments and into the thinking of the public. To this effect, public participation should not merely be seen as a requirement of law but as a positive step towards achieving an effective EIA process and ensuring a sustainable environment.

6.4. Conclusion

In conclusion, this thesis has argued that EIA policies and principles could help to assuage Nigeria's and Canada's environmental challenges related to the oil and gas sector. It has established the role of EIA as a preventive tool in helping to ensure oil and gas activities in Nigeria and Canada are environmentally managed. It has also established that public participation is an integral part of the EIA process and a failure to adhere to it will lead to a failure of the EIA process. This thesis propounded that an effective and meaningful participation of the public in the EIA process legitimizes or validates decisions taken with regard to oil and gas projects. Although public participation has its challenges, including that it may lead to inconclusive decisions because of the diversity of interests involved in the process, the obligation is placed on responsible authorities to weigh these divergent views and choose wisely in order to ensure peace and enhance sustainable development.

⁵⁹⁸ See *Oronto Douglas v. SPCD & Ors* (unreported) Suit No FC/CS/573/93.

This thesis has identified areas of comparison between the Nigerian and Canadian EIA processes in a bid to recommend ways in which Nigeria can primarily learn from Canada. This thesis has established that much still needs to be done in both the Nigerian and Canadian EIA processes, especially as it relates to the promotion of public participation. To this end, Canada and Nigeria need to take realistic and appropriate actions geared towards fostering participatory development and bridging the gap between international and domestic environmental standards.

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