

A COMPARATIVE REVIEW OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) PRACTICE REGIMES IN NIGERIA, INDIA, CANADA AND SOUTH AFRICA

Felicia Anyogu*
Empire Hechime Nyekwere**

ABSTRACT

Development projects (DPs) have contributed to industrialization and economic growth which provided man with material comforts and luxuries of life. However, DPs directed at improving levels of material comfort have had unintended detrimental effects on people and the environment. In the past, DPs were undertaken without any consideration to their environmental consequences, thus, resulting to environmental pollution and degradation which has reached a threatening level. Water, land, and air have been degraded to the point where they can no longer sustain existing levels of development and quality of life. In view of the colossal damage to the environment caused by DPs, people are now concerned about the environmental impacts of these projects. Environmental impact assessment (EIA) enables the decision makers to examine the effect of developmental activities or projects on the environment prior to their execution. This paper, which adopted the doctrinal research methodology, provides a comparative overview of the EIA regimes in Nigeria, South Africa, India, and Canada. The paper reviews the legal, regulatory and procedural frameworks of each EIA regimes and proceeds to a detailed comparison of same. This paper finds that the Canadian, South African and Indian EIA regimes allows for robust public consultation and participation in the EIA process as against the Nigerian EIA regime which only allows opportunity for public comment on the environmental impacts of proposed projects. The paper recommends that the Nigerian EIA regime should allow for more robust public consultation and participation in its EIA process in line with the practice of the Canadian, Indian and South African EIA regimes.

Keywords: *Environmental Impact Assessment (EIA), Nigeria, South Africa, India, Canada, Comparative Review*

I. INTRODUCTION

Ever since the passage of the *National Environmental Policy Act* by the United States of America (USA) in 1969, more than 100 countries including Nigeria, India, Canada and South Africa have tread the part of the USA. For example, Nigeria first implemented EIA in 1992, India in 1994, Canada in 1973, and South Africa in 1997. Environmental Impact Assessment (EIA) is an assessment of the possible positive and negative impact that a proposed project may have on the environment.¹ EIA is also considered as the formal process of identifying, predicting, evaluating and mitigating the environmental, social, economic and other relevant effects of development proposals prior to major decisions being taken and commitments made.² EIA facilitates the systematic consideration of environmental issues as part of development decision-making. It does so primarily by assembling and analysing information on the potential environmental effects of development proposals and how they can be best prevented or mitigated.³

EIA is an instrument of preventive environmental management⁴ that the global society is currently using to achieve sustainability by directing development away from unsustainable alternatives.⁵ EIA is considered globally to be a key tool for sustainable development and used throughout the world to ensure that all planned projects are economically feasible, socially unbiased and environmentally sustainable.⁶ EIA is the most commonly known, used, and globally widespread environmental planning and management tool. It is the only environmental policy tool that is required by most countries around the world and whose results are regularly publicly acknowledged and

*PhD, BL, Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria.

**Lecturer, Department of Public and International Law, College of Law, Bowen University, Osun State, Nigeria. PhD Research Candidate (Nnamdi Azikiwe University, Anambra State, Nigeria); LL.M. (University of Ibadan, Oyo State, Nigeria); BL. (Lagos); LL.B. (Obafemi Awolowo University, Osun State, Nigeria). Email: empirehechime@gmail.com

¹Abdullatecf, A.I. and others. 'Environmental Impact Assessment in Nigeria - A Review' [2020] (8)(3) *World Journal of Advanced Research and Reviews*; 330; Anulika, N.P. and others. 'The Role of Environmental Impact Assessment in Environmental Sustainability of Onitsha Metropolis in Anambra State' [2015] (3)(11) *International Journal of Technology Enhancements and Emerging Engineering Research*; 109-114.

²See UN Environment, *Assessing Environmental Impacts - A Global Review of Legislation* (Nairobi, Kenya, United Nations Environment Programme 2018), 2 (hereinafter, UN Environment).

³H Abaza and R Bisset and B Sadler, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (United Nations Environment Programme (UNEP) 2004) p.40.

⁴See Sophie Nyirabakwiye, 'The Performance Evaluation of Environmental Impact Assessment in Selected Environmental Improvement Projects: Enhancing and Detracting Factors' PhD Thesis (University of Cape Town, South Africa 2008), 13.

⁵*Ibid.*

⁶Manogrie Chetty, 'Methodologies used for determining impact significance and the implications for EIA effectiveness in South Africa: Case studies from KwaZulu-Natal' Master Thesis (University of KwaZulu-Natal, Westville, South Africa 2015), 11; See Alex Weaver, 'EIA and Sustainable Development: Key Concepts and Tools' in *Environmental Impact Assessment in Southern Africa* (Part 1. Windhoek: Southern African Institute for Environmental Assessment, 2003), 3-10.

available.⁷ EIA is concerned both with the protection and management of the environment.

The essential idea behind EIA is that a formal process will ensure that a comprehensive environmental assessment is undertaken in a systematic manner, leading to a well informed decision regarding proposed development activities.⁸ The EIA seeks to give the environment its due place in the decision-making process by clearly evaluating the environmental consequences of a proposed activity before action is taken. EIA has ramifications in the long run for almost all development activities or projects because sustainable development depends on protecting the natural resources which is the foundation for further development.⁹ The emphasis of EIA, compared with many other mechanisms for environmental protection, is on prevention.¹⁰

EIA helps to provide information to decision makers and the public about the environmental implications of implementing proposed actions or projects before decisions are made.¹¹ Consequently, EIA takes place before major decisions are taken and, ideally, while feasible alternatives and options to a proposed project are still open. In this context, the decision-making process extends from project initiation to implementation.¹² Thus, EIA is a means of improving decision-making, because it allows for the input of public opinion, and other knowledge and information, to ensure fairness and balance in the final decision of a proposed developmental project or activity.¹³

The purpose of the EIA process is to present information on the environmental effects of proposed activities for decision-making and identify suitable mitigation measures that encourage environmentally beneficial and sustainable development. The objectives of EIA can be separated into two groups: the short term and long term objectives. The aim of the short term objective is to ensure that the decision-making authority is provided with the necessary information including the identification of potential significant environmental impacts and hazards of the proposed project activities. The aim of the long term objective is to achieve sustainable development. One of the ways to achieve this is to ensure that the proposed development activity or project does not damage important resource and ecological functions provided by the

⁷UN Environment, *supra* note 2.

⁸*Ibid*, p.3.

⁹Jonathan Randall, *Environmental Impact Assessment Tools and Techniques*(World Wildlife Fund and American National Red Cross 2010), 6.

¹⁰Mohammed Nuruddeen Isah, 'The Role of Environmental Impact Assessment in Nigeria's Oil and Gas Industry' PhD Thesis (United Kingdom, School of Earth and Ocean Sciences: Cardiff University 2012), 36.

¹¹B. Lohani, and others, *Environmental Impact Assessment for Developing Countries in Asia* (Volume 1- Overview, Asian Development Bank 1997), 1.

¹²Abaza and Bisset and Sadler, *supra* note 3, p.40.

¹³Arctic Environment Protection Strategy 1997: Guidelines for Environmental Impact Assessment (EIA) in the Arctic (Sustainable Development and Utilization: Finnish Ministry of the Environment, Finland 1997), 5-7.

environment, including the role it provides to communities in terms of their wellbeing and lifestyles.¹⁴

The EIA is usually initiated at an early stage of project development so as to become an integral and influential part of planning. It predicts 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.¹⁵ EIA evaluates proposed developmental projects likely impacts on the environment and assists in ensuring environmentally and socially sound management of the project during its entire lifecycle.¹⁶ If the EIA process is successful, it identifies alternatives and mitigation measures to reduce the environmental and a proposed development project can be achieved. An EIA is often mandated by law for major infrastructural, commercial, industrial, or residential development project proposals. It is a widely recognized environmental management tool for mainstreaming the environment into development projects, and has been made mandatory by legal systems in many countries.¹⁸

II. THE NIGERIAN ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGIME

A. Legal Framework for Environmental Impact Assessment in Nigeria

The Environmental Impact Assessment (EIA) Act of 1992¹⁹ is the main legislation for EIA practice in Nigeria. It is administered by the Federal Ministry of Environment. Section 2(1) provides that no project within the private and the public sector shall be undertaken without prior consideration of their effects on the environment at an early stage.²⁰ Subsections 2(2) & 2(3) of the EIA Act further provide that “where the extent, nature or location of a proposed project or activity is such that is likely to significantly affect the environment, its environmental impact assessment shall be undertaken in accordance with the provisions of this Act. The criterion and procedure under this Act

¹⁴Chetty, supra note 6, pp.8-9; See Barry Sadler and Mary McCabe (eds), *Environmental Impact Assessment Training Resource Manual – Topic 1: Introduction and Overview of EIA* (2nd edn, United Nations Environment Programme 2002).

¹⁵Randall, supra note 9, p.3.

¹⁶Environmental

Impact

Assessment

<<https://www3.opic.gov/environment/cia/greenfields/Chapter%207%20-%20Environmental%20Impact%20Assessment.pdf>> accessed 20 September 2021.

¹⁷Overview of the EIA Process, p.19 <<https://www.elaw.org/files/mining-eia-guidebook/Chapter2.pdf>> accessed 19 September 2021.

¹⁸Randall, supra note 9, p.6.

¹⁹Nigerian EIA Act of 1992, CAP E12, LFN, 2004 (hereinafter, Nigerian EIA Act 1992); Note: There are two versions of the existing EIA Act. The first version was released as EIA Decree No. 86 of 1992. The second version came into circulation sometime in 2010. The major changes in the second version include replacing the word “Decree” with “Act”, and FEPA (as an implementing agency) with Federal Ministry of Environment.

²⁰Section 2(1), Nigerian EIA Act 1992.

shall be used to determine whether an activity is likely to significantly affect the environment, and is therefore subject to an environmental impact assessment.” Section 61 of the EIA Act empowers the regulatory ministry, with the approval of the President, to make regulations on procedures, requirements and period relating to the EIA Process.²¹

The Nigerian EIA Act recognises three broad categories of development projects namely Category 3 Projects/Activities, Category 2 Projects/Activities, and Category 1 Projects/Activities, within the EIA systems. The EIA procedure employs the following criteria for categorisation of projects/activities: magnitude, extent or scope, duration and frequency, risks, significance, mitigation measures available for associated and potential environmental impacts, location of the project in environmentally sensitive areas (ESAs). The EIA Act further considers national emergency situations, limitation of the regulator’s powers and national security concerns as criteria for categorising projects/activities for environmental assessment.²² Sections 49-51 and 56 of the EIA Act also make potential environmental effects outside jurisdiction (i.e. interstate or international) a condition for conducting environmental assessment for projects/activities in the EIA exclusion list.²³

Category 3 Projects/Activities are projects with beneficial impacts on the environment or the community. The projects in this category do not have significant environmental impacts and thus, requires no EIA. The projects in this category as enumerated in the EIA procedure include Institutional Development, Health Programme, Family Planning Programme, Nutritional Programme, Educational programme and Environmental Awareness.²⁴

Category 2 Projects/Activities are projects that (unless within the Environmentally Sensitive Area) full EIA is not mandatory. They only require a partial EIA because they are likely to have minimal environmental effects.²⁵ Projects in this category are small in magnitude and extent of environmental impacts compared to the mandatory full-scale projects in category 1. Development projects in this category include small-scale agriculture, industrial, rural and infrastructural developments. However, development projects in this category located in or close to Environmentally Sensitive Area (ESAs) are considered as Category 1 projects in respect of

²¹See section 61(a-c), Nigerian EIA Act 1992.

²²See sections 17(4), 61(d) and 61(e), Nigerian EIA Act 1992.

²³Tayo Akcem Yusuf, *Environmental Impact Assessment (EIA) Regulations and Practice in Nigeria* (Lagos, Al-Hakim International 2017), 36.

²⁴See section 15(1)(e), Nigerian EIA Act 1992; Yusuf, *ibid*, p.37; See Echefu N. and Akpofure E, ‘Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework’ in *UNEP EIA Training Resource Manual, Law, Policy and Institutional Arrangements. Case Study 7. Case Studies from Developing Countries*, p.66 <<https://www.iaia.org/pdf/case-studies/EIANigeria.pdf> > accessed 12 June 2021.

²⁵Sections 15(1) (a) & 61(b), Nigerian EIA Act 1992.

environmental effects and thus, require a full-scale EIA. ESAs include unique scenery, wetlands, etc.²⁶

Category 1 Projects/Activities require mandatory full-scale EIA study. Category 1 projects are projects with significant and diverse environmental impacts. EIA is mandatory for Category 1 activities in all sectors of the economy.²⁷ The activities in the oil and gas sector which require the oil and gas companies operating in the Niger Delta to conduct an EIA include: Oil and gas fields development, Construction of off-shore pipelines in excess of 50 kilometres in length, Construction of oil and gas separation, processing, handling, and storage facilities, Construction of oil refineries, Construction of product depots for the storage of petrol, gas or diesel (excluding service stations) which are located within 3 kilometres of any commercial, industrial or residential areas, and which have a combined storage capacity of 60,000 barrels or more and Petroleum refining.²⁸

B. Environmental Impact Assessment Procedure under the Nigerian EIA Act of 1992
The Nigerian EIA procedure is the different phases a project goes through from proposal to approval for implementation. EIA procedure in Nigeria involves the steps as discussed below.

1. Project Proposal

This first stage requires the project proponent to develop the proposal for the project in accordance with the EIA regulations and submit same to the Federal Ministry of Environment for screening to determine the need or otherwise for EIA. The information content required for a project proposal includes: a) A concise description of the project; b) An outline of the planning and implementation programme; c) An outline of the major elements of the surrounding environment which might be affected; and d) Comment on environmental protection measures incorporated in the design and any further environmental implications.²⁹

2. Screening

The screening process uses criteria such as the Initial Environmental Evaluation (IEE) to decide the development projects or activities that are subject to EIA on the grounds of environmental impacts and social benefits. The screening process categorises project proposals into three: Projects clearly requiring an EIA, Projects not requiring an EIA, Projects for which requirement for an EIA is not clear. The EIA procedure also requires the regulator to issue an appropriate advice (Screening Report) in writing to the project proponent within ten (10) days of the receipt of a project proposal.

²⁶See Yusuf, *supra* note 23, p.36; See Echefu and Akpofure, *supra* note 24, p.36.

²⁷See Yusuf, *ibid*; See Echefu and Akpofure, *ibid*.

²⁸Paragraph 12, Schedule on Mandatory Study Activities, Nigerian EIA Act 1992.

²⁹See section 4, Nigerian EIA Act 1992.

3. Scoping

Upon the receipt of a screening report on the category of a proposed project, the project proponent is required to carry out a scoping exercise to ensure that all significant impacts and reasonable alternatives are addressed in the intended EIA. The EIA Procedure stipulates the following for a scoping process: a) Preparation and submission of a Terms of Reference (TOR) on the scope of the proposed EIA study; and where necessary, at the request of the regulator, conduct a preliminary assessment report and specific studies to ensure availability of adequate data on the project; b) The vetting of the TOR of the proposed study and making a final decision on the scope of the EIA required by the regulator; c) The conduct of public hearing depending on the public interest in the project by the regulator; and d) Undertaking of an EIA study by the project proponent in accordance with the TOR agreed with the regulator.³⁰

4. Draft EIA Report and Review Process

This stage requires the project proponent to submit the draft EIA report to the Federal Ministry of Environment (FMoE) for review. In line with the EIA guidelines, the draft EIA report submitted to the FMoE by a proponent is evaluated by the Ministry to establish the type of review to be adopted. There are different forms of reviews, depending on the nature, scope, anticipated impact, risks, etc, that may arise in project planning and implementation, and an EIA report may be subject to any or a combination of these reviews. The four types of review process are In-House Review, Public Review (Review of public comments received from EIA displays), Panel Review and Mediation.³¹

In In-House Review, all draft EIA reports forwarded to the FMoE are reviewed in-house to assess how far issues raised in the Terms of Reference (TOR) have been addressed and to determine if the draft EIA reports are suitable for public review (if necessary). If the In-House Review finds that the issues in the report do not merit putting it on public display, the review process may be terminated at the In-House Review stage. Some projects (e.g. those that fall under category III of the EIA Act) may be recommended for approval by the Ministry's in-house panel of experts.³²

In Public Review, in accordance with the provisions of section 25 of the EIA Act, interested members of the public are given the opportunity to participate in the EIA review process through comments on project reports that are put on display. Such displays are usually done for a 21 working day period at strategic locations. Notices of such venues of display are usually published in the Newspapers circulating nationally and locally within the area of the project and information about such display are complemented with further announcements on the relevant State electronic media.

³⁰ See section 22(1), (2) & (3), Nigerian EIA Act 1992.

³¹ Isah, *supra* note 10, p.56.

³² See section 22(1) (a), Nigerian EIA Act 1992; Isah, *ibid*, p.56.

Often the venues of displays include: the local government headquarters where a project is located, the State Ministry of Environment or Environmental Protection Agency(s), the FMoE zonal offices, liaison office Lagos and the headquarters, Abuja. Comments received from the display venues are collated and evaluated by the FMoE in preparation for the project's panel review.³³

Where there is need for Panel Review after the conclusion of the public display exercise, the FMoE may decide to set up a review panel³⁴ to review the draft EIA report depending on the sensitivity or significance of the comments received. The review panel meetings are held in the public so that stakeholders can utilize this opportunity to put forward their views and concerns for consideration. The choice of members of the review panel depends on the type of project, its scope as well as the ecosystem to be affected. However, the chairman of the affected Local Government(s) and the Commissioner of Environment of the project location are always included in the panel.³⁵

With respect to Mediation, when a project is likely to cause significant adverse effects that are immitigable, or public concerns about the project warrant it, such a project is referred to the FMoE Ministerial Council for subsequent referral to mediation. For a mediation to be set up, the Ministerial Council would have been convinced that the parties involved are willing to participate in the mediation and to abide by its decisions.³⁶

5. Final EIA Report

At this stage, all the issues raised by the public and at the mediation or panel review in respect of the draft EIA report are taken care of. The EIA Act also requires the final EIA Report to include amendment regarding any significant changes in the circumstances of the project. For instance section 21 of the EIA Act provides:

Where a proponent proposes to carry out, in whole or in part a project for which a screening report has been prepared but the project did not proceed or the manner in which it is to be carried out has subsequently changed... the Agency shall ensure that any adjustments are made that in its opinion are necessary to take into account any significant changes in the circumstances of the project.³⁷

³³See sections 25(1) (a-c), 25(2) and 22(3), Nigerian EIA Act 1992; Isah, *ibid.*

³⁴See section 60(1) (f), Nigerian EIA Act 1992.

³⁵See sections 22(1) (b & c), 23(b), 31(a), 26, 27, 37(a & b), 38(3), Nigerian EIA Act 1992; Isah, *supra* note 10, p.57.

³⁶See sections 22(1) (b & c), 23(b), 26, 27, Nigerian EIA Act 1992; Isah, *ibid.*

³⁷Sections 21(1) & (2), 24(1) & (2), Nigerian EIA Act 1992.

In line with the EIA procedure, the project proponent is expected to submit the final EIA report to the FMoE within six (6) months of the receipt of the Ministry comments (feedback) on the initial draft EIA report.

6. Decision-Making

After a submission of an acceptable final EIA report, the final EIA report will be due for approval by a technical committee of the FMoE headed by the Permanent Secretary of the Ministry. The EIA Act requires the Agency to seek the public participation at this phase. 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 government agencies, members of the public, experts in any relevant discipline and interested groups to make comment on environmental impact assessment of the activity". The EIA Act further provides that "The Agency shall not give a decision as to whether a proposed activity should be authorised or undertaken until appropriate period has elapsed to consider comments pursuant to sections 7 of the EIA Act."³⁸

The issuance of the Environmental Impact Statement (EIS) and Certificate by the technical committee represents the final statutory approval of the project subject to the EIA Act. It is mandatory on the FMoE to publish its decision in respect of project authorization in a manner by which members of the public and all interested persons shall be notified.³⁹ Section 9 of the EIA Act provides:

The report of the Agency shall be made available to interested person or group. If no interested person or group requested for the report, it shall be the duty of the Agency to publish its decision in a manner by which members of the public or persons interested in the activity shall be notified. The Council may determine an appropriate method in which the decision of the Agency shall be published so as to reach interested persons or groups, in particular the originators or persons interested in the activity subject of the decision.⁴⁰

Generally, approval for a proposed project is based on sustainability of the activity and compliance of its assessment with the EIA regulations and guidelines. For instance, section 9(1) of the EIA Act provides that the Agency's decisions on any proposed activity subject to environmental impact assessment shall include the provisions, if any, to prevent, reduce or mitigate damage to the environment.⁴¹

³⁸Section 8, Nigerian EIA Act 1992.

³⁹Yusuf, *supra* note 23, p.50.

⁴⁰Section 9(2), (3) & (4), Nigerian EIA Act 1992.

⁴¹Section 9(1) (c), Nigerian EIA Act 1992.

7. Project Implementation Stage

At the conclusion of the review process, and authorization of the commencement of the project that have undergone the EIA process by the Federal Ministry of Environment, the project proponent may proceed to implement the project in accordance with the stipulated specifications and mitigation measures in the Final EIA Report and Environmental Impact Statement.⁴²

8. Project Monitoring Stage

The Federal Ministry of Environment is "required to engage in environmental impact mitigation monitoring designed to monitor the environmental management plan, and to assess the extent to which commitments contained in the EIA reports are reflected during the various phases of the project development and operations."⁴³

III. THE INDIAN ENVIRONMENTAL IMPACT ASSESSMENT REGIME

A. Legal Framework for Environmental Impact Assessment in India

EIA in India started as an administrative requirement in 1976-1977 when the Planning Commission asked the Department of Science and Technology to examine the multipurpose river-valley projects and hydropower projects from an environmental angle. This was subsequently extended to cover those projects, which required the approval of the Public Investment Board. Prior to 1994, environmental clearance from the Indian Central Government was an administrative decision and lacked legislative support.⁴⁴ However, EIA was legally protected and made mandatory in India through the 1994 EIA Notification adopted under Section 3 of the Environment Protection Act, 1986 read with Rule 5(3) of the Environment Protection Rules, 1986⁴⁵ This Notification made Environmental Clearance (EC) legally mandatory for all development projects listed in Schedule 1 of the EIA Notification of 1994.⁴⁶ The schedule I comprises category 1 projects for which an application of EIA is mandatory and includes 30 types of projects such as projects in river valleys, nuclear power, exploration of oil and gas,

⁴²See Ingelson, A. and Nwapi, C. 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' [2014] (10) *Law, Environment and Development Journal*, 48.

⁴³Isah, supra note 10, p.57.

⁴⁴Understanding EIA, Centre for Science and Environment <<https://www.cseindia.org/understanding-eia-383>> accessed 10 September 2021.

⁴⁵Ministry of Environment and Forests, EIA Notification, 1994, S.O. 60(1), 27 January 1994.

⁴⁶See Dibya, J. K. 'Environmental Impact Assessment (EIA) in India: An Appraisal' [2016] (3)(1) *Dilmorian Review*, 52; See Khadka, R.B. and Shrestha, U.S. 'Process and Procedure of Environmental Impact Assessment Application in Some Countries of South Asia: A Review Study' [2011] (4) *Journal of Environmental Science and Technology*, 215-233; See Raghavendra, D.V. and Vijayachandra, R.S. and Ravindra, C. 'Environment Impact Assessment: Significance, Process and Problems' [2016] (5)(5) *International Journal of Humanities and Social Science Invention*, p.7; Understanding EIA - Centre for Science and Environment <<https://www.cseindia.org/understanding-eia-383>> accessed 11 September 2021.

ports, petroleum refineries, mining (major minerals), thermal power, highway roads etc., requiring environmental clearance from the central Government.⁴⁷

The Indian EIA has the objectives of predicting environmental impact of projects, finding ways and means of reducing adverse impacts, shaping the projects to suit local environment, and presenting the predictions and options to the decision-makers.⁴⁸ The Indian Ministry of Environment and Forest (MoEF) is the body responsible for valuation of EIA through Environmental Clearance.⁴⁹ It is noteworthy, that from 1994 forward there have been 12 alterations made in the Indian EIA notification of 1994.⁵⁰ For instance, in 1997, the MoEF amended the EIA notification of 1994 to make compulsory requirement of public hearings for environmental clearance. According to the amendments, the State Pollution Control Board must conduct public hearings before the proposed development is submitted to the MoEF, where environmental clearance must be approved.⁵¹

Subsequently, the Indian MoEF passed (notified) a new EIA legislation – the Indian Environmental Impact Assessment (EIA) Notification of 2006. The notification makes it mandatory for various projects such as mining, thermal power plants, river valley, infrastructure (road, highway, ports, harbours and airports) and industries to get environmental clearance.⁵² Three significant changes were initiated through the 2006 EIA Notification amendment that superseded the 1994 EIA Notification. First, the decentralization of regulatory functions to State Governments, that is, State level Environment Impact Assessment Agencies (SEIAAs).⁵³ Projects in Schedule 1 were divided into two categories, Category ‘A’ and ‘B’. Category ‘A’ requires clearance from Central Government, and Category ‘B’ requires clearance from State Government. However, the state government is required to determine if a Category ‘B’ project falls under the ‘B1’ or ‘B2’ category. Category ‘B1’ projects require preparation of EIA reports, while the remaining projects are termed Category ‘B2’ projects. These do not require an EIA report.⁵⁴ In other words, SEIAAs were to oversee smaller scale

⁴⁷Khadka and Shrestha, *ibid*; See Nupur, C. ‘Environmental Impact Assessment in India: Reviewing Two Decades of Jurisprudence’ 5 *IUCNAEL EJournal*, 28 <<https://www.iucnael.org/en/documents/1140-environmental-impact-assessment-in-india-reviewing-two-decades-of-jurisprudence/file>> accessed 12 October 2021.

⁴⁸Hakeem, I. ‘Public Participation in Environmental Impact Assessment in Nigeria: Prospects and Problems’ [2015] (13) *The Nigerian Juridical Review*, 98; See Arvin, T. ‘Public Participation in Environmental Impact Assessment’ <<https://www.legalserviceindia.com/article/1435-Public-Participation-in-Environment-Impact-Assessment.html>> accessed 10 September 2021.

⁴⁹Vikrant, S. Y. ‘Environmental Impact Assessment: A Critique on Indian Law and Practices’ [2018] (5)(1) *International Journal of Multidisciplinary Research and Development*, 2-3.

⁵⁰Paliwal, R. ‘EIA practice in India and Its Evaluation using SWOT Analysis’ [2006] (26)(5) *Environment Impact Assessment Review*, 492-510.

⁵¹Khadka and Shrestha, *supra* note 46.

⁵²Understanding EIA, *supra* note 46.

⁵³Nupur, *supra* note 47.

⁵⁴Stellina, J. and Siddharth, S. ‘Environmental Impact Assessment Draft Notification 2020, India: A Critique’ [2021] (5) *Chinese Journal of Environmental Law*, 15.

projects (Category B) and the MoEF would continue to regulate larger scale projects (Category A).⁵⁵ Second, although the final regulatory approval would be decided by the MoEF or the concerned SEIAA, they in turn were to base their approvals on the recommendations of the State Expert Appraisal Committee (SEAC) and the Expert Appraisal Committee (EAC) functioning in the MoEF. Third, the State Pollution Control Boards (SPCB) or the Union Territory Pollution Control Committee (UTPCC) was given the responsibility for conducting the public hearing, taking responsibility away from the project proponents. These three changes were designed to make the appraisal process more streamlined, transparent and independent of politicking.⁵⁶

On 23 March 2020, the Indian Ministry of Environment, Forest, and Climate Change issued Draft Environmental Impact Assessment Notification, 2020, which is intended to replace the existing EIA Notification, 2006.⁵⁷ However, the adoption of the Draft EIA Notification 2020 by the Ministry of Environment, Forest and Climate Change has triggered several criticisms over its problematic provisions of ex post facto clearance, reduced public consultation, and exempting projects near border areas from public consultation.⁵⁸ Clause 22 of the Draft EIA Notification incorporates ex post facto clearance provisions. It provides that a committee will appraise the lack of environmental clearance and its consequences for an already initiated project. The Committee will assess whether the construction or expansion of the project complies with environmental norms. If answered in the negative, the project's closure will be recommended. Alternatively, if answered in the positive, the project will be granted clearance.⁵⁹ It is argued that this provision sends a message to the project proponents that obtaining an environmental clearance (EC) is not mandatory and that the default may be condoned retrospectively. It is important to note that under the 1994 EIA Notification and the 2006 EIA Notification, there was no provision for ex post facto clearance. Thus, the Draft EIA Notification represents a significant departure from existing practice.⁶⁰

Further, the Draft EIA Notification 2020 continues with the reduction of public consultation by bringing in an additional category of exemptions to that required under the 2006 EIA Notification. The 2006 EIA Notification had prescribed that all Category

⁵⁵Nupur, supra note 47.

⁵⁶Nupur, supra note 47.

⁵⁷Ministry of Environment, Forest and Climate Change, Draft Environment Impact Assessment Notification, 2020, S.O. 1199(E) The Gazette of India: Extraordinary Part II Section 3(ii), 23 March 2020 <http://environmentclearance.nic.in/writereaddata/om/6998FGGHOI_Gaztte_EIA2020_Comments.pdf> accessed 2 November 2021 (hereinafter, Indian MoEF Draft EIA Notification 2020).

⁵⁸Stellina and Siddharth, supra note 54, pp. 12, 20; See Abhishek Chakravarty, Draft EIA notification 2020: Is it contra legem to international conventions, judicial verdicts, Monday 19 October 2020 <<https://www.downtoearth.org.in/blog/environment/draft-eia-notification-2020-is-it-contra-legem-to-international-conventions-judicial-verdicts-73858>> accessed 2 November 2021.

⁵⁹See Indian MoEF Draft EIA Notification 2020, clause 22(2) and (3); Stellina and Siddharth, *ibid*, p.22.

⁶⁰Stellina and Siddharth, *ibid*, pp.22-23.

'A' and Category 'B1' projects undertake public consultation. The Draft EIA Notification 2020 provides an exemption for Category 'A' and 'B1' expansion proposals or modernization with a capacity increase of less than 50 percent from public consultation. This provision has been criticised on the ground that the project proponents can divide the expansion or modernization into phases and show it as less than 50 percent and avoid public scrutiny.⁶¹ Also, the Draft EIA Notification 2020 exempts some projects in the border areas from public consultation. It is problematic that the highways or pipeline projects carried out in this area will be exempted from the public consultation process.⁶² This provision, it is argued, will gravely impact several parts of India, especially, the Northeastern States which is an ecologically sensitive region and a biodiversity hotspot.⁶³ These border projects are also likely to generate trans-boundary impacts.⁶⁴

B. Environmental Impact Assessment Procedure under the Indian EIA Notification of 2006

The Indian EIA procedure is the different phases a project goes through from proposal to approval for implementation. EIA procedure in India involves the steps as discussed below.

1. Screening

Project screening is the first stage of EIA. This stage determines whether the proposed projects have considerable environmental impacts and hence requires an EIA or not. If it does, then the level of assessment required.⁶⁵ Ideally, the Indian MoEF or the Impact Assessment Agency (IAA) (which is constituted by MoEF) receives the project application from the project proponent.⁶⁶ The project proponent has the responsibility to initiate the proposed project for the EIA process.

2. Scoping

Scoping is the process of identifying problems that need to be addressed or mitigated, the information to be collected, and the analysis required to assess the environmental impacts of a project. This stage also defines the boundary and time limit of the study. Scoping identifies the key environmental issues that are required to be addressed in EIA. The primary output of scoping is the terms of reference (TOR) required to conduct

⁶¹Indian MoEF Draft EIA Notification 2020, Clause 14(2) and 14(2)(a); Stellina and Siddharth, *ibid*, p.26.

⁶²Indian MoEF Draft EIA Notification 2020, clause 14(2); Stellina and Siddharth, *ibid*, p.32.

⁶³Indian MoEF Draft EIA Notification 2020, item 31 and 38 of the schedule; Stellina and Siddharth, *ibid*.

⁶⁴Stellina and Siddharth, pp.32-33.

⁶⁵Dibya, *supra* note 46, p.50; Akhand, P. and Navlakha, S. and Akhand, A. 'Environmental Impact Assessment (EIA)-Decision Making Tool for Project Approval in India' [2015] (3)(9) *Social Issues and Environmental Problems*, 2.

⁶⁶See Vikrant, *supra* note 49.

an EIA and to prepare the EIA report.⁶⁷ It provides an opportunity to public and environmental organizations/institutions to get acquainted with the project and to raise their voice, if required. In scoping the EIA team identifies the primary issues to be dealt with.⁶⁸

3. Public Involvement

This phase of the EIA procedure aims to ensure the quality, comprehensiveness and effectiveness of the EIA. The law requires that the public must be informed and consulted on a proposed development after the completion of EIA report. Any one likely to be affected by the proposed project is entitled to have access to the Executive Summary of the EIA. The affected persons may include: bonafide local residents; local associations; environmental groups active in the area; and any other person located at the project site of displacement. They are to be given an opportunity to make oral or written suggestions of their views on the proposed developmental project requiring environmental clearance.⁶⁹ In India, public consultation has been made a compulsory component of the EIA by an amendment dated April 10, 1997 to the EIA notification of 1994. The State Pollution Control Board or the Union Territory Pollution Control Committee (UTPCC) is responsible for the public consultation process through duly constituted public hearing panel.⁷⁰

4. Impact Analysis

This stage of EIA identifies and predicts the likely environmental and social impact of the proposed project and evaluates the significance. Impact prediction is a way of mapping the environmental consequences of the significant aspects of the project and its alternatives. Environmental impact can never be predicted with absolute certainty and this is all the more reason to consider all possible factors and take all possible precautions for reducing the degree of uncertainty.⁷¹

5. Mitigation

In this phase of the EIA procedure, mitigation measures are proposed and analyzed to prevent, reduce, remedy or compensate for each of the adverse environmental and social impacts evaluated as significant. Possible mitigation measures include:

⁶⁷Lohani, and others, *supra* note 11, p.7.

⁶⁸Vikrant, *Supra* note 49, p.2.

⁶⁹See N.C. Saxena, and others, *Mining Environment Management Manual* (Scientific Publishers, 2004), 264; See *Stages of Environmental Impact Assessment* | Environment <<https://www.environmentalpollution.in/eia-2/stage-of-environmental-impact-assessment-environment/4428>> accessed 24 September 2021; *Environmental Information System: Technology Training and Project Management* <<https://www.envis.org/eia/eia-manual/79-public-hearing>> accessed 21 September 2021.

⁷⁰See Dibya, *supra* note 46, p.53.

⁷¹See Saxena, and others, *supra* note 69; See *Stages of Environmental Impact Assessment*, *supra* note 69; *Environmental Information System*, *supra* note 69.

1. Changing project sites, routes, processes, raw materials, operating methods, disposal methods, disposal routes or locations, timing or engineering designs.
2. Introducing pollution controls, waste treatment monitoring, phased implementation, landscaping, personal training, special social services or public education.
3. Offering (as compensation) restoration of damaged resources, money to affected persons, concessions on other issues, or off site programmes to enhance some other aspects of the environment or quality of life for the community.⁷²

6. EIA Report

Report summarizes the description of the project, baseline conditions, important findings, regional setting, and impact prediction of the study. The report is put together and delivered to all the stakeholders, wherein the government is the primary stakeholder. Other stakeholders include: developers, regulators, planners, investors, politicians and the communities affected by the project. The report is also put up for public consultation so as to consider the concerns of the community regarding the impact of proposed project on the environment. Thus, the EIA report plays a vital role in investigating the environmental conditions and is an important document that helps to check the viability of the project.⁷³

7. Review of EIA

The EIA review phase examines the adequacy and effectiveness of the EIA report and provides the information on the adequacy and effectiveness of the EIA report for decision-making. Often EIA reports are reviewed by a review agency or by a special "Standing Committee" or "Commission" established to review projects in a given sector. In most cases, a technical evaluation of the EIA report is made by specialists. This technical evaluation provides the basis for the review. The output of the review is either a rejection of the project, or an approval report outlining terms and conditions under which the project may proceed. These terms and conditions are attached to any licence, permit, or certificate issued by the approval authority.⁷⁴

8. Decision-Making

Depending on the final report of EIA, the decision whether to approve or reject the project is taken by concerned government agencies. The decision of approval may be

⁷²Raghavendra and Vijayachandra and Ravindra, supra note 46, p.10; A Murthy and H S Patra, *Environment Impact Assessment Process in India and the Drawbacks* (Environment Conservation Team, September 2005), 9.

⁷³Nikhil, C. and Anupama, D. and Siddhesh, P. 'Critical Assessment of Environmental Impact Assessment (EIA) Reports in India: Challenges and Recommendations' [2020] (7)(3)*Journal of Critical Reviews*, 1376.

⁷⁴Lohani, and others, supra note 11, p.15.

absolute or subject to certain conditions.⁷⁵ It decides whether the project is rejected, approved or needs further change. The assessment has to be completed within a period of 90 days from the receipt of the requisite documents from the project authorities and completion of public hearing. The decision has to be conveyed to the proponent within 30 days thereafter.⁷⁶

9. Post Project Monitoring

Post project monitoring aims to ensure that an action had been implemented in accordance with the measures specified, while providing the environmental clearance.⁷⁷ Basically, monitoring serves three purposes: 1. Ensuring that required mitigation measures are being implemented; 2. Evaluating whether mitigation measures are working effectively; and 3. Validating the accuracy of models or projections that were used during the impact assessment process.⁷⁸

IV. THE CANADIAN ENVIRONMENTAL IMPACT ASSESSMENT REGIME

A. Legal Framework for Environmental Impact Assessment in Canada

The compulsory need for an EIA was first considered and given priority to with the establishment of the Federal Environmental Assessment and Review Process (EARP) on 20th December 1973. The EARP was amended by a second decision in 1977 and the responsibility of the Federal Minister of the Environment for the environmental assessment of federal projects, programmes and activities was reaffirmed in the Government Organization Act of 1979. In 1984, the Canadian government enacted a legal document, the Environmental Assessment and Review Process Guidelines Order (EARPGO) of 1984,⁷⁹ which contained provisions clarifying the roles and responsibilities of the participants in the EARP procedures. The purpose of the EARP Guidelines was to ensure that the environmental consequences of project proposals for which the federal government had decision-making authority were adequately assessed.⁸⁰

However, in 1992, there was a change in the environmental assessment legal framework with the federal government introduction of the Canadian Environmental Assessment Act (CEAA) of 1992 which came in force early in 1995.⁸¹ The Act

⁷⁵ Vikrant, *supra* note 49, p.2.

⁷⁶ Akhand and Navlakha and Akhand, *supra* note 65.

⁷⁷ Pratibha and Sonal and Archana, *ibid.*

⁷⁸ Vikrant, *supra* note 49.

⁷⁹ Environmental Assessment and Review Process Guidelines Order 1984.

⁸⁰ Fasina, Omolola Anuoluwapo, *Environmental Impact Assessment for Oil and Gas Projects: A Comparative Evaluation of Canadian and Nigerian Laws* (Master Thesis, University of Western Ontario 2016), 95-96; See Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (2nd edn, England: Pearson Education Ltd. 2003), 70.

⁸¹ Canadian Environmental Assessment Act 1992.

provided the necessary legal framework to hold decision-makers obligated to integrate environmental considerations in all its decisions relating to projects. 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”.⁸² The CEAA of 1992 applied to all projects involving federal funding, permits, licensing or approval that may potentially alter the environment; it required comprehensive study and encouraged public participation.⁸³

In order to make the Canadian environmental assessment regime more effective in preventing projects from causing significant environmental harm.⁸⁴ The Federal Government of Canada enacted the Canadian Environmental Assessment Act (CEAA) of 2012 to effect some changes to the CEAA of 1992.⁸⁵ Amendments in 2012 shrank the list of projects requiring review, narrowed the scope of assessments, shortened time limits, and restricted participation to those ‘directly affected’ or with specific expertise.⁸⁶ In 2015, two Expert Panels assessed and recommended ways to ‘modernize’ Environmental Assessment in Canada. Their 2017 reports recommended major changes to the Canadian environmental impact assessment regime. Subsequently, the Canadian Government enacted the Canadian Impact Assessment Act of 2019⁸⁷ which repealed the CEAA of 2012 and among other things, created the new Impact Assessment Agency of Canada which is responsible for conducting impact assessments under the *Impact Assessment Act*.⁸⁸ Projects subject to impact assessment under the

Canada, apart from the existence of the federal CIAA 2019, the provinces also have their own different environmental legislations governing the environmental impact assessment process.⁹⁰

B. Environmental Impact Assessment Procedure under the Canadian Impact Assessment Act (CIAA) of 2019

The Canadian EIA procedure is the different phases a project goes through from proposal to approval for implementation. EIA procedure in Canada involves seven steps, which are uniformly important in influencing the general performance of the project. They are as discussed below.

1. Planning Phase

Planning is the first stage in the Canadian EIA procedure. At this stage, the proponent of a designated project must provide the Impact Assessment Agency of Canada (the Agency) with an initial description of the project.⁹¹ The Agency is expected to confirm that the proposed project is identified on the list of project that requires an impact assessment under the Act and determines whether the information on the initial project description conforms to the regulations.⁹² Where the foregoing requirements are confirmed and accepted, the Agency informs the project proponent and posts it on the Agency's Registry Internet Site.⁹³ At this stage, the Agency is expected to contact and consults with federal authorities who may be in possession of specialist or expert information or knowledge in the project area, invite the public and Indigenous peoples who may be affected by the project to provide comments (information) and contribute to planning the assessment.⁹⁴

2. Impact Statement

At this stage, the project proponent collects information and conducts studies for an impact statement. The project proponent continues to engage Indigenous groups and the

See Overview of the Impact Assessment Act-Level 1 Training, p.8
<https://www.canada.ca/content/dam/iaac-acei/documents/mandate/president-transition-book-2019/overview-impact-assessment-act.pdf> accessed 13 September 2021.

⁹⁰See John Tidball and others, Environmental Law and Practice in Canada: Overview
[https://ca.practicallaw.com/5032764?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://ca.practicallaw.com/5032764?transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed 15 September 2021.

⁹¹Section 10(1), Canadian Impact Assessment Act 2019.

⁹²See section 16(1) & (2), Canadian Impact Assessment Act 2019.

⁹³See sections 10(2) & 16(1) & (2), Canadian Impact Assessment Act 2019; Impact Assessment Process Overview (Impact Assessment Agency of Canada) <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview.html> accessed 13 September 2021.

⁹⁴See sections 13(1), 11, and 12, Canadian Impact Assessment Act 2019; Impact Assessment Process Overview, *ibid*.

public to inform its impact statement through indigenous knowledge and sound science. The project proponent develops an Impact Statement containing the information and studies outlined in the Tailored Impact Statement Guidelines and submit it to the Agency.⁹⁵ Where the Agency is satisfied that the project proponent has provided the required information or studies, the Impact Statement is posted on the Agency's Registry Internet Site. The Agency reviews the Proponent's Impact Statement to determine if it conforms to the Tailored Impact Statement Guidelines. The Agency invites comments on the Impact Statement and engages with federal authorities, Indigenous groups, and members of the public to ensure all information and studies outlined in the Guidelines are included in the Proponent's Impact Statement. The Agency may also set up a Review Panel to provide advice to the Agency on whether all the information and studies outlined in the Guideline are included in the Proponent's Impact Statement. When the Agency is satisfied that the Impact Statement contains all of the information and studies outlined in the Guidelines, a notice informing the public that the Impact Statement contains all the required information and studies is posted on the Agency's Registry.⁹⁶

3. Impact Assessment Phase

The impact assessment considers the potential environmental, health, social and economic impacts of proposed projects, including benefits.⁹⁷ Potential impacts to indigenous groups and rights of indigenous people are also assessed. At this stage, the Agency may continue to engage and consult federal authorities with specialist or expert information with respect to a designated project, indigenous groups and the public by holding public hearing to allow Indigenous groups, stakeholders and the public to participate in the impact assessment process.⁹⁸ If required, the Agency can initiate an External Technical Review of independent experts that addresses scientific questions posed to them and produce a report based on such questions. The Agency uses the information, evidence and comments provided by the Proponent, expert federal departments, Indigenous groups, the public, External Technical Review of independent experts, and other stakeholders to develop an impact assessment report.⁹⁹ The Agency then submits the Impact Assessment Report, Consultation with Indigenous People Report and recommended potential conditions of the proposed project to the Minister of Environment and Climate Change to make public interest decision.¹⁰⁰

⁹⁵See section 18(1) (a) & (b), Canadian Impact Assessment Act 2019.

⁹⁶Impact Assessment Process Overview, supra note 82; See section 19(4), Canadian Impact Assessment Act 2019.

⁹⁷Sections 22(1) and 7(1), Canadian Impact Assessment Act 2019.

⁹⁸See sections 23, 27 & 51(1)(c), Canadian Impact Assessment Act 2019.

⁹⁹See sections 25 & 26(1), Canadian Impact Assessment Act 2019.

¹⁰⁰See section 28(2), Canadian Impact Assessment Act 2019; Impact Assessment Process Overview, supra note 93.

4. Decision-Making

Upon the receipt of the Impact Assessment Report, Consultation with Indigenous People Report and recommended potential conditions of the proposed project by the Minister of Environment and Climate Change, the Minister must determine if the adverse direct or incidental effects of the project are in the public interest, or refer the determination to the Governor in Council.¹⁰¹ Prior to making the determination, the decision-maker (whether Minister or Governor in Council) must be satisfied that the Crown duty to consult and accommodate Indigenous peoples has been fulfilled. Once the decision is made that the project's adverse impacts are in the public interest by the decision-maker (Minister or Governor in Council), the Minister issues a Decision Statement to the project proponent with the reasons for the decision and enforceable conditions, providing transparency and accountability.¹⁰²

Public interest determinations or decisions made by the Minister of Environment and Climate Change usually take into account the Impact Assessment Report and the following five public interest factors: 1) The extent to which the designated project contributes to sustainability; 2) Extent to which adverse effects within federal jurisdiction and the adverse direct or incidental effects indicated in the Impact Assessment Report in respect of the designated project are significant; 3) The associated mitigation measures that the Minister or the Governor in Council considers appropriate; 4) The impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Canadian Constitution Act, 1982*;¹⁰³ and 5) The extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and climate change commitments.¹⁰⁴

5. Post Decision

At this stage of the EIA procedure, the Agency takes active steps in verifying the project's compliance with the Minister of Environment and Climate Change Decision Statements. This stage allows for greater transparency around follow-up programs, with increased access to key documentation, as well as increased opportunities for Indigenous community and public participation in follow-up and monitoring programs. In circumstances of non-compliance, the Agency's enforcement officers and analysts will take the appropriate steps to work with the project proponent to ensure compliance

¹⁰¹Section 60(1)(a) & (b), Canadian Impact Assessment Act 2019.

¹⁰²See section 65(1) & (2), Canadian Impact Assessment Act 2019; Impact Assessment Process Overview, *supra* note 93.

¹⁰³See section 3, Canadian Impact Assessment Act 2019 provision on the Rights of Indigenous peoples of Canada.

¹⁰⁴See section 63(a-c), Canadian Impact Assessment Act 2019.

with the *Impact Assessment Act* and the Minister of Environment and Climate Change Decision Statement.¹⁰⁵

V. SOUTH AFRICAN ENVIRONMENTAL IMPACT ASSESSMENT REGIME

A. Legal Framework for Environmental Impact Assessment in South Africa
 Legal provisions for EIA in South Africa were first incorporated in the Environment Conservation Act (ECA), 1989 (Act No.73 of 1989) (ECA), and Regulations for EIA were promulgated in terms of Sections 21 and 26 of ECA on 5 September 1997. These initial EIA Regulations were meant to regulate activities that were identified as having the potential to have a "substantial detrimental effect" on the environment and to require that environmental impact reports be prepared. The EIA regulations promulgated under ECA were subsequently repealed and replaced by the National Environmental Management Act 107 of 1998 (NEMA) EIA Regulations promulgated on 21 April 2006, in terms of Section 24 of the NEMA Act, which is the framework legislation for environmental management in South Africa.¹⁰⁶ The NEMA was an improvement in the EIA process as it bestowed integrated environmental management principles to be considered during the EIA process.¹⁰⁷ The 2006 EIA regulations still aims for environmental protection, but more "quicker, simpler and better" for South Africa.¹⁰⁸

The National Environmental Management Act EIA Regulations of 2006 was subsequently amended. This amendment paved the way for new EIA regulations promulgated on 18 June 2010, and repealed fully the 2006 EIA regulations. A subsequent amendment of the National Environmental Management Act EIA Regulations of 2010 led to the promulgation of the National Environmental Management Act EIA Regulations of 4 December 2014.¹⁰⁹ The 2014 NEMA EIA Regulations were subsequently amended by the NEMA EIA Regulations of 2017 which came into effect on 7 April 2017.¹¹⁰

¹⁰⁵See sections 120(1), 122(1-4), 127(1), Canadian Impact Assessment Act 2019; Impact Assessment Process Overview, supra note 93.

¹⁰⁶Environmental Impact Assessment (EIA): An Introduction (Western Cape Government: Environmental Affairs and Development Planning) p.3 <https://www.westerncape.gov.za/ealp/files/atoms/files/EIA_2015.pdf> accessed 20 October 2021 (hereinafter, Environmental Impact Assessment (EIA): An Introduction).

¹⁰⁷Precious Mbalenhle Mbhele, 'The Quality of EIA Reports for Housing Developments in the Nkangala District of the Mpumalanga Province, South Africa' Masters' Thesis (North West University, South Africa 2009) p.6; See Glazewski Jan, *Environmental law in South Africa* (Durban: LexisNexis Butterworths 2005), 3-24; See Wood, C. 'Pastiche or Postiche? Environmental Impact Assessment in South Africa' [1999] (81)(1) *South African Geographical Journal*, 52-59.

¹⁰⁸Mbhele, supra note 107.

¹⁰⁹Environmental Impact Assessment (EIA): An Introduction, supra note 106.

¹¹⁰See Processes for Environmental Impact Assessment (EIA) and Basic Assessment (BA) (Environmental Assurance (Pty) Ltd. 2017) <<https://www.envass.co.za/eia-ba/>> accessed 25 October 2021.

The South African EIA Regulations categorise projects into 3 Listing Notices: (1) Basic Assessment (BA); (2) Scoping & Environmental Impact Report (S&EIR); (3) EIR for Activities Concerning Specified Sensitive Geographical Areas only. Projects that are considered to have little impact on the environment will most likely follow the BA process. These activities are smaller in size and the impacts of the triggered activities/projects can be easily managed and are less likely to have significant impact on the surrounding environment. Projects or activities that are anticipated to have greater impact on a much larger scale are more likely to follow the S&EIR process.¹¹¹

B. Environmental Impact Assessment Procedure under the South African National Environmental Management Act EIA Regulations of 2017

The South African EIA procedure is the different phases a project goes through from proposal to approval for implementation. EIA procedure in South Africa involves the steps as discussed below.

1. Screening

At this first stage of the South African EIA procedure, the Environmental Assessment Practitioner (EAP) appointed by the project proponent manages the application to the competent authority for an Environmental Authorisation of a proposed project or activity on behalf of the project proponent. The EAP has the responsibility of determining which process to follow: Basic assessment process, Scoping & Environmental Impact Report, or request an exemption depending on whether the proposed project is deemed to have minimal impact or a significant impact.¹¹² The determination of which process to follow is guided by the level of impact the proposed project is anticipated to have on its environment. Projects that are considered to have little impact on the environment will most likely follow the BA process.¹¹³ In addition to the appointment of an EAP, a specialist may be appointed by the project proponent, if the level of assessment is of a nature requiring the appointment of a specialist.¹¹⁴

In the Environmental Impact Assessment procedure, the basic assessment process is a succinct process which results in a Basic Assessment Report. The Basic Assessment Report provides a brief overview of the potential impacts of the activity on the environment and the impacts of the environment on the activity. This report is submitted by EAP, together with an Environmental Impact Assessment application form to the Competent Authority for authorization. If the Basic Assessment Report provides sufficient detail to allow the competent authorities to make a decision as to

¹¹¹ *Ibid.*

¹¹² See sections 12(1), 15(1) & 16, The Environmental Impact Assessment Regulations of South Africa No. 326, 2017 made pursuant to the National Environmental Management (NEMA) Act, 1998 (Act No. 107 of 1998) (hereinafter, NEMA Act of 1998 EIA Regulations 2017); See Rebelo, C. and Guerreiro, J. 'Comparative Evaluation of the EIA Systems in Kenya, Tanzania, Mozambique, South Africa, Angola, and the European Union' [2017] (8) *Journal of Environmental Protection*, 606-607.

¹¹³ Chetty, *supra* note 6, p.44.

¹¹⁴ Section 12(2) NEMA Act of 1998 EIA Regulations 2017.

whether the activity/project should proceed, the authorisation may be granted. However, if the Competent Authority cannot make a decision based on the information provided in the Basic Assessment Report, the authority will either request additional information to be submitted or will recommend that the activity be subjected to a scoping and environmental impact assessment process. In essence, the basic assessment stage determines whether an activity warrants a detailed scoping and environmental impact assessment process or not.¹¹⁵

2. Scoping

The purpose of the scoping phase in the South African environmental impact assessment procedure is to determine the plan of study (similar to a Terms of Reference) for the environmental impact assessment itself. The emphasis during the scoping phase is to identify issues; potential impacts of the activity; and potential alternatives to the activity. The scoping procedure results in the Scoping Report, which includes the plan of study for the environmental impact assessment. It also includes the scope of the environmental impacts that need to be investigated in the environmental impact assessment and the method for identifying and prioritizing these impacts.¹¹⁶ The scoping report is subject to public review (through consultation and participation) and if approved by the Competent Authority, then the EIR phase commences.¹¹⁷ The Scoping Report thus provides a practical foundation, in the form of the plan of study, for the environmental impact assessment.¹¹⁸

3. Impact Assessment

When the Competent Authority accepts the scoping report and a plan of study for environmental impact assessment, the EAP can proceed with the environmental impact assessment. The purpose of the environmental impact assessment is to address issues that have been raised during the scoping phase; assess alternatives to the proposed activity in a comparative manner; assess all identified impacts and determine the significance of each impact; and formulate mitigation measures, both engineering and non-engineering measures. The environmental impact assessment phase results in an Environmental Impact Report which is subjected to public review (through public consultation and participation process which reflects the incorporation of comments

¹¹⁵Department of Health, *Environmental Health Impact Assessment (EHIA) in South Africa* (Department of Health: Environmental Health Impact Assessment Guideline, Republic of South Africa 2010), 15-16 (hereinafter, Department of Health EHIA); See generally sections 19(1)(2)(3) & 20, NEMA Act of 1998 EIA Regulations 2017.

¹¹⁶See sections 21 & 22, NEMA Act of 1998 EIA Regulations 2017; See Appendix 2 to the NEMA Act of 1998 EIA Regulations 2017; See Department of Health EHIA, *ibid*, pp.19, 23.

¹¹⁷See section 7(2) NEMA Act of 1998 EIA Regulations 2017.

¹¹⁸See Department of Health EHIA, *supra* note 115, p.23.

received) prior to submission to the Competent Authority for approval.¹¹⁹ The impact assessment stage is an important quality control aspect, because it helps to ensure that information on the environmental impacts of proposed activity identified at the scoping stage is sufficient before it is used as a basis for decision making.¹²⁰

4. Draft Environmental Management Plan

The outcome of the impact assessment phase of the EIA procedure is a draft Environmental Management Plan ("EMP") which is a documentation of the actions identified in the environmental impact assessment phase.¹²¹ EMP is a plan detailing all likely environmental and other effects of the development and the mitigation measures required. EMP is compulsory for all proposed projects applications in South Africa basic assessment or full EIA. The EMP among other things include, a description of the impact management outcomes, including management statements identifying the impacts and risks that need to be avoided, managed and mitigated as identified through the environmental impact assessment process for all phases of the development including planning and design; preconstruction activities, construction activities, rehabilitation of the environment after construction and where relevant, operation activities.¹²² The EMP also describes the proposed impact management actions, identifies the manner in which the impact management outcomes contemplated will be achieved, and must, where applicable, include actions to avoid, modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation; and comply with any provisions of the Act regarding financial provision for rehabilitation, where applicable.

Further, the EMP lays out the method of monitoring the implementation of the impact management actions; the frequency of monitoring the implementation of the impact management actions; an indication of the persons who will be responsible for the implementation of the impact management actions; the time periods within which the impact management actions must be implemented; the mechanism for monitoring compliance with the impact management actions; a program for reporting on compliance; and an environmental awareness plan describing the manner in which the project proponent intends to inform his or her employees of any environmental risk which may result from their work; and risks must be dealt with in order to avoid

¹¹⁹Chetty, supra note 6, p.45; See generally, sections 23, 40 & 41, NEMA Act of 1998 EIA Regulations 2017; Environmental Impact Assessment Process, Appendix 3, paragraph 2(d-h), NEMA Act of 1998 EIA Regulations 2017.

¹²⁰Campion, B. B. and Essel, G, 'Environmental Impact Assessment and Sustainable Development in Africa: A Critical Review' [2013] (3)(2) *Environment and Natural Resources Research*, 44; See Fuller, K. 'Quality and Quality Control in EIA' in Judith Petts (ed), *Handbook of Environmental Impact Assessment* (Vol. 2., Oxford, UK: Blackwell Science Ltd. 1999), 55-82.

¹²¹AM Hearn, Environmental Impact Assessment in South Africa - What Difference can a Sustainability Assessment Make?' Master Thesis (North-West University, South Africa 2018),20.

¹²²See section 23(4), NEMA Act of 1998 EIA Regulations 2017; Environmental Impact Assessment Process, Appendix 4, paragraph 2(b-d), NEMA Act of 1998 EIA Regulations 2017.

pollution or the degradation of the environment; and any specific information that may be required by the competent authority.¹²³

5. Decision Making

If the Competent Authority is satisfied that sufficient information has been provided to make a decision, that adequate consultation has taken place, and that the application for the proposed activity/project complies with planning requirements, then a decision is taken. This decision could be to approve the proposed activity/project (with or without imposing conditions), request that further information be obtained, or refuse approval.¹²⁴ The relevant Competent Authority makes the decision by issuing an environmental authorisation for the proposed project. An environmental authorisation usually specifies: (a) the name, address and contact details of the person to whom the environmental authorisation is issued; (b) a description of the activity that is authorised; (c) a description of the location of the activity; (d) the conditions subject to which the activity may be undertaken, including conditions determining requirements for the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity additional to those contained in the approved EMP, and where applicable the closure plan.¹²⁵

6. Post-Decision Monitoring

In the post-decision monitoring phase, the promises made in the environmental assessment are followed up continually to ensure that the project had been implemented in accordance with the measures specified and upon which an environmental authorization was granted. Post-decision monitoring is one of the important functions to be fulfilled in the operational phase of the project authorized.¹²⁶

VI. ENVIRONMENTAL IMPACT ASSESSMENT REGIMES IN NIGERIA, INDIA, CANADA AND SOUTH AFRICA COMPARED

This section draws comparisons between the EIA regimes in Nigeria, India, Canada and South African. A comparison of the EIA regimes of the four countries reviewed in this paper reveals several insights.

A. National EIA Legislation

In comparing Nigeria's EIA practice regime with that of South African, Indian and Canadian practice regimes it is noticeable through the pages of this work that all the countries assessed have each established a national legal regime for EIA. That is, all the

¹²³See section 23(4), NEMA Act of 1998 EIA Regulations 2017; Environmental Impact Assessment Process, Appendix 4, paragraph 2(f-n), NEMA Act of 1998 EIA Regulations 2017.

¹²⁴Merle, S. and Richard, F. and Guy, P. 'A Review of the Evolution of Environmental Evaluation Procedures in South Africa' [1995] (15) *Environmental Impact Assessment Review*, 61.

¹²⁵See sections 21(1) & 26(a-d), NEMA Act of 1998 EIA Regulations 2017.

¹²⁶See Hearn, *supra* note 121, p.20.

four countries assessed have national legal provisions concerning EIA. The EIA legislation in all of these jurisdictions applies to projects that are likely to have significant detrimental impacts on the environment. The Nigerian EIA legislation is the Environmental Impact Assessment (EIA) Act of 2010 which repealed the Nigerian EIA Act of 1992. The Indian EIA legislation is the EIA Notification of 2006 promulgated by the Indian Ministry of Environment and Forest. The Canadian EIA legislation is the Canadian Impact Assessment Act of 2019, while that of South Africa is the National Environmental Management Act EIA Regulations of 2017.

Further, in Canada, apart from the existence of the federal CIAA of 2019, the provinces also have their own different environmental legislations governing the environmental impact assessment process. This situation has sometimes presented overlapping issues which has delayed the EIA process. In Nigeria, the reverse is the case as there is only one EIA law in existence (that is, the EIA Act of 1992) which governs the federal and state EIA process. 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.¹²⁷ However, this is not the case as accountability is a major setback in ensuring adherence to laws, norms, rules and procedures of EIA in Nigeria. There is also the problem of inadequate human and financial resources to perform EIA. Part of the problem is, also, the inability of the responsible agencies to have the courage to tell promoters and the government that certain decision cannot be taken prior to EIA on some projects for fear of being seen as anti-development and in some cases anti-government programme.¹²⁸ Thus, Nigeria needs to ensure that the challenges facing EIA process is tackled and Canada also needs to ensure that there is a proper harmonization of federal and provincial laws in carrying out of the EIA process.

Just like Nigeria, India and South Africa have one EIA law - the Indian EIA Notification of 2006 promulgated by the Indian Ministry of Environment and Forest, and the South African National Environmental Management Act (NEMA) EIA Regulations of 2017 respectively. Further, the Indian EIA Notification of 2006 and the South African National Environmental Management Act (NEMA) EIA Regulations of 2017 are commendably working and helping to protect the Indian and South African environment respectively. However, the criticisms of reduction of public consultation and participation in the EIA process against the Draft Indian EIA Notification of 2020 which seeks to repeal and replace the current Indian EIA Notification of 2006 must be addressed before the new law is made effective.

¹²⁷ Anuoluwapo, supra note 80, p.126.

¹²⁸ Agbazue, V. E. and Ehiemobi, M. C. 'The Challenges of the Environmental Impact Assessment Practice in Nigeria' [2016] (5)(6) *International Journal of Scientific Research Engineering & Technology (IJSRET)*, 343.

B. National EIA Regulatory Institution (Body)

Each of the countries assessed has a national EIA regulatory body or competent authority (as it is called in some jurisdictions), that is saddled with the responsibility of regulating the EIA process. The Nigerian national EIA regulator is the Nigerian Federal Ministry of Environment, while that of India is the Indian Ministry of Environment and Forest or the Impact Assessment Agency (IAA) for specified project, which is usually constituted by Indian Ministry of Environment and Forest. The Canadian national EIA regulator is the Impact Assessment Agency of Canada, while that of South Africa is the national Minister responsible for the environment (Minister of Environmental Affairs) or the relevant Provincial Member of the Executive Council (MEC) responsible for environmental management with the concurrence of the Minister.¹²⁹

C. Categorisation of Projects

The EIA regimes of the four countries assessed all recognized some categories of development projects. The Nigerian EIA Act recognises three broad categories of development projects namely Category 3 Projects/Activities, Category 2 Projects/Activities, and Category 1 Projects/Activities, within the EIA systems.¹³⁰ The South African EIA regime recognized three categories of development projects namely projects that requires Basic Assessment, projects the requires Scoping & Environmental Impact Report and Environmental Impact Report for projects concerning Specified Sensitive Geographical Areas.¹³¹ Under the Canadian EIA regime, designated development projects subject to impact assessment are described in the Physical Activities Regulations (Project List).¹³² The Indian EIA regime broadly categorized all development projects and activities into two categories - Category A and Category B, based on the spatial extent of potential impacts and potential impacts on human health and natural and man-made resources.¹³³

D. Initiation of EIA for Proposed Projects, Screening, Scoping and Report Preparation

The initiation of project proposals for the EIA process in Nigeria, India and Canada is done by the project proponents. Whereas, in South Africa, the Environmental Assessment Practitioner (EAP) appointed by the project proponent manages the application to the competent authority for an environmental authorisation of a proposed

¹²⁹ See section 24(2) of the National Environmental Management (NEMA) Act No.107 of 1998.

¹³⁰ See sections 17(4), 61(d) and 61(c), Nigerian EIA Act 1992.

¹³¹ See sections 24(2) and 24(2)(a), South African National Environmental Management (NEMA) Act No. 107 of 1998; See Processes for Environmental Impact Assessments (EIA) and Basic Assessments (BA), supra note 110.

¹³² See section 9(1) and 7(1), Canadian Impact Assessment Act 2019; See Physical Activities Regulations, supra note 89; See Overview of the Impact Assessment Act, supra note 89.

¹³³ Section 4, Indian MoEF EIA Notification of 2006 (Gazette of India, Extraordinary, Part-II, and Section 3, Sub-section (ii) Government of India, Ministry of Environment and Forest) <<http://www.environmentwb.gov.in/pdf/EIA%20Notification,%202006.pdf>> accessed 26 October 2021.

project or activity on behalf of the project proponent. Further, the EIA process comprises screening and scoping. Screening determines whether or not a project proposal requires an EIA and what level of EIA is required. All the countries reviewed in this paper go through the screening stage to identify whether an EIA is required for a proposed project. Another important phase in the EIA process is scoping. Scoping identifies key issues (and non-issues) and concerns and evaluates, organizes, and presents them to assist in analysis and decision-making. Some form of scoping exists in the EIA processes of the four countries assessed.

The EIA regimes of the four countries assessed all contains a legal requirement for the preparation of a report. In Nigeria, the project proponent is expected to submit a Draft EIA Report (emanating from the screening and scoping stage of the EIA process) to the Federal Ministry of Environment (FMOE) for review. Subsequently, the project proponent is expected to submit the Final EIA Report to the FMOE within six (6) months of the receipt of the Ministry comments (feedback) on the initial draft EIA report. The Indian EIA regime also requires the preparation of an EIA Report which is usually delivered to all stakeholders including the affected communities. The essence of this EIA Report is usually to consider the environmental concerns and viability of the proposed project. The Canadian EIA regime requires the project proponent to prepare a report called "Impact Statement" to be submitted to the Canadian Impact Assessment Agency. The Impact Statement contains all information and studies the Canadian Impact Assessment Agency determines necessary to conduct the impact assessment.¹³⁴ The South African EIA regime requires the project proponent to prepare a report called Draft Environmental Management Plan, which is a documentation of the actions to be taken throughout the proposed project lifecycle as identified in the environmental impact assessment phase.¹³⁵

E. Public Participation, Review Stage, Decision Making and Post Decision Monitoring
The EIA regimes of the four countries assessed all require public participation in their EIA processes. The South African National Environmental Management Act EIA Regulations of 2017 made substantial provisions for public participation, especially, of persons who are likely to be affected by the proposed projects, via public meetings and comments.¹³⁶ Regulation 39-44 of South Africa's EIA Regulations 2017 provides for public participation and plays an efficient and effective role to ensure public

¹³⁴ See Overview of the Impact Assessment Act-Level 1 Training, supra note 89, p.25.

¹³⁵ Hearn, supra note 121, p.20.

¹³⁶ Anaobo, O. K. and Eghosa, O. E. 'Realising Substantive Rights to Healthy Environment in Nigeria: A Case for Constitutionalisation' [2015] (17)(2) *Environmental Law Review*, 23; Du Plessis, A. 'Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights' [2008] (11)(2) *Potchefstroom Electronic Law Journal*, 5.

participation in the South African EIA process.¹³⁷ Both the Canadian Impact Assessment Act (CIAA) of 2019 and the Indian EIA Notification of 2006 recognizes the right of the public to participate throughout the stages of the EIA process.¹³⁸ The Nigerian EIA regime allows members of the public an opportunity to 'comment' on the environmental impacts of projects that could potentially affect them, their livelihoods and their environment.¹³⁹ However, the level of public participation in the Nigerian EIA process has been alleged to be abysmal. This comment based public participation is believed to be inherently insufficient as there should be a better interaction between the government, civil society and affected persons including processes of open dialogue, establishment of partnership, information sharing and evaluation of developmental policies and programmes with regard to projects that may potentially affect its host communities. It is further argued that notwithstanding that government policies in Nigeria tend to advocate the need for public participation, sufficient policy framework or practice mechanisms have not been effectively put in place to achieve this objective.¹⁴⁰

It is equally noted that the EIA regimes of the four countries assessed all have a legal requirement for an EIA review or an impact assessment. Nigerian and Indian EIA regimes recognise an EIA review phase while Canada and South African EIA regimes recognise an impact assessment phase. Also, all the EIA regimes of the four countries assessed in this paper made provisions for legal requirement of decision making. The decision for a proposed project to be carried out as noted in the four countries assessed are made by the national EIA regulators and such decisions are usually made based on the projects contribution to sustainability. More so, the EIA regimes of the four countries reviewed made provisions for post decision monitoring.

F. Recognition of Aboriginal/Indigenous Rights

The Nigerian EIA did not recognize the rights of indigenous people to participate in the EIA process. For example, the rights of the indigenous Niger Delta people to be consulted and to participate in the EIA process of projects in the Niger Delta region that are likely to affect their environment is not provided for and guaranteed in the Nigerian EIA Act. This is in contrast with the Canadian Impact Assessment Act which recognizes and respects the rights of Aboriginal (Indigenous) peoples to participate in the EIA process. The CIAA 2019 has notable provisions which seek to ensure not only that Aboriginal people are consulted or entitled to participate in the EA process, but that

¹³⁷ Anaobo and Eghosa, *ibid*; Murombo, T. 'Beyond Public Participation. The Disjuncture between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' [2008] (11)(3) *Potchefstroom Electronic Law Journal*, 106.

¹³⁸ See sections 11 and 27, Canadian Impact Assessment Act 2019.

¹³⁹ See section 7, Nigerian EIA Act 1992.

¹⁴⁰ Anaobo and Eghosa, *supra* note 136.

their role in general is essential and thereby engaged to promote the process.¹⁴¹ Firstly, the purpose section of CIAA 2019 specifically indicates the promotion of “communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment.”¹⁴² Furthermore, section 19(3) enjoins proponents to consider Aboriginal traditional knowledge in conducting environmental assessment. These provisions clearly convey the essential recognition of the role of Aboriginal peoples and their rights in CIAA 2019 and further reflect the commitment of the Canadian government to recognizing and respecting the rights of indigenous people.

The South African EIA Regulations made a general provision for public participation without any specific provision for the rights of indigenous people to be consulted and to participate in the EIA process. The Indian EIA Notification of 2006 recognises the rights of anyone likely to be affected by a proposed project to participate in the EIA process. The Indian EIA Notification 2006 went further to explain those likely to be affected by a proposed project to include local residents, thus, recognizing the rights of indigenous people to participate in the Indian EIA process.

G. Establishment of an Internet Site

Section 105 of the CIAA 2019 provides for the establishment and maintenance of an internet site in the EIA process in Canada which gives opportunities for the public to be constantly aware of the EIA process. The records and information relating to the impact assessment of a designated project that the Agency conducts which the Agency is expected to post and maintain on the internet site include: any public notice issued by the Agency to request the participation of the public in the impact assessment; a description of the factors to be taken into account in the impact assessment and of the scope of those factors; the report of the impact assessment or a summary of the report and an indication of how a copy of the report may be obtained; any scientific information that the Agency receives from a project proponent or a summary of the scientific information and an indication of how that information may be obtained; a description of the results of the follow-up program that is implemented with respect to that designated project or a summary of the results and an indication of how such a description may be obtained; notice of the Agency’s decision to terminate the impact assessment; and any public comments received during the impact assessment.¹⁴³

In contrast, Nigeria does not have this kind of opportunity in existence. The Nigerian EIA Act has a provision which is similar to section 79 of CIAA 2019. Section

¹⁴¹ Anuoluwapo, *supra* note 80, p.124; Chongatera Godfred Tigawuvc, *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*(I.L.M. Thesis, Dalhousie University, 2012), 29.

¹⁴² Anuoluwapo, *ibid*; See Section 4 of Canadian Impact Assessment Act 2019.

¹⁴³ See sections 105(1) and (2)(a-g), Canadian Impact Assessment Act 2019.

39 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."¹⁴⁴ However, this paper argues that the provision of section 39 of the Nigerian EIA Act is a vague provision when compared to section 105 of CIAA 2019. This is because section 39 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.¹⁴⁵ Additionally, both the Indian and South African EIA legal regime did not make any provisions for the establishment and maintenance of an internet site to create more awareness and aid public participation in the EIA process in Indian and South Africa.

H. Participant Funding Programme

The importance for financial support for aiding public involvement and participation in the EIA process has long been established since the 1990s. Without participant funding, "the cost associated with public participation would prohibit many potential participants (in particular, minority groups) from getting involved in the process."¹⁴⁶ In Canada, a participant funding programme seeks to support full and effective public involvement in the EIA process. Section 75 of the CIAA 2019¹⁴⁷ require the Canadian Environmental Assessment Agency to establish a Participant funding program to facilitate the participation of individuals, Environmental Non Governmental Organizations (ENGOS) and Aboriginal (Indigenous) 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.¹⁴⁸

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 Nigerian EIA process. Thus, this paper argues that Nigeria needs to adopt this scheme into its EIA process thereby providing funding to local communities most especially the Niger Delta in order to ensure their full and effective participation. This can be achieved with the establishment of an independent and transparent funding body with

¹⁴⁴ See section 38, Nigerian EIA Act 1992.

¹⁴⁵ Anuoluwapo, supra note 80, p.129.

¹⁴⁶ Anuoluwapo, *ibid*, p.130; See Raj, A. and Ian, G. S. 'Financing Public Participation' [1982] (66) *Canadian Bar Review*, 81; Joan, B. A. 'Citizen Participation at Government Expense' [1979] (39) *Public Administration Review*, 477; Robert, G. 'Environmental Assessment Design: Lessons from the Canadian Experience' [1993] (15) *Environmental Professional*, 12; See KG Englehart and MJ Trebilcock, *Public Participation in the Regulatory Process: The Issue of Funding* (Working Paper No.17, Economic Council of Canada 1981), 18.

¹⁴⁷ See section 75, Canadian Impact Assessment Act 2019.

¹⁴⁸ Anuoluwapo, supra note 80, p.130.

the goal of providing adequate financial assistance that would promote public participation in all stages of the EIA process.¹⁴⁹ Additionally, the Indian and South African EIA regime has no provision for a participant funding program.

VII. CONCLUSION

The review of the EIA regimes discussed above indicates that although, there are slight differences in the procedural framework, all the EIA regimes are similar to each other. The Nigerian, Indian, Canadian and South African EIA regimes share a common EIA legal framework. They all have legal provisions for EIA and specific legislation concerning its practice. Also, the four EIA regimes share a common EIA regulatory framework. Each regime (country) has identified a competent authority (regulatory institution or body) for overseeing the EIA process. Furthermore, the four EIA regimes share a common EIA procedural framework. Screening, scoping, EIA report preparation, public consultation and participation, EIA review, decision making and post decision monitoring are all procedures of the EIA process in the four EIA regimes reviewed. Also, in all the four countries reviewed, the EIA is initiated by the project proponent. Although, in South Africa, the Environmental Assessment Practitioner (EAP) appointed by the project proponent initiates the EIA on behalf of the project proponent.

However, the four countries reviewed can learn some lessons from the EIA regimes of others. Nigeria can learn a great lesson from the EIA regimes of others in the area of public consultation and participation in the EIA process. The Canadian, South African and Indian EIA regimes made provisions for robust public consultation and participation in the EIA process as against the Nigerian EIA regime which only allows members of the public an opportunity to comment on the environmental impacts of proposed projects that could potentially affect their environment and livelihood. This comment based public participation is believed to be inherently inadequate as there should be a better interaction between the public, especially, those likely to be affected by the proposed project and the initiators and developers of the project.

Also, the Canadian and Indian EIA regimes recognized indigenous rights in the EIA process. Indigenous rights mean the rights of indigenous peoples to be consulted and to fully participate in the EIA of projects that will affect their environment and livelihood. The Canadian EIA regime expressly recognized indigenous rights by recognizing the rights of indigenous peoples (Aboriginal rights) to be consulted and to participate in the EIA process of developmental projects that will affect them. On the other hand, the Indian EIA regime impliedly recognized indigenous rights by recognizing the rights of anyone likely to be affected by a proposed project and went further to explain those likely to be affected by a proposed project to include local residents (indigenous peoples).

¹⁴⁹ *Ibid*, p.131.

Further, the Canadian EIA regime made provisions for the establishment of an internet site to create more awareness of the Canadian EIA process and facilitate the effectiveness of the EIA procedure. This provision for the establishment of an internet site is absent in the EIA regimes of Nigeria, India and South Africa. In addition, the Canadian EIA regime provided for participant funding programme to aid public involvement and participation in the Canadian EIA process. This provision is absent in the Nigerian, Indian and South African EIA regimes.

In the light of the above, the authors recommends that the Nigerian EIA regime should allow for more robust public consultation and participation in its EIA practice in line with the practice of the Canadian, Indian and South African EIA regimes. Also, the Nigerian EIA Act and the South African National Environmental Management Act (NEMA) EIA Regulations of 2017 should be amended to recognize indigenous rights, as obtainable in the Canadian and Indian EIA regimes. Further, the Nigerian, Indian and South African EIA regimes should, in line with the Canadian EIA practice, make provisions for the establishment of internet sites to create more awareness of their EIA process and facilitate the effectiveness of their EIA procedures. Also, they should emulate the Canadian EIA practice regime by initiating participant funding programmes to aid public involvement and participation in their EIA practice regimes.