

**LEGAL AND INSTITUTIONAL FRAMEWORK FOR MULTI-STAKEHOLDER
PARTICIPATION IN OIL AND GAS MANAGEMENT IN NIGERIA: PERSPECTIVES
ON THE MULTI-STAKEHOLDER DIALOGUE APPROACH**

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ABSTRACT

This thesis explores the potential and practicality of incorporating multi-stakeholder participation into the legal and institutional frameworks for managing Nigeria's oil and gas. Despite the natural resource wealth embedded in the Niger Delta, her people suffer greatly from social, economic and infrastructural underdevelopment and this thesis argues that failure to respect the right of the Niger Delta communities to participate in Nigeria's oil and gas management and in developmental projects that affect their lives is the foundation of the resource curse besetting the region.

As a solution to the resource curse problem of the Niger Delta and in response to the incessant conflicts, environmental degradation, social, economic and infrastructural underdevelopment and military injustice perpetrated in the region, this thesis promotes the enforcement of the right to participation of the Niger Delta peoples through the incorporation of the United Nations promoted Multi-Stakeholder Dialogue Approach (MSDA) and this argument is based on the Participatory Development Theory (PDT).

The thesis proposes legal and institutional frameworks to ensure the effective incorporation of the MSDA into Nigeria's oil and gas regime. Other than the human rights basis for promoting the participatory development of the Niger Delta peoples, the thesis examines the business case for participatory development as an incentive to encourage oil and gas companies operating in the Niger Delta to inculcate the values of the MSDA. This thesis establishes that incorporating the MSDA into Nigeria's oil and gas legal and institutional regime in furtherance of the participatory development of the Niger Delta communities will promote environmental sustainability, peaceful coexistence, better informed decision making processes and economic and social sustainability among others.

Though there are other rights infringement issues that bear on the development of the Niger Delta communities, it is anticipated that recognition of the Niger Delta peoples as stakeholders and their effective participation in Nigeria's oil and gas management will give them a voice and opportunity to significantly address other human rights issues and to hold other stakeholders accountable.

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DEDICATION

This thesis is dedicated to the memory of my dad, Late Pastor S.A.O. Akinbami.

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CHAPTER 1

LEGAL AND INSTITUTIONAL FRAMEWORK FOR MULTI-STAKEHOLDER PARTICIPATION IN OIL AND GAS MANAGEMENT IN NIGERIA

1.1 BACKGROUND

The aim of this thesis is to explore the potential and practicality of incorporating multi-stakeholder participation into the legal and institutional frameworks for managing Nigeria's oil and gas. This thesis discusses and proposes the Multi-Stakeholder Dialogue Approach (MSDA) as an integrated framework for achieving sustainable stakeholder participation in oil and gas development in Nigeria.¹ It examines the legal and theoretical prospects and challenges of adopting the MSDA as a means for reforming existing oil and gas management regimes in Nigeria to integrate and reflect international best practices on effective multi-stakeholder participation in the management of oil and gas, especially in the interaction between government and host and impacted communities in Nigeria's oil producing region. Stakeholders in this context include the Nigerian Federal Government, oil companies (also referred to as investors in this thesis), and host and impacted communities. This thesis focuses on the Nigerian government, oil companies and host and impacted communities as stakeholders directly involved and affected by Nigeria's oil and gas management. Other actors that may also be affected by Nigeria's oil and gas management include "funders, international financial institutions, and development banks."² With regards to the environmental impact of Nigeria's oil and gas production, the entire Nigerian populace, the neighbouring countries and the entire globe are affected by the environmental degrading activities perpetrated in the Niger Delta through global warming, ozone layer depletion and climate change.³

¹ United Nations Department of Economic and Social Affairs, *Sustainable Development: Knowledge Platform Online*: <<https://sustainabledevelopment.un.org/index.php?page=view&type=13&nr=279&menu=996>>; United Nations Department of Economic and Social Affairs, *Multi-Stakeholder Dialogues: Learning from the UNCSD Experience DESA/DSD/PC3/BP4*, 3rd Session, 2002.

² Ibiro T. Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of Multi-Actor Investment Agreement Framework" (2014) 15 *Melbourne Journal of International Law* 473 at 476.

³ For more on the transnational and global effect of environmental degradation in Niger Delta, see Angel Kesiena Etuonovbe, "The Devastating Effects of Environmental Degradation: A Case Study of the Niger Delta Region of Nigeria" (2009) *Environment and Land Use Planning* 1; Etiosa Uyigüe & Matthew Agho, "Coping with Climate

Climate change is a global problem caused by human relationship with nature and felt in all parts of the globe regardless of the source of the causative environmental degradation. With 123 flaring sites in the Niger Delta, Nigeria has been categorized as one of the highest greenhouse emitters in Africa.⁴ “Greenhouse gases emitted anywhere contribute to global warming everywhere”, and reduction of greenhouse emission is one of the human rights obligations of states to climate change.⁵ Therefore the environmental degrading activities carried out by oil and gas companies in the Niger Delta and the Nigerian Government’s action or inaction in restraining these activities and enforcing punitive actions have impact on the global environment and climate change. Though several actors are affected by Nigeria’s oil and gas production, this thesis focuses on those directly involved and affected by Nigeria’s oil and gas management, which are the aforementioned, Federal Government of Nigeria, oil companies operating in Nigeria and Niger Delta communities and the MSDA is proposed to foster co-management of Nigeria’s oil and gas by these three actors.

As used in this thesis, the MSDA specifically refers to the policy framework increasingly promoted and proposed by the United Nations (UN) which encourages all entities of the UN system and national governments to promote dialogue between those who have a ‘stake’ in a given issue or decision.⁶ The key objective of multi-stakeholder dialogue is to enhance levels of trust between the different actors, share information and institutional knowledge, and generate solutions and relevant best practices.⁷ The MSDA is an approach that fosters effective stakeholder participation in decision making. The UN recognizes the MSDA as an approach that can help to facilitate decisions that are more acceptable to the public, ensure greater sustainability of the outcomes and minimize technical, environmental, social, and financial risks.⁸

Change and Environmental Degradation in the Niger Delta of Southern Nigeria” (2007) Community Research and Development Centre 1.

⁴ Akinola Olusegun Akinro, D.A. Opeyemi & Boniface Ologunagba, “Climate Change and Environmental Degradation in the Niger Delta Region of Nigeria: Its Vulnerability, Impacts and Possible Mitigations” (2008) 3:3 Research J of Applied Sciences 167.

⁵ See John H. Knox, “Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment” (2016) UNHRC 31st Session, A/HRC/31/52 at Paragraph 34.

⁶ UNDESA, *International Decade for Action; Water for Life* (2015) UN-Water Annual International Zaragoza Conference, http://www.un.org/waterforlifedecade/waterandsustainabledevelopment2015/multistakeholder_dialogue_17_01_2015.shtml.

⁷ Karin Bäckstrand, “Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness” (2006) 16 European Environment 290.

⁸ UNEP, “Promoting Dialogue, Dams and Development Projects” (2007) Information Sheet No. 4, DU/CP/3010-01-

This thesis examines the following research questions:

- 1) Could the MSDA be applied as a framework for achieving participation of diverse stakeholders in oil and gas management in Nigeria?
- 2) What are the legal justifications for adopting the MSDA in oil and gas management in Nigeria?
- 3) What are the potential challenges of applying and implementing the MSDA in Nigeria?
- 4) What are the legal frameworks and institutional structures needed to overcome the challenges of implementing the MSDA in Nigeria?

These questions are examined through an exploration of elements, potential, practicability and challenges of implementing the MSDA in light of the social and economic dynamics of the Niger Delta oil producing region of Nigeria. This thesis also discusses the benefits of the MSDA to the oil companies operating in Nigeria (the business case), and the government's role in ensuring the implementation and enforcement of the participatory right of the Niger Delta communities. It also analyzes relevant laws and judicial decisions to demonstrate the legal basis for the participatory right of the Niger Delta peoples and to demonstrate the gaps in the subsisting legal and institutional frameworks. Furthermore, options for the enforcement of the results of stakeholders' dialogue are explored. This thesis finds that the MSDA can be incorporated into Nigeria's oil and gas management to foster participatory development and sustainability in the Niger Delta.

Chapter 1 of this thesis gives an insight into the challenges bedeviling the Niger Delta communities and the adverse consequences of oil and gas production within their communities. This brings to fore the inadequacies of the existing oil and gas legal regime in Nigeria and the necessity of a viable approach. The MSDA is introduced as a solution to the participatory development setbacks of the Nigerian oil and gas sector. Legal and theoretical basis for multi-

stakeholder participation in Nigeria's oil and gas management is examined in light of international, regional and domestic legal instruments. The relationship between the Human Rights Based Approach and the MSDA is identified to demonstrate the position of the international system on the promotion of participatory right. More so, this chapter examines the theoretical basis for the argument made in this thesis which is in favour of the promotion of the participatory right of the Niger Delta communities. While a review of programs promoted by international systems in furtherance of participatory development reveals the shortcomings experienced in implementing participatory development programs, a review of the literature identifies various scholarly positions on the promotion and implementation of participatory right. In light of the identified gaps in the literature, the scholarly significance of this thesis is stated to demonstrate the contribution of this thesis to legal academia on participatory development in resource management.

1.2 STAKEHOLDER AGITATIONS AND CONCERNS IN NIGERIA'S OIL AND GAS INDUSTRY: AN OVERVIEW

Nigeria had the 8th largest oil and gas reserves in the world in 2014.⁹ According to the United States Energy Information, Nigeria was the largest oil producer in Africa and the world's fourth leading exporter of Liquefied Natural Gas in 2012.¹⁰ However, despite Nigeria's abundant oil wealth and position as a leading oil and gas producer in the world, the people of the Niger Delta where most of Nigeria's oil deposits are located remain some of the poorest in the world.¹¹ With a life expectancy of less than 47 years at birth, an average household income of \$1 a day, and the lack of access to clean water due to oil spillage,¹² the Niger Delta region of Nigeria has often been described as suffering from the resource curse or the paradox of plenty.¹³ The resource curse refers

⁹ Organization of the Petroleum Exporting Countries, "OPEC Share of World Crude Oil Reserves, 2014", online: <http://www.opec.org/opec_web/en/data_graphs/330.htm>.

¹⁰ US, Energy Information Administration, *Independent Statistics & Analysis* (last updated 30 December, 2013) Online: <<http://www.eia.gov/countries/country-data.cfm?fips=NI>>.

¹¹ United Nations Development Programme, *Niger Delta Human Development Report* (Lagos: Perfect Printers publishers, 2006) at 131 (UNDP); Joseph C. Ebegbulem, Dickson Ekpe & Theophilus Oyime Adejumo, "Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis" (2013) 4:3 Intl J. of Business & Social Science 279

¹² UNICEF, *At a Glance: Nigeria* (2013) Fact Sheet on Nigeria, UNICEF Report.

¹³ Emeka Duruigbo, "The Global Energy Challenge and Nigeria's Emergence as a Major Gas Power: Promise, Peril or Paradox of Plenty?" (2008) 21 Geo. Int'l Env'tl. L. Rev. 395. For a discussion on the impact of oil booms on oil-exporting countries, see Terry Lynn Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (London: University of California Press, 1997).

to the “paradox that countries or communities with an abundance of natural resources, specifically oil and gas, tend to have less economic growth and worse development outcomes than countries with fewer natural resources”,¹⁴ often due to government mismanagement of resources, or weak, ineffectual, unstable or corrupt institutions. In communities suffering from the resource curse, the overall impacts of natural resources might be more an economic curse than a blessing as host communities and citizens have little or nothing to show for the abundance of resource wealth derived from their country.¹⁵ High levels of corruption and low stakeholder engagement in resource utilization have resulted in decades of social, environmental and economic problems for Niger Delta communities.¹⁶

Despite the abundance of natural resources situated within the Niger Delta region, the economic and social development of the communities have been impeded for decades, and this is due to the activities of oil and gas companies operating within the communities.¹⁷ “Beyond vast oil and gas deposits, the delta is blessed with good agricultural land, extensive forests, excellent fisheries, and a large labour force. But juxtaposed against the potential for economic growth and sustainable development are deteriorating economic and social conditions that have been largely ignored by contemporary policies and actions.”¹⁸ In comparison to other parts of Nigeria, these problems are peculiar to the Niger Delta communities. First, because of the location of oil production and the consequent environmental degradation within the communities, the Niger Delta communities feel the negative impacts of oil production the most. Second, the economic underdevelopment of the Niger Delta communities is worsened by the contamination of the rivers and lands that have served

¹⁴ Andrew Warner, “The Elusive Revival” (2013) 50:3 Finance & Development 1 at 1.

¹⁵ Annegret Mahler, “Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil-Violence Link in the Niger Delta” (2010) German Institute of Global and Area Studies 25; Frederick van der Ploeg, “Natural Resources: Curse or Blessing?” (2011) 49:2 J. of Economic Literature 366; Erik S. Reinert, “Diminishing Returns and Economic Sustainability: The Dilemma of Resource-Based Economies under a Free Trade Regime” (1996) Oslo, Centre for Development and the Environment 1; Jefferey Sachs & Warner Andrew, “The Curse of Natural Resources” (2001) 45 European Economic Review 827; Paul Stevens, “Resource Impact: Curse or Blessing? A Literature Survey” (2003) 9:1 J. of Energy Literature 3; Leif Wenar, “Property Rights and the Resource Curse” (2008) 36:1 Philosophy & Public Affairs 2; Richard M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (London: Routledge 1993).

¹⁶ Damilola Olawuyi, “Legal and Sustainable Development Impacts of Major Oil Spills” (2013) 4:3 Columbia University Consilience J. of Sustainable Development 1.

¹⁷ Charles Udosen, Abasi-Ifreke S. Etok & I.N. George, “Fifty Years of Oil Exploration in Nigeria: The Paradox of Plenty” (2009) 8:2 Global J. of Social Sciences 37.

¹⁸ UNDP *supra* note 11 at 9.

as major sources of livelihood for the communities.¹⁹ Third, the imposition of military actions within the communities during conflicts and the resultant loss of lives, property destruction, deteriorating social wellbeing and insecurity are challenges suffered by the Niger Delta communities that do not have direct impact on the other regions of Nigeria. Other challenges experienced by the Niger Delta communities, that do not have direct effect on other regions in Nigeria, include involuntary displacement from their lands, health problems caused by environmental pollution and unjust loss of lives.²⁰ Hence, Niger Delta's resource curse problems require an innovative and forward looking legal regime that could deliver sustainable and responsible resource governance.²¹

The lack of effective environmental standards enforcement and developmental policies has impeded the sustainability of Nigeria's oil and gas sector²² despite the plethora of relevant statutes. The existing regulatory framework for the oil and gas sector which includes the *Petroleum Act*,²³ the *Oil Pipelines Act*,²⁴ the *Petroleum Profit Tax Act*,²⁵ the *Nigerian National Petroleum Corporation (NNPC) Act*,²⁶ and the *Petroleum Products Pricing Regulatory Act*²⁷ has not had the desired level of coherence and effect in tackling issues of governmental corruption, low level of transparency, human rights abuse, environmental degradation, poverty and lack of genuine consultation and engagement with the oil producing communities in Nigeria.²⁸ Therefore, based

¹⁹ For a brief description of the Niger Delta peoples, see Michael Watts "Resource Curse? Governmentality, Oil and Power in the Niger Delta, Nigeria" (2004) 9 *Geopolitics J.* 50 at 57-58.

²⁰ Damilola S. Olawuyi, *The Principles of Nigerian Environmental Law* (Nigeria: Afe Babalola University Press 2015) at pages 178-184.

²¹ Xavier Sala-i-Martin & Arvind Subramanian, "Addressing the Natural Resource Curse: An Illustration from Nigeria" (2003) 22:4 *J. of African Economies* 570; James A. Robinson, Ragnar Torvik & Thierry Verdier, "Political Foundations of the Resource Curse" (2006) 79 *J. of Development Economics* 447; Rhuks Ako *Environmental Justice in Developing Countries: Perspectives from Africa and Asia-Pacific* (London: Routledge 2013).

²² Sustainability in this context refers to the resultant outcome of oil production in Nigeria not being harmful to the environment or depleting natural resources, but supporting long-term ecological balance. Oyvind Ihlen, "The Oxymoron of 'Sustainable Oil Production': the Case of the Norwegian Oil Industry" (2009) 18 *Business Strategy and the Environment* 53. The imbalance of natural resource extraction in contrast to resource conservation, community participation, equitable distribution of resources and environmental protection practices is a setback to the sustainability of Nigeria's oil and gas sector. Chukwudi U. Anyanwu, "The Oil Industry and the Nigerian Environment" (27 May – 1 June 2012) 32nd Annual Meeting of the Int'l Association for Impact Assessment, IAIA12.

²³ Cap P10, Laws of the Federal Republic of Nigeria (LFN) 1990.

²⁴ Cap 338, LFN 1990.

²⁵ Cap P13 LFN 2004.

²⁶ Cap 320 LFN 1990.

²⁷ Cap 123 LFN 2003.

²⁸ Onyekachi Duru, "An Appraisal of the Legal Framework for the Regulation of Nigerian Oil and Gas Industry, with Appropriate Recommendations" (2011) Social Science Research Network, SSRN-id2137979.

on past experiences in Nigeria's oil and gas industry that demonstrate that the enactment of new statutes does not provide the desired solution, this thesis does not suggest that an additional statute is required for the implementation of the MSDA. Rather this thesis proposes that the MSDA be incorporated into the existing oil and gas regime to achieve the desired effectiveness and coherence. Over time, the government has established agencies responsible for protecting the environment and managing oil production with the aim of addressing the challenges of oil production in Nigeria. The National Environmental Standards and Regulations Enforcement Agency²⁹ (NASREA) is responsible for "the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology including coordination, and liaison with, relevant stakeholders on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines."³⁰ The Department of Petroleum Resources is responsible for "ensuring compliance with petroleum laws, regulations and guidelines in the oil and gas industry."³¹ The *Environmental Impact Assessment Act* provides that the Nigerian Environmental Protection Agency is responsible for the review of any environmental impact assessment submitted to the agency before giving a decision on the proposed project.³² Establishment of these agencies, among others, reveals the Nigerian government's willingness to address the challenges of the oil and gas industry but this has not been effective due to the lack of defined duties of different agencies and conflict of authority and responsibilities. Nerry and Ekeh argue that though Nigeria took the right step in enacting the Environmental Impact Assessment Act, there are too many agencies with similar responsibilities; and call for merger and clear sharing of duties.³³

Host and impacted communities in the oil producing areas of Nigeria often accuse the Nigerian government of high-handedness and collusion with multinational oil companies to deny them of their human rights and to take decisions on projects without their involvement.³⁴ These issues have

²⁹ Established by the National Environmental Standards and Regulations Enforcement (Establishment) Act, 2007.

³⁰ Online: <<http://www.nesrea.gov.ng/about/index.php>>.

³¹ Department of Petroleum Resources, online <<https://dpr.gov.ng/index/about-dpr/functions-of-dpr/>>.

³² Section 7 of the Environmental Impact Assessment Act Cap E12 LFN 2004 (EIA Act).

³³ Echefu Nerry & Akpofure Ekeh, "Environmental Impact Assessment in Nigeria: Regulatory Background and Procedural Framework" (1999) UNEP EIA Training Resource Manual. Case Studies from Developing Countries 63 at 71.

³⁴ Miriam Kennet et al, "Denying Oil Exploration and Corruption in the Niger Delta" (2011) 8 Green Economics Institute Handbook 1.

been decided in *Social and Economic Rights Action Centre (SERAC) and Anor. v Nigeria* where the African Commission on Human and Peoples Rights (African Commission) agreed that several rights of the Ogoni people of Nigeria were violated by the Nigerian government including the right to participate in resource development.³⁵

Despite the decision of the African Commission, the issue of genuine stakeholder engagement and participation in extractive resource development in Nigeria remains far from settled. Host and impacted communities have had little or no input in policy formulation or in the processes resulting in the approval of oil and gas projects which is contrary to the principles being promoted by international organizations. Many theoretical frameworks have been proposed for facilitating stakeholder participation³⁶ but without substantial impact in Nigeria due to failure to adopt and integrate them into the legal system. This section briefly discusses three decision making processes that are closely related to the proposed MSDA and their inadequacies.

First is public consultation which is a process of giving host and impacted community members the opportunity to comment on projects that affect them usually before commencement. It involves a two-way flow of information and promotes transparency but does not oblige the decision maker to comply with the opinions of the public.³⁷ The public consultation framework limits the members of the public to contributors whose opinions are not binding and the final decision still lies in the government or the person empowered to make such decision. If due precaution is not taken, this approach may cause controversy where people exert efforts in making contributions to decision making and the outcome does not reflect their opinion.

³⁵ *Social and Economic Rights Action Centre (SERAC) and Anor. v Nigeria* (2001) African Human Right Law Report 60 (Communication 155/96) (SERAC).

³⁶ Rhuks Temitope Ako, Lawrence Ogechukwu Obokoh & Patrick Okonmah, "Forging Peaceful Relationships between Oil-Companies and Host-Communities in Nigeria's Delta Region: A Stakeholder's Perspective to Corporate Social Responsibility" (2009) 3:2 *J. of Enterprising Communities* 205 (Ako, Obokoh & Okonmah); Ibronke T. Odumosu, "Revisiting NGO Participation in WTO and Investment Dispute Settlement: From Procedural Arguments to (Substantive) Public Interest Considerations" (2006) 44 *Can. Y.B. Int'l L.* 353; Sonja Vermeulen & Lorenzo Cotula, "Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa" (2010) 37:4 *J. of Peasant Studies* 899. With regards to home state responsibility to enforce participatory rights, see Sara L. Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 *Yale Human Rights and Development L.J.* 177.

³⁷ Delia Rodrigo & Pedro Andrés Amo, "Background Document on Public Consultation" online: <<http://www.oecd.org/mena/governance/36785341.pdf>>.

Secondly, collaborative policy making is the process of bringing different actors with different potentials and goals together for the purpose of policy making. It involves the “facilitation of multi-actors, organizations and governments for problem solving and policy making.”³⁸ The collaborative policy making approach fails to define the criteria for selecting those who will participate in the process and it only facilitates the cooperation of different members of the society in solving a particular short term problem.³⁹ Based on the equivocal mode of selecting participants, it may be difficult to maintain equality in participation and power to influence the process. Consequently, the commitments and contributions to the decision making process becomes weaker or stronger over time depending on how much influence a participant has.⁴⁰

Thirdly, there is deliberative democracy which promotes the articulation of people’s opinions and reaching a consensus which is a product of the majority view. It involves rational debate on objectives before decisions are made.⁴¹ Deliberative democracy does not require parties to participate in the decision making process but welcomes variety of opinions which may result in deadlock when too many participants with diverse interests are invited. More so, the government or the oil companies may be obliged to consult and deliberate with the host and impacted communities but they are not required to abide by their opinions.⁴² The lack of defined participants, multiplicity of opinions and susceptibility to unresolved issues makes the deliberative democracy framework less desirable.

The multi-stakeholder dialogue approach (MSDA) which is proposed in this thesis promotes the involvement of stakeholders in decision making by giving them the opportunity for voluntary participation and recognition of their comments in order to foster trust and support for projects. A stakeholder is a person that is involved in a decision making process or who may be directly affected by the outcome of the decisions made.⁴³ The MSDA is founded on the recognition of

³⁸ Michael McGuire, “Collaborative Policy Making and Administration: The Operational Demands of Local Economic Development” (2000)14:3 Economic Development Quarterly 278.

³⁹ Jon Vernon et al, “Collaborative Policymaking: Local Sustainable Projects” (2005) 32:2 Annals of Tourism Research 325 (with focus on tourism management).

⁴⁰ *Ibid* at 341.

⁴¹ For more on what deliberative democracy entails, see Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press) at 3-7.

⁴² David M. Ryfe, “Does Deliberative Democracy Work?” (2005) 8 Annual Rev. Polit. Sci 49.

⁴³ See Chapter 2.1 for more discussion on the definition of stakeholder.

decision makers⁴⁴ and direct recipients of the outcome of decisions reached as stakeholders. Giving credence to the positive reports by the UN on the effective implementation of the MSDA,⁴⁵ and Nigeria's past respect for UN agencies' recommendations,⁴⁶ this thesis explores the effectiveness of this approach as a response to the developmental challenges in Nigeria's oil and gas management. Furthermore, the MSDA promotes the involvement of all stakeholders in decision making which is one of the major challenges of oil and gas management in Nigeria where decisions are typically made by the government and oil companies. It is pertinent to state that the MSDA has pockets of implementation setbacks (some of which are discussed in Chapter 4 of this thesis) but this approach has been endorsed by the UN as a normative framework and pivotal tool in furtherance of development projects that countries adopt to implement effective public participation.

International law is increasingly recognizing the need for an approach that actively engages host and impacted communities to shape their own future.⁴⁷ Many of these efforts are geared towards realizing, protecting and fulfilling the rights of host and impacted communities through participation.⁴⁸ The United Nations Under-Secretary General for Economics and Social Affairs,

⁴⁴ Decision makers in this instance refer to the Nigerian government and the oil companies. This thesis proposes that Niger Delta communities as direct recipients of the result of the decisions made by the government and oil companies be acknowledged as stakeholders and therefore given avenues to participate in decision making.

⁴⁵ United Nations Department of Economic and Social Affairs (UNDESA), "International Decade for Action: Water for Life 2005-2015" online: <http://www.un.org/waterforlifedecade/waterandsustainabledevelopment2015/multistakeholder_dialogue_17_01_2015.shtml>; Consensus Building Institute, "Multi-Stakeholder Dialogues: Learning from the UNCSD Experience" Background Paper No 4, DESA/DSD/PC3/BP4.

⁴⁶ Universal Periodic Review, "Responses to Recommendations and Voluntary Pledges: Nigeria" (adopted 20 March 2014) Second Review, Session 17; United Nations Commission on Sustainable Development, "Nigeria, Country Profile: Implementation of Agenda 21" (7-25 April 1997) Fifth Session National Implementation of Agenda 21.

⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007); Cordillera Indigenous Peoples' Legal Centre (DINTEG) and UNDP Regional Initiative on Indigenous Peoples' Rights and Development, *Indigenous Peoples and the Human Rights-Based Approach to Development: Engaging in Dialogue* (Thailand: Keen Publishing, 2007); Chetan Kumar, "Revisiting 'Community' in Community-Based Natural Resource Management" (2005) 40:3 *Community Development J.* 275; Wicky Meynen & Martin Doornbos, "Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?" (2004) 16:1 *European J. of Development Research* 235.

⁴⁸ The idea of participation has its theoretical root in the participatory development theory of international law. Many other theories can be brought to bear on participation; these include, multi-stakeholder theory (promotes the active involvement of different stakeholders in decision making), liberal democracy (promotes the principles that protect the rights of the individuals as provided by laws), civic republicanism (underscores the interconnection of individual freedom and civic participation for the common good), and deliberative democracy (which is a form of democracy in which deliberation is central to decision making), among others. Participatory development theory, however, is remarkably important to the environmental and natural resource management discourse. George Pring & Susan Noé, "The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development" in Donald Zillman, Alastair Lucas & George Pring (eds), *Human Rights in Natural Resource*

during his opening remarks at the Dialogue for Sustainable Development, emphasized the need for a multi-stakeholder process that can stimulate implementation of sustainable development and multi-stakeholder participation, which is a necessity for improving ownership in development initiatives.⁴⁹ In the same light, the then Secretary-General of the United Nations, Kofi A. Annan, called on all UN agencies to make human rights a standard approach in their activities and programmes.⁵⁰ He stated that the fundamental elements of a Human Rights Based Approach (HRBA) are as follows:

- “Assessment and analysis which identifies the human rights claims of right-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying and structural causes when rights are not realized.
- Programmes assess the capacity of rights-holders to claim their rights and of duty bearers to fulfil their obligations. They then develop strategies to build these capacities.
- Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- Programming is informed by the recommendations of international human rights bodies and mechanisms.”⁵¹

Other elements are the right to participation and the implementation of locally owned development process.⁵² Later in 2007, various agencies converged to develop a “Common Understanding” of a HRBA. Six principles were enumerated as the elements of the HRBA: “participation and inclusion, universality and inalienability, indivisibility, inter-dependence and inter-relatedness, equality and non-discrimination, accountability and rule of law.”⁵³

Development: Public Participation in the Sustainable Development of Mining and Energy Resources (OUP 2002) at 13; Robert Chambers, *Rural Appraisal: Rapid, Relaxed and Participatory* (Brighton, England: Institute of Development Studies, 1992) at 28. See, e.g., Giles Mohan & Kristian Stokke, “Participatory Development and Empowerment: The Dangers of Localism” (2000) 21:2 Third World Q 247; Ilan Kapoor, “The Devil’s in the Theory: A Critical Appraisal of Robert Chambers’ Work on Participatory Development” (2002) 23:1 Third World Q 107; Arun Agrawal & Clark Gibson, “Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation” (1999) 27:4 World Development 629; Wicky Meynen and Martin Doornbos, “Decentralizing Natural Resource Management: A Recipe for Sustainability and Equity?” (2004) 16:1 European J. of Development Research 235.

⁴⁹ Sha Zukang, “Opening Remarks by Under-Secretary-General for Economic and Social Affairs to the Multi-stakeholder Dialogue on Implementing Sustainable Development” (February 1, 2010) online; <http://www.un.org/esa/desa/ousg/statements/2010/20100201_dialogue_development.html>.

⁵⁰ UNDP, “The Human Rights-Based Approach: Statement of Common Understanding” (2003) Annex B at 91.

⁵¹ *Ibid* at page 92-93.

⁵² *Ibid* at 93.

⁵³ UNDG “The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies” (2007) online: <http://www.undg.org/archive_docs/6959-

International organizations' increasing interest in the involvement of host and impacted communities for peaceful and sustainable oil and gas management brings relief to host and impacted communities who have actively clamoured for better management of resources. This is a pointer to the fact that the international system is now paying attention to the opinion of the host and impacted communities. However community participation can only make viable impact when Governments align with this concept and mainstream it into their oil and gas management. There have been several conflicts in the Niger Delta region over time,⁵⁴ and one of the reservations the host and impacted communities have against oil production is the lack of local participation in oil and gas management.⁵⁵ The need to incorporate the MSDA into Nigeria's oil and gas management cannot be overstated, as the reverse situation has impeded the development of the oil producing communities. Host and impacted communities' participation in oil and gas management has the potential to foster peaceful interrelationship between host and impacted communities and oil companies. The people need a reliable channel to articulate their opinions and needs which must be addressed by the government and oil and gas companies in order to make the MSDA productive. This thesis proposes legislative and institutional frameworks that can produce reliable and effective stakeholder participation in Nigeria's oil and gas management.

Relying on primary documents and scholarly literature, the next section explores the legal and theoretical basis for multi-stakeholder participation in resource management. The review of relevant literature and primary documents reveals the increasing recognition of the importance of multi-stakeholder participation to resource management, and the efforts of the international community to promote multi-stakeholder participation based on the recognition of people's rights and in furtherance of sustainable development.

The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf>.

⁵⁴ Emmy Irobi, "Resolving the Niger Delta Conflict in Nigeria" (2010) 3:1 Peace Studies J. 33.

⁵⁵ One of the issues raised by the Ogoni people in the case of *SERAC* (*supra* note 35) was the failure of Nigerian government to require oil companies to consult communities before embarking on projects and the African Commission on Human and Peoples' Rights appealed to the Nigerian government to provide information and give communities likely to be affected the opportunity to participate in decision making on oil production.

1.3 LEGAL AND THEORETICAL BASIS FOR MULTI-STAKEHOLDER PARTICIPATION

International and regional instruments that bear on the right to participation are discussed in this section to demonstrate that other countries have realized the nexus between the right to participation, development and other human rights and have taken steps by signing international instruments that promote the right to participation.⁵⁶ Finnemore and Sikkink argue that there are three stages of norm development. In the first stage, there is a creation of general awareness of the norm. After the first stage and before the second stage is the “tipping point” where the norm is accepted by a number of states. In the second stage, a “critical mass of states” accepts the norms and in the third stage, the norm is internalized as domestic law.⁵⁷ On this basis, it can be argued that the right to participation of host and impacted communities in resource management is at the second stage of the norm development cycle, yet to be internalized by countries like Nigeria but widely accepted by a large number of States. After the African Commission’s decision in *Social and Economic Rights Action Centre (SERAC) and Anor. v Nigeria (SERAC Case)*,⁵⁸ the status of the right to participation has become an issue that the Nigerian government must take seriously in terms of its legal obligation. The African Commission’s decision in the SERAC Case projects that it is necessary for States to protect the participatory right of host and impacted communities among other social and economic rights. The African Commission’s condemnation of a State party, Nigeria, for violation of economic, social and cultural rights demonstrates that “cases of alleged violations of economic, social and cultural rights and collective rights can be fully justiciable.”⁵⁹ Particularly, the interpretation of Article 16 and 24 of the African Charter by the African Commission makes the right to participation justiciable at the regional level. The African Commission states that:

Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include... providing information to those communities exposed to

⁵⁶ While studying human rights obligations relating to enjoyment of healthy and sustainable environment, Knox underscored the procedural obligations of States to enforce community participation in environmental decision making. See John H. Knox, “United Nations mandate on Human Rights and the Environment: Mapping Report” (2014) A/HRC/25/53.

⁵⁷ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52:4 Int’l Organization 887 at 895-896.

⁵⁸ SERAC *supra* note 35.

⁵⁹ Fons Coomans, “The Ogoni Case before the African Commission on Human and Peoples’ Rights” (2003) 52 Intl and Comparative Law Quarterly 749 at 757.

hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.⁶⁰

Certain international legal norms bear on the right to participation of host and impacted communities and this demonstrates the international community's realization of the importance of participatory rights to development and their commitment to enforce this right.⁶¹ To the extent that there are customary international laws on the right to participation, it can be argued that customary international law that protect the right to participation are part of Nigeria's legal regime subject to its "establishment before the Nigerian court and that it passes the repugnancy test, incompatibility test and the public policy test."⁶² However, this thesis does not focus on the scope of international law sources such as treaties and customs but they are discussed because they provide normative guidance and framework which can be incorporated into domestic statutes and practices by the Nigerian government in order to promote host and impacted communities' participation. It must be noted that Nigeria is not a party to the North American Agreement on Environmental Cooperation, Aarhus Convention and Espoo Convention discussed later in this section. As a result, they are not binding on the Nigerian government. However, Nigeria is a party to the Convention on Biological Diversity and this convention includes provisions on participation. Article 8(j) obliges each contracting party to, as far as possible and as appropriate:

...subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and host communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the

⁶⁰ SERAC *Supra* note 35, paragraph 53.

⁶¹ For an explanation on the binding nature of customary international law, see Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110:4 Harvard L. Rev. 815; Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95:4 American J. of Int'l L 757; Earnest A. Young, "Sorting Out the Debate over Customary International Law" (2002) 42 Va. J. Int'l L. 365.

⁶² Elizabeth A. Oji, "Application of Customary International Law in Nigerian Courts" (2010) NIALS Law and Development J.151 at 164-165.

equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices.⁶³

Nigeria abstained from voting in favour of the United Nations Declaration on the Right to Development (UNDRD) which gives prominent recognition to participation as a key requirement for development. This Declaration states that the right to development includes the right to “participate in, contribute to, and enjoy economic, social, cultural and political development”.⁶⁴ It recognizes that there are three human rights standards that are particularly relevant to the full enjoyment of the right to development: the right to self-determination, sovereignty over natural resources and popular participation.⁶⁵ The significance of right to participation to the realization of development was underscored by the General Assembly in another resolution that stressed the importance of the adoption of measures to ensure effective participation, as appropriate, of all the elements of society in the preparation and implementation of national, economic and social development policies and of the mobilization of public opinion and the dissemination of relevant information in support of the principles and objectives of social progress and development.⁶⁶

In human right terms, it could be said that participation includes the right to take part in decision making processes on matters affecting the host and impacted communities and to influence the decisions taken.⁶⁷ According to the Human Rights Committee in *Ilmari Lansman et al v Finland*, the essential factor is that the people have an adequate opportunity to voice their concerns fully about a proposed activity that may affect them, determine their priorities and that those concerns are given due weight in the design and implementation of the project.⁶⁸

⁶³ Convention on Biological Diversity (Adopted 5 June 1992, entered into force on 29 December 1993). See also Art 14(1)(a).

⁶⁴ Art. 1(1), United Nations Declaration on the Rights to Development, GA Res A/RES/41/128, 97th Plenary Meeting 41/128 (1986).

⁶⁵ *Ibid* at Art 1(2).

⁶⁶ Resolution on the Importance of Popular Participation to Development and Realization of Human Right, UN Res/A/37/55 (1982).

⁶⁷ Damilola S. Olawuyi, “Mainstreaming Human Rights under National and International Law: Legal and Epistemic Question” (2013) 3 Indonesia Law Review 213; Vermeulen & Cotula, *supra* note 36 at 900; Mark S. Reed, “Stakeholder Participation for Environmental Management: A Literature Review” (2008) 141 Biological Conservation 2417; Roy J. Adams, “The Right to Participate” (1992) 5:2 Employee Responsibilities and Rights J. 91.

⁶⁸ Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), UNHCHR. See also *Apirana Mahuika et al. v. New Zealand* Communication No. 547 /1993.

Similarly, the African Commission at its 51st Ordinary Session held from 18th April to 2nd May 2012 in Banjul, Gambia adopted a Resolution on a Human Rights-Based Approach to Natural Resources Governance.⁶⁹ This resolution is a laudable attempt by Governments in Africa to recognize, adopt and mainstream human rights language into the development and use of natural resources. Amongst other things, paragraph 2 calls on governments to ensure that respect for human rights prevails in all matters of natural resource management and requires them to promote effective community participation in decision making about any development on their land or other resources. Though this resolution is undoubtedly a necessary effort aimed at ensuring systemic integration of stakeholder participation issues in resource utilization in Africa, effective host and impacted community participation in oil and gas management is still lacking in Nigeria.

Participation has also gained increased recognition in a number of international environmental instruments and this demonstrates the recognition of the importance of participation to environmental protection by the international community.⁷⁰ Notably, Agenda 21, adopted at the Rio Earth Summit in 1992 (Agenda 21), declares that:

...one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups, and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those that potentially affect the communities in which they live and work.⁷¹

⁶⁹ Adopted May 2, 2012 at the 51st Ordinary Session, ACHPR 224.

⁷⁰ See the 1994 UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa arts. 3(a), 10(e), and 19(1); 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat 2 February 1971, 996 U.N.T.S. 245, 11 I.L.M. 97 (1971) (Ramsar Convention).

⁷¹ Chapter 23(2) of Agenda 21, approved by the UN Conference on Environment and Development on 13 June 1992: UN doc A/CONF.151/26 (vols I–III) (1992). Also Principle 22 of Rio Declaration on Environment and Development states that “indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

The Convention on Transboundary Effects of Industrial Accidents (CTEIA) was the first international environmental treaty to provide for the three procedural environmental rights: information, participation and access to remedies.⁷² The Convention requires parties to ensure that adequate information is given to the public in all areas capable of being affected by an industrial accident arising out of a hazardous activity. Article 9(3) provides that parties shall “provide natural and legal persons who are being or are capable of being adversely affected by the trans boundary effects of an industrial accident” with access to, and participation in relevant administrative and judicial proceedings, including the possibility of instituting a legal action and appealing a decision affecting their rights, equivalent to those available to persons within their own jurisdiction.⁷³

Host and impacted communities’ participation in resource management has been an important part of environmental rights activism over time and one of the ways participation can be productive is to involve the host and impacted communities in the environmental impact assessment (EIA) process. The United Nations Environmental Program defines EIA as “an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development”⁷⁴ The environmental and social impact of a project can be effectively identified by the local communities who are affected by the results of the project, therefore any EIA which does not involve the host and impacted communities is incomplete. This is the basis for the inclusion of a right to participation in international environmental instruments.

Article 1 of the 1993 North American Agreement on Environmental Cooperation provides that the objectives of the Agreement are to promote transparency and public participation in the development of environmental laws, regulations and policies.⁷⁵ The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) also emphasizes the rights of the public to participate in environmental policy formation and decision

⁷² United Nations Convention on Transboundary Effects of Industrial Accidents adopted 17 March 1992 in Helsinki 31 I.L.M 1330 (1992).

⁷³ *Ibid.*

⁷⁴ UNEP, “Goals and Principles of Environmental Impact Assessment” Preliminary Note, issued on January 16, 1987.

⁷⁵ North American Agreement on Environmental Cooperation (1993) 32 I.L.M. 1480.

making.⁷⁶ Article 6 states that, public information and participation is required for all decisions on whether or not to permit industrial, agricultural and construction activities listed in Annex I to the convention. Article 6 (4) provides that each party shall provide for early public participation, when all options are open and effective public participation can take place. Article 7 also provides that each party shall make appropriate practical provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. According to the Convention, the public shall then be allowed to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.⁷⁷ The opinion expressed by the public should as far as possible be taken into account in deciding to embark on the proposed activity.⁷⁸ The Aarhus Convention therefore covers the rights of the public to take part in decision-making and to influence the final decision on whether or not an activity or project should move ahead.

Similarly, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context guarantees non-discriminatory public participation in environmental impact procedures within the scope of the Convention.⁷⁹ The Convention requires parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm. Article 2(6) provides that states shall “provide an opportunity to the public in areas likely to be affected to participate in relevant impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the party of origin.” Article 3 states that the concerned states shall ensure that the public of the affected party in the areas likely to be affected be informed of, and be provided with the opportunity for making comments or objections on the proposed

⁷⁶ UNECE, “Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” (adopted 25 June 1998, entered into force 30 October, 2001) No. 37770.

⁷⁷ Article 6 (7), see also Article 8 of Aarhus Convention, *Ibid.*

⁷⁸ Article 6 (8), *Ibid.*

⁷⁹ Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (adopted 25 February 1991 in force 27 June 1997), 30 I.L.M. (1991) 802.

activity, and for the transmittal of these comments or objections to the competent authority of the party of origin, either directly to this authority or, where appropriate, through the party of origin.⁸⁰

A more expansive provision on the right to take part and influence decision making was included in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which affirms the right of indigenous peoples to choose the modalities of participation and the right to participate fully.⁸¹

Article 18 states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 32(2) of UNDRIP elaborates further:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁸²

The Nigerian constitution does not recognize the Niger Delta peoples as indigenous peoples.⁸³ Contrary to the opinion of the Niger Delta peoples, the Nigerian government contends that the Niger Delta peoples are not indigenous peoples and thereby abstained from voting in favour of the UNDRIP. This demonstrates the challenging situation between the Niger Delta peoples and the Nigerian government. It is also an evidence of the Nigerian government's unwillingness to affirm the rights of the Niger Delta peoples as indigenous peoples.⁸⁴ These are important issues that bear

⁸⁰ Article 3 para. 8.

⁸¹ Art. 18, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc/ A/61/L.67 (2007). UNDRIP was adopted by the General Assembly on 13 September 2007 by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions which includes Nigeria. Since its adoption, Australia, New Zealand, Canada and the United States have all reversed their positions and now endorse the Declaration.

⁸² Henriksen *ibid* at 18.

⁸³ Section 25 of the 1999 Constitution of the Federal Republic of Nigeria.

⁸⁴ Nigeria was not the only African country that abstained from signing the UNDRIP. Most other African States were either absent or abstained from signing the UNDRIP. This demonstrates that the issues surrounding recognition of a

on the right of the Niger Delta communities and their recognition as indigenous peoples which require further research beyond the scope of this thesis.⁸⁵

Categorization and recognition of the Niger Delta peoples as indigenous peoples has significant ramification on their rights but this thesis does not engage on the definition of the term “indigenous peoples”. However, it is apposite to state the factors that delineate a group or community of people as indigenous. Some of the identified elements are:

self-identification of an individual as indigenous and acceptance of the community as their member, historical continuity, strong link to territories and surrounding natural resources, distinct social, political or economic system, distinct language or culture, they form non-dominant groups of the society and have resolved to maintain their ancestral environment as distinct peoples and communities.⁸⁶

Addressing the human rights issues of indigenous peoples in resource extraction, James Anaya recommended that indigenous peoples through representative institutions should be allowed to participate and be respected in “strategic state planning for resource extraction and development” and indigenous peoples should be provided the opportunity to participate in environmental and human rights impact assessments of extractive operations.⁸⁷ Anaya’s report sets out the international standard for the enforcement of the rights, including the participatory right, of indigenous peoples. However, this thesis addresses the right of communities that are directly affected by oil and gas production in Nigeria, herein referred to as “host and impacted

group of people as indigenous are not limited to Nigeria but affects other African States. See generally, Dwight G. Newman, “The Law and Politics of Indigenous Rights in the Postcolonial African State” (2008) 102 Proceedings of the Annual Meeting ASIL 69.

⁸⁵ There is an ongoing debate on whether the Niger Delta peoples can be rightly classified as indigenous peoples. Omorogbe argues against the indigenous status of the Niger Delta peoples. Yinka Omorogbe, *Oil and Gas Law in Nigeria* (Lagos: Malthouse Law Books, 2004) at 146-151. On another hand, it has been argued that three groups in Nigeria can be rightly categorized as indigenous, and they are, the Ogonis, the Ijaws and the Nomadic Fulanis. International Labour Organization and African Commission on Human & Peoples’ Rights, *The Constitutional and Legislative Protection of the Rights of Indigenous Peoples: Nigeria* (Switzerland: ILO Publications, 2009) at pages 3-6. Another school of thought contends that the Niger Delta region is made up of different indigenous peoples. Barisere Rachel Konne, “Inadequate Monitoring and Enforcement in the Nigerian Oil Industry: The Case of Shell and Ogoniland” (2014) 47 Cornell Int’l L.J. 181 at 182.

⁸⁶ United Nations Human Rights Office of the High Commissioner, “Indigenous Peoples and the United Nations Human Rights System” (2013) Fact Sheet No. 9/Rev. 2; John B. Henriksen, “Research on the Best Practices for the Implementation of the Principles of ILO Convention No. 169” (2008) Case Study 7.

⁸⁷ James Anaya, “Report of the Special Rapporteur on the Rights of Indigenous Peoples” (2013) UNHRC 24th Session A/HRC/24/41

communities”. People whose health condition is affected by the incessant oil spillage and gas flaring in their community,⁸⁸ those who face the brunt of military actions unjustly imposed by the government resulting in loss of properties and lives, those whose means of sustenance have been destroyed by the activities of oil companies, and not other Nigerians who are not subjected to the same level of hardship as the Niger Delta communities, are the subject of this research work. The acknowledgement of the Niger Delta communities as indigenous peoples is not the focus of this thesis; rather the focus is on the development of avenues to create a healthy environment and participatory development for the host and impacted communities.

The UNDRIP gives an explanation of what participation entails. It provides that participation includes consultation and state procurement of the “free, prior and informed consent” of the people before approving any project. There are scholarly ideas on what active participation entails. For example, O’Faircheallaigh argues that effective public participation involves the ability of the public to influence decision making among other factors.⁸⁹ In the context of environmental decision making, it has been noted that meaningful input of the public is necessary for the attainment of effective public participation.⁹⁰ Simon argues that meaningful participation is said to include early consultation, informing the participants of the effects of their participation and the reasons for their participation, and willingness of the consulting party to incorporate participants’ input in decision making.⁹¹ While O’Faircheallaigh focuses on the ability to influence the decision making process, Simon emphasizes the need for the participants to make informed contribution to the decision making process. The United States Department of Energy, Environment, Safety and Health Office states that public participation activities must include early public involvement, public hearing, making information available and responding to public comments.⁹² With

⁸⁸ For reported data on the impacts of oil production on Niger Delta communities, see Adati Ayuba Kadafa, “Environmental Impacts of Oil Exploration and Exploitation in the Niger Delta of Nigeria” (2012) 12:3 Global J. of Science Frontier Research Environment & Earth Sciences 19.

⁸⁹ Ciaran O’Faircheallaigh, “Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making” (2010) 30 Environmental Impact Assessment Review 19.

⁹⁰ Susan Charnley & Bruce Engelbert, “Evaluating Public Participation in Environmental Decision-Making: EPA’s Superfund Community Involvement Program” (2005) 77:3 J. of Environmental Management 165.

⁹¹ Judy Simon, “Effective Public Participation: Some “Whys” and “Hows” for Regulators” (1993) 888 INDECO1; Charnley & Engelbert *Ibid.* at 167; See Lindsay C. Stringer, “Unpacking Participation in the Adaptive Management of Social-Ecological Systems: a Critical Review” (2006) 11:2 Ecology and Society 39.

⁹² “Effective Public Participation under the National Environmental Policy Act, Second Edition” (1998) online: <http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-Public_Participation.pdf>.

perspective on participation through representative groups, Chavis and Wandersman argue that participation connotes the “voluntary involvement of community members in representative organizations that represent the collective interest of the communities”.⁹³ Hence it is clear that effective participation includes consultation,⁹⁴ early notice and ability to affect decision making, among others.

It is pertinent to note here that consultation is a prerequisite for effective participation. Host and impacted communities need to be consulted before they can participate in oil and gas management. According to the African Development Bank, there are two levels of stakeholder involvement, consultation and participation. Activities at the consultation level include information sharing, learning and listening and joint assessment. Afterwards there is participation which involves joint decision making, collaboration and empowerment.⁹⁵

Generally, this thesis opines that existing legal regimes on oil and gas development in Nigeria establish consultative procedures that fall short of scholarly and policy interpretations of human rights requirements on participation. Even though Section 7 of the Environmental Impact Assessment Act⁹⁶ provides that the Nigerian Environmental Protection Agency shall give “government agencies, members of the public, experts in any relevant field and interested groups” opportunity to make comments before giving its decision on specified environmental activities, it fails to elaborate on what constitutes effective participation with respect to resource development. It also fails to provide compulsory participatory procedures for project approvals. This thesis responds to these issues through a careful review and study of Nigeria’s practices in light of the participatory development theory.

⁹³ David M. Chavis & Abraham Wandersman, “Sense of Community in the Urban Environment: A Catalyst for Participation and Community Development” (1990) 18:1 *American J. of Community Psychology* 55.

⁹⁴ See Newman for an explanation of what consultation connotes with regards to the duty to consult in Canada. Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Pub., 2009) at pages 47-57.

⁹⁵ African Development Bank, “Handbook on Stakeholder Consultation and Participation in ADB Operations” (2010) OESU 1. Questions on what constitutes adequate participation in Nigeria are considered later in this thesis.

⁹⁶ EIA Act, *supra* note 32.

1.4 RELATIONSHIP BETWEEN HUMAN RIGHTS BASED APPROACH (HRBA), MULTI-STAKEHOLDER DIALOGUE APPROACH (MSDA) AND PARTICIPATORY DEVELOPMENT THEORY (PDT)

1.4.1 The Human Rights Based Approach (HRBA) and Multi-Stakeholder Dialogue Approach (MSDA)

The HRBA is a UN-led normative framework which promotes the protection of human rights by governments. It promotes the empowerment of people by requiring that they be informed of their rights and how to claim these rights, and ensuring individuals and institutions respect these rights.⁹⁷ “The HRBA is a UN directive which focuses on those who are most marginalized, excluded or discriminated against.”⁹⁸ Elements of the HRBA include realization of human rights germane to development, recognition of people as stakeholders in their own development and participation as a means of achieving development.⁹⁹ The HRBA is a means of achieving different goals by placing the recognition and respect of human rights at the core of all decisions. For example, there is a HRBA to development cooperation and a HRBA to poverty reduction. Hence in the process of achieving the goal of development or reducing poverty, the right of the people must be the center of every decision taken.

Participation is one of the elements of the HRBA and it promotes the involvement of host and impacted communities in projects affecting them. Scholars such as Toomey¹⁰⁰ and Noor¹⁰¹ have promoted participatory development. They advocate that people should be involved in all development projects because the objective of any development project is only achievable when the people participate in it.¹⁰² Naku and Afrane state that participatory development is an approach

⁹⁷ Scottish Human Rights Commission, “Care about Rights” online: <<http://www.scottishhumanrights.com/careaboutrights/whatisahumanrightsbasedapproach>>.

⁹⁸ UNFPA, “Human Rights Based Approach” online: <<http://www.unfpa.org/human-rights-based-approach>>.

⁹⁹ *Ibid.*

¹⁰⁰ Anne H. Toomey, “Empowerment and Disempowerment in Community Development Practice: Eight Roles Practitioners Play” (2011) 46:2 Community Development J. 181.

¹⁰¹ Mohammad Noor, “People Participation in Development Projects at Grass-Roots Level. A Case Study of Alampur and Jagannathpur Union, Parishad” (2010) Department of General and Continuing Education, North South University, Bangladesh.

¹⁰² *Ibid.*

to development planning “geared towards a general set of principles, notably the willingness to involve local people in development decisions that will affect their lives.”¹⁰³

Based on the recognition of participation as a pivotal tool in furtherance of development projects, the UN advocates the MSDA as a normative framework that countries can adopt to implement effective participation. Lawrence Strickling, states that “the multi-stakeholder process involves the full involvement of all stakeholders, consensus-based decision-making and operating in an open, transparent and accountable manner.”¹⁰⁴ The MSDA requires the involvement of all parties affected or who may be affected by a project in planning and decision making. It is a process of involving all stakeholders in order to give everyone the opportunity to affect and contribute to the decision making process which is in furtherance of the tenets of the HRBA, that is, respect for the rights of all parties involved and making sure duty bearers respect and protect these rights. Gurstein states that a multi-stakeholder process “should enhance democracy by increasing opportunities for effective participation by those most directly impacted by decisions and particularly those at the grassroots who so often are voiceless in these processes.”¹⁰⁵ The MSDA is a UN policy template which directs countries on how to actualize effective public participation. As a normative framework, the MSDA is soft law and not legally binding although the binding effects of directives are unsettled. In *Francovich v Italy*, the European Court of Justice held that member states could be liable to pay damages where loss is suffered due to failure to comply with EU directives.¹⁰⁶ As a policy template, the MSDA is not binding. However, where the MSDA is incorporated into a binding international instrument that protects the participatory right, it becomes binding on State parties to such international instrument.

This thesis advocates for the involvement of host and impacted communities in oil and gas management through the MSDA, in order to protect their rights, by giving them the avenue to articulate their thoughts and reservations about projects in their communities. This argument is

¹⁰³ Daniel Wandera Clief Naku & Sam Afrane, “Local Community Development and the Participatory Planning Approach: A Review of Theory and Practice” (2013) 5:5 Current Research J. of Social Sciences 185.

¹⁰⁴ National Telecommunications & Information Administration, United States Department of Commerce, “Moving Together beyond Dubai” (2013) online: <<http://www.ntia.doc.gov/blog/2013/moving-together-beyond-dubai>>.

¹⁰⁵ Mike Gurstein, “In Defence of Multistakeholder Processes” (2013) online: <<https://gurstein.wordpress.com/2013/03/21/in-defense-of-multistakeholder-processes/>>.

¹⁰⁶ *Andrea Francovich and Danila Bonifaci and others v Italian Republic* (1991) European Court Reports 61990J0006 page I-05357.

based on the participatory development theory which has proven over time that participation is important to the achievement of any development goal.

1.4.2 Participatory Development Theory (PDT)

This thesis adopts Participatory Development Theory (PDT) as a theoretical basis for analysis of the meaning, nature and scope of stakeholder participation in oil and gas management. The idea of participation is central to PDT. Participatory development promotes the involvement of host and impacted communities in development projects and gives all members of the community the opportunity to express their views on projects that affect them.¹⁰⁷ The concept of participatory development emerged in 1970 when it was presented as an essential part of the “basic needs approach” to development¹⁰⁸ but it gained much recognition as a mechanism for good governance in the early 1990s.¹⁰⁹ Its fundamental assumption is that host communities have a right to determine their own future, to take part in decisions that affect their lives,¹¹⁰ and have an atmosphere whereby people can effectively identify and address their own needs.¹¹¹

PDT emerged as a response to traditional approaches to development that have been blamed for escalating the development problems in the developing and least developed countries.¹¹² Many components of participation have been identified in the literature. According to Cohen and Uphoff, when speaking of participation the following questions must be asked: “i) what kind of participation? Is it participation in decision-making, participation in implementation, participation in benefits (or harmful consequences), or participation in evaluation? ii) who is participating in it?

¹⁰⁷ Giles Mohan & Kristian Stokke, “Participatory Development and Empowerment: The Dangers of Localism” (2000) 21:2 *Third World Quarterly* 247.

¹⁰⁸ Andrea Cornwall, “Historical Perspectives on Participation in Development” (2006) 44:1 *Commonwealth & Comparative Politics* 62.

¹⁰⁹ Benjamin Richardson & Jona Razzaque, ‘Public Participation in Environmental Decision-making’, in Benjamin Richardson & Stepan Woods (eds) *Environmental Law for Sustainability* (Hart 2006) 168, (describes how citizens’ protests and activism by NGOs in the black communities in the USA and in indigenous communities in Canada, Australia and New Zealand brought about legal recognition for participatory development).

¹¹⁰ Barry Barton, “Underlying Concepts and Theoretical Issues in Public Participation in Resources Development” in Zillman, *supra* note 48 at 81.

¹¹¹ Edward L. Deci & Richard M. Ryan, “The “What” and “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behaviour” (2000) 11:4 *Intl J. for the Advancement of Psychological Theory* 227.

¹¹² John Cohen & Norman Uphoff, “Participation’s Place in Rural Development: Seeking Clarity through Specificity” (1980) 8 *World Development* 214; Anne H. Toomey, “Empowerment and Disempowerment in Community Development Practice: Eight Roles Practitioners Play” (2009) 46 *Community Development J.* 181.

(local residents, local leaders, government personnel, and foreign personnel); and how is participation occurring? (What is the basis of participation, form of participation, extent of participation, and effect of participation?)”.¹¹³ The MSDA is mainly concerned with participation in the decision-making process. The top-down development approach of the early 1960s and even beyond has been criticized for stifling the growth of human rights by neglecting the rights of citizens to be involved in the conduct of public affairs and the rights of individuals to be heard.¹¹⁴ This approach failed to meet the needs of the poor mainly because “the decisions were made by experts far removed from the people and their needs, and implemented through structures intended to be more responsive to central direction than local reality”.¹¹⁵ As a result, outsiders who knew little about and paid little attention to the communities formulated projects designed to overpower these communities.

There are two perspectives to the application of PDT, the social movement perspective and the institutional or project-based perspective.¹¹⁶ The social movement perspective focuses on issues of power and justice. It criticizes elitism and calls for better attention to the needs and opinions of the poor and marginalized.¹¹⁷ The institutional perspective argues that stakeholder opinions are tools to achieve development goals set out by people not part of the host and impacted communities.¹¹⁸ Both perspectives are interconnected and in order to have productive multi-stakeholder participation, both perspectives must be functional. While the government and oil companies are required to pay attention to the needs and complaints of the host and impacted

¹¹³ Cohen & Uphoff *ibid* at 219-220.

¹¹⁴ Julie Lemmer, “Cleaning up Development: EIA in Two of the World's Largest and Most Rapidly Developing Countries” (2007) 19 *Georgetown International Environmental Law Review* 275; David Korten, “Rural Development Programming: The Learning Process Approach” in David Korten & Rudi Klaus (eds.), *People-Centered Development: Contributions toward Theory and Planning Framework* (West Hartford 1984) at 183-184; Yogesh Atal, “Involving the Poor: The Many Question Marks” in Yogesh Atal & Else Oyen, eds., *Poverty and Participation in Civil Society* (UNESCO 1997).

¹¹⁵ Janette Hartz-Karp & Michael Briand, “Institutionalizing Deliberative Democracy” (2009) 9 *J. of Public Affairs* 125; David Korten & Felipe Alfonso (eds), *Bureaucracy and the Poor: Closing the Gap* (Kumarian Press, 1983) at 2; David Korten, ‘Rural Development Programming: The Learning Process Approach’ in David Korten & Rudi Klaus (eds.), *People-Centered Development: Contributions toward Theory and Planning Framework* (Kumairan 1984) 183-184; Atal, *supra* note 114.

¹¹⁶ Thomas Tufte & Paolo Mefalopulus, “Participatory Communication: A Practical Guide” (2009) World Bank Working Paper No 170.

¹¹⁷ Robert D. Lamb, Bill Varettoni, & Chunli Shen, “Participatory Development and the World Bank” (2005) 14:2 *International Affairs Review* 171.

¹¹⁸ Tufte & Mefalopulus, *supra* note 116 at 4.

communities, their opinions during decision making are also important in order to achieve development goals.

Effective host and impacted communities' participation involves all members of the community, either directly or through representatives appointed by the community members. The need for participatory development in the Niger Delta region of Nigeria is undeniable. Several past conflicts could have been undoubtedly avoided if the people were allowed to participate in decisions affecting them. It has been discovered over time that lack of community participation in projects either causes such projects to fail or may result in intensified conflicts between groups.¹¹⁹ Any project that aims to develop resources in the Niger Delta region of Nigeria must involve the community members else the actualization of development goals will be inhibited and/or may result in conflicts.

1.5 PARTICIPATORY DEVELOPMENT AND THE INTERNATIONAL SYSTEM

The international system has lent its voice to participatory development through the emergence of relevant international documents¹²⁰ and activities of international organizations. For example the United Nations Division for Public Administration and Development Management promotes adequate information sharing with the public and deliberation by member state governments to ensure effective participation.¹²¹ Similarly the United Nations Department of Economic and Social Affairs promotes multi-stakeholder dialogue for the implementation of sustainable development.¹²² As much as the UN seems to be at the fore of the drive on participatory development, the insubstantial attention paid to the opinions of NGOs diminishes the value given to its course of development through public participation.¹²³ The European Union (EU) is not left

¹¹⁹ Andrea Cornwall & Vera Schatten Coelho, *Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas* (Malta: Gutenberg Press 2007) at 73.

¹²⁰ For example the United Nations Declaration on the Right of Indigenous Peoples, Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) and Agenda 21, adopted at the Rio Earth Summit in 1992 (Agenda 21).

¹²¹ UN Department of Economic and Social Affairs, "Civil Society Participation: Public Administration" (2007) NGO Branch.

¹²² United Nations Department of Economic and Social Affairs, "Multistakeholder Dialogue on Implementing Sustainable Development" (2010) Sustainable Development Knowledge Platform, CSD-17 Agenda.

¹²³ Otto Spijkers & Arron Honniball, "Developing Global Public Participation" (2015) 17:3 Int'l Community L. Review 222.

out of the revolution. It committed itself to promote the importance of public participation to the success of projects.¹²⁴

Some international organizations have successfully projected the idea of participatory development but the position of international financial institutions, particularly the World Bank, remains debatable. Totaro examined three World Bank programs that promote the norms of participatory development.¹²⁵ The Voice of the Poor Program (VPP) which focuses on the predicaments of the poor based on the report of interviews conducted in developing and developed nations, the Poverty Reduction Strategy Papers (PRSP) and the Global Monitoring Report which supports the Millennium Development Goals (MDGs). Though these programs promote participatory development and show the World Bank's commitment to encourage adequate participation through its policies, the programs were faulted by Totaro on the basis of defective study methodology, failure to address governments' power to manipulate the choice of participants in projects and the internal structures of the bank among others. One of the contentions against the PRSP is that governments remain in control of what group is allowed to participate in projects and this can be manipulated in favour of the government by excluding some groups.¹²⁶ These are germane factors ignored by the World Bank in formulating the programs. More so, it is important to acknowledge the fact that governments prefer to restrict the public's participation in project management because of the restriction it places on their free operation. Giving governments an avenue to influence public participation reduces the credibility of the VPP, PRSP and the MDGs.

The World Bank has taken a positive step by acknowledging the importance of participation to the growth of borrowing states. Projects that relate to provision of services to communities have particularly been more productive with the contribution of the public.¹²⁷ Despite the World Bank's efforts at adopting projects that foster public participation, its intentions and actual stance on participatory development has been questioned and its adopted procedure faulted on several

¹²⁴ European Commission, *2011 Annual Report on the EU's Development and External Assistance Policies and their Implications in 2010* (Luxembourg: EU Publications Office 2011) at 11.

¹²⁵ Martin V. Totaro, "Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development" (2008) 48 Va. J. Int'l L. 719.

¹²⁶ *Ibid* at 744-757.

¹²⁷ Robert D. Lamb, Bill Varettoni, & Chunli Shen, "Participatory Development and the World Bank" (2005) 14:2 International Affairs Review 171.

grounds such as lack of comprehensive choice of public participants, low probability of continuity, low accountability structure and lack of defined implementation scheme.¹²⁸ The World Bank explained the role of governments in the success of its programs and contended that based on the variability of the result of its programs, its success relies on the internal mechanism and ductility of the borrowing government.¹²⁹ This extends the responsibility of the workability of World Bank programs to borrowing governments but it is pragmatic that the power to manipulate participatory right of the public is well curtailed from inception otherwise the actual reason for setting up the programs may be defeated.

1.6 MULTI-STAKEHOLDER DIALOGUE APPROACH AS A TEMPLATE FOR ACHIEVING PARTICIPATORY RESOURCE MANAGEMENT: THE LITERATURE

Scholars have examined the value of multi-stakeholder approaches as templates that could be adopted by countries that are desirous of improving participatory development.¹³⁰ As mentioned earlier, host and impacted communities' participation is important to the attainment of development goals, hence the interrelationship between effective participation and development. In a broader sense, it may be referred to as the interrelationship between human rights and development. On this note, Hamm refers to participation and empowerment as the fundamentals of a human rights approach to development, that is, participation in the context of a right and not as an instrument to secure acceptance of projects.¹³¹

Environmental decision making processes readily come to mind when discussing the right of host and impacted communities to participate in resource decision making, therefore the involvement of the public in environmental impact assessment (EIA) has been argued to be of importance to

¹²⁸ Ila Patlolla, "Is the World Bank's Attitude towards Participatory Development Changing?" (9 April 2013) *Institute of Development Studies* 1.

¹²⁹ The World Bank, "When do Participatory Development Projects Work?" (November 14, 2012) *The World Bank Group Press Release*.

¹³⁰ Lanka Thabrew, Arnim Wiek & Robert Ries, "Environmental Decision Making in Multi-Stakeholder Contexts: Applicability of Life Cycle Thinking in Development Planning and Implementation" (2009) 17 *J. of Cleaner Production* 67; Nicolas Faysse, "Troubles on the Way: An Analysis of the Challenges faced by Multi-Stakeholder Platforms" (2006) *Natural Resources Forum* 219.

¹³¹ Brigitte I. Hamm, "A Human Rights Approach to Development" (2001) 26:4 *Human Rights Q* 1005.

resource management.¹³² This position is supported by authors citing examples of projects that have succeeded or failed based on public participation.¹³³ Gariépy outlines the importance of public participation to the achievement of an EIA and supports his position by reviewing the achievements made on some projects in Quebec based on effective public participation.¹³⁴ Pohjola and Tuomisto also argue that participation, assessment and policy making are intertwined and the right to participate can only be effective if stakeholders also have the right to participate in assessment and policy making.¹³⁵ Therefore the public and stakeholders should be given the right to participate in assessment and policy making in environmental health issues. Participation is undoubtedly important to EIA but there are different participatory plans for different projects and stakeholders must consider which plan is most suitable in each case for the EIA process to be successful.¹³⁶ For example, Hourdequin et al have criticized the mechanisms for public participation in EIA adopted by the United States Federal Government as “ineffective and unable to resolve conflicts” due to failure to incorporate democratic values in the processes.¹³⁷ This demonstrates that having a legal and institutional framework for host and impacted communities’ participation is not enough; a suitable mechanism must also be employed and all the elements of effective participation must be implemented.¹³⁸

Lack of an effective legal and institutional framework for host and impacted communities participation in Nigeria has resulted in challenges of environmental decision making in the Niger Delta region. These challenges are examined by Adomokai and Sheate and the problems of public

¹³² Ciaran O’Faircheallaigh, “Public Participation and Environmental Impact Assessment: Purposes, Implications, and Lessons for Public Policy Making” (2010) 30 *Environmental Impact Assessment Review* 19. With regards to public participation in impact assessment for trade processes, see Stella Bastidas, “The Role of Public Participation in the Impact Assessment of Trade Process” (2004) CIELAP Brief on Canadian Trade Policy, Speaker paper for the Impact Assessment for Industrial Development – IAIA’04.

¹³³ Obaidullah Nadeem & Thomas B. Fischer, “An Evaluation Framework for Effective Public Participation in EIA in Pakistan” (2011) 31 *Environmental Impact Assessment Review* 36 (cited four projects in Pakistan).

¹³⁴ Michel Gariépy, “Toward a Dual-Influence System: Assessing the Effects of Public Participation in Environmental Impact Assessment for Hydro-Quebec Projects” (1991) 11 *Environmental Impact Assessment Review* 353 (cited some projects in Quebec).

¹³⁵ Mikko V Pohjola & Jouni T Tuomisto, “Openness in Participation, Assessment, and Policy Making upon Issues of Environment and Environmental Health: A Review of Literature and Recent Project Results” (2011) 10:1 *Environmental Health* 58.

¹³⁶ Robert D. Lamb, Bill Varettoni & Chunli Shen, “Participatory Development and the World Bank” (2005) 14:2 *International Affairs Review* 171.

¹³⁷ Marion Hourdequin et al, “Ethical Implications of Democratic Theory for U.S. Public Participation in Environmental Impact Assessment” (2012) 35 *Environmental Impact Assessment Review* 37.

¹³⁸ Ajit Krishnaswamy, “Strategies and Tools for Effective Public Participation in Natural Resource Management” (2012) 13:2 *J. of Ecosystems and Management* 1.

participation in decision making are identified based on reports of interviews with stakeholders.¹³⁹ The authors advocate for improved awareness of environmental impact assessment and benefits of public participation but fail to align their suggestion with Nigeria's legal frameworks. A detailed analysis of what the right to participation entails and a review of legislative protection of this right is missing from Adomokai and Sheate's study. The place of local legal frameworks in actualizing an effective host and impacted communities' participation in Nigeria cannot be overstated. The Nigerian government needs to mainstream public participation in oil and gas management into its laws and provide adequate and reliable institutional frameworks for effective host and impacted communities participation. This position is supported by Doelle and Sinclair, stating that an approach to legislating public participation in project assessment is required to encourage constructive participation which will address various criticisms.¹⁴⁰ Though Nigeria has legislated on the assessment of environmental impact of projects,¹⁴¹ the right of host and impacted communities to participation in oil and gas management is not effectively protected by local statutes.

Lack of an adequate legal framework is not the only hindrance to the actualization of host and impacted communities' right to participation in oil and gas management. Nigeria's land tenure system is also an obstacle. Some authors argue that participatory rights are related to some other rights and practical participation is only attainable where these other rights are enforceable. With regards to indigenous peoples, James Anaya discusses the relationship between the right to consultation and the nature of the people's right to land and resources.¹⁴² He argues that "as a matter of international law, indigenous peoples have rights of property over land and natural resources arising out of their own customary land tenure systems. These property rights attract all the protections attached to property generally and where property rights are affected by natural resource extraction, consent by the indigenous people concerned is required."¹⁴³

¹³⁹ Rosemary Adomokai & William R. Sheate, "Community Participation and Environmental Decision-Making in the Niger Delta" (2004) 24 Environmental Impact Assessment Review 495.

¹⁴⁰ Meinhard Doelle & A. John Sinclair, "Time for a New Approach to Public Participation in EA: Promoting Cooperation and Consensus for Sustainability" (2006) 26 Environmental Impact Assessment Review 185.

¹⁴¹ EIA Act, *supra* note 32.

¹⁴² James Anaya, "Indigenous Peoples' Participatory Rights In Relation To Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources" (2005) 22 *Ariz. J. Intl & Comp. L* 7.

¹⁴³ *Ibid* at 16-17.

In the Nigerian context, Ako analyses the impact of the Land Use Act (LUA)¹⁴⁴ on the Niger Delta region arguing that the Act is a tool employed to deprive host communities of their right to participate in Nigeria's oil and gas industry.¹⁴⁵ He argues that the effect of the LUA is to strip the host communities of their right to ownership of the land beneath which the resource is situated, and vests the same in the government¹⁴⁶ which deprives the Niger Delta people of benefits that should accrue to them, including the right to participate in decision making.¹⁴⁷ Ako's work points to the effect of the LUA in aggravating the problems of host and impacted communities' participation in oil and gas management in Nigeria. On another note, Vermeulen and Cotula argue that the right to land is ineffective in promoting the bargaining power of local land users in achieving better outcomes during deal-making process with investors. They believe that local land users' participation in the decision making process will limit their bargaining strategies and points of leverage. For Vermeulen and Cotula contract terms also limit the "space for rights-based arguments and defence of land access".¹⁴⁸ This thesis differs on the argument made by Vermeulen and Cotula as the place of land ownership and multiparty contracts cannot be disregarded in the struggle to enforce participation. Though the rationale for host and impacted communities' involvement in oil and gas management is based on their right to participation, limited real property rights in Nigeria often affect their position while clamouring for their human rights and objecting to aspects of oil and gas production activities in the region.

¹⁴⁴ Land Use Act, Chapter 202, Laws of the Federation of Nigeria 1990 (LUA).

¹⁴⁵ Rhuks Ako, "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice" (2009) 53:2 J. of African L 289 (Ako: Nigeria's LUA).

¹⁴⁶ LUA, *supra* note 144 at Section 1.

¹⁴⁷ Ako: Nigeria's LUA, *supra* note 145 at 297. Before the enactment of the LUA, customary land ownership was the predominant land tenure system in Nigeria. Land ownership was held by communities and families in trust for the community and family members. For more on the nature of the customary land tenure system, see *Amodu Tijani v The Secretary, Southern Province Nigeria* (1921) AC 399. Upon the promulgation of the LUA in 1978, existing rights in land (family or communal ownership) were extinguished. Under the LUA, all land within the territory of a state is vested in the state Governor who holds title in trust and for the benefit of all Nigerians. The Niger Delta communities collectively had ownership of their communal land until 1978 when the right to ownership was reposed in the state governors. Now, the state governors hold title to the land within their territories in trust for the people. Namso Basse Udoekanem, David Odegwu Adoga and Victor Onyema Onwumere, "Land Ownership in Nigeria: Historical Development, Current Issues and Future Expectations" (2014) 4:21 J. of Environmental and Earth Science 182 at 182-185. For more on Nigerian land tenure system, see Kabir Akintunde Otubu, "The Land Use Act and Land Ownership Debate in Nigeria: Resolving the Impasse" (2015) SSRN 2564539.

¹⁴⁸ Vermeulen & Cotula, *supra* note 36 at 913.

While the Nigerian government relies on the provisions of the LUA in depriving the host and impacted communities of their right to participation in oil and gas management,¹⁴⁹ host and impacted communities often enter into agreements with oil companies in which oil companies undertake to meet the identified requests of the host and impacted communities in order to address the challenges of “old models of corporate-community engagements.”¹⁵⁰ This has led to some mutual agreements between investors and host communities.¹⁵¹ Odumosu-Ayanu states that “these agreements, sometimes generically known as Community Development Agreements (CDA) are the emerging expression of contractual relationships between investors and local communities.”¹⁵² Although agreements are useful in bridging the gap between host and impacted communities and oil and gas companies as Faysse notes, host and impacted communities often encounter challenges such as “power relationships, platform composition, stakeholder representation and capacity to participate meaningfully in the debates, decision-making power and mechanism; and cost of setting up a multi-stakeholder participation system”.¹⁵³ Hurdles encountered by host and impacted communities during negotiation processes have been classified as cultural, political and legal issues, therefore Castro and Nielsen have suggested a “conflict management consideration” as a means to address conflicts that may arise in the course of negotiations.¹⁵⁴ They also reviewed the conflicts that may arise in cases of limited local participation citing Canada and Australia as examples. Though mutual agreements have been useful in bringing investors and host and impacted communities to a consensus, investors also employ active corporate social responsibility (CSR) measures to assuage host and impacted communities in order to minimize conflicts and promote peaceful relationship. CSR has been defined and discussed from various perspectives by academics, government institutions, NGOs, and business organizations, among others and this demonstrates the diversity of views on the context of CSR.¹⁵⁵ Based on the diversity of opinions

¹⁴⁹ Ako: Nigeria’s LUA, *supra* note 145 at 304.

¹⁵⁰ Kiiikpoye K. Aaron, “New Corporate Social Responsibility Models for Oil Companies in Nigeria’s Delta Region: What Challenges for Sustainability?” (2012) 12:4 *Progress in Development Studies* 259 at 266.

¹⁵¹ For example, the Global Memorandum of Understanding in Nigeria. See Ibronke T. Odumosu-Ayanu, “Governments, Investors and Local Communities: Analysis of Multi-Actor Investment Agreement Framework” (2014) 15 *Melbourne Journal of International Law* 473.

¹⁵² *Ibid* at 474.

¹⁵³ Faysse, *supra* note 130 at 222.

¹⁵⁴ Alfonso Peter Castro & Erik Nielsen, “Indigenous People and Co-Management: Implications for Conflict Management” (2001) 4 *Environmental Science & Policy* 229.

¹⁵⁵ For a comparison of various definitions of CSR, see Andrew Crane, Dirk Matten, and Laura Spence, “Corporate Social Responsibility in a Global Context” in Andrew Crane, Matten Dirk and Laura Spence, *Corporate Social Responsibility: Readings and Cases in a Global Context* (London: Routledge, 2008) at 6-8. In order to delineate

on the meaning of CSR, it is a term that is devoid of a specific meaning but it has been argued that “the foundation of CSR is the acknowledgement that businesses have responsibilities to society that go beyond shareholder wealth maximization.”¹⁵⁶ In the context of corporate contributions towards development, CSR is defined as “a platform for corporations to be involved in economic development of disadvantaged people.”¹⁵⁷ In the social and environmental context, CSR is defined as “actions that corporations voluntarily undertake both to promote social and environmental goals and to minimize any potential social and environmental costs associated with their business activities.”¹⁵⁸ CSR involves companies taking steps beyond their legal obligations with the aim of developing cordial relationships with the host and impacted communities affected by their operations.¹⁵⁹

In light of the importance of CSR in the acquisition of social license to operate, investors are encouraged to use the firm’s resources to solve social problems within the communities they operate.¹⁶⁰ If organizations use their resources to build good relationships with host communities, this will facilitate firms’ ability to develop intangible assets that will serve as valuable competitive resource against other firms.¹⁶¹ Carroll suggests a conceptual framework for categorizing CSR at four levels of company obligations: “economic, legal, ethical and discretionary”.¹⁶² These four categories are based on three foundations of defining CSR, understanding of the needs of the recipients of CSR and sensitivity to the recipients. It is believed that this maximizes the result of a good relationship with local communities. While CSR is a viable tool in promoting good relationships between investors and host and impacted communities, local realities often influence this process. For example the underdevelopment and low level of economic and social security

common understanding on the concept of CSR, Freeman and Hasnaoui analyze the definitions of CSR adopted by the governments of United Kingdom, France, United States and Canada. Ina Freeman & Amir Hasnaoui, “The Meaning of Corporate Social Responsibility: The Vision of Four Nations” (2011) 100:3 J. of Business Ethics 419.

¹⁵⁶ Xavier Font, et al, “Corporate Social Responsibility: The Disclosure-Performance Gap” (2012) 33 Tourism Management 1544 at 1544.

¹⁵⁷ Michael Hopkins, *Corporate Social Responsibility and International Development: Is Business the Solution?* (New York: Routledge 2007) at 2.

¹⁵⁸ Jean-Frederic Morin & Amandine Orsini, *Essential Concepts of Global Environmental Governance* (London: Routledge 2015) at 2.

¹⁵⁹ Ako, Obokoh & Patrick, *supra* note 36 at 208.

¹⁶⁰ Amy Hillman & Gerald D. Keim, “Shareholder Value, Stakeholder Management, and Social Issues: What’s the Bottom Line?” (2001) 22:2 Strategic Management J. 125.

¹⁶¹ *Ibid* at 135.

¹⁶² Archie B. Carroll “A Three-Dimensional Conceptual Model of Corporate Performance” (1979) 4:4 Academy of Management Review 497.

ravaging the Niger Delta affects their expectations from oil companies. Oguda examines how poverty and economic marginalization can affect the expectations of host communities from oil companies and the effect of oil companies' failure to satisfy these expectations.¹⁶³

Though CSR helps to pacify host and impacted communities for a limited period of time,¹⁶⁴ it is not a long term mechanism that can put an end to oil related conflicts. It can only augment other deeply rooted methods that several generations of host and impacted community members can relate with.¹⁶⁵ While CSR is a tool for fostering cordial relationship between the oil companies and host and impacted communities,¹⁶⁶ it does not suffice and a long term mechanism which involves all parties and promotes development is required. This is the place of effective participation.

Upon a review of scholarly contributions to the importance of effective participation to development and an analysis of the legal and theoretical basis for multi-stakeholder participation, there is no work known to this author that has sought to apply the MSDA to the development of legal and institutional frameworks for oil and gas management in Nigeria in the manner this thesis approaches the subject. This thesis critically explores the shortcomings of relevant Nigerian statutes that have fostered low level participation of communities in decision making processes. It underscores the necessity for the recognition of participation as a fundamental legal obligation, which must be respected, protected and fulfilled in oil and gas management by the Nigerian government. This thesis also proposes the emerging MSDA as a policy template through which effective participation in oil and gas management could be implemented and realized. The MSDA provides normative instructions and guidance on how countries such as Nigeria can reflect robust stakeholder perspectives in oil and gas management. This thesis explores the meaning, nature and scope of the MSDA and provides justifications for its application in Nigeria.

¹⁶³ David Oguda, "Corporate Social Responsibility: Case Study of Community Expectations and the Administrative Systems, Niger Delta" (2012) 17:73 the Qualitative Report 1.

¹⁶⁴ Rhuks Temitope Ako, Lawrence Ogechukwu Obokoh & Okonmah Patrick, "Forging Peaceful Relationships Between Oil Companies and Host Communities in Nigeria's Delta Region: A Stakeholder's Perspective to Corporate Social Responsibility" (2009) 3:2 J. of Enterprising Communities (2009) 205; Alexis Rwabizambuga, "Negotiating Corporate Social Responsibility Policies and Practices in Developing Countries: An Examination of the Experiences from the Nigerian Oil Sector" (2007) 112:3 Business and Society Review 407.

¹⁶⁵ These deeply rooted methods are the mainstreamed human rights principles which include right to participate in decision making, right to protect the environment from pollution and access to justice. See The Human Rights-Based Approach: Statement of Common Understanding, (2003) UNDP, Annex B, SOWC04 at 91.

¹⁶⁶ Hillman & Keim, *supra* note 160.

Several on-the-ground practical challenges in Nigeria may stifle the success of this proposal.¹⁶⁷ This thesis therefore also examines practical problems that the MSDA framework might face in Nigeria. Lack of intergovernmental coordination, low capacity and resources, resource control, lack of financial resources and low level of education and awareness are identified as factors that may frustrate the success of the MSDA in Nigeria. The thesis concludes by proposing practical solutions on how these challenges could be addressed in order to give a proper foundation to the actualization of the multi-stakeholder framework based on the rights of host and impacted communities.

1.7 SCHOLARLY SIGNIFICANCE

The aim of this thesis is to explore the potential, practicality and challenges of incorporating multi-stakeholder participation into the legal and institutional frameworks of Nigeria's oil and gas management through the MSDA. Nigeria's enactment of several statutes relating to oil and gas management and creation of government departments to promote the development of the Niger Delta communities demonstrate the government's willingness to address the development challenges in the Niger Delta region and the setbacks of the oil and gas industry. However these laws and institutions have not been effective in resolving the challenges of Nigeria's oil and gas industry and the development problems of the Niger Delta region. As an alternative to the ineffectiveness of the existing regime, the host and impacted communities sometimes enter into agreements with oil and gas companies, however these agreements, which are limited in scope, do not address the factors impeding the participatory development of the host and impacted communities.¹⁶⁸ This reveals the necessity for a different approach that promotes participatory development in Nigeria's oil and gas management. Though scholars have pointed out the importance of stakeholders' participation to the development of the host and impacted communities in Nigeria,¹⁶⁹ there is still need to explore the viability of the UN-promoted MSDA

¹⁶⁷ These practical challenges include the level of illiteracy of the people, how the rate of poverty may affect the host and impacted community's representatives' sense of judgment, prevalence of political corruption in Nigeria and many more factors to be discussed in the proposed thesis. Adomokai & Sheate, *supra* note 139 at 500; Irobi, *supra* note 54 at 44; United Nations Development Programme, *Niger Delta Human Development Report* (Lagos: Perfect Printers publishers, 2006) at 42.

¹⁶⁸ Kiiikpoye, *supra* note 150 at 271.

¹⁶⁹ Odumosu-Ayanu, *supra* note 151; Ako: Nigeria's LUA *supra* note 145.

in fostering participatory development in Nigeria's oil and gas management. Hence in order to promote the participatory development of the host and impacted communities, this thesis proposes legal and institutional frameworks for the incorporation of the MSDA and with due consideration to the cultural, political, social and economic dynamics of the Niger Delta region.

CHAPTER 2

MULTI-STAKEHOLDER DIALOGUE APPROACH – AN OVERVIEW

2.1 EVALUATION OF THE CONCEPT OF MULTI-STAKEHOLDER DIALOGUE

Dialogue connotes a “conversation in which the message becomes clear to all, resulting in a common understanding which requires voluntary participation and mutual influencing from all parties, ensuring the incorporation of different opinions and preferences in the end result.”¹ In relation to community projects, dialogue may be defined as “an integral part of a stepwise process of decision making, which helps to develop better solutions acceptable to all parties, by incorporating public concerns in decision making, to build trust and gain community support for a project.”² The idea of dialogue in decision making involves the procurement of stakeholders’ opinions and judgment on a project thereby giving everyone a sense of responsibility. The imperative question that arises in dialogue processes is the relevant parties to be invited, that is, who is a stakeholder?

A stakeholder is a person that is involved in a project or may be affected by the outcome of a project. Determination of who a stakeholder is depends on what constitutes legitimate stake.³ In relation to participation in environmental management, stakeholders are referred to as “polluters who effect change by causing pollution and victims who are affected by the pollution.”⁴ In relation to oil and gas production management, stakeholders are those actively involved in decision making and those directly affected by oil production activities. Therefore the Niger Delta communities, being the direct recipients of the adverse effect of oil and gas production, are stakeholders and the oil companies responsible for environmental degradation through oil spillage and gas flaring are also stakeholders. The Nigerian Federal Government as the key decision maker in oil and gas management in Nigeria is also a stakeholder. The MSDA promotes the involvement of

¹ Rob Van Tulder et al, “What Characterizes a Strategic Shareholder Dialogue?” in the Dutch Booklet “The Strategic Stakeholder Dialogue” Chapter 2 (2004) English Translation by Lewis Van Leeuwen I (Van Tulder).

² Phil Richardson, *What is Stakeholder Dialogue and Why is it Important?* (Poland: Galson Sciences, 2012) at 3.

³ Mark S. Reed et al, “Who’s in and Why? A Typology of Stakeholder Analysis Methods for Natural Resource Management” (2009) 90 J. of Environmental Management 1933.

⁴ Ronald Harry Coase, “The Problem of Social Cost” in *Ibid* at 1934.

stakeholders in decision making by giving them the opportunity for voluntary participation and recognition of their views in order to foster trust and support for a project. It is a UN framework that promotes involvement of stakeholders in the decision making process in order to promote trust and knowledge sharing.⁵

2.2 IMPLEMENTING EFFECTIVE MULTI-STAKEHOLDER PARTICIPATION IN NIGERIA'S OIL AND GAS MANAGEMENT

Implementation of effective multi-stakeholder participation requires an enabling legal and institutional framework as its foundation. The Nigerian government's commitment to participatory development of the oil and gas producing region commences with making the necessary legal and institutional reforms. The incessant crises and level of underdevelopment of the Niger Delta are enough to compel the government to promote participatory development. When there is an unusual occurrence that propels a government to take active steps to avert further damage, such circumstance is referred to as a "triggering event".⁶ For instance, the Warri crisis erupted in 1997 based on the disagreement of the Itsekiri and Ijaw ethnic groups regarding the location of a local government headquarters formed by the then military government of General Sanni Abacha. Despite the political and cultural nature of this crisis, six Shell BP installations were overtaken by the rioting communities as the people ceased the opportunity to vent their anger on the oil companies.⁷ Later in November 1999, twelve policemen were killed among others in the course of the Odi community crisis and this aroused the anger of then Civilian President Obasanjo who evoked emergency powers. The military swayed into action and left over 300 people dead. Properties were destroyed and the survivors took shelter in the bushes. The Odi community was practically destroyed with only a church and a bank left.⁸ Afterwards, legal action was initiated and on February 19, 2013, a Federal High Court, sitting in Port Harcourt, ordered the Nigerian Federal Government to pay ₦37.6 billion as compensation to the people of Odi within three

⁵ Karin Bäckstrand, "Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness" (2006) 16 *European Environment* 290.

⁶ Glen Gardner & Heather Heavin, "Collaborative Policy Management: Involving Citizens and Stakeholders" (2013) Johnson Shoyama Graduate School of Public Policy Workshop Paper 1.

⁷ Bronwen Manby, "The Warri Crisis: Fuelling Violence" (2003) 15:18 *Human Rights Watch* 1.

⁸ Osita Nwajah, "A Tale of Military Massacres: From Ogoni Land to Odi Town" (December, 1999) online: <http://www.waado.org/environment/fedgovt_nigerdelta/bayelsainvasion/FederalGovernInvadesBayelsa/MilitaryInOdi/MilitaryMassacres.html>.

weeks.⁹ As a result, the Odi Community Compensation Trust Fund Management Committee was set up to oversee the disbursement of compensation and by December 24, 2014, the Chairman of the Committee, Professor Kobina Imananagha stated that the Federal Government had completed payment of the compensation as directed by the court.¹⁰ Other than the payment of compensation in accordance with the court order, no regulatory reform was implemented to avoid future conflicts. The Odi and Warri crises are sufficient triggering events to propel the implementation of a viable multi-stakeholder participatory policy and the government's effective intervention is desired to alleviate the level of poverty in this region.

Application of the MSDA as a normative tool for promotion and protection of the participatory rights of host and impacted communities in Nigeria's oil and gas management is dependent on effective execution of all the elements of the MSDA which are interrelated.¹¹ Lack of compliance with any of the elements may affect the productivity of the approach and lead to an exercise in futility. These elements are discussed below.

2.2.1 Early Notification

An important element of the MSDA is early notification¹² of all stakeholders in order for them to have enough time to acquire knowledge about the project and make informed contribution to the process. In Nigeria, oil companies usually consult with the government leaving the community members in the dark.¹³ Representation of the Niger Delta people by the government in resource management has been faulted due to past experiences of "states' lack of capacity, lack of interest

⁹ Nicholas Ibekwe, "Odi Massacre: Court Orders Nigerian Government to Pay N37Billion Damages to Residents" (20 February, 2013) *Premium Times*.

¹⁰ Ernest Chinwo, "Odi: FG has Completed Payment of Compensation, Says Community" (December 24, 2014) *Thisday Live*.

¹¹ Carmen Malena, "Challenges and Best Practices in the Management and Governance of Multi-Stakeholder Partnerships Involving UN and Civil Society Actors" (February 2004) Background Paper for the Multi-Stakeholder Workshop on Partnerships and UN-Civil Society Relations, Pocantici, New York; Felix Dodds, "Multi-Stakeholder Partnerships: Making them Work for the Post-2015 Development Agenda" (2015) Global Research Institute, 2015 Partnership Background Note 1.

¹² Lynn Richards & Matthew Dalbey, "Creating Great Places: The Role of Citizen Participation" (2006) 37:4 *Community Development* 18 at 23.

¹³ Okechukwu Ibeanu, "Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria" (2000) 6 *Environmental Change & Security Project Report* 19.

or even conflict of interest”.¹⁴ More so, this approach often works to the disadvantage of Niger Delta communities because the government fails to communicate information received from the oil and gas companies to the people.¹⁵ Host and impacted community members are entitled to early and adequate information about projects in order to have adequate time to elect their representatives and consult with experts in relation to projects. Civil society organizations can provide requisite information and sometimes represent them at stakeholder meetings. Early notification provides opportunity to make productive contributions during project planning before decisions are made.¹⁶

Early notification involves intimating the public of the facts of a project, for example, duration, health implications, benefits of the project to the community and the exact project site. Notification is “a one-way process of communication in which the public plays a passive consumer role of government information. Notification does not, itself, constitute consultation, but can be a first step. In this view, prior notification allows stakeholders the time to prepare themselves for upcoming consultations.”¹⁷ It prevents conflicts and it is the first step towards acquiring the social license to operate.

To have a successful multi-stakeholder dialogue, adequate information about the proposed project must be dispensed.¹⁸ The stakeholders need to be transparent and truthful in divulging all relevant information. Unnecessary technicalities and ambiguities may confuse the representatives of the host and impacted communities. Information couched in a language easily comprehensible by all parties will help everyone make “informed judgments about the changes that will affect their

¹⁴ Ibrionke T. Odumosu-Ayanu, “Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Agreement Framework” (2014) 15 *Melbourne J. of Int’l L.* 473 at 478.

¹⁵ Past incidences of corrupt practices by government representatives show that the Nigerian government lack the political will to give the oil communities access to necessary information on oil and gas management. Chris Newsom, “Conflict in the Niger Delta: More than a Local Affair” (2011) United Nations Institute of Peace Special Report 271 page 1 at 13-14.

¹⁶ Government of Canada, “Key Elements of Meaningful Public Participation” (2012) Canadian Environmental Assessment Agency.

¹⁷ Delia Rodrigo & Pedro Andrés Amo, “Background Document on Public Consultation” (2006) Organization for Economic Cooperation and Development [org/dataoecd/4/43/36785341](http://dataoecd.org/4/43/36785341) at 1.

¹⁸ Sam Kaner, Jamie Watts and Emile Frison, “Participatory Decision-Making: The Core of Multi-Stakeholder Collaboration” (2008) 19 *Institutional Learning and Change (ILAC) Initiative Brief* 1.

lives.”¹⁹ Early notification processes do not only involve oil companies; other stakeholders also have roles to play. Host and impacted communities need to take advantage of this by seeking informed counsel early enough in order to participate effectively from the inception of the dialogue process. Preliminary negotiations involve stakeholders bargaining their level of participation in the project, for example, community members may insist on participating not only in the preliminary consultation process but also in the project planning and profit sharing. This is also the time to obtain the contact information of the management of the oil companies and representatives of the government for adequate access even after the preliminary planning phase.²⁰

The government is not left out of this phase. The government needs to be informed early enough by the oil companies of the strategy for host and impacted communities’ participation in their operations and their plans on corporate social responsibility as the oil companies’ contribution towards the participatory development of the communities. The relevant government agency or department, upon receiving the necessary information, will know what resources to commit to the project, members of staff that will be actively involved, draw up plans for effective participation and attend preliminary meetings.²¹

2.2.2 Appropriate Representation and Participation

Appropriate representation and participation means that all stakeholders must be adequately represented and have the opportunity to voluntarily and effectively participate. Multi-stakeholder dialogue “represents a special form of democracy, whose goals reach beyond multi-party representation. They give allocated seats to different groups rather than majority vote, and make room for extensive deliberation, giving voice to weaker or smaller interests.”²² Appropriate representation requires determining the section of the public that will be affected by the project

¹⁹ International Finance Corporation, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets* (Washington D.C.: World Bank Group 2007) at 29.

²⁰ OEP Gas Outreach Team, “Ideas for Better Stakeholder Involvement in the Interstate Natural Gas Pipeline Planning Pre-Filling Process” (2001) FERC 1.

²¹ *Ibid* at page 11.

²² Jeroen F. Warner, “More Sustainable Participation? Multi-Stakeholder Platforms for Integrated Catchment Management” (2006) 22:1 *Intl J. of Water Resources Development* 15 at 21; Svitlana Kravchenko & John Bonine, *Human Rights and the Environment: Cases, Law and Policy* (North Carolina: Carolina Academic Press, 2008).

and to ensure that such group is adequately represented.²³ In the instance of Niger Delta communities, it is necessary that the representatives include people residing in the affected communities. Selection of representatives by government or the investors is not permissible; the communities must be allowed to elect their representatives. For instance, a representative who has his/her origin from the Niger Delta but resides in other parts of the country may not represent the host and impacted communities adequately.

Background knowledge of the representatives is also important. For example, a group of representatives that comprises only illiterate village heads/chiefs may not amply represent the people in discussions that involve technical terms. Election from different interest groups within the communities allows for broad representation. Experts can contribute during technical discussions while residents can represent the history and societal contributions of the people. Appropriate representation requires having a requisite number of trustworthy and people-elected delegates, with required knowledge of what the dialogue entails.

Effective participation is also an essential element of the MSDA. Several scholars have underscored the importance of participation to the success of any project especially development projects.²⁴ Taking a cue from the Food and Agriculture Organization of the United Nations, Lamb, Varettoni and Shen define participation as “various forms of direct public involvement where people, individually or through organized groups, can exchange information, express opinions and articulate interests, and have the potential to influence decisions or the outcome of specific issues.”²⁵ With respect to resource management, “participation is where individuals, communities, and stakeholder groups can exchange information, articulate interests, and have the potential to

²³ Gina Gilbreath Holdar & Olha Zakharchenko, *People's Voice Project: International Centre for Policy Studies* (Ukraine: iMedia Ltd, 2002) at 15.

²⁴Rhuks Temitope Ako, Lawrence Ogechukwu Obokoh& Patrick Okonmah, “Forging Peaceful Relationships between Oil-Companies and Host-Communities in Nigeria’s Delta Region: A Stakeholder’s Perspective to Corporate Social Responsibility” (2009) 3:2 J. of Enterprising Communities 205; Ibronke T. Odumosu, “Revisiting NGO Participation in WTO and Investment Dispute Settlement: From Procedural Arguments to (Substantive) Public Interest Considerations”(2006) 44 Can. Y.B. Int'l L. 353; Sonja Vermeulen& Lorenzo Cotula, “Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa” (2010) 37:4 J. of Peasant Studies 899.

²⁵ Robert Lamb, Bill Varettoni & Chunli Shen, “Participatory Development and the World Bank” (2005) 14:2 Int'l Affairs Review 171.

influence decisions or the outcome of natural resource management issues.”²⁶ Participation entails giving all stakeholders the opportunity to voluntarily articulate their concerns and opinions about projects and having influence over decision making.

Effective participation involves first, dissemination of information, which entails revealing the intention of oil companies and the expected risk of the project to the communities.²⁷ Second is consultation which requires meeting with the village heads and social groups and interviewing local residents. Third, collective assessment by all stakeholders is part of effective participation and this stage requires representatives with adequate knowledge of the project. Host communities, investors and other stakeholders meet to deliberate on their interests, assess the project and decide whether the project should commence or continue. Fourth, effective participation involves shared decision making and collaboration which requires all stakeholders to equally decide on the way forward. This entails resolving conflict, conceding to other people’s view and insisting on unwavering demands.²⁸ All these processes are interrelated and total compliance is required for productive stakeholder participation. The MSDA results in more informed decisions, avoidance of imminent conflicts, sense of ownership for all stakeholders, creation of peaceful atmosphere and above all, promotion of the participatory right of host and impacted communities.²⁹ It also helps oil companies acquire the social license to operate thereby creating a safe and friendly work environment for their staff members.

Effective participation and productive dialogue requires sensitivity to community values, and this is crucial.³⁰ The host and impacted communities have long term traditions that cannot be easily changed and attempts to undermine these values may result in conflict. Rather these values and traditions require due consideration and acknowledgment during dialogue processes and decision making. Oil companies must intimate their workers of these values and government must refrain from contradicting these values. For example, host and impacted communities use particular plots

²⁶ Robin Mearns et al, “Community-Based Resource Management” (2002) 2 Australia Department of Sustainability and Environment 2005.

²⁷ This entails revealing the intention of the oil companies and the expected risk of the project to the communities.

²⁸ Lamb, Varettoni & Shen, *supra* note 25 at 175.

²⁹ African Development Bank, “Handbook on Stakeholder Consultation and Participation in ADB Operations” (2010) OESU 1.

³⁰ See Karen Engle, *The Elusive Promise of Indigenous Development* (London: Duke University Press 2010) at 141-183.

of land for religious purposes and government's allocation of such land for oil production will only incur the wrath of the people. According to the report of the Technical Committee on the Niger Delta, one of the misfortunes of the Niger Delta region is the "devaluation of its values and family ethos."³¹ Values revered by the Niger Delta communities must be respected if the goal is to have peaceful participation and the development of a cordial relationship between stakeholders.

2.2.3 Deliberative Democracy

Deliberative democracy, as an element of the MSDA, involves making stakeholders' deliberation the center of decision making. That is, decisions are made subject to voluntary, free and fair deliberations by all parties. Deliberative democracy calls for "a free association of equal citizens who engage in a rational discussion on issues, presenting options and seeking a consensus on what is to be done."³² Gutmann and Thompson argue that deliberative democracy is a process of government and citizens giving reasons for their action, which means that government is obliged to give reasons for decisions it makes and citizens are allowed to give reasons for their response.³³ Deliberative democracy promotes the recognition and respect of each stakeholder's views, giving equal weight to their opinions because it represents the uniqueness of each stakeholder and the group they represent.³⁴

Equality is an important characteristic of deliberative democracy. Each stakeholder must be seen as equal and their views accorded equal recognition. Equal and non-compelled participation is important to deliberative democracy.³⁵ In addition:

All issues have to be open to question: all opinions voiced in conditions of equality and free domination. Decision processes have to be conditioned by the desire of participants to reach agreement in the absence of coercion or threat of coercion. To this end each has to put forward reasons that others could reasonably accept, and

³¹ Technical Committee on the Niger Delta, "Niger Delta Report" (November 2008) Vol. 1, Page 1 at 87.

³² Steven Wheatley, "Deliberative Democracy and Minorities" (2013) 14:3 EJIL 507 at 508.

³³ Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (New Jersey: Princeton University Press 2004) at 2.

³⁴ David Miller, "Deliberative Democracy and Social Choice" (2007) 40:1 Political Studies 54.

³⁵ Julia Black, "Procuralizing Regulation" (2000) 20 OJLS at 597.

seek acceptance for their reasons, and reject proposals on the basis that insufficiently good reasons have been offered for them.³⁶

Gutmann and Thompson argue that deliberative democracy requires that relevant information must be accessible, the process must produce a binding decision and there must be possibility of further dialogue.³⁷ Deliberative democracy in Nigeria's oil and gas management requires equality of stakeholders' views regardless of what group the participant represents. Giving government officials undue powers during dialogue defeats the requirement of equality in productive dialogue processes. This position is difficult due to the financial gap between the host and impacted communities and the oil companies. In such instance, it requires effort on the part of the parties to enforce equality.

2.2.4 Transparency

It is necessary to avoid secrecy in dialogue processes and in the dissemination of information about its outcome. It is pertinent to divulge all necessary information to all stakeholders and discrimination in the process of inviting parties for dialogue sessions must be avoided.³⁸ All parties must divulge all necessary information and no stakeholder restriction to any dialogue sessions.³⁹ Rob Van Tulder et al define transparency as "being open about points of view, opinions, assumptions and expectations, being open about relevant business interests, and supplying all relevant parties with all relevant information."⁴⁰ The MSDA does not imply "a form of back room politics in which everything takes place behind closed doors without transparency, feedback or accountability afterwards."⁴¹ Where parties hoard information, stakeholders will not trust the outcome of the dialogue and this will defeat the whole essence of the process. To ensure

³⁶*Ibid* at 609.

³⁷ Gutmann & Thompson, *supra* note 33 at 4.

³⁸ On the importance of accountability and transparency to natural resource management, see Andres Mejia Acosta, "The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources" (2013) 31 Development Policy Review 89; Huma Haider, "Participation in Transparency and Accountability Initiatives: The Case of Budgetary Processes and Extractive Industries" (2012) Governance and Social Development Resource Centre 1 at 5.

³⁹ Seemin Qayum, et al, "Multi-Stakeholder Decision-Making" (2012) UNDP, Bureau for Development Policy Environment and Energy Group, 1 at 27.

⁴⁰ Van Tulder, *supra* note 1 at 10.

⁴¹ Van Tulder, *supra* note 1 at 7.

transparency, it is important to have a plan for the process from inception, with guiding rules, such as parties' obligations to divulge necessary information and openness of dialogue process to all stakeholders without restriction.⁴²

The results of multi-stakeholder dialogue must also be transparent. The public must be able to have access to the results and make voluntary comments without fear of coercion. The transparency responsibility of oil and gas companies is not only to the government but also to the host and impacted communities especially on mechanisms implemented for the cleaning up of the environment. The transparency requirement subsists while the project is going on and after conclusion. For example, revenue transparency subsists throughout oil and gas production and afterwards. The revenue transparency objective has been promoted by the Extractive Industries Transparency Initiative (EITI) in the context of management of revenue derived from extractive resource production.⁴³

The EITI is an international standard that seeks to improve natural resource revenue transparency. In countries participating in EITI, oil, gas and mining companies are required to publish what they pay to governments and governments are required to publish what they receive from companies. These figures are then reconciled by an independent body. A multi-stakeholder group that includes representatives from the government, industry and civil society oversees the EITI process in each country.⁴⁴

In order to promote transparency, Nigeria signed up to the EITI in June 2003.⁴⁵ Subsequently, the Nigeria Extractive Industries Transparency Initiative⁴⁶ (NEITI) was established “to ensure transparency and accountability in the payment and receipt of revenue by all Extractive Industry companies of revenue due to or paid to the Federal Government.”⁴⁷ Despite the establishment of NEITI, lack of legal frameworks to foster transparency impedes the effort to make government

⁴² Christopher Gilbert Sheldon et al, “Innovative Approaches for Multi-Stakeholder Engagement in the Extractive Industries” (2013) 29 Extractive Industries Development 1.

⁴³ Extractive Industries Transparency Initiative, *The EITI Standard* (EITI International Secretariat: Norway 2015).

⁴⁴ Natural Resource Governance Institute, “EITI” online: <<http://www.resourcegovernance.org/issues/eiti>>.

⁴⁵ Zainab Ahmed, “EITI Implementation in Nigeria: Outcomes, Impacts and Challenges” (2014) Global Commodities Forum I at 5.

⁴⁶ Established by the Nigeria Extractive Industries Transparency Initiative Act, 2007

⁴⁷ *Ibid* at section 2.

expenditure transparent.⁴⁸ However, in accordance with the transparency agenda of the EITI, the Federal Government began to publish monthly oil revenue allocations to states and local governments which are less than 50% of the total oil revenue. Failure to report the disbursement of the Federal allocation which comprises 50% of the total revenue makes the process questionable.⁴⁹ More so, it has been reported that the NEITI has not had any significant impact on Nigeria's resource management so far.⁵⁰ A productive transparency agenda requires a supporting legal framework, adequate revenue allocation and expenditure reporting at all levels of government.⁵¹ Though this may seem difficult in a politically corrupt environment like Nigeria,⁵² the success of a multi-stakeholder dialogue depends on it and it is believed that transparency leads to better governance.⁵³

2.2.5 Follow Through

A multi-stakeholder dialogue process can only produce effective result if stakeholders actively participate until its conclusion and not only during the planning process.⁵⁴ The MSDA proposes that after prior dialogue, parties must be involved in the implementation process till the end.⁵⁵ Over time, oil companies have restricted host and impacted communities' involvement to only preliminary consultation after which they are ignored in the process of oil production and revenue

⁴⁸ One of the identified gridlocks is the failure to pass the Fiscal Responsibility Bill into law. Fatima Diallo & Richard Calland, *Access to Information in Africa: Law, Culture and Practice* (Boston: Brill Publications, 2013) at 136. For a review of the activities and shortcomings of EITI, see Bashir Bature, "Transparency and Accountability: Adaptation and Implementation of Extractive Industries Transparency Initiative (EITI) Principles in Nigeria" (2014) 3:8 The Macrotheme Review 107.

⁴⁹ Natural Resource Governance Institute, "Nigeria: Transparency Snapshot" online: <<http://www.resourcegovernance.org/countries/africa/nigeria/transparency-snapshot>>.

⁵⁰ Nicholas Shaxson, "Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit" (2009) Chatham House, Royal Institute of International Affairs 1 at 44.

⁵¹ Aaron Sayne, "Nigeria's Petroleum Industry Bill: Improving Sector Performance through Strong Transparency and Accountability Provisions" (2011) Facility for Oil Sector Transparency in Nigeria, Policy Brief, Revenue Watch 1 at 3-4.

⁵² Daniel Egiegba Agbibo, "Between Corruption and Development: The Political Economy of State Robbery in Nigeria" (2012) 108:3 J. of Business Ethics 325.

⁵³ Morgan Bazilian, et al, "Oil, Energy Poverty and Resource Dependence in West Africa" (2013) 31 J. Energy & Nat. Resources L. 33 at 46-53.

⁵⁴ Department of Economic and Social Affairs, "Multi-Stakeholder Dialogues: Learning from the UNCSD Experience" (April 2002) DESA/DSD/PC3/BP4.

⁵⁵ UNDP, "Multi-Stakeholder Engagement Processes" A UNDP Capacity Development Resource, Conference Paper 7, Working Draft, November 2006.

allocation.⁵⁶ Multi-stakeholder dialogue requires continuity throughout the period of oil production because this shows “strong commitment of the stakeholders combined with the ability to autonomously set a coherent, manageable agenda and push it forward.”⁵⁷

It is recommended that a plan for continued stakeholder participation be made from the inception of the dialogue process. This involves following up with stakeholders and finding out new concerns that were not discussed during the preliminary dialogue process.⁵⁸ This level of participation is necessary because other factors may come to light after the commencement of oil production that were not previously known to the host and impacted communities or other stakeholders. Regular and continuous dialogue and feedback between stakeholders will help to address potential conflicts, foster operational multi-stakeholders decision-making and help evaluate compliance with stated objectives and goals.⁵⁹

Follow through will demonstrate stakeholders’ commitment to achieve the objective of the multi-stakeholder dialogue. It will serve as a reminder to oil companies and government of their obligations and a reassurance of the respect and recognition of the participatory right of host and impacted communities. This gives the host and impacted communities a stronger sense of ownership of the oil production system and will consequently reduce conflict. The follow through process requires a planned out procedure, known to all parties, which specifies how all stakeholders can follow through on the dialogue processes and management decisions. This includes giving host and impacted communities the opportunity to call for dialogue at reasonable intervals of oil production thereby giving them avenues to express their grievances for the failure of other parties to comply with agreed terms and this is only possible where community members have access to representatives of oil companies and government officials who are committed to accord due recognition to the concern of the people.

⁵⁶ Patrick B. Ereba & Boniface B. Dumpe, “Shell’s Poor Stakeholder Engagement” in *Shell in Niger Delta: A Framework for Change* (ECCR: 2010) at 28.

⁵⁷ Department of Economic and Social Affairs, “Multi-Stakeholder Dialogues: Learning from the UNSCD Experience” (April 2002) Background, Study 2, DESA/DSD/PC3/BP4.

⁵⁸ United States Environmental Protection Agency, “FRP Guide to Stakeholder Engagement” (November 2007) Facility Reporting Project, CERES, 1.

⁵⁹*Ibid* at 23.

2.2.6 Accountability

All stakeholders must be accountable, that is, the oil companies, government and Niger Delta communities must be answerable for their actions relating to oil and gas management.⁶⁰ Oil and gas companies are accountable to the Niger Delta communities, Nigerian government and international community for their activities that degrade the environment. Accountability of oil companies can be enforced through active implementation of the provisions against illegal oil and gas activities and the consequent penalties. The government is accountable to the Niger Delta people on the evocation of statutory retributive actions on oil companies for environmental degradation and this can be aided by creating a channel for community members to make complaints regarding environment degrading activities by the oil companies and a government department that is adept in addressing such complaints and ensuring that the oil companies comply. The representatives of the Niger Delta communities are accountable to their communities on their effective and loyal participation. The duty to be accountable subsists until the end of the oil and gas production projects and afterwards. This can be achieved by periodic town hall meetings where the representatives report their activities to the community members and prepare to answer questions and address complaints.

2.3 INTERRELATIONSHIP OF THE ELEMENTS OF THE MSDA

All the elements of the MSDA are interrelated. They are not an open ended procedure but they are continuous and must be maintained.⁶¹ For example, in the course of following through other factors may be discovered and stakeholders may need to deliberate on them. Accountability of all parties is a continuous process and requires the dedication of all stakeholders.

The Nigerian government's present demeanour shows lack of commitment to the participatory development of the Niger Delta communities. As a party to the Resolution on a Human Rights-Based Approach to Natural Resources Governance⁶² and the International Covenant on Civil and Political Rights,⁶³ the Nigerian government is not oblivious to this era of effective public

⁶⁰ *Ibid.*

⁶¹ Gardner & Heavin, *supra* note 6.

⁶² Adopted May 2, 2012 at the 51st Ordinary Session, ACHPR 224.

⁶³ Adopted 16 December 1966, (entered into force 23 March 1976) 999 UNTS 171.

participation in management as promoted by the international community. Omorogbe encapsulates the realities of the implementation of participatory development in Nigeria's oil and gas management thus:

...reality is the low level of adaptability of the (Nigerian) governments to present trends of transparency, democratic governance, and incorporation of the people and stakeholders in the development process...The new Nigerian democracy is still in a learning phase and is yet to realize that the essence of democracy is that voices must be heard and that legal aspirations of the people should be accommodated. The governments must learn that companies cannot take over the role of governance any more...There is no alternative to the governments playing their rightful and primary roles as initiators and providers of development and basic amenities.⁶⁴

Enforcement of the participatory right of Niger Delta peoples requires the commitment of all stakeholders and the government's stanchness in promoting participatory development by sending delegates during dialogues or stakeholders' meetings and refusing to influence the opinions of other stakeholders will enhance and determine the faith and trust others will have in the process. Participation is about having the ability to communicate and influence decisions and this is only realizable if the government creates an avenue for the representatives of the Niger Delta peoples to reach government officials and communicate their concerns. Community members may become weary and offended if their concerns are not duly addressed. Therefore the government must be prepared to address their grievances by imposing adequate penalty when there is environmental degradation by the oil companies⁶⁵ and acceding demands on community-sensitive issues. Transparent and judicious management of revenue and prior consultation with community members before granting licences is requisite for a peaceful coexistence of all stakeholders. However the host and impacted communities' ability to participate effectively in oil and gas management requires financial commitment for payment of experts, transportation of delegates to meetings and payment of solicitors' fees among others. In order to optimize the host and impacted

⁶⁴ Yinka Omorogbe, "The Legal Framework for Public Participation in Decision-Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless" in Donald Zillman, Alastair Lucas & George Pring *Human Rights in Natural Resource Development* (Oxford: Oxford University Press 2002) at 581-582.

⁶⁵ Caroline L. Miller, *Implementing Sustainability* (London: Routledge 2011) at 30-31.

communities' contribution to oil and gas management and alleviate the effect of lack of funds by the communities, government allocation of funds that will provide for the expenses incurred during participation is necessary. This will demonstrate the government's commitment to support the Niger Delta communities' effort to improve their participatory development. For instance, the Canadian government through the Participant Funding Program provides financial support for expenses incurred by Aboriginal communities and NGOs in participating in federal environmental assessment.⁶⁶ Also the Ontario government through the Canadian Environmental Defence Fund provides funding for public participation in drinking water safety decision-making.⁶⁷

Oil companies' involvement in the participatory development of Niger Delta communities is not limited to consultation with the communities before the commencement of projects and compliance with oil and gas regulations but it extends to the involvement of the communities in social development projects. Funds are better channelled and projects are more appreciated when the people have a voice to choose the projects they need in their community.⁶⁸ Ability of host and impacted communities' delegates to communicate with the management of the oil companies occasionally and according due weight to communities' opinion will foster the actualization of multi-stakeholder management of Nigeria's oil and gas resources. The Niger Delta communities must also be prepared to take the dialogue processes and management duties seriously by electing knowledgeable delegates and refraining from illegal activities, such as vandalism and property destruction that adversely affect oil and gas production. Dialogue is a better way to communicate and achieve agreement between stakeholders.

⁶⁶ Canadian Environmental Assessment Agency, *Participant Funding Program Guide* (National Energy Board, 2014).

⁶⁷ Eva Ligeti & Burkhard Mausberg, "Public Participation in Drinking Water Safety Decision-Making" (2001) Walkerton Inquiry Submission, 1.

⁶⁸ The Global Memorandum of Understanding (GMOU) model which has been implemented in some oil and gas contracts in Nigeria gives communities the choice of developmental projects to be implemented by oil companies. Ibiro Oduosun-Ayanu, "Foreign Direct Investment Catalysts in West Africa: Interactions with Local Content Laws and Industry-Community Agreements" (2013) 35 N.C. Cent. L. Rev. 65.

CHAPTER 3

EFFECTIVE STAKEHOLDER PARTICIPATION: CRITICAL REVIEW OF KEY LEGAL FRAMEWORKS FOR OIL AND GAS MANAGEMENT IN NIGERIA

In order to promote the implementation of effective participatory development in Nigeria's oil and gas sector, it is apposite to review the subsisting relevant legal framework and how they affect the enforcement of the participatory right of stakeholders. More so, an analysis of judicial precedents demonstrates the efforts of host and impacted communities in enforcing their rights and implementing remedial measures against defaulters within Nigeria's judicial system and in foreign courts.

3.1 LEGAL FRAMEWORK FOR OIL PRODUCTION IN NIGERIA

This section reviews the existing legal regime of Nigeria's oil and gas management and reveals its inadequacy in protecting the participatory right of Niger Delta peoples. Despite the direct effect of these laws on the Niger Delta communities compared to other parts of the country, none of these laws acknowledge the Niger Delta peoples as stakeholders in Nigeria's oil and gas management. This section examines the relevant laws and identifies the provisions that contradict or limit the practicability of the participatory right of the Niger Delta peoples with suggestions on how they can be amended or interpreted in conformity with the values of the MSDA and best international practices.

3.1.1 Constitution of the Federal Republic of Nigeria, 1999

The Nigerian constitution¹ is the basic norm from which other statutes derive their foundation and any inconsistency with the constitution renders the other law "null and void to the extent of its inconsistency".² The constitution sets out the powers and duties of the different levels of government and the rights and duties of the citizens. The Nigerian Federal Government, as the holder of the "entire property and having control of all minerals, mineral oils and natural gas under

¹ Constitution of the Federal Republic of Nigeria [Nigeria], Act No. 24, 5 May 1999 (CFRN).

² Section 1(3) of CFRN *ibid.*

or upon any land in Nigeria,”³ is at the fore of the management of Nigeria’s natural resources. Notwithstanding the Federal Government’s exclusive jurisdiction over oil and gas management,⁴ there are other constitutional duties that apply to the state and local governments with regards to the development of the Niger Delta communities. Chapter II of the constitution provides for the “Fundamental Objectives and Directive Principles of State Policy” which prescribes the duties of all organs of government and anyone in government (executive, judiciary or legislative). Though the provisions of Chapter II set out the primary needs of the citizenry and the duty of the government to actualize them, they remain non-justiciable, thereby reducing them to a guide rather than government’s enforceable duties.⁵ The lack of ability to enforce the provisions of Chapter II deprives Nigerians including the Niger Delta peoples the ability to hold the government accountable for failure to comply with the directive principles.

The social objectives provide that “governmental actions shall be humane, and exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community, shall be prevented.”⁶ States are mandated to direct their policy to guarantee that “all citizens have opportunity to secure adequate means of livelihood without discrimination and there are adequate medical and health facilities for all persons.”⁷ These obligations are far from actualized in the Niger Delta communities and the government is answerable to the people for relenting in its duties. Government has failed in its constitutional duty of providing social welfare and the people especially the host and impacted communities are forced to bear the brunt. Oil production has been detrimental to host and impacted communities⁸ and this contradicts the constitutional social order. Oil spillage and gas flaring have destroyed the ecosystem and polluted the water thereby depriving the Niger Delta communities of their means of livelihood.⁹ Despite

³ Section 44(3) of CFRN *supra* note 1.

⁴ Item 39, Exclusive Legislative List, Part 1, Second Schedule, CFRN *supra* note 1.

⁵ Section 6(6)(c) of CFRN *supra* note 1.

⁶ Section 17(2) of CFRN *supra* note 1.

⁷ Section 17(3) of CFRN *supra* note 1.

⁸ Marcus O. Edino, Godwin N. Nsofor & Leonard S. Bombom, “Perceptions and Attitudes towards Gas Flaring in the Niger Delta, Nigeria” (2010) 30 *The Environmentalist* 67; Isiaka Alani Badmus, “Oiling the Guns and Gunning for Oil: Oil Violence, Arms Proliferation and the Destruction of Nigeria’s Niger-Delta” (2010) 2:1 *J. of Alternative Perspectives in the Social Sciences* 323.

⁹ Samson Imasogie Omofonmwan & Lucky Osaretin Odia, “Oil Exploration and Conflict in the Niger-Delta Region of Nigeria” (2009) 26:1 *J. Hum Ecol* 25; Phillippe Calain, “The Interaction between Non-Governmental Organizations and Extractive Industries: a Perspective from Medecins Sans Frontieres” (2012) 94:887 *Int’l Review of the Red Cross*

the despicable condition of the environment due to oil and gas production and the resultant health problems, the health facilities in the Niger Delta communities are below average.¹⁰ The environmental objectives provide that “the government shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria.”¹¹ The government’s lackadaisical attitude towards enforcing remedial or punitive actions for environmental degradation and cleaning up of production waste by oil companies contravenes its duty of environmental protection. The government’s disposition to the social and environmental condition of the Niger Delta communities is an antithesis of the dictates of Chapter II of the constitution and there is no recourse to the courts to enforce compliance based solely on Chapter II of the Constitution. However, some of these fundamental objectives are also addressed under the African Charter and member states are obliged to recognize these rights. This provides recourse for Nigerians with regards to the provisions of Chapter II of the Constitution at the regional level.¹²

3.1.2 Petroleum Act

The Petroleum Act¹³ provides for the “exploration of petroleum from the territorial waters and the continental shelf of Nigeria and vests the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable therefrom in the Federal Government and for all other matters incidental thereto.”¹⁴ This Act is the foundation of natural resource management centralism in Nigeria. In conjunction with the constitution, it vests ownership of all petroleum resources from every part of Nigeria in the Federal Government and disengages the state governments and local governments from matters regarding petroleum production.

The Minister of Petroleum Resources, who is an appointee of the president of the Federal Republic of Nigeria, administers oil operations in Nigeria and is empowered to grant oil exploration

1115. See Iboronke T. Odumosu, “Transferring Alberta’s Gas Flaring Reduction Regulatory Framework to Nigeria: Potentials and Limitations” (2007) 44 *Alta. L. Rev.* 875.

¹⁰ Global Health Watch, “Oil Extraction and Health in the Niger Delta” In *Global Health Alternative World Health Report* (London and New York: Zed Books 2008) at 170; United Nations Development Programme, *Niger Delta Human Development Report*, UNDP (2006) at 48.

¹¹ Section 20 of CFRN *supra* note 1.

¹² Chapter 1 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Chapter A9, Chapter 10 LFN 1990.

¹³ Chapter P10, Cap 350, Laws of the Federal Republic of Nigeria 2004.

¹⁴ *Ibid*, at Preamble.

licences, oil prospecting licences and oil mining leases.¹⁵ By an order published in the Federal Gazette, the Minister of Petroleum fixes the price of petroleum products in Nigeria.¹⁶ The minister by writing may oblige anybody who has significant information that may influence her decision in fixing the price of petroleum products to divulge such information and the person becomes legally compelled to grant the minister's request.¹⁷ This provision would have been a participatory right clause in this Act but for its obligatory nature, lack of specification on the weight to be attached to such information and the Minister's prerogative to discountenance the information.

The Petroleum Act does not acknowledge the rights of host and impacted communities; instead it proscribes anyone from interfering with the rights and powers of a licensee or lessee.¹⁸ Given that the Petroleum Act is the law that regulates the operation of oil and gas production and management in Nigeria, it will be an appropriate statutory platform for the enforcement and protection of the rights of the Niger Delta communities.

3.1.3 Petroleum (Drilling and Production) Regulations

These regulations provide the prerequisites for applying for oil licenses and mining leases and one of the documents required for application is "details of a specific scheme for the recruitment and training of Nigerians".¹⁹ This is the only precondition that relates to the proposed investor's duty to Nigerians with no specification on the investor's commitment to the host and impacted communities. There is no prescription on the percentage of Nigerians that must be part of the investor's staff list. The provision also relates to Nigeria as a whole and not the Niger Delta communities in particular, therefore the investor may employ people from other parts of the country who are oblivious of the consequences of oil production endured by the host and impacted communities.

The Petroleum (Drilling and Production) Regulations (PDPR) acknowledge some of the rights of host and impacted communities. Section 11 stipulates that a holder of an oil exploration licence

¹⁵ Section 2 of the Petroleum Act, 1990.

¹⁶ Section 6 of the Petroleum Act, 1990.

¹⁷ *Ibid* at Section 6(2).

¹⁸ *Ibid* at Section 13.

¹⁹ Section 1(2)(h) of the Petroleum (Drilling and Production) Regulations, 1969 (PDPR).

may, with the approval of the Director of Petroleum Resources, erect temporary structures or machinery in a relevant area, subject to the rights of the owners and occupiers of the land.²⁰ The licensee and lessee's right to use and store water on the licensed land is subject to the right of host and impacted communities to water.²¹ These provisions only give the licensee and lessee the responsibility to acknowledge the presence and rights of the host and impacted communities on the licensed land but there is no recourse for failure to comply with these requirements and no provision on the communities' right to restrain the licensee and lessee from infringing on their rights or depriving them of their resources.

Section 17 of the PDPR prescribes the restrictions to the licensee or lessee's right to use land and it relates to land used for public purposes, or occupied by the Federal or State government. The restriction extends to land used for communal purposes such as burial grounds and trading areas, land used for agricultural purposes and land used for or close to any building or construction site or within fifty plots of any railway.²² These restrictions are subject to the acquisition of written permission from the Minister of Petroleum Resources. The PDPR is silent on the requirement to consult the Niger Delta communities or their representatives before entering upon or using their land. The decision to grant permission in these exceptional instances lies in the minister who is far removed from the local dynamics of the communities and therefore may be oblivious to the values the host and impacted communities place on these specified areas.

The power to grant licenses or leases on private land is reposed in the minister subject to the payment or tendering of fair and adequate compensation to the lawful occupier of such land.²³ This provision gives room for the infringement of the right of a lawful occupier. First, the absoluteness of the power to grant licenses or leases on private land is problematic. A precondition for the minister's consultation with the community leaders and prior consent from land owners or occupiers before granting licences or leases on private lands may correct this anomaly. Second, the licensee or lessee is only obliged to pay or tender the compensation, meaning that, in a situation

²⁰ Section 11 of PDPR *ibid.*

²¹ Section 15(1)(c) of PDPR *supra* note 19.

²² Section 17(1)(b) of PDPR *supra* note 19.

²³ Section 17 (1)(c) of PDPR *supra* note 19. This provision applies to "lawful occupiers" and not holders of right of occupancy. Therefore, in the absence of contrary claim, lawful occupation or possession of land suffices in proof of entitlement to compensation in this regard.

where the lawful occupier refuses to accept the compensation, the condition precedent would still have been satisfied. With the level of reverence Niger Delta communities attach to their land, this gives room for an unthinkable height of injustice. The host and impacted communities deserve to be allowed to have a peaceful occupation of their private land without fear of unjust removal. Thirdly, the licensee or lessee is required to tender or pay “fair and adequate compensation”. This requirement is vague because what constitutes fair and adequate compensation is relative. An investor willing to compensate an occupier may be willing to pay the purchase value or prevailing market value of the land while the occupier may be expecting payment for the commercial value of the natural endowment of the land. It is important to have prescriptions regarding unequivocal compensation plans based on the value of the land and where there is dispute in determining the value of the land, recourse to the court is an alternative with an option for the land occupier to retain possession regardless of the compensation offered. In practice, Full Preparation Plans are prepared to designate the areas that will be used for oil and gas operations.²⁴ The designated areas may cut across roads, farmlands, right of way, and residential buildings. A compilation of affected lands is used to calculate the compensation payable to land occupiers in accordance with the PDPR. However, it has been reported that compensations paid are usually inadequate to reimburse the land occupiers for evacuating their homes or farmlands, and a sustainable compensation practice in this regard is necessary.²⁵

The Niger Delta communities are predominantly fishermen and women and they rely on their rivers for fishing.²⁶ There have been complaints of incessant oil spillage rendering the rivers unhealthy and unproductive, thereby depriving the host and impacted communities’ means of income.²⁷ Section 23 of the PDPR provides that “if the licensee or lessee exercises the rights

²⁴ Jacob Odeh Ehiorobo & Henry Audu, “Technical and Legal Issues in Land Acquisition for Development of Crude Oil and Natural Gas Facilities Within the Niger Delta Region of Nigeria” (2010) FIG Congress, Land Tenure and Land Management Projects in Developing Countries, Sydney, Australia 1 at 4.

²⁵ Victor A Akujuru & Les Ruddock, “The Determination of Compensation Payable in the Niger Delta for Compulsory Acquisition and the Need for a Sustainable Practice” (2014) J. of Sustainable Development in Africa 102.

²⁶ Uwafiokun Idemudia & Uwen E. Ite, “Demystifying the Niger Delta Conflict: Towards an Integrated Explanation” (2006) 33:109 Review of African Political Economy 391; Aaron Kiikpoye, “Perspective: Big Oil, Rural Poverty, and Environmental Degradation in the Niger Delta Region of Nigeria” (2005) 11:2 J. of Agricultural Safety and Health 127; Christopher Obiukwu, “Impact of Refinery Effluent on the Physicochemical Properties of a Water Body in the Niger Delta” (2005) 3:1 Applied Ecology and Environmental Research 61.

²⁷ Chris Opukri & Ibaba Samuel Ibaba, “Oil Induced Environmental Degradation and Internal Population Displacement in the Nigeria’s Niger Delta” (2008) 10:1 J. of Sustainable Development in Africa 173; Mobolaji Aluko,

conferred by his license or lease in such a manner as unreasonably to interfere with the exercise of any fishing rights, he shall pay adequate compensation therefore to any person injured by the exercise of those first-mentioned rights.” Limitation of the licensee or lessee’s liability to unreasonable interference creates a gap in this law. It is pertinent to extend the licensee or lessee’s liability to compensate for injury caused to reasonable and unreasonable interference. Any injury caused deserves reciprocal compensation. More so, payment of “adequate compensation” is relative and may be difficult to determine. Interfering with people’s means of income can be hard to compensate without adequate provision to reinstate them to the way they were before the interference. Also, only persons injured by the interference with fishing rights are entitled to compensation. There is no pointer as to the form of injury, maybe physical or/and economical injury.²⁸ It will be unjust to limit compensation to those physically injured when a large number of the community members are further impoverished by environmental degradation. Considering the enormous profits made by the oil and gas companies, restricting compensation to community members that are directly affected due to financial limitation is not tenable. On another hand, economic injuries take a while before becoming apparent and it may be difficult to prove the causal damage that resulted in the economic loss.

The first four sections of Part 4 of the PDPR provide for the “recruitment and training of Nigerians” by oil companies.²⁹ Investors are required to submit to the Minister of Petroleum a plan for the training of Nigerians in all phases of petroleum operations within twelve months of receiving a license.³⁰ Scholarship structure arranged by the licensee or lessee must also be submitted to the

“Sustainable Development, Environmental Degradation and the Entrenchment of Poverty in the Niger Delta of Nigeria” (2004) 15:1 J. Hum. Ecol. 63.

²⁸ The ambiguous compensation provisions in the PDPR and other relevant laws cause challenges during compensation processes in practice, especially during extrajudicial compensation processes. So many uncertainties regarding who to compensate, how much compensation is payable, process of sharing compensation among victims and when victims will receive compensation. Amnesty International, “Petroleum, Pollution and Poverty in the Niger Delta” (2009) AFR 44/017/2009 page 1 at 68-72. When oil spillage or gas flaring affect a whole community or group of communities, compensation is bargained on behalf of the whole community or communities, sometimes by the government, without the involvement of the actual victims. For example, lack of community participation in compensation negotiation and inefficient disbursement of compensation to victims are some of the issues that have stalled the compensation processes for the Ilaje and Bonga oil spillage. See Adewale Sanyaolu, “\$3.6bn Bonga Oil Spill Compensation: Ilaje Communities Beg Buhari” (October 26, 2015) *The Sun*; Akpokona Omafuaire, “Bonga Oil Spill: Communities Threaten SNEPCO over Compensation” (August 20, 2015) *The Vanguard*.

²⁹ Sections 26-29 of PDPR *supra* note 19.

³⁰ Section 26 of PDPR *supra* note 19.

Minister of Petroleum.³¹ These sections are ways of ensuring the investors contribute to the development of Nigerian people without a directive on how the host and impacted communities can benefit from this plan. In a country where oil wealth is embedded in 7.5% of the total land mass,³² directing such benefit to other parts of the country does not address the concerns of communities directly affected by oil production.

Involvement of beneficiaries in productive development programs is pertinent. In a situation where the power to approve developmental programs and vary them after approval lies in the minister,³³ the sense of community ownership is lost.³⁴ These paternalistic sections of the PDPR encourage oil companies to develop and implement community development programs without involving the communities. This brings to light reasons for the failure of development projects in the Niger Delta region.³⁵ Though the PDPR encourages the oil companies to respect few of the rights of the Niger Delta peoples, it fails to duly acknowledge them and accord the level of recognition they deserve. It also fails to promote the participatory right of these people and omits important obligations expected from the investors. The PDPR ignores the cumulative impacts of development projects and fails to provide for an adequate transparent process for asserting claims or means of calculating or disputing compensation payments.

3.1.4 Oil Pipelines Act

The Oil Pipelines Act³⁶ (OPA) provides that the Minister of Petroleum Resources has the power to “grant permits to survey routes for oil pipelines and licenses to construct and operate oil pipelines.”³⁷ Upon the grant of a license, the holder or his agents can enter any land on the specified route or land adjacent to the route with their equipment.³⁸ Such entry is subject to the grant holder

³¹ Section 27 of PDPR *supra* note 19.

³² Aniefiok E. Ite, et al, “Petroleum Exploration and Production: Past and Present Environmental Issues in the Nigeria’s Niger Delta” (2013) 1:4 American J. of Environmental Protection 78.

³³ Section 28 of PDPR *supra* note 19.

³⁴ See Jean C. Simpson et al, “The Process and Impact of Implementing Injury Prevention Projects in Smaller Communities in New Zealand” (2003) 18:3 Health Promotion International 237 (with regards to communities in New Zealand).

³⁵ Uwafiokun Idemudia & Uwem E. Ite, “Corporate-Community Relations in Nigeria’s Oil Industry: Challenges and Imperatives” (2006) 13 Corp. Soc. Responsibility and Environmental Management 194.

³⁶ Cap 338, LFN 2004 (OPA).

³⁷ Section 3 of OPA *ibid*.

³⁸ Section 5 of OPA *supra* note 36.

giving an occupier of a building or an enclosed property or cultivated land prior notice. His obligation in this regard is limited to intimating the person in possession of his intention to operate on his land but the permit holder is not bound to receive the consent of the land occupier. Consent of occupiers or persons in charge is required only for land occupied by a cemetery or a sacred land.³⁹ The OPA gives permit holders the power to encroach on the right of people that have been occupying their land for centuries by giving 14 days notice and the obstruction of permit holder's entry is an offence under this Act punishable by three months imprisonment or the option of a fine.⁴⁰ This right extends to cultivated land. The poverty level in the Niger Delta communities is high and deprivation of cultivated land or residential area is one of the factors that not only undermine the economic development of these communities but also threaten subsistence. The OPA requires that a permit holder is obliged to avoid unnecessary damage to land entered upon else he will pay compensation to the owner or occupier of the land.⁴¹ However, compensation is not an adequate remedy to prevent the land occupiers' economic loss due to the actions of the permit holders because damages to cultivated land may not be immediately noticeable, except such compensation takes into account future loss that may be incurred. For instance, spilling harmful chemicals on the soil becomes manifest over a period of time and the probability of making the permit holder answerable is low. Standards for preventing economic loss to the host and impacted communities rather than providing remedy after the damage has been done can help mitigate some of the challenges created by this Act.

Part four of the OPA provides for the payment of compensation and matters arising in this regard. Compensation to a person whose land was adversely affected by pipeline operations or who suffered damage due to a permit holder's neglect or due to pipeline breakage or leakage is subject to various considerations such as disturbance caused, loss in value of or interest in the land, and level of damage to buildings, crops or profitable trees.⁴² Based on these considerations among others, the court decides the compensation payable and if it exceeds the amount earlier offered to the permit holder, the claimant may be reimbursed for cost of litigation by the defendant.⁴³ The

³⁹ Section 6 and 15 of OPA *supra* note 36.

⁴⁰ Section 25 of OPA *supra* note 36.

⁴¹ Section 6(3) of OPA *supra* note 36.

⁴² Section 11(5) and 20(2) of OPA *supra* note 36.

⁴³ Section 20 (6) of OPA *supra* note 36.

Act is silent on the right of land owners/occupiers to lawfully prevent pipeline operators from entry upon or operating on their land but they are required to comply with the dictates of the court on the amount of compensation they are entitled to without option of returning to the status quo before the pipeline operator took interest in their land. This leaves much to be desired with regards to the protection of the rights of the Niger Delta communities and the promotion of their economic growth.

3.1.5 Environmental Impact Assessment Act

The Environmental Impact Assessment Act⁴⁴ provides for the mandatory environmental impact assessment (EIA) of projects that are likely to have adverse effects on the environment. The objectives of the EIA Act are to mandate the undertaking of EIA by both private and public bodies before embarking on projects that may affect the environment, promote policies that will enhance compliance with the EIA procedure and foster information sharing and consultation between the proposed project initiator and members of the community that may likely be affected by the environmental impact of the project.⁴⁵ Some of the Mandatory Study Activities (MSA) include “agriculture, construction of drainage and irrigation, construction of fishing harbours, construction of infrastructural projects, construction of ports, mining of minerals, ore processing and petroleum projects which involves oil and gas fields development, construction of oil refineries, construction of off-shore pipelines and construction of product storehouse for petroleum, gas or diesel.”⁴⁶

In order to ascertain the process of carrying out the EIA for any project, the relevant environmental issues must be ascertained at the initial stage of the procedure.⁴⁷ The EIA report shall provide an overview of the proposed activity, specific areas to be affected within and outside Nigeria and what impact the project may have on them, available measures to alleviate the effect of the environmental impact, information gap faced during computation and non-technical summary of the proposed activities.⁴⁸ A government agency is required to make a decision on all projects that require EIA and there is a precondition to give the public and experts in an appropriate profession

⁴⁴ Cap E12 LFN 2004 (EIA Act).

⁴⁵ Section 1 of EIA Act *ibid*.

⁴⁶ Schedule to EIA Act on list of Mandatory Study Activities.

⁴⁷ Section 3 of EIA Act *supra* note 44.

⁴⁸ Section 4 of the EIA Act *supra* note 44.

the avenue to give their opinion on the EIA of the proposed project⁴⁹ and the Federal agency in charge of EIA is the Nigerian Environmental Protection Agency (NEPA).⁵⁰ Such decision must be written and contain rational and proposed measures to reduce the environmental harm.⁵¹

The EIA Act acknowledges the involvement of the public in EIA in several instances but the level to which the public can influence the outcome of EIA reports is not defined. For instance, NEPA has two options upon completion of a screening report to either take steps to ensure adequate mitigation measures are implemented and later permit commencement of the project or refer the project to mediation or a review panel where it believes there is probability that the project may result in an immitigable environmental effect or cause public criticism.⁵² Before deciding on any of the above mentioned options, NEPA is required to “give the public an opportunity to examine and comment on the screening report that has been filed in the public registry established in respect of the project.”⁵³ It is not stated whether NEPA is bound to adhere to the public comments filed in this regard before deciding on an action or whether the comments are only persuasive.

The right to information and participation in EIA matters are protected under the EIA Act. The public has a right to the information contained in an assessment review and the relevant panel must hold a hearing session to give the public the avenue to be involved in the assessment and the panel’s report must contain a summary of the public comments.⁵⁴ Though the EIA Act provides for the involvement of the public in EIA, the lack of definitive weight to be accorded to the public view gives room for the relevant government officials to disregard the public’s opinion and this may result in public criticisms and conflict where people take adequate steps to make their voice heard and later realize that it was only used for compliance purposes but disregarded during decision making.⁵⁵

⁴⁹ Section 7 of the EIA Act *supra* note 44.

⁵⁰ Section 63(1) of the EIA Act *supra* note 44.

⁵¹ Section 9 of the EIA Act *supra* note 44.

⁵² Section 22(1) of the EIA Act *supra* note 44.

⁵³ Section 22(3) of the EIA Act *supra* note 44.

⁵⁴ Section 37 of the EIA Act *supra* note 44.

⁵⁵ A report shows that EIA processes have not been quite effective in Nigeria due to personnel incompetence, process politicizing and disregard for public view among other factors. Chris Nwoko, “Evaluation of Environmental Impact Assessment System in Nigeria” (2013) 2:1 Greener J. of Environmental Management and Public Safety 22 at 28-30; Agaja Silas, “Public Participation in Environmental Impact Assessment (EIA) Reports: The Nigerian Experience”

3.1.6 Land Use Act

The Land Use Act⁵⁶ (LUA) vests all land within the urban area of a state in the state governor who holds the land in trust for the people and manages it to the advantage of the people with an exception of the non-urban areas where land is vested in the local governments.⁵⁷ The LUA is one of the statutes entrenched in the Nigerian Constitution⁵⁸ and can only be amended in accordance with the provisions of the amendment section of the constitution which provides that amendment is subject to two-third votes of members of the National Assembly and approval by resolution of the state Houses of Assembly of not less than two-third votes.⁵⁹ The rights of the Governor and Local Government Chairmen under the LUA do not apply to land held by the Federal Government or its agencies.⁶⁰ The LUA is a controversial law⁶¹ which was promulgated during the military era.⁶² Some scholars believe this Act was intentionally promulgated by the then military government with the intent of stripping the Niger Delta communities of their right to participate in natural resource management and grant the Federal Government “exclusive ownership and control of oil resources.”⁶³ This position is supported by Ako thus:

The legislative framework regulating the oil industry must be reviewed with particular attention to the offensive (Land Use) Act. Sections of the Act that deprive inhabitants of environmental justice must be reviewed with due consideration to the realities of the circumstances prevalent in the region. The goal of such a review should be to achieve equality, equity and justice among the citizenry, without subjugating one less privileged group to others.⁶⁴

(2013) IAIA13 Conference Proceedings, 33rd Annual Meeting of the International Association for Impact Assessment, Calgary, Alberta.

⁵⁶ Chapter 202, LFN 2004 (LUA).

⁵⁷ Section 1 & 2 of the LUA *ibid*.

⁵⁸ Section 315(5)(d) of the 1999 CFRN *supra* note 1.

⁵⁹ Section 9(2) of the 1999 CFRN *supra* note 1.

⁶⁰ Section 49 of LUA *supra* note 56

⁶¹ Ebeku iterates the instrumentality of the LUA in perpetrating injustice in the Niger Delta. Kaniye S.A. Ebeku, “Oil and the Niger Delta People: The Injustice of the Land Use Act” (2002) 35:2 Law and Politics in Africa, Asia and Latin America 201. With regard to the effect of the LUA on the Nigerian housing sector, see Ola Aluko, “The Effect of Land Use Act on Sustainable Housing Provision in Nigeria: The Lagos State Experience” (2012) 5:1 J. of Sustainable Development 114.

⁶² It was promulgated in 1978 by the then Military Head of State, General Olusegun Obasanjo. Akintunde Kabir Otubu, “Land Reforms and the Future of Land Use Act in Nigeria” (2008) 1 Nigerian Current Law Review 1.

⁶³ Rhuks T Ako, “Nigeria’s land Use Act: An Anti-Thesis to Environmental Justice” (2009) 53 J. Afr. L. 289 at 296; Yinka Omorogbe, “The Legal Framework for Public Participation in Decision Making on Mining and Energy Development in Nigeria: Giving Voices to the Voiceless” in Zillman Lucas & Pring *Human Rights in Natural Resource Development* (Oxford: Oxford University Press 2002) at 560 (Omorogbe).

⁶⁴ *Ibid* at 304.

The LUA diminished the place of land owners to holders of 99 year right of occupancy subject to acquisition of certificate of occupancy from the Governor after payment of the prescribed rent and the occupier's right to possession is transferable subject to the Governor's consent.⁶⁵ The title holder has exclusive rights to the apportioned land against all persons except the Governor and subject to any law relating to "prospecting for minerals or mineral oils or oil pipelines."⁶⁶ This provision affirms the argument that the LUA is an instrument to dispossess land owners for the ease of oil exploration and Omorogbe rightly interprets the effect of the LUA thus:

First it operates to alienate the people from their land and to give them only surface rights over the land...Secondly it deprives the people of any rights that they would have had as the owners of the land. The companies are able to use the land freely, without the legal requirement of consent or agreement by the resident communities... It is said that Nigeria's production costs are among the cheapest in the world, and the communities ascribe this to the Land Use Act which has deprived them of rights over the land that would have required compensation if the land were still legally vested in the people.⁶⁷

Oil and gas production has been elevated over the welfare and rights of the people through the LUA. The LUA gives the Governor the power to revoke a right of occupancy if the land is required for mining or oil pipelines construction or any other related purpose.⁶⁸ Though acquisition of land for public purposes is a well-known practice,⁶⁹ it is usually subject to payment of adequate compensation to the land owners with good resettlement plan. Under the LUA, options presented to the title holders are not quite advantageous. An acceptance of relocation to an alternative accommodation provided by the Governor which is higher in value than the vacated land amounts to a loan of the differential payable to the Governor and forfeiture of any right to compensation by

⁶⁵ Section 10, 21 & 22 of the LUA *supra* note 56.

⁶⁶ Section 14 of LUA *supra* note 56.

⁶⁷ Omorogbe, *supra* note 63.

⁶⁸ Section 28 of the LUA *supra* note 56.

⁶⁹ For example of compulsory land acquisition in China, see Chengri Ding, "Policy and Praxis of Land Acquisition in China" (2007) 24 Land Use Policy 1; Odame Larbia, Adarkwah Antwia & Paul Olomolaiyea, "Compulsory Land Acquisition in Ghana: Policy and Praxis" (2004) 21:2 Land Use Policy 115 (for examples of land acquisition in Ghana). For an overview of compulsory land acquisition experiences in Sub-Saharan Africa, see Laura German, George Schoneveld & Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?" (2013) 48 World Development 1.

the occupier.⁷⁰ The LUA is not human rights oriented and the current civilian dispensation requires a land tenure system that is more human rights conscious and people oriented.

3.1.7 Petroleum Industry Bill

Nigeria's Petroleum Industry Bill (PIB)⁷¹ was initiated in 2008 with the aim of addressing the lacunae in the existing laws and providing a regulatory framework for Nigeria's oil and gas management that is at par with international standards.⁷² The objectives of the PIB include provision of a favourable operating atmosphere for petroleum companies, creation of proficient regulatory agencies, promotion of transparency in Nigeria's petroleum resource management, and sustainability of Nigeria's petroleum industry.⁷³

There are eleven enumerated objectives of the PIB but none addresses the developmental needs of the Niger Delta region. The PIB, like the subsisting oil and gas laws in Nigeria, fails to address the participatory development challenges of Nigeria's oil and gas management. One of the outlined objectives of the PIB is the promotion of transparency in Nigeria's petroleum management but it fails to propose an effective framework for achieving this in the midst of a system run by government agencies and leaders that have not been effective at disbursing necessary information in the past.⁷⁴

It is inappropriate to promote the sustainability of Nigeria's petroleum industry without taking the communities where the operations take place into consideration. The underdevelopment of these communities will continually impede the growth of the petroleum industry and it is unfortunate that the PIB fails to address this foundational problem. The right to participatory development of the host and impacted communities is not adequately protected in the existing laws and the PIB would have been an effective opportunity to right this wrong. Instead it adopts paternalistic approaches, thereby depriving the host and impacted communities the voice to make the desired

⁷⁰ Section 33 of the LUA *supra* note 56.

⁷¹ The Petroleum Industry Bill, 2012, 7th Parliament, 2nd Session Bill 01/01/2012 (PIB).

⁷² Samuel Diminas, "An Analysis of the Nigerian Petroleum Industry Bill 2012" (2013) 1 Westpaq 1.

⁷³ Section 1 of PIB *supra* note 71.

⁷⁴ Wumi Iledarei & Rotimi Suberu, "Framework Paper: Oil and Gas Resources in the Federal Republic of Nigeria" (March 3-4, 2010) Conference on Oil and Gas in Nigeria Federal Systems, World Bank Headquarters, Washington DC, 1.

change that will affect their lives. Section 116 of the PIB establishes the Petroleum Host Community Fund which “shall be utilized for the development of the economic and social infrastructure of the communities within the petroleum producing area.”⁷⁵ Leaving the utilization of the accrued fund in the hands of the state governments is imprudent as the management of the existing 13% petroleum derivation by the state governments has not been seen to have the desired effect on the communities or addressed the anger they feel towards oil production and oil workers.⁷⁶ Practicable and productive provisions for the judicious management of funds accruing to the Niger Delta communities are germane to the success of the PIB. Creation of more funds that can be easily squandered by politicians is not the solution.⁷⁷ Until Nigeria’s oil and gas legal regime effectively addresses the mismanagement of funds meant for community development, the desired change may not be accomplished.

Section 8 of the PIB provides for public inquiry by the Minister of Petroleum Resources before making any regulations under the Act.⁷⁸ This is a plausible development and the result of such inquiry can contribute to informed decision making. Otherwise, failure to acknowledge public views will amount to an exercise in futility. An exception to the public enquiry requirement is in case of time constraint. In this exception instance, if the minister makes any regulation without public inquiry, such regulation will subsist for a maximum of twelve months.⁷⁹ Employing the word “public” in Section 8 without any reference to the members of the host and impacted communities leaves much to be desired. Conducting inquiries on regulations that will have direct effect on the Niger Delta communities in the Federal Capital Territory or any other part of the country outside the affected locality reduces their ability to make necessary contributions during inquiries. Though other members of the public may participate in Nigeria’s oil and gas management, the Niger Delta communities deserve to be given priority especially by situating some of the locations for public inquiries within the host and impacted communities for ease of access of the most affected group. Including specific provisions on the participation of the Niger

⁷⁵ Section 116 and 117 of PIB *supra* note 71.

⁷⁶ Onah R. Ogrì, “A Review of the Nigerian Petroleum Industry and the Associated Environmental Problems” (2001) 21 *The Environmentalist* 11; Asume Isaac Osuoka, “Oil and Gas Revenue and Development Challenges for Niger Delta and Nigeria” (2007) Paper Presentation, UNDESA, New York.

⁷⁷ Diminas, *supra* note 72 at 7.

⁷⁸ Section 8 (2) and (3) of PIB *supra* note 71

⁷⁹ Section 8 (6) and (7) of PIB *supra* note 71.

Delta communities, regarding formulation of regulations that directly affect them, will help to avoid challenges and uncertainties during implementation of the PIB provisions. Ignoring the existence of a group of people with higher interest in oil and gas management than that of the rest of the public is not prudent. On another note, limiting public inquiry to formulation of regulations may not produce desired participatory development. A more progressive approach is to extend public inquiry and participation to the approval of operation grants or licenses and administration of oil production.

The PIB fails to acknowledge the participatory right of the host and impacted communities in Nigeria's petroleum management. Without an adequate legal and institutional framework to promote the participatory development of the Niger Delta communities, Nigeria's oil and gas industry may keep travelling in circles without substantial transformation. The PIB establishes the Upstream Petroleum Inspectorate but the place of the host and impacted communities is discountenanced in its establishment, operations and governance. Bearing in mind that the upstream operations take place in the local communities, their input is an undeniable factor in the success of the Inspectorate.⁸⁰ On a similar note, the composition of the Board of the Petroleum Assets Management Company Limited, also established by the PIB, follows the same trail by refusing to acknowledge the place of the representatives of the Niger Delta communities.⁸¹

The PIB establishes several agencies and corporations and none of them provides avenues for the host and impacted communities to be part of petroleum management. Instead better chances are given to wealthy members of the public to invest in Nigeria's oil and gas sector. Six years after the date of incorporation, thirty percent of the shares of the National Oil Company and forty-nine percent of the shares of the National Gas Company, both created by the PIB, shall be open to the public on the Nigerian Stock Exchange.⁸² Though such investment is required to be in a transparent manner, financial incapacity of most members of the Niger Delta communities that are largely impoverished⁸³ is a contributing factor to the communities' limitation. This development may

⁸⁰ *Ibid* section 13–18.

⁸¹ *Ibid* section 131.

⁸² *Ibid* section 151 & 162.

⁸³ Joseph C. Ebegbulem, Dickson Ekpe & Theophilus Oyime Adejumo, "Oil Exploration and Poverty in the Niger Delta Region of Nigeria: A Critical Analysis" (2013) 4:3 Intl J. of Business & Social Science 279.

strengthen the bias Niger Delta communities have against oil production. It is unjust to disregard the direct recipients of the adverse effects of oil production who have been denied of a large portion of their ancestral land in the Bill that is believed to revolutionize Nigeria's oil and gas management.

The Bill establishes an "environmental remediation fund" which serves as a deposit for the correction of unrectified environmental damage caused by oil operators.⁸⁴ This is a condition precedent to the approval of a licence or lease and it is subject to the size of the oil company's operations and its consequential threat to the environment.⁸⁵ The challenge with this provision is the freedom it gives the licensees and lessees to annually self-assess and if necessary increase their contribution to the fund.⁸⁶ Environmental liability is not mathematical geometry that can be ascertained without consideration of many other factors such as the resultant damage to crops, health, ecological species and the climate. Giving the oil operators the liberty to score themselves in this instance diminishes the credibility of the process.⁸⁷ While self-regulation is a common model in most parts of the world, it might not be time for Nigeria's oil and gas industry to incorporate this model because of past antecedents of oil and gas companies operating in Nigeria. For example, SPDC has been accused of falsehood in its reports about the environmental impact of its operations in Nigeria.⁸⁸ Nigeria's oil and gas management has not developed to the extent of adopting self-regulation because the effectiveness and success of self-regulation depends on several cogent and interrelated factors. These factors include transparency and disclosure standards enforced by the government and effective public participation and community reporting of the activities of the oil companies with adequate response from the government and these factors have not been inculcated into Nigeria's oil and gas management.

In the alternative, environmental NGOs working with and in support of the Niger Delta communities could be appointed as assessors subject to their collaboration with the host and impacted communities. For instance, Amnesty International has been dutiful in reporting the

⁸⁴ Section 203 of PIB *supra* note 71.

⁸⁵ Section 203 (1) & (2) of PIB *supra* note 71.

⁸⁶ Section 203(4) of PIB *supra* note 71.

⁸⁷ See David Graham & Ngaire Woods, "Making Corporate Self-Regulation Effective in Developing Countries" (2006) 34:5 World Development 868 at 881-882.

⁸⁸ John Vidal, "Shell Made False Claims about Niger Delta Oil Pollution, says Amnesty" (7 November 2013) *The Guardian*.

environmental damage and human rights infringements caused by Nigeria's oil and gas operators.⁸⁹ Failure to involve the host and impacted communities in the assessment of environmental damage while leaving such precarious issue in the hands of the oil companies questions the productivity of the environmental remediation fund.

The PIB leaves much to be desired and without acknowledgment of the ability of the Niger Delta communities to influence the growth of Nigeria's oil and gas industry, the desired change may not become a reality. Participatory development of the host and impacted communities has a ripple effect on all the objectives listed in Section 1 of the PIB. A conflict ravaged community cannot provide a conducive and safe atmosphere for oil operators and this will affect other foreign oil companies' decision to invest in Nigeria's petroleum industry. Niger Delta communities' inability to make the government and oil companies accountable for their actions negatively affects the transparency agenda of the PIB. Failure to promote and protect participatory development and environmental sustainability is tantamount to failure to "protect health, safety and the environment in the course of petroleum operations."⁹⁰ The growth of Nigeria's oil and gas sector depends to a large extent on the development of the communities where the natural resources are located and the realization of the irreplaceable contribution of the members of the oil producing communities towards the development of the sector will greatly influence the success of the PIB.

Existing laws relating to oil and gas production in Nigeria fail to protect the participatory right of Niger Delta communities and acknowledge their place in promoting oil and gas administration. Most provisions are directed to the public in general but there is need for a legal framework that acknowledges the Niger Delta communities as stakeholders in Nigeria's oil and gas management with legally justiciable provisions to protect their rights and enforce their active contributions.

⁸⁹ Amnesty International, "Nigeria: Hundreds of Oil Spills Continue to Blight Niger Delta" (19 March 2015) online: <<https://www.amnesty.org/en/articles/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/>>; Amnesty International, "Shell's False Claims on Niger Delta Oil Spills Exposed" (7 November, 2013) online: <<https://www.amnesty.org/en/articles/news/2013/11/shell-s-false-claims-niger-delta-oil-spills-exposed/>>; Ruth Krause, "Oil Spills keep Devastating Niger Delta" (20 March 2015) *Deutsche Welle* online: <<http://dw.com/p/1Etsa>>.

⁹⁰ Section 1(j) of PIB *supra* note 71.

3.2 RELEVANT JUDICIAL PRECEDENTS: A REVIEW

Enforcement of the rights of the Niger Delta peoples by the courts has been quite challenging both at the foreign and local courts. The following reviewed cases demonstrate the various challenges the host and impacted communities experience in seeking judicial remedies. In *Jonah Gbemre v. Shell Petroleum Development Company Limited and Co.*⁹¹ the Federal High Court of Nigeria held that the Applicant, as a citizen and resident of the Niger Delta Iweherekan Community, has the right to institute an action for himself and on behalf of his community for the enforcement of their human rights. The court decided on the substantive issue and declared that the Respondents' incessant gas flaring is a violation of the rights of the Applicant's community to life, healthy environment and dignity of person. The Respondents claimed that their actions were permitted by the provisions of Nigeria's *Associated Gas Re-Injection Act*⁹² (AGRA) but the court ruled that this provision is inconsistent with the Applicant's right to life and dignity of human person as provided by the Constitution of the Federal Republic of Nigeria and the *African Charter on Human and Peoples Right (Ratification and Enforcement) Act*⁹³ and therefore the AGRA was declared null and void to the extent of its inconsistency with the Constitution. The Respondents were ordered to refrain from flaring gas in the Applicant's community and though the Attorney-General of Nigeria as a third Respondent in the matter did not make an appearance, the court ordered him to ensure that a Bill for the amendment of the AGRA be enacted after proper consultation with the Federal Executive Council. Though no award of compensation or damages was made, the Applicant's community received judgment in their favour through the condemnation and prohibition of environment degrading activities in their community.

The reaction of the Respondents (Shell Petroleum Development Company Nigeria Limited, Nigerian National Petroleum Corporation and the Attorney General of the Federation) to this landmark decision⁹⁴ leaves much to be desired in the acknowledgement and enforcement of the rights of host and impacted communities in Nigeria. The Attorney General refused to appear and

⁹¹ (2005) fhc/b/cs/53/05.

⁹² Associated Gas ReInjection Act No. 99, 1984.

⁹³ OAU Doc. CAB/Leg/67/3/Rev.5, reprinted in (1981) 21 I.L.M. 58.

⁹⁴ Butti argues that Gbemre's case is a landmark decision because it is the first instance where the Nigerian court assigned more weight to environmental protection over revenue maximization but the Respondents' failure to comply with the court's decision restricted the Applicant's victory to the pages of law reports. Luciano Butti, "The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America" (2011) 2:10 Climate Law Reporter 31 at 36.

this is a gross disregard to the Nigerian Judiciary. On another hand, Shell refused to submit any report on the mechanism for avoiding gas flaring as directed by the court.⁹⁵ However there is a Bill for an Act to Prohibit Flaring of Natural Gas in Nigeria and for Matters Connected Therewith⁹⁶ but the Bill provides for an exception to the prohibition of gas flaring subject to the Minister of Petroleum Resources' permission in cases of "start-up, equipment failure or shut down."⁹⁷ In these exceptional instances, gas flaring may not be illegal. The PIB also prohibits gas flaring and defaulters are "liable on conviction to pay a fine which must not be less than the value of gas flared."⁹⁸

Niger Delta peoples have instituted several judicial proceedings against oil companies operating in their communities and the Nigerian government but their claims were often for compensation and damages as seen in the cases of *Seismograph Services Limited v Mark*,⁹⁹ *Shell v. Isaiah*,¹⁰⁰ and *Ogaile v. Shell*.¹⁰¹ No compensation or damages was awarded in any of the above mentioned cases.¹⁰² In comparison with the decision in Gbemre's case, it is apposite that Niger Delta communities do not limit their judicial claims to compensation and damages. They need to refocus their attention on the prohibition and prevention of environment degrading and human rights infringing activities in their communities. Though Gbemre's case has not yet yielded practical benefits, the Bill for an Act to Prohibit Flaring of Natural Gas in Nigeria and for Matters Connected Therewith is a positive result of the decision in Gbemre's case and there is hope that upon passage into law, it will help to address some of the environmental issues of Nigeria's oil and gas management.

⁹⁵ Labode Adegoke, "Pollution as a Constitutional Violation: Gbemre's Case" (2009) (presents a detailed summary of the case) online: <<https://www.scribd.com/doc/21340644/Pollution-as-a-Constitutional-Violation-Gbemre-s-Case-by-Labode-Adegoke#scribd>>.

⁹⁶ Sponsored by Senator Osita Izunaso representing Imo West Senatorial District (Imo is part of the Niger Delta Region). (2008) C 1696 No. SB 126.

⁹⁷ Section 1(3) of the Bill for an Act to Prohibit Flaring of Natural Gas in Nigeria and for Matters Connected Therewith (2008) C 1696 No. SB 126.

⁹⁸ Section 281 of PIB, *supra* note 71.

⁹⁹ (1993) 7 NWLR part 304 Page 203.

¹⁰⁰ (1997) 6 NWLR Part 508 Page 236.

¹⁰¹ (1997) 1 NWLR Part 480 Page 148.

¹⁰² Adegoke, *supra* at note 95.

At the regional level of the African Commission on Human and Peoples Rights (the African Commission), the Socio-Economic Rights and Accountability Project (SERAP) and Center for Economic and Social Rights (CESR) (the Petitioners) instituted an action against the Federal Republic of Nigeria (the Respondent)¹⁰³ regarding the environmental pollution and inhumane treatments that amount to the infringement of the rights of Ogoni communities to healthy environment, housing and food. The Petitioners claimed that the actions of the Respondent are against the rights of the Ogoni peoples as enshrined in Articles 2, 4, 14, 16, 18, 21 and 24 of the Universal Declaration of Human Rights (UDHR),¹⁰⁴ and other human rights instruments such as, International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰⁵ International Convention on the Elimination of all Forms of Racial Discrimination (ICERD),¹⁰⁶ Convention on the Elimination of All Forms of Discrimination Against Women,¹⁰⁷ and the International Convention on the Rights of the Child (CRC).¹⁰⁸ It was alleged that the operations of the Nigerian National petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC) have caused serious environmental damage and consequent health problems for the Ogoni people and the Respondent has supported the activities of NNPC and SPDC through the provision of legal and military protections. The African Commission held that the Respondent violated Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter and appealed to the government of Nigeria to protect the right of the Ogoni peoples to healthy environment, health and livelihood.

Though the Nigerian government failed to appear before the African Commission to defend the allegations made by the Petitioners, the decision of the African Commission demonstrates the willingness of the Commission to recognize rights that are not expressly stipulated by the African Charter, such as right to food and right to housing. More so, condemnation of the Respondent shows that economic, social and cultural rights are justiciable under the African Charter.¹⁰⁹ The recommendations of the African Commission which are in accord with the recommendations of

¹⁰³ Socio-Economic Rights and Accountability Project (SERAP) and Center for Economic and Social Rights (CESR) v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).

¹⁰⁴ U.N. Doc. A/810, 71 (1948)

¹⁰⁵ U.N. Doc. A/6316 (1966) (ratified by Nigeria Oct. 1993)

¹⁰⁶ U.N.T.S. 195 (1966) (ratified by Nigeria, Oct. 1967)

¹⁰⁷ U.N. Doc. A/RES/34/180 (1980) (ratified by Nigeria, June 1985)

¹⁰⁸ U.N. Doc. A/RES/44/25, 1989 (ratified by Nigeria, Apr. 1991).

¹⁰⁹ Fons Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" (2003) 52 Int'l and Comparative law Quarterly 749.

the Petitioners are positive indications of the benefit of institution of class actions by NGOs on behalf of host and impacted communities.

Taking advantage of the West African regional court of justice, the Socio-Economic Rights and Accountability Project (SERAP) instituted a matter against the Federal Republic of Nigeria and Universal Basic Education Commission¹¹⁰ at the Court of Justice of the Economic Community of West African States (ECOWAS) alleging the violation of the rights to health, good standard of living and social and economic development of the Niger Delta peoples by the Federal Republic of Nigeria and the Universal Basic Education Commission. The court held that Federal Republic of Nigeria's complacency towards the harmful environmental activities of oil companies in the Niger Delta is a violation of the African Charter on Human and People's Rights, therefore Federal Republic of Nigeria was ordered to take measures to remedy the environmental damage in the Niger Delta, prevent further damage and take retributive actions against environmental offenders.¹¹¹

Niger Delta communities (and sometimes NGOs acting on their behalf) have resorted to litigation several times for the enforcement of their rights and demand for remedial claims for damages to their person, properties or communities at foreign courts. The oil companies operating in Nigeria have been sued for their inhumane activities and collusion with the Nigerian government in infringing on rights and exerting military actions against the people. In the case of *Wiwa et al v. Royal Dutch Petroleum Company and Shell Transport and Trading Company PLC*¹¹² the plaintiffs claimed that they and some of their deceased family members¹¹³ were subjected to inhumane treatments by the collective efforts of the Nigerian government and the defendants. Procedural issues were raised with regards to the jurisdiction of the United States Federal Court but on June 8, 2009 before the substantive issue was heard, the defendants agreed to settle out of court by paying the plaintiffs compensation of \$15.5million and part of the incurred legal costs and

¹¹⁰ SERAP v Federal Republic of Nigeria and Universal Basic Education Commission (2012) ECW/CCJ/APP/08/09 with judgment No. ECW/CCJ/JUD/18/12.

¹¹¹ *Ibid* at Paragraph 21.

¹¹² (2000) 226 F.3d 88 (Wiwa).

¹¹³ Including the popular Niger Delta activist, Ken Saro-Wiwa who was executed among others by the then military administration of Abacha. Scott Pegg, "Feature Review Ken Saro-Wiwa: Assessing the Multiple Legacies of a literary Interventionist" (2000) 21:4 Third World Quarterly 701; Nnenna Ibeh, "Brief Facts on Ken Saro-Wiwa's Murder, Ogoniland" (30 December 2012) *Premium Times*.

establishing of a trust fund for the Ogoni people.¹¹⁴ Though the substantive issue was not decided, the defendants' agreement to public settlement suggests victory for the plaintiffs, the Niger Delta peoples and human rights activism.

SPDC is not the only oil company that has had judicial actions taken against them by the Niger Delta communities. In the case of *Larry Bowoto et al. v. Chevron Texaco Corp. et al.*,¹¹⁵ five Nigerians instituted an action before the United States Federal Court alleging that they suffered human rights violations in the hands of Nigerian military personnel acting on behalf of the defendants in three instances which all resulted in the loss of lives of their community members. The defendants' motion for summary judgment was dismissed but they were later cleared of all the charges raised. This decision was upheld at both the Court of Appeal and Supreme Court¹¹⁶ despite the application of the Alien Tort Statute (ATS) to human right violations in this case.¹¹⁷ The ATS "grants jurisdiction to federal district courts in all causes where an alien sues for a tort only in violation of the law of nations or of a treaty of the United States."¹¹⁸ The jurisdiction of the District Court on actions for violation of the law of nations occurring outside the United States came into question in the case of *Kiobel v. Royal Dutch Petroleum Co.*¹¹⁹ The Petitioners, former residents of Ogoni land, relocated to the United States of America where they were granted political asylum following the alleged carnage perpetrated by the Nigerian military with the support of the defendants. The petitioners instituted the action at the District Court, under the ATS alleging that the defendants acted in violation of the law of nations in Nigeria. Dismissing the action, the court held that the law of nations does not apply to corporate liability and the presumption against extraterritoriality applies to claims instituted under the ATS. The dismissal was upheld at the Court of Appeal.¹²⁰ At the Supreme Court, it was held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."¹²¹ The Supreme Court concluded that the ATS could not be applied to actions undertaken by Shell in Nigeria thereby limiting the jurisdiction of United States Courts regarding

¹¹⁴ Ingrid Wuerth, "Wiwa v. Shell: The \$15.5 Million Settlement" (2009) 13:14 American Society of Int'l L. 1.

¹¹⁵ (2004) 312 F. Supp.2d 1229 (Bowoto).

¹¹⁶ Held before the United States Court of Appeals, Ninth Circuit, (2010) 621 F.3d 1116.

¹¹⁷ Kathleen Jawger, "Environmental Claims under the Alien Tort Statute" (2010) 28:2 Berkeley J. of Int'l L. 519.

¹¹⁸ Title 28 United States Code 1350.

¹¹⁹ (2013) 133 S.Ct. 1659 (Kiobel).

¹²⁰ 621 F.3d 111 (2010) Docket Nos. 06-4800-cv.

¹²¹ *Kiobel v. Royal Dutch Petroleum Co.*, (2013) S.Ct. 133 S. Ct. 1659, section 3 (paragraph 16).

human rights violations committed outside the United States to actions that affect the United States with “sufficient force”.¹²²

Over time, Niger Delta peoples have approached foreign, regional and domestic courts for the enforcement of their rights, prohibition of environmental degradation and payment of damages and compensation by defaulters. In all instances where the courts assumed jurisdiction and proceeded to the substantive matter, degradation of the Niger Delta communities through oil production and violation of their human rights were never in doubt. Despite the numerous judicial decisions and court orders prohibiting offensive actions by the oil companies and the Nigerian government, Niger Delta peoples are still being subjected to inhumane conditions and the communities remain resolute in finding recourse in the courts.¹²³ Also, the decisions in *Wiwa, Bowoto and Kiobel* reveal the gap in international law in enforcing the participatory rights of the host and impacted communities despite various international laws on the recognition and enforcement of participatory rights. The judicial decisions discussed above demonstrates the minimal role of both domestic and foreign judiciary in assuaging the Niger Delta struggles. Subjecting parties to frequent adversarial proceedings that waste time and cost is ineffective and cannot produce the desired outcome. Instead a forward-looking alternative that prevents rather than remedies environmental degradation and human rights violation is desirable and this can be achieved through adequate participatory development of the communities through the MSDA.

¹²² *Ibid* section 4 (paragraph 1).

¹²³ John Vidal, “Niger Delta Communities to Sue Shell in London for Oil Spill Compensation” (7 January 2015) *The Guardian*.

CHAPTER 4

LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE IMPLEMENTATION OF THE MSDA IN NIGERIA

This chapter analyzes the legal and institutional frameworks for the implementation of the MSDA in Nigeria with the aim of promoting the participatory development of the Niger Delta peoples. The effectiveness of the proposed legal framework is dependent on some factors such as the recognition of the host and impacted communities as stakeholders in Nigeria's oil and gas management because this is the basis for the implementation of the MSDA. The proposed legal frameworks are also dependent on well-structured and functional institutional frameworks which are also proposed in this chapter.

4.1. PROPOSED LEGAL FRAMEWORK FOR THE MSDA

As mentioned in Chapter 1,¹ this thesis does not suggest that Nigeria requires a new statute to incorporate the MSDA into oil and gas management; rather it argues that existing statutes require necessary amendments to incorporate the MSDA. For the MSDA to be practicable in Nigeria's oil and gas management, all statutory provisions that contradict the participatory rights of the host and impacted communities must be repealed or amended accordingly. The practicability of effective and productive host and impacted communities' participation in Nigeria's oil and gas management requires that the identified inadequacies in the existing legal regime be amended.²

First, due to failure to acknowledge the Niger Delta communities' right to participation in the Petroleum Act, this thesis proposes an amendment to the extent of recognizing the Niger Delta peoples as stakeholders, affirming their right to voluntarily and effectively participate in oil and gas management, provision of early information regarding oil and gas production and community development projects, and recognition and protection of every other rights of stakeholders. The Petroleum Act provisions relating to grant of operation licences and leases without prior

¹ See Chapter 1.2 of this thesis.

² The inadequacies of the existing legal regime are discussed in Chapter 3.

consultation with the Niger Delta peoples cannot operate in conjunction with the MSDA, therefore there is need to amend the relevant sections accordingly.

Second, the provisions of the Petroleum (Drilling and Production) Regulations, (PDPR) regarding recruitment quota of Nigerians in the oil and gas industry,³ grant of operation licence or lease without consulting the community members,⁴ compensation of community members for damages caused by oil and gas production or compensation for taking over individual or communal land, among others, negate the principles of the MSDA. Incorporation of the MSDA principles would dictate amendments to the PDPR to the effect of recognizing the host and impacted communities as stakeholders, inclusion of provisions that affirm the right of the host and impacted communities to participate in the grant of oil and gas operation licence, inclusion of provisions that protect the right of host and impacted communities to participate in compensation negotiations and disbursement and amendment of the provision on the recruitment quota for Nigerians to specify the ratio of Niger Delta community members that will be recruited by the oil and gas companies. More so, provisions of the PDPR that conflict with the participatory right of the Niger Delta communities must be repealed for an effective implementation of the MSDA in Nigeria's oil and gas management.

Third, not only does the Oil Production Act (OPA) fail to recognize the Niger Delta communities as stakeholders, some of its provisions negate the principle of participatory development.⁵ As mentioned earlier, the Niger Delta communities' right to participation implies they have a right to participate in the process of granting operation lease or licence. This thesis proposes an amendment to the OPA by adding provisions that stipulate the roles of the Niger Delta communities in the process of granting operation licence or lease and approval of oil pipelines construction. The roles of the Niger Delta communities in this instance may include interviewing the proposed investors, visitation of the proposed operation site to clarify that it is not an area used for communal or spiritual purposes and communication of the expectations of the community members to the proposed investors and receiving guarantee from the proposed investors that they will comply.

³ Section 1(2)(h) of the Petroleum (Drilling and Production) Regulations, 1969 (PDPR).

⁴ *Ibid* Section 11 and 17.

⁵ The provisions of the OPA that contradict the right to participation of the Niger Delta peoples are discussed in Chapter 3.1.4 of this thesis.

Furthermore, the provisions of the OPA regarding entry upon communal, cultivated or residential land must be amended to include the requirement of prior consent of land occupiers before a lease or licence holder can enter upon such land. More so, the compensation procedures in the OPA require community participation procedures and the Act can only be aligned to the dictates of the MSDA if these amendments are made.

Fourth, the PIB as the proposed reformative legislation for Nigeria's oil and gas management can incorporate MSDA principles, as it is still at its formative stage. Though one of the objectives of the PIB is to develop the oil and gas producing communities,⁶ the PIB fails to confirm the participatory right of the Niger Delta communities.⁷ The objective to develop the Niger Delta communities cannot be achieved without adequate participation of the communities in oil and gas management. To foster the participatory development of the Niger Delta communities through the MSDA, the PIB must acknowledge, protect and enforce the right of the communities to early notification in oil and gas projects. The PIB must protect the right of the Niger Delta communities to early notification and participation in community development projects, community representatives' equality with other stakeholders during deliberations regarding oil and gas management and community development issues, community representatives' right to hold other stakeholders accountable for their actions and transparency in all issues relating to oil and gas management. The PIB can also be amended to include provisions relating to the continuity of stakeholders deliberations at all stages of oil and gas production and the provision of penalties for infringing on the participatory right of the Niger Delta communities. As a practicable instrument,⁸ the MSDA can be aptly incorporated into the PIB before being passed into law.

Nigeria's oil and gas laws need to recognize and protect the participatory right of host and impacted communities in irrefutable terms and provide mechanisms to protect such right from infringement. In giving the MSDA due recognition in the Nigerian statutes, the existing laws must be amended accordingly and the following must be legally entrenched.

⁶ Nigerian National Petroleum Corporation, "The Petroleum Industry Bill: Fundamental Objectives" online: <<http://www.nnpcgroup.com/PetroleumIndustryBill.aspx>>.

⁷ See Chapter 3 for more on the shortcomings of the PIB regarding the Niger Delta communities' right to participation.

⁸ George Comyn & Hamish McArdle, "The Petroleum Industry Bill: Looking Forward" (2013) Law Business Research.

4.1.1 Recognition of Host and Impacted Communities as Stakeholders

It is inappropriate that no Nigerian statute gives adequate recognition to the host and impacted communities as stakeholders in oil and gas management. To give this chapter adequate premise, it is politic to answer the question; who is a stakeholder?⁹ A stakeholder is a person that is involved in a project or may be directly affected by the outcome of a project. According to the African Development Bank, “stakeholders are people/communities who may directly or indirectly, positively or negatively affect or be affected by the outcome of projects or programs.”¹⁰ The definition of stakeholders is not limited to those actively involved in decision making but it extends to those directly affected by the decision reached.¹¹ Therefore Niger Delta communities, as actors directly affected by the activities of oil and gas companies and government’s action or inaction in regulating these activities effectively, are stakeholders in Nigeria’s oil and gas management.

As discussed in Chapter 3, Nigeria’s Petroleum Act prescribes the mode of oil and gas licences, grants and operation but makes no reference to the host and impacted communities that are mostly affected by these activities.¹² The PDPR directs that an oil licensee’s right to enter upon land for the purpose of his operations is restricted if the land is a sacred land.¹³ The question of what constitutes sacred land would have been rightly directed to the community members or their leaders. This would have been a good means of involving the communities but the law directed such delicate matter to the state government whose seat of administration is outside the affected communities. The host and impacted communities do not have the right to question the state government’s decision in this matter as the government’s decision is final. This means that should the state government erroneously categorize sacred land, the community has no power to reverse such decision. Furthermore, the PDPR restrict the licensee’s right to enter land used for public purpose, situated within a market, burial ground or township, any cultivated land and a private

⁹ See definitions of Stakeholder in Chapter 2.

¹⁰ African Development Bank, Handbook on Stakeholder Consultation and Participation in ADB operations (2001) 1 at 2.

¹¹ For an analysis of the identification of stakeholders in natural resource management, see Yves Renard, “Guidelines for Stakeholder Identification and Analysis: A Manual for Caribbean Natural Resource Managers and Planners” (2004) Caribbean Natural Resources Institute Guidelines Series 7-10.

¹² Petroleum Act, Chapter P10, Cap 350, Laws of the Federal Republic of Nigeria 1990.

¹³ Section 17(1)(a) of PDPR *supra* note 3.

land.¹⁴ These exempted lands are obviously used for collective community purposes by host communities but this restriction can be lifted by the minister if the licensee makes or presents compensation to the occupier or owner of the land.¹⁵ The probability of anyone negotiating on such sacred land is very low which makes the situation more precarious. This means that though the community leaders may not agree to transfer interest in sacred land to the licensee, the licensee is not bound to reach consensus with the community members and may still take possession by merely tendering compensation.

Despite the failure of the government and oil companies to respect the participatory right of the host and impacted communities, quasi-judicial actions are sometimes instituted against the oil companies and government.¹⁶ Also extrajudicial actions such as kidnapping and pipeline vandalism are employed to show resistance to oil and gas operations in communities.¹⁷ In 2003, Chevron was forced to suspend its operations in Warri, Delta State for about 18 months due to crisis in the area.¹⁸ Pipeline vandalism and conflicts¹⁹ have gotten the attention of the government and oil companies in the past but none of the parties benefited from this. It is important for the government to acknowledge the power of host and impacted communities to negatively or positively impact oil and gas management in Nigeria. Niger Delta communities are directly affected by oil production and sufficiently meet the standards for categorizing them as stakeholders. Therefore this thesis proposes that the Nigerian legislature make relevant amendment to existing oil and gas laws in order to legally recognize Niger Delta peoples as stakeholders in oil and gas management.

The MSDA can only be incorporated into the Petroleum Act, OPA, PDPR and other relevant oil and gas laws if they recognize the host and impacted communities as stakeholders and all provisions contradicting the roles of Niger Delta communities as stakeholders are repealed or

¹⁴ Section 17(1)(b) of the PDPR *supra* note 3.

¹⁵ Section 17 of the PDPR *supra* note 3.

¹⁶ *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (2001) African Human Right Law Report 60 (Communication 155/96).

¹⁷ Oteh Chukwuemeka Okpo & Eze R. C., "Vandalization of Oil Pipelines in the Niger Delta Region of Nigeria and Poverty: An Overview" (2012) 3:2 Studies in Sociology of Science 13.

¹⁸ Bronwen Manby, "The Warri Crisis: Fueling Violence" (2003) 15:18 Human Rights Watch 1.

¹⁹ Mohammed Lawal, "Environmental Impact of Pipeline Vandalization on the Nigerian Landscape: The Case of the Niger Delta Region" (2012) 39:1 J. Hum Ecol, 73.

amended accordingly. The implication of recognizing the host and impacted communities as stakeholders is that they become entitled to early notification before oil and gas projects and community development projects begin. More so, as legally recognized stakeholders, the Niger Delta communities have a right to be represented during oil and gas stakeholders' deliberations and to be treated equally and fairly by other stakeholders. As co-stakeholders, the government and oil and gas companies are accountable to the Niger Delta communities just as the communities are also accountable to other stakeholders on issues such as environmental management, developmental projects, oil and gas allocation disbursement and host and impacted communities' sustainability.

4.1.2 Creation of Effective Avenues for Host and Impacted Communities' Participation

Upon recognition of host and impacted communities as stakeholders, it is imperative that the government create avenues for communities to participate in oil and gas management. It is necessary to create these avenues in the laws in order to deter people from creating unpleasant alternatives which may not be acceptable to the government or beneficial to the oil companies. Due to the lack of avenues for the communities to express their grievances, there has been a rise of militant groups who claim to act on behalf of the Niger Delta communities but often resort to conflicts and unlawful acts in order to attract the government and oil companies' attention. For example, in October 2013, two Americans were kidnapped from a platform supply vessel six days after the foreign company they worked for received a threat letter to kidnap their workers if more local workers were not employed.²⁰ Incidences like this may have been avoided if there had been opportunity for the Niger Delta communities to effectively participate in oil and gas management with their opinions accorded due weight by the government and oil companies. Though the militants may have other ulterior motives and employ unlawful means to communicate their grievances, some of their complaints could have been addressed lawfully in dialogues between all stakeholders.

Participation is not a one-way information sharing process but involves all parties influencing the decision making process through information sharing, deliberative process and collective decision

²⁰ James Bridger, "Kidnapping Resurgent in Gulf of Guinea Piracy" (March 14, 2014) *USNI News*.

making. Host and impacted communities need to have legal access to information about oil production and how accruing revenue is allocated. Under the proposed legal framework, oil companies are required to divulge necessary information about oil production to the Niger Delta communities, including the duration, impact of the project on the community, expected revenue, developmental projects the community expresses interest in and so on. The duties of the government relating to transparency in revenue management, enforcement and protection of the rights of the communities and active forbearance of dangerous oil and gas practices by oil companies require effective and unambiguous legal provisions enforcing these duties.

Practicable means of participation depends on the creation of a viable institutional coordination. Niger Delta communities require a collective representative umbrella body with elected representatives from different communities, interest groups and clans. This body will help to negotiate collective interests with the government, international organizations and investors while various communities retain the right to participate in community-specific issues. Every group must be allowed to partake in the election and impeachment process of their representatives and this process must be free from external influence. Representation for a specified duration or term is more practicable in ensuring transparency and accountability of representatives after which successors can be elected through the same transparent process. Criteria for election as representatives must not be restricted to age but other factors must be considered. The level of education of some of the representatives is essential in order to contribute knowledgeably during dialogue processes. It is astute to have experts who are conversant with oil and gas production processes and mechanical terminologies. The elderly community members can provide historical and social contributions when needed. In practice, the communities may ensure proportionate representation from different groups by stipulating the ratio of representatives from each group or the ratio of representatives with different knowledge base. For instance, there may be a communal practice of having 50:50 ratio representatives from the socially and historically knowledgeable members on one hand and the educated members of the communities on another hand. The representatives must be allowed to participate voluntarily without fear of coercion from the government or oil companies and they must be answerable to the people. This thesis proposes that these representatives be allowed to voluntarily communicate their opinions and given equal voting rights with other stakeholders in conformity with the dictates of the MSDA.

4.1.3 Respect for Communal Values

Existing Nigerian laws do not adequately acknowledge the communal values of Niger Delta peoples. There are things these communities hold in high value, including, their spiritual/sacred land, graveyards, rivers for fishing and reverence for their community heads/chiefs. It is unhelpful for the PDPR to refer issues relating to some of these sensitive community possessions to the state government and the Minister of Petroleum Resources.²¹ Development in Nigeria's oil and gas sector hinges on a peaceful relationship between all stakeholders and an angry community will impede peace and development.

Niger Delta communities predominantly depend on their natural habitat for sustenance and their productivity has been adversely affected by environmental degradation caused by oil spillage and gas flaring.²² These people are protective of the rivers they fish in because they provide their major means of sustenance and unrelenting oil spillages deprive the people of their means of survival. Any activity by oil companies that diminishes the productivity of the host and impacted communities requires active legal retribution. There is need for restriction, backed by law, on the approval of licence on any of the sacred or communal land²³ without an option for negotiation because there is little probability that a community with the same bargaining power with oil companies will dispose of its sacred land or graveyards. This is to avoid situations whereby negotiations will be foisted on the communities by oil workers that are much more financially buoyant than they are. Also, the communities' reverence for their village heads/chiefs shows that they must be respected and any action by the oil companies that tends to disrespect the village heads/chiefs may affect the dialogue process and the cooperation of the communities. The law can protect the position of the village heads/chiefs by legally acknowledging their position and making one of the preconditions of acquiring oil operation licence consultation with village heads/chiefs. It is pertinent that continuity of oil and gas operations be legally dependent on the periodical positive reference received from the village heads/chiefs and various interest groups such the youth

²¹ Section 17(1)(a) & (b) of the PDPR *supra* note 3.

²² Abah Roland Clement, "Vulnerability of Fisheries Livelihood in the Coastal Area of the Niger Delta Region of Nigeria" (2013) 5:2 World J. of Fish and Marine Sciences 152.

²³ Sacred lands have spiritual sentiments attached to them by the community members while communal lands are used collectively by the community members for various purposes such as park and market. Roxanne T. Ornelas, "Understanding Sacred Lands" (2007) 17 J. of Natural and Social Sciences 165; Michael Liu, "Legal Analysis of Communal Land and Communal Title" (2009) 1 Rights Links 5.

forum and women's group. Respect for and legal protection of community values is necessary for the peaceful operation of oil workers and the growth of Nigeria's oil and gas sector. Therefore legal protection for these values with prescribed penalty for defaulters will contribute immensely towards conflict reduction in the Niger Delta region. Penalties of fine, suspension or loss of operation license for defaulting oil and gas companies may be sufficient deterrence.

4.1.4 Provision of Schemes for Compensating Host and Impacted Communities

Acts and regulations obliging oil licensees to give occupiers of land "fair and adequate" compensation in different instances are vague. The phrase "fair and adequate compensation" can be easily subjected to different interpretations. For example, section 37 of the first schedule to the Petroleum Act provides that a licensee is liable to pay fair and adequate compensation for infringing on the right of any lawful occupier of land. Section 17 (1)(c)(ii) of the PDPR also provides that a licensee is only required to pay or tender fair and adequate compensation to the lawful occupier or owner of private land whose right is affected by a licensee in the exercise of his right granted under the licence. The vague compensation provision gives room for the oil companies to unfairly negotiate with the members of the communities who do not have the same bargaining power as the oil companies. This situation is worsened by the fact that the licensee is not compelled to have its compensation accepted by the community members; merely tendering the compensation suffices. This thesis proposes the development of a scheme for calculating compensation and ensuring transparency of compensation processes in the laws and regulations.²⁴ To make the oil and gas operators committed to compensation processes, their operation licenses may be suspended until compensation is accepted except for instances of unreasonable demands and unwarranted hostility by the community member(s) involved. This will encourage the oil companies to make reasonable offers and give the aggrieved community members an assurance that justice will be served.

²⁴ Like the Saskatchewan Surface Rights Board of Arbitration (SSRBA), an institution may be created to oversee compensation procedures and disputes arising therefrom. The SSRBA is created by the *The Surface Rights Acquisition and Compensation Act* Chapter S-65 of the Revised Statutes of Saskatchewan, 1978.

4.1.5 Legalization of the Outcome of Dialogue Processes and Access to Justice

The enforcement of the outcome of dialogue processes relies on the provision of a compliance, implementation and enforcement mechanism otherwise stakeholders' commitment will be based on moral justification which is insubstantial. Successful implementation of the MSDA in Nigeria's oil and gas management calls for a statutory duty of parties to comply. There is need for a law that binds stakeholders to conform to the terms of a dialogue process. Without such law, the outcome of a dialogue process can be frivolously discountenanced.²⁵

On another note, access to justice through provision of funds and availability of a speedy and unbiased judicial process is important. The government is encouraged to provide a judicial division that is devoted to environmental issues and gives speedy decisions on oil and gas management matters due to the distinctiveness and long term effect of actions that affect the environment.

4.2 PROPOSED INSTITUTIONAL FRAMEWORK FOR THE MSDA

The Niger Delta Development Commission (NDDC) was established in 2000 with the mandate of “facilitating the rapid, even and sustainable development of the Niger Delta into a region that is economically prosperous, socially stable, ecologically regenerative and politically peaceful”²⁶ but it has not been very effective in achieving these goals. The NDDC lacks autonomy and is regulated by the Federal Government to a large extent, resulting in the officials' alliance with the government.²⁷ Another challenge with the operation of the NDDC is lack of focus in developmental projects. Too many infrastructure projects are commenced leaving many of them incomplete and resulting in waste of funds.²⁸ Other challenges limiting the successful operationalization of the NDDC are internal organization problems such as disloyalty of the commission leaders and furtherance of self-aggrandizement over the interest of the Niger Delta

²⁵ The enforceability of the MSDA will be discussed further later in this chapter.

²⁶ Niger Delta Development Commission Official Website, online: <<http://www.nddc.gov.ng/about%20us.html>> retrieved 22 June 2015.

²⁷ The interference by the government sometimes limits the pace of the NNDC. For instance, the former President Jonathan during his tenure barred the commission from commencing new contracts in the Niger Delta until existing ones were completed. More so, the functions of the NDDC are not well defined and this causes lack of direction in actualizing its objectives. Talatu Usman, “Don't Commence New Contracts in Niger Delta, Jonathan tells NDDC” (16 December 2013) *Premium Times*.

²⁸ Idumange John, “The Impact of Niger Delta Development Commission in the Eyes of the Ordinary Niger Delta People” (8 September 2011) *The Nigerian Voice*.

people, violation of the provisions of the NDDC Act²⁹ regarding awarding of contracts, conflicts within the board which is made up of the Federal Government's appointees, and inefficiency in revenue expenditure.³⁰ These issues have impeded the productivity of the NDDC and its positive impact on the development of the Niger Delta region.

Earlier, the Oil Mineral Development Commission (OMDC) was developed by the then military government led by General Ibrahim Babangida.³¹ Its objectives included the management of Federal Government allocation to the Niger Delta region and the development of the region.³² The OMDC did not exist for long because allocated funds were embezzled and by the time it was dissolved in 1999, it was in enormous debt.³³ The institutions that have been developed in the past were under the control of the government without the Niger Delta communities' involvement. This limited and still limits the success of these institutions as they are perceived as government agencies representing the government and not the Niger Delta peoples. In order to have a system that is dedicated to the participatory development of the Niger Delta communities, this thesis proposes an alternative institutional framework.

4.2.1 Concurrent Administrative Agency by Both Federal and State Governments

The Federal Government established the NDDC³⁴ with powers to implement policies for the development of the Niger Delta region and protection of the region from environmental degradation among others. The NDDC has offices in all the oil producing states but reports to the presidency at the Federal Capital Territory, Abuja on several issues, for example, fund borrowing³⁵ and increment of number of directors.³⁶ State governments have no power over oil production and commissions set up by the Federal Government. Based on the closeness of the state and local governments to the host and impacted communities, there is need for the Federal Government to involve the state and local governments and accord them due powers and responsibilities to them.

²⁹ Niger-Delta Development Commission (Establishment etc) Act, No 6, LFN 2000 (NDDC Act).

³⁰ *Ibid.*

³¹ Decree No. 23, LFN 1992.

³² *Ibid* at Section 2.

³³ Jack Akhigbe & Okouwa Peace, "The State and Development Interventions in the Niger Delta Region of Nigeria" (2013) 3:10 Int'l J. of Humanities and Social Science 255 at 259.

³⁴ NDDC Act *supra* note 29.

³⁵ *Ibid* at Section 17.

³⁶ *Ibid* at Section 9(2).

The states may not be able to set up independent commissions that will fully address developmental issues of the Niger Delta region because this may infringe on the exclusive power of the Federal Government on natural resource management. The Federal Government, while working in conjunction with state and local governments, may delegate some powers and functions in furtherance of the development of the Niger Delta communities. This can be achieved through the establishment of an agency under the concurrent powers of the federal and state governments. The established agency will help to bridge the gap between the federal, state and local governments with regards to Niger Delta development. Therefore while the Federal Government remains the exclusive constitutional administrator of oil and gas in Nigeria, the state and local governments are active partners in formulating and implementing developmental policies that affect the Niger Delta peoples.

4.2.2 Restructuring of the Niger-Delta Development Commission (NDDC)

The constitution of the NDDC is not structured towards the participatory development of the people. There is only one spot for each oil-producing state on the board of NDDC, which means that there are only nine representatives from all the oil producing states on a board of 19 people. The other representatives who do not have to be members of the Niger delta region are, three representatives of non-oil producing states, a representative of the oil companies, a representative of the Federal Ministry of Finance, a representative of the Federal Ministry of Environment, the managing director of the commission, two executive directors and the Chairman.³⁷ The NDDC Act is silent on the right of the host and impacted communities to elect their representatives or participate in the proceedings of the commission.

Development projects that do not originate from the people cannot have the desired effect because people tend to resist development projects they are not part of. The NDDC's operating structure is against the tenets of participatory development theory which proposes that people must be allowed to decide their future by participating in the development projects in their communities and have opportunity to influence decision making. Projects by a commission in which people's

³⁷ Section 2, NDDC Act *supra* note 29.

representatives are a minority is paternalistic. It means the decision makers are mostly people that are not members of the communities. It will be difficult for the Niger Delta communities to have a sense of ownership of NDDC projects especially in a situation whereby their representatives were appointed by the government. There is need to restructure the NDDC to encourage host and impacted communities' participation. This thesis proposes restructuring of the NDDC to create avenue for the participation of the host and impacted communities in its operation, election of its officials and project planning and implementation.

4.2.3 Statutorily Recognized Host and Impacted Communities Organizations

Actualization of any proposed legal framework depends on the government's willingness to recognize an organization representing the interest of the Niger Delta peoples. This does not amount to self-governance or conflict with state or Federal Government authority. Instead it is the recognition of a group of people elected within the host communities by their people to liaise with the government, oil companies or other external bodies on behalf of the Niger Delta peoples.

Various groups have emerged but they are not legally recognized and some of them have been employed for illegal purposes, especially militancy though they claim their initial purpose was for the protection of the rights of the Niger Delta communities. The Movement for the Emancipation of the Niger Delta (MEND) originated in 2005 and they now have subsidiaries such as Federated Niger Delta Ijaw Communities (FNDIC), Niger Delta Strike Force (NDSF) and Outlaws.³⁸ MEND became well known when its members kidnapped four oil workers and outlined their ransom which included host communities participation in oil and gas management, socioeconomic development and reduction of military presence in their communities.³⁹ Though these demands are community oriented, their subsidiaries were involved in illegal militant acts in pursuance of their self-interest.

The Niger Delta People's Volunteer Force (NDPVF) founded by Mujahid Dokubo-Asari in 2004 worked against oil companies and financed their operations through revenue generated from oil

³⁸ Tomas Malina, "Militancy in the Niger Delta" GSPIA; online <[https://www.ridgway.pitt.edu/Research/Issues/InternationalPeaceSecurity/Backgrounders\(IPS\)/tabid/552/ArticleId/646/Militancy-in-the-Niger-Delta.aspx#Who_are_the_Main_Militant_Groups_>](https://www.ridgway.pitt.edu/Research/Issues/InternationalPeaceSecurity/Backgrounders(IPS)/tabid/552/ArticleId/646/Militancy-in-the-Niger-Delta.aspx#Who_are_the_Main_Militant_Groups_>)

³⁹ *Ibid.*

theft.⁴⁰ Other groups include Niger Delta Vigilantes (NDV) and People’s Liberation Force (PLF). In order to avert the illegal activities of these militant groups, oil companies sometimes pay “protection money” to them and local chiefs.⁴¹ These groups emerged as a result of lack of well structured, legally recognized organizations that actively protect the rights of the Niger Delta peoples and address their grievances. If there had been an institution where the people can report oil companies’ wrongful operations and have the assurance that their reports will be given due attention, the escalation of militant groups could have been curtailed.

The Philippines and Canada are examples of countries that legally recognize host and impacted communities’ representative organizations. Section 3(i) of the Philippine Indigenous Peoples’ Right Act provides that “Indigenous Political Structures refer to organizational and cultural leadership systems, institutions, relationships, patterns and processes for decision-making and participation, identified by Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs) such as, but not limited to, Council of Elders, Council of Timuays, Bodong Holders, or any other tribunal or body of similar nature.”⁴² Section 3(n) of the same Act provides that “Peoples Organization refers to a private, non-profit voluntary organization of members of an ICC/IP which is accepted as representative of such ICCs/IPs.” Similarly, the Canadian government recognizes five national Aboriginal representative organizations: Congress of Aboriginal Peoples (CAP), Assembly of First Nations, Inuit Tapiriit Kanatami, Metis National Council and Native Women’s Association of Canada.⁴³ Different provinces also recognize organizations representing Aboriginal peoples within their provinces.⁴⁴ Having these organizations make it easier for the above cited governments to dialogue with indigenous peoples through their representatives and know who to give recognition when the indigenous communities need to communicate with the government. Though the Nigerian government does not recognize the host and impacted communities as

⁴⁰ *Ibid.*

⁴¹ Stratfor “Nigeria’s MEND: Odili, Asari and the NDPVF” (March 18, 2009) online: <<https://www.stratfor.com/analysis/nigerias-mend-odili-asari-and-ndpvf>>.

⁴² The Preamble, Philippine Indigenous Peoples’ Right Act, Republic Act No 8371 (IPRA).

⁴³ Queens University “Aboriginal Representative Bodies” School of Policy Studies, Institute of Intergovernmental Relations.

⁴⁴ Bob McLeod, “Government of the Northwest Territories Taking a More Prominent Role on the National Scene” online: <<http://beta.gov.nt.ca/newsroom/bob-mcleod-government-northwest-territories-taking-more-prominent-role-national-scene>>. The Aboriginal Affairs and Northern Development Canada’s website contains a detailed list of aboriginal tribal councils under different provinces, online: < <http://pse5-esd5.ainc-inac.gc.ca/fnp/Main/Search/SearchTC.aspx?lang=eng>> (accessed on 22 June 2015).

indigenous peoples, this does not prevent the application of principles applicable to indigenous peoples in other parts of the world to the Niger Delta communities.

Recognition of representative organizations does not threaten the unity of the country rather it demonstrates that the government acknowledges the host and impacted communities as groups of people having interests different from others. Niger Delta communities have interests different from that of other Nigerian regions which is the protection of their communities from oil spillage, gas flaring, unjust military actions among others. Legal frameworks cannot reach their full potential without having organizations legally representing the interest of the Niger Delta peoples.⁴⁵ The proposed organization is different from government agencies that are responsible for the implementation of government directives in relation to the Niger Delta region. What is required is an organization directed by the representatives who have the peoples' mandate and are committed to the protection of their interests.

4.3 LESSONS FROM THE PHILIPPINE'S IMPLEMENTATION OF FREE, PRIOR AND INFORMED CONSENT (FPIC)

FPIC is a principle for receiving the consent of indigenous communities before the commencement of projects and it is traditionally applied to the right of indigenous peoples to protect their rights and participate in the decisions that affect their land and resources.⁴⁶ FPIC is a principle which requires consultation with and voluntary consent of indigenous peoples or a group of people with such right before the commencement of a project. In an attempt to define FPIC, MacKay states that "free implies that there is no coercion, intimidation or manipulation. Prior implies that consent is sought in advance of any authorization or commencement of activities. Informed implies that information is provided about major aspects of the project and consent involves consultation and participation."⁴⁷ Some argue that the foundation of FPIC is the ability of indigenous peoples to

⁴⁵ Having a community with viable and strong institutional framework is a necessity for the actualization of any policy or developmental project. Jean Philippe Platteau & Anita Abraham, "Participatory Development in the Presence of Endogenous Community Imperfections" (2010) 39:2 J. of Development Studies 104 at 129.

⁴⁶ Robert Goodland, "Free, Prior and Informed Consent and the World Bank Group" (2004) 4 Sustainable Dev. L. & Pol'y 66; Joji Carino, "Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice" (2005) 22 Ariz. J. Int'l & Comp. L. 19

⁴⁷ Fergus MacKay, "Indigenous Peoples' Right To Free, Prior and Informed Consent and the World Bank's Extractive Industries Review" (2004) 4 Sustainable Dev. L. & Pol'y 43 at 49.

voluntarily consent before an activity commences on their land based on adequate information given to them about the extent and effects of the project.⁴⁸ On another hand, it is argued that international law is unsettled on the question of whether FPIC imposes an obligation on states to obtain the consent of indigenous peoples before the commencement of projects.⁴⁹ Due to the diversity of opinions on the obligation of States to receive the consent of indigenous peoples before commencement of projects, Barelli has proposed a flexible approach to FPIC which stipulates that “indigenous peoples should have a right to veto in relation to all matters affecting their lands. At the same time, however, it affirms that when a development project is likely to have a serious (negative) impact on the cultures and lives of indigenous peoples, states must obtain their consent before implementing it.”⁵⁰ Indigenous communities over the world have been clamouring for the right to FPIC on projects initiated in their communities as direct recipients of the outcome (either adverse or otherwise) of projects.⁵¹ FPIC gained much recognition when it was incorporated into the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵²

FPIC has been integrated into the Philippines’ legal frameworks with adequate institutional framework to ensure compliance and this thesis analyses these frameworks to exemplify the integration of normative frameworks such as FPIC and the MSDA. The Philippine Indigenous Peoples’ Rights Act was developed to “recognize, protect and promote the rights of indigenous cultural communities/indigenous peoples, creating a national commission on indigenous peoples, establishing implementing mechanisms, appropriating funds therefor, and for other purposes.”⁵³

⁴⁸ Tara Ward, “The Right to Free, Prior and Informed Consent: Indigenous Peoples’ Participation Rights within International Law” (2012) 10:2 Nw. U. J. Int’l Hum. Rts. 54.

⁴⁹ Mauro Barelli, “Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead” (2012) 16 The Int’l J of Human Rights 1. In an attempt to integrate FPIC principles into the Policy and Performance Standards of the International Finance Corporation (IFC), it was admitted that the provisions of FPIC are equivocal. Shalanda H. Baker, “Why the IFC’s Free, Prior, and Informed Consent Policy Doesn’t Matter (Yet) to Indigenous Communities Affected by Development Projects” (2013) 30:3 Wisconsin Intl L.J. 669.

⁵⁰ Barelli *ibid* at 17.

⁵¹ Nick Magel, “Peru’s Indigenous Communities make a Business Case for FPIC” (5 July 2011) *Earthworks* online: <http://www.earthworksaction.org/earthblog/detail/peru_s_indigenous_communities_make_a_business_case_for_fpic#.VYg15_IVh2I>; Cathal Doyle & Jill Carino, “Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector” (2013) online: <<http://www.ecojesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>>.

⁵² Adopted 13 September 2007, UNGA 61/295.

⁵³ IPRA, *supra* note 42.

This Act provides the legal basis for the incorporation of FPIC principles into the Philippine legal system. Section 3(g) of IPRA provides that:

The consensus of all members of the Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs) to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.⁵⁴

This definition gives an excellent scope of what FPIC connotes and how such right can be rightfully preserved thereby avoiding ambiguities which could have resulted in unwarranted setbacks. The IPRA goes further to enforce the right of indigenous peoples to give prior consent through recognized institution acting on behalf of indigenous peoples. According to Section 59 of Philippine IPRA:

All department and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, licence or lease, or entering into any production-sharing agreement, without prior certification from the National Commission on Indigenous Peoples (NCIP) that the area affected does not overlap with any ancestral domain... Provided that no certificate shall be issued by NCIP without the free and informed and written consent of the ICCs/IPs concerned... Provided finally, that the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.

It is expedient to state here that the Philippine experience is explored to demonstrate the incorporation of FPIC into their legal system and not to analyze the potential of FPIC as a framework for indigenous peoples' participation. The Philippine IPRA empowers indigenous peoples to give their consent before any project commences and resist the continuation of projects that fail to meet the required test which serves as a good example for other governments. Legal recognition of FPIC with a well-structured institutional framework for its implementation

⁵⁴ Philippine Indigenous Peoples' Right Act, Republic Act No 8371.

demonstrates a State's active practice of inculcating an internationally recognized norm into its system.

The Philippine experience is an indication of the possibility of incorporating the MSDA into Nigeria's oil and gas legal and institutional regime. As proposed in this thesis, the Philippine IPRA acknowledges the indigenous communities as stakeholders, and goes further by recognizing the body representing the indigenous peoples. This demonstrates that the legal and institutional frameworks proposed in this thesis are practicable subject to the willingness of the Nigerian government to incorporate the MSDA into relevant statutes. Contrary to the Nigerian government's position, the recognition of a group of people as indigenous reveals the Philippine government's commitment to affirm the inherent rights of the group. More so, the IPRA's reference to the National Commission on Indigenous Peoples supports the argument earlier made in this thesis that the creation of numerous government agencies with diverse objectives is not necessary⁵⁵ but the creation or maintenance of few government agencies with sufficient independence and coherent objectives suffices.

4.4 SIGNIFICANCE OF THE MSDA IN NIGERIA'S OIL AND GAS MANAGEMENT

First, effective stakeholder participation enhances trust between the parties because decisions made would originate from all the stakeholders. Parties have the opportunity to explain the reasons behind their decisions in the course of dialogue thereby giving other stakeholders an understanding of their views and reducing uninformed ideas. The MSDA will give the oil companies the opportunity to explain some of their actions and disabuse the minds of the local communities about oil production. This will enhance cordial relationship between the parties and give the Niger Delta communities a sense of ownership.

Where there is input from all stakeholders in decision making, it produces a well-informed process. The host and impacted community members will have the opportunity to advise on the societal norms and cultural dynamics of the people, while the oil companies can educate other stakeholders

⁵⁵ Chapter 1.2 of this thesis.

on the technicality of their operations. The government representatives can enforce compliance with government regulations and enlighten the people on their human rights. The MSDA “brings not only additional skills, knowledge, concerns and ideas to the table, but also solutions that might not have otherwise arisen.”⁵⁶

Second, the MSDA has the potential to foster effective community participation and peaceful coexistence. The rationale behind most oil-related conflicts is the anger of Niger Delta peoples vented on oil companies because of environmental degradation caused by oil spillage and gas flaring.⁵⁷ For example the Odi and Warri crises revealed the Niger Delta communities’ outrage against oil production and the consequent military action could have been avoided.⁵⁸ This and many more conflicts have caused the oil producing communities their lives and properties in the past. All parties have lost from the ceaseless conflicts and there is need for change. Oil companies lose some of their kidnapped staff members and others live under security threats. In 2003, due to the Warri crisis, Chevron was forced to suspend its operations for almost 18 months and recorded huge financial loss during the period.⁵⁹ The Nigerian government recorded revenue loss because suspended operations by oil companies amounted to reduced royalties. The government also lost some of its military forces in the process.

More so, people tend to appreciate development projects they partake in and having developmental projects that address the needs of the people, protects their human rights and enforces accountability is advantageous.⁶⁰ Participation in oil and gas management will give the people a sense of ownership and give the government and oil companies the opportunity to address the negative opinions the host and impacted communities hold against them and oil production.⁶¹

⁵⁶ Stella Bastidas, “The Role of Public Participation in the Impact Assessment of Trade Process” (2004) Canadian Institute for Environmental Law and Policy, Speaker Paper for the Impact Assessment for Industrial Development – IAIA’04.

⁵⁷ Perekunah Bright Eregha, “Oil Induces Environmental Degradation in the Nigeria’s Niger-Delta: The Multiplier Effects” (2009) 11:4 J. of Sustainable Development in Africa 160.

⁵⁸ Osita Nwajah, “A Tale of Military Massacres: From Ogoni Land to Odi Town” (December, 1999) online: <http://www.waado.org/environment/fedgovt_nigerdelta/bayelsainvasion/FederalGovernInvadesBayelsa/MilitaryInOdi/MilitaryMassacres.html>.

⁵⁹ Bronwen Manby, “The Warri Crisis: Fueling Violence” (2013) 15:18 Human Rights Watch 1.

⁶⁰ Margeret Ledwith, *Community Development: A Critical Approach* (Great Britain: Policy Press, University of Bristol, 2005) at 146.

⁶¹ Emeka Duruigbo, “Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds” (2005) 30 N.C.J. Int’l & Com. Reg. 121.

Participation adds value to planning and management processes and fosters the inclusion of community members' knowledge and opinions for more acceptable decision making.⁶² Participatory development can make Niger Delta communities more at peace with oil production and provide a communication link between these communities and the other stakeholders. For oil companies, it is a step towards acquiring the social licence to operate which is important for a secure operating environment.

Third, the MSDA promotes environmental sustainability through host and impacted communities' contributions to reduced or discontinued oil spillages and gas flaring by articulating their views on environmental degradation which must be duly redressed by the government and oil companies. The Niger Delta communities often complain about the incessant oil spillages and gas flaring in their communities but the government and oil companies have not been adequately responsive. Through public scrutiny, active host and impacted communities' participation can identify environmental issues that may otherwise be neglected, thereby preventing future problems.⁶³ An effective multi-stakeholder dialogue process which gives the Niger Delta peoples the opportunity to articulate their concerns with the assurance of other stakeholders giving their opinions due recognition will help to deter oil companies from activities that degrade the environment, thereby sustaining the environment.

Fourth, the Niger Delta communities rely to a large extent on their environment for sustenance⁶⁴ and having a sustainable environment with clean water for fishing and drinking and unpolluted land for farming will reduce poverty in the Niger Delta.⁶⁵ This will have an enormous impact on the economic and social development of the Niger Delta communities. More so, conflict reduction will stop occasional damage to property and promote communal growth which will also positively impact the economic development of the host and impacted communities.

⁶² Melissa Marschke & John Sinclair, "Learning for Sustainability: Participatory Resource Management in Cambodian Fishing Villages" (2009) 90:1 J. of Environmental Management 206.

⁶³ Bastidas, *supra* note 56 at 2.

⁶⁴ Uwafiokun Idemudia & Uwen E. Ite, "Demystifying the Niger Delta Conflict: Towards an Integrated Explanation" (2006) 33:109 Review of African Political Economy 391; Kiiikpoye, "Perspective: Big Oil, Rural Poverty, and Environmental Degradation in the Niger Delta Region of Nigeria" (2005) 11:2 J. of Agricultural Safety and Health 127.

⁶⁵ Merilee S. Grindle, "Good Enough Governance: Poverty Reduction and Reform in Developing Countries" (2004) 17:4 Int'l J. of Policy, Administration and Institutions 525; Hartmut Schneider, "Participatory Governance for Poverty Reduction" (1999) J. of Int'l Development 521.

Fifth, the MSDA ensures that all stakeholders are accountable for their actions. The oil companies operating in Nigeria often engage in activities that are dangerous to the health of the Niger Delta peoples, but due to lack of effective mechanisms to make them accountable for their actions, they have not made necessary amendments.⁶⁶ The Nigerian government has also not been accountable in its management of oil revenue and this is another issue that infuriates the oil producing communities.⁶⁷ Effective multi-stakeholder participation will enforce accountability of the stakeholders, thereby promoting environmental protection, prudent revenue management and foster conflict reduction.

Sixth, the MSDA promotes sustainable development. Sustainable development is commonly described as “development that meets the needs of the present without compromising the ability of future generations to meet their needs.”⁶⁸ A World Bank Policy Research Report argues that community participation improves “resource sustainability and quality of infrastructure.”⁶⁹ Proponents of sustainable development argue that there is need for people to see the world as a revolving structure in which present actions have effect on the future generations.⁷⁰ Sustainable development is “about improving standard of living by protecting human health, conserving the environment, using resources efficiently and advancing long-term economic competitiveness. It requires the integration of environmental, economic and social priorities into policies and programs and requires action at all levels - citizens, industry, and governments.”⁷¹

⁶⁶ Alison Shinsato, “Increasing the Accountability of Transactional Corporations for Environmental Harms: The Petroleum Industry in Nigeria” (2005) 4:1 *Northwestern J. of Intl Human Rights* 185.

⁶⁷ Oladele Rotimi, “Revenue Generation and Transparency in Nigeria Oil and Gas Industry: Position of Nigeria Extractive Industries Transparency Initiative” (2013) 4:6 *Research J of Finance and Accounting* 99.

⁶⁸ World Commission on Environment and Development, *Our Common Future* (Oxford; New York: Oxford University Press, 1990) at 43; Section 2, Canada Federal Sustainable Development Act, S.C. 2008, c.33.

⁶⁹ Ghazala Mansuri & Vijayendra Rao “Localizing Development: Does Participation Work?” (2013) A World Bank Policy Research Report, SKU18256.

⁷⁰ International Institute of Sustainable Development, “What is Sustainable Development?” (2013) online: <<https://www.iisd.org/sd/#one>>.

⁷¹ Christopher Clague, *Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries* (London: John Hopkins University Press 1997); Environment Canada, “Sustainable Development” (2014) online: <<http://www.ec.gc.ca/dd-sd/>>.

The underlining result of the aforementioned importance of participatory development is to have sustainable development in the Niger Delta region.⁷² The host and impacted communities' ability to partake in oil and gas management will result in their active and productive opposition to environment degrading activities of oil companies. They can express their dissatisfaction about oil spillages and gas flaring by oil companies during dialogue and induce the government to take steps against defaulting oil companies. This will encourage the government to be more active in prohibiting and penalizing oil companies for oil spillage and gas flaring thereby promoting environmental sustainability in the oil and gas producing communities. The ultimate goal is to discontinue the trend of poverty and shortened life span of the residents of the oil and gas communities, giving future generations better lives and opportunities to develop.

4.5 CHALLENGES OF IMPLEMENTING THE MULTI-STAKEHOLDER DIALOGUE APPROACH IN NIGERIA

Introduction and implementation of the MSDA may be hindered in some ways considering the social, economic and cultural dynamics of the Niger Delta region and the political nature of the Nigerian government. These challenges may delay the incorporation of the MSDA into Nigeria's oil and gas management but they do not render this approach inoperable. They are issues that can be addressed as the oil and gas industry evolves in line with the dictates of the MSDA and through the joint effort of the stakeholders. For example, the challenge of lack of resources in the oil and gas communities cannot be resolved momentarily but it is hoped that the living condition of the people will improve as participatory development is inculcated and enforced in Nigeria's oil and gas sector. The challenges listed below are not exhaustive but they are paramount issues that cannot be underestimated in the successful implementation of the MSDA in Nigeria's oil and gas management.

⁷² Romina Picolotti & Jorge Daniel Taillant, *Linking Human Rights and the Environment* (Arizona: University of Arizona Press, 2003); Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lome Convention* (Boston: Kluwer Law Int'l 2000); United Nations Development Programme, "Extractive Industries: Strategy Note" (December 2012) UNDP's Strategy for Supporting Sustainable and Equitable Management of the Extractive Sector for Human Development' 1 at 18-19.

4.5.1 Lack of Resources

First, poverty rates in the Niger Delta are quite high with people living on an average household income of less than \$1 per day.⁷³ Lack of resources may prevent the people from participating effectively in oil and gas management. First, lack of adequate funds may prevent them from contracting the services of experts regarding oil and gas issues they are not conversant with. When other stakeholders share information with community representatives, they may need to consult experts in order to make informed decisions but where this is not achievable, they may fail to make intelligible decisions. More so, for people living on a household income of \$1 per day, ability to make selfless and long term decisions may be difficult. In this situation, the people's priority is their immediate needs, that is, food, shelter and health care for the sick. Meanwhile, oil and gas management involves high monetary figures that the Niger Delta representatives may find difficult to comprehend.

Second, lack of resources affects the way others relate with Niger Delta peoples and accord them due respect. This may affect stakeholders' equality and the weight given to the views of community members during dialogue.⁷⁴ The UNDP report on the Niger Delta Human Development Report puts this in context: "while poverty may seem to cause deprivation and hinder individual development, it is also the consequence of a number of social and national factors, such as poor governance and the exclusion of particular social groups, including minority ethnic groups, women and youth, from participation in decision-making on matters relating to their welfare."⁷⁵ Furthermore, financial constraint impedes the ability of host and impacted communities to develop and maintain representative organizations and limits their capacity to retain the services of experts to advise them on technical and legal issues related to oil and gas management.

This challenge may be addressed by electing representatives that are resolute about the development of the Niger Delta communities and are willing to ignore momentary benefits to achieve their long term goals. These are people that have the interest of their people at heart and

⁷³ UNDP, *Niger Delta Human Development Report* (Lagos: Perfect Printers publishers, 2006) at 37 (UNDP Report).

⁷⁴ The requirement of stakeholder equality can be problematic except parties take necessary steps to enforce it. Lisa M. Campbell & Arja Vainio-Mattila, "Participatory Development and Community-Based Conservation: Opportunities Missed for Lessons Learned (2003) 31:3 Human Ecology 417.

⁷⁵ UNDP Report, *supra* note 73 at 37.

are determined to work for the development of their community. Having people of integrity as representatives of the Niger Delta peoples will be beneficial.

4.5.2 Level of Illiteracy in Host and Impacted Communities

The level of illiteracy in the Niger Delta region is high. Reports show that 40% of the people are illiterates⁷⁶ and primary school registration is at 30% to 40% of the registerable age.⁷⁷ Illiteracy affects the people's ability to appreciate issues such as oil and gas management that is mostly presented in complex terms and requires some level of formal education to understand. Having illiterate decision makers will have an adverse effect on the communities and the process of electing community representatives may be cumbersome because the people with the requisite historical and sociological knowledge of the community may require educated personnel to assist them function optimally as the representatives of the people.

On another hand, the community heads/chiefs are often consulted directly by oil companies and their illiteracy affects their decision making prowess.⁷⁸ This challenge may be addressed by illiterate community leaders' willingness to work in accord with educated members of the community. While the community heads may contribute towards social, cultural and historical issues, the educated members may deal with technical issues.

4.5.3 Inadequate Institutional Coordination

Institutional coordination is defined as “a multi-level process of dissemination of information, formation of capabilities and structuring of interactions based on institutional arrangements. It is the first place in the construction and application of different types of orders, based on the interrelation between actors and institutions that affect the realization of activities by actors.”⁷⁹ Institutional coordination is the process of harmonizing the goals of different groups in the

⁷⁶ Diana Arubayi, “Demographic Characteristics and Skills of Youths in the Niger Delta Region of Nigeria” (2010) 18:1 J. of Research in National Development 1.

⁷⁷ Augustine Ovuoronye Ikelegbe, “Niger Delta is Dying” (6 December, 2012) Urhobo Times; online: <http://www.urhobotimes.com/individual_news.php?itemid=928>.

⁷⁸ Human Rights Watch, “The Niger Delta: No Democratic Dividends” (2002) 14:7 online: <<http://www.hrw.org/reports/2002/nigeria3/nigerdelta.pdf>>.

⁷⁹ Bruno Gandlgruber, “Regimes of Institutional Coordination of Economic Activities” (2007) online: <http://www.fep.up.pt/conferencias/eaepe2007/Papers%20and%20abstracts_CD/Gandlgruber.pdf>.

community with the objective of promoting the sustainable development of the community. In order to have an efficient institutional coordination, there must be a structure in place for communal deliberation and planning for collective implementation of goals. Niger Delta communities lack well-structured institutions synchronizing the interest of different groups, disseminating information and working towards their collective development. There are different groups within the host and impacted communities which includes women's groups, youth groups and elders' forums. These groups have great potential to contribute to the development of the region but there is no institutional coordination for harmonizing their goals and bringing the groups to their full potential. Uniting a community without efficient institutional coordination for election of representatives to partake in dialogue with other stakeholders may be difficult. This may also affect the ability of government officials and oil companies to circulate information within all the groups.

There is need for a legally recognized institution that is charged with the responsibility of institutional coordination of the communities and liaison with the interest groups. This well coordinated institution will ensure the adequate dissemination of information, recognition of every group's interest, community planning, cooperation of all groups and promotion of the community's interest as a whole. Having the different groups merge their efforts towards the development of the community will produce cohesive community participation and stronger effort to repel environmental degradation and underdevelopment. As Axner aptly puts it; "when you have many groups with different views, resources, and skills applying their intelligence and strength to solve a problem together, the results can be like the work of superheroes."⁸⁰

4.5.4 Low Level of Democratic Culture

The extent to which Niger Delta communities will imbibe a democratic culture, that is, predisposition of members and leaders to the principles of democracy in governance, is

⁸⁰ Marya Axner, "Promoting Coordination, Cooperative Agreements and Collaborative Agreements among Agencies" (2014) online: <<http://ctb.ku.edu/en/table-of-contents/implement/improving-services/coordination-cooperation-collaboration/main>> at Section 3.

debatable.⁸¹ Democratic culture is about “everyone’s liberty to participate in decision making and not just political, economic or cultural elites.”⁸² Niger Delta communities are culturally governed by chiefs who are appointed either through a monarchical system or by spiritual leaders. The people’s inability to elect their community heads has an adverse effect on the democratic culture of the Niger Delta communities. Though there are accountability mechanisms under the traditional system, the monarchical system of appointing the leaders demonstrates the undemocratic structure of the communities.

A democratic culture does not only involve the ability of people to participate in decision making but it includes the people’s power to hold their leaders accountable. In Tyoyila and Terhenmen’s words: “it includes democratic self-rule that calls for a high degree of accountability of the state and substantial direct participation of the people in their community’s institutions. It requires the creation of equal opportunity for participation including social and economic rights.”⁸³ The Niger Delta peoples have little or no power over the appointment and removal of their community leaders. The chiefs have been accused of disloyalty by receiving bribes from oil companies and lack of commitment to their office.⁸⁴ For the MSDA to be productive in the Niger Delta region, the communities’ democratic culture must improve and this can be addressed by the election of representatives that will be accountable to the people thereby reducing the undemocratic nature of their leaderships.

4.5.5 Environmental Centralism

Administration of environmental issues in Nigeria is under the central control of the Federal Government managed through the National Environmental Standards and Regulations Enforcement Agency (NESREA).⁸⁵ The agency is responsible for the “protection and development

⁸¹ For a discussion on the effect of customary laws on the enforcement of human rights of indigenous peoples, see Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (New York: Routledge, 2014) at 180-206.

⁸² Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society” (2004) 79:1 N.Y.U.L. Rev 1 at 3.

⁸³ Tyoyila Gabriel Akwen & Terhenmen Daniel Geve, “Challenges of Democracy and Development in Nigeria’s Niger Delta Region: An Appraisal (2012) 8:16 *European Scientific J.* 52 at 63.

⁸⁴ Michael Peel, “Crisis in the Niger Delta: How Failures of Transparency and Accountability are Destroying the Region” (2005) Chatham House AFP BP 05/02.

⁸⁵ Established by the National Environmental Standards And Regulations Enforcement Agency (Establishment) Act, Laws of the Federal Republic of Nigeria 2007

of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, laws and guidelines.”⁸⁶ The agency submits annual reports to the Federal Executive Council.⁸⁷ This removes the control over environmental issues from the state and local governments and reposes same in the Federal Government. The implication is that issues of environmental degradation caused by oil companies is addressed to NESREA, an agency situated at the Federal Capital Territory, Abuja with 14 branch offices and 3 of such branches in the oil producing region. This makes deliberating on environmental problems of the Niger Delta region difficult because the agency representing the Federal Government is far removed from the people and may not be as conversant with the challenges of the people.

Another disadvantage of environmental centralism is that the solution lies in the Federal Government whose election cannot be decided by the local communities alone but the entire country.⁸⁸ Invariably, the host and impacted communities cannot employ their voting power to influence the government’s decision because they are a minority. It would have been a different scenario if the local or state government whose mandate lies in the oil producing region was in charge. The Federal Government’s environmental management has been flawed for failing to resolve the environmental issues in the Niger Delta region and this reveals the need for a productive policy which decentralizes environmental management in Nigeria.⁸⁹ While focusing on the United States of America’s environmental system, Schoenbrod enumerated some disadvantages of environmental centralism:

It requires federal delegation of environmental policy making to NESREA. As a result, environmental policies are made by bureaucrats rather than officials who are directly accountable to voters. Secondly, voters cannot effectively hold national officials accountable for how they resolved local environmental disputes. Thirdly, federal

⁸⁶ Section 2 of NASREA Act.

⁸⁷ *Ibid* at Section 18.

⁸⁸ See David Schoenbrod, “Why States, Not EPA, Should Set Pollution Standards” (1996) 19 Regulation J. 18.

⁸⁹ Ibrahim Baba, “Political Ecology of Environmental Management and Resource Control in the Niger Delta Region of Nigeria: Lessons of Experience and the Way Forward” (2014) 2:8 Universal J. of Management 146 at 148-149.

mandates give federal legislators and the president the means to take credit for the benefits of environmental programs while placing blame for any ensuing costs on state and local officials.⁹⁰

The problem environmental centralism poses also affects the implementation of the MSDA in Nigeria's oil and gas management because state and local governments do not have the imperative to address environmental problems during stakeholder dialogue. Recourse has to be made to the Federal Government. This may slow down the process and affect the people's trust and commitment. State and local governments would have ideally represented their people's interest bearing in mind that they owe them their political mandate. Therefore it is expedient to empower state and local governments to administer their environmental policies.

4.6 LIMITATIONS OF THE MSDA

It will be erroneous to suggest that the MSDA is a flawless framework. Four factors that can restrict the productivity of community involvement in decision making are; disproportional powers and resources between stakeholders, lack of required financial capacity for local communities, ability to hold others accountable, and communities' ability to benefit from the natural resource they are co-managing with other stakeholders.⁹¹ Despite the developmental potential of implementing the MSDA, it comes with pockets of disadvantages but the benefits greatly outweigh the identified limitations discussed below.

The MSDA extends the decision making time frame due to the involvement of multiple stakeholders in the deliberation process. Consultation may be cumbersome and time consuming and this may be discouraging for oil companies willing to start operations as soon as they can. Implementing the MSDA in Nigeria's oil and gas management will prolong the preliminary requirements of commencing oil production and increase the process of receiving licences for operation. Though this burdensome process may deter oil and gas investors, the consequent increase in profit margin and reputation enhancement are sufficient incentives. More so, the

⁹⁰ Schoenbrod, *supra* note 88 at 21.

⁹¹ Ghazala Mansuri & Vijayendra Rao "Localizing Development: Does Participation Work?" (2013) A World Bank Policy Research Report, SKU18256.

subsisting system of disconnect between the stakeholders with the consequent conflicts is more time consuming and costly, therefore the time spent in dialogue is more productive and shorter than the time lost to conflicts.

Stakeholders in Nigeria's oil and gas management have diverse interests to protect.⁹² The oil companies hope to maximize their profit and dispose associated gas at minimum cost. The government's interest is to increase the inflow of oil and gas revenue, though it is expected that government will also be interested in the development of the people but the former seems more important to the Nigerian government. The host and impacted communities want development and environmental sustainability. Deliberating on these conflicting interests can be difficult and stakeholders may become hostile and rigid.⁹³

4.7 ENFORCEMENT MECHANISMS FOR THE MSDA IN NIGERIA'S OIL AND GAS MANAGEMENT

The MSDA is a multi-party deliberative process without an inherent compliance or enforcement mechanism. In the absence of an enforcement framework, parties cannot be compelled to comply with the agreed terms. The MSDA can only appeal to the moral sentiments of stakeholders unless other mechanisms are implemented to ensure compliance and enforcement of decisions made. This thesis proposes the multi-actor contract model and statutory enforcement mechanism for the enforcement of the MSDA in Nigeria. These mechanisms are suggested based on the promotion of the human rights of the Niger Delta peoples, the responsibility of the Nigerian government to protect the human rights of the people, the duty of the oil companies to respect the rights of host and impacted communities⁹⁴ and the business perspective for the oil companies. The rights of the

⁹² Benedict Akpomuvie, "Tragedy of Commons: Analysis of Oil Spillage, Gas Flaring and Sustainable Development of the Niger Delta of Nigeria" (2011) 4:2 J. of Sustainable Development 200; David Wheeler, Heike Fabig & Richard Boele, "Paradoxes and Dilemmas for Stakeholder Responsive Firms in the Extractive Sector: Lessons from the Case of Shell and the Ogoni" (2002) 39 J. of Business Ethics 297.

⁹³ Ibiroke Odumosu-Ayanu, "Multi-Actor Contracts, Competing Goals and Regulation of Foreign Investment" (2014) 65 UNB L. J. 269 at 273 (Odumosu-Ayanu; Multi-Actor Contracts); Jean-Philippe Platteau & Anita Abraham, "Participatory Development in the Presence of Endogenous Community Imperfections" (2010) 39:2 J. of Development Studies 104 at 114.

⁹⁴ United Nations Human Rights Office of the Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework" (2011) HR/PUB/11/04 (PRR Principles).

host and impacted communities to participation and the government's duty to protect this right have been discussed in Chapter 1 of this thesis. The business case for the MSDA is made later in this Chapter to outline the benefits of the MSDA to the oil companies and to demonstrate the necessity for them to embrace this approach.

4.7.1 Statutory Enforcement Mechanism

Nigeria has many statutory instruments that regulate the oil and gas sector, therefore this thesis is not suggesting the development of a new statute on the enforcement of the MSDA; rather the necessary provisions can be incorporated into a relevant existing law or bill such as the Petroleum Industry Bill.⁹⁵ The necessity for a statutory enforcement mechanism is to make the decisions of stakeholders legally binding. More so, a legally binding provision that addresses the enforcement of multi-party agreement will clearly specify the duties of the stakeholders, the punitive measures for defaulters and access to legal remedies against defaulters through judicial processes. Also, the efforts of both the legislative and executive governments in amending a law or bill to create a legally enforceable instrument will demonstrate the commitment of the government to promote and enforce the participatory rights of the host and impacted communities.

4.7.2 The Multi-Actor Contract Model

Stakeholders may be contractually bound to comply with the terms of collective decisions through a multi-actor contract. The contract model has been proposed as a solution for legislative lacunas and policy insufficiency in natural resource management and this can be extended to the challenge of lack of compliance mechanism of the MSDA.⁹⁶ The contract model, which is also regulatory in nature, encapsulates the interests of the stakeholders and creates the opportunity for negotiating rights and duties of parties before the commencement of projects.⁹⁷ However, Odumosu-Ayanu suggests that multi-actor contracts be implemented as “quasi-regulatory instruments”, serving as addendum to subsisting or developed regulatory instruments.⁹⁸ The multi-actor contract model not

⁹⁵ See Chapter 3 of this thesis.

⁹⁶ Iboronke Odumosu-Ayanu, “Governments, Investors and Local Communities: Analysis of Multi-Actor Investment Contract Framework” (2014) 15 *Melb. J. Int'l* 473 (Odumosu-Ayanu).

⁹⁷ *Ibid* at 495.

⁹⁸ Odumosu-Ayanu, “Multi-Actor Contracts” *supra* note 93 at 272.

only ensures the involvement of all stakeholders in the decision-making process, it is an enforcement mechanism that makes each stakeholder accountable. Though the statutory enforcement mechanism is a viable means for ensuring stakeholders adhere to their agreements, it is better implemented with a contract model due to the limitations of domestic regulation instruments. This position is rightly encapsulated by Odumosu-Ayanu thus:

Multi-actor contracts may be situated within the international investment regime in a manner that challenges some of the propositions of this regime, especially its state-investor centric nature, without violating dictates of international investment law. Hence these contracts have the potential to reconcile the interests of the major actors to a larger extent than is currently the case, facilitate amicable relationships among them, manage competing goals and serve quasi-regulatory purposes.⁹⁹

In light of the limits of domestic regulations and the relationship of the MSDA to the elements of the multi-actor contract model, the effectiveness and enforceability of the MSDA in Nigeria's oil and gas management requires both the statutory mechanism and the multi-actor model. Odumosu-Ayanu states further:

In articulation of multi-actor contracts' quasi-regulatory functions, the contract envisaged...is between the investor, the government as regulator and the local communities impacted by investment activities, thereby giving the communities *concrete, participatory rights to ensure a meaningful balance of competing goals. It provides some surveillance over the actions of the investor and the government.* This form of contract contributes to fulfilling the ideal of democratic governance. It also takes the regulatory aspect of contracting into account and does not advocate a choice between private contracts and public regulation. Rather, it straddles the public-private divide and regulation-contract divide.¹⁰⁰

The parties may enter into a contract stipulating the recognition of host and impacted communities' right to participation and enforcement of the proceedings of dialogue processes, thereby making participants contractually obligated to comply with the decisions collectively made. Some of the

⁹⁹ *Ibid* at 285.

¹⁰⁰ Emphasis mine. *Ibid* at 294-295.

identified advantages of the multi-actor contract model are the identification and acknowledgement of the interests of all stakeholders including the host and impacted communities, active participation of all stakeholders and positive influence of the contracts on relevant legal regimes.¹⁰¹ This model in conjunction with statutory instruments will provide the necessary enforcement mechanism for the MSDA in Nigeria's oil and gas management.

4.8 MAKING A BUSINESS CASE FOR THE MSDA

Protection of the participatory right of the Niger Delta peoples has been promoted in this thesis from the human rights perspective. On another note, taking a stance from the business perspective reveals the positive effect of effective stakeholder dialogue on the investor's profit margin. Protection of the human rights of the host and impacted communities is the prerogative of the government but the United Nation's Protect, Respect and Remedy (PRR) Guiding Principles obliges investors to respect human rights wherever they operate.¹⁰² The guiding principles of the PRR Framework are founded on the acknowledgement of States' duty to protect human rights, business enterprises' duty to respect human rights and obey applicable laws, and remedial right upon infringement. Murphy and Vives expounded on the practicability of the PRR framework through a stretch of the scope of "organization justice" to business and human rights contexts but the underlying reality subsists that the PRR is soft law.¹⁰³ The International Finance Corporation (IFC) analyzed its Sustainability Framework in conjunction with the UN Guiding Principles on Business and Human Rights in order to identify similarities of both documents.¹⁰⁴ The IFC Sustainability Framework and the UN Guiding Principles on Business and Human Rights stipulate the obligation of business enterprises to respect human rights by avoiding human rights

¹⁰¹ *Ibid* at 310-311.

¹⁰² PRR Principles, *supra* note 94. The guiding principles of the PRR Framework is founded on the acknowledgement of state's duty to protect human rights, business enterprises' duty to respect human right and obey applicable laws, and remedial right upon infringement.

¹⁰³ Matthew Murphy & Jordi Vives, "Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework" (2013) 116 J. Bus Ethics 781. For implications of soft law instruments on businesses, see Andrew T. Guzman, "A Compliance Based Theory of International Law" (2002) California L. Rev. 1823; John M. Conley & Cynthia A. Williams, "Global Banks as Global Sustainability Regulators?: The Equator Principles" (2011) 33:4 Law & Policy 542; Anthony D'Amato, "The Coerciveness of International Law" (2010) Northwest University School of Law Scholarly Commons, Faculty Working Paper 91.

¹⁰⁴ International Finance Corporation, "UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework" online: <<http://www.ifc.org/wps/wcm/connect/c3dedb0049c51e71886d99da80c2ddf3/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES>>.

infringement and taking remedial actions where they are involved in adverse human rights impacts. The IFC has also incorporated standards for the promotion of environmental and social sustainability by businesses.¹⁰⁵ More so, the Organization for Economic Co-operation and Development (OECD) emphasizes the duty of businesses to respect internationally recognized human rights¹⁰⁶ and the necessity for companies to involve stakeholders, including local communities, in their planning and decision making.¹⁰⁷ The OECD presents a practical framework that can be implemented by extractive companies in furtherance of stakeholder engagement. These international documents stipulate some standards for human rights obligations of businesses and incorporate some implementation mechanisms to ensure businesses comply with the standards.¹⁰⁸ However, other than the human rights obligations of businesses to respect the rights of host and impacted communities, oil companies' realization of the importance of a viable multi-stakeholder dialogue process in furtherance of their goals may foster their commitment and response to its outcome.¹⁰⁹ Some of the advantages of the MSDA to the oil companies from the business perspective are discussed below.

4.8.1 Protection and Improvement of Company's Reputation

Oil companies operating in Nigeria have often been accused of actively and indirectly infringing on the human rights of the Niger Delta peoples and this has attracted international attention.¹¹⁰

¹⁰⁵ International Finance Corporation, *Performance Standards on Environmental and Social Sustainability* (Washington D.C.: World Bank Group, 2012).

¹⁰⁶ See OECD, "Guidelines for Multinational Enterprises" (2011) OECD Publications at 31-34.

¹⁰⁷ OECD, "Due Diligence Guidance for Meaningful Stakeholder Engagement Due Diligence in the Extractive Sector" (2016) OECD Publications 1.

¹⁰⁸ For a discussion on the impact of the OECD guidelines on businesses, see Business and Industry Advisory Committee to the OECD, "Responsible Business Conduct: The OECD Guidelines for Multinational Enterprises" (2015) online: <<http://biac.org/wp-content/uploads/2015/06/FIN-15-06-GUIDELINES-BROCHURE.pdf>>; Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3:1 J. of Human Rights and Environment 5; Jernej Letnar Cernic, "Corporate Responsibility Analysis of the OECD Guidelines for Multinational Enterprises" (2008) 3:1 Hanse L. Rev. 71; Elisa Morgera, "An Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead Up to the 2006 Review" (2006) 18 Geo. Int'l Envtl L. Rev. 751. For an update on the impact of the IFC Sustainability Framework on businesses, see The Office of the Compliance Advisor/Ombudsman for the IFC, "Review of IFC's Policy and Performance Standards on Social and Environmental Sustainability and Policy on Disclosure of Information" (2010) online: <http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf>.

¹⁰⁹ Roberta Costa & Tamara Menichini, "A Multidimensional Approach for CSR Assessment: The Importance of the Stakeholder Perception" (2013) 40:1 Expert Systems with Applications 150.

¹¹⁰ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001); Office of the High Commissioner for Human

This may affect their credibility with future business associates and the international community. Corporate reputation is “an intangible and valuable asset which provides a sustainable competitive advantage for firms that enjoy a strong reputation.”¹¹¹ Maintaining a good reputation is easier than correcting a bad reputation. Companies sometimes calculate the financial worth of their reputation¹¹² which is part of their net worth¹¹³ and may increase their bargaining power especially during corporate take-over or merger. Some of the benefits of good corporate reputation are increased corporate value in the market, reputable corporate branding, market competitiveness, ability to attract good employees and best professional service providers, ease of introducing new products to the market and reliable support from stakeholders during dispute.¹¹⁴ The negative reports by civil society and international journalists against oil companies operating in Nigeria reduce their net worth and good standing in international economic fora. Their efforts towards participatory development of the host and impacted communities and environmental protection will benefit their corporate reputation and improve their worth.

4.8.2 Conflict Minimization and Acquisition of Social Licence to Operate

Interaction with other stakeholders including the host and impacted communities creates opportunity for communicating views and concerns about the companies’ operations and how damages can be promptly and effectively remedied. Stakeholders’ interaction is advantageous to companies’ decision making with regards to corporate responsibility as the people’s ability to communicate their areas of interest will prevent projects which may not be appreciated by the people. This is an important step to acquiring the social license to operate and creating a peaceful operating locality. The oil production suspensions and the consequent revenue loss during conflicts

Rights, “United Nations Special Representative of the Secretary General for Human Rights Defenders Visits Nigeria” (12 May 2005) *OHCHR*.

¹¹¹ Amy Hillman & Gerald D. Keim, “Shareholder Value, Stakeholder Management, and Social Issues: What’s the Bottom Line?” (2001) 22:2 *Strategic Management J.* 125 at 126; Nathalie de Marcellis-Warin & Serban Teodoresco, “Corporate Reputation: Is your Most Strategic Asset at Risk?” (2012) Center for Interuniversity Research and Analysis on Organizations, 2012RB-01.

¹¹² Rosa Chun, “Corporate Reputation: Meaning and Measurement” (2005) 7:2 *Int’l J. of Management Review* 91.

¹¹³ Benjamin Neville, Simon Bell & Bulent Menguc, “Corporate Reputation, Stakeholders and the Social Performance-Financial Performance Relationship” (2005) 39:9 *European J. of Marketing* 1184; Schnietz Karen & Epstein Marc, “Exploring the Financial Value of a Reputation for Corporate Social Responsibility during a Crisis” (2005) 7:4 *Corporate Reputation Review* 327.

¹¹⁴ Markus Eberl & Manfred Schwaiger, “Corporate Reputation: Disentangling the Effects on Financial Performance” (2005) 39:7 *European J. of Marketing* 838.

can be avoided in a peaceful atmosphere.¹¹⁵ In the first eight months of 1998, Shell BP lost 11 billion barrels of crude oil estimated at US\$1.32 billion and was unable to satisfy overseas demand.¹¹⁶ This and other Niger Delta crises have economic consequences on the oil companies and the creation of a framework to reduce or stop these conflicts works in favour of oil companies.

4.8.3 Reduction in Security Cost

Oil companies and their personnel operating in Nigeria have had some unpleasant experiences with Niger Delta activists. Kidnapping of oil workers became rampant at the height of the Niger Delta struggles¹¹⁷ and some were killed in the process.¹¹⁸ The oil companies resolved to employ security operatives in conjunction with delegated Nigerian Police Force members to protect their workers on operation sites and along their pipeline routes to avoid vandalism and these services cost much.¹¹⁹ A report on Shell's security spending in Nigeria and other countries reveals that most of its security cost is incurred in Nigeria. 43% of Shell's global security spending for 2008 was spent on their subsidiary in Nigeria and over \$120million was incurred in 2009.¹²⁰ The escalating security cost and the despicable condition of oil operations in Nigeria has caused a drop in Shell's share price on the London Stock Exchange.¹²¹ Oil companies operating in Nigeria have borne and may continue to bear the consequences of lack of security in the Niger Delta if adequate actions are not taken. Procuring the people's license to operate, promoting the participation of the communities in oil and gas management, supporting participatory development and avoiding environmental degradation are some of the requirements for enjoying a peaceful operating atmosphere in Nigeria.

¹¹⁵ Bronwen Manby, "The Warri Crisis: Fueling Violence" (2013) 15:18 Human Rights Watch 1.

¹¹⁶ John Boye Ejobowah, "Who Owns the Oil?: The Politics of Ethnicity in the Niger Delta of Nigeria" (2000) 47:1 Africa Today 28.

¹¹⁷ Catherine Philip, "British Hostages Moved by Niger Rebels after Botched Rescue" (19 January 2009) *The Times*; Will Connors, "Gunmen Kidnap Five Oil Workers in Nigeria" (8 November 2010) *The Wall Street Journal*.

¹¹⁸ Nseabasi S. Akpan, "Kidnapping in Nigeria's Niger Delta: An Exploratory Study" (2010) 24:1 J. of Soc Sci 33; Augustine Ikelegbe, "The Economy of Conflict in the Oil Rich Niger Delta Region of Nigeria" (2005) 14:2 Nordic J. of African Studies 208.

¹¹⁹ Afua Hirsch & John Vidal, "Shell Spending Millions of Dollars on Security in Nigeria, Leaked Data Shows" (19 August 2012) *The Guardian*.

¹²⁰ Ben Amunwa, *Dirty Work: Shell's Security Spending in Nigeria and Beyond* (London: The Platfrom, 2012).

¹²¹ Shane Croucher, "Royal Dutch Shell: Worsening Nigeria Security Dents Oil Giant's Earnings" (31 October 2013) *IBTimes*.

4.8.4 Improved Employee Productivity

The level of insecurity in the Niger Delta due to the incessant kidnappings, killings and conflicts affects the productivity of oil workers.¹²² Working atmosphere is one of the factors that affect employee productivity and operating in an insecure environment may have an adverse effect on oil workers. The fear of losing their lives during operations may compel some of them to resign from work, costing the oil companies their good workers and the pressure of recruiting new personnel for replacement and the consequent training cost for every recruitment process. Newly employed workers may be unable to perform at the same pace as the kidnapped, killed or resigned workers and the period of acclimatization with the company's operation have economic costs. A peaceful Niger Delta will have a significant effect on oil workers' productivity where they can operate without tense military presence on site and free from fear of retribution from militants. More so, it has been proven that the perception employees hold about the company they work for can affect the company's reputation.¹²³ Therefore if oil and gas workers in the Niger Delta have the general notion that their work environment is insecure, the reputation and profit margin of the oil companies may be affected.

4.8.5 Profit Increment

The ultimate effect of promoting participatory development in the Niger Delta for the oil companies is the maximization of profit.¹²⁴ Elimination of avoidable costs, such as security costs and recurrent recruitment and training costs will reduce operation cost and increase profitability. Increased employee productivity and corporate reputation are also advantageous to the companies' profit making goals. Oil companies operating in Nigeria can benefit from the development and peace of the Niger Delta and this can be achieved through the effective implementation of the MSDA in Nigeria's oil and gas management.

¹²² Valerie J. Sutherland & Cary L. Cooper, "Stress Prevention in the Offshore Oil and Gas Exploration and Production Industry" (1996) International Labour Office, Geneva, Working Paper CONDI/WP.7/1996.

¹²³ Karen Cravens & Elizabeth Goad Oliver, "Employees: The Key Link to Corporate Reputation Management" (2006) 49:4 Business Horizons 293.

¹²⁴ Abigail McWilliams & Donald Siegel, "Corporate Social Responsibility: A Theory of the Firm Perspective" (2001) 26:1 Academic Management Rev. 117; Lindsay Lavine, "The Power of Giving Back: How Community Involvement can Boost your Bottom Line" (26 June 2013) *The Entrepreneur* Article 226974.

4.9 CONCLUSION

This thesis has analyzed the social, economic and developmental challenges of the Niger Delta region, caused by environmental degradation, incessant conflicts and deprivation of means of sustenance among others. These challenges are consequences of oil production within the Niger Delta communities and this thesis affirmed that lack of relevant statutes is not the reason for the challenges bedevilling the Niger Delta communities. Rather the ineffective implementation of existing oil and gas laws, imprudent management of relevant government agencies and failure to acknowledge and promote the participatory right of the Niger Delta communities are factors besetting the development of the host and impacted communities. On this basis, the development of the Niger Delta communities was hinged on the promotion and protection of their participatory rights through the incorporation of the MSDA into subsisting legal and institutional frameworks.

This thesis proposed the MSDA, a UN normative framework, as a viable approach for the promotion of the participatory development of the Niger Delta communities. It explored the legal and theoretical bases for proposing the MSDA through an analysis of international, regional and domestic instruments that protect the participatory right of the Niger Delta peoples. International and regional instruments binding on Nigeria establish the Nigerian government's obligation to protect the participatory right of the Niger Delta peoples. Non-binding international instruments exemplify the progress other States have made in realizing the importance of participation to the development of their people and the commitment they have made in protecting this right, with the hope that this will influence the Nigerian government's commitment to protect the participatory right of the Niger Delta peoples.

In light of the dynamics of the Niger Delta region and the subsisting challenges of Nigeria's oil and gas industry, this thesis has focused on the enforcement of the participatory right of the host and impacted communities as a solution to these challenges. The nexus between the development of the host and impacted communities, the growth of Nigeria's oil and gas sector and oil companies' profit maximization was expounded to demonstrate the influence the Niger Delta communities have over Nigeria's oil and gas industry. The identified theoretical basis for the interrelationship of the participatory right of the Niger Delta peoples to the development of the Niger Delta region and the growth of Nigeria's oil and gas industry is the Participatory

Development Theory (PDT). The underlying tenet of the PDT is the participation of community members towards their community development. Based on past experiences, the PDT underscores the imminent failure of projects that fail to involve the host and impacted communities. There are two perspectives to the PDT, the social movement perspectives and the institutional or project-based perspective. This thesis has argued that both perspectives are interconnected and are equally relevant in enforcing the participatory right of the Niger Delta peoples.

Scholarly contributions that promote the importance of participation to development were examined to demonstrate the level of awareness and diversity of opinions about participatory development, the subsisting debates, and the stance of this thesis on pertinent issues that borders on participatory development. Relevant literatures were also cited in support of some of the arguments made in the thesis. The gaps in the literatures were identified to reveal the scholarly significance and the contribution of this thesis to legal academia.

The proposed MSDA was expounded in relation to the promotion of the participatory right of the host and impacted communities and how its elements (early notification, deliberative democracy, transparency, follow-through, accountability and appropriate representation and participation), can be incorporated into Nigeria's oil and gas management. This thesis argued that the elements of the MSDA are interdependent and for the MSDA to be successfully incorporated into Nigeria's oil and gas management, all the elements of the MSDA must be implemented through the commitment of all stakeholders.

Analysis of relevant Nigerian laws and judicial decisions reveals the gap in existing legal regime and substantiates the necessity for a productive approach for the successful enforcement of the participatory right of Niger Delta communities. Chapter II of the Constitution of the Federal Republic of Nigeria which provides for the "Fundamental Objectives and Directive Principles of State Policy" was examined to extrapolate the constitutional duties of the Nigerian government regarding the promotion of the social and environmental development of Nigerians. By examining the relevant constitutional provisions in light of the social and environmental underdevelopment of the Niger Delta communities, this thesis has opined that the Nigerian government has failed in fulfilling its constitutional duties to the host and impacted communities.

The Petroleum Act, Petroleum (Drilling and Production) Regulations, Oil Pipelines Act and Environmental Impact Assessment Act were explored to establish the failure of the subsisting oil and gas legal regime in acknowledging the Niger Delta communities as stakeholders in Nigeria's oil and gas management and the inadequacy of the laws in protecting the participatory right of the Niger Delta peoples. The exclusion of the Niger Delta communities in the process of granting operation licence, the faulty procedure for granting licence on occupied and community land, the compensation process, the procedure for enforcing penalty for environmental degradation, among others, substantiate the inadequacy of the laws in enforcing the participatory right of the Niger Delta peoples and the adverse effect of these provisions on the development of the Niger Delta communities. The contribution of the Land Use Act in impeding the participatory development of the Niger Delta communities was also elucidated through a review of the antecedence of the Land Use Act and the effect of the existing land tenure system on the participatory development of the Niger Delta communities. An evaluation of relevant judicial precedents reveals the subsisting challenges of the Niger Delta communities in acquiring remedial injunctions against other stakeholders that infringe on their rights and receiving damages for losses caused by oil and gas production in their communities.

In order to incorporate the MSDA into Nigeria's oil and gas legal regime, legal and institutional frameworks were proposed. As mentioned earlier, incorporation of the MSDA does not require enactment of a new statute, rather amendment of the existing laws suffices. Required amendments in the relevant laws were identified with particular reference to the Petroleum Industry Bill which is still in a formative stage and can rightly integrate the MSDA values. More so, legal and institutional frameworks that will provide the bases for the successful and productive implementation of the MSDA are proposed. Recognition of the host and impacted communities as stakeholders in Nigeria's oil and gas management is the foundation for the incorporation of the MSDA. This thesis proposed that necessary amendments be made to the existing laws to the effect of acknowledging the Niger Delta communities as stakeholders in Nigeria's oil and gas management. Other identified required legal frameworks are the creation of effective avenues for public participation, respect for communal values, provision of schemes for compensation of host and impacted communities, and legalization of the outcome of dialogue processes.

Past and existing government agencies established for the promotion of the development of the Niger Delta communities were analyzed and reasons for their lack of productivity were identified to demonstrate the need for institutional frameworks that acknowledge and promote participatory development of the Niger Delta communities. This thesis did not suggest the establishment of new agencies but proposed that the existing Niger-Delta Development Commission (NDDC) be restructured to incorporate the values of the MSDA. However, the establishment of an agency concurrently administered by the Federal and State Governments was proposed to bridge the gap created by the exclusive jurisdiction of the Federal Government on oil and gas management. This will also foster the involvement of state and local governments within the Niger Delta region in the participatory development of the communities. Statutorily recognizing host and impacted communities' organizations is also one of the important institutional frameworks required for the incorporation of the MSDA. In order to promote the practicability and potential of the proposed legal and institutional frameworks, the Philippine experience in implementing the Free, Prior and Informed Consent (FPIC) was extrapolated. The Philippine experience also supports the viability of some of the legal and institutional frameworks proposed in this thesis.

Failure to acknowledge and protect the participatory right of the Niger Delta communities has been identified as the foundation of the challenges impeding the growth of the Niger Delta communities and consequently, stalling the growth of Nigeria's oil and gas industry. This argument was substantiated by enumerating the significance of effective host and impacted communities' participation to Nigeria's oil and gas management. It was argued that effective participation will enhance trust between stakeholders, reduce conflicts, promote environmental sustainability, promote communal growth, foster effective accountability of stakeholders and most importantly, promote sustainable and participatory development. Despite the viability of the MSDA in promoting participatory development in Nigeria's oil and gas management, communal and political dynamics of Nigeria's oil and gas industry may hinder the smooth incorporation of the MSDA. Factors such as lack of resources, level of illiteracy in the host and impacted communities, inadequate institutional coordination, low level of democratic culture in the host and impacted communities, and Nigeria's environmental centralism may restrict the implementation of MSDA.

However, modes of addressing these challenges and reducing their effect on the incorporation of the MSDA were suggested in this thesis.

The MSDA has pockets of limitations which do not render it inoperative or disadvantageous but requires the commitment of parties to make it work. The MSDA is time consuming and economically intensive but considering the loss of time, properties and profits caused by conflicts in the present system, the MSDA is a more desirable and productive approach. Another limitation of the MSDA is that it is devoid of an inherent enforcement mechanism. In order to make multi-stakeholder decisions enforceable in Nigeria's oil and gas management, the multi-actor contract model and statutory enforcement mechanisms were proposed. This thesis proposed the joint implementation of both mechanisms for an effective enforcement of the MSDA in Nigeria's oil and gas management. The contract model provides a quasi-regulatory mechanism for making the decisions of the stakeholders contractually binding while the statutory enforcement mechanism provides a legal basis for compliance, imposition of penalties against defaulters and accessing remedies for wrongs and damages caused by the actions of other stakeholders. These mechanisms were proposed based on the principles of participatory development, human rights duties of the government and oil companies and the beneficial implications of the MSDA to all stakeholders.

A business case for effective community participation through the MSDA was made in this thesis. This is to establish the influence of the participatory development of the Niger Delta communities on the profit margin of oil and gas companies operating in the Niger Delta region. The MSDA as a tool for implementing participatory development will have direct effect on the reputation, profit margin, acquisition of social licence to operate, security cost, operating cost, and employee productivity of the oil companies. Therefore, the participatory development of the Niger Delta peoples was promoted not only based on human rights principles but also based on the business perspective. All the stakeholders stand to benefit from the participatory development of the Niger Delta communities and the present precarious state is a pointer to the need for urgent, active and joint effort of all stakeholders to promote effective stakeholders participation and sustainability of the Niger Delta communities.

In conclusion, this thesis has found that one of the major causes of the social, economic and development setbacks of the Niger Delta region is the failure to enforce the participatory right of the Niger Delta peoples in Nigeria's oil and gas management. This thesis propounded that participatory development of the Niger Delta region is a solution to the challenges of Nigeria's oil and gas management and implementation of the MSDA principles will foster participatory development. In order to make the MSDA practicable in Nigeria's oil and gas management, this thesis found that the existing legal and institutional frameworks need amendments and exclusion of legal provisions that hinder the enforcement of the participatory right of the Niger Delta peoples. It was established that other than the human rights basis for the enforcement of the participatory right of the Niger Delta peoples, the business case is also a reason for the oil companies to support the promotion of the participatory development of the Niger Delta communities through the MSDA. It was confirmed that the MSDA is devoid of an inherent enforcement mechanism but this thesis concluded that implementation of the statutory enforcement mechanism and the multi-actor contract model will make the decisions reached by stakeholders enforceable. This thesis has established that promotion of the participatory right of the Niger Delta communities through the MSDA will contribute immensely towards solving the economic, social and development challenges of the Niger Delta region.

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