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QUALIFICATION REGISTERED: LLM (MARINE AND ENVIRONMENTAL
LAW)
DISSERTATION TITLE: CRITICAL ANALYSIS OF *EX POST FACTO*
ENVIRONMENTAL IMPACT ASSESSMENT
AUTHORISATIONS IN SOUTH AFRICAN
LAW
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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM (Marine and Environmental Law) in approved courses and dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM (Marine and Environmental Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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CHAPTER 1: INTRODUCTION

Lon Fuller, writing in 1964, noted that any attempt to create and maintain a system of legal rules might “miscarry” in at least eight ways, which are, “if you will, eight distinct routes to disaster.”¹ Among these eight ways of legislating for disaster, five are important for this dissertation. These are: (1) a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis; (2) a failure to publicise or to make available to the affected party, the rules that the affected party is expected to observe; (3) an abuse of retroactive legislation, as it not only cannot itself guide action, but it undercuts the integrity of rules with a prospective effect by putting them under the threat of retrospective change; (4) enactment of contradictory rules; and (5) a failure of congruence between the rules as announced and their actual administration.²

Fuller’s views were based on his allegory of the monarchical rule of Rex.³ His views were based on sound logic and, it is submitted that, they transcend time and, as such, are applicable to modern legal systems, including the South African legal system. Crucially, Fuller is of the view that any one of the ways of legislating for disaster, if pursued to finality, does not simply result in a bad system of law but, “it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.”⁴

It is argued in this dissertation that Fuller’s views are relevant in so far as they apply to the issue of *ex post facto* environmental impact assessment (“EIA”) authorisations in South African law. In this dissertation I consider the issue of *ex post facto* EIA authorisations from the inception of the EIA regime in South African law to present. At the heart of the analysis is the question of whether, at different stages of the evolution of the EIA regime, such authorisations are provided for in South African law, adequately or at all. If such authorisations are provided for, a related question which is also

¹ Lon Fuller, *The Morality of Law*. Copyright 1964 by Yale University. Reprinted, by permission of the Yale University Press, In Joel Feinberg and Jules Coleman, *Philosophy of Law*, Sixth Edition, (2000), Wadsworth, page 93.

² *Ibid*, page 93.

³ *Ibid*, page 93.

considered is whether such provision does not amount to legislating for disaster (in Fuller's words) in any of the five ways that are mentioned above. Conversely, if such authorizations are not provided for, a related question is whether that, on its own, amounts to legislating for disaster.

Crucially, the nature of the EIA is such that an *ex post facto* EIA and a subsequent authorization are an anomaly. An EIA is a proactive, prospective and planning tool that is applicable to activities before they commence. The literature on EIAs supports this argument. The current South African EIA regime, like other regimes of many foreign jurisdictions some of which are considered in this dissertation, seems to be based on this assertion. The attitude of the relevant (South African) national environmental authority seems to support this view. In this regard, the ten-year review of the Department of Environmental Affairs and Tourism ("DEAT") dated 2004 states that:

"Over the past decade the department, together with the provincial authorities, have (*sic.*) been implementing a cutting-edge environmental impact management tool – the EIA. Since 1997 all new developments that could result in significant environmental pollution or degradation have been subjected to a rigorous assessment of their possible impacts."⁵ (Emphasis supplied.)

This quote clearly indicates how critical EIA has been, as a tool, at the disposal of DEAT and provincial authorities. Important to note in this quote is that, by its own admission, DEAT, which is the national department principally responsible for environmental affairs seems to have regarded an EIA (since 1997) as applicable to "new developments that could result in significant environmental pollution or degradation." This is an important consideration although it is not decisive. It is important because the quote is by the department that was responsible for developing policy which was eventually implemented by promulgating the relevant regulations that perfected the EIA regime in

⁴ Ibid, page 93.

⁵ Page 62.

South African law.⁶ Hence what this department regards as the ambit of the EIA regime is important as it determines the manner in which it implements the relevant requirements. The consideration is, by no means, a decisive factor because the courts ultimately interpret statutory provisions to determine their meaning. Courts make such determinations, mainly, in the context of performing their judicial review function in respect of administrative decisions.

While, at first glance, the concept of “new developments” as used in the above quote gives a particular meaning the same cannot be said if it is applied to specific circumstances. For instance, where 10 per cent of construction of a dam has been undertaken a question arises whether can it still be regarded as a “new development” that may require an EIA before completion? Related to this question is the question of whether the matter is dealt with by the *de minimus* principle in terms of which the law does not attach any consequences on conduct with trivial consequences. In other words, it may be argued that, there may be circumstances where the consequences of the development undertaken before the lodging of an application for authorisation are so trivial that the law would regard the development as a “new development”. If that were to be the position of the law the question that would arise is what constitutes “trivial consequences”? This question poses a difficulty if one has regard to the fact that what constitutes trivial consequences to the environment is not free from doubt. This is because the opposite of trivial consequences is significant impact to the environment, an issue which is equally not free from doubt.

Another question that arises is whether completed activities can be regarded as new developments. While this question may prompt a quick answer in the negative it is argued that the matter is not that simple. There may be a situation where a person undertakes and completes a development without undertaking an EIA as required by the law in a case where a person would have been granted an authorization had it been applied for. In such a case, should the person be obliged to demolish the development

⁶ This is the case, it is argued, even though the relevant regulations were promulgated under an old statute, namely the Environment Conservation Act, 73 of 1989, which statute was passed by the old National Party

and then undertake an EIA and, once he or she has obtained authorization, reconstruct the development? That seems absurd and the law must be interpreted in a way that avoids such absurdity. If one follows this reasoning to its logical conclusion then, in such a situation, the development should be treated as a new development for the purposes of undertaking an EIA. The difficulty with this reasoning, however, is that it is difficult to determine whether the development would have been authorized, or not, after it has been completed. Expediency may prevail and may result in most developments which are already completed being regarded as new developments and being authorized even though they may not have been authorized had an EIA preceded the development.

In the next Chapter I consider literature which deals with the nature of an EIA. Chapter 3 deals with the current EIA regime and, specifically, considers whether it provides for *ex post facto* EIA authorisations. In Chapter 4 I briefly consider whether international law provides any guidance on *ex post facto* EIA authorizations. This is followed by Chapter 5 that considers the EIA regimes of ten foreign jurisdictions with a view to ascertain whether they provide for EIA authorizations. Chapter 6 critically analyses the provisions of National Environmental Management: Second Amendment Act⁷ which provide for *ex post facto* EIA authorizations. In conclusion, in Chapter 7, I summarise the findings of this dissertation.

CHAPTER 2: NATURE OF AN EIA

In order to appreciate the nature of an *ex post facto* EIA, it is important to appreciate the nature of an EIA. Wood, correctly asserts that, an EIA is the evaluation of the effects likely to arise from a major project (or other action) significantly affecting the natural and man-made environment and must lead to abandonment of environmentally unacceptable actions and to the mitigation to the point of acceptability of environmental effects of proposals which are approved.⁸ Wood adds that an “EIA is thus an anticipatory,

government in its last decade of apartheid rule.

⁷ 8 of 2004.

⁸ Christopher Wood, *Environmental Impact Assessment – A comparative review*, (1995), Longman Group Limited, page 1.

participatory environmental management tool, of which the EIA report is only one part.”⁹ This, Wood continues, is made clear by the objectives of the Californian EIA system which are: to disclose to decision-makers and the public the significant environmental effects of proposed activities; to identify ways to avoid or reduce environmental damage; to prevent environmental damage by requiring implementation of feasible alternatives or mitigation measures; to disclose to the public reasons for approvals of projects with significant environmental effects; to foster coordination; and to enhance public participation.¹⁰ It is submitted that these objectives clearly capture the essence of an EIA as a proactive planning tool.

Armour expresses a similar view when stating that it is a principle that “for the EIA to be meaningful and useful, impact analysis must occur early in the planning process and prior to any decision to proceed with a project or action.”¹¹ The use of the phrase “meaningful and useful” by Armour is worth noting. Implicit in this phrase is that an EIA which is done later, after a decision to proceed with a project or action is made, is meaningless and useless. It is submitted that therein stems the problem of *ex post facto* EIAs and subsequent authorisations. The term “*ex post facto*” is a Latin term which means “from a thing done afterwards” or “after the deed”.¹² When this term is used in relation to an EIA or an EIA authorisation it refers, respectively, to an EIA undertaken after the activity or project has been commenced with or to an EIA authorisation granted for an activity or project that has been commenced with. Notably, in some jurisdictions *ex post facto* EIAs are referred to as “retrospective EIAs”.¹³ For instance, in the Chinese EIA regime it has been stated that EIAs can be classified into three categories as “retrospective environmental impact assessment for existing projects, the present environmental impact assessment for project under construction and the prospective environmental impact

⁹ Wood, (1995), page 1.

¹⁰ Wood, (1995), page 2.

¹¹ Armour, A. (1991), *Impact Assessment and the Planning Process: A Status Report*. *Impact Assessment Bulletin* 9(4): 27 – 33, page 29, quoted from Leonard Ortolano, *Environmental Regulation and Impact Assessment*, John Wiley & Sons, Inc. (1997), page 337.

¹² http://en.wikipedia.org/wiki/Ex_post_facto.

¹³ <http://rcep.org.uk/epevid/p2-index>.

assessment for project under planning. Generally speaking, the environmental impact assessment refers almost all (*sic.*) to the prospective EIA.”¹⁴

Furthermore, there is a view that an EIA is not only *ex post facto* in the circumstances referred to above. It is also *ex post facto* where it is undertaken when it is preceded by a decision to proceed with an activity. This point is made in the following statement which relates to EIAs in the United Kingdom: “In the worst cases EIA is undertaken as a retrospective process when the nature of the development has already been determined and is in effect fixed.”¹⁵ This is an interesting dimension as it places within the ambit of an *ex post facto* EIA an EIA which is undertaken in respect of an activity to which, even though it has not been commenced with, a decision has been taken to the effect that it will proceed and the manner in which it will proceed has been determined. Such an EIA falls squarely within the category of EIAs that, in Armour’s views, are meaningless and useless.

Taken to its logical conclusion, Armour’s statement to the effect that an EIA is meaningless and useless where a decision to commence with an activity or project has been made means that, where an activity or project has been commenced with or completed an EIA is even more meaningless and useless. In this regard, it is submitted that, while Armour’s statement is accurate there may be limited circumstances where such an EIA is of significance in so far as it enables the taking of mitigation and remedial measures is concerned. In fact, herein is a crucial distinction that must be drawn. The critical analysis in this dissertation is on *ex post facto* EIAs that are undertaken with a view to obtain an authorization and not on EIAs that are undertaken with a view to monitor and deal with environmental effects of on going activities. It is submitted that the scholars’ views discussed here also relate to the former.

The Canadian Environmental Assessment Research Council made a point similar to that made by Armour when it advanced a criterion for evaluating the effectiveness of an EIA.

¹⁴ <http://www.faithli.com/shg/english/pianzi/ch.htm>.

¹⁵ <http://rcep.org.uk/epevid/p2-index>.

It stated that an EIA is considered effective if: information generated in the EIA contributed to decision-making; predictions of the effectiveness of impact management measures were accurate; and proposed mitigatory and compensatory measures achieved approved management objectives.¹⁶ Simple put, the argument in this regard is that there can be no effective EIA where an activity was undertaken without one in the first place. In addition, the effectiveness of such an EIA is seriously undermined from the outset. This is because, when the EIA is undertaken, there are already parts of the activity whose undertaking was not informed by an EIA.

The view of McCutcheon makes a point which is similar to the ones made above. McCutcheon states that an EIA is “a way to tackle pollution problems proactively – evaluating a project prior to building it and determining whether it should be built in the first instance – as distinguished from the regulatory model which merely ensures that whatever is [already] built complies with a standard.”¹⁷ In this statement an *ex post facto* EIA would qualify as a reactive regulatory model which merely ensures that whatever has been built would qualify and cannot be referred to as an EIA.

Taken together, the views of Wood, Armour, the Canadian Environmental Assessment Research Council and McCutcheon support the principle that an effective EIA which complies with the objectives of undertaking an EIA is one that is proactive, undertaken early in the planning process and, in any event, before an activity or project is commenced with. In this context, an *ex post facto* EIA is an anomaly. Logically, so is the *ex post facto* EIA authorisation.

Clearly, Fuller’s views on legislating for disaster are relevant to the issue of *ex post facto* EIAs. To provide for an *ex post facto* EIA amounts to a contradiction in terms: the law states that an EIA must undertaken prior to the undertaking of particular activities or projects; it also states, on the other hand, that an EIA may be undertaken after the

¹⁶ Wood, (1995), page 9.

¹⁷ McCutcheon, Edward D., Think Globally, (En)Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations, Cornell International Law Journal (Volume 31) 1998, page 450.

undertaking of activities which required an EIA in the first place. It also creates two EIA regimes: one which is effective in line with the authors' views (and based on sound theoretical basis) and; the other which is potentially meaningless, useless and ineffective.

There is also another side of the coin in this debate. There is an unstated value in providing for or undertaking *ex post facto* EIAs and authorizations. The value is that it brings activities undertaken without an EIA authorization within the control of the responsible authorities. While the provision for *ex post facto* EIA is at odds with the meaningfulness, usefulness and effectiveness of the EIA regime, as discussed above, it seems to be a necessary evil in some countries given their particular circumstances. Hence, in some countries, it would seem that the question is not whether or not to provide for *ex post facto* EIAs but (it is) how to provide for *ex post facto* EIAs that are effective and which address the circumstances of the country concerned and do not undermine the ordinary EIA regime. In such countries, there is a real possibility for the EIA regime to disintegrate and become a Pickwickian legal system as visualized by Fuller.

It is submitted that, practically, there are five possible ways of dealing with the issue of *ex post facto* EIAs. The first is for the EIA legislation to expressly prohibit it. In this case the legislation is clear in that an *ex post facto* EIA authorisation may not be granted. The second is for the EIA legislation to be silent on the issue. As it is shown below, this is the most common way of dealing with the issue. In this case there is confusion on whether an *ex post facto* EIA authorisation may be granted or not. Reliance is placed on the courts to interpret the provisions of the applicable legislation. In common law jurisdictions, the principles and rules of common law play a major role in this regard. The third is for the EIA regime to expressly provide for a narrow scope of undertaking *ex post facto* EIAs and the granting of *ex post facto* EIA authorisations. This way has its own problems in that the extent of the scope provided is often arbitrary and may lead to absurdity. This is the manner in which the issue is provided for in the Kingdom of Lesotho. The fourth way is to provide for an unlimited scope of the undertaking of *ex post facto* EIAs and the granting of *ex post facto* EIA authorisations. This leads to a situation of two EIA regimes operating side-by-side as discussed above. The fifth way is

to provide for an *ex post facto* EIA and authorisations on an ad hoc basis. In this regard, the relevant authority issues notices granting an opportunity for defaulters to lodge applications for or to undertake *ex post facto* EIAs within a period of time. This has its own potential problems as it must be accompanied by actual threat of prosecution of those who do not take advantage of the given window period. Otherwise there would be a need to keep on extending the window period. This may seriously undermine the EIA regime as it seems to be the case in India, as is discussed below.

Each of the five ways of dealing with the issue, it is submitted, if pursued to finality, fits perfectly on one or more of Fuller's ways of legislating for disaster discussed above. The discussion in the next chapters illustrates this point.

CHAPTER 3: CURRENT EIA REGIME

Introduction

The point of departure is to consider the relevant provisions of the Constitution. The 1996 Constitution gives everyone the right to an environment that is not harmful to their health or well-being, and “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”¹⁸

The above constitutional provision places an obligation, among others, on the government to take reasonable measures that give effect to the environmental right. Such measures include the passing of appropriate laws and adoption of appropriate policies. In the context of EIAs, it is argued that, the government had an obligation to introduce, maintain and enforce EIA laws.

Once such laws are passed a person that infringes them, automatically, infringes the constitutional right. In the case of *The Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*,¹⁹ the court captured this when it said that “the applicant has established that the operation of the Rheese burner by the respondent without a certificate of registration under s 9 of the Act [Atmospheric Pollution Prevention Act 45 of 1965] is unlawful conduct. It is not only unlawful in the light of s 9, but in my view, the generation of smoke in these circumstances, in the teeth of the law, as it were, is an infringement of the respondent’s neighbours to ‘an environment which is not detrimental to their health or well-being’ – enshrined for them in section 29 of the Constitution of South Africa Act 200 of 1993.”²⁰ By analogy, this applies to a situation where a person has undertaken an activity in contravention of EIA laws.

The Constitution also clearly requires government to “respect, protect, promote and fulfil the rights in the Bill of Rights.”²¹ It also further provides that “all constitutional obligations must be performed diligently and without delay.”²² In the context of EIA laws, the Constitution places an obligation on the relevant organs of state to ensure that, among others, those who disregard the requirement to undertake an EIA are brought to book. An *ex post facto* EIA in South African situation must be understood in this context. Essentially, it is an EIA undertaken in respect of an activity which was undertaken in contravention of a constitutional right. To eventually authorize that activity may in certain circumstances allow a person to benefit from the contravention of a constitutional right.

Principle of preventive action

Before dealing with statutory provisions on the issue of *ex post facto* EIA authorisation, it is important to take into account the principle of preventative action and to discuss its impact on the issue. This principle emanates international law but is now part of the

¹⁸ Section 24.

¹⁹ 1996(6) SA 155 (N).

²⁰ Page 164.

²¹ Section 7(2).

²² Section 237.

South African law. The 1996 Constitution states that customary international law is law in South Africa unless it is inconsistent with the Constitution or a statute.²³ I agree with Sands that this principle has become part of body of customary international law because of its wide international support.²⁴

The essence of this principle is the obligation on states to prevent damage to the environment and to reduce, limit or control activities which might cause or risk such damage.²⁵ The principle is clearly consistent with the Constitution and other relevant statutes. It is argued that directly, or indirectly, national EIA legislation, including South African, is designed to comply with this principle. This argument is in line with Sands' view as he states that "under the preventative principle, a state may be under an obligation to prevent damage to the environment within its own jurisdiction, including by means of appropriate regulatory, administrative and other measures."²⁶

There is flexibility involved in the principle as Sands points out that it requires action to be taken at an early stage and "if possible" prior to the damage has occurred.²⁷ Arguably, the undertaking of an *ex post facto* EIA is contrary to the principle of preventive action. This is the case, especially, where it is possible to take action by undertaking an EIA in order to apply for authorisation. Sands also points out that the principle may take several forms, including the use of penalties and the application of liability rules.²⁸

Statutory provisions

The current EIA regime is governed by the provisions of the Environment Conservation Act²⁹ (the "ECA") and took effect with the promulgation of its regulations,³⁰ namely the

²³ Section 232.

²⁴ Sands, *Principles of International Environmental Law*, Second Edition, Cambridge University Press, (2003), page 249.

²⁵ Sands, (2003), page 246.

²⁶ Sands, (2003), page 246.

²⁷ Sands, (2003), page 247.

²⁸ Sands, (2003), page 247.

²⁹ 73 of 1989.

³⁰ Under section 21.

“Identification of activities which may have a substantial detrimental effect on the environmental effect” regulations³¹ and the “General EIA Regulations”³².

Glazewski notes that EIAs have been undertaken extensively in South Africa, since the 1970s, not because the law required it but because of the development of the Integrated Environmental Management (IEM) procedure from the Council for the Environment and the DEAT.³³ Glazewski notes further that the relevant provisions of the ECA were developed roughly at the same time as the IEM procedure but the two processes were not aligned.³⁴

On 9 June 1989, the ECA came into effect and, among others, provided a framework for the current EIA regime. The first component of this EIA framework is the power of the Minister of DEAT to identify activities “which in his opinion may have a substantial detrimental effect on the environment, whether in general or in respect of certain areas.”³⁵

The second component is the prohibition imposed on the undertaking of identified activities except upon a written authorization.³⁶ The third component is that the authorization may only be issued after the consideration of reports regarding “the impact of the proposed activity and of alternative proposed activities on the environment.”³⁷ The fourth component is the discretionary power to grant or refuse authorization for the proposed activity or an alternative proposed activity.³⁸ The fifth component is the discretionary power to withdraw an authorization upon breach of a condition in the authorization and the exercise of this power is subject to the giving of a 30 days’ notice to the affected person.³⁹ The sixth component is that undertaking an identified activity

³¹ Government Notice R1182, Government Gazette 18261 of 5 September 1997, as amended.

³² Government Notice R1183, Government Gazette 18261 of 5 September 1997, as amended.

³³ Glazewski, *Environmental Law in South Africa*, First Editions, (2000), Butterworth Publishers (Pty) Ltd, page 279.

³⁴ Glazewski, page 280.

³⁵ Section 21(1).

³⁶ Section 22(1).

³⁷ Section 22(2).

³⁸ Section 22(3).

³⁹ Section 22(4).

without the requisite authorization, or breaching a condition in an authorization, is an offence.⁴⁰ The commission of this offence attracts a fine which does not exceed R100,000.00 or to imprisonment for a period not exceeding 10 years or to both such a fine and such imprisonment, and to fine not exceeding three times the commercial value of any thing in respect of which the offence was committed.⁴¹

A crucial point worth noting in respect of the commission of the above-mentioned offence is that on or after 29 January 1999 it triggers the application of the provisions of section 34 of the National Environmental Management Act⁴² (the “NEMA”). The above-mentioned offence is listed in Schedule 3 of the NEMA. The provisions of section 34 provide, among others, that a person convicted of the above-mentioned offence (or any offence listed in Schedule) may be ordered by a court:

- to pay for the loss suffered by any organ of state or other person, “including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment”;
- in addition to any other punishment imposed, to pay damages or compensation or a fine equal to the amount the court assessed as any advantage gained or likely to be gained by the offender as a consequence of the offence; and
- to pay reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and the prosecution of the offence.

The Minister, by promulgating the regulations under the provisions of the ECA, in 1997, brought into effect the current EIA regime. An important point to emphasise is that the Minister may only act within the framework of the ECA in promulgating the regulations and it is clear that it applies to “proposed activities” because it provides that an authorization may be issued only “after consideration of reports concerning the impact of the proposed activity and of alternative proposed activities.”⁴³ From

⁴⁰ Section 29(4).

⁴¹ Section 29(4).

⁴² 107 of 1998.

⁴³ Section 22(2).

this perspective it seems that the current EIA regime does not provide for the undertaking of an *ex post facto* EIA.

There are two related points that need further elucidation in respect of the above paragraph. The first is that an activity that is commenced with may not be logically termed “a proposed activity”. This is obviously subject to the *de minimus* principle. The second is that an activity that is completed is definitely not “a proposed activity” since one cannot propose to do what is already done. This must, however, be understood in the context of the EIA regulations as are discussed below.

The first set of identified activities start with an introductory phrase which is “the construction, erection or upgrading of”⁴⁴ and then a list fifteen categories of facilities and infrastructure is set out. Among the listed infrastructure are: roads, railways, airfields and associated structures.⁴⁵ The second set of identified activities begins with an introductory phrase “the change of land use from”⁴⁶ and then list “agricultural or zoned undetermined use or any equivalent zoning, to any other land use”⁴⁷, “use for grazing to any other form of agricultural use”⁴⁸ and “use for nature conservation or zoned open space to any other land use”⁴⁹. The regulations list nine other sets of identified activities which sets include scheduled processes listed in the Second Schedule to the Atmospheric Pollution Prevention Act.⁵⁰ Scheduled processes as a trigger for a requirement to undertake an EIA provide an interesting scenario since these processes are ongoing activities while most other activities are once off. Hence to undertake a scheduled process without an EIA authorization amounts to an ongoing commission of an offence.

Related to the issue of scheduled processes being ongoing activities, as discussed above, is the question of whether in respect of other activities which trigger the

⁴⁴ Regulation 1 of the Identification of activities regulations.

⁴⁵ Regulation 1(d).

⁴⁶ Regulation 2.

⁴⁷ Regulation 2(c).

⁴⁸ Regulation 2(d).

⁴⁹ Regulation 2(e).

requirement to undertake an EIA does the unlawfulness of the activity stop when, for instance, the construction of a facility is completed. An example that may be used here is the construction of a road for which a fee is charged for its use without authorization as required by the current EIA framework.⁵¹ The construction of that road is an offence in terms of the current EIA frame but a question arises whether the subsequent operation thereof is an offence. The EIA framework does not explicitly prohibit the operation from or on infrastructure or facilities which were constructed without the required EIA authorization. It is, however, argued that such an operation amounts to benefiting from a crime and, as such, the proceeds of the operation are proceeds of crime. As such, the law, logically, cannot allow the generation of proceeds of crime. Besides the fact that to allow the generation of proceeds of crime would be *contra bonos mores* another point to note, as discussed above, is that the current EIA framework gives a court discretion to enquire into and assess the monetary value of any advantage gained or likely to be gained as consequence of committing an offence by undertaking an identified activity without the required authorization.⁵² As stated above, in addition to any punishment of the offender, a court may order the award of damages or compensation or a fine equal to the amount so assessed. Although a court has discretion to undertake the enquiry and assessment in this regard it is argued that it is clear that the intention of the Legislature as expressed in the EIA framework is to provide for the forfeiture of proceeds of criminal conduct. This is a clear indication that the Legislature intended to prohibit the use of infrastructure which infrastructure was constructed by committing an offence in terms of the EIA framework. To issue an *ex post facto* EIA would seem not to be in line with this intention.

The General EIA regulations set out the EIA process that is followed if one wants to obtain an authorization to undertake an identified activity and other related matters. Key features of the EIA process include public participation, information gathering

⁵⁰ 45 of 1965.

⁵¹ Regulation 1(d) read with Regulation 11(b).

⁵² Section 34 of the NEMA read with Schedule 3.

and reporting to the decision-maker, while the process itself is undertaken by an independent consultant who is appointed by an applicant.

The first step in the EIA process is the lodging of an application with the relevant authority who may be the Minister or a provincial department of environmental affairs depending on the nature of the application concerned.⁵³ The second step is the consideration of the application by the relevant authority.⁵⁴ As a result of this consideration, the relevant authority either request the applicant to submit a plan of study for scoping and for the purposes of eventually producing a scoping report or to submit a scoping report without a prior plan of study.⁵⁵ At this stage it is important to note that the consideration of alternatives is already part of the picture since a plan of study for scoping must include “a description of proposed method of identifying the environmental issues and alternatives.”⁵⁶ The General EIA regulations define the term “alternative” as “in relation to an activity ... any other possible course of action, including an option not to act.”⁵⁷ Also important to note is that plan must include a brief description of the activity “to be undertaken.”⁵⁸ Considered together, these requirements make it clear that the EIA process is designed to apply to activities yet to be undertaken. An option not to undertake an activity is rendered a nullity where the activity has been undertaken and completed. It may be exercised where an activity has been partially undertaken, depending on the circumstances of each case, although it would be severely compromised.

As part of the second step, the relevant authority considers the plan of study for scoping and may accept it or may request additional information from the application before accepting the plan of study.⁵⁹ The third step is the undertaking of the scoping process, submission and consideration of a scoping report. A component of the public participation process takes place at this stage since a scoping report must

⁵³ Regulation 4.

⁵⁴ Regulation 5.

⁵⁵ Regulation 5(1).

⁵⁶ Regulation 5(2)(e).

⁵⁷ Regulation 1.

⁵⁸ Regulation 5(2)(a).

include an appendix containing a description of the public participation process and a list of interested parties and their comments.⁶⁰

At this stage the relevant authority may decide that the information contained in the scoping report is sufficient for the consideration of the application without further investigation or that the information is insufficient and that a full EIA must be undertaken before the application is considered or that the scoping report must be amended before it is considered.⁶¹

The fourth step is the submission of a plan of study for EIA. This stage builds upon the scoping process since the plan of study for EIA must include a description of the feasible alternatives identified during scoping that may be further investigated and an indication of additional information required to determine the potential impacts of the proposed activity on the environment.⁶² The use of the term “proposed activities” in these requirements is important to note. It makes it clear that the EIA framework is designed to apply to activities not yet undertaken.

The above step is followed by the undertaking of an EIA and the submission of an EIA report (“the EIR”). The key features of this step include public participation, an assessment of each alternatives and a comparative assessment of all alternatives.⁶³ An EIA process culminates into an EIR which is submitted to the relevant authority for its consideration.

The fifth step is the consideration of the application as underpinned by all the information and reports submitted by the applicant. This step may follow the submission of the scoping report where the relevant authority deems the information

⁵⁹ Regulation 5(3).

⁶⁰ Regulation 6(1)(e).

⁶¹ Regulation 6(3).

⁶² Regulation 7(1).

⁶³ Regulation 8.

contained in that report sufficient that the application may be considered.⁶⁴ In other circumstances it may also follow the submission of an EIR.⁶⁵

The relevant authority considers the application and may issue an authorization (with or without conditions) or refuse the application and, where an authorization is issued, (it) must determine the period of validity of such authorization.⁶⁶ Conditions that are imposed on authorization may be reviewed and amended or deleted “in a manner that is lawful, reasonable and procedurally fair.”⁶⁷

When the relevant takes a decision to grant or refuse an EIA application it must issue a record of that decision to the applicant and, where requested, to any other interested party.⁶⁸ Importantly, the record of decision must include: a brief description of the proposed activity and the implementation programme for which the authorization is issued; and the specific place where the activity is to be undertaken.⁶⁹ This puts it beyond doubt that the current EIA regime designed to apply to activities that have not yet been undertaken. Otherwise, the requirements referred to here would be irrelevant to activities already undertaken.

Finally, the General Regulations provide for the process to be followed by a person who wishes to exercise a right to internal appeal as granted by the ECA.⁷⁰ The Regulations provide that any report submitted for the purposes of the regulations is a public document subject to the rights of its owner.⁷¹ These two provisions support the EIA framework as they provide interested parties with necessary means to participate in the EIA process. The appeal provisions are also important that as the law requires, generally, that a person takes advantage of appeal provisions provided by statutory provisions (in this case the ECA read with its regulations) before

⁶⁴ Regulation 6(3)(a) read with Regulation 9(1).

⁶⁵ Regulation 9 read with Regulation 8.

⁶⁶ Regulation 9(1) and (2).

⁶⁷ Regulation 9(3).

⁶⁸ Regulation 10(1).

⁶⁹ Regulation 10(2)(a) and (b).

⁷⁰ Section 35(3) of the ECA read with Regulation 11.

⁷¹ Regulation 12.

approaching a court of law with a view to review and set aside an administrative decision taken under statutory provisions.⁷²

The effect of ex post facto EIA authorisation in the current EIA regime

It is clear that the provisions of the ECA and its EIA regulations are not designed to be applicable to activities already commenced with or completed. Firstly, central to the current EIA framework is the concept of “proposed activities” and nowhere is reference made to current or commenced or completed activities.

Secondly, to undertake an EIA on an activity that is commenced with or completed undermines the role of the EIA process in a decision-making process. This is because the consideration of alternatives is seriously compromised as well as the role and the value of public participation in decision-making. An EIA on a commenced or existing activity would effectively narrow the scope of the consideration of alternatives and of the public participation at varying degrees in each and every EIA process.

Thirdly, that the current EIA framework does not specifically provide for an *ex post facto* EIA leads to uncertainty about what would happen when a person approaches the relevant authority and lodges an application with a view of undertaking an EIA and obtaining authorisation for an activity that is commenced with or completed. Because there are no legal provisions nor are any guidelines on how to deal with such a situation and the applicable requirements and rules, where such an EIA is undertaken, would be determined on a case-by-case basis. This clearly amounts to legislating for disaster in the same way defines by Fuller and discussed above.

Fourthly, it seems that the current EIA framework was based on the idea that it is sufficient to make it an offence to undertake an identified activity without requisite

⁷² The Promotion of Administrative Justice Act, 3 of 2000, makes this a statutory requirement. See section ?

EIA authorisation. This idea misses a point made by Allott that “a law cannot compel action. No one can be forced to do anything merely by law ... even if the law is accompanied by a sanction. All a law can do is to try to induce someone ... to a certain cause of action.”⁷³ Accordingly, and in line with Allott’s point, it is submitted that the current EIA framework had to provide, adequately, for a situation where there is non-compliance with the requirement to obtain an authorisation before commencing with an identified activity.

Making it an offence to breach the requirement to obtain an EIA authorisation before commencing with an identified activity is essential but is not sufficient on its own to deal with the issue of what happens once an activity has been commenced without the requisite EIA authorisation. The penalties that may be imposed are also important. The penalties that are set out in the ECA are dated but are now complemented by the provisions of section 34 of the NEMA as discussed above. This potentially provides an effective punitive mechanism.

To the current EIA framework’s credit, the provisions of section 31A of the ECA are applicable to a situation where there is non-compliance with the requirement to obtain an EIA authorisation before an identified activity is commenced with. Section 31A provides that, if it is in the opinion of the authorities listed in the provision, “an person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected” any of the listed authorities may issue a written directive to such a person.⁷⁴ The listed authorities are: the Minister of the Environmental Affairs and Tourism, the competent authority, a local authority or a government institution concerned.⁷⁵

A listed authority may issue a directive to the person concerned to cease the activity in question, or to take appropriate steps, within a specified period with a view to deal

⁷³ Anthony Allott, “The Limits of Law”, Butterworths, 1980, pages 45 to 46.

⁷⁴ Section 31A(1).

⁷⁵ Section 31A(1).

with the damage, danger or detrimental effect of the activity.⁷⁶ The activities which trigger the requirement to undertake an EIA before authorisation are such that, by nature, they are some of the activities that may significantly affect the environment. In this regard, in respect of all identified activities, the Minister has already expressed a view that their undertaking may detrimentally affect the environment since section 21 provides that the Minister may “identify those activities which in his opinion may have a substantial detrimental effect on the environment.”

It is clear that an authority acting in terms of the provisions of section 31A(1) may order a person who has commenced with an activity without the requisite EIA authorisation to cease that activity. It is also clear that, where such an activity has been completed, a listed authority may order the demolition of constructed structures or the taking of other steps “with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.”

What is not clear, however, is whether, in any of those circumstances, can a listed authority order the undertaking of an *ex post facto* EIA as part of the directive? A positive answer, in this regard, would be supported by the argument that the discretion given to a listed authority by the provisions of section 31A(1) are sufficiently wide to require the undertaking of an EIA since a listed authority may order the person concerned “to take such steps as the Minister, competent authority, local authority or government institution ... may deem fit.” It is argued that this argument is correct. A proviso in this regard is that the wide nature of the powers that are given to a listed authority is limited by the purpose of the provisions of section 31A which is to deal with a threat posed by an activity to the environment. Such powers are exercised for that purpose which does not include powers to authorise an activity that requires an EIA before commencement. The prohibition of the undertaking of these activities and their authorisation is provided for by the provisions of section 22(1) as discussed above. In my view, it would be absurd to interpret the ECA as implicitly providing for authorization powers under section 31A.

⁷⁶ Section 31A(1)(a) and (b).

Furthermore, to allow the granting of an *ex post facto* authorisation in the context of exercising powers under the provisions of section 31A would seriously undermine the current EIA framework. This is because these powers are reactive in nature whereas the powers given under section 22(1) are proactive as they are exercised before the activity commences. Were the powers given under the provisions of section 31A to be utilised for the granting of an EIA authorisation it might lead to abuse by persons who would commence activities without the requisite authorisation with a hope that they would not be caught by the authorities and that, even if they are caught, they would be required to undertake an *ex post facto* EIA after which an authorisation might be granted to them.

In addition, to utilise the provisions of section 31A to grant *ex post facto* EIA authorisations is not ideal since some of the listed authorities are not competent to issue an EIA authorisation. Leaving aside the issue of whether an *ex post facto* EIA authorisation may be granted or not, local authorities and other government institutions that may utilise the provisions of section 31A are not competent to utilise the provisions of section 22(1) to grant an EIA authorisation. In the current EIA framework, such powers are exercised by the Minister and the MECs responsible for environmental affairs in different provinces, or by official to whom these powers are delegated by the Minister or an MEC.

The powers that all listed authorities have are to direct the person to whom a directive has been issued to perform any activity or function with a view to rehabilitate any damage caused to the environment as a result of the activity.⁷⁷ If a listed authority is of the view that the person concerned has failed to perform an activity or function, it may perform such activity or function and may authorise any person to take all steps required for that purpose and may recover its expenditure from the person concerned.⁷⁸

⁷⁷ Section 31A(2).

⁷⁸ Section 31A(3) and (4).

Section 28 of the NEMA contains provisions that are similar to the provisions of section 31A of the ECA. These two sets of provisions apply side-by-side since the coming into effect of the NEMA. The NEMA provisions will not be discussed here save to point out that they give similar powers to certain authorities as given under the provisions of section 31A of the ECA. The NEMA provisions also do not provide for the granting of *ex post facto* EIA authorisation. Both provisions complement the penalty provisions of the ECA and the provisions applicable in criminal proceedings in terms of section 34 of NEMA. This is subject to a proviso that it is not an offence to contravene the provisions of section 28 of NEMA or a failure to comply with a directive under section 28(4).

These enforcement powers (discussed above) depend on the relevant authorities being aware of the offending activity betrays the limited nature of these powers. The law does not provide guidance on whether an offending party may approach a competent authority for guidance. This is because the law is not clear on whether, if such a person does not have an EIA authorization, an *ex post facto* EIA authorization may be granted in appropriate circumstances.

Case law on ex post facto authorization

Below I deal with how courts have treated the issue of *ex post facto* EIA and (possible) authorization when it came before them.

The first reported case that dealt with the issue of *ex post facto* EIA is *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*⁷⁹ which case was decided on 20 June 2001.

The applicant was a voluntary organisation comprising ten non-governmental organisations (“NGOs”) while the first and second respondents, respectively, were

⁷⁹ 2002 (1) SA 478 (C).

lessee and lessor of the site in Simonstown, Cape Town.⁸⁰ The first respondent commenced with earthworks in preparation for the planting of a vineyard on a site that, at least, since 1945, had been quarried for gravel.⁸¹ One of the NGOs which was later to be part of the applicant requested the first respondent to undertake an EIA and threatened legal action in the event that the request was not complied with.⁸² This request elicited a letter from the first respondent's attorneys informing the NGO that the first respondent was proceeding with the establishment of the proposed vineyard and stated that the first respondent had appointed its attorneys to accept service of any application.⁸³

About a year later, applicant's attorneys addressed another letter to the first respondent's attorneys in which they threatened to institute interdictory proceedings against the first respondent.⁸⁴ Following a response from the first respondent's attorneys reiterating the entitlement of the first respondent to establish a vineyard and informing the applicant that the vineyard had already been planted, the applicant instituted court proceedings.

The applicant approached the court for an order that forcing the first respondent be ordered to undertake an EIA in terms of the ECA or, alternatively, in terms of the policy determined in terms of the ECA or, further alternatively, in terms of the provisions of the NEMA, in respect of the planting of a vineyard and the constriction of dams.⁸⁵

The court considered the relevant statutory provisions and concluded that:

“When this legislative framework is analysed in its complex totality, it becomes clear that an EIA fits in the scheme which has been set up to ensure that an official

⁸⁰ pages 479 to 480.

⁸¹ page 479.

⁸² Page 480.

⁸³ Page 480.

⁸⁴ Page 480.

⁸⁵ Page 479.

approval is granted before certain land can be put specific uses as defined ... It would appear that, in general, a person who performs an identified activity unlawfully without authorization cannot be forced to comply with a procedure applicable to one who has in fact sought authorization. The unlawfulness of the conduct determines the remedy.”⁸⁶

Further, the court reasoned that the current EIA regime does not envisage that an EIA can be wrenched from its particular purpose as conceived in the legislative structure and be employed “as an independent remedy.”⁸⁷ The remedies that are available where a person undertook an identified activity without an EIA are based on both civil law and criminal law. In respect of the former, there may be a mandatory interdict or a prohibitory interdict, and, in respect of the latter, there may be criminal prosecution and an order to repair damages to the environment.⁸⁸

The court, therefore, refused to grant the relief sought on the basis that it would have no legal significance.⁸⁹

It is argued that the court decision is correct in holding that the current EIA regime is applicable to activities that have not taken place. The court pronounced this as a general principle as it used the term “generally” in pronouncing the legal position. What are the exceptions to this general rule? The court did not pronounce on this as it was not necessary for the case that the court had to decide.

Furthermore, it is clear that, whatever the exceptions are, the facts of the case did not fit any of the exceptions nor was there any need to consider any of them. It is argued that the exceptions that the court implicitly referred to had to be explored and properly conceptualized in subsequent cases. This, unfortunately, did not happen.

⁸⁶ Page 488.

⁸⁷ Page 488.

⁸⁸ Page 488.

⁸⁹ Page 488.

In addition to the remedies that the court mentioned which are available where a person has undertaken an identified activity without an EIA, there are statutory remedies provided by the ECA and the NEMA. Powers are given to various authorities to issue an order (directive) against any person (including an owner of land and any person who has a right to use the land) who causes, has caused, or, may cause significant or serious harm to the environment.⁹⁰ Most identified activities, if not all, may at least cause significant or serious harm to the environment and the authorities with these powers may issue a directive against offenders, subject to compliance with procedural requirements.

The second reported case is the decision in *Eagles Landing Body Corporate v Molewa NO and Others*⁹¹ Judgment on this case was handed down, by the Transvaal Provincial Division on 22 March 2002.

The applicant was the body corporate of the Tradewinds Sectional Title Scheme and the first and second respondents were, respectively, the MEC for, and the head of, the North West provincial department of environmental affairs (the “department”).⁹² The third respondent was a golf estate developer.⁹³ The third respondent commenced construction of a peninsula (as part of the golf estate) and the department issued a directive, in terms of the NEMA, directing the third respondent to cease the earthworks and undertake an EIA.⁹⁴ The third respondent complied and was, eventually, granted an authorization to continue with the construction.⁹⁵ The applicant, unsuccessfully, appealed against the decision authorizing the continuation of the construction and construction was continued and completed.⁹⁶ The applicant then approached the High Court to review and set aside the decision.

The order sought was to:

⁹⁰ The powers in NEMA are given in section 28 and the powers in the ECA are given in section 31A.

⁹¹ 2003 (1) 412.

⁹² Page 416.

⁹³ Page 416.

⁹⁴ Page 416.

⁹⁵ Page 416.

- declare that the decision authorizing the construction was contrary to the doctrine of legality or that it was *ultra vires* the provisions of section 22 of the ECA as it purported to grant an *ex post facto* authorization;
- set aside the decision on appeal and replacing it by a decision upholding the appeal, denying the application for authorization; and
- declare that the construction took place without the necessary authorization in terms of section 22 of the ECA and is unlawful.

The court held that granting the order sought by the applicant would have no practical effect since the construction had been completed.⁹⁷ On this basis the court refused to grant the order sought by applicant.⁹⁸ The court nevertheless furnished its views on other issues in the matter.

With respect to the issue of whether an *ex post facto* EIA authorization may be granted under the provisions of section 22 of the ECA, the court expressed a view that the law did not permit the granting of an *ex post facto* authorization.⁹⁹ In this regard, the court agreed with the argument of counsel for applicant in that, in terms of the ECA, “authorization for any identified activity must precede the undertaking of the activity” but expressed a view that it was unable to uphold that argument to the facts of the case before court.¹⁰⁰ The court expressed a view, agreeing with counsel for the third respondent, that it was never the intention of the Legislature that authorization could never be given for the completion of construction in every case where some construction had been undertaken without EIA authorization.¹⁰¹ In this regard, it is noted that the intention of the Legislature is clear in that it intended all activities that trigger the requirement to undertake an EIA to be undertaken after an EIA authorisation had been granted. To intend otherwise, it is submitted, would have defeated, or at least undermined, the purpose of the EIA regime.

⁹⁶ Page 416.

⁹⁷ Page 432.

⁹⁸ Page 432.

⁹⁹ Page 433.

¹⁰⁰ Page 443.

¹⁰¹ Page 444.

The court expressed a view that:

“Provided that the authorization for the completion of the partially undertaken activity is the result of a proper compliance with the provisions, and the environment protection and preservation objectives, of the environmental legislation, it will, in my judgment, constitute a valid authorization. The circumstance that unauthorized partially undertaken activity would thereby in effect be legitimated would be no more than an incidental result of the authorization granted.”¹⁰²

The court noted held that the above proviso applied in the circumstances of the case and that there was no other concern raised in respect of the authorization other than the fact the construction was partially undertaken.¹⁰³

There are few points to note in this judgment. Firstly, the court’s views do not create a binding precedent. It is trite law that a precedent is created by a court’s reasoning in reaching (its) decision. The court’s reasoning in this case was that the order sought would have no practical value to the applicant and hence the court decided not to grant the order. Hence the court’s views discussed above were merely *obiter dicta*, that is, they only have persuasive value. Secondly, the court did not refer to the *Silvermine* judgment notwithstanding that it was decided a year earlier. While the *Silvermine* judgment was not binding on the court in the Transvaal Provincial Division it had persuasion value as it dealt, broadly, with the question of whether an *ex post facto* EIA authorisation may be granted. The court in the *Eagles Landing* case could have built on the jurisprudence of the *Silvermine* judgment by, possibly, pronouncing the circumstances of the case before it as falling within one of the exceptions to the general rule that an *ex post facto* EIA authorization cannot be granted. Doing so would have been possible, especially, because in both judgments the court held that the current EIA regime applies to activities not yet undertaken.

¹⁰² Page 444.

¹⁰³ Page 444.

Thirdly, the court's view that an *ex post facto* EIA authorization would be valid where granting it for a partially undertaken activity is "the result of a proper compliance with the provisions, the environment protection and preservation objectives, of the environmental legislation" is problematic. If one agrees with the court's view in the *Silvermine* judgment then the legal position is that the current EIA regime does not provide for the granting of an *ex post facto* EIA authorization and the court's view, in this regard, therefore does not help. In addition, commencing an identified activity without authorization is against environmental legislation and to authorize the completion of such an activity seems, logically, to be against the provisions of the environmental legislation. In fact, the court's view, shows that the ECA's dealing with the issue of *ex post facto* authorisation is exactly what Fuller called a legal system in the Pickwickian sense where a void contract is said to be some kind of a valid contract.

Fourthly, the court, by holding that an EIA authorization must precede the commencement of identified activity and then indicating that there may be circumstances where this proposition cannot be applied, it is submitted, implied that the granting of an *ex post facto* authorization is an exception to the general rule. This is crucial because it means that there is commonality between the *Silvermine* judgment and the *Eagles Landing* judgment in so far as both courts implied that the granting of an *ex post facto* EIA authorisation is an exception to a general rule.

The question of *ex post facto* EIA authorization was also, briefly, dealt with in a 2005 unreported case of *Capital Park Motors CC and Another v Shell South Africa Marketing (Pty) Ltd and Others*.¹⁰⁴ The substance of the case, however, was not about whether such an authorization may be granted or not. I will only deal with those aspects which relate to the issue of *ex post facto* authorisation.

¹⁰⁴ Case number 3016/2005 of the Transvaal Provincial Division.

The first respondent commenced with, and completed, the construction of a filling station and associated infrastructure in 2001.¹⁰⁵ The first respondent was convicted for the unlawful construction and fined an amount of R10,000.00.¹⁰⁶ With a view of rectifying the unlawfulness of the construction, the first respondent applied for an authorization in terms of the ECA and application was unsuccessful.¹⁰⁷ The first respondent then lodged an appeal, in terms of section 35 of the ECA, against the refusal of authorization which appeal was pending at the time of the court decision.¹⁰⁸ Operation of the constructed petrol filling station started on 28 January 2005 and prompted a demand, by applicants, for an undertaking that the first respondent will desist from operating pending the undertaking of further steps.¹⁰⁹ The undertaking was not given.¹¹⁰ The applicants then approached the court for a relief.

The order sought by the applicants was an interim interdict against the first and/or fifth respondents to stop the operation of the petrol filling station pending the finalisation of the appeal lodged in terms of section 35 of the ECA, other steps set out in the relief.¹¹¹

The court referred to the *Eagles Landing* case and held that that case was not authority for a proposition that granting an *ex post facto* EIA authorization was impossible.¹¹² The court held that the pronouncements made by the court in the *Eagles Landing* case were merely *obiter* and that, in addition, the court expressed a view that such an authorization can be given.¹¹³ Pointing out that the judgment in the *Eagles Landing* case dealt with a partially completed activity, the court held that the court's views in that case were *obiter* in relation to a completed activity and that, further, if an *ex post facto* authorization could be granted for a partially completed

¹⁰⁵ Page 6.

¹⁰⁶ Page 7.

¹⁰⁷ Page 7.

¹⁰⁸ Page 7.

¹⁰⁹ Page 7 to 8.

¹¹⁰ Page 8.

¹¹¹ Page 4.

¹¹² Page 19.

¹¹³ Page 19.

activity there is no reason why it could not be given for a completed activity.¹¹⁴ The pending appeal, the court held, was not a dead letter because an *ex post facto* authorization could be granted.¹¹⁵ The court therefore granted the order sought by the applicant.¹¹⁶

The court decision is problematic in a number of ways. The court stated that the *Eagles Landing* judgment had persuasive value in so far as the court pronounced on the possibility of granting an *ex post facto* authorization. I agree with this. But what the court did not attach sufficient importance on is that the essence of the persuasive value in the *Eagles Landing* judgment is that the view that an *ex post facto* authorization may not be granted as it is not provided for by the current EIA regime. In the *Eagles Landing* judgment, the court intimated that that was a general rule which rule could not be applied in the circumstances of the case before it. It is submitted that this is the crux of the persuasive value in the *Silvermine* judgment.

Furthermore, the court noted that the *Eagles Landing* judgment was concerned with a partially undertaken construction and, then, stated that the judgment had persuasive value for completed activities. I agree with the court in this regard. Based on this, the court concluded that if an *ex post facto* authorization may be granted for a partially undertaken activity there is no reason why it cannot be granted for a completed activity. The court does not elaborate on this. The crux of the problem here is that there are no clearly defined requirements for exceptional circumstances where an *ex post facto* authorisation would be lawfully granted. The court merely states that if such an authorisation may be granted for partially undertaken activities there is no reason why it should not be granted for completed activities. Other than this pronouncement, the court did not make any contribution in the development of the jurisprudence on *ex post facto* authorisation. It did not consider the *Silvermine* case which, as is discussed above, is authority that, generally, an *ex post facto* authorization cannot be granted. In considering the *Silvermine* case, the court could

¹¹⁴ Page 19.

¹¹⁵ Page 27.

have developed principles with respect to the exceptions which are applicable to this general rule. The court did, however, express a view that operating from a facility that is constructed without an environmental authorization was unlawful because “the prohibition against construction/erection is aimed at not being able to have or utilize such prohibited activity. Otherwise the whole prohibition becomes nugatory/redundant.”¹¹⁷

Conclusions on the position of the current EIA regime

It is clear that the general rule, in terms of the current EIA framework is that an *ex post facto* EIA authorization is not provided for. It is also clear that the de minimus principle applies to this general rule which principle, in this context, states that a trivial activity may be authorized notwithstanding that it has been commenced with at the time authorization is granted. What is not clear is what other exceptions are applicable to this general rule. Courts have not been helpful in developing principles in this regard. It may be that this is because the courts have never been called upon to specifically circumscribe the ambit of these exceptions. Conceivably, that there is no clarity on the exceptions has not helped DEAT and various provincial departments of environmental affairs in appreciating the ambit of their powers in their decisions that relate to partially undertaken or completed activities which require EIA authorization.

Furthermore, because the courts have not been specifically called upon to specifically circumscribe the ambit of the exceptions to the general rule that an *ex post facto* EIA authorization may be granted, the courts have not referred to nor have they sought any guidance from international law and foreign law. None of the judgments discussed above referred to, or quoted from, any international or foreign sources. This is notwithstanding that South African environmental law, like domestic environmental laws of most countries, has been heavily influenced by international law.¹¹⁸ While this point is made, it is submitted that, criticism of the courts in this

¹¹⁶ Page 30.

¹¹⁷ Page 21.

¹¹⁸ Glazewski, page 31.

regard would be unfair since, it seems that, interpreting and applying the relevant provisions of South African law and applicable principles was sufficient to dispose of the respective disputes that the courts were called upon to adjudicate.

It is argued that the manner in which the issue of *ex post facto* EIA authorisation was legislated for in the current EIA framework fitted one or more of the ways of legislating for disaster which are referred to above. One, there was a failure on the part of the legislature to create rules for an *ex post facto* situation. As a result, every *ex post facto* situation had to be decided on an ad hoc basis as the cases discussed here confirm. Two, because no rules were created on *ex post facto* EIA authorisations, there was no publication of applicable rules so that citizens become aware of the applicable rules. As a result of this, there has been confusion in society on this issue. Three, in so far as the courts expressed a view that an *ex post facto* EIA authorisation may be granted in certain circumstances without creating or identifying applicable rules, it is argued that is the symptom of a failure of congruence between the law and its actual administration.

Based on the above argument, it is submitted that, the manner in which the question of *ex post facto* EIA authorisation in the current EIA framework has been legislated for is a disaster. Below I consider whether international law and foreign law provide any guidance on how to deal with the issue of *ex post facto* EIA authorization with respect to whether it may be granted and, if so, in what circumstances.

CHAPTER 4: INTERNATIONAL LAW

Introduction

There are seven traditional sources of international law. These are: international conventions or treaties, customary law, general principles of law recognized by civilized nations, judicial precedent, text writings by experts on international law, codification and *Jus Cogens*.¹¹⁹ International conventions or treaties and customary international law are recognized as the primary sources providing substantive content on those aspects dealing with environmental law.¹²⁰ In addition to these traditional sources of international law, ‘soft law’ plays a significant role in developing international law, by pointing to the direction of formally binding obligations, even though it is not binding in itself.¹²¹ Examples of ‘soft law’ include the Rio Declaration and the Stockholm Declaration.¹²²

I proceed below by considering whether *ex post facto* EIA authorizations are provided for by some of these sources of international law. Logically, this consideration is preceded by considering whether EIAs are required or provided for in the sources considered.

Rio Declaration

The first source of international law to be considered is the 1992 Rio Declaration. One of the principles of the Rio Declaration states that EIA “as a national instrument shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”¹²³ As indicated above, soft law is not binding per se, rather, it points to the direction of the law. The principle is accordingly important.

¹¹⁹ Glazewski, page 35 to 36.

¹²⁰ Page 36.

¹²¹ Page 36.

¹²² Page 36.

There are few points to note in this regard. Firstly, the principle requires states to establish national EIA regimes. Secondly, such EIA regime must be applicable to activities that are likely to have significant adverse impact on the environment and are subject to a decision of a competent national authority.

Thirdly, the principle clearly requires that an EIA to be undertaken before an activity is undertaken as it refers to ‘proposed activities.’ Fourthly, the principle does not state that there is an exception where an EIA may be undertaken after the activity has been undertaken and that authorization may be granted in that situation. It is submitted that, while the Rio Declaration, gives an indication that EIAs must precede the undertaking of activities, it does not answer the question of whether an EIA may be taken after the activity has been partially undertaken or completed.

1991 Espoo Convention

The 1991 United Nations Economic Community for Europe Convention on Environmental Impact Assessment in a Transboundary Context, which is also known as the 1991 Espoo Convention, is the another source of international law that I consider which makes reference to EIAs. As the name of the Espoo Convention indicates, it is applicable in a transboundary context and was adopted under the auspices of the Economic Community for Europe.

Among others, the Espoo Convention records a commitment of the signatory states to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.¹²⁴ A Party in which an activity is planned which activity is likely to cause a significant adverse transboundary impact, referred to as Party of origin in the Convention, is obliged to inform affected Parties and discussions must take place between concerned parties.¹²⁵

¹²³ Principle 17.

¹²⁴ Philippe Sands, *Principles of international environmental law*, volume 1, Manchester University Press, 1995, page 558.

¹²⁵ Philippe Sands, page 588.

It is important to note how the Convention defines the terms “impact” and “transboundary impact” as these terms are central to the EIA regime that the Convention establishes. The Convention defines “impact” widely as including: “any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.”¹²⁶

Transboundary impact is defined as “any impact, not exclusively of a global nature, within an area under the jurisdiction of a party caused by a proposed activity the physical origin of which is situated wholly or in part within the area of jurisdiction of another party.”¹²⁷

Both definitions indicate that the Convention envisages EIA in the context of activities which are yet to take place as they use the phrase ‘proposed activities.’ This argument is supported by the fact that the Convention requires the Party of origin to ensure that an EIA is undertaken ‘prior to a decision to authorize or undertake a proposed activity listed ... that is likely to cause significant adverse transboundary impact.’¹²⁸

The Convention, therefore, does not contain provisions which explicitly indicate that it may be used in a case of *ex post facto* authorization. The whole focus of the Convention is on activities which are proposed and which are likely to have significant transboundary impacts. Although the Convention is an important international instrument on EIAs, it does not provide any help on how to deal with the situation of *ex post facto* authorization. Below, I consider foreign law experience, specifically, whether it provides any guidance on the issue of *ex post facto* authorization.

¹²⁶ Article 1(vii).

¹²⁷ Article 1(viii).

CHAPTER 5: FOREIGN LAW

Introduction

It is always advisable to treat foreign law with caution when considering it with a view of ascertaining its position on a particular aspect. This is because domestic law functions as a system with various aspects inextricably intertwined together. Understanding a particular aspect, no matter how insignificant it may be, generally, requires the understanding of the whole system or, at least, its inter-related aspects. The domestic laws of countries that are discussed in this dissertation are no different from other domestic laws in this regard. The only reason the domestic laws of these countries are considered here is to ascertain how they deal with the issue of *ex post facto* EIA authorisation. I do not, in this dissertation, consider the entire domestic legal system of these countries in order to ascertain this. I am of the view that considering EIA laws of these countries is sufficient for the purposes of ascertaining how these countries deal with the issue of *ex post facto* authorisation.

Canada

In Canada, EIAs are provided for in a separate statute which statute deals only with EIAs and related matters. This is unlike the South African situation where EIAs are provided for in a general environmental management statute, namely the ECA or NEMA. The Canadian Environmental Assessment Act¹²⁹ (“CEAA”) came into effect in 1995.

The provisions of the CEAA do not use the phrase “environmental impact assessment” or EIA as it is the case in the ECA. Instead, the CEAA uses the phrase “environmental assessment” (“EA”) which is defined as “in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act”.¹³⁰ This definition is in line with the approach adopted by Glazewski that the term EA covers both EIAs which targets projects specifically and “strategic

¹²⁸ Article 2(3).

¹²⁹ C. 37 of 1992.

¹³⁰ Section 2(1).

environmental assessments” which covers the assessment of policies, programmes and plans.¹³¹ The use of the introductory words “in respect to a project” in the definition recognises this otherwise wide meaning of the phrase. The net effect of the definition, however, is that the phrase, as used in the CEAA, has the same meaning as an EIA. Hence, to avoid confusion, I use the EIA instead of EA notwithstanding that the CEAA refers to the latter.

The importance of EIAs in Canada is emphasized by Boyd when he stated that “Environmental Assessment, as described by the Supreme Court of Canada, is “a planning tool that is now generally regarded as an integral component of sound decision-making”” and it involves gathering and evaluating information about the potential impacts of a proposed course of action, and integrating environmental and economic factors in order to produce sustainable development.¹³²

The purposes of the CEAA include ensuring that environmental impacts are considered before actions are taken.¹³³ There are two kinds of EIA processes that may be undertaken in terms of the CEAA, namely a screening process or a comprehensive study. The term “screening” is defined as an EIA “that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1),”¹³⁴ while a “comprehensive study” is defined as an EIA “that is conducted pursuant to sections 21 and 21.1, and includes a consideration of the factors required to be considered pursuant to subsections 16(1) and (2).”¹³⁵ The factors that are considered in every screening process or comprehensive study are:

- the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

¹³¹ Glazewski, pages 270 – 271.

¹³² David Richard Boyd, *Unnatural Law, Rethinking Canadian Environmental Law and Policy*, (2003), University of British Columbia, page 149.

¹³³ Boyd, page 151.

¹³⁴ Section 1.

¹³⁵ Section 1.

- the significance of the effects set out above;
- comments from the public that are received in accordance with the provisions of the CEAA;
- measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- any other matter relevant to the screening or comprehensive study, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of screening, the Minister after consulting with the responsible authority, may require to be considered.¹³⁶

In addition, a comprehensive study includes a consideration of the factors set out below:

- the purpose of the project;
- alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- the need for, and the requirements of, any follow-up programme in respect of the project; and
- the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future generations.¹³⁷

The term “project” is also crucial in the EIA regime created by the CEAA. This term is defined as:

- a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
- b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations.¹³⁸

¹³⁶ Section 16(1).

¹³⁷ Section 16(2).

¹³⁸ Section 1.

The provisions set out directly above are similar to the provisions of the current South African EIA framework in so far as they clearly envisage that an EIA must be undertaken before an activity is undertaken as they refer to “proposed” activity.

The CEAA provides that EIA is required “before a federal authority exercises one of the following powers or performs one of the following duties or functions of a project, namely, where a federal authority

- (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;
- (b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission, or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;
- (c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or
- (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.”¹³⁹

Important to note from this quote is that the projects that fall within the first two categories set out are public projects in a sense that they are either undertaken by a

¹³⁹ Section 1(1).

federal authority or that they are supported by public funds. The third category involves the provision of public land with a view of facilitating the project. The fourth category provides for EIA in private projects where they require authorization from a federal authority.

The CEAA also provides for the exclusion of certain activities from the requirements to undertake an EIA. Activities are excluded, among others, if they are: included in an exclusion list;¹⁴⁰ to be carried out in response to an emergency and carrying out the project forthwith is in the interest of preventing damage to property for which special temporary measures are being taken under the Emergencies Act.¹⁴¹

Where required an EIA is required the federal authority must ensure that it is conducted as early as possible during the planning phase of the project and before irrevocable decisions are taken.¹⁴² This is clearly at odds with an *ex post facto* EIA. It has also been stated that the idea behind the EPAA is that an EIA should be an inherent part of the whole process of decision-making, starting as soon as a proposal is first mooted and, as such, an EIA “was not something to be simply tacked on after a decision had already been made to proceed on economic and/or social grounds.”¹⁴³ As such, “an environmentally harmful activity should never reach the stage where so much time and energy had been invested that it was impossible to back down.”¹⁴⁴

Activities which trigger the application of a screening process are those that are not described in the comprehensive study list or in the exclusion list.¹⁴⁵ Involved in the screening process is the screening itself and the preparation of a report for submission

¹⁴⁰ Section 1(1)(a).

¹⁴¹ Section 7(1)(b).

¹⁴² Section 11(1).

¹⁴³ David Farrier, Rosemary Lyster, Linda Pearson, Zada Lipman, *The Environmental Law Handbook, Planning and Land Use in New South Wales*, Redfern Legal Centre Publishing, Third Edition, (2000), page 509.

¹⁴⁴ *Ibid.*

¹⁴⁵ Section 18(1).

to the responsible authority.¹⁴⁶ Public participation depends on whether the responsible authority deems it appropriate or the regulations require it.¹⁴⁷

A comprehensive study is triggered by an activity which is listed in a comprehensive study list.¹⁴⁸ In respect to a comprehensive study, the responsible authority must ensure public consultation with respect to the proposed scope of the project, the factors proposed to be considered in the EIA, the proposed scope of those factors and the ability of the comprehensive study to address issues relating to the project.¹⁴⁹

The CEAA does not specifically deal with the question of *ex post facto* authorisation. Its provisions are clear that they are designed to locate an EIA before an activity takes place. It is submitted that this situation is the same as the current South African EIA framework. As such, the CEAA does not provide any guidance on how to deal with the issue of *ex post facto* authorisation. In this regard it is important to consider a case where a court ordered the undertaking of an *ex post facto* EIA, albeit, before the CEAA came into operation.

Friends of the Oldman River Society v Canada (Minister of Transport)

The Canadian Supreme Court gave a judgment in 1992 in the case of *Friends of the Oldman River Society v Canada*¹⁵⁰ (parties were cited as per the court of first instance) which judgment referred to the issue of *ex post facto* EIA. The respondent was an environmental group based in Alberta and brought an application for a certiorari and mandamus in the Federal Court which sought to compel certain federal departments to conduct an EIA in terms of the federal Environmental Assessment and Review Process Guidelines Order, in respect of a dam constructed on the Oldman River by the province of Alberta.¹⁵¹ The project of constructing a dam affected

¹⁴⁶ Section 18(1).

¹⁴⁷ Section 18(1).

¹⁴⁸ Section 21(1).

¹⁴⁹ Section 21(1).

¹⁵⁰ [1992] 1 S.C.R. 3.

¹⁵¹ Page 3.

several federal interests, specifically navigable waters, fisheries, Indians and Indian lands.¹⁵²

Construction of the Dam was 40 per cent complete when the respondent commenced the court proceedings in the Federal Court.¹⁵³ The applications were dismissed and the respondent lodged an appeal with the Court of Appeal which was successful and the approval for the project was quashed and the Ministers of Transport and of Fisheries and Oceans were ordered to comply with the Guidelines Order.¹⁵⁴ The applicants lodged an appeal against this decision with the Supreme Court.

The appeal in the Supreme Court had to consider the validity of the Guidelines Order as well as its nature and applicability and, further, whether the Court of Appeal properly exercised its discretion in deciding not to grant the remedy sought on the grounds of unreasonable delay and futility.¹⁵⁵

The Supreme Court dismissed the appeal but decided not to issue a mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.¹⁵⁶ It is submitted that the decision of the court not to issue a mandamus in this regard had no substantive effect on the outcome of the case. This is because Alberta province required to undertake an EIA before it could be granted an approval from the Minister of Transport under section 5 of the Navigable Waters Protection Act. Hence, that the decision of the court not to issue a mandamus is insignificant since the decision of the Court of Appeal quashing the section 5 approval was confirmed.

The rationale for the decision of the Supreme Court is, largely, not relevant to the issue of *ex post facto* EIA authorization. The aspect that is relevant is that the court interpreted the relevant provisions of the Guidelines Order creatively to hold that they

¹⁵² Page 3.

¹⁵³ Page 3.

¹⁵⁴ Page 3.

¹⁵⁵ Page 3.

¹⁵⁶ Pages 3 to 4.

were not applicable to new projects only.¹⁵⁷ In this regard, the court considered the provisions of the Act in terms of which the Guidelines Order was enacted and held because the provisions of section 6 of the Act provide that the Guidelines Order applied to “any proposal ... that may have an environmental effect on an area of federal responsibility” the Guidelines Order was not confined to new project and, as such, it applied to the Oldman River Dam Project notwithstanding that it had already been partially undertaken.¹⁵⁸ Furthermore, the court held that:

“ ... it is not at all obvious that the implementation of the Guidelines Order even at this late stage (where 40 per cent of the project had been completed) will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.”¹⁵⁹

As a result of the judgment of the Supreme Court an EIA was undertaken in respect of the Oldman River Dam Project notwithstanding the fact that the project was 40 per cent complete. The judgment treated an *ex post facto* EIA, and logically authorization thereafter, as clearly provided for and did not categorise it as an exception to the general rule. The judgment provides no guidance on how to deal with the issue. Instead, it highlights the role of the courts in any jurisdiction in applying statutory provisions in a just and fair manner in the circumstances of the case before it. It is unclear what is the role of this judgment in *ex post facto* authorization situations in Canada since the judgment preceded the CEAA which clearly requires an EIA and authorization to precede commencement of a project. Interestingly, the CEAA does not specifically deal with the issue in light of the Supreme Court decision.

Finally, it is important to note that, in respect of the EIA that was subsequently undertaken for the Oldman River Dam Project, Boyd states that, “the experts who conducted the court-ordered EA recommended that the dam not be completed, but

¹⁵⁷ Page 35.

¹⁵⁸ Page 35.

their recommendations were ignored.”¹⁶⁰ This clearly shows that there is a limit to what environmental laws, as enforced by the courts, can achieve in any society, and not only in South Africa.

*Castle-Crown Wilderness Coalition v Flett*¹⁶¹

This is a case which concerned an EIA process under the Alberta’s EIA statute.¹⁶² The administrative decision which was subject of this case related to a new proposal by a resort operator to significantly expand the existing resort.¹⁶³ The resort operator had contacted the Director of the relevant authority about the need to submit an EIA for a proposed expansion and the latter reviewed the proposal and decided that an EIA was not required.¹⁶⁴ The decision was based on the fact that the ski resort was an existing activity which had already commenced and, accordingly, was not a proposed activity subject to the EIA process.¹⁶⁵ The Castle-Crown Wilderness Coalition requested the Minister of the relevant authority to exercise his powers under the EIA statute but their request was not granted.¹⁶⁶ The Coalition then approached the Court¹⁶⁷ for review and setting aside of both the Director’s and Minister’s administrative decision.¹⁶⁸

The court addressed two main issues: the determination that the proposed expansion did not trigger the requirement to undertake an EIA and the decisions of the Director and the Minister that an EIA was not required.¹⁶⁹ The court found that the Director had interpreted the EIA statute in an unjustifiably narrow manner and one of the Justices in the case commented that:

¹⁵⁹ Page 63.

¹⁶⁰ Boyd, page 159.

¹⁶¹ 2004 ABQB 515 (2 July 2004).

¹⁶² Cindy Chiasson, Court Affirms Purpose of Alberta’s EIA Process, News Brief – Environmental Centre, Volume 19 No. 3, 2004, accessed from <http://www.elc.ab.ca/ims/client/upload/CourtAffirmsPurpose-Vol19-3pdf>.

¹⁶³ Page 1.

¹⁶⁴ Page 1.

¹⁶⁵ Page 1.

¹⁶⁶ Page 1.

¹⁶⁷ The Alberta Court of Queen.

¹⁶⁸ Page 1.

¹⁶⁹ Page 1.

“... I assume that it was her view that because there were some buildings on the land, along with a ski hill that was in operation, that the activity had already commenced. Taking that argument to its logical conclusion, any existing recreational or tourism facilities could enlarge its facilities and thereby their use in any astronomical or tourism facilities and thereby their use in any astronomical number and, because there was already an existing facility in operation, their enlargement would never be subject to the environmental assessment process. This cannot possibly be the correct interpretation of the legislation, particularly when one looks at the purpose of the EPBEA which is the protection of the environment, the need to balance environmental protection with economic factors and to prevent and mitigate the environmental impact of development.”¹⁷⁰

The court also found that the EIA process was the only way to obtain the information that could answer the environmental concerns of the project and, accordingly, the court found that the decisions of both the Director and the Minister were patently unreasonable in not requiring an EIA.¹⁷¹

There are two points worth noting from this case. The first is that the state EIA laws are same as those which apply through out Canada in that they do not explicitly provide for ex post EIA authorization. The statute that the court was concerned with in this case is an example in this regard. Secondly, the court decision was very creative and, it is argued, (it) stretched the provisions of the statute too far. The court effectively declared that the functionaries (the Director and the Minister) have powers to decide EIA applications even though the provisions of the statute clearly do not give such powers. This is an anomaly since, ordinarily, were the Director or the Minister to exercise such power decisions made would be *ultra vires* the provisions of the statute. This is again a clear case of how the failure to legislate for *ex post facto* EIA authorization amounts to legislating for disaster. It leaves everyone uncertain

¹⁷⁰ Pages 1 – 2.

¹⁷¹ Page 2.

too much reliance is had on the courts for interpretation. Because of this uncertainty, the issue is dealt with on a case-by-case basis (which is a result of failure to achieve rules as indicated by Fuller) and the functionaries are reluctant to make decisions either way and hope to be taken to court for direction.

Australia

In Australia the EIA regime is governed by the Environment Protection and Biodiversity Act¹⁷² (the “EPBA”) which Act does not only provide for EIAs.

Central to the EIA system the EPBA provides for is the term “controlled action” which is defined as “an action that a person proposes to take ... if the taking of the action by the person without approval under Part 9 for purposes of a provision of Part 3 would be prohibited by the provision.”¹⁷³ Part 3 sets out a number of activities which activities are prohibited unless a person has obtained an approval under Part 9. Some of these activities, such as the taking of an action which has or will have a significant impact on a listed threatened species included in the extinct wild category, are definitively set out in Part 3.¹⁷⁴ Part 3 provides that some of these activities are to be set out through the promulgation of regulations.¹⁷⁵ Also of importance to note is that Part 3 stipulates civil which are applicable to situations where its provisions are contravened. Part 9 provides for the powers of the Minister to make decisions whether to grant or refuse approval and to impose conditions where the approval is granted.

The first step in the EPBA EIA system is the referral to the Minister of a proposal to undertake a controlled action. The referral may be made by the person who proposes to take the action;¹⁷⁶ or a State or a self-governing Territory;¹⁷⁷ or a Commonwealth

¹⁷² 91 of 1999.

¹⁷³ Section 67.

¹⁷⁴ Section 18(1).

¹⁷⁵ Section 25(1).

¹⁷⁶ Section 68.

¹⁷⁷ Section 69.

Agency.¹⁷⁸ Where a referral is not made by a person who proposes to undertake the action, the Minister must inform such person as soon as is practicable after receiving a referral.¹⁷⁹ The Minister also has powers to request, from the person who intends to undertake an action, referral of proposal where he or she is of the view that it is a controlled action.¹⁸⁰ Upon receipt of a proposal, where the Minister is satisfied that the action is a component of a larger action, the Minister may reject the referral and request the referral of a larger project.¹⁸¹ It is noted here that the EPBA uses the term “proposal” which clearly indicates that the requirement to undertake an EIA is applicable to an activity before it is undertaken.

The second step is not applicable if the person who is proposing to take an action states that he or she thinks that it is a controlled action.¹⁸² This step comprises the Minister informing any other Minister whom he or she believes has administrative responsibilities relating to the proposal and requesting from such Minister information which is relevant in deciding whether the proposed activity is a controlled action or not.¹⁸³ The Minister also invites comments from those Ministers and from the public.¹⁸⁴

The third step comprises the Minister considering referral, taking into account any negative and beneficial impacts of the project and public comments and then deciding whether a proposal referred to him or her is a controlled action.¹⁸⁵

In the fourth step the Minister decides on the assessment approach that must be used for the assessment of the relevant impacts of the action.¹⁸⁶ These are the approaches that the Minister chooses from: assessment by an accredited assessment process;

¹⁷⁸ Section 71.

¹⁷⁹ Section 73.

¹⁸⁰ Section 70.

¹⁸¹ Section 74A.

¹⁸² Section 74(4).

¹⁸³ Section 74(1).

¹⁸⁴ Section 74(2) and (3).

¹⁸⁵ Section 75.

¹⁸⁶ Section 87.

assessment on preliminary documentation; assessment by public environment report; assessment by environmental impact statement; and, assessment by enquiry.¹⁸⁷ The decision of the Minister conveyed to interested parties.¹⁸⁸

The fifth step comprises of the undertaking of the assessment in accordance with the decision of the Minister. This is followed by the submission of the assessment report to the Minister.¹⁸⁹

In the fifth step the Minister considers the assessment report and decides whether to grant or refuse the proposal for the controlled action.¹⁹⁰ Where approved, the content of the approval includes conditions and specification the period for which the approval has effect.¹⁹¹ The EPBA sets out penalties for the contravention of the conditions of the approval.¹⁹²

It is important to note that, notwithstanding the extensive provisions of the EPBA, it does not provide specifically for *ex post facto* EIAs authorization. It is submitted that the EPBA, therefore, does not provide any guidance on how to deal with the issue of *ex post facto* EIA authorization.

Republic of Lithuania

In the Republic of Lithuania EIA legislation is similar to that of Australia and Canada in not providing for *ex post facto* EIAs with a view to granting or refusing authorization. In this country EIAs are governed by a statute titled “Law on Environmental Impact Assessment of the Republic of Lithuania.”¹⁹³ This is clear as states that an environmental impact means “a probable change in environment caused

¹⁸⁷ Section 87(1).

¹⁸⁸ Section 91.

¹⁸⁹ Section 130(2).

¹⁹⁰ Section 133(1).

¹⁹¹ Section 133(2).

¹⁹² Section 142.

¹⁹³ Adopted on 15 August 1996.

by a proposed activity”¹⁹⁴ and that an EIA is “the process of identifying and predicting the potential impact of a proposed activity on the environment.”¹⁹⁵ The Act also states that its aim is “to provide regulations for the evaluation of proposed activity which may cause negative impact on the environment.”¹⁹⁶ This is further confirmed by the provisions which state that the proposed activity cannot be carried out if the EIA decision is negative.¹⁹⁷

Nigeria

In Nigeria EIAs are provided for in terms of the Environmental Impact Assessment Decree.¹⁹⁸ The provisions of the Decree are clear in that they envisage an EIA to be conducted before a project is undertaken. This is clear from its general principles of EIA whose objectives include to establishing before a decision is taken the extent of the likely effects of the activity on the environment.¹⁹⁹ This is also clear from its usage of the terms it uses such as “the proponent of the project”²⁰⁰ and the definition of the term project which is defined as “a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out or a physical activity that a proponent proposes to undertake or otherwise carry out.”²⁰¹

The Decree contains no provisions which suggest that an *ex post facto* authorization may be considered and that an authorization may be granted in that regard.

Northern Ireland

There are a number of specific EIA laws in Northern Ireland. One of these laws comprises the Roads (Environmental Impact Assessment) Regulations (Northern

¹⁹⁴ Article 1.

¹⁹⁵ Article 1.

¹⁹⁶ Article 2.

¹⁹⁷ Article 13.

¹⁹⁸ No. 86 of 1992.

¹⁹⁹ Section 1(a).

²⁰⁰ Section 14(1)(a).

²⁰¹ Section 63(1).

Ireland) 1999 which are made under the European Communities Act²⁰² and deals specifically with EIAs in the context of roads. The Regulations are made in an attempt to comply with relevant European Council Directives.²⁰³ They apply to those activities which fall within the Annexures to the Directives and “in respect of those proposals to construct new roads and to improve roads.”²⁰⁴

The Regulations are designed to apply to activities before they commence. In this regard, the term “relevant project” is defined as “a project for constructing or improving a road where the area of the proposed works” exceeds 1 hectare, or is situated in a sensitive area.²⁰⁵ The Regulations also provide that public participation, as part of an EIA, must take place before a decision is taken to “proceed with the construction or improvement to which the assessment relates.”²⁰⁶

The Regulations therefore do not provide any guidance on how to deal with *ex post facto* EIA authorizations.

England

Among the laws that require EIAs in England are the Town and Country Planning (Environmental Assessment and Permitted Development) Regulations 1995.²⁰⁷ These Regulations are made under the European Communities Act.²⁰⁸ They are designed to apply prospectively as they refer to a “prospective developer” who is defined as “a person ... who intends to undertake development ...”²⁰⁹

The Regulations therefore do not provide any assistance on how to deal with *ex post facto* EIA authorizations. It is, however, important to note that EIAs in England are

²⁰² No. 89 of 1999.

²⁰³ Preamble.

²⁰⁴ Explanatory Note. Although the note is not part of the Regulations, it is clear support the view that they are designed to apply prospectively.

²⁰⁵ Section 67(1).

²⁰⁶ Section 67A(3) and (4).

²⁰⁷ No. 417 of 1995.

²⁰⁸ No. 68 of 1972.

²⁰⁹ Section 2.

linked to planning applications as the following quote (from a document titled, “Using the Planning System to Conserve and Enhance your Local Environment – Planning Applications and Special Cases” captures it:

“Developments likely to have significant effects on the environment are subject to Environmental Impact Assessment (EIA). Environmental Statements must accompany planning applications.”²¹⁰

Curiously, the document states that “Retrospective Planning Applications Developments that have already been started or built without authorization may still be the subject of planning applications. The arrangements for handling these are the same as far as any other application. Refusal would almost inevitably be accompanied by enforcement action to remedy the damage already done or remove any building erected without planning permission.”²¹¹ The document is drafted in the form of an internal memorandum for relevant planning department/s. It therefore appears that, even though the law is silent on *ex post facto* EIA authorizations, a practice has emerged in terms of which such EIAs are undertaken and, in some cases, authorizations are granted. As indicated in Chapter 1, Fuller argued that it amounts to legislating for disaster to have a lack of congruence between the laws as they are written, on the one hand, and the practice of administering those laws, on the other.

Important to note, in ²¹²this regard, is that the position that in respect of a decision to refuse an *ex post facto* authorization to accompany the refusal by an enforcement action is similar to that introduced in South African law by the amendment to NEMA as discussed below.

²¹⁰ <http://www.cprw.org.uk/factsheets/factsheet3.htm>.

²¹¹ <http://www.cprw.org.uk/factsheets/factsheet3.htm>.

²¹² As discussed below, under NEMA, a refusal of an *ex post facto* EIA application is a directive to take specified measures to remedy the harm to the environment.

Scotland

In Scotland there are also a number of statutory provisions which require the undertaking of EIAs. Among these are the Environmental Impact Assessment (Scotland) Amendment Regulations 2002.²¹³ These Regulations require that certain planning applications²¹⁴ be subjected to an EIA before a decision is made approving or refusing those applications.²¹⁵ In this way, the Regulations are similar to those of England discussed above as they do not deal with the issue of *ex post facto* EIAs and provide no guidance for the South African situation.

Kingdom of Lesotho

The Kingdom of Lesotho (“Lesotho”)’s EIA regime is provided for in Part V of the Environment Act 2001. As it is discussed below, this Act, interestingly, provides for a possibility of the undertaking of an *ex post facto* EIA in limited circumstances.

Attached to the Act is a Schedule that specifies projects and activities, which trigger the requirement to undertake an EIA.²¹⁶ In all, there are currently 18 types of projects and activities set out in the Schedule. The Act is clear in its requirement that a “developer ... prior to commencing, carrying out, executing or conducting a project or activity specified in the Schedule” must submit to the Environment Authority a project brief.²¹⁷ In this regard, there is no doubt that the Act envisages that an EIA must precede a specified activity or project since the submission of a project brief is the first step in the EIA process. A project brief must state, among other things, the nature of the project; the activities to be undertaken; and, the environment that may be affected.²¹⁸

The second step in the EIA process is the consideration of the project brief by the Authority. The Authority has a wide discretion on deciding what happens after

²¹³ No. 324 of 2002.

²¹⁴ Those relating to the authorization of minerals development.

²¹⁵ Section 43(16).

²¹⁶ Section 27(1).

²¹⁷ Section 28(1).

considering the project brief. It may require the developer to submit further information,²¹⁹ or approve the project or activity,²²⁰ or require that an EIA be conducted.²²¹ The discretion of the Authority is subject to consultation of the relevant Line Ministry and the formulation of an opinion whether the project is likely to have a significant impact on the environment or not.²²² Also of importance, where the Authority is of the view that there is likely to be significant impact on environment, the Authority is obliged to invite written or oral comments from the public on the project brief and, where necessary, it may consult the community of areas where the proposed project will be situated.²²³

The third step is the undertaking of an EIA, where it is required, which EIA includes assessment of alternative sites,²²⁴ environmental impact of proposed activity or project,²²⁵ mitigation measures.²²⁶ Public participation is also part of the EIA process.²²⁷ The EIA process culminates into an environmental impact statement.²²⁸

The fourth step is the submission of an environmental impact statement to, and its consideration by, the Authority.²²⁹ The Authority has a wide discretion, which includes a decision to approve or reject the project or activity;²³⁰ to subject the project to require further public participation;²³¹ and, to require a redesign of the project, taking into account the suggestion and comments made by the public and all environmental factors.²³²

²¹⁸ Section 28(1).

²¹⁹ Section 28(2).

²²⁰ Section 28(3).

²²¹ Section 28(4).

²²² Section 28(2), (3) and (4).

²²³ Section 28(5).

²²⁴ Section 29(1) read with section 29(5)(d).

²²⁵ Section 29(1) read with section 29(5)(e).

²²⁶ Section 29(1) read with section 29(5)(f).

²²⁷ Section 29(3).

²²⁸ Section 29(1).

²²⁹ Section 30.

²³⁰ Section 30(e) and (g).

²³¹ Section 30(a) and (b).

²³² Section 30(g).

The fifth step is the Authority's granting or refusal of an EIA licence.²³³ This step, obviously, stems from the fourth step. The Act states clearly that "no one shall operate, execute or carry out a project or activity specified in the Schedule without" an EIA licence²³⁴ and, if a person does not adhere to this prohibition, he or she or it commits an offence which triggers, on conviction, a fine not less than M5,000 but not exceeding M100,000 or to imprisonment for a term not less than two years and not exceeding 10 years or to both fine and imprisonment.²³⁵ These provisions of the Act clearly indicate that the Act intends to prohibit the undertaking of specified activities without an EIA.

Furthermore, the Act prohibits other licensing authorities, acting in terms of any other law, from issuing a licence or permit with respect to a project or activity for which an EIA may be required unless the application for such a licence is accompanied by an EIA licence issued under the Act or there is a Certificate by the Authority stating that is not required under the Act.²³⁶ In this way, the Act ensures that the EIA authorisation precedes other licences that may be issued in respect of an activity or project.

It is also important to note that, in addition to the provisions discussed above, the Act specifically envisages the undertaking of an EIA after an EIA licence has been issued. In this regard, the Authority has discretion to direct the holder of a licence to submit fresh environmental statement one of the two conditions is present: either there is a substantial change or modification in the project or in the manner in which the project is being operated;²³⁷ or, the project poses environmental threat, which could not have been reasonably foreseen at the time of the first study.²³⁸ These provisions are strengthened by the fact that a failure to comply with a directive issued by the Authority is an offence which, upon conviction, triggers liability to a fine not less

²³³ Section 33(2).

²³⁴ Section 33(1).

²³⁵ Section 33(5).

²³⁶ Section 33(4).

²³⁷ Section 34(1)(a).

²³⁸ Section 34(1)(b).

than M5,000 but not exceeding M10,000 or to imprisonment for a term not less than two years but not exceeding ten years or to both a fine and imprisonment;²³⁹ and the cancellation of an EIA licence.

The scope of an *ex post facto* EIA is accordingly provided for in the Act. Firstly, the scope is limited to situations where there was an EIA licence. Hence, it is limited to situations where an EIA was conducted before a specified project or activity was commenced with. Secondly, the project or activity must have been commenced with and either of the two conditions discussed above is present. Thirdly, and by implication, situations where a specified activity or project has been commenced without the requisite EIA licence fall outside the ambit of the *ex post facto* EIA process envisaged by the Act. Fourthly, an *ex post facto* EIA provided for is a reactive mechanism. It can only be done at the behest of the Authority. In other words, a directive by the Authority is a jurisdictional fact that must be present before an *ex post facto* EIA may be undertaken in compliance with the provisions of the Act.

Four points are worth noting in respect of the *ex post facto* EIA process envisaged by the Act. One, the Act does not set out a separate EIA procedure for *ex post facto* EIAs. This means that they must follow the ordinary EIA process which is set out in the Act and is discussed above. The ordinary EIA procedure is not designed to be followed where the activity has been commenced with. This, potentially, is problematic. The Act also states that an *ex post facto* EIA is a fresh EIA. A question arises whether a supplementary EIA is not more appropriate compared to a fresh EIA.

Two, that an *ex post facto* EIA is undertaken with respect to an activity or project does not mean that an *ex post facto* EIA authorisation would be granted. Instead, the Authority exercises its discretion as if an *ex post facto* EIA were a new EIA although, it is submitted, it does take into account that the activity or project had been commenced with under an EIA authorisation. The tension that arises here is: how can the Authority achieve this without treating a fresh EIA as a supplementary EIA. It is

²³⁹ Section 34(2)(i).

submitted that to disregard the old EIA process in its entirety, when considering a fresh EIA, is untenable. In fact, disregarding some of the aspects of the old EIA may amount to a failure to consider relevant considerations and, that, may result in administrative decisions taken by the Authority being judicially reviewed and set aside by the courts.

Three, with respect to all other situations where an activity or project has been commenced with or without an EIA the Act relies on its criminal sanctions and other control mechanisms.

Four, the discretionary powers are also provided to the Authority to direct an EIA where there is an EIA licence but it turns out that the activity results in significant environmental effects which were not contemplated when an EIA was undertaken.

In summary, therefore, the limited *ex post facto* EIA process envisaged by the Act deals with situations where a person had obtained an EIA licence but the two conditions that are discussed above are met. It is not, therefore, relevant to the situation where an activity or project is commenced without a requisite licence. It is submitted that there is doubt whether it makes sense to distinguish between situations where there was an EIA licence but its conditions were not complied with and where there was no EIA licence at all. At least, in certain circumstances, such a distinction may lead to absurdity. An example, in this regard, is a situation where there has been a significant breach of the conditions of an EIA licence to an extent that it may be said that there was no compliance, at all, with an EIA licence. In such a situation, it is submitted, there is no substantive distinction between an activity undertaken without an EIA to the one undertaken in significant breach of the EIA licence. In principle, in that situation, there is no distinction between the two activities. It is absurd for the law to treat such activities differently.

India

In India EIAs are provided for in terms of the Environmental Clearance Notification, 1993 (the “Notification”). The Notification was issued by the relevant Minister under powers conferred by section 3(2)(v) read with section 29(3) of the Environment (Protection) Act.²⁴⁰ To the Notification, Schedules I and II are attached which contain, respectively, lists of activities which require an environmental clearance before they are undertaken.²⁴¹ The Notification requires that an application for an environmental clearance must include an EIA report and an Environmental Management Plan in accordance with the guidelines issued by the Central Government in the Ministry of Environment and Forestry.²⁴²

The Notification clearly does not envisage the undertaking of an *ex post facto* EIA. It states that an EIA must be undertaken by “a person who desires” to undertake a Scheduled activity.²⁴³ It also states that “No work preliminary or otherwise relating to the setting up of the project may be undertaken till the environmental authorization is obtained.”²⁴⁴ There is therefore no doubt that the Indian Environment (Protection) Act does not provide for *ex post facto* EIA authorization. The Act envisages that action may be taken to prosecute those who commence activities without the required authorization.

The manner in which India has dealt with the issue of *ex post facto* EIA is to provide for it on an ad hoc basis. On 5 November 1998, the Ministry of Environment and Forestry issued a circular giving defaulters who had commenced activities without the requisite environmental clearance an opportunity to undertake EIAs and apply for environmental clearance by 31 March 1999.²⁴⁵ In that circular, no mention of action to be taken against defaulters and some commentators described this as

²⁴⁰ 29 of 1986.

²⁴¹ Section 4(I)(a).

²⁴² Section 4(I)(a).

²⁴³ Section 4(I)(a).

²⁴⁴ Section 4(III)(c).

²⁴⁵ Circular No. J-21011/11/98-ALL, dated 5 November 1998.

“shocking.”²⁴⁶ The Ministry has been extending these opportunities to defaulters ever since.²⁴⁷

There are two points to note in the manner in which India provides for *ex post facto* EIAs. Firstly, the providing of ad hoc *ex post facto* EIAs is based on the fact that the EIA regime does not provide for them. Secondly, there seems to be very weak environmental laws in India, EIA regime included. Rohit Prajapati captures the essence of this when stating that “environmental laws appear to be mere paperwork and a formality” and that the functioning of industries without environmental licences is so common to an extent that “only 5 per cent of Industrial units obtained consent.”²⁴⁸ A lesson that can be drawn from the Indian experience, therefore, is how to deal with a very weak EIA regime where 95 per cent of Industrial units are operating without EIA authorisation. In such a country there is no threat of prosecution which spurs the defaulters into compliance.

Kingdom of Cambodia

In the Kingdom of Cambodia (“Cambodia”) EIAs are required by the Sub-Decree on Environmental Impact Assessment Process²⁴⁹ which applies to “every proposed and ongoing project(s)” described in the annexure to the Sub-Decree.²⁵⁰ In this regard, the Sub-Decree clearly envisages both a prospective EIA on proposed projects and an *ex post facto* EIA on ongoing projects.

Important to note here is that an *ex post facto* EIA envisaged in the Sub-Decree is in respect of an activity that was commenced with without an EIA because it was not a requirement at the time but the Sub-Decree subsequently require that an EIA be undertaken on it. Two sets of procedures, respectively, for reviewing prospective

²⁴⁶ http://www.combatlaw.org/print.php?article_id=148&issue_id=6.

²⁴⁷ http://www.combatlaw.org/print.php?article_id=148&issue_id=6.

²⁴⁸ http://www.combatlaw.org/print.php?article_id=148&issue_id=6.

²⁴⁹ No. 72 ANRK.BK dated 11 August 1999.

²⁵⁰ Article 2.

EIAs²⁵¹ and retrospective EIAs.²⁵² With respect to the latter, on the requirements is that an EIA must be conducted and EIA reports compiled and submitted to the relevant authorities for review and approval at least within a year of the promulgation of the Sub-Decree.²⁵³

The type of *ex post facto* EIA similar to the one provided for in Cambodia has been introduced in the NEMA EIA regime as discussed below.

Conclusion

As is clear from above, most foreign law discussed above does not provide any guidance on how to deal with the issue of *ex post facto* EIA. It seems that in these jurisdictions the issue is left to the practical application of the relevant legal provisions which impose the requirement to undertake an EIA. As is shown in the case of Canada the Supreme Court ordered the undertaking of an EIA after the project was 40 per cent completed. In that way the court implicitly endorsed a view that an *ex post facto* may be granted in certain circumstances. The court in this regard, however, did not develop any principles which principles can be interpreted and applied in the South African context. It also seems that in some countries, notably, England the issue is left to practice which apparently provides for *ex post facto* EIAs.

It is only in the case of Lesotho and India that there are statutory provisions providing for *ex post facto* EIA authorisations. As is discussed above, these also have their problems.

What is clear from foreign law is whether there is a provision for *ex post facto* EIA authorisations or not, either way potentially creates problems. Below I discuss the provisions of South African law that provides for *ex post facto* EIA authorisations.

²⁵¹ Articles 14 to 20.

²⁵² Articles 21 to 26.

²⁵³ Article 21.

Where appropriate, I indicate similarities and differences with *ex post facto* EIA provisions of India and Lesotho.

CHAPTER 6: EX POST FACTO AUTHORISATION IN TERMS OF THE AMENDMENT ACT

The NEMA provides for its own EIA framework which framework, in due course, will replace the current EIA framework. From 29 January 1999 to 6 January 2005, the NEMA EIA framework existed side by side with the current EIA framework as Judge Dennis Davis in the *Silvermine Valley* judgment captured the essence of this situation when he stated that, “Because ss 21 and 22 of the ECA remain in force, where a person seeks authorisation to carry out an activity identified under s 21 of the ECA, the ECA Regulations continue to apply, subject to compliance with s 24(7) of NEMA.”²⁵⁴

During this period, the trigger for the application of the NEMA EIA regime was a two-stage test, which required (1) that the activity must require authorisation or permission by law and (2) that it might significantly affect the environment.²⁵⁵ Where the test is satisfied, an EIA had to be conducted which complied with requirements set out in section 24(7).²⁵⁶ This caused a lot of confusion since the second stage of the test was flexible and, whether it was met or not, depended on the circumstances of each case. Furthermore, it seemed that the test was met in almost all proposed activities which trigger the application of the ECA EIA regime and, in that situation, two EIA regimes had to be undertaken in respect of one activity.

On 7 July 2005, the National Environmental Management Second Amendment Act²⁵⁷ (the “Amendment Act”) removed the two-stage test and, in that way, changed the

²⁵⁴ Page 487.

²⁵⁵ Section 24(1) before amendment.

²⁵⁶ Section 24(1) and (3) read with section 24(7) before the amendment of section 24.

²⁵⁷ 8 of 2004.

requirements that trigger the application of NEMA EIA regime.²⁵⁸ The Amendment Act gives powers to the Minister and every Member of the Executive Council (“MEC”) responsible for environmental affairs in the province to identify activities which trigger the requirement to undertake the NEMA EIA regime.²⁵⁹ The MEC, in exercising these powers, must act in concurrence with the Minister.²⁶⁰ The Minister or the MEC may identify:

- (a) activities which may not commence without authorisation from the competent authority;²⁶¹
- (b) geographical areas based on environmental attributes in which specified activities may not commence without environmental authorisation from the competent authority;²⁶²
- (c) geographical areas based on environmental attributes in which specified activities may be excluded from authorisation by the competent authority;²⁶³
- (d) individual or generic existing activities which may have a detrimental effect on the environment and in respect of which an application for an environmental authorisation must be made to the competent authority.²⁶⁴

A few points are worth noting here. There is nothing new in South African law in respect of the powers that the Minister or the MEC may exercise in terms of (a). These powers are similar to those that exercised in terms of the ECA in identifying activities that trigger the requirement to undertake an EIA. A proviso, in this regard, is that an MEC is empowered to identify activities which is not the case in the current EIA framework. The powers that are set out in (b), (c) and (d) are new. In respect of (b) and (c), the MEC has to identify geographical areas and specify activities in those areas which activities require or do not require authorisation. The identification of geographical areas will be based on environmental attributes. Also important to note is that the powers to identify “excluded activities”, which is

²⁵⁸ Proclamation R1 in Government Gazette 27161 of 6 January 2005.

²⁵⁹ Section 24(2).

²⁶⁰ Section 24(2).

²⁶¹ Section 24(2)(a).

²⁶² Section 24(2)(b).

²⁶³ section 24(2)(c).

provided for in (c) above are new in South African law. Also new are the powers to identify “existing activities” as provided for in (d). The powers set out in (d) are a clear indication that NEMA envisages that an EIA may be undertaken in respect an activity that has commenced. As discussed above, this amounts to an *ex post facto* EIA which is similar to the one provided for in Cambodia. It must be distinguished between the granting of an EIA authorisation under the powers set out in (d) and the issue of *ex post facto* EIA authorization which is the principal subject of this dissertation. Under the powers set out in (d) an authorisation would be required and, where appropriate, granted in respect of an activity which commenced lawfully at a time when there was no legal requirement to undertake an EIA, and the requirement comes into effect later, so that an EIA and, subsequently, an authorisation is required before the activity may be continued with.

Together the powers set out above complicate the NEMA EIA regime from the outset, at the stage of determining whether the requirement to undertake an EIA is triggered or not. The powers set out in (b), (c) and (d), therefore, indicate a shift, in South African environmental law dealing with EIAs, from simplicity to complexity. Glazewski states that the new EIA regime represents “a far-reaching and not altogether satisfactory departure ... of the EIA practice in South Africa ... which has evolved over the last decade or more.”²⁶⁵

The NEMA EIA regime sets out the minimum requirements, which requirements must be ensured in an EIA which is undertaken in terms of NEMA.²⁶⁶ The NEMA EIA regime will be perfected by the promulgation of relevant regulations, which regulations will be promulgated under section 24 as amended. It is only upon the promulgation of these regulations that effect of the NEMA EIA regime will be felt.

²⁶⁴ Section 24(2)(d).

²⁶⁵ Jan Glazewski, *Environmental Law in South Africa*, Second Edition, Lexis Nexis, Butterworths (2005), page 244.

²⁶⁶ section 24(4).

It is an offence to commence an activity identified under (a) or (b) above without an environmental authorisation and to continue an existing activity identified under (d) without an environmental authorisation.²⁶⁷ It is also an offence to contravene a condition of an environmental authorisation.²⁶⁸ I refer to these offences as “a section 24F offence.” A defence that may be raised, by an accused, in respect of a section 24F offence is that the activity was commenced or continued in response to an emergency in order to protect human life, property or the environment.²⁶⁹ Where a person is convicted of a section 24F offence a court may impose a fine not exceeding R5 million or a term of imprisonment not exceeding ten years, or both such fine and such imprisonment.²⁷⁰

It is important to note that the sentence that may be imposed on a person who is convicted of committing a section 24F offence is huge and is an improvement from equivalent provisions of the ECA which provisions are discussed above. What is disturbing, however, is that these provisions, unlike equivalent provisions of the ECA, are not linked to the application of the provisions of section 34 of NEMA which are discussed above. As discussed above, the provisions of section 34 are important as they provide for, among other things, the imputing of a company’s liability on its directors and other employees when a person is convicted of an offence. They also provide for the forfeiture of any benefit that was obtained as a result of the commission of an offence. Nevertheless, the penalty set out in the Amendment Act has a reasonable chance to act as a deterrent.

The above provisions clearly indicate that the Amendment Act obliges the undertaking of an EIA before undertaking a listed activity. This is obviously excluding those activities listed under (d) as they would be existing activities. It is submitted that the powers to list activities under (d) may be challenged on the basis

²⁶⁷ Section 24F(1) read with (2).

²⁶⁸ Section 24F(2).

²⁶⁹ Section 24F(3).

²⁷⁰ Section 24F(4).

that they would effectively deprive persons of the benefits of activities commenced with lawfully.

Crucially, the Amendment Act also, for the first time in South African law, expressly provides for an *ex post facto* EIA authorisation. This is applicable to a person who has committed a section 24F offence.²⁷¹ The Amendment Act sets out a process that must be followed by such a person with a view that, in appropriate circumstances, an *ex post facto* EIA authorisation might granted by the competent authority.

The first step in this process is that a person who has committed a section 24F offence applies to the Minister or the MEC, depending on which between these authorities has authority to grant an environmental authorisation that was required before the commencement or continuing with the identified activity.²⁷² A person who committed a section 24F offence is not obliged to lodge this application. It is open to such person to take advantage of the *ex post facto* EIA regime. Also important to note is that, by virtue of lodging an application in terms of these provisions, a person admits to having committed a section 24F offence. This is a prerequisite for taking advantage of these provisions. It is also important to note that, in this regard, the provisions of the Amendment Act are not as limited as the Lesotho's Environment Act. As discussed above, in terms of the Lesotho's Environment Act, *ex post facto* EIAs are limited to where an environmental authorization was granted, in the first place. The Amendment Act avoids the absurdity that results from the application of the Lesotho's Environment Act which absurdity is also discussed above.

The second step comprises the Minister or the MEC considering the application and the appropriate order to be issued against the applicant.²⁷³ In this regard, the Minister or the MEC may direct the applicant:

(a) to compile a report containing –

²⁷¹ Section 24G.

²⁷² Section 24G(1).

²⁷³ Section 24G(1).

- (i) an assessment of the nature, extent, duration and significance of the impacts of the activity on the environment, including the cumulative impacts;
 - (ii) a description of mitigation measures undertaken or to be undertaken in respect of the impacts of the activity on the environment;
 - (iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;
 - (iv) an environmental management plan; and
- (b) to provide such other information or undertake such further studies as the Minister or the MEC may deem necessary.²⁷⁴

The Minister and the MEC are, accordingly, given discretionary powers to order an *ex post facto* EIA. As is clear from the powers set out above, what is envisaged is a full EIA which takes into account, among other things, cumulative effects and comments from a public participation process. Absent from such an EIA process is the consideration of alternatives since, in most circumstances, it would be an anomaly to consider alternatives of an activity that has already been commenced with or continued with in contravention of a requirement to undertake an EIA. The report of this EIA must be submitted to the Minister or the MEC.

The third step comprises the Minister or the MEC considering and determining the appropriate administration fine, which must not exceed R1 million, to be imposed on the applicant.²⁷⁵ The applicant must pay the fine before the Minister or the MEC may consider the report.²⁷⁶ This is problematic because a fine precedes the consideration of reports. This poses a question: what is the basis for determining a fine? It would make more sense, in my view, to consider the *ex post fact* EIA before determining a fine to be imposed on the applicant.

²⁷⁴ Section 24G(1)(a) and (b).

²⁷⁵ Section 24G(2).

In the fourth step, the Minister or the MEC, after receipt of the fine from the applicant, considers the report and may:

- (a) direct the applicant to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or the MEC may deem necessary; or
- (b) issue an *ex post facto* environmental authorisation to the applicant subject to conditions that the Minister or the MEC deem fit.²⁷⁷

Where a person, including the applicant, is dissatisfied by the decision of the Minister or the MEC, such a person may lodge a review of that decision with a relevant Division of the High Court. This is because the decision of the Minister or the MEC is an administrative decision under the provisions of the Promotion of the Administrative Justice Act.²⁷⁸ Also important to note is that a failure to comply with a directive issued by the Minister or the MEC or to contravene an *ex post facto* EIA authorisation is an offence with the same penalties as those imposed for committing a section 24F offence. These penalties are discussed above. This provides an interesting scenario. In respect of the same activity it would be possible to commit two offences. This is because a person may undertake a listed activity without an EIA authorization and, in that way commits a section 24F offence. Where such a person lodges an application in terms of section 24G, he or she or it may commit a section 24G offence if he or she or it fails to comply with a directive issued in terms of section 24G or contravenes the provisions of an *ex post facto* EIA authorization where granted. In due course courts would have to consider whether prosecuting a person for the same activity, in respect of the two sets of offences, is consistent with the rule of law.

The Amendment Act, therefore, expressly introduces the possibility of undertaking an *ex post facto* EIA and, logically, the granting of an *ex post facto* EIA authorisation.

²⁷⁶ Section 24G(2).

²⁷⁷ Section 24G(2)(a) and (b).

As noted above, the issue of *ex post facto* EIA authorisation is dealt with in different ways in different jurisdictions. The Amendment Act, in this regard, therefore, ushers a new dispensation of an EIA framework in South African law. It is submitted that one of the reasons for the Amendment Act to usher this new dispensation is that the current situation which does not explicitly provides for an *ex post facto* EIA authorisation is unsatisfactory since there are no clear principles which govern the issue. The courts have not developed these principles and this left the issue on the legislature.

The main question which arises is whether the new dispensation would be abused or not. The possibility for abuse may arise since unscrupulous developers may take a view that, instead of conducting an EIA in respect of a listed activity, they undertake the activity with a view that if they have a reason to believe that the relevant authorities are considering the taking of enforcement measures against them they (developers) would lodge an application for an *ex post facto* authorization as a pre-emptive strike. Only time will tell on how would the relevant authorities deal with such situations.

What is clear at this stage is that the provisions of the Amendment Act create a contradiction in the EIA regime. The law provides that an EIA must be undertaken before an activity may be undertaken and, in the same breath, provides that an EIA may be undertaken after the activity is undertaken. This contradiction is, however, counter-balanced by the fact that it is based on a realistic assessment of the South African situation in that there would be people who will undertake listed activities without the requisite authorization. The provisions of section 24G are also based on the reality that responsible organ/s of state cannot prosecute all those who will undertake listed activities without an EIA and, accordingly, it makes sense to provide for some of those persons to approach the authorities in order to bring those activities within the control of the responsible authorities.

²⁷⁸ 3 of 2000.

The most obvious positive aspect of the provisions of section 24G is that the competent authority has an opportunity to consider the activity in light of the *ex post facto* EIA reports. As Ahmad and Wood put it, “ the most important decision made during the EIA process is whether to approve the project or to reject it.”²⁷⁹ If the competent authority approves such a project it may impose conditions with a view to protect the environment through the adoption of mitigation measures.

Also of importance is to note that the granting of an *ex post facto* EIA authorisation does not exempt the holder from prosecution for the initial commission of a section 24F offence. This is because the Minister or the MEC does not have powers to exempt a person from being prosecuted for the committed offence. Such powers, to pardon or reprieve an offender, are granted only to the President by the provisions of the Constitution.²⁸⁰ Perhaps this is what saves the *ex post facto* EIA provisions from contravening the environmental right as enshrined in the Constitution. The undertaking of an *ex post facto* EIA and, where appropriate, the granting of an *ex post facto* EIA authorization do not take away that that a constitutional right has been infringed through the undertaking of an activity without an EIA. Nor are the remedies that are available to those who were affected by the activity when it was undertaken without an authorization.

The essence of an *ex post facto* EIA authorisation, therefore, is to permit the activity from the day the authorisation is given. It will be up to the Director of Public Prosecutions to decide whether or not to prosecute the offender.²⁸¹ In fact, the Director is obliged to prosecute such persons since they have infringed a constitutional right to an environment that is not harmful to people’s health or well-being. Upon conviction of an offender, for that offence, a court would consider the penalties that are set out in the Amendment Act which penalties are discussed above. This is interesting in that the offender, by taking advantage of the *ex post facto* EIA

²⁷⁹ Baslam Ahmad and Christopher Wood, A comparative evaluation of the EIA systems in Egypt, Turkey and Tunisia, Environmental Impact Assessment Review, Volume 22, Issue 3, May 2002, Pages 213-234, page 223.

²⁸⁰ Section 84(2)(j) of the 1996 Constitution.

provisions, opens himself or herself or itself to being prosecuted for historic contraventions of the EIA law.

Finally, the new dispensation has not yet come into effect since the Minister and the respective MECs are still to promulgate regulations which will perfect the NEMA EIA regime.

Application of section 24G to the current EIA framework

The provisions of section 24G read with the provisions of section 7 made the section 24G applicable to the current EIA framework. Section 7 of the Amendment Act provides that:

“For a period of six months after the date on which this Act comes into operation, the provisions of section 24G of the principal Act apply, with the necessary changes, in respect of any listed activity commenced or continued in contravention of a provision of the Environment Conservation Act, 1989 (Act No. 73 of 1989).”

This Act came into operation on 7 January 2005 and, accordingly, this provision was applicable from 8 January 2005 until 8 July 2005. Because this period was provided for in the Act, the Minister or an MEC had no authority to extend it. This is problematic since some people who wanted to take advantage of the opportunity provided for by these provisions may have missed the opportunity for some justifiable reasons. Sadly, there is no remedy for such a situation other than to effect an amendment of the Act. If the Minister or the MEC were to consider such applications and then make decisions, purportedly acting in terms of the provisions of section 7 read with the provisions of section 24G, such decisions would be *ultra vires* and susceptible to a legal challenge on their validity.

The phrase “with the necessary changes” in section 7 enjoins one to read the provisions of section 24G in a manner that makes the latter provisions work for a

²⁸¹ Section 20(3) of the National Prosecuting Authority Act 32 of 1998.

person who has undertaken an activity without an EIA authorisation and in contravention of the provisions of the ECA. This means that an applicant who sought to take advantage of the provisions of section 24G must be a person who committed an offence in terms of section 29(4) of the ECA as opposed to have committed a section 24F offence. It also means that the applicant must be a person who has/had committed such an offence before 6 July 2005. Also of importance to note is that the phrase “continued” in section 7 is irrelevant for the purposes of interpreting section 24G for these purposes since the ECA only prohibits the undertaking of or commencement with the identified activity.

Furthermore, in light what is discussed above regarding the powers to exempt offenders from prosecution being vested in the President and to no one else, the taking advantage of these provisions does not exempt a person from being prosecuted for having committed an offence in terms of section 29(4) of the ECA. This undermined what was otherwise an excellent opportunity to rectify historic contraventions of the ECA provisions in order to facilitate a smooth transition from current EIA regime to the NEMA EIA framework.

Crucially, a person who failed to take advantage of the provisions of the Amendment Act, having committed an offence in terms of section 29(4) of the ECA, may not be prosecuted for that offence under the provisions of NEMA as amended by the Amendment Act. Such a person has not committed an offence under NEMA. This situation must be distinguished from a situation where a person who committed an offence in terms of section 29(4) lodged an application to rectify his activity in terms of the provisions of the Amendment Act. Such a person may be prosecuted in terms of the NEMA if he fails to comply with a directive issued under section 24G(2)(a) of the NEMA or if he contravenes an *ex post facto* EIA authorization issued in terms of section 24G(2)(b). Consequently, it is only such a person who may, on conviction, be liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.²⁸²

²⁸² In terms of section 24F(4).

The point made above was completely missed by DEAT and the relevant provincial department of environmental affairs. For instance, a guideline document titled, “Gauteng Department of Agriculture, Conservation and Environment: Section 24G, Guideline No. 1” told would be applicants “Should a person or company who has commenced or continuing with an activity listed in the EIA Regulations not apply within the 6 month period he/she will be guilty of an offence in terms of Section 24F of the Act and may be subject to a fine of R5 000 000 and/or 10 year imprisonment.”²⁸³ In light of what is discussed above, this is clearly not true.

Furthermore, these transitional provisions are not free from doubt. Interestingly, there are two ways of constructing the provisions of section 7 read with the provisions of section 24G. The first way is to say that they fail to provide for a system of retrospective authorization since the provisions of section 24G are not yet applicable as their application would be triggered by the promulgation of EIA regulations under section 24 of the NEMA. In terms of this reasoning, the provisions of section 7 read with the provisions of section 24G are meaningless since the EIA regulations were not promulgated between 8 January 2005 and 8 July 2005. It is submitted that this way of construction is wrong on the basis that it is too technical and neglects the purpose of the provisions. The second way, which I submit is correct, is to say that the effect of the provisions of section 7 read with the provisions of section 24G is to bring into operation the provisions of section 24G for the purposes of dealing with historic contraventions of the relevant provisions of the ECA. This is effectively dealt with by the phrase in section 7 which requires provisions of section 24G to be applied with the “necessary changes.”

Perhaps the most serious challenge to provisions of section 7 read with the provisions of section 24G is the argument which says that the effect of these provisions is that section 24G amounts to *ex post facto* law or retrospective law. This argument states that section 24G is made to affect facts that existed prior to the enactment of the

²⁸³ Unnumbered pages 2 to 3 of the guideline document.

Amendment Act. The contravention of the provisions of the ECA to which the Amendment Act provides a possibility to rectify took place before the Amendment Act became law. This, so goes the argument, contravenes the rule of law which is one of the founding values of the Constitution.²⁸⁴ If this argument prevails it means that the provisions of section 24G may only be utilized to rectify activities that contravened the provisions of the ECA from 8 January 2005 to 8 July 2005. Such a scenario would seriously undermine the effect of the provisions of section 7 read with the provisions of section 24G.

There seems to be no answer to the above challenge except to distinguish the provisions of the Amendment Act from what is prohibited by the rule of law. The prohibition against *ex post facto* laws is generally aimed at protecting individuals from being prosecuted for conduct which was not a crime when it was undertaken or from being subjected to a greater punishment than that provided by the law at the time of the commission of the offence.²⁸⁵ The aim of the Amendment Act is not to prosecute individuals for conduct which was not a crime when it was undertaken or to convict those individuals to a greater punishment than that provided for at the time of commission of the offence, but to provide for a smooth transition from one EIA regime to another. In fact, the basis for applying under the provisions of section 7 read with the provisions of section 24G is that a person has committed an offence under the provisions of the ECA.

The provisions of section 7 read with the provisions of section 24G provided an ad hoc *ex post facto* EIA authorization in respect of the current EIA regime. As discussed above, India provides for *ex post facto* EIAs in the same way. It is important to note that India provides for *ex post facto* EIAs in this way, among others, on the basis that its EIA regime does not provide for *ex post facto* EIAs. It is submitted that in the (South African) current EIA regime the Amendment Act provided for an ad hoc *ex post facto* EIAs in an attempt to ensure a smooth transition

²⁸⁴ Section 1.

²⁸⁵ http://en.wikipedia.org/wiki/Ex_post_facto accessed on 23 August 2005.

from the current EIA regime to the NEMA EIA regime and not with a view to confirm that *ex post facto* EIAs are not provided for in the current EIA regime. In other words, the question is still open whether the current EIA regime provides for an *ex post facto* EIA. Now that 8 July 2005 has passed the position of the law in respect of *ex post facto* EIAs in the current EIA regime has returned to the state of uncertainty as it was on 7 January 2005.

The attempts by the Amendment Act to ensure a smooth transition of the EIA system by providing for an ad hoc *ex post facto* EIA for activities undertaken without an ECA EIA authorization has failed dismally since the NEMA EIA regime is still not in operation. In my view, it seems that the Legislature contemplated that the NEMA EIA regime was going to be perfected before 8 July 2005, which date was the closing of the window of opportunity to rectify activities undertaken in contravention of the ECA EIA regime. The Legislature is now faced with a difficult choice of either following the Indian example where such windows of opportunity are extended perpetually or to simply allow the relevant organs of state to prosecute those who did not take advantage of the opportunity.

CHAPTER 7: CONCLUSION

In this dissertation I discuss the issue of *ex post facto* EIA authorization in South African law from the inception of the formal EIA regime to present. With respect to the current EIA regime, except between 8 January 2005 and 8 July 2005, the law does not expressly provide for the undertaking of EIAs once an activity has been undertaken. Court decisions on the current EIA regime have suggested that the general rule is that an EIA precedes the undertaking of an activity which requires an EIA before it is undertaken. These decisions suggest that it is an exception to this general rule that, in certain circumstances, it would be lawful to undertake an EIA after the activity has been commenced or completed. These decisions do not set out the principles that determine what falls within the exception and what falls outside.

The new EIA regime which will be activated by the promulgation of relevant regulations under the NEMA explicitly provides for *ex post facto* EIAs. This was effected by the coming into effect of the Amendment Act. This Act also affected the current EIA regime. The provisions of the Amendment Act provided for *ex post facto* EIAs between 8 January 2005 to 8 July 2005 on the current EIA regime. The aim was to ensure a smooth transition from the current EIA regime to the NEMA EIA regime. This has not been achieved since the NEMA EIA regime has not come into effect.

The position of the current EIA regime is the same as that of eight foreign jurisdictions discussed above where EIA laws are silent on whether an *ex post facto* EIA is provided for or not. It is argued in these jurisdictions EIA laws are clearly designed to ensure that an EIA takes place before an activity is undertaken. In some of these countries, it appears that, *ex post facto* EIA authorisations are granted. This results in a lack of congruence between the laws as promulgated and the practice. In this regard, the practice in England when refusing such an authorisation is similar to a refusal under the Amendment Act in South Africa as it is an order forcing the applicant to restore the environment.

This dissertation also discusses EIA laws of two countries which provide for *ex post facto* EIAs. The first is Lesotho where an *ex post facto* is provided in limited circumstances. These are circumstances where there is an environmental authorization which was granted by the Authority but was either not complied with or the environmental harm that results was not contemplated when the authorization was granted. In such circumstances the Authority may direct the undertaking of a fresh EIA. An absurdity arises from this law as it distinguishes from a situation where there was an EIA and that where there was no EIA for the purposes of undertaking an *ex post facto* EIA. Such a distinction serves no purpose where a person completely disregarded the provisions of the environmental authorization to the effect that its existence had no effect. Fortunately this absurdity was not transplanted into South African law.

The second country which provides for *ex post facto* EIAs which is discussed in this dissertation is India. This country provides for ad hoc *ex post facto* EIAs as it provides for windows of opportunity to those who have undertaken Scheduled activities without an environmental clearance to undertake *ex post facto* EIA and lodge applications for environmental clearance before a stipulated date. The stipulated dates have been perpetually extended to allow more defaulters to conduct *ex post facto* EIAs with a view to obtaining an environmental licence. The provisions of the Amendment Act (section 7 read with section 24G) have the effect of a similar (ad hoc) *ex post facto* EIA regime in South Africa. In South Africa, the window of opportunity has not been extended to allow more defaulters to take advantage of the ad hoc *ex post facto* EIA regime.

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