

PROMOTING AND STRENGTHENING PUBLIC PARTICIPATION IN NIGERIAN ENVIRONMENTAL IMPACT ASSESSMENT PROCESS: COMPARING THE USA, CHINA AND NIGERIA'S ENVIRONMENTAL IMPACT ASSESSMENT LAWS

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ABSTRACT

The Environmental Impact Assessment process in itself is a new discovery the world over and same came about following growing concerns over the adverse effects of development on the environment. There is a general consensus that the public especially experts be allowed to make inputs in the Environmental Impact Assessment process; however the degree of such input varies from country to country. It is necessary therefore not only to understand the role of the public participation in the Environmental Impact Assessment process especially after considering public participation as enshrined in the United States of America, the Peoples Republic of China and Nigeria Environmental Impact Assessment laws but also make suggestions as to ways by which public participation in the Environmental Impact Assessment process can be promoted and strengthened. The result of this research shows that the United States of America being a developed country has a more standard law as per public participation in the Environmental Impact Assessment process while China and Nigeria are still developing theirs.

INTRODUCTION

Prior to the 1970's, the world all over was concerned with social and economic challenges. Thereafter, however, the world's attention has been drawn to issues of environmental pollution and degradation and its adverse effects on the climate. With gaseous emissions, mainly from industrial and infrastructural developments, being released into our environments, the need for laws to regulate same came to be.

Environmental Impact Assessment (EIA) is the device used in determining the effect of a development on the surrounding environment which includes the land, sea, air, human beings, and animals within the said environment. Environmental Impact Assessment (EIA) is 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

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impacts, both beneficial and adverse². United Nations Environmental Programme (UNEP) defines Environmental Impact Assessment (EIA) as a tool used to identify the environmental, social and economic impacts of a project prior to decision-making³. It aims to predict environmental impacts at an early stage in project planning and design, find ways and means to reduce adverse impacts, shape projects to suit the local environment and present the predictions and options to decision-makers. The Environmental Impact Assessment (EIA) is an important instrument to balance the diverging interests of two of the decades' most pressing concerns – the protection of the environment and the growth of the economy⁴. Historically, the choice of new projects was primarily based on one criterion: economic viability. Today, a second and a third choice criteria, environmental and social impact, have become a strong yardstick, hence the triple bottom-line approach (economic, environmental and social) to project viability. Basically, Environmental Impact Assessment came in as a result of the need to balance social, economic and environmental challenges, which simply put, are to ensure sustainable development. That is to say that whatever infrastructural developments that are being carried out today must be such that would not only be for the benefit of the present generation but also such as would not inhibit the future generation. EIA can be defined as a systematic process for identifying, predicting and evaluating potential impacts associated with a development project⁵. The EIA process must proffer mitigation measures to avoid, reduce or minimize the negative impacts on the environment, public health and property. It must also enhance positive impacts. The mitigation measures entail identifying possible alternative site, project, process design, including that of not proceeding with the project. Environmental Impact Assessment Process ensures that potential problems that would be associated to developments are dealt with even before the development itself commences.

The absence of public participation from most Environmental Impact Assessment process led scholars and practitioners to seek approaches and instruments, eventually resulting in that

² What is Impact Assessment, <<http://www.cbd.int/impact/whatis.shtml>> accessed on 08 January 2014

³ Ibid

⁴ C. Toth and M. Lucivjansky, *Slovakia: Public Participation in Environmental Impact Assessment Procedures – a Blessing and a Curse?* <<http://roadmap2013.schoenherr.eu/public-participation-in-eia-procedures/>> accessed on 08 January, 2014

⁵T.A. Yusuf, *The Environmental Impact Assessment Practice In Nigeria: The Journey So Far*, <<http://www.nigeriansinamerica.com/articles/3105/1/The-Environmental-Impact-Assessment-Practice-In-Nigeria-The-Journey-So-Far-/Page1.html>> accessed on 08 January 2014

public participation is incorporated in most laws of the various nations. The public have experienced unprecedented change with respect to their legal right to participate in decisions affecting the environment since public participation and relative issues were stipulated in a set of draft measures and regulations after the enactment of the EIA Laws. Public participation is necessary for minimizing or avoiding public controversy, confrontation and delay, and can make a positive contribution to the EIA process⁶. Public participation in the EIA process in Nigeria is still generally regarded as very weak.

This Seminar paper overviews the historical background of Environmental Impact Assessment in general, examines the role/benefits of public participation in the EIA process, compares the EIA laws in the United States of America, People's Republic of China and Nigeria especially as pertains public participations, and finally it suggests ways that can improve and/or strengthen public participation in the Nigerian EIA laws.

HISTORICAL BACKGROUND OF EIA LAWS

As far back as development in itself, industrialization and urbanization in western countries was causing rapid loss of natural resources. This continued to the period after the Second World War giving rise to concerns for pollution, quality of life and environmental stress. In early 1960s, investors and people realized that the projects they were under taking were affecting the environment, resources, raw materials and people⁷. As a result of this, pressure groups formed with the aim of getting a tool that can be used to safeguard the environment in any development. The USA established a National Environmental Policy Act (NEPA) in 1969, enacted in 1970⁸ to consider its goal in terms of environmental protection and mandating all federal agencies and departments to consider and assess the environmental effects of proposals for legislation and other major projects. The USA became the first country to enact legislation on EIA. This was the first time that EIA became the official tool to be used to protect the environment. The United Nations Conference on Environment held in Stockholm in 1972 and subsequent conventions formalized EIA. Between the 1970's-1980's, there were growing concerns over environmental issues. This led to the issue being

⁶ Public Participation, <<http://www.coastlearn.org/pp/ppandeia.html>> accessed on 08 January, 2014

⁷P.F.A. Ogola, *Environmental Impact Assessment General Procedures* <<http://www.os.is/gogn/unu-gtp-sc/UNU-GTP-SC-05-28.pdf>> accessed on 10 January 2014

⁸Wikipedia, the free encyclopedia, *Environmental Impact Assessment* <http://en.wikipedia.org/wiki/Environmental_impact_assessment#United_States> accessed on 10 January 2014

discussed in most international conferences and a number of bilateral and multilateral agreements. The World Commission on Environment and Development (WCED) endorsed the concept of sustainable development in its Brundtland Report of 1987 (also called Our Common Future)⁹. The Commission defined “Sustainable Development” as “Development which meets the needs of the present without compromising the ability of future generations to achieve their needs and aspirations”¹⁰.

PUBLIC PARTICIPATION IN THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS

The public has been defined broadly by the EIA Act of Slovakia as one or more natural or legal persons, associations, organisations or other groups; in a word: anybody¹¹. The role of the public in the EIA process has been a topic of major discourse all over the world and most laws have in varied degrees recognised as well as given public participation a special place in the EIA process. Department of the Interior Training in *the Principles of Effective Public Participation* defined Public participation as the direct engagement of all voices in a planned effort to make responsible and sustainable decisions¹².

Many international organisations as well as international agreements have built-in the idea of public participation in environmental issues. For instance, the World Charter for Nature of 1982 states in clear terms that "All persons, in accordance with their national legislation, shall 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"¹³. In the same vein a whole lot of the **Principles in the Rio Declaration of the Environment and Development** provides and highlights the importance of public participation in the EIA process, giving room for the individuals, indigenous people and their local community, youths and women. The most comprehensive transformation of Article 10 of Rio declaration is the **United Nations**

⁹ T. A. Yusuf, *op cit.*

¹⁰ *Ibid*

¹¹ C. Toth and M., *op cit.*

¹² C. Wasserman, US EPA, *Strengthening Public Participation in Environmental Management in Indonesia* <<http://www.epa.gov/oita/public-participation-guide/workshopPDFs/application-pp-eia.pdf>> accessed on 15 January, 2014

¹³ R.K. Salman, “Secession: Public Interest Litigation(PIL) On Environmental Rights and Protection in Malaysian Courts: Lesson from Indian Judiciary” vol.vii No.2 (2010) *Soochow Law Journal*.

Economic Commission for Europe (UN-ECE) 1998 Convention on Access to Justice in Environmental Matters (hereinafter referred to as **Aarhus Convention**)¹⁴. Apart from the fact that the Convention is open to accession by countries from all over the world, it is also hailed as the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations as well as a new kind of environmental agreement that links environmental human rights. The **Aarhus Convention's** importance could be gleaned from its objective which states that *“in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provision of this Convention”*.¹⁵

Basically, there are three occasions where public participation is necessary in the EIA process namely- access to information from the early stage, access to decision making and access to justice/enforcement¹⁶. Following the Rio Declaration and the Aarhus Convention, a lot of developing countries have made laws on EIA and incorporated public participation therein, the applicability and enforcement of these laws however vary depending on the development of each country. In developed economies, a number of projects have been brought down due to the role of public participation in the EIA process.

The **benefits** of public participation in the EIA process are innumerable. Some of them are¹⁷-

- a) It improves process quality by exerting pressure on project sponsors/donors to address the negative environmental impacts of some projects.
- b) It draws attention to the concerns of local people and by focusing on specific issues of local concern, the process has been made more relevant and useful and even reduces conflict.
- c) It induces many of the larger agencies and commercial organizations to set up special environmental units/departments to focus on EIA
- d) It extends and improves public awareness of environmental concerns.
- e) It promotes the sustainability of some projects.
- f) It builds and strengthens indigenous capacity and gives greater access to community skills and knowledge.

¹⁴ *Ibid*

¹⁵ *Op cit.*

¹⁶ *Op cit.*

¹⁷ J. O. Kakonge, *Problems with Public Participation in the EIA Process: Examples from Sub-Saharan Africa* <<http://www.hardystevenson.com/Articles/PROBLEMS%20WITH%20PUBLIC%20PARTICIPATION%20IN%20EIA%20PROCESS%20EXAMPLES%20FROM%20SUB-SAHARAN%20AFRICA.pdf>> accessed on 16 January 2014

- g) It improves community understanding of conservation issues and responsibility for conservation outcomes¹⁸.
- h) It reduces cost for the developers as key issues are identified early in the process and potential delays in decision making are reduced¹⁹.

Despite these benefits, a number of **challenges** have been identified to face public participation in the EIA process. They include lack of consultation, Lack of communication between government and the people , Lack of legal framework (cum weak enforcement agency), Inadequate Government capacity to foster public participation , Lack of transparency , Late preparation and submission of EIA,²⁰ amongst others-

- i) Lack of consultation/awareness or low regard for public consultation: Despite the fact that the EIA law of Nigeria provides that the public shall be consulted. In reality, this is hardly the case as there is no proper consultation or awareness. The EIA documents are drafted in highly technical terms thus making it difficult to solicit involvement from the general and affected public who are mostly uneducated.
- ii) Lack of communication between government and the people: The affected public in most projects where there are likely to be high environmental impacts are usually persons in the rural areas who don't have access to newspapers or the electronic media, hence are left out of the process.
- iii) Lack of legal framework (cum weak enforcement agency): The law does not provide for an effective sanction for failure to consult the public in EIA process. Likewise there is no effective enforcement of even the laws that exist.
- iv) Inadequate Government capacity to foster public participation: Government lacks the capacity to achieve public participation in the EIA process. It is not enough to make publications inviting the public to be part of the process. The Government should carry out enlightenment programmes and use social scientists to reach out to the populace.
- v) Lack of transparency: It has been found that most developers are not transparent in releasing information concerning the exact impact of their projects in the EIA process and because of lack of experienced professionals in the field; the developers get away with whatever information they submit. The public generally believe that they do not have the ability to test the information or comment on it, hence they stay away.

¹⁸ Benefits and disadvantages of public participation < <http://www.doc.govt.nz/Documents/science-and-technical/sfc308a.pdf>> accessed on 16 January 2014

¹⁹ *Ibid*

²⁰ J. O. Kakonge, *op cit*.

- vi) Late preparation and submission of EIA: It is equally a common case to find developers failing to submit the EIS to the Ministry well into the project. At that stage the public do not find the use of comment on its impact on the environment.
- vii) Lack of technical capacity, knowledge and experience in environmental matters and motivation: Most members of the public especially the affected public do not have knowledge and experience in environmental matters much less their impacts, they also lack the technical capacity to get involved in deciding what is good or bad for the environment and hence do not take the opportunity of participating in the EIA process even where they are aware.
- viii) Non co-operation from local communities: As a result of negative effects of certain developments in some areas, most local communities do not even want developments in their communities talk less of being part of the EIA process. The lack of co-operation thus makes it difficult for them to understand what exactly is being done or to avert their minds on mitigation in case of an impact etc., hence focus is lost in totality.

PUBLIC PARTICIPATION IN THE EIA PROCESS UNDER THE EIA LAW OF THE USA

As mentioned earlier, the USA was the first country to promulgate a law on environmental issues. The Environmental Impact Assessment process in the USA is therefore regulated mainly by the National Environmental Policy Act (NEPA) of 1969. There are 3 goals of NEPA to wit- Harmony between human and environment, eliminate environmental damage and promote welfare of humanity and to enrich understanding of natural resources²¹. NEPA requires all “major Federal actions significantly affecting the quality of the human environment” to undergo EIA. In other words, all federal agencies must follow the procedures outlined in NEPA and prepare a detailed statement before they carry out an environmentally significant proposed action or plan. The Agency must prepare an Environmental Impact Statement (EIS) which makes Agencies not only to weigh the environmental impact of a proposed development but also its consequences.

Where the proposed development affects more than one Agency, the agencies would decide which of them would be the lead Agency and it would be the duty of that lead agency to ensure that the EIA procedures are complied with and also to prepare the EIS. On the rare

²¹ National Environmental Policy Act (NEPA) of 1969, <<http://www.cfr.msstate.edu/students/Wfpages/wfd/wf4353/NEPA.pdf>> accessed on 17 January 2014

occasion when agencies disagree about the environmental impacts of a proposal, such disputes are submitted to the Council on Environmental Quality (CEQ) for resolution²². The CEQ is a three-member advisory panel within the Executive Office of the President²³, and although it is not itself subject to NEPA regulations for purposes of EIA, CEQ plays an instrumental role in the EIA process as the promulgator of NEPA regulations²⁴. The NEPA relatively does not provide specific procedural guidance and as such must be read along side with CEQ's regulations²⁵. Although, NEPA makes it a requirement for "major Federal actions significantly affecting the quality of the human environment to inform decision makers and the public of the proposed action, reasonable alternatives, and their environmental impacts"²⁶, these CEQ regulations are the starting point for analysis of any issue relating to public participation in the NEPA process and they receive great deference from U.S. courts²⁷.

Public participation requirements can be found throughout the Council on Environmental Quality's Regulations (CEQR) for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500-1508) while the regulations describe specific requirements, they also state broad goals for public participation in the NEPA process. For example, the Council on Environmental Quality regulations note that public scrutiny is essential to implementing NEPA (40 CFR 1500.1(b))²⁸. Hence the CEQ provides extensively for public participation and in comparing public participation in the EIA process of the USA with that of China and Nigeria, reference would be made more to the CEQ than the NEPA. The CEQ regulations unlike the statute itself create avenues for public participation not only during preparation of

²² J.L. Moorman and G. Zhang, Promoting And Strengthening Public Participation In China's Environmental Impact Assessment Process: Comparing China's EIA Law and U.S. NEPA, vol.8, *Vermont Journal on Environmental Law*.

²³ 42 U.S.C. § 4342 (establishing the CEQ)

²⁴ J.L. Moorman and G. Zhang, *op cit*.

²⁵ *Ibid*

²⁶ National Environmental Policy Act (NEPA) of 1969, < <http://www.usbr.gov/gp/eca/slideshow.pdf>> accessed on 17 January 2014

²⁷ See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference.")

²⁸ Effective Public Participation Under The National Environmental Policy Act Second Edition (U.S. Department Of Energy Environment, Safety And Health Office Of NEPA Policy And Assistance August 1998) <http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-Public_Participation.pdf> accessed on 17 January 2014

an EIS, but also in instances where no EIS is required—in other words, for proposed actions that are environmentally insignificant²⁹. The relevant provisions of the CEQ regulations³⁰ on public participation are outlined thus-

- a) It provides for notice and disclosure of EIA documents, public hearings, and commenting pave the avenues for public involvement in the NEPA process and agencies are required to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents. In all instances, notice must be mailed to anyone requesting it.
- b) For proposed actions of national concern, notice must be published in the *Federal Register* and mailed to “national organizations reasonably expected to be interested in the matter.” Where the effects of a proposed action are discrete, or primarily of local concern, the regulations provide several methods by which agencies can provide notice. The regulations leave it to the agencies to craft their own procedures regarding when public hearings or public meetings might be “appropriate” in the NEPA process. This agency discretion applies to scoping meetings as well. Short of actually requiring public hearings, the regulations instruct that hearings might be “appropriate” where there is substantial controversy or interest surrounding the proposed action, or where another agency requests a hearing.
- c) Where a draft EIS is to be the topic of a public hearing, agencies must make the draft EIS available to the public fifteen days prior to the hearing. Agencies must make NEPA-related “environmental documents,” including Environmental Assessments (EAs), Finding of No Significant Impacts (FONSI), Notice of Intent (NOI), and Environmental Impact Statements (EIS), available to the public pursuant to the Freedom of Information Act. The public is afforded no less than forty-five days to comment on draft EISs. By contrast, the regulations do not expressly mandate a public comment period for EAs or FONSI, although agencies commonly circulate EAs for public comment.

²⁹ J. Feller, *Public Participation Under NEPA*, in THE NEPA LITIGATION GUIDE 102, 104–07 (Karin P. Sheldon & Mark Squillace eds., 1999)pp. 108-109, cited in J. L. Moorman and G Zhang, *op cit*.

³⁰ See generally 40 Code of Federal Regulations (C.F.R.) § 1506.6 (2006), § 1506.6(b), *Id.* § 1506.6(b)(1), *id.* § 1506.6(b)(2), *Id.* § 1506.6(b)(3)(i)–(ix), *Id.* § 1506.6(c), *id.* § 1506.6(c)(1)–(2), *Id.* § 1506.6(c)(2), 40 C.F.R. § 1508.10 (2006), 40 C.F.R. § 1506.6(f) (2006), *id.* § 1506.6(b), 40 C.F.R. § 1501.4(e)(1) (2006), *id.* § 1501.4(e), 40 C.F.R. § 1508.9(a) (2006), 40 C.F.R. § 1506.10(c) (2006), 40 C.F.R. §1508.9(a) (2006), and 40 C.F.R. §1501.4(e)(2) (2006)

- d) Furthermore, U.S. courts have interpreted NEPA and the CEQ regulations to require public comment for both EAs and FONSI. CEQ regulations do, however, mandate a thirty-day “public review” period where FONSI is controversial or unprecedented.

It is obvious that the CEQ regulations not only clarify the public’s role in the NEPA process, but also broaden the scope of participation as provided in NEPA. There are opportunities for public participation/involvement at every step in the process. All NEPA-related environmental documents are made available by the Agencies as they become available. Public hearings, although not mandated by the regulations, are common agency practice, especially where controversial or otherwise significant proposals are being assessed³¹. Furthermore, opportunities for the public comment on environmental documents exist throughout the NEPA process, in both the screening and EIS phases³². The scoping phase is one area of the NEPA process where the agency obligation to involve the public is somewhat lacking³³.

PUBLIC PARTICIPATION IN THE EIA PROCESS UNDER THE EIA LAW OF THE CHINA

Environmental Impact Assessment in China traces back to 1973 when the First Conference for National Environmental Protection introduced the “Environmental Quality Assessment Program” on a provisional basis to address industrial pollution³⁴. Following the growth of industrialisation in China, the Environmental Protection Law of 1979 was adopted on a provisional basis in September of that same year as the first formal legislation on EIA³⁵, although it didn’t provide for the EIA procedure in detail. In 1981, **Guidelines of Environmental Management for Construction Projects** were issued for the implementation of EIA and were amended in 1986. The revised version covered more specific requirements in terms of projects, EIA preparation and review procedures, EIA approval

³¹ J. L. Moorman and G. Zhang, *op cit*.

³² *Ibid*

³³ *Op cit*.

³⁴ Y. Wang et al., “ Environmental Impact Assessment of Projects in the People’s

Republic of China: New Law, Old Problems”, vol.23 (2003) *Environ. Impact Assessment Rev.* pp. 543, 545

³⁵ Y. Zhang et al, *Challenges of public participation in China’s EIA practice*, <<http://www.iaia.org/conferences/iaia12/uploadpapers/Final%20papers%20review%20process/Zhang,%20Yuhuan.%20%20Challenge%20of%20Public%20Participation%20in%20China%e2%80%99s%20EIA%20Practice.pdf?AspxAutoDetectCookieSupport=1>> accessed on 17 January 2014

authority and responsible parties, the detailed requirements about EIA reports and EIA practitioner's qualification and certification system (Gu and Sheate, 2005)³⁶. In 1998, the guidelines were amended again and issued as **Ordinance of Environmental Management for the Construction Projects (OEMCP)**. This Ordinance required three different EIA reports, the Environmental Impact Statement, EIA form, EIA registration form.

It was not until 2003 that China enacted its EIA Law which expanded the EIA mandate to encompass government plans (government plans for land use and regional development, as well as plans for industry, agriculture, energy, transportation, urban development, tourism, and natural resource development must undergo Project-Plan based EIA), as well as construction projects³⁷. The 2003 EIA Law marked a watershed moment for not only EIA but also public participation in China, as before 2003, EIA required only project-based for individual construction projects and there was no public involvement. The only EIA document mentioned among the provisions relating to plans is the EIR. SEPA or the relevant environmental protection bureau is the entity responsible for coordinating plan-based EIRs. Developers are responsible for coordinating project-based EIA documents. For construction projects and plans requiring EIA (in other words, for EIRs and in project-based EIFs) the EIA documents are prepared by licensed impact assessment organizations³⁸.

Despite this law, public participation was still extremely poor in the EIA process as a result of the gap between the law and practice concerning public participation in EIA process, in February 2006, China's State Environment Protection Administration (SEPA) officially issued *Provisional Measures for Public Participation in Environment Impact Assessment* (2006 Measures), which particularly points to public participation as an important means of solving environmental problems in China, and states that the process of providing environmental information is a requisite for public participation in environmental affairs³⁹. In May 2008, *Measures for the Disclosure of Environmental Information* for trial implementation) (2008 measures) were put into effect. Besides the requirement on open government information, the measures made specific requirements on corporate disclosure and also stated that every March 31st environmental authorities should publish an

³⁶ *Ibid*

³⁷ *Ibid*

³⁸Environmental Impact Assessment Law, <http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.)> accessed on 17 January 2014

³⁹ *Ibid*

environmental information disclosure report to improve public access to environmental information⁴⁰.

For projects with high likely high environmental impact, developers must prepare an Environmental Impact Report (EIR) which is similar to EIS under NEPA while for projects with light and small environmental impacts, developers should only fill the Environmental Impact Report Form and Environmental Impact Registration Forms respectively. The EIA process in China involves four basic phases- investigation design or scoping, evaluation of existing environmental quality, prediction of potential environmental impacts, and assessment and analysis (a cost-benefit analysis) of the environmental impacts⁴¹. The EIR should contain a detailed analysis of the potential impact of the project, the mitigating measures and the likely impact of the development on the environment. Under the EIA Law however, the public are to participate in the EIA process “in appropriate ways.” This is applicable to plans and projects, respectively, and requires that there be some form of public participation in the preparation of an EIR before it is submitted for approval. The form of public participation is broad as the only requirement is that there is some opportunity made available to the public prior to the completion of a draft EIR. Responsible entities are given the option of holding a hearing or adopting “other forms” of soliciting public opinion on the EIR. For plan-based EIRs, this requirement appears to be conditioned on whether or not the environmental impacts of the proposed plan “involve environmental rights and interests of the public.” There is no indication of how or when such rights and interests are implicated. On the other hand, the participation requirement for project-based EIRs is only limited “in conditions where secrecy is required by State stipulations.”⁴²

The SEPA Guidelines which became operative in 2006 however explained in detail the role of the public as well as developers in the EIA process covering areas of less significant environmental impacts whereas the EIA Law of 2002 only provided for public participation in construction projects⁴³. The SEPA Guidelines require public disclosure of EIA information at the outset of an EIA investigation and prior to the designated time for public participation. Simply put, the Guideline states thus⁴⁴-

⁴⁰ *Ibid*

⁴¹ J.L. Moorman and G. Zhang, *op cit*.

⁴² Articles 11 and 21 of the Environmental Impact Assessment Law, 2003, <http://www.sepa.gov.cn/law/law/200210/t20021028_84000.htm (P.R.C.)> accessed on 17 January 2014

⁴³ Art. 2 and 8 SEPA Guidelines

⁴⁴ Art. 7, 9, 12, 13, 16, and 17 SEPA Guidelines

- a) Developers, agencies, or the organizations that have been commissioned to conduct EIA investigations (whom we refer to collectively as the “responsible entities”) are encouraged to solicit the views of the public within fifteen days prior to submitting EIA documents to the environmental agency for approval.
- b) This initial disclosure must identify the initiating developer or agency, as well as the organization that has been hired to conduct the EIA investigation, and the “major items and methods of soliciting public suggestions and opinions.”
- c) Once the responsible entity has finalized a draft EIA document, it must publish notice of the availability of EIA information and solicit suggestions and opinions through questionnaires, expert consultations, workshops, debates, and hearings about the EIA document from the public prior to submitting it for approval.
- d) Discretion rests with the responsible entity to choose the form and time of public participation, which they must then include in the notice of EIA availability, and must be made available at least ten business days prior to the time set for public participation either in the newspapers, website or in public places.
- e) When the time for public comment has passed, the responsible entity is then required to clearly explain why certain opinions were accepted and others were rejected and include these explanations with the draft EIA document when it is filed for approval.
- f) Finally, if any member of the public feels that the responsible entity has not clearly explained its decision to reject an opinion, they may send their comments directly to the environmental agency in charge of approving the EIA.

The major criticism of the EIA laws and regulations of China is the limitation as to the nature of projects where public participation are permitted and even for the projects where public participation are allowed, it does not provide for same at the screening stage. There is also no strong requirement for the approving agency to take complaints seriously especially where the responsible entity fails to solicit public opinion and it appears that the length of time given is random.

PUBLIC PARTICIPATION IN THE EIA PROCESS UNDER THE EIA LAW OF THE NIGERIA

Having mentioned earlier that the law guiding EIA in Nigeria is the Environmental Impact Assessment Act, 1992 and described in details the EIA process as obtainable in Nigeria,

emphasis herein shall be made specifically on public participation as found in the EIA laws of Nigeria. **Section 7 of the Act,**⁴⁵ and provide as follows-

*“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 environmental impact assessment of the activity”.*⁴⁶

The Procedure for achieving public participation is further provided for in Act⁴⁷ as follows-

- a) The developer submits an EIA to the Agency,
- b) The Agency examines the report and makes same available to government agencies, members of the public, experts in any relevant discipline and interested groups who are given the opportunity to participate in the EIA review process at a given location for at least 21 working days on national and local dailies and announcements on electronic media⁴⁸.
- c) The review panel meetings are held in the public so that stakeholders and the public can utilize this opportunity to put forward their views and concerns for consideration. Projects that may likely cause significant adverse effects that are immitigable, or public concerns about the project warrant it, such a project is referred to Ministry Of Environment Ministerial Council for subsequent referral to mediation.
- d) The Review Panel or Mediation Report shall again be made available to be public for comments following which the Review Panel may either approve or reject the EIA.
- e) Where the EIA is approved a monitoring or follow-up programme is drawn up and still made available to the public before a Certificate is issued.

The approving agency is referred to is the Federal Ministry of Environment (FMENV) which was formally known as the National Environmental Protection Agency. The EIA Act of Nigeria as per public participation does appear in form to be quite comprehensive as it involves the public almost the all the stages of EIA process. It however didn't give room for public participation after the Certificate has been issued and/or during the monitoring or follow-up stage. As found in the USA, where a number of projects have been halted as a result of public participation even after the approval and when development has gone to an

⁴⁵ EIA Act, 1992.

⁴⁶ *Ibid*

⁴⁷ S. 25, 39, and 41 of the EIA Act, 1992

⁴⁸ C.O. Nwoko, “Evaluation of Environmental Impact Assessment System in Nigeria”(2013), *Greener Journal of Environmental Management and Public Safety*, <http://www.gjournals.org/gjemps%20pdf/2013/January/nwoko.pdf>> accessed on 10 January,2014.

advanced stage. The EIA Act did not provide specifically that developers should consult the local communities and this has posed a challenge. According to local reports “EIA legislation in Nigeria does not require companies to consult communities on all the projects they are funding. This has resulted in oil companies carrying out their activities without regards to community”⁴⁹.

It is important to state that although there is ample law on public participation in EIA process, in reality; Nigerians are not participating fully as expected. This challenge is attributed mainly to lack of awareness, lack of technical capacity, knowledge and experience in environmental matters, low regard for public consultation, non co-operation from local communities, lack of motivation etc. Hence, public participation in the EIA process in Nigeria is still generally considered very weak, though there is a framework for it.

DIFFERENCES AND SIMILARITIES IN PUBLIC PARTICIPATION UNDER THE EIA LAWS OF USA, CHINA AND NIGERIA

There are a number of identifiable differences and similarities in the EIA Laws of USA, China and Nigeria though the differences outshine the similarities. The reasons for these are simply that most economies especially the developing ones are part of the United Nations and hence try to tailor their laws to meet with international standards. However tailoring these national laws to meet with the individual socio-cultural and economic needs of each nation becomes a problem as individual nations have their various challenges. The EIA Law of the USA is developed and there is sufficient public participation both in law and practise unlike Nigeria where there is reasonable laws but no active participation due to some inherent challenges, whereas in China, it is still very recently that the public started getting involved in EIA, as all there believe is developing their economy and nothing more. The EIA Law of the USA provides for public participation at all stages of the EIA process except the scoping stage where it is somehow lacking and also states the goal of public participation in the EIA process which is to provide public scrutiny whereas the in EIA law of Nigeria the opportunity for public participation actually commences at the Scoping stage but does not extend beyond the issuance of Certificate and the EIA Law does not state the goal of public participation. In the case of China, the public are involved at the investigating stage and prior to submission of the EIR but not at the screening stage which is crucial.

⁴⁹ J.O. Kakonge, *Environmental Planning in Sub-Saharan Africa: Environmental Impact Assessment at the Crossroads*, (Yale Publishing Services Center, 2006)

DIFFERENCES

1. Under the CEQ Regulations of the USA, avenues are created for public participation not only during preparation of an EIS, but also in instances where no EIS is required, i.e., even where the proposed actions are environmentally insignificant. Whereas in Nigeria and China, public participation is only required for projects where an EIS or EIR is produced or will be produced i.e., only for projects with likely high environmental significance.
2. The EIA laws of USA and Nigeria provides for notice and disclosure of EIA documents, public hearings and commenting in the NEPA/EIA process and Agencies and the Ministry in the case of Nigeria are required to provide public notice of hearings, public meetings, and make environmental documents available to the public. Whereas under the SEPA Regulations of China, it is the developer that gives Notice or disclosure and sets date and time of hearing and commenting by the Public.
3. The EIA Law of the USA provides that Notices must be mailed to any person requesting same and for publication in the *Federal Register* if it's a project of national concern and mailed to "national organizations reasonably expected to be interested in the matter." While that of China and Nigeria does not give room for Notices to be mailed to any person, it only provides for Notices via the newspapers/dailies and electronic media.
4. Also, under the EIA Law of the USA, where a draft EIS is to be the topic of a public hearing, agencies must make the draft EIS available to the public 15 days prior to the hearing. Agencies must make NEPA-related "environmental documents," including Environmental Assessments (EAs), Finding of No Significant Impacts (FONSI), Notice of Intent (NOI), and Environmental Impact Statements (EISs), available to the public pursuant to the Freedom of Information Act. The public is afforded no less than 45 days to comment on draft EISs. In China however, upon preparation of the EIR, the developer makes same available to the public for commenting and/or hearing at least 15 days prior to submission to the Agency for approval while the public is given 10 days to comment. While in Nigeria, it is the duty of the Ministry upon receipt of the EIS to make same available to the public at least 21 days prior to the EIA review process or hearing.

SIMILARITIES

There are very limited similarities between the EIA Laws of USA, China and Nigeria when it comes to the issue of public participation. Some of these are highlighted below.

1. There are set time frames to enable the public's opinion, views, comments, or complaints under the 3 laws.
2. All the laws provide for public hearing or meetings to gather the opinions of the public on projects being carried out in their environment.
3. All comments, complaints, opinions etc are sent to the Agency, Ministry or Approving agencies respectively.
4. Notices or disclosures are circulated through newspapers/dailies and electronic media in all the 3 laws.
5. Under the 3 EIA laws, EIS or EIR is required to be made available to the public before approval of the project can be granted.

EXAMPLES OF PROJECTS THAT HAVE BEEN HALTED AS A RESULT OF PUBLIC PARTICIPATION

It is very common to find projects been carried out not only without involving the public in an Environment Impact Assessment process but also not carrying out an EIA totally. Most cases in China therefore arise after a disaster has occurred or when the public experiences serious harm especially health wise following pollution of the ecology and waters. In Huankantou village, Zhejiang province, Eastern China, about two protesters were killed following a mass protest which involved 200 hundred elderly women who had kept a two-week vigil outside a chemical factory that they blamed for ruined crops and deformities in new-born babies⁵⁰. Construction of a similar company in the region was halted following the massive protests.

A case at hand is in the city of Xiamen, the construction on a Taiwanese-invested paraxylylene (PX) petrochemical plant which the provincial and municipal government reportedly bowed to public pressure and halted⁵¹. Its opponents included white-collar workers, the elderly and housewives, who used a range of methods to express their opposition, from text-message campaigns, online protests, demonstrations at public hearings and letters written by academics, to marches though the streets⁵². This Project was relocated to another part of

⁵⁰J. Watts, "Chinese Village protest turns into thousands of protests" <<http://www.theguardian.com/world/2005/apr/12/china.jonathanwatts>> accessed on 07 March 2014

⁵¹ T. Hao, "Xiamen PX: A Turning Point?", <<https://www.chinadialogue.net/article/show/single/en/1626-Xiamen-PX-a-turning-point>> accessed on 07 March, 2014

⁵² *Ibid*

China known as Zhangzhou, without recourse to the public who know nothing about its impact.

The case of China's largest manufacturer of paraxylene (PX) – a chemical used to make polyester products is a notable one as a public storm was whipped against the company following Typhoon Meihua which battered China's east coast in early August, 2011 and which washed away chemicals bringing the plant's existence to the attention of the local population and triggering public safety fears⁵³. Over 10,000 residents of the north-eastern city of Dalian gathered in front of the municipal government building to express opposition to the project, demanding the plant be moved and the full details made public. Following the uproar, Dalian authorities ordered the managers of the Fujia Dahua facility immediately to halt production and relocate their plant⁵⁴.

In contrast, the Clean Air Act (CAA) of the USA clearly requires the US Environmental Protection Agency (EPA) to revoke permits when petitioning citizens demonstrate that they were issued in violation of the law. In an instant case in 2009, when it was discovered that a state agency had issued an air permit to a waste incinerator which was known for its out-of-date pollutant emissions controls in Newark, in the state of New Jersey, without following any of the participation requirements, the community wanted to advocate for technology that would protect their neighbourhood and petitioned the EPA, which required the state agency to re-issue the permit to allow for public participation⁵⁵. The community was then able, through both written comments and public hearings, to convince the state agency, Port Authority of New York and New Jersey to enter an Agreement with the operator, Covanta Energy, which calls for installation of state-of-the-art pollution emissions control system at the agency's site, the largest in the state⁵⁶.

A most recent and still on-going case which involves demonstration by environmental activists is Environmental activists is the case of Keystone XL Pipeline in the USA were

⁵³ T. Hao, "Public storm in Dalian", <<https://www.chinadialogue.net/article/show/single/en/4511-Public-storm-in-Dalian>> accessed on 07 March, 2014

⁵⁴ *Ibid*

⁵⁵W.J. Schulte, "Public Participation still lacking from China's Environmental laws", <<https://www.chinadialogue.net/article/show/single/en/6482-Public-participation-still-lacking-from-China-s-environmental-laws>> accessed on the 07 March, 2014.

⁵⁶T. Johnson, "For SMOG Control Incinerator, Public Pressure played key role" <<http://www.njspotlight.com/stories/12/0405/0033/>> accessed on 07 March, 2014

demonstrators have wrapped a giant pipeline around the White House fence, marched on Washington in the frigid cold, been arrested, and followed President Obama around the country to press their concerns while raising millions of dollars for the cause⁵⁷. The Report of the State Department review that states that the project when concluded would send 830,000 barrels of oil a day from Alberta, Canada, to the Gulf Coast and would have little impact on the rate of development of oil sands and would not affect greenhouse gas emissions have been rejected by activists. In the same case a Nebraska judge blocked the Keystone XL pipeline's planned route through the state which is considered a new hurdle for the embattled project⁵⁸. The judge, Stephanie F. Stacy of the Third Judicial District Court, ruled that the law giving Gov. Dave Heineman, a Republican, the authority to approve a crude oil pipeline was unconstitutional although the governor said he would appeal⁵⁹. All eyes are currently on President Obama for his decision whether to approve the project or not and it is believed that this would determine the faith of the American public not only in Keystone but also the government's ability to fund, carry out, understand and implement scientifically based environmental policy which should not be President Obama's legacy.

The story is different in Nigeria where there is still no identifiable project halted following public participation because the generality of the affected communities are indifferent or lack understanding of the effects of developments and would rather resort to extorting money from the developers.

CONCLUSIONS AND RECOMMENDATIONS

In conclusion, one can say that the USA laws on EIA is more comprehensive and shown itself to be more useful and reliable as it pertains public participation in the EIA process. While has a reasonable framework, its enforceability and usefulness is yet to be seen. As for China, despite the rate of industrialisation and commercialisation going, the laws are yet to develop and provide in an encompassing way for public participation. Even the SEPA

⁵⁷ The New York Times, Sarah Wheaton and Coral Davenport, published on 1/2/2014, "Pipeline Opponents' Hope now rests largely on Kerry" <http://www.nytimes.com/2014/02/01/us/pipeline-opponents-hopes-now-rest-largely-on-kerry.html?_r=0> accessed on 07 March 2014

⁵⁸ The New York Times, Sarah Wheaton, published on 20/2/2014, "Nebraska: Judge Blocks Pipeline Route" <<http://www.nytimes.com/2014/02/20/us/nebraska-judge-blocks-pipeline-route.html>> accessed on 07 March 2014

⁵⁹ *Ibid*

regulations on public participation are still filled with some lacunas, this is more so as a regulation would not supersede the superior legislation which is the EIA Law of 2002.

It is obvious that some reforms are needed in order to improve the role of public participation in Nigeria and the Peoples' Republic of China. First, the EIA Law of China needs to be amended for public participation to be encompassed in all areas of developments where there would be any form of environmental impact while that of Nigeria should give room for participation even after the issuance of Certificate and commencement of project. Besides amendment of the law which was promulgated over 20 years ago, when Nigerians were yet to even understand the import of Environmental Impact, it would be most important for environmental awareness programmes to be organised to educate the Nigerian masses on the need to be environmentally alert, and their right to knowledge and information as per activities likely to have negative environmental impacts on their environment. Environmental experts and consultant should not only come together and make proposals suitable for our own needs and which would be practicable in ensuring that the public participate in the EIA process but also ensure that the appropriate agency gives due attention and regards to their contributions and comments on EIA reports whenever given. Importantly, the law should ensure that local communities and all other interested persons should be consulted. There should be an enforceable and exemplary penalty for failure to submit and carry out EIA on any given project and also failure to notify and consult all interested persons by a developer. Finally, the twenty-one days timeframe given to notify the public of the Review Panel sitting appears to be too short for any meaningful research and/or contribution of an environmental impact which is a technical area to be carried out. It is suggested that the timeframe be elongated so that more meaningful input and contribution can be made.