A REVIEW OF THE DEVELOPMENT OF ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION IN SELECTED AFRICAN COUNTRIES

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Research dissertation presented for the approval of Senate in partial fulfilment of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

September 1994

Only my wife Betty will probably understand and appreciate the determination and effort that went into this project. To her and our children, Anita and Glory, this modest work is dedicated.

ACKNOWLEDGEMENTS

I wish to thank my supervisor, Mr Jan Glazewski of the Environmental Law Unit, for his assistance, patience and encouragement. I am also indebted to a number of officials in various ministries and departments of environmental protection in a number of African countries and international organizations who supplied me with information, books and pamphlets. Finally, my thanks go to Mrs Sue Wright for her assistance in typing this work.

PREFACE

Legislation by its nature is a dynamic process. In order to keep abreast with changing circumstances and demands, new legislation often has to be introduced and old legislation amended. Recent global developments have led to widespread environmental awareness and the need for better methods of environmental protection. As a result there have been remarkable developments in the field of environmental law during the last two or three decades. Environmental Impact Assessment legislation is one area in which changes have been quite profound. This study takes into account such changes and it is for this reason that I have to point out that the information contained in this study is valid as at the end of August 1994.

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September 1994

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CHAPTER 1

INTRODUCTION

1.1 Historical background

Fuggle and Rabie point out that the 1960's heralded a growing awareness of the adverse and often complex environmental impacts of development, and of the need to understand and deal with these impacts if serious problems were to be avoided.[1] Indeed, the last decade has seen the growing realization that developing countries in particular will not extracate themselves out of the vicious cycle of poverty which they find themselves in unless environmental concerns are addressed. One method of doing so is the formal adoption of the environmental impact assessment procedure (hereinafter referred to as EIA).

By the end of the 1960's the basic principles of impact assessment had been formulated in developed countries such as the USA where the National Environmental Policy Act of 1969 introduced environmental evaluations into the realm of public policy. Many countries followed this lead and environmental evaluation procedures became widely institutionalized, predominantly in western industrialized countries.[2]

In recent years, particularly in developed countries, the EIA procedure has become an accepted tool and has been widely employed to determine the impact of various activities on the environment with the view to avoid or mitigate adverse impacts.

In general environmental protection and management has been neglected in African countries, in spite of the importance of the issue. Many of these countries already face serious

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1 RF Fuggle and MA Rabie (Eds) Environmental Management in South Africa, Juta and Co 1992 Cape Town, 748.

2 Fuggle and Rabie (n1) 748.

environmental problems resulting both from the legacy of the colonial past (over-exploitation of natural resources, monoculture, etc) and the consequence of modernization (rapid urbanization, industrialization and ill-conceived development projects). As pointed out by Fuggle and Rabie, EIA directs considerable attention to long term or intergenerational ecological criteria, aesthetic considerations and scientific/ educational interests.[3] In most African countries,

> '...scientific, education and aesthetic requirements are regarded by many to be a luxury, while concern for the future is seldom as pressing as present needs for food, shelter and security. As a result, environmental concerns do not carry a strong electoral basis in many of these countries, leading to a lack of political will to introduce environmental assessment in the legislation'.[4]

Nevertheless some African countries have noted and acknowledged the importance of assessing the environmental impact of various activities. Growing environmental awareness has increasingly focused attention on the interaction between development actions and their environmental consequences. In some African countries this has led to the public demanding that environmental factors be explicitly considered in the decision-making process.[5]

Consequently many African countries, as will be elaborated on below, have adopted and included EIA in their laws. Some countries have specific EIA legislation, others have no specific EIA legislation and the situation is covered by general statutes, and yet others are in the process of enacting EIA legislation.

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3 Fuggle and Rabie (n1) 748.
4 Ibid 748.
5 CD Schweizer (Ed) Council for the Environment, Working Document for the Development of a National Policy on Environmental Impact Assessment in South Africa 1985, Cape Town, 2.

1.2 What is Environmental Impact Assessment?

Fuggle and Rabie define EIA as:

> 'A procedure designed to ensure that the environmental consequences of development are understood and adequately considered in the planning process'[6]

This definition indicates that EIA attempts to define and assess the physical, biological and socio-economic effects of a proposed activity in a form that permits a logical and rationale decision to be made. Attempts can be made to reduce potential adverse impacts through the identification of possible alternative sites and processes. There is however, no general and universally accepted definition of EIA. The following examples illustrate the great diversity of definitions:

> '... to identify, predict and describe in appropriate terms, the pros and cons (penalties and benefits) of a proposed development. To be useful the assessment needs to be communicated in terms understandable by the community and decision makers, and the pros and cons should be identified on the basis of the criteria relevant to the countries'.[7]

> '... an assessment of all relevant environmental and resulting social effects which could result from a project'.[8]

> '... the systematic examination of the environmental consequences of projects, policies, plans and programmes. Its main aim is to provide the decision-makers with an account of the implications of alternative courses of action before a decision is made'.[9]

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6 Fuggle and Rabie op cit (n1) 749.

7 UNEP (1978) Drafting Guidelines for Assessing Industrial Impact and Environmental Impact Criteria for Citing of Industry UNEP, Paris.

8 Batelle Institute (1978) The Selection of Projects for EIA, Brussels Commission of the European Communities Environment and Consumer Protection Service, Brussels.

9 PADC, A Manual for the Assessment of Major Development Proposals HMSO London 1981.

> '... consists of establishing quantitative values for selected parameters which indicate the quality of the environment before, during and after the action'.[10]

These definitions provide a broad indication of the objectives of the EIA, but illustrate different concepts of EIA. These concepts include; the social effects of development projects, public participation in decision-making, health and environmental effects of a proposed project and the consideration of alternatives.

The scope of EIA is perhaps best defined by Munn that EIA is

> '... an activity designed to identify and predict the impact on the biogeophysical environment and on man's health and well-being of legislative proposals, policies, programmes, projects and operational procedures and to interpret and communicate information about the impacts'.[11]

From the foregoing definitions, it can be deduced that EIA is

> 'a formal study process used to predict the environmental consequences of a proposed development project. Such project may include, for example, building a hydroelectric dam or a factory, irrigating a large valley or developing a harbour'.[12]

According to the United Nations Environmental Programme (UNEP), an EIA concentrates on problems, conflicts or natural resource constraints that could affect the viability of a project. It also examines how the project might cause harm to people, their homeland or their livelihood, or to other nearby developments. After predicting potential

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10 JA Heer and DJ Hagerty Environmental Assessment and Statements, Van Nostrand, Renihold, New York, 1977.

11 RE Nunn (Ed) Environmental Impact Assessment, SCOPES 2nd Edition, Wiley and Sons, Chichester, UK, 1979.

12 UNEP, Environmental Impact Assessment - Basic Procedures for Developing Countries, 1.

problems, the EIA identifies measures to minimise the problems and outlines ways to improve the project's suitability for its proposed environment.[13]

UNEP further points out that:

> 'The aim of an EIA is to ensure that potential problems are foreseen and addressed at an early stage in the project's planning and design. To achieve this aim, the assessment's findings are communicated to all the various interest groups who will make decisions about the proposed project; the project developers, planners and politicians. Having read the conclusions of an EIA, project planners and engineers can shape the project so that its benefits can be achieved and sustained without causing inadvertent problems'.[14]

A number of international institutions have played an important role in developing EIA in Africa and these are now turned to.

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13 UNEP (n12) 2.
14 UNEP (n12) 2.

CHAPTER 2

THE ROLE OF INTERNATIONAL ORGANIZATIONS

2.1 Introduction

The first attempts to introduce EIA for assessing proposed development activities in Africa were made by international institutions and funding agencies. For example, since 1975 the US Agency for International Development requires an Initial Environmental Evaluation to be carried out on all projects and an EIA in cases where the impact is expected to be significant. In 1980 a declaration was signed by funding agencies including the World Bank, regional development banks, UNDP and UNEP, which advocated the need to assess the environmental impacts of development projects.[15]

Since then, other donor agencies, such as the Organization for Economic Co-operation and Development (OECD) and governmental development aid agencies in industrialized countries have also started to take into account environmental considerations in project appraisal although with less formal requirements.

2.2 World Bank

Starting in 1983, non-governmental organizations (NGOs) from developing and industrialized nations launched efforts to stimulate policy operations and lending reforms in the World Bank. Focussing attention on environmental issues, NGO's have pressed the Bank to undertake changes in its lending operations. In response the Bank implemented operational changes over the last few years designed to incorporate environmental concerns in its lending policies.[16]

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15 Schweizer (n5) 541.

16 R Hauber, A Citizens Guide to World Bank Environmental Assessment Procedures, The Bank/Information Centres 1992 331.

In a paper[17] outlining the Bank's policy and procedures pertaining to projects, technical assistance, and other aspects of its work that may have environmental implications, it is stated that the principles behind the guidelines may be summarised as follows:

'The Bank

(a) endeavours to ensure that each project affecting renewable natural resources does not exceed the regenerative capacities of the environment;

(b) will not finance projects that cause severe or 'irreversible' environmental deterioration, including species extinctions without mitigatory measures acceptable to the Bank;

(c) will not finance projects that unduly compromise the public's health and safety;

(d) will not finance projects that displace people or seriously disadvantaged vulnerable groups without undertaking mitigatory measures acceptable to the Bank as outlined in separate notes on involuntary resettlement and on tribal peoples;

(e) will not finance projects that contravene any international agreements to which the member country concerned is a party;

(f) will not finance projects that could significantly harm the environment of a neighbouring country without the consent of that country;

(g) will not finance projects which would significantly modify natural areas designated by international conventions as World Heritage Sites or Biosphere Reserves, by national legislation as national parks, wildlife refuges, or other protected areas and

(h) endeavours to ensure that projects with unavoidable adverse consequences for the environment are sited in areas where the environmental damage is minimised, even at somewhat greater initial cost'.[18]

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17 The World Bank (1984) Environmental Requirements of the World Bank, Environment and Science Unit, Projects Policy Department, The World Bank, Washington, DC.

18 As quoted in Schweizer, op cit, (n5).

The most practical way to give flesh to these laudable but general ideals is to ensure that an environmental evaluation is carried out on all development projects.

An important step in this direction occurred in October 1989 with the issuance of the Bank's 'Operational Directive 4.00, Annex A: Environmental Assessment'. This policy mandated 'an environmental assessment for all projects that may have a significant negative impact on the environment'. Operational Directive 4.00 was vastly strengthened and reissued as Operational Directive 4.01 (OD4.01) in October 1991. It 'outlines the Bank policy and procedures for the environmental assessment of Bank lending operations'. It states that environmental assessment

> 'is the way to improve decision-making and to ensure that the project options under consideration are environmentally sound and sustainable', and that 'the Bank expects the borrower to take the views of affected groups and local NGO's fully into account in project design and implementation, and in particular in the preparation of environmental assessments'.[19]

It is needless to over-emphasize how the above World Bank requirements affect EIA Legislation in Africa since obviously most African countries are inevitable beneficiaries of World Bank loans.

2.3 The African Development Bank

In 1990 the African Development Bank/African Development Fund (ADB/ADF) adopted an Environmental Policy Paper.[20] Chapter 4 of that Policy Paper provides for Strategy for Policy Implementation. Under that Chapter, the requirement of EIA in the Project Cycle is outlined.

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19 R Haeuber A Citizen's Guide to World Bank Environmental Assessment Procedures, The Bank Information Centre, 1992, (ix).

20 African Development Bank/African Development Fund, Environmental Policy Paper, 48.

4.1.1 States:

> 'The key to the ADB Group's approach to environmental management and sustainable development will be the use of procedures to assess the environmental impacts of bank's lending programmes and projects. These procedures will enable the integration of environmental safeguards in projects. Environmental considerations wherever essential, will become an integral part of loan agreements and bidding documents'.[21]

A further section makes it clear that an environmental assessment system will be utilized through all the stages of the Project Cycle (identification, preparation, appraisal, implementation and post-evaluation). Prior to the application of the environmental assessment process, an initial environmental examination will be carried out on all projects to determine whether EIA's or environmental mitigation measures are required.[22]

In May 1992 the African Development Bank/African Development Fund formulated guidelines[23] with the objective of integrating an assessment process of environmental issues into ADB group development projects and programmes. The overall aim was to ensure that the Bank Group is financing sustainable development in Regional Member Countries (RMCs), which continue economic growth with poverty reduction and the protection of the environment.

According to the Bank's guidelines EIA is a tool for the evaluation and analysis of projects on their environmental impacts. It provides the organized transfer of relevant information to the appropriate decision-makers. The systematic description and quantification of environmental

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21 ADB/ADF Policy Paper Sec. 4.1.1.
22 Ibid (n21) Sec. 4.1.2 (at 48).
23 ADB/ADF, Environmental Assessment Guidelines, May 1992.

impacts improves the cost benefit analysis of the proposed project.[24]

The guidelines make it clear that the purpose of environmental assessment is to ensure that the development options under consideration are environmentally sound and sustainable. As economic, financial, institutional and technical analyses are part of the project preparation, so is environmental assessment. If potential environmental problems are identified at an early stage during project planning, environmental degradation and economic losses that may result from poor project planning can be avoided.[25]

2.4 United Nations Environmental Programme (UNEP)

With its headquarters in Nairobi, the UNEP is a specialized UN agency entrusted with the responsibility of coordinating and directing environmental programmes within the UN system.

According to Decision 14/25 of the Governing Council of UNEP[26], EIA means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development. The document (Decision 14/25) lays down thirteen principles of EIA. Principles 1 and 2 are of particular importance. According to these principles

> 'states (including their competent authorities) should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects. Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive EIA should be undertaken'.[27]

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24 See (n23) at 3.
25 See (n23) at 8.
26 UNEP: Environmental Law Guidelines and Principles: Goals and Principles of Environmental Impact Assessment.
27 Principle 1 (see n27).

It is further stated that

> 'the criteria and procedures for determining whether an activity is likely to significantly affect the environment and is therefore subject to an EIA, should be defined clearly by legislation, regulation, or other means, so that subject activities can be quickly and surely identified, and EIA can be applied as the activity is being planned.[28]

According to another UNEP document[29], it is pointed out and acknowledged that a number of developing (including African) countries have enacted legislation requiring all major development projects to undergo an EIA procedure. The procedure may be integrated into the land use planning procedure, or the licensing procedure, or it may be a separate legal requirement.[30]

The document further states that the legislation governing EIA should indicate, as clearly as possible, which projects are subject to EIA procedures and which are not, so as to avoid bureaucratic constraints on minor activities.

> 'It should establish effective review and dispute settlement procedures to avoid unnecessary delays in decision-making. And it should provide adequate enforcement powers, including the power of the review agency to hold proposed action until the EIA has been conducted,'[31]

Another important UNEP document[32], points out that EIA as a planning tool, seeks to upgrade the place of environmental

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28 Principle 2 (see n27).
29 UNEP: New Directions in Environmental Legislation and Administration Particularly in Developing Countries.
30 Ibid (n29) at 14.
31 14.
32 UNEP: Legal and Institutional Arrangements for Environmental Protection and Sustainable Development in

factors in the decision-making process so that unnecessary damage to the environment can be avoided.

> 'This does not imply that environmental concerns should occupy a paramount position vis-a-vis the economic, technological or financial, but rather that they should receive due and balanced consideration, before a final decision is made.[33]

The document further states that in giving effect to an EIA requirement, 'each country should develop its own approach, appropriate to its own constitutional and legal system and its own socio-economic requirements'.[34]

2.5 United Nations Conventions

Over the years a number of United Nations Conventions with relevance to EIA have been adopted. These are of particular importance since their provisions are themselves a form of legislation. They are also of particular importance since their provisions determine the form and content of domestic legislation.

A key convention in this context is the United Nations Convention on Environmental Impact Assessment in a Transboundary Context (February 1991). According to Article 2(3), the party of origin shall ensure that in accordance with the provisions of the Convention, an EIA is undertaken prior to a decision to authorise or undertake a proposed activity listed in Appendix 1 that is likely to cause a significant adverse transboundary impact.

Article 2(7) provides that EIA as required by the Convention shall, as a minimum requirement be undertaken at the project level of the proposed activity. To the extent

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Developing Countries; UNEP Environmental Law and Institutions Unit, Nairobi.

33 Ibid (n32) at 3.

34 Op cit (n32) at 3.

appropriate, the parties shall endeavour to apply the principles of EIA to policies, plans and programmes.

Another important Convention is the United Nations Environmental Programme Convention on Biological Diversity (adopted at the Earth Summit) of 1992. Article 14(1) of the Convention states that:

> 'Each contracting party, as far as possible and as appropriate, shall
>
> (a) introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects, and where appropriate, allow for public participation in such procedures;
>
> (b) introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account'.[35]

Having looked at the role of international institutions promoting EIA legislation in developing countries, a review of the situation in specific African countries now follows.

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35 The Earth Summit: United Nations Environmental Programme Convention on Biological Diversity, June 1992.

CHAPTER 3

EIA LEGISLATION IN SPECIFIC AFRICAN COUNTRIES

3.1 Introduction

Africa can benefit from the experience of other areas in implementing EIA. Kakonge and Imebvore have however pointed out that:

> 'African countries face a greater challenge in achieving this goal due to such problems as inadequate environmental legislation, inappropriate institutional framework for coordinating and monitoring governmental activities, a shortage of qualified manpower, inadequate financial resources, absence of public awareness of the need of EIA and lack of suitable screening procedures to determine which development projects require an EIA'.[36]

These problems can to some extent be addressed if EIA legislation is in place. Experience from developed countries (eg USA) has shown that formal legislation is one of the major instruments for the effective implementation of EIA. However, most African countries have no specific national EIA legislation. According to Muslin 'experience from some countries indicates that some of the existing environmental legislation dates back to the colonial period'.[37]

In acknowledging the importance of incorporating EIA in the national legislative framework, each nation has been faced with a choice whether or not to institute new legislation or to amend existing legislation and include EIA principles. According to Burton, Wilson and Munn, the different solutions countries have chosen reflect the decisions they have made about how impact assessments fit into their

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36 J Kakonge and A Imebvore; Constraints on Implementing Environmental Impact Assessment in Africa; Environmental Impact Assessment Review Vol 13, 1993. 300.

37 F Muslin; Environmental Impact Assessment, Environmental Policy and Law Vol 12, 1983.

overall policies and strategies for controlling and managing the impact upon the environment of their activities.[38]

While some countries have enacted or are in the process of enacting special legislation establishing new EIA processes, others 'have preferred to integrate EIA procedures in their pre-existing planning processes'[39], thereby having 'legislative and institutional backing for general environmental protection without a special set-up for EIA'.[40] There are still others which do not have either.

As already pointed out earlier, three situations exist in African countries regarding EIA legislation and they will be presented as follows:

(1) countries with specific EIA legislation;
(2) countries with no specific EIA legislation (where the situation is covered by general statutes);
(3) countries where EIA legislation is proposed (where legislation is in process of enactment).

It is obviously not possible to analyse EIA legislation of each and every African country. For the purposes of this paper and for the purposes of striking a compromise between generality and specificity, a few countries will be chosen from each of the above categories and it is hoped that a look at each of those countries' EIA legislation will give a representative and general picture of EIA legislation in the whole of Africa.

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38 I Burton, I Wilson and RE Munn, 'Environmental Impact Assessment: National Approaches and International Needs', Environmental Impact Assessment Review Vol 12(4) (1992), 133.
39 See Burton, Wilson and Munn (n38) 133.
40 Worldletter (Environmental Impact Assessment) 1.

3.2 Countries with EIA legislation already in place

3.2.1 South Africa

The central environmental statute in South Africa is the Environment Conservation Act (No 73 of 1989). Part V of this statute deals with the 'Control of Activities which may have Detrimental Effect on the Environment'. Section 21(1) provides that the Minister may identify those activities which may have a substantial detrimental effect on the environment. Section 22 prohibits undertaking activities identified in terms of s21. Section 23 provides for a declaration by the Minister of limited development areas, where no development or activity may be undertaken without authorization. And s26 provides for regulations regarding environmental impact reports.

Mention should be made of the fact that draft regulations under this section were published in Notice 171 of 1994 contained in Government Gazette No 15529 of 4 March 1994, for public comment. These regulations give effect to the principles and procedures espoused in the Department of Environment Affairs 1992 version of IEM, elaborated on below. Also pursuant to s21, prohibited activities have been identified and published in Notice 172 of 1994 for public comment.

The nature and role of IEM

Long before the Environment Conservation Act (73 of 1989) was enacted (in 1984 to be precise) the Council for the Environment established a committee to investigate and recommend a national strategy that would ensure the integration of environmental concerns in development actions. Due consultations and investigations were carried out involving experts and interested parties, and a constructive process of guiding and documenting development decisions was recommended and established. This process was called integrated environmental management (IEM) and it

essentially develops and expands the EIA philosophy for South African conditions and circumstances.

Details of the IEM process are contained in a series of Guideline Documents entitled Integrated Environmental Management Series published by the Department of Environmental Affairs and Tourism. These series cover several aspects of IEM including: procedure, scoping, report requirements, review, environmental characteristics and a glossary of terms.

IEM is a procedure designed to ensure that the environmental consequences of development are understood and adequately considered in the planning process.

> 'It is intended to guide rather than impede the development process by providing a positive interactive approach to gathering and analysing useful data and presenting findings in a form that can easily be understood by non-specialists. It thus serves to refine and improve proposed policies, programmes and projects through a series of procedures which are linked to the development process'.[41]

IEM encourages participation through an opportunity for public input in the decision-making process. According to Fuggle and Rabie this may involve consultation with interested and affected parties during the planning stage; a positive and pro-active approach is encouraged through the enhancement of positive impacts as well as the mitigation of negative impacts.[42] IEM therefore 'attempts to ensure that the social costs of development (those borne by society) are outweighed by the social benefits (the benefits to society as a result of the development)'.[43]

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41 R Fuggle and MA Rabie, op cit, 149.
42 Fuggle and Rabie (n1) 50.
43 Fuggle and Rabie (n1) 50.

Provision is made for an initial assessment whose purpose is to determine whether the proposed development will have a significant environmental impact. The whole idea behind the initial assessment is to determine whether a full scale impact assessment should be undertaken or whether it is not necessary.

The nature and form of the initial assessment may vary from project to project depending on the planning of the developer and the nature of the project.

> 'An initial assessment may need to present information in order to justify a finding of no significant impact. This may take the form of separate specialist reports on specific areas of concern (such as pollution) or environmental features (such as groundwater).[44]

Should it be found that a full scale environmental impact assessment is required, then it will be conducted based on the following three main components of an impact assessment:

(1) Scoping which determines the extent and approach to the investigation is governed by the 'Scoping Guidelines' of the Department of Environment Affairs.[45]

(2) Investigation, guided by the Scoping decisions, is intended to provide the authorities with enough information on the positive and negative aspects of the proposal, and feasible alternatives with which to make a decision.

(3) Report based on the 'Guidelines for report requirements' of the Department of Environmental Affairs.[46]

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44 Fuggle and Rabie (n1) 754.
45 These guidelines are contained in the series already referred to above (op cit 17).
46 Ibid (n45).

The Environment Conservation Act (73 of 1989) makes provision for the legal enforcement of IEM procedures, and although the required statement of policy, identification of activities, definition of development areas, as well as the necessary regulations have taken a long time in materializing, both pubic sector and private sector project proponents have been following the Council for Environment's IEM procedures, with a few exceptions.

3.2.2 Nigeria

The Federal Environmental Protection Agency Decree (No 58) of 1988 establishes an environmental agency and provides for its composition, function and powers. EIA in Nigeria however, is governed by the Environmental Impact Assessment Decree (No 86) of 1992. Part I of this quite detailed and comprehensive decree provides for general principles of EIA.

Section 1 of the decree provides for the goals and objectives of the EIA. Inter alia, the objectives of any EIA shall be:

> 'to establish before a decision taken by any person, authority, corporate body or unincorporated body including the Government of the Federation, state or local government areas, intending to undertake or authorise the undertaking of any activity that may likely [sic] or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into account [sic]'.[47]

Under s2(1) the public or private sector of the economy shall not undertake or embark or authorise projects or activities without prior consideration, at an early stage, of their environmental effects.

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47 Section 1(a) of the Environmental Impact Assessment Decree 86/1992.

Section 2(2) provides that where the extent, nature or location of a proposed project or activity is such that it is likely to significantly affect the environment, its EIA shall be undertaken in accordance with the provisions of the decree.

Provision is made under s4 for the minimum content of an EIA and states that it should include at least the following minimum matters:

(a) a description of the proposed activity;
(b) a description of the potential affected environment including specific information necessary to identify and assess the environmental effects of the proposed activities;
(c) a description of the practical activities, as appropriate;
(d) an assessment of the likely or potential impacts of the proposed activity and the alternatives, including the direct or indirect cumulative, short-term and long-term effects;
(e) an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and assessment of those measures;
(f) an indication of gaps in knowledge and uncertainty which may be encountered in computing the required information;
(g) an indication of whether the environment of any other state or local government area or area outside Nigeria is likely to be affected by the proposed activity or its alternative;
(h) a brief and non-technical summary of the information provided under paragraphs (a) and (g) of this section.

Under s5, the environmental effects in an environmental assessment shall be assessed with a degree of detail commensurate with their likely environmental significance. Provision is made under the decree for the duties and the powers of the Agency.[48] Among other things, provision is made for the examination of EIA, decision making and supervision of the activity (project) by the Agency. Also, the Agency is entrusted with the power to facilitate environmental assessment[49] and power to make regulations.[50]

Other important and relevant provisions appear under Part II of the decree, which deals with the environmental assessment of projects. Section 14 outlines cases where environmental assessment is required. These include cases where the Federal government or government agency is the proponent of the project, or it provides financial assistance or assistance of any other form for the purpose of enabling the project to be carried out in whole or in part.

A rather curious provision is s15 which provides that

> 'An environmental assessment of a project shall not be required where;
>
> (a) in the opinion of the Agency the project is in the list of projects which the President, Commander-in-Chief of the Armed Forces or the Council is of the opinion that the environmental effects of the project are likely to be minimal;
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> (b) the project is to be carried out during national emergency for which temporary measures have been taken by the government.
>
> (c) the project is to be carried out in response to circumstances that in the opinion of the Agency

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48 The Nigerian Environmental Protection Agency established by the Federal Environmental Protection Agency Decree 58 of 1988.
49 Section 60.
50 Section 61.

> the project is in the interest of public health and safety'.

This provision seems to indicate that EIA of some projects can only take place with government approval. This certainly does not auger well for environmental protection since the government can always use its power to exclude certain projects from EIA.

Mention also ought to be made of the provisions of the decree dealing with EIA process and procedure. These include screening (s19), mandatory study (s23) and public notice (s25), among other things.

Provision is also made for referral to council, mediation and review panel.[51] Under s27;

> 'where at any time the Agency is of the opinion that
>
> (a) a project is likely to cause significant adverse environmental effects that may not be mitigated, or
>
> (b) public concerns respecting the environmental effects of the project warrant it;
>
> the Agency may refer the project to Council for a referral to mediation or review panel...'

Mention should also be made of the provisions of the decree dealing with the designing and implementation of follow-up programmes (s41), issue of certificates stating that an EIA has been completed (s42) and jurisdiction of Joint Review Panels (s42).

Finally, provision is made for EIA of trans-border and related environmental effects (ss49-55), international agreements and arrangements (s56) and the establishment of a

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51 Sections 27-34.

public registry for the purpose of facilitating public access to records relating to EIA.

It is not known how effectively the above measures have been applied in practice but undoubtedly Nigeria's EIA legislation is among the most elaborate in Africa.

3.3 Countries with no specific EIA legislation

3.3.1 Kenya

While Kenya has accepted to employ EIA process to determine the impact of development activities likely to have adverse consequences for the environment, one has to look at a wide array of laws and administrative requirements to determine the nature and efficacy of the process currently in use in the country. This is because Kenya does not have any specific legislation providing for the procedure and substance of the mechanism which would serve the objectives of an EIA.

Kenya's concern, however, about the impact of development activities on the environment, was reflected in the countries Five Year Development Plan as far back as 1979. The purpose of a Development Plan is to set out policies and guidelines by which a government is directed in trying to achieve its development objectives over a particular period of time.

The 1979-83 Development Plan provided that:

> 'Government policies with respect to the environment are designed to ensure that development proceeds in an orderly manner... Hence environmental considerations must be entertained at the planning stage in order to ensure that the pattern of development is consistent with a healthy environment'.[52]

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52 1979-83 Kenya Development Plan, Part 1, para 2.141 and 2.144.

And how was this to be done?

> 'A system of environmental impact report will be introduced. All major proposed government, parastatal, and private projects will be required to prepare such reports.... Projects will be modified before implementation if environmental standards would otherwise be threatened'.[53]

The 1984-88 Development Plan affirmed that:

> 'The main concern with environment at this stage of our development is to control human behaviour so as to achieve a balance between the development of the nation and the enhancement of the environment... the thrust will be to strengthen the institutions necessary for the assessment and monitoring of environmental changes that are likely to be harmful in the future'.[54]

Provisions relevant to the EIA process are to be found in the Water Act (Cap 372, Laws of Kenya), in relation to an application for the abstraction of water from a river for an industry. The applicant is required to indicate how he proposes to use the water and dispose of the effluents.

More comprehensive provisions are set out in the Development of Land Use (Planning) Regulations[55] which relate to land usage in urban areas. The requirement that consent for all and any developments should be obtained in advance as well as the power of the planning authority to impose conditions provide a basis on which to determine the impact of an activity and where necessary to adopt corrective measures or ameliorative steps.

The provisions of the Water Act[56] which are relevant to EIA relate to the industrial use of water. They require the applicant to indicate the specific purpose for which he

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53 Ibid, para 2.149.
54 1984-1988 Kenya Development Plan.
55 LN 561/1961.
56 Cap 372, Laws of Kenya.

seeks a permit, the industrial process he intends to operate and, in relation to pollution control to state whether the water would be used for any 'purpose or in any process that will foul it or that will increase its burden of silt or gravel or boulders or cause it to be injurious directly or indirectly to public health, to stock, to fish or to crops or gardens...'.[57] Where an application to abstract or divert water relates to its use for irrigation, the water authorities are obligated to ensure, before granting that application, that sufficient provision has been made for the delivery of the use or unused water to a watercourse or body of water. The applicant is required to provide detailed information on the crops to be irrigated and area to each crop, the quantity of water required, the class of soil to be irrigated, the nature of sub-soil and its drainage possibilities, the works to be constructed to drain the irrigated land and the body of water into which used and unused water would be disposed of.[58]

The information which the applicant submits in compliance with the above requirements should provide a reasonable basis upon which the relevant authority should be able to determine the impact of an industrial or irrigation activity on the environment.

The administration of the EIA process on the national level is the responsibility of the New Projects Committee of the Ministry of Industry in collaboration with the National Environment and Human Settlement Secretariat. This New Projects Committee requires developers to prepare EIA reports.[59] This requirement however is administrative rather than statutory. But of course this does not supersede the

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57 LN 228/1961.
58 Ibid. LN/228/1961.
59 Farouk Muslin; Environmental Impact Assessment, op cit, (n37) 7.

administration of those EIA reports which might be required under legislation relating to specific sectors or resources.

According to Muslin, an administrative system for evaluating the impact of development activities on the environment has, in general terms, the same capacity to carry out its responsibilities as one which rests on statutory provisions, but it is arguable that if EIA procedures were of a statutory basis,

> 'institutions responsible for their operation would find it more difficult to ignore the provisions calling for objective determination of the impact of development activities on the environment'.[60]

It is interesting to know that the government has, on several occasions, proposed the enactment of a framework law to be known as the National Environmental Enhancement and Management Act, that would create and empower a central environmental agency and also provide for EIA procedures. This proposal has, however, been systematically opposed by sectorial agencies and for more than fifteen years the Bill has failed to be passed into law.

3.3.2 Lesotho

There are numerous laws of Lesotho which have a potential impact on the environment, but there is no specific legislation that addresses environmental assessment. However, a National Environmental Action Plan (NEAP) was adopted by the Lesotho Government in 1989. The plan lays out the country's environmental policy and among its objectives are (1) to require prior environmental assessments of proposed activities which may significantly affect the environment or use of a natural resource, and (2) to ensure

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60 See Muslin (n37) 75.

that conservation is treated as an integral part of planning and implementation of development activities.

The NEAP also does stipulate who is to oversee EIA measures:

> 'While there are some "informal" environmental impact assessment (EIA) methodologies currently practiced, the Highlands Water Project is the first project in Lesotho to have been subjected to a specified, explicit EIA process. This large project adds to the urgency for creating a new environmental institution. It is recommended that a formal requirement be established to ensure that EIA becomes an integral component of all economic feasibility studies of projects which will have significant effect on the environment. The responsibility for seeing that EIA's are conducted satisfactorily should be assumed by the NEC (National Environmental Council), while the national institutions which are to carry out such investigations should be strengthened. For projects and programmes where a formal EIA would not be justified, NEC's should nonetheless ensure that environmental factors have been adequately taken into account. EIA should not be regarded as delaying or diverting development, indeed this assessment information often reveals new opportunities for economic growth while protecting the renewable resource base and environmental quality'.[61]

It can be seen that the responsibility to ensure that EIAs are conducted is entrusted with the NEC (National Environmental Council). Due to lack of EIA legislation, however, there is no guarantee that EIA's would be conducted for all development projects. The EIA for Lesotho Highlands Water Project (LHWP)[62] was carried out mainly because of the magnititude of the project and also because the treaty signed between Lesotho and South Africa establishing the project required it.

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61 Source: National Environmental Action Plan, Kingdom of Lesotho, June 1989.

62 The Lesotho Highlands Water Project (LHWP) is discssed in Chapter 4 below (see 4.2).

3.3.3 Tanzania

Although Tanzania has had several laws with a bearing on the environment for a number of years, Environmental Impact Assessment (EIA) of proposed development projects had never been undertaken. Following a study started by the government in the early 1980's it was found imperative to undertake EIA to planned or new development projects as a means to evaluate the impact resulting from the projects.[63]

In 1983 an Act of Parliament[64] was passed that established the National Environment Management Council to deal with all environmental matters. The Council became operational in 1986 and it immediately undertook the task of preparing guidelines and procedures to be followed in any new major development project.

It was recommended by the Council that environmental consideration should be viewed as an integral part of the project planning process beginning with an early identification of the project alternatives and the potentially significant environmental impacts associated with them and continuing through the planning cycle.[65]

It is provided in the Act[66] that one of the functions of the Council is

> 'to evaluate existing and proposed policies and activities of the government directed to control pollution and enhancement of the environment and to the accomplishment of other objectives which affect the quality of the environment and on the basis of that formulate policies and programmes which will achieve

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63 GL Kamukala, 'Application of the Environmental Impact Assessment in the Appraisal of Major Development Projects in Tanzania' in AK Biswas and SBC Agarwala Environmental Impact Assessment for Developing Countries, Butterworths-Heinman Ltd, London, 1992, 184.

64 Act No 19 of 1983.

65 GL Kamukala, op cit, (n63) 185.

66 Act No 19 of 1983.

more effective management and enhancement of environmental quality'.[67]

Furthermore, the Act provides that the Council has to 'recommend measures to ensure that the government policies including those for the development and conservation of natural resources, take adequate account of environmental effects'.[68] To this end among its functions, the Council therefore pays much attention to the environmental impacts likely to be caused by development projects. This is done through a comprehensive scrutiny of the project proposals which are supposed to be submitted to the Council.[69]

The Council has to ensure that environmental considerations are taken immediately at the planning stages of these projects. Currently strict methods or procedures of EIA have been undertaken only in a few major development projects, mainly due to the lack of any legislative framework to enforce such procedures.

Recently the Council has been trying to devise a procedure which compulsorily requires the feasibility study of a major project to include EIA. At the same time the Council has been examining the possibility of including EIA in the overall development planning process. However, specific EIA legislation is yet to be formulated and until this is done project proponents will continue to avoid carrying out EIA procedures, to the detriment of the environment.

3.4 Countries where EIA legislation is proposed

3.4.1 Mauritius

This is one of the countries whose specific legislation on EIA has only recently been proposed. The Environmental

67 Section 4(c).
68 Section 4(d).
69 GL Kamukala, op cit, (n63) 187.

Protection Bill was proposed in 1991, and at the time of writing it is not clear whether the Bill has been passed into law yet.

The object of the statute is to provide for an institutional and legislative framework for the management and protection of the environment, taking into account the amplitude of the subject and the need to ensure a proper co-ordination of the public departments on the enforcement of the provisions of the statute.[70]

Part IV of the Bill relates to the requirement of an EIA. Section 13 requires a proponent to submit an EIA which is open to public inspection and public comments.

The statute outlines the contents of an EIA, as a true statement and description of:

> '(a) the location of the undertaking and its surroundings;
> (b) the principle, concept and purpose of the undertaking;
> (c) the direct and indirect effects that the undertaking is likely to have on the environment;
> (d) the social, economic and cultural effects that the undertaking is likely to have on people and society;
> (e) any actions or measures which may avoid, prevent, change, mitigate or remedy the likely effects of the undertaking on the environment, people and society;
> (f) the inevitable adverse environmental effects that the undertaking is likely to have on the environment, people and society if it is implemented in the manner proposed by the proponent;
> (g) the irreversibility and irretrievability commitments of resources which will be involved by the undertaking, if implemented in the manner proposed by the proponent;
> (h) any alternative to the proposed undertaking;

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70 As stipulated in the accompanying explantory memorandum.

(i) such other information as may be necessary to proper review of the potential environmental impact of the undertaking'.[71]

After review, the EIA is referred to the Environmental Adjudication Tribunal for the purpose of a public hearing.[72] Section 18 provides for the decision on the EIA by the tribunal s19 sets out the factors which should be taken into account before an EIA is approved. These include:

(a) the minimum requirements of an EIA as prescribed by the regulations;
(b) the environmental factors considered in the EIA;
(c) the measures proposed to avoid or minimize adverse effects on the environment, people or society;
(d) the alternative proposed in the EIA,
(e) such other matters that may be relevant in weighing the significance or insignificance of the potential environmental impact of the undertaking.

The Director may require a fresh EIA where there is a substantial change or modification in the undertaking or where the circumstances of the undertaking with regard to its surrounding environment so require.

Under s23, the Minister may exempt any public undertaking from the requirement of an EIA licence. It states:

'The minister may declare an undertaking by a public department, which in his opinion is urgently needed in the national interest or for the economic development of Mauritius, to be an exempt undertaking'.[73]

This again is a rather curious provision because not only does it give the Minister excessive discretionary powers, but it also highlights the conflict between the desire for

71 Section 14 of the Bill.
72 Section 17 of the Bill.
73 Section 23(1) of the Bill.

fast economic development and the need for environmental protection characteristic of most African countries.

3.4.2 Botswana

Although Botswana is not deficient in enactments aimed at controlling the threats to its environment, there is no central organ charged with the administration of environmental policies. It has been observed that:

> 'There is no central environmental ministry or government department. Environmental duties are divided between ministries and ultimately departments, according to the respective portfolio responsibilities... Co-ordination of environmental matters is not set up by law, but it is normal government procedure for ministries to consult each other on matters of common interest before taking action'.[74]

Consequently there has not been any specific legislation governing EIA's in Botswana until very recently when in drafting instructions of legislation required to give effect to the initial stages of the implementation of the Botswana National Conservation Strategy a requirement is laid out in Part III for EIA for certain projects.

The statute is to provide for the carrying out of EIA for certain development projects. An EIA for a proposed project shall be undertaken and submitted for the consideration of a competent authority. The statute will require the preparation of such an assessment when the development is proposed to be carried out by public bodies as well as private bodies.

Provision is made under the statute for a checklist of factors to be considered in the preparation of an EIA. It

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74 K Afrimpong, 'Environmental Protection through Legislation in Botswana' Lesotho Law Journal Vol 3(2), 1987.

is stated that the list is not exhaustive but rather merely indicates the type of factors that should be measured in preparing EIA. In this connection the Statute divides the factors into four main groups:- ecological, social and interactions of these - landscape and land use.

The EIA shall be prepared by the proponent of the proposed development at his own expense. Where further material is required by the competent authority or the agency, this material shall be furnished by the proponent under the same conditions.

The Statute will provide that, if a dispute arises as to the adequacy of an EIA, the matter shall be referred to the Agency for its opinion, which shall be determinative but that such opinion shall be provided within a reasonable time.

Provision will be made under the statute that where the proposed development forms part of a series or programme of associated developments, the competent authority or the Agency may require that the EIA prepared in respect of the development take into account also the effects on the environment and natural resources of those associated developments.

Where the developer is unsure as to whether certain material should be included in the EIA or whether any matters addressed therein have been dealt with adequately, such questions shall be referred to the Agency for advice or decision.

The statute should provide that the EIA must be submitted to the competent authority along with any application relating to the proposed development (where applicable), and in all

cases should be submitted prior to the undertaking of works carrying on any stage of the development.

The statute should also provide that, where no administrative responsibility presently exists, in respect of a scheduled development, the EIA shall be submitted to the proposed Agency.

On receipt of an EIA, the competent authority or the Agency shall take such steps as may be necessary to ensure that the content of the EIA is made available to the public. Provision is made for copies of the EIA to be made available for inspection at convenient localities.

Under the statute, the public will be afforded a suitable opportunity to comment on the contents of the EIA and that those comments be taken into account by the competent authority in coming to its decision. Where the competent authority considers that, in order to properly judge the environmental or natural resource impacts of a proposed development, further information is required in addition to that contained in the EIA as submitted, it may require the proponent to supply such further information.

The statute should also provide that the competent authority must take into account the EIA in arriving at its decision in respect of the proposed development in question and that the authority, in announcing its decision, shall make reference to the matter in which the matters raised in the EIA have been addressed.

Finally, the statute will provide for referrals to the Board and if matters cannot be resolved at the Board they shall be referred to the cabinet for consideration.

It can be seen that if and when the provisions of the above proposed legislation come into force, they will go a long way to addressing the impacts of development projects on the country's rich and vast environment, on which the scanty population largely depends for subsistence.

3.4.3 Zimbabwe

Although Zimbabwe may be said to be one of those countries with no specific EIA legislation, the Ministry of Environment and Tourism is presently taking steps in the direction of formulating EIA legislation. In September 1993, the Ministry produced a Prospectus for Environmental Assessment Policy in Zimbabwe.[75] The purpose of this Policy Paper is to provide the background on the 'issues, objectives, and possible time-table for introducing formalized EIA into the operations of the country.

Part I of the Prospectus deals with the proposed goals, principles and objectives of EIA. Provision is also made under this section for the consultation process and the identification and resolution of issues.

Part II provides for an interim EIA Policy Proposal and indicates that the basis for the Interim EIA Policy is the Second Five Year Development Plan, which states that;

> 'environmental impact assessment will be undertaken before any major development projects are embarked on'[76]

This statement is taken to mean that no major development project may receive the approvals, permits and/or licences required for its implementation unless and until an

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75 The Paper is also referred to as a Public Background Discussion Paper.

76 Zimbabwe 1991-1995 Development Plan.

acceptable EIA report for it has been produced or the project has been exempted from EIA requirements.

Under Part I of the Prospectus, specific principles and objectives for EIA have been suggested:

- both public and private sector development proposals should be made subject to EIA.

- Proponents should be responsible for funding and conducting EIA.

- Prescribed activities and screening guidelines will be needed for an effective and manageable policy.

- EIA should include the development effects on the biophysical, socio-economic and cultural environment.

- EIA should begin as early as possible in the development planning process or project cycle i.e. when the proposal is being initially conceived and feasibility is being assessed.

- Those people that could be potentially affected by a development proposal should be consulted during the planning process and participate in reviewing the proposal.

- Information about the development proposal should be really available to all public and private stakeholders.

- Formal review of an EIA report prepared by a proponent should be assessed as to its adequacy by a qualified impartial body, independent of the proponent, the professional/technical persons who prepared the EIA, and the approving authority.

- EIA should provide for specifically identified mitigation measures, management planning for impacts during the development, implementation and operational phases, and ongoing monitoring and management of impacts.

- An effective assignment and co-ordination of roles and responsibilities should be developed for proposal submission, review, referral and approval.

- People and communities that suffer a loss from development should be fairly compensated.

- An environmental licence should be considered for proposals before they proceed as part of the approval process.

Under Part II of the Prospectus, provision is made for more general principles of EIA as embodied in the Interim EIA Policy.

- EIA is a means for project planning, not just evaluation. Thus EIA reports must describe the process and result of environmental planning that have gone into a project as well as both the anticipated environmental costs and benefits residual to the planning effort and the proposed means of managing them.

- Identifying means for managing project impacts is an essential component of the Interim EIA Policy, hence the policy requires proponents to include in their EIA reports specific plans for monitoring and managing environmental impacts.

- Other general principles include involvement of the participation of all government agencies, paying particular

attention to the distribution of project costs and benefits, and public consultation as an essential part of the Interim EIA Policy.

This EIA Interim Policy Proposal as can be seen is only an embryo of the egg from which EIA legislation will be hatched. First, a clear and comprehensive EIA policy has to be formulated.[77] But until both clear EIA policy and legislation are properly formulated and finalised, Zimbabwe will remain one of the African countries with a lacunae in their environmental legislation.

3.4.4 Uganda

The first formal concern signifying the Uganda government's concern with the environment on a national and a standing basis was the establishment of a Ministry of Environment Protection by the NRA/NRM government soon after it took power in 1986.[78]

Prior to this, expression of environmental concern under the preceding administration was only implicit, arising, for example, from the implications of forest and game conservation measures, protection of national or historic sites, water management, etc.

At the moment, Uganda does not have specific EIA legislation and until recently there were no serious attempts to formulate it. However, just like Kenya and Tanzania, Uganda can be said to have oblique provisions emanating from the Convention for Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region and Related Protocols. This Convention was a result of the

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77 According to the Ministry of Environment and Tourism, hopefully over the 1994/1995 period.

78 G N Okoth-Obbo 'The Need to Rethink Strategies' Environmental Policy and Law Vol 19 (1989). 170.

Conference of Pleinpotentiaties on the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, held in June 1985.[79]

Article 13 of the Convention deals with EIA and provides that:

> '(1) As part of their environmental management policies, the contracting parties shall, in co-operation with competent regional and international organizations if necessary, develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimize harmful environmental impacts on the Convention areas.
>
> (2) Each contracting party shall assess, within its capabilities, the potential environmental effects of major projects which it has reasonable grounds to expect may cause substantial pollution of, or significant and harmful changes to, the Convention area.
>
> (3) With respect to the assessments referred to in paragraph (2), the Contracting Parties shall, if appropriate in consultation with the organization, develop procedures for the dissemination of information and, if necessary for consultation among the contracting parties concerned.'

Apart from these provisions of this East African regional convention, Uganda has recently started taking decisive steps in the direction of formulating EIA legislation. In November 1992, a National Environmental Action Plan (NEAP) was prepared by the Ministry of Water, Energy, Mineral and Environmental Protection, to review the existing legislation in the field of environment and to draft a framework for environmental legislation. According to the NEAP, Environmental Impact Assessment is said to be;

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79 Convened by the Executive Director of UNEP pursuant to decision 8/13C adopted on 29 April 1980 by the Governing Council of UNEP.

> 'a brief examination conducted to determine whether or not a project requires an environmental impact statement'.[80]

The Plan further says that the issue is how to include in EIA legislation:

> 'It should be noted that, by its nature EIA depends on the project in question. The considerations taken into account are often sector specific. What the framework legislation can do is to provide for the basic principles of an EIA and the basic contents of an EIS (Environmental Impact Statement) ... . Once the basic rules are concluded, the specific guidelines for EIA in each sector should be made as subsidiary legislation under sectoral laws, or under the framework legislation'.[81]

Following the NEAP, a National Environment Management Policy was formulated in 1993. One of the objectives of the Policy is to provide a system of EIA and environmental monitoring so that adverse environmental impacts can be foreseen and eliminated. The Policy also states that EIA process should be administered by a National Environmental Management Authority in consultation with line ministries, departments and the private sector. One of the strategies to be adopted is to create by law an EIA process which requires as appropriate, EIA, environmental impact statements and environmental audits for all private and public development projects.

In line with the National Environment Action Plan and the National environment Policy, legislation is now under way, in form of the Environment Management Bill, 1993. The

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80 A Jervelov and U Marinor, An Aproach to Environmental Impact Assessment for Projects Affecting the Coastal and Marine Environment, UNEP, 1990.

81 National Environment Action Plan - Para 5.1.6(a) and (b).

Statute establishes a National environment Management Authority[82] which, among other things, is charged with the responsibility of adopting EIA guidelines and formulating procedures for conducting EIA.[83]

The Bill provides for the requirement of an EIA where a project:

(a) may have an impact on the environment
(b) is likely to have a significant impact on the environment, and
(c) will have a significant impact on the environment.

An important provision is s18(3) which provides than an EIA shall be undertaken by experts whose names and qualifications are approved by the Authority.

Provision is also made for the participation of the public, especially those most affected by the project in the assessment.[84] And s180 provides that the conduct of an EIA shall be publicized in such a manner as may be prescribed. Provision is made under s19 for environmental impact statements following an EIA or study.

The salient and remarkable provisions of the proposed legislation include; the establishment of a National Environment Authority, the provision for EIAs to be undertaken by approved experts, the provision for public participation and provision for environmental audit. It is hoped that when the legislation is passed, it will help in mitigating the impact of development projects on the environment of the overpopulated country.

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82 Section 5 of the Bill.
83 Section 18(7).
84 Section 18(7)(c).

Having outlined some of the initiatives to formulate specific legislation in certain African countries, a few practical cases where such legislation could be, or has been applied, will now be examined with a view to identifying certain legal issues and implications arising therefrom.

CHAPTER 4

LEGAL ISSUES AND IMPLICATIONS

4.1 Introduction

There are a number of legal issues and implications that arise from the existence or non-existence of EIA legislation in any country. In order to discuss these issues more properly and clearly, a project/case study approach will be adopted so as to identify particular legal issues that have been pertinent in particular outstanding and controversial major projects in Africa. The following projects will be considered:

(1) The Lesotho Highlands Water Project in Lesotho.
(2) The Tana and Athi Rivers Development Authority in Kenya, and
(3) The Eastern Shores of Lake St Lucia Project in South Africa.

An examination of the legal issues pertaining to the EIA of these projects will give some insight of the implications of EIA legislation or lack of it in the various African countries discussed in this study.

4.2 The Lesotho Highlands Water Project (Lesotho)

The Lesotho Highlands Water Project is the largest and most significant single development project to take place in Southern Africa in recent years and it is likely to have significant environmental impacts. The project is a multi-purpose scheme involving the construction of five major dams, a power station, a smaller dam as the tail of the hydroelectric station, 225 km of tunnels, three pumping stations, and 650 of upgraded access roads.[85] It is the

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85 Environmental Evaluation Unit (UCT) Report No 10/94/121b.

first project in Lesotho to have been subjected to a specific EIA process.[86]

One might say that the whole existence of a major project such as the LHWP is based on fundamental law - in form of the Treaty that establishes it. The legal issues arising from EIA legislation, or the lack of it are some of the implications posed by that law.[87]

The Treaty for instance, whose full title is the Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, provides that,

> 'The parties agree to take all reasonable measures to ensure that the implementation, operation and maintenance of the project are compatible with the protection of the existing quality of the environment and in particular shall pay due regard to the maintenance of the welfare of persons and communities immediately affected by the project'.[88]

This would mean that the project must provide compensation, not just for dwellings and other structures, but also for loss of livelihood.

> 'Under current law and procedure for land acquisition however, families losing their fields to the Project would lose their income from that land and would receive no compensation either in cash or in the form of other land'.[89]

Needless to add that this problem is compounded by lack of specific EIA legislation in Lesotho. Indeed it was pointed

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86 P McAuslan 'The Lesotho Highlands Water Project and Environmental Law: A Case Study in the Light of "Our Common Future"' Lesotho Law Journal (1987) 3, 41.

87 Ibid (n86) 42.

88 Article 15 of the Treaty.

89 Doc C-2-14- Report C to the Feasibility Study - Environmental and Social Impact in Lesotho (April 1986).

out in the EIA to the project that as the law stood, 'no compensation would be payable to those whose arable or grazing land held under customary law was acquired for the project and that this was a matter that needed consideration'.[90]

The anomaly is no doubt attributable to the fact that the EIA for the project was of an ad hoc nature. Now we can see the dangers of the absence of specific EIA legislation that would ordinarily have provided for public participation in the form of consultation and input, among other things. As pointed out by McAuslan 'No opportunity was given to the affected communities, the public generally or recognized experts or groups to comment on the EIA of the Project'.[91]

4.3 The Tana and Athi rivers Development Authority (Kenya)

The Tana and Athi Rivers Development Authority (TARDA) is the largest water resources development in Kenya. It was established in 1974 and its functions were to include the planning, coordinating and monitoring projects in the Tana and Athi River basins. Its mandate also included the implementation of these projects. According to Hirji and Ortolano

> 'By the mid-1980's, it had implemented several large hydroelectric power schemes and irrigation projects which included; the Masinga and Kiambere Dams on River Tana, the Munyu Dam on Athi river and the Tana Delta Irrigation Project'.[92]

Since the Authority's creation, attempts have been made to require it to undertake EIA for its proposed projects. TARDA

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90 See McAuslan (n86) 56.
91 See McAuslan (n86) 60.
92 R Hirji and L Ortolano 'Strategies for Managing Uncertainties Imposed by Environmental Impact Assessment - Analysis of a Kenyan River Development Authority' in Environmental Impact Assessment Review 1991 (11) 204.

has resisted some EIA requirements because, it claims, 'they introduce uncertainties into its decision process and reduce its ability to exercise discretion'.[93]

The legal issues arising from the existence or non-existence of EIA legislation, as illustrated by this particular project case study may be formulated as follows:

(i) to what extent is a project proponent required to carry out EIA, and to what extent can this requirement be ignored?

(ii) By whom should EIA requirements be enforced?

(iii) To what extent can a project proponent be secretive about the EIA process of the project?

To analyse what TARDA has done to account for the environmental impacts of its projects, it is necessary to understand that the entities which have been influential in promoting this accounting are; the National Environment Secretariat (NES) and the international development assistance organisations operating in Kenya (donor agencies).[94]

Attempts by the NES to promote a law mandating EIA for economic development activities were unsuccessful. Also its efforts to promote the National Environment Enhancement Bill in the early 1980's failed. A national EIA requirement was called for in the Environmental Management Policy that was part of the 1979-1983 Development Plan (as has already been mentioned) and a national EIA regulation was adopted in

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93 Ibid (n92) 203.

94 These include, the World Bank and the African development Bank, as discussed above (ss2.2 and 2.3).

1983.[95] 'However, these efforts did not result in EIA's being undertaken consistently mainly because there was no legislation to back up enforcement of the EIA requirements that NES promoted'.[96]

Sometimes, as was mentioned earlier, foreign donors impose EIA requirements as a condition for providing support. For example, TARDA's Kiambere Dam investigations were funded by several donors including the World Bank. The Bank insisted that it would not fund the project unless and until an EIA was carried out.

But TARDA has always felt that an EIA requirement imposed on it by either NES or a foreign donor constitutes a form of external control. Like many other organizations, TARDA seeks to avoid external controls because they restrict its autonomy, ie its ability to decide for itself when to initiate or terminate actions. According to Hirji and Ortolano, TARDA's argument was that 'conducting an EIA can introduce uncertainties by requiring it to generate new information that may make its proposals less attractive and by giving other organizations opportunities to influence its decisions'.[97]

Hirji and Ortolano further point out that:

> 'Up to now TARDA has responded effectively to threats to its autonomy that outsiders have posed by attempting to require EIA. While it has performed several EIA, it has almost always been able to effectively manage the EIA process by selecting the consultants, determining the impacts to be studies, and retaining the authority to decide which EIA recommendations to act on'.[98]

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95 Guidelines of Project Preparation, Appraisal and Approval for New Public Sector Investments.
96 See Hirji and Ortolano (n92) 206.
97 See Hirji and Ortolano (n92) 207.
98 See Hirji and Ortolano (n92) 207.

Even where it lost control over an EIA process on one of its projects, it employed strategies that made it possible to completely ignore the EIA's recommendations.[99]

On the issue of secrecy, apart from the Masinga Dam EIA, which TARDA submitted to NES, TARDA has consistently chosen to keep its EIA activities to itself. This is demonstrated by the Munyu Dam EIA. TARDA did not even submit a copy of the final environmental impact report to NES as required by the Environmental Management Policy.[100]

TARDA's practice of withholding information about its EIA is, needless to say, a direct result of the non-existence of EIA legislation in that country. The legal, social and environmental consequences of such a practice are only too obvious. It does not only undermine government control and monitoring of the projects, but it also eliminates any possibility of public participation and involvement. This obviously defeats the whole purpose of EIA.

From the observations about the case study in point (TARDA), it can be seen that in a country without specific EIA legislation, a project proponent can ignore EIA requirements without penalty. It can also be seen that the government lacks the power and proper mechanisms to enforce EIA requirements. And finally, it can be seen that a project proponent can afford to be secretive about the EIA process and recommendations thereby eliminating the very important aspect of public participation and involvement.

4.4 The Eastern Shores of Lake St Lucia (Republic of South Africa)

There has been a lot of controversy surrounding the appropriate forms of land use at Lake St Lucia and its

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99 The Tana Delta Irrigation Project.
100 In the 1979-1983 Five Year Development Plan.

surrounds on the east coast of northern Natal, South Africa. Many decisions affecting the land use of this area have been made during the last forty years. When the Richards Bay Minerals (RBM) applied for the rights to mine its Kingsa/Tojan lease area in 1989, the South African Cabinet instructed that an EIA be carried out.[101]

The principles of IEM as developed by the Council for the Environment in 1989, and revised by the Department of Environmental Affairs guided the EIA which commenced in September 1989. The Department of Environmental Affairs was given responsibility for seeing that a comprehensive EIA was successfully executed. According to the EIA Summary Report[102] on the Project, two land-use options were suggested - the nature conservation and tourism option, and the mining option. The mining option also included conservation and tourism as far as would be feasible in conjunction with mining.[103]

The EIA predicted both negative and positive impacts that would arise from the two proposed land use options. The impacts were grouped into four main categories: environmental, economic and developmental, the indirect and intrinsic values associated with the Eastern Shores and issues related to institutional, policy and statutory frameworks.

Our interest lies in legal issues and foremost among these is the question of land ownership. It is mentioned in the EIA report[104] that people who previously occupied and used

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101 See The Eastern Shores of Lake St Lucia, EIA Summary Report, January 1993; CSIR Environmental Services, Pretoria, 1.
102 Op cit (n101).
103 Op cit (n101) 2.
104 Final Report Volume 4, Part 1, 52.

the land on and around the Eastern shores are known to have been removed from the land during the 1950-1970s.

> '...It would be difficult to establish the exact numbers of people evicted from the Eastern Shores without substantial effort. The point remains that several thousand people were removed from the area and that these people and their descendants are in a position to reclaim the land'.[105]

Another legal issue that arises from the Lake St Lucia EIA is the decision-making process which has been agreed to by government in accepting or rejecting the recommendations of the EIA. In terms of the Minerals Act (No 50 of 1991), the decision whether to grant rights to the mining company, rests with the Minister of Mineral and Energy Affairs. However, it was agreed that the EIA process would advise the government through recommendations made by the Review Panel. These recommendations would also be made public. Should the government choose to go against them, it would have to justify its decision politically but not legally. The question arises whether the decision-making process in such contentious developments cannot be improved in any way.

A rather interesting and important legal issue is whether or not the EIA has legal standing. According to the report[106], the EIA was executed in response to a Cabinet instruction. The Constitution in force at the time[107] provided that the executive authority is vested in the State President, acting in consultation with the ministers who are members of the Cabinet. The Cabinet instruction is binding in terms of constitutional law, provided that it does not contradict any existing legislation. The EIA therefore would also be seen to have legitimacy as a result of the process adopted.[108]

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105 Ibid (n104) 52.
106 Final Report Chapter 3.3 Volume 4 Part 1, 3-6.
107 South African Constitution (Act 110 of 1983).
108 Final Report Vol 4 part 1, 3-8.

In a report on the Legal Aspects of Lake St Lucia Dune Mining Proposal[109], it is stated that the legal status of the EIA inevitably ties in with the legal implications of the dune mining proposal. Of particular relevance are national statutes and Natal Provincial Ordinances. A broad spectrum of laws are pertinent ranging from mining statutes to resource conservation, pollution and development control laws as well as an international convention protecting wetlands.

As far as legislation on mining is concerned, the position is established by the Minerals Act[110] which repealed and replaced virtually all prior legislation on mining in South Africa. Provision is made under the Act for circumstances in which a mining authorization may be granted or refused.

Further, there is a requirement for compliance with certain water and air pollution control laws. More specifically a permit has to be obtained under the Water Act.[111]

As regards resource conservation, according to the Report, the Natal Nature Conservation Ordinance has some bearing on the proposal in that the Natal Parks Board can control access, issue permits regarding destruction or disturbance of wild birds and amphibians. The Forest Act[112], is pertinent in that the Cape Vidal has been declared a demarcated forest under the Act. A further permit would have to be obtained under this Act. A National Monuments Act[113] could prevent certain objects being excavated unless a permit is obtained.

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109 Report by JI Glazewski of the Environmental Law Unit, Faculty of Law, University of Cape Town.
110 Act 50 of 1991.
111 Act 54 of 1956.
112 Act 122 of 1984.
113 Act 28 of 1969.

The proponents would also have to comply with certain statutory rehabilitation requirements under the Mines and Works Act.[114] These are administered by the Government Mining Engineer and could be supplemented by further specific conditions inserted into the mining lease.[115]

The implications of the above laws in regard to EIA legislation are quite obvious. If EIA is to live by its definition, aims and objectives as '... a systematic examination of the environmental consequences of a proposal project with the aim of providing decision makers with an account of the implications of alternative courses of action before a decision is taken...'[116], then it is no wonder that a decision on the Lake St Lucia mining project has so far failed to materialise and a number of other alternative projects have been consistently suggested.

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114 Act 27 of 1956.
115 Report by JI Glazewski, op cit, 624.
116 PADC A Manual for the Assessment of Major Development Proposals, HMSO, London, 1981.

CHAPTER 5

CONCLUDING REMARKS

The use of EIA as an environmental management and planning tool for development projects is slowly increasing in Africa. As it is still a relatively new concept, several countries lack information as well as the resources needed to conduct EIA studies. The incorporation of EIA therefore, into institutional and legislative framework of many African countries is as yet incomplete.

From the foregoing discussion, the EIA procedures that have been adopted by different countries can be distinguished according to whether they are based in 'informal' procedures, which are often modified or adapted to the needs of individual situations and proposals, or on 'formal' procedures which are sometimes embodied in legislation, and which are specifically designed to ensure an integrated examination of economic, social and environmental factors affecting a development proposal.

In some African countries, therefore, there has been a thorough and systematic effort to create a distinct EIA process and to provide the institutional and legislative resources needed to make it operate, as has been seen with South Africa and Nigeria. Other countries rely on exceedingly brief and unspecific references in statute law to the desirability of taking environmental factors into account when decisions are made about development to provide the legal and/or political basis for EIA.

It has been seen that environmental legislation in some African countries dates back to the colonial period - EIA being anew concept, is obviously not sufficiently provided for in such legislation. In 1988 the World Bank Study on Economic Development withe Environmental Strategies for Mauritius concluded that -

> 'The existing legislative framework concerning environmental protection and management in Mauritius is grossly inadequate. The laws which bear on the subject are inconsistent, some are outdated. There are areas of duplication or inconsistency in coverage, responsibility and authority, and there are major gaps in coverage. Where regulation does exist, the penalties are uniformly low, adequate enforcement is reported to be lacking and there is inadequate provision for accountability'.[117]

This may be said for many other African countries and although Mauritius may have done something about it by proposing the 1991 Environmental Protection Bill, many other countries have not.

As observed by Kakonge and Imevbore:

> 'There is therefore a need for most of the African countries to review their existing environmental protection and land-use legislation and to design a comprehensive legislative framework for the application of EIA'.[118]

It has been seen that although some African countries have laws requiring that EIA be undertaken for certain projects or programmes, a number of others have sectorial laws that require EIA to be conducted.

> 'In other instances EIA is not mandated by specific laws, but is undertaken as part of the administrative and quasi-legal permitting procedures. There is therefore a need for formal EIA for certain kinds of projects'.[119]

Also, at the regional or sub-regional level EIA legislation is necessary in order to address environmental problems that cross frontiers and that involve common resources (eg river systems, transcontinental roads, the disposal of toxic waste, etc).[120]

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117 As quoted in JO Karonge and A Imevbore in Environmental Impact Assessment Review Vol 13, 1993, op cit (n37) 300.
118 Kakonge and Imevbore, op cit (n37) 301.
119 Op cit (n37) 304.
120 Op cit (n37) 305.

A number of legal issues and implications have been discussed with reference to particular projects in various parts of Africa. The issues of public participation and compensation have been seen to be pertinent with regard to the Lesotho Highland Water Project, particularly in view of the fact that Lesotho is one of those countries without specific EIA legislation. Issues of enforcement and implementation, secrecy (or public disclosure) and accountability have also been seen to be relevant in regard to the Tana and Athi Rivers Development Authority in Kenya. And in regard to the mining proposal of the Eastern Shores of Lake St Lucia, issues of land ownership, legal status of EIA and the implications of pertinent statutes and other laws have also been raised and discussed.

It is therefore only fair to conclude that the need for legislation requiring all major developments to undergo EIA as a prerequisite cannot be over-emphasized. Without such legislation EIA will not influence decision-making and will continue to be used on an 'ad hoc' basis by development assistance organisations only as a condition of project funding.[121]

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121 Kakonge and Imevbore, op cit (n37) 307.

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