

1 INTRODUCTION

1.1 BACKGROUND

The Southern African Institute for Environmental Assessment (“SAIEA”) is currently undertaking a two-year project, the aim of which is to enhance the participation by civil society in environmental assessment (“EA”) decision-making in countries in the Southern African Development Community (“SADC”) (“the Calabash project”). This enterprise is supported by the World Bank and the Canadian CIDA. One of the outputs of the Calabash project is the preparation of a legal guide to assist civil society to engage in the decision-making related to environmental assessment.

1.2 THE ROLE OF PUBLIC PARTICIPATION IN THE EA DECISION-MAKING PROCESS

Before considering the purpose of this guide, it is useful to explain the role of public participation in the EA decision-making process, since this gives some insight into the motivation for preparing the guide. Underpinning the idea of public participation is the recognition that it facilitates the exercise of various rights that people may have. Importantly, sound public participation allows for the views of a wide range of potentially affected parties to be explored and increases the likelihood of marginalised communities voicing their concerns. This may assist environmental decision-makers in ensuring an equitable distribution of environmental impacts and thereby, may facilitate environmental justice. In addition, public participation is likely to result in more informed decisions that enjoy a higher degree of public support. Each of these factors will result in better environmental governance.

1.3 PURPOSE OF THIS LEGAL GUIDE

The purpose of this legal guide is to provide civil society in the SADC countries with practical assistance in understanding the opportunities that the laws in each of the SADC countries provide for participating in the EA process and the manner in which this may most effectively be done.

1.4 FORMAT OF THE GUIDELINE

Before considering the detailed legal provisions relating to EA decision-making in each country, this guide looks at a broad overview of legal instruments that regulate EA. Firstly, the guide considers briefly international and regional conventions and their implications for the EA decision-making process. Thereafter, it explains the difference between so-called hard and soft law. It also explores the distinction between civil and common law jurisdictions within the SADC region. Finally, the guide introduces briefly the applicability of African customary and common law in the EA decision-making process. Thereafter, it comprises a country-by-country analysis, arranged alphabetically.

In order to assist readers in determining with certainty whether any given proposed development falls within the EA regime in a particular country, we have listed the trigger developments and activities for each state. However, so as not to burden the guide, we have listed these in Annex 1 at the end of the guide.

For the sake of consistency, the laws of each country have been answered by posing and answering a series of questions. For the sake of convenience, we have prepared a summary of the opportunities for public participation in each country in the form of a table; is set out in Annex 2 to the guide. Finally, in Annex 3, examples of letters that may be written in order to facilitate participation in the EA process have been included. We have used Malawi as an example, but these letters could be used in anyone of the SADC counties, provided that reference is made to the applicable laws in the country in question.

1.5 INTERNATIONAL AND REGIONAL TREATIES

A number of international and regional treaties have been entered into by one or more of the SADC member states. Unlike national legislation, these treaties do not ordinarily impose obligations or confer rights upon individuals, but only impose obligations on the countries that become parties to them. However, the position is different in civil and common law jurisdictions. This difference is dealt with in section 1.6 of this guide.

1.5.1 International Conventions

International conventions that are binding in the SADC region do not generally speaking, create opportunities for the participation of communities in decisions that affect them, but there are exceptions, notably the International Covenant on Civil and Political Rights¹ and the Convention on Biological Diversity (“CBD”),² both of which allow for public participation in instances where a project may have significant adverse impacts on the environment.³ Furthermore, the CBD provides that contracting parties must introduce appropriate measures which require EAs on proposed projects, programmes and policies that are likely to have significant adverse impacts on biological diversity with a view to avoiding or minimising such effects.⁴ Also of importance is that there is an obligation on the contracting parties, where appropriate, to allow for public participation in those EAs.⁵ These provisions are set out in the CBD as follows:

“Each Contracting Party, as far as possible and as appropriate, shall:

(a) Introduce appropriate procedures requiring environmental impact assessment of its

¹ It came into force on 21 October 1986.

² Rio de Janeiro, 1992. It entered into force on 29 December 1993.

³ Articles 27 and 14(1)(a) respectively.

⁴ Article 14(1)(a) and (d).

⁵ Article 14(1)(a).

proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimising 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.”⁶

These obligations are flexible since they are qualified by phrases such as "as far as possible", "as appropriate", and "where appropriate".⁷ As a result, and despite the fact that all of the SADC countries are contracting parties to the CBD,⁸ the impact on and the relevance of these obligations on each of the SADC countries vary widely.

As discussed in section 2 of this guide, in the case of Angola, for example, the Constitution specifically requires that in the assessment of disputes by Angolan Courts, international instruments to which Angola has adhered apply even where they are not invoked by the parties. The Angolan Constitution also stipulates that the fundamental rights it contains do not exclude other rights stemming from the laws and applicable rules of international law.⁹ International instruments such as the CBD, accordingly, play a vital role in the Angolan legal system insofar as they provide for rights to public participation. The same is not true in all countries considered in this guide.

Significantly, the Convention on Environmental Impact Assessment in a Transboundary Context,¹⁰ commonly referred to as the Espoo Convention, sets out the obligations of Parties to assess the environmental impact of certain activities and also lays down the general obligation of States to notify and consult each other on proposed major projects that are likely to have a significant adverse transboundary environmental impact. In 2001 an amendment was adopted, which once brought into force, will extend accession to UN member states that are not members of the UN Economic Commission for Europe, thereby paving the way for African countries to become signatories to it.

1.5.2 Regional Conventions

References to public participation in regional conventions are limited. Depending on the nature or the purpose for which a regional convention was enacted, it may make provision for the right to be heard, which right may include the right to appeal to competent authorities, the right to receive information and the right to an environment

⁶ Article 14(a) and (b).

⁷ Article 14(1)(a).

⁸ [Http://www.diodiv.org/world/parties.ast](http://www.diodiv.org/world/parties.ast) accessed on 19/01/2005.

⁹ See section 2 of this document.

¹⁰ Espoo (Finland), 26 February 1991. It entered into force on 10 September 1997

favourable for development.¹¹

One of the most important regional legal instruments is the African Charter on Human and Peoples' Rights ("the Charter").¹² The Charter provides that every individual shall have the right to have his or her cause heard, which includes, the right to appeal to competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs enforced.¹³ An individual also has the right to receive information.¹⁴

The African Convention on the Conservation of Nature and Natural Resources,¹⁵ as revised, provides for, among other things, procedural rights which include the adoption of legislative and other measures for the dissemination of environmental information, access of the public to environmental information and participation in decision-making.¹⁶ Included in this are measures to enable the active participation of local communities in planning processes and management of natural resources.¹⁷ These regional conventions provide the impetus for active participation of communities in matters that relate to the environment.

SADC Protocols which are relevant to the EA decision-making process include the Protocol on Shared Watercourses;¹⁸ the Revised Protocol on Shared Watercourses¹⁹ and the Protocol on Forestry.²⁰ The Protocol and the Revised Protocol on Shared Watercourses provide for the management and regulation of shared watercourses. The Protocol on Shared Watercourses specifically, among other things, provides for the promotion of EIA in respect of developments within the shared watercourses system.²¹ Under the Revised Protocol, watercourse States are entitled to participate in consultations regarding the implementation of a particular project, programme or use where their use of

¹¹ See for example the African Charter Human and Peoples' Rights, articles 7(1)(a), 9(1) and 24.

¹² Which was adopted on 27 June 1981 and entered into force on 21 October 1986, <http://www1.umn.edu/humanrts/instree/z1afchar.htm> accessed 19/01/2005. All the SADC member countries have ratified or acceded to the Charter. Unlike other conventions, the Charter imposes duties upon the individuals to, among other things, preserve and strengthen positive African cultural values in the spirit of dialogue and consultation. The Commission, which is created in terms of the African Charter to promote human and peoples' rights, must also take into consideration the customs generally accepted as law (articles 29(7) and 61).

¹³ Article 7(1)(a).

¹⁴ Article 9(1).

¹⁵ Adopted in Mozambique on 11 July 2003. It has not yet come into force.

¹⁶ Article XVI(1)(a-d).

¹⁷ Article XVII(3).

¹⁸ Which was signed on 28 August 1995 and entered into force on the same day.

¹⁹ Which was signed on 7 August 2000.

²⁰ Which was signed on 3 October 2002.

²¹ Article 5(d)(iii).

shared watercourses may be significantly affected.²²

The Forestry Protocol, which recognises the value of forests and that the unique forms of life within them must be safeguarded, contains a number of provisions relevant to public participation. State parties are required to facilitate public participation in decision-making regarding sustainable management of forests and to recognise that communities are entitled to effective involvement in the sustainable management of those forests.²³ National and administrative measures to, among other things, grant interested and affected parties the right to participate in decision-making regarding the natural forests and to have access to any information that is necessary to enable this right to be exercised effectively, must be enforced and implemented.²⁴ Prior to granting authorisation to plant, use or manage forests, a full assessment of the environmental and social impacts, with particular regard to the rights of women,²⁵ of the proposed activity must be conducted and taken into account by the decision-maker before making his or her decision.²⁶

1.5.3 Soft law instruments

The international and regional conventions discussed above are often referred to as “hard law”. Policies or directives, sometimes described as “soft law” may also have a bearing on participation in the EA process. Agenda 21, which is an action plan and blueprint for sustainable development that was adopted at the 1992 Rio Summit, is an example of such an instrument. It recognises, among other things, the importance of integrating socio-economic considerations, environmental issues and public participation in the environmental decision-making process, thereby improving it.²⁷ The inter-relationship between the natural environment and the physical well-being of indigenous people and the role of indigenous people in implementing environmentally sound and sustainable development practices is also recognised.²⁸ It acknowledges that information must be useable for decision-making and that the information gap has to be breached.²⁹

All of the above-mentioned instruments are indicative of the obligations imposed upon states, at an international level, to allow for effective public participation of all relevant stakeholders in potential projects which may have a significant impact on the environment, particularly where it threatens their livelihood and existence.

²² Article 6(7).

²³ Article 4(9) and (10)

²⁴ Article 11(c).

²⁵ Article 13(a).

²⁶ Article 11(f).

²⁷ Chapter 8.

²⁸ Chapter 26.

²⁹ Chapter 40.

1.6 DISTINCTION BETWEEN CIVIL AND COMMON LAW JURISDICTIONS

Legal systems are often grouped into categories or “families” based on their fundamental characteristics and historical development. The common law³⁰ family of legal systems are those that have their roots in English law and are characterised by the central role played by the judgments of courts. In common law countries judgments are accorded a certain status based on the courts that gave them (so an appeal court decision would rank higher than the judgment of the court that first heard the matter) and the number of judges that presided over the matter. As a result of the principle of *stare decisis*³¹ (standing by previous decisions) a court is bound to follow and apply the rationale of earlier judgment with a higher status, and must take account of similar judgments of other courts at the same level. The effect of this is to create an extensive body of non-statutory law, called “common law”, that reflects the consensus of centuries of judgments by courts. This common law may be displaced by legislation, but in order to get a full picture of the law on a particular subject it is necessary to consider both legislation and the decided cases on the subject. Within the SADC region, Botswana, Tanzania and Zimbabwe are examples of common-law jurisdictions because their legal systems were shaped by the legal system of the former colonial power, Britain.

The civil law family of legal systems are based originally on the legal system of both the Roman Republic and the Roman Empire, from its earliest days to the time of the Eastern Roman Empire, and including the laws of the Emperor Justinian, well after the fall of Rome itself.³² Civil law systems are characterised by the fact that most of the fundamental legal principles of the legal system have been distilled and incorporated into written codes, such as a Civil Code, or a Criminal Code. This system of codification was introduced in Europe by the French Emperor Napoleon and subsequently spread throughout the French Empire in Europe (e.g. to countries such as the Netherlands, Portugal and Germany), and at a later stage to African colonies of these European states.

In civil law jurisdictions judges are not bound to follow previous judgments, so a single article in a code may be interpreted differently by courts at different times. Civil law systems are also characterised by the existence of a separate system of administrative courts and tribunals that regulate the acts of public bodies. Judges and other judicial

³⁰ The “common law” has been defined as: “The system of laws originated and developed in England and based on court decisions, on the doctrines implicit in those decisions, and on customs and usages rather than on codified written laws.” (*The American Heritage® Dictionary of the English Language*, Fourth Edition, Houghton Mifflin Company).

³¹ “*Stare decisis*” literally translates as “to stand by decided matters”. The phrase “*stare decisis*” is itself an abbreviation of the Latin phrase “*stare decisis et non quieta movere*” which translates as “to stand by decisions and not to disturb settled matters”. Merriam-Webster’s *Dictionary of Law* 1996 defines this principle as follows: “The doctrine under which courts adhere to precedent on questions of law in order to insure certainty, consistency, and stability in the administration of justice with departure from precedent permitted for compelling reasons (as to prevent the perpetuation of injustice).”

³² <http://en.wikipedia.org/wiki/Rommon-law> accessed on 20/01/2005.

officers in civil law jurisdictions are also required to play a more active role in investigating contraventions of the law than their counterparts in common law jurisdictions, whose role is mainly to decide which of the litigants has put forward the most credible and legally sound case. Consequently the court procedures in civil law jurisdictions are referred to as being “inquisitorial” rather than being “adversarial” like those in common law legal systems.

In the SADC, region Angola and Mozambique, which were both colonised by Portugal, are examples of civil law jurisdictions. South Africa is an example of a mixed or hybrid legal system because although it is a common law country, many of its legal principles are derived from Roman-Dutch law which was introduced by the Dutch before the legal system in the Netherlands was codified. Namibian law is similar to South Africa law because Namibia was colonised by South Africa. Mauritius, too, can be classified as a mixed legal system because its courts function like those in common law countries (by virtue of the British occupation of Mauritius) but much of its laws are based on French law, the original colonial power.

An important difference between common law jurisdiction and civil law jurisdictions is to how international legal instruments like treaties become binding on the country and are incorporated into the law of that country. In civil law countries, treaties with other countries will usually become binding on the country once ratified by a signatory state, and will become binding within the country to the extent that they are sufficiently clearly worded to be able to be implemented. In common law jurisdictions on the other hand, treaties are usually not binding until the national parliament has ratified them, and national laws must be enacted to give effect to the obligations in the treaty within the country (i.e. it will not be directly binding on people within that country).

It therefore follows that in civil law jurisdictions, it is important to consider both the national (domestic) laws and the relevant provisions of international and regional treaties, whereas in common law jurisdictions, these treaties do not create binding domestic obligations directly, and the relevant provisions must first be enacted in domestic legislation before they are binding on people within the country.

1.7 THE RELEVANCE OF AFRICAN CUSTOMARY LAW

The legal systems and rules of the indigenous peoples of Africa are usually referred to collectively as “African customary law”.³³ African customary law systems are diverse but are typically unwritten (except in a few cases in which colonial powers or governments have attempted to codify aspects of African customary law). The elders of a community play an important role in perpetuating, developing and teaching customary law and in deciding disputes. However generally many members of a community would have the right to voice their view in traditional decision-making

³³ It should be noted however that in some countries like South Africa, the term “African customary law” is generally used to refer to the customs of Bantu people and not, for example, to the Khoi and San people who are also indigenous people to the region.

processes. This means that even though African customary laws may not specifically address the issue of public participation in environmental assessments, customary decision-making practices may give community members the right to be heard on issues that affect them, which may include proposed developments in the area.

In most SADC countries, African customary law systems have been largely (but not completely) displaced by the dominant common law or civil law legal systems. However, the constitutions of most SADC countries preserve African customary law and recognise its application (at least in traditional communities) to the extent that it does not conflict with the dominant legal system and in particular, constitutional rights such as the right to equality.

In compiling this guide, it was generally not possible to provide specific guidance on the rules or principles of customary law that would be relevant to EA decision-making in each SADC country. This was due to a number of factors, including the oral nature of African customary law and the fact that little of it is recorded in writing or easily accessible³⁴ and the fact that it varies from culture to culture and region to region. Consequently we have limited ourselves to discussing situations in which customary law is recognised in a country's constitution and its possible effects on environmental decision-making. Readers should, however, note that in certain situations customary law may provide opportunities for participation in decision-making in the EA process in their countries beyond those described here.

1.8 THE RELEVANCE OF COMMON LAW

As mentioned in section 1.6 of this guide, above, some of the member countries of SADC are former colonies of the United Kingdom. In those countries, the common law is of particular importance. The common law includes, among other things, rules of natural justice.³⁵ One of the principles of natural justice is the *audi alteram partem* rule, also called the *audi* principle, which essentially requires that a person who may be affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision.³⁶ This principle is one of the oldest principles of natural justice as the quote below indicates:

"It is true that the *audi alteram partem* principle is a very ancient one, deriving strength from a biblical passage...and the application of this rule to judicial proceedings is beyond doubt"³⁷

"This principle predates the Founding Fathers by 2000 years. Fairness in common sense requires it. It is essential not only for judicial proceedings but also for public discussion in a well functioning

³⁴ The resources that we accessed largely dealt with the traditional African customary law issues such as marriage and succession.

³⁵ Johan De Vaal, Ian Curry and Gerhard Erasmus, *The Bill of Rights Handbook*, fourth edition, page 509.

³⁶ See De Vaal and others, footnote 35.

³⁷ <http://www.ebc-india.com/lawyer/article/71v1a2.htm> accessed on 19/01/2005.

democracy."³⁸

The extent to which this principle has been modified by statutory laws of each country where common law applies, differs in each case. It is however clear that there are two main requirements to which an affected individual is entitled: notice of the intended action and a proper opportunity to be heard.³⁹

The importance of the principle is that it has to be enforced in all circumstances where a decision-maker exercises powers given to him by the law unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply.⁴⁰ In other words, in all countries where there is a common law legal system, the decision-maker on the EA is obliged to apply the principle unless it is clear that Parliament has passed a law making it clear that it should not apply. As is indicated, below, most countries with common law jurisdictions provide in almost all circumstances that EAs must ensure for public participation or other forms of consultation. The presence of such rights or opportunities for public participation do not take away the application of the principle.

There are other important aspects of this principle. Firstly, for anyone to rely on the principle when involved in any EA processes, one must ordinarily establish his, her or its standing in common law. This means essentially, the right to be heard by a court or the decision-maker in question. At the common law there are three things that the person must claim:

1. some legal right or recognised interest is a stake;
2. the right or interest is direct; and
3. the right or interest is a personal (and possibly special) one.⁴¹

In each case where one relies on a common law right to approach a decision-maker with a view to participate in an EA process these three things must be demonstrated. It should not usually be difficult, since in most countries within the SADC, the Constitution provides an environmental right or directive of state principle. The precise nature of the ability of an individual to (successfully) rely on the common law will depend on a range of issues. These issues include the Court decisions on the *audi* principle and the provisions of the laws that deal with EAs.

It is important to note that the common law does not afford any right of appeal, which is therefore only available if provided for by statute.⁴² The remedy that the common law affords anyone who is dissatisfied by a decision of a decision-maker in the EA process is

³⁸ <http://www.enterstageright.com/archive/articles/1299awg.htm> accessed on 20/01/2005.

³⁹ Lawrence Baxter, *Administrative Law*, (1984), at page 544.

⁴⁰ <http://www.ebc/india.com/lawyer/articles/71v1a2.htm> accessed on 19/01/2005.

⁴¹ Lawrence Baxter at page 652.

⁴² Lawrence Baxter at page 306.

to approach a Court for a decision setting aside the EA decision.⁴³ This is one of the main weakness of the common law. The institution of Court proceedings is expensive and often not affordable for many individuals and communities. In addition, legal proceedings are complex and should ideally be instituted by a lawyer on behalf of the affected person, people or communities do not always have access to lawyers. However, some countries provide legal assistance through state-funded lawyers, or pay private lawyers through legal aid. It is important to bear in mind that the institution of Court proceedings must be done without unreasonable delay, failing which the Court may refuse give an order in favour of the applicant on the basis that the Courts are reluctant to hear the applicant who “now wishes to drag a cow long dead out of a ditch.”⁴⁴ Any person wishing to institute legal proceedings relying on the common law is advised to do so within a reasonable time of the decision on the EA being taken.

1.9 LIMITATIONS OF THE GUIDE

This guide is obviously not an exhaustive description of all of the laws regulating the EA decision-making process in each of the SADC countries. Furthermore, it is written at a particular point in time and laws often change, especially in a new field of law such as this one. It is therefore important not to rely entirely on this guide when participating in the EA process.

2 COUNTRY BY COUNTRY ANALYSIS

2.1 REPUBLIC OF ANGOLA

2.1.1 Brief description of legal framework and applicable laws

The Republic of Angola’s legal system is a civil law one.⁴⁵ The laws applicable to participation in the EA decision-making process are the Constitutional Law of the Republic of Angola 1992 (“the Angolan Constitution”), the General Environmental Law⁴⁶ and international law instruments. Customary law may also be applicable.⁴⁷

The Angolan Constitution gives all citizens the right to live in a healthy and unpolluted environment.⁴⁸ It also obliges the State to take the necessary measures to protect the environment and to maintain ecological balance.⁴⁹ These constitute a fundamental right

⁴³ Lawrence Baxter at page 305.

⁴⁴ Lawrence Baxter, page 715.

⁴⁵ <http://www.hrw.org/backgrounder/africa/angola/2004/4.htm> accessed on 2 December 2004.

⁴⁶ Law No. 5/98, of 19 June 1998.

⁴⁷ http://www.hrdc.unam.na/an_politics accessed on 17 January 2005.

⁴⁸ Article 24.1.

⁴⁹ Article 24.2.

of the citizen and duty of the State, respectively, in the Angolan Constitution⁵⁰ and form a solid foundation for opportunities for public participation in EA for citizens of Angola. There is also a fundamental constitutional principle which requires that "the State shall promote the protection and conservation of natural resources guiding the exploitation and use thereof for the benefit of the community as a whole".⁵¹

2.1.2 Is there a legal obligation to undertake environmental assessment?

The General Environmental Law was enacted in response to constitutional provisions referred to above.⁵² Under the General Environmental Law, there is an obligation to carry out EIAs for all undertakings which have an impact on the balance and well-being of the environment and society.⁵³ There is also an obligation on the Government to publish specific legislation defining the form to be taken by EIAs and other related requirements.⁵⁴

2.1.3 In what circumstances does that legal obligation apply?

EIAs and Social Impact Assessments must also be conducted for all planned undertakings which involve activities which may affect or impact on communities, interfere with the ecological balance or use of natural resources to the detriment of third parties.⁵⁵ The list of planned undertakings is set out in a schedule at the back of this guide.

2.1.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

All EA processes must include a public consultation process⁵⁶ and there is therefore a clear opportunity for public participation. It states that:

"An Environmental and Social Impact Assessment shall be conducted for all planned undertakings which involve activities which may affect the interests of communities, interfere with the ecological balance or use natural resources to the detriment of third parties, such assessment shall include a public consultation process."⁵⁷

Importantly, the General Environmental Law gives all citizens the right to be informed about the management of the country's environment while it also safeguards the rights of

⁵⁰ These provisions are part of Part II, which is titled "FUNDAMENTAL RIGHTS AND DUTIES."

⁵¹ Article 12.2.

⁵² The preamble of the General Environmental Law.

⁵³ Article 16.1.

⁵⁴ Article 16.2

⁵⁵ Article 10.

⁵⁶ Article 10 and article 16.3(d).

⁵⁷ Article 10.

third parties to the privacy of their information.⁵⁸ This further strengthens the opportunity of the public to participate in the EA process.

2.1.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

The question of what happens where a member of the public has participated in the public participation process but is not satisfied either with the process itself or with the manner in which the views of the public, or any member of the public, or any section of the public were considered is governed by both the Angolan Constitution and the General Environmental Law. Simply put, where that happens it means that an opportunity to participate that is afforded to citizens may have been compromised. One of the fundamental rights of a citizen is the right to contest and take legal action against any acts that violate his or her rights as set out in the Angolan Constitution and other legislation.⁵⁹ The General Environmental Law gives content to this right in the context of EA as it provides that "any citizen who deems that his rights ... have been violated or are going to be violated may have recourse to the Court in order to restore his rights or prevent such violation."⁶⁰

2.1.6 Consideration of ancillary rights and opportunities for participating in environmental assessment decision-making

In addition to these rights, the General Environmental Law also gives a right to "all persons" to access to environmental education in order to be able to take part effectively in the management of the environment.⁶¹ Importantly, there is an ambiguity regarding this right. The Constitution and the General Environmental Law grant rights to "citizens" to participate in EA processes. The right that is given here to access environmental education is given to "all persons", i.e. the right to environmental education appears to be broader than the environmental right.

A further opportunity to participate in EA processes is afforded by the Angolan Constitution. Importantly, it provides that the constitutional rights do not exclude other rights stemming from laws and applicable rules of international law.⁶² It further states that even where one relies on fundamental rights in the Angolan Constitution, the laws involved must be interpreted and incorporated in a manner that is consistent with The Universal Declaration of the Rights of Man, the African Charter on the Rights of Man

⁵⁸ Article 21.

⁵⁹ Article 43.

⁶⁰ Article 23.1.

⁶¹ Article 22.

⁶² Article 21.

and Peoples and other international instruments to which Angola has adhered.⁶³ The international instruments to which Angola has acceded apply in the assessment of disputes by Angolan courts, even where they were not invoked by any of the parties to the legal proceedings.⁶⁴ As indicated in section 1.4.1 of this guide, the CBD is one of the crucial international instruments to which Angola is a party and, since it is a civil law jurisdiction, the provisions of the CBD are immediately applicable. The CBD provides that each Contracting Party must, as far as possible and as appropriate, "introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimising such effects and, where appropriate, allow for public participation in such procedures."⁶⁵ Importantly, the obligations that are imposed on the Angolan State may be viewed by the Angolan Courts as affording corresponding rights to Angolan Citizens and other people within the borders of Angola.

2.2 REPUBLIC OF BOTSWANA

2.2.1 Brief description of legal framework and applicable laws

Botswana's legal system is based on Roman Dutch Law and customary law.⁶⁶ The Constitution of Botswana⁶⁷ ("the Constitution") states that every individual person in Botswana is entitled to their fundamental rights and freedoms, subject to the rights and freedoms of others.⁶⁸ A person may under appropriate circumstances be deprived of property where, among other things, it is necessary to secure the development or utilisation of that property for a purpose beneficial to the community.⁶⁹ The Constitution provides for freedom of conscience,⁷⁰ expression,⁷¹ assembly and association.⁷² The protection on the discrimination of race is limited to exclude, among other things, the application of customary law.⁷³

The Environmental Impact Assessment Bill has recently been presented to Parliament by

⁶³ Article 21.

⁶⁴ Article 21.3.

⁶⁵ Article 14(1)(a).

⁶⁶ <http://www.cia.gov/cia/publications/factbook/geos/bc.html> accessed on 17 January 2004.

⁶⁷ Adopted in September 1966. Only a summary of this Constitution could be obtained at <http://www.ditshwanelo.org.bw/index/Other/Botswana%20Constitution.htm>.

⁶⁸ Section 3.

⁶⁹ Section 8(1)(a)(ii).

⁷⁰ Section 11(1).

⁷¹ Section 12.

⁷² Section 13.

⁷³ Section 15(4)(d).

the Minister for Environment, Wildlife and Tourism.⁷⁴ The Minister indicated that there are currently no laws in Botswana providing for EA and even where assessments have been undertaken, it was difficult to determine the success or failure of such an assessment as they were no criteria against which to measure the EA. It appears that the government currently depends on administrative persuasion or on financiers of projects requiring EIAs before they will provide funds for such developments.⁷⁵

We have on numerous occasions requested copies of the Bill from the Botswana government and other agencies in the area. We have however not been able to obtain a copy of the Bill. It has however been indicated that the Bill will be passed by Parliament in the near future.⁷⁶ We were advised that we would only be able to obtain a copy of the Bill once it had been passed into law.⁷⁷

2.3 DEMOCRATIC REPUBLIC OF CONGO

2.3.1 Brief description of legal framework and applicable laws

The legal system of the Democratic Republic of Congo (DRC) is a combination of civil law and tribal law.⁷⁸ The DRC adopted its Constitution on 1 April 2003; it contains provisions which are relevant to this guide. It provides that all "Congolese shall have the right to a healthy environment that is favourable to their development."⁷⁹ It also imposes a duty on the public authorities and citizens to ensure the protection of the environment according to conditions defined by the law.⁸⁰ There is also a provision which gives all persons the right to information.⁸¹ The provisions of the Constitution mentioned here provide a basis for the passing of laws which will provide for EIAs in the DRC. The Constitution also provides that courts must "apply the law and statutory acts and also customary law, insofar as the latter conforms to public law and order and accepted moral standards."⁸² Customary law is therefore recognised by the Constitution.

Currently, there are no laws in the country which provide for EIAs. Instead, the

⁷⁴ Republic of Botswana: *Daily News* online, "Bill to safeguard Environment" of 24 February 2005 as accessed on 31 March 2005.

⁷⁵ *Daily News* online, article quoted above.

⁷⁶ In an e-mail received from Dr L Gakale, Permanent Secretary of the department of Environment, Wildlife and Tourism.

⁷⁷ In an email from Mushanana L. Nchunga (Executive Secretary, National Conservation Strategy Coordinating Agency) on 23 November 2004.

⁷⁸ <http://www.cia.gov/cia/publications/setbook/deos/cp.html> accessed on 9 December 2004.

⁷⁹ Article 54. This is obviously significant in that it therefore means that there is not a right available to non-Congolese people living in the DRC.

⁸⁰ Article 54.

⁸¹ Article 29.

⁸² Article 149.

Environmental Guidelines outlined in the *World Bank Pollution Prevention and Abatement Handbook*⁸³ (“the World Bank Handbook”) are used as the standards for environmental compliance.⁸⁴

2.3.2 Is there a legal obligation to undertake environmental assessment?

There is currently no legal obligation to undertake EA. The Constitution of DRC does provide for the framework for the creation of this legal obligation as it contains an environmental clause.⁸⁵

2.3.3 In what circumstances does that legal obligation apply?

The World Bank Handbook divides proposed projects into different categories. Of importance are Categories A and B. A proposed project is classified as Category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented.⁸⁶ On the other hand, Category B projects are those which are described as having potential adverse environmental impacts on populations or environmentally important areas which are less adverse than those of Category A projects.⁸⁷ A list of these two categories of projects are set out in Annex 1 at the back of this guide.

2.3.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

The World Bank Handbook stipulates that for all Category A projects there must be public consultation of the project-affected groups and local and governmental organisations about the project's environmental aspects and their views must be taken into account.⁸⁸ With respect to Category B projects, public consultation must be undertaken where it is appropriate.⁸⁹

The opportunity for the public to participate in EAs in DRC is therefore provided for by the World Bank Handbook. Such an opportunity is potentially weak. This is because the guidelines were designed by the World Bank to deal with the projects that it finances. There is no remedy for the public in a case where the project is not financed by the World Bank. Furthermore, if opportunities given to participate in EA decision-making process are inadequate or where the views of the public are not taken into consideration, adequately or at all, when a decision to continue with a proposed project is taken, it is

⁸³ 1998.

⁸⁴ This appears in the environmental impact assessment document of the Dikulushi Copper Silver Project dated April 2003 done by African Mining Consultants at page 5.

⁸⁵ Article 54.

⁸⁶ Section 8(a) of the International Finance Corporation's Operational Policies, dated October 1998.

⁸⁷ Section 8(b).

⁸⁸ Section 12.

⁸⁹ Section 12.

doubtful whether civil society has any right of recourse. Although this is the case, the World Bank Handbook requires that members of the public be given sufficient information to enable them to participate in EA.⁹⁰ Until there is a statute in the country which effectively deals with EIA's, the opportunities for public participation in EAs will remain weak.

Importantly, however, the DRC is a party to the CBD, which goes a long way to provide for opportunities in the EAs.⁹¹ Also significant is the fact that the DRC is a civil law jurisdiction, as a result of which the public participation requirements of the CBD are binding in the DRC, despite the absence of domestic law. Those provisions are discussed in section 1 of this guide.

2.4 KINGDOM OF LESOTHO

2.4.1 Brief description of legal framework and applicable laws

The Kingdom of Lesotho has a legal system which consists of the common law, customary law and statutory law.⁹² The laws applicable to EA are the Constitution of Lesotho ("the Constitution") and the Environment Act.⁹³

The Constitution provides that Lesotho must adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and that it must also endeavour to assure all citizens a sound and safe environment adequate for their health and well-being.⁹⁴ This requirement is one of the principles of State policy which form part of the public policy of Lesotho but are not enforceable by any court.⁹⁵ These principles merely guide the authorities and agencies and other public authorities in the performance of their functions with a view to achieving progressively the full realisation of those principles.⁹⁶

2.4.2 Is there a legal obligation to undertake environmental assessment?

At present there is no obligation to undertake an EA since the Environment Act has not come into operation even though it has been passed by the Parliament.⁹⁷ Once it comes

⁹⁰ Section 14.

⁹¹ <http://www.biodiv.org/world/parties.asp>

⁹² <http://www.broitcivil.uottawa.ca/wor3/emg/commonwealthmembers.htm> accessed on 12 December 2004.

⁹³ Act No. 15 of 2001.

⁹⁴ Section 36.

⁹⁵ Section 25.

⁹⁶ Section 25.

⁹⁷ Bore Motsamai, Jagiso and Keatimilwe and Motebang Pomela. (Part II Country Report: Lesotho) in Southern African Institute for Environmental Assessment: Environmental Impact Assessment in Southern

into operation, the Environment Act will introduce an obligation to undertake EA and will also provide for rights and opportunities to participate in the EA process.

2.4.3 In what circumstances does that legal obligation apply?

The Environment Act provides that an EIA will be triggered by projects and activities which are specified in its Schedule.⁹⁸ The Schedule is not attached to the Act and will be (presumably) attached before or when the Act comes into operation.

2.4.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

The precise nature of the public participation opportunities that are provided by the Environment Act is dependent on the discretion of the Lesotho Environment Authority. Also of importance is that the EA process has two stages and this affects the nature of public participation provided for. The first stage involves the submission by the developer of a project brief, and for consideration by the Authority.⁹⁹ The Environment Act states that:

“The Authority shall, where it is of the view that the project or activity is likely to have significant impact on the environment invite written or oral comments from the public thereon and where necessary may consult the community of the areas where the proposed project will be situated, of the proposed project and the contents of the project brief.”¹⁰⁰

In this regard, the Authority has a discretion to invite written or oral comments from the public in respect of the project or activity that it is of the view, that it is likely to have significant impact on the environment. Where necessary, the Authority may decide to consult the community of the areas where the project will be situated. At this stage, the Authority may decide to approve or refuse the proposed project or activity.¹⁰¹

The second stage is triggered if the Authority is of the opinion that the project is likely to have a significant impact on the environment and requires that an EA must be conducted.¹⁰² The Environment Act states that:

“The Authority shall, on receipt of the environmental impact statement submitted to it in accordance with section 29 and in consultation with the Line Ministry study the environmental impact statement and if it deems it proper in its form and content shall –

Africa. Windhoek: Southern African Institute for Environmental Assessment, page 71. This is further confirmed by a country paper prepared for the United Nations Development Program Drylands Development Centre titled REVIEW OF DECENTRALISED NATURAL RESOURCES MANAGEMENT IN LESOTHO, by L. K. Mdele, dated November 2004, page 21.

⁹⁸ Section 27(1).

⁹⁹ Section 28.

¹⁰⁰ Section 28(5).

¹⁰¹ Section 28(3).

¹⁰² Section 28(4).

- (a) invite public comments on the environment impact statement in general;
- (b) invite the comment of those persons who are most likely to be affected by the proposed project by specifically drawing their attention to the environmental impact statement;
- (c) consider the environmental impact statement and all the comments made;
- (d) require the holding of a public hearing for persons most likely to be affected by the proposed project or activity if he deems it necessary;
- (e) approve the project or activity after consultation with the relevant Line Ministry if it is satisfied that the project or activity shall not result in significant damage to the environment;
- (f) require that (*sic*) the developer to redesign the project or do such other thing as the Authority considers necessary, taking into consideration the suggestions or comments made and all environmental factors; or
- (g) reject the project where it is of the opinion that the project may cause significant and irreversible damage to the environment.”¹⁰³

The Authority therefore has a discretion to invite public comments on the environment impact statement in general; invite the comment of those persons who are most likely to be affected by the proposed project by specifically drawing their attention to the environmental impact statement; and require the holding of a public hearing for persons most likely to be affected by the proposed project or activity if it deems it necessary.

2.4.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

Any person who is aggrieved by that decision may appeal to the Environmental Tribunal within 21 days of the date upon which the person is informed of the decision.¹⁰⁴ A person who is aggrieved by the decision of the Tribunal may appeal to the High Court within 30 days of the decision of the Tribunal.¹⁰⁵ The opportunities to lodge appeals with the Tribunal and the High Court will be important once the Environment Act has come into operation because one of the requirements is that the Environment Authority must consider the environmental impact statement and all of the comments made.¹⁰⁶ These opportunities will be important where a person is of the view that his or her or its comments were not considered, adequately or at all.

The person instituting appeal proceedings must give the secretary of the Tribunal a written notice of the appeal, which notice must set out the grounds on which the appeal is

¹⁰³ Section 30.

¹⁰⁴ Section 111(1).

¹⁰⁵ Section 111(3).

¹⁰⁶ Section 30(c).

based.¹⁰⁷

Importantly, the Tribunal will have powers to confirm, vary, amend or alter a decision made by the Authority or an environmental inspector or reverse or substitute such decision for any decision which is just and equitable and which is in the interest of the protection and management of the environment or the conservation and sustainable utilisation of natural resources.¹⁰⁸ As a result, the appeal process is potentially a very powerful provision in the EA process. The powers of the High Court when considering an appeal in terms of the Environment Act are not specifically set out in the Act, as a result of which there is uncertainty regarding the extent of the Court powers on appeal.

2.4.6 Is customary law recognised?

Customary law is recognised by the Constitution which provides that no law may discriminate either of itself or in its effect does not apply to any law that makes provision “for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law.”¹⁰⁹

2.4.7 Is the land under customary tenure?

The Constitution provides that the land is vested in the Basotho nation and that the King is vested, on behalf of the Basotho nation, with powers to grant interests or rights over the land.¹¹⁰

2.4.8 Does common law provide additional rights of public participation in the decision-making process?

The implications of the common law are discussed in section 1 of this document.

2.5 REPUBLIC OF MALAWI

2.5.1 Brief description of legal framework and applicable laws

Malawi’s legal system is based on English common law, statutory law and customary law.¹¹¹ The laws applicable to EA and to participation in that process are the Constitution of the Republic of Malawi¹¹² (“the Constitution”) and the Environment Management

¹⁰⁷ Section 112(2).

¹⁰⁸ Section 112(3)(b).

¹⁰⁹ Section 18(4)(c).

¹¹⁰ Sections 107 and 108.

¹¹¹ <http://www.odci.gov/cia/publications/factbook/geos/mi.html> accessed on 8 December 2004.

¹¹² The Constitution was obtained from the following website <http://www.sdn.org.mw/constitut/dtlindx.html> which was accessed on 25 November 2004.

Act¹¹³ (“the EMA”). Guidelines for Environmental Impact Assessments (“the Guidelines”) have also been published.¹¹⁴

The Constitution provides that any law or any Act of government which is inconsistent with the Constitution shall be invalid to the extent of such inconsistency.¹¹⁵ The Constitution contains fundamental constitutional principles and principles of national policy.¹¹⁶ In terms of the constitutional principles, the State and all persons are required to recognise and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals.¹¹⁷

The principles of national policy require that the State actively promotes the welfare and development of its people by progressively adopting and implementing policies and legislation that achieve, among other things, the following goals: the prevention of degradation of the environment; the provision of a healthy living and working environment; the consideration of intergenerational equality; and the conservation and enhancement of the biological diversity of Malawi.¹¹⁸ Although the principles of national policy are only directive in nature, a court may consider them when interpreting and applying any constitutional provision or any law or in determining the validity of decisions of the executive.¹¹⁹

The EMA provides for the assessment of environmental impacts and environmental audits. The Guidelines are to be used in conjunction with the EMA. In addition to the above, a National Environmental Policy was also published.¹²⁰

2.5.2 Is there a legal obligation to undertake environmental assessment?

There is a legal obligation to undertake environmental impact assessments for certain types and sizes of projects, which projects, may not be implemented until such assessments have been undertaken.¹²¹ These are listed in an Annex 1 at the back of this guide. Only once the Director has certified in writing that a project has been approved by

¹¹³ Act 23 of 1996.

¹¹⁴ *Guidelines for Environmental Impact Assessment*, December 1997, as published by the Ministry of Forestry, Fisheries and Environmental Affairs.

¹¹⁵ Section 5.

¹¹⁶ Sections 12 and 13.

¹¹⁷ Section 12(iv)

¹¹⁸ Section 13(d)(i) to (iv).

¹¹⁹ "The principles of national policy contained in this Chapter [III] shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution" (section 14).

¹²⁰ Ministry of Research and Environmental Affairs, February 1996.

¹²¹ Section 24(1) of the EMA.

the Minister or that an EIA is not required, may the licensing authority issue the licence.¹²²

2.5.3 In what circumstances does that legal obligation apply?

As indicated above, the legal obligation to undertake environmental impact assessments only comes into operation for certain types and sizes of projects which the Minister has specified as requiring such assessment. The size and type of projects that trigger an EIA are outlined in the Guidelines.¹²³ For some projects an EIA is mandatory and for others it is discretionary. From the respective lists in the Guidelines it appears that the determining factor in deciding whether a project is mandatory or not is, among other things, the size and scale of the project. However, a number of activities identified on list A (mandatory projects list) are also reflected on list B (discretionary EIA).¹²⁴

Before implementing projects that require EA, the developer must submit a project brief to the Director who may request further information.¹²⁵ The Director may request such other information for the project brief in writing from the developer or any other person as the Director may require.¹²⁶ Where the information is regarded as sufficient by the Director the developer may conduct an environmental impact assessment in accordance with the Guidelines.¹²⁷

2.5.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

2.5.4.1 *The EMA*

Under the EMA, it appears that the environmental impact assessment report will be available for public inspection only once it has been completed. The section provides that:

“The environmental impact assessment report shall be open for public inspection provided that no person shall be entitled to use any information contained therein for personal benefit except for purposes of civil proceedings brought under this Act or under any written law relating to the protection and management of the environment or the conservation or sustainable utilization of natural resources.”¹²⁸

This conclusion is supported by the provision that the Director, on receipt of the report,

¹²² Section 26(3).

¹²³ Appendix B of the Guidelines at 25.

¹²⁴ See for example A7.2 of appendix B at 27 and B4 at 30.

¹²⁵ Director of Environmental Affairs. Section 9.

¹²⁶ Section 24(2)(f) and 24(3).

¹²⁷ Section 24(2), (3) and section 25(1).

¹²⁸ Section 25(3).

must invite written or oral comments from the public. This provision states that:

“(1) Upon receiving the environmental impact assessment report, the Director shall invite written or oral comments from the public thereon, and where necessary may -

- (a) conduct public hearings at such place or places as the Director deems necessary for purposes of assessing public opinion thereon;
- (b) require the developer to redesign the project or to do such other thing as the Director considers desirable taking into account all the relevant environmental concerns highlighted in the environmental impact assessment report, any comments made by the public and the need to achieve the objectives of this Act;
- (c) require the developer to conduct a further environmental impact assessment of the whole project or such part or parts of the project as the Director may deem necessary, or to revise the information compiled in the environmental impact assessment report;
- (d) recommend to the Minister to approve the project subject to such conditions as the Director may recommend to the Minister.”¹²⁹

The information contained in the environmental impact assessment report may not be used for personal benefit but may be used for civil proceedings brought under the EMA or any other written law dealing with the protection and management of the environment.¹³⁰ Any person may have access to information submitted to the Director relating to the implementation of the provisions of the EMA.¹³¹

The Director may therefore conduct public hearings at such places as he deems necessary in order to assess the public opinion on a particular project. This is discretionary and may not occur where the Director does not consider it necessary. Although the EMA does not provide for public consultation during the project brief phase, the Guidelines require fairly robust public consultation during both the project brief and EIA phases.¹³²

2.5.4.2 *The Guidelines*

The Guidelines require that the public is to have access to project briefs, EIA terms of reference, drafts and final EIA reports and to the decisions of the Director.¹³³ The Director may, on the advice of the Technical Committee on the Environment ("TCE"), conduct his or her own public consultation to verify or extend the work of a developer.¹³⁴

The Guidelines, in discussing the requirements for public consultation, describes it as a

¹²⁹ Section 26.

¹³⁰ Section 25(3).

¹³¹ Section 52(1).

¹³² Guidelines at paragraph 2.4.1 at 14.

¹³³ Guidelines at paragraph 2.4.3 at 14.

¹³⁴ Guidelines at paragraph 2.4.2 at 14.

"programme extending throughout the project cycle".¹³⁵ It further requires that public consultation be started as early as possible, that it continues throughout the project cycle and that it is timed to coincide with "significant planning and decision-making activities in the project cycle".¹³⁶ Furthermore, public consultation may be undertaken during the preparation of the EIAs terms of reference, the carrying out of the EIA, government's review of the EIA report and when preparing environmental terms and conditions for approval.¹³⁷ Substantial efforts to overcome the constraints to public consultation must be made.¹³⁸ The processes and the information provided must be appropriate to both the project and its social settings.¹³⁹ Furthermore, efforts must be made to reach all the important stakeholders in a project area and those stakeholders must be informed about the project and their views must be collected.¹⁴⁰ Advertisements should at least be placed in national newspapers and in newspapers where the project is proposed. Depending on the circumstances, adverts may have to be broadcasted by means of radio advertisements. Lists of individuals, groups and organisations consulted during the EIA process should be appended to the study report. The objectives, methods and results of the public consultation process must be recorded in the EIA report.

2.5.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

The EMA establishes an Environmental Appeals Tribunal ("the Tribunal") which may consider appeals against any decision or action of the Minister, Director or Inspector under the EMA.¹⁴¹ Therefore, where a person feels aggrieved by a decision, an appeal may be made to the Tribunal. No time period is specified in the EMA within which an appeal may be made to the Tribunal.¹⁴² The Tribunal may have regard to any matter that it considers of relevance in order to arrive at a just and equitable decision for the advancement of the purposes of the EMA.¹⁴³

Anyone dissatisfied with the decision of the Tribunal may, within 30 days from the date of the Tribunal's decision, appeal to the High Court.¹⁴⁴

¹³⁵ Guidelines, appendix G at G.3.

¹³⁶ Guidelines, appendix G at G.3.1, G.3.2 and G.3.3.

¹³⁷ Guidelines, appendix G at G.3.3.1, G.3.3.2, G.3.3.3 and G.3.3.4.

¹³⁸ Guidelines, appendix G at G.3.3.4.

¹³⁹ Guidelines, appendix G at G.3.4.

¹⁴⁰ Guidelines, appendix G at G.3.5.

¹⁴¹ Section 69.

¹⁴² As appeals against the Tribunal's decision to the High Court must be made within 30 days of that decision, we are of the view that appeals should be lodged as quickly as possible.

¹⁴³ Section 70(3).

¹⁴⁴ Section 70(7).

2.5.6 Consideration of ancillary rights and opportunities for participating for environmental assessment decision-making

2.5.6.1 *The Constitution*

The Constitution provides for freedom of expression¹⁴⁵ and opinion.¹⁴⁶ Every person has the right of access to information to the extent that such information is required for the exercise of these rights.¹⁴⁷ Every person has the right of access to justice and legal remedies by a court or tribunal for acts violating rights and freedoms granted in terms of the Constitution or any other law.¹⁴⁸ People also have the right to lawful and procedurally fair administrative action where freedom, legitimate expectations or interests are affected and threatened.¹⁴⁹ Where a person's fundamental rights or freedoms, guaranteed by the Constitution have been infringed, that person may apply to a competent court, the Ombudsman or the Human Rights Commission to secure assistance and advice.¹⁵⁰ The Ombudsman may investigate cases where it is alleged that a person suffered injustice and there is no remedy reasonably available in terms of court proceedings or there is no other practicable remedy available.¹⁵¹ The Ombudsman may direct that appropriate administrative action be taken, and cause the authority to ensure that in future, there are reasonably practicable remedies to address similar grievances.¹⁵²

2.5.6.2 *The EMA*

The EMA places a duty on every person to take all necessary and appropriate measures to protect and manage the environment.¹⁵³ Everyone performing functions relating to the environment is obliged to take such steps and measures as are necessary, including, among other things, promoting public awareness and participation in formulation and implementation of environmental and conservation policies.¹⁵⁴ The Minister is also responsible for co-ordinating public awareness on the protection and management of the environment.¹⁵⁵

¹⁴⁵ Section 35.

¹⁴⁶ Section 34.

¹⁴⁷ Section 37.

¹⁴⁸ Section 41.

¹⁴⁹ Section 43.

¹⁵⁰ Section 46(2)(a) and (b).

¹⁵¹ Section 123(1).

¹⁵² Section 126.

¹⁵³ Section 3.

¹⁵⁴ Section 3(2)(d).

¹⁵⁵ Section 8(2)(f).

Every person has the right to a clean and healthy environment.¹⁵⁶ Where a person has reason to believe that his or her right to a clean or healthy environment has been violated he or she may file a written complaint, outlining the nature and particulars, to the Minister. The Minister must within 30 days from the date of the complaint, investigate the activity or matter complained of and provide a written response to the complainant stipulating what action the Minister has taken or will take.¹⁵⁷

An action may also be instituted in the High Court to stop any negative impacts of activities (or omissions) on the environment or to instruct public officials to take measures to prevent actions or omissions which are injurious to the environment.¹⁵⁸ The High Court action may only be commenced with after the Minister has responded in writing to the complainant.¹⁵⁹

2.5.7 Is customary law recognised?

As indicated in section 2.5.1 above customary law is recognised. Local government authorities are to include a number of persons serving as Chiefs in the area of jurisdiction of such authorities.¹⁶⁰

2.5.8 Does common law provide additional rights of public participation in the decision-making process?

The rules of natural justice are important, especially the requirement that all sides be heard before a decision which may have a deleterious effect on existing rights is made. Although it may not be directly provided for in statute, it is applicable in the law of Malawi.

2.6 REPUBLIC OF MAURITIUS

2.6.1 Brief description of legal framework and applicable laws

The Republic of Mauritius is a country with a mixed legal system, comprising the common law and civil law.¹⁶¹ The applicable law is The Environment Protection Act.¹⁶² The Constitution contains no provision which deals with environmental or other related

¹⁵⁶ Section 5(1).

¹⁵⁷ Section 5(3).

¹⁵⁸ Section 5(2)(a) and (b).

¹⁵⁹ Section 5(4).

¹⁶⁰ Section 146(4).

¹⁶¹ <http://www.droitcivil.uottawa.ca/wor.../eng/commonwealthmembers.htm> accessed on 6 December 2004.

¹⁶² Act No.19 of 2002.

issues.¹⁶³

2.6.2 Is there a legal obligation to undertake environmental assessment?

The Environment Protection Act provides that an EIA licence is required where one wants to undertake an undertaking specified in Part B or Part C of its First Schedule.¹⁶⁴

2.6.3 In what circumstances does that legal obligation apply?

The obligation to undertake an EIA is triggered when one wants to undertake an undertaking in Part B or Part C of the First Schedule to the Act.¹⁶⁵ These are listed in Annex 1 at the back of this guide.

2.6.4 Does the legal framework provide rights and opportunities to participate in the environmental assessment process?

Members of the public have an opportunity to participate in the EIA process since an EIA must be open for public inspection during working hours and notice of such public inspection must be specified in two issues of the *Government Gazette* and two issues of two daily newspapers. The section reads as follows:

“(1) An EIA submitted under section 18 shall be open for public inspection during working hours at -

- (a) the office of the Department;
- (b) the main office of the municipal council or district council for the area where the undertaking is to be carried out; and
- (c) such other places as may be specified in a notice under subsection (2).

(2) The Director shall give notice of public inspection specified in subsection (1) in 2 issues of the Gazette and in 2 issues of 2 daily newspapers, there being in each case an interval of at least 7 days between the first and second publication.

(3) A notice published under subsection (2) shall -

- (a) give a summary description of the undertaking;
- (b) state the address where the undertaking is to be carried out;
- (c) state the place where the EIA may be inspected;
- (d) specify the time limit for the submission of public comment in writing which shall not be later than 28 days after the date of the first appearance of the notice in the Gazette.

¹⁶³ <http://www.tov.mu/constitu.htm> accessed on 4 November 2004.

¹⁶⁴ Section 15(2)(b).

¹⁶⁵ Section 15(2)(b).

(4) The Director may in respect of an EIA, other than one submitted through the Board of Investment, extend the time limit specified in subsection (2) to afford reasonable opportunity for any person to submit public comments on the EIA.

(5) The Director may cause to be published an EIA or an extract of an EIA on the internet for public inspection."¹⁶⁶

Members of the public therefore have 28 days within which they may submit their comments in writing. This period may be extended to afford reasonable opportunities for any person to submit public comments on the EIA. A further opportunity to make representation may be allowed by the Director of Environment at his or her discretion for the purposes of reviewing an EIA.¹⁶⁷ The comments made by the public are among other considerations that are submitted to the EIA Committee for examination.¹⁶⁸ Furthermore, before an EIA is approved the decision-maker is obliged to consider measures proposed to avoid or minimise adverse effects on the environment, people or society.¹⁶⁹

2.6.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

An Environment Appeal Tribunal ("the Tribunal") is established it hears and determines appeals against any decision of the Minister of Environment on an EIA.¹⁷⁰ An opportunity to lodge an appeal with the Tribunal is open to "any person" and an appeal must be lodged within 30 days of the decision.¹⁷¹ The Tribunal conducts its activities in public, except with the agreement of all the parties, or where the Tribunal so orders in the interest of the public.¹⁷² On hearing an appeal, the Tribunal may confirm, amend or cancel any decision taken by the Minister.¹⁷³ An opportunity to appeal the decision of the Tribunal, relating to an appeal, is limited to a person who was a party in the appeal proceedings.¹⁷⁴ Such a person, if dissatisfied with the final decision of the Tribunal, may appeal to the Supreme Court. This opportunity is further limited by the fact that such a party may only lodge an appeal with the Supreme Court if he or she is satisfied with the decision of the Tribunal as being erroneous on point of law.¹⁷⁵ This appeal must be

¹⁶⁶ Section 20.

¹⁶⁷ Section 21(2)(a).

¹⁶⁸ Section 21(1)(b).

¹⁶⁹ Section 24(1).

¹⁷⁰ Section 64(1)(a)(i).

¹⁷¹ Section 54(2).

¹⁷² Section 55(3)(c).

¹⁷³ Section 56(4).

¹⁷⁴ Section 57(1).

¹⁷⁵ *Ibid.*

lodged within 21 days of the date of the decision of the Tribunal.¹⁷⁶

2.7 REPUBLIC OF MOZAMBIQUE

2.7.1 Brief description of legal framework and applicable laws

The Republic of Mozambique has a civil law system¹⁷⁷ that is based on the Portuguese civil law and customary law.¹⁷⁸ The legislation applicable to public participation within EA is the Constitution of Mozambique ("the Constitution"),¹⁷⁹ the Framework Law on Environment,¹⁸⁰ and the Regulation on the Procedure for Environmental Impact Assessment ("the Decree").¹⁸¹ Environmental quality standards and sectoral legislation (on oil, gas and mineral resources prospecting, research and production¹⁸²) are also applicable.

The Constitution states that all citizens have the right to live in a balanced natural environment¹⁸³ and that efforts to guarantee the ecological balance and preservation of the natural environment for the betterment of the quality of life for its citizens must be promoted.¹⁸⁴ This is a fundamental right and a duty of the citizens¹⁸⁵ as well as a duty of the State.¹⁸⁶

¹⁷⁶ Section 57(2).

¹⁷⁷ http://www.indexmundi.com/mozambique/legal_system.html accessed on 14 March 2005.

¹⁷⁸ Mozambique's Legal system implicitly recognizes costume as a law source, but it can not derogate the values and principles established under the Constitution (Article 4 of the Constitution - "The State acknowledges the several legal and conflict resolution systems which co-exist on Mozambiquean society, as long as they do not contradict the fundamental values and principles of the Constitution").

¹⁷⁹ Accessed on the MOZLEGAL – Mozambique's Legal Resource Portal website <http://www.mozlegal.com/> on 9 March 2005. The National Assembly approved the Constitution in 16.11.2004 and it is in force since 21.01.2005.

¹⁸⁰ Law No. 20 of 1997 of 01.10.1997.

¹⁸¹ Decree No. 45 of 2004 of 29.09.2004.

¹⁸² Decree No. 26 of 2004 of 20.08.2004 approved the environmental regulation for mining activities; this Decree establishes that underground mining activities using mechanical methods must undertake an environmental impact study (Article 8(1)); legislation on oil and gas is yet to be approved.

¹⁸³ Article 90(1).

¹⁸⁴ Article 117(1).

¹⁸⁵ Article 45 (d) - "Everyone has the right to a balanced environment and the duty to defend it" and Article 90(1) "All Citizens have the right to live in a balanced environment and the duty to defend it".

¹⁸⁶ Article 90(2) - "The State and Local authorities, with the participation of environmental associations, adopt environmental protection policies and promote the rational use of natural resources".

2.7.2 Is there a legal obligation to undertake environmental assessment?

There is a legal obligation to undertake EIA for certain types and sizes of projects, which may not be implemented until such assessments have been fully undertaken.¹⁸⁷ Only once the Ministry for Environmental Action Coordination¹⁸⁸ (“the Ministry”), through the National Department for Environmental Impact Assessment (“the Department”) has certified in writing that a project has been approved or that an EIA is not required, may the licensing authority issue the environmental licence.¹⁸⁹

2.7.3 In what circumstances does that legal obligation apply?

Activities contained in the appended list to the Decree require mandatory environmental impact studies.¹⁹⁰ (These are set out in Annex 1 to this guide.) These activities are, amongst other, projects located in protected areas and ecosystems or in areas with valuable resources, intensive livestock and agricultural development projects, urban water supply and sanitation projects, minerals processing exploitation projects and energy production projects.¹⁹¹ This legal obligation to undertake an environmental impact study also applies to activities that may have a direct or indirect influence on components of the environment¹⁹² under Article 3 of the Framework Law on Environment.¹⁹³

Activities without significant impacts on human health and/or environmentally sound sensitive areas only require simplified environmental impact studies.¹⁹⁴ An activity that is not listed on annex I or III¹⁹⁵ of the Decree, but is capable of causing environmental impact, may be subjected to pre-assessment.¹⁹⁶ The Ministry undertakes this assessment, the purpose of which is to determine whether an environmental impact study is required or not.¹⁹⁷ Where the pre-assessment indicates that the environmental impact of the activity or undertaking is already known, the Ministry is required to issue the

¹⁸⁷ Article 7(4) and Article 19(1).

¹⁸⁸ <http://www.micoa.gov.mz/>.

¹⁸⁹ Article 19(1).

¹⁹⁰ Article 3(a).

¹⁹¹ A full list of all the activities which require environmental impact studies is provided for in annex I of this document.

¹⁹² The components of the environment are the natural resources, i.e., air, soil, subsurface ground, fauna, flora, and all socioeconomic and health factors that may effect the communities.

¹⁹³ Article 2(1).

¹⁹⁴ Article 3(b). A full list of all the activities which require simplified environmental impact studies is provided for in annex II of this document.

¹⁹⁵ Activities which usually are not subject to environmental impact assessment. These activities have to follow the good environmental practice guidelines.

¹⁹⁶ Article 7(1).

¹⁹⁷ Article 7(2).

environmental licence.¹⁹⁸

2.7.4 Does the legal framework provide rights and opportunities to participate in the environmental assessment process?

The proposers of an activity are responsible for the environmental impact study.¹⁹⁹ This study must include, among other requirements, a non-technical summary for the purposes of public consultation, which summary covers the main questions and conclusions proposed.²⁰⁰ The environmental impact study must be submitted in Portuguese to the Department in a report.²⁰¹

It does not appear to provide a basis for persons dissatisfied with the decision or process to appeal.

2.7.5 Interested and affected persons

The Decree makes provision for the public participation process to allow for consulting and hearing of interested and affected persons, which process must be performed in accordance with the Ministry guidelines.²⁰² The Department and the Provincial Departments for Environment (“the Provincial Departments”) shall certify that the proposers allow for public participation during the environmental impact evaluation and the simplified environmental impact evaluation processes,²⁰³ and for full access to all existing information.²⁰⁴ The proposer is required to make known the public consultation periods and procedure in order to reach the communities affected by the proposed activity.²⁰⁵

Public participation processes (public consultation and public hearing) are mandatory for projects with significant environmental impacts²⁰⁶ and for projects which may result in the displacement of people or communities and goods, and/or restriction to the use of natural resources.²⁰⁷ Public hearings are also required where the scale of likely impacts of the project justifies it, or it is requested by a public entity, private entity or legally

¹⁹⁸ Article 7(4).

¹⁹⁹ Article 12(1).

²⁰⁰ Article 17 of the Constitution and Article 12(2).

²⁰¹ Article 12(4).

²⁰² Article 14(1). To date, the Ministry did not approve general guidelines for the public participation process. These guidelines may be stipulated for each public participation process.

²⁰³ Article 14(4) and Article 14(2).

²⁰⁴ Article 14(10).

²⁰⁵ Article 14(4).

²⁰⁶ I.e. projects subject to environmental impact assessment (annex I).

²⁰⁷ Article 14(5).

constituted association for the protection of the environment.²⁰⁸ Members of civil society, including local government bodies, who have a direct or indirect interest in the proposed activity, may participate in the public hearing.²⁰⁹ The oral submissions and presentations made at the public hearing and the written presentations presented to local government bodies or to the proposer, up until ten days before the close of the period of review, shall be considered in the decision on granting an environmental licence, provided that those comments concern the direct or indirect environmental impacts.²¹⁰

National environmental standards shall be observed as the environmental quality standards for impact assessment.²¹¹ Although the Ministry has the power to, among other things, undertake reviews of environmental impact studies in collaboration with civil society and communities, Article 16 of the Decree titled "Review of the Environmental Impact Study", does not expressly provide for the participation of interested persons in the review process and is focused on the technical aspects of the environmental impact study.²¹²

2.7.6 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

The courts may not apply principles which are contrary to the Constitution.²¹³ The Administrative Court controls the legality of administrative acts, particularly, acts dealing with legal disputes arising from administrative actions and procedures and to adjudicate appeals against decisions of organs of State, or their office holders.²¹⁴

The Framework Law on Environment establishes that all citizens have a right to judicial appeal in order to prevent the violation of their right to live in a sound balanced environment.²¹⁵ The Administrative Procedural Law²¹⁶ allows for the review of administrative acts, in case of an alleged violation of the applicable law.²¹⁷ Appeals have to be submitted within 90 days after the act,²¹⁸ except when the act appealed is void. In

²⁰⁸ Article 14(8).

²⁰⁹ Article 14(7).

²¹⁰ Article 16(6).

²¹¹ Article 8(2).

²¹² Article 3(b).

²¹³ Article 214.

²¹⁴ Article 173(1) and (2)(a) and (b).

²¹⁵ Article 21(1).

²¹⁶ Law 9 of 2001 of 07.07.2001.

²¹⁷ Article 27(1).

²¹⁸ Article 30(2). The time frame is extended to one year in case of appeals of tacit acts and appeals submitted by public prosecutors.

this situation, appeals can be submitted at any time.²¹⁹

Appeals may be submitted by those who allege an infringement of their rights or the impairment of legally protected interests, or claim that they have been affected by the act which is subject to appeal and that they have a direct, personal and legal interest in its submission.²²⁰ Appeals may also be submitted by the holders of the public action right,²²¹ public prosecutors, private companies, and local governments.²²² These appeals must be submitted in writing,²²³ with the relevant documents.²²⁴

2.7.7 Consideration of ancillary rights and opportunities for participating for environmental assessment decision-making

The Constitution states that all citizens have the right to freedom of expression, freedom of the press and the right to information.²²⁵ The right to freedom of expression and the right to information may not be limited by censorship.²²⁶ Accordingly, it is legally permissible for people publicly to express concern about the EA process. The exercise of these rights and freedoms may be regulated by law, subject to the respect for the Constitution and the dignity of persons.²²⁷ Where rights have been violated or infringed or when acting in the defence of the public interest, citizens have the right to present petitions, complaints and plans before the relevant authority.²²⁸

Citizens may contest acts violating their rights recognised under the Constitution or any other law²²⁹ and they shall have the right of recourse to the courts against such acts.²³⁰ The Supreme Council for Mass Communication is to guarantee the rights to information, freedom of the press and, among other things, the right to reply.²³¹

²¹⁹ Article 30(1).

²²⁰ Article 38 (1).

²²¹ Accordingly to the Constitution, citizens and representative organisations have the right to submit a popular action (Article 81(1)).

²²² Article 38(1).

²²³ Article 46(1).

²²⁴ Article 48.

²²⁵ Article 48 (1).

²²⁶ Article 48(2).

²²⁷ Article 48(6).

²²⁸ Article 79.

²²⁹ Article 80.

²³⁰ Article 70.

²³¹ Article 50(1).

2.7.8 Is customary law recognised?

The Constitution recognizes and values traditional authority, legitimated by populations and by customary law.²³² However the relationship between traditional authorities with other institutions, and its participation in the country's economic, social and cultural life is regulated by law.²³³

Although the Constitution does not expressly recognise customary law, it may be inferred from several provisions.²³⁴ However, customary law cannot prevail against the values and principles established by the Constitution.

2.7.9 Is land under customary tenure?

Ownership of the land vests in the State,²³⁵ and it can not be sold or otherwise alienated, mortgaged or encumbered without its authorisation.²³⁶ The State shall determine land use conditions.²³⁷ Land use is regulated under several legal instruments.²³⁸

2.8 REPUBLIC OF NAMIBIA

2.8.1 Brief description of legal framework and applicable laws

Namibia has a mixed legal system consisting of common law and civil law.²³⁹ The laws applicable are The Constitution of the Republic of Namibia ("the Constitution") and the Environmental Assessment Policy for Sustainable and Environmental Conservation²⁴⁰ ("the Policy"). The Environmental Management and Assessment Bill is yet to be passed by Parliament for it to become the law.²⁴¹ The result is that there is no specific statute in Namibia which requires the undertaking of EAs at the moment, although, as a matter of practice, the procedures laid down by the Bill are ordinarily complied with. The Constitution provides that the State must actively promote and maintain the welfare of the people by adopting, among others, policies aimed the maintenance of ecosystems, essential ecological processes and biological biodiversity of Namibia and the utilisation

²³² Article 118(1).

²³³ Article 118(2).

²³⁴ Articles 4 and 118(2).

²³⁵ Article 109(1).

²³⁶ Article 109(2) of the Constitution and Article 3 of Law No. 19 of 1997.

²³⁷ Article 110(1) of the Constitution.

²³⁸ Land Law (Law No. 19 of 1997) and Land Law Regulations (Decree 66 of 1998 and Decree 77 of 1999).

²³⁹ <http://www.broitcivil.uottawa.ca/wor.../eng/commonwealthmembers.htm> accessed on 6 December 2004.

²⁴⁰ It was approved in August 1994 by Cabinet Resolution 16.8.94/002.

²⁴¹ This was confirmed by the Environmental Department in an e-mail written to our Mr. Sibonelo Ndlovu.

of the living natural resources on a sustainable basis for the benefit of all Namibians, both present and future. In particular, the government must provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.²⁴² The Policy was adopted to discharge this constitutional obligation. This constitutional provision is one of the principles of state policy contained in Chapter 11 which the Constitution specifically states that they are not legally enforceable by any court and that they are there to guide the Government in making and applying laws to give effect to the fundamental objectives of these principles.²⁴³ The courts are nevertheless entitled to have regard to these principles in interpreting any laws based on them.

2.8.2 Is there a legal obligation to undertake environmental assessment?

The Policy does not provide for a clear requirement for an EA. In a letter that is prefixed to the Policy, the then Minister of Environment and Tourism states that the final product of the policy "reflects a broad consensus on the need for EIAs in Namibia, and general agreement has been reached on how these should be conducted".²⁴⁴ This statement correctly captures the essence and the nature of the Policy. There will be a legal obligation to undertake an EA when the Environmental Management and Assessment Bill becomes law.²⁴⁵

2.8.3 In what circumstances does that legal obligation apply?

The Policy states that the requirements for undertaking an EA will be triggered by the undertaking of listed policies, programmes and projects.²⁴⁶ The precise nature of the list and the EA procedure will be determined by the envisaged Environmental Management and Assessment Bill. The Bill provides that an EA must be undertaken where any person wants to commence 'a project involving activities listed in Schedule 1.'²⁴⁷ These are listed in Annex 1 at the back of this guide.

2.8.4 Does the legal framework provide rights and opportunities to participate in the environmental assessment process?

The Policy provides that:

“The EA procedure will, as far as is practicable, set out to:

...

²⁴² Article 95(1).

²⁴³ Article 101.

²⁴⁴ This letter is dated 1 December 1994.

²⁴⁵ Section 11 of the Bill provides for the requirement to undertake EAs on activities set out in Schedule 1.

²⁴⁶ Section 1.

²⁴⁷ Section 11(1).

- (iii) strive for a high degree of public participation and involvement by all sectors of the Namibian community in the EA process.”²⁴⁸

The notification of neighbours and other interested and affected parties is also one of the requirements required at the earliest stage of the development of a proposal to undertake any of the listed activities.²⁴⁹ The Bill states that one of the principles which apply to both government institutions and private persons is that “public consultation on matters affecting the environment shall be promoted.”²⁵⁰ Furthermore, the Bill establishes an Environmental Assessment Unit whose duties include the supervision of EA process, including public participation.²⁵¹ Section 12 of the Bill provides as follows:

“(2) The Competent Authority shall, within 14 (fourteen) days of receipt of such application and information, furnish copies thereof to the Head of the Environmental Assessment Unit, save that where the Competent Authority elects at the outset not to authorise a project, it shall not be obliged to do so. On receipt of such application and information the Head of the Environmental Assessment Unit shall:

- (a) register the application in an environmental assessment register as provided for in regulations;
- (b) notify and make copies of relevant information available at a prescribed fee to Interested and Affected Parties and invite comment from such parties within such period as the Head of the Environmental Assessment Unit in consultation with the Competent Authority where there is a Competent Authority and where the Competent Authority is not the Proponent may deem reasonable in the circumstances.”²⁵²

The Bill therefore obliges the Head of the Unit to notify interested and affected parties that an application for authorisation has been received and to invite comments from them. The Head of the Unit has a discretion to invite further public comment and input as it may determine and may also direct that the project be subject to public hearings. This is provided for in section 16, which states that:

“(1) On receipt of the Environmental Assessment Report the Head of the Environmental Assessment Unit shall review the Environmental Assessment Report and, in consultation with the Competent Authority where there is a Competent Authority and where the Competent Authority is not the Proponent, may:

- (a) invite such further public comment and input as it may determine;
- (b) direct that the project to be (*sic*) subject to public hearings;”²⁵³

²⁴⁸ Section 2(iii).

²⁴⁹ Section 3.

²⁵⁰ Section 6(3).

²⁵¹ Section 8(2)(c).

²⁵² Section 12(2).

²⁵³ Section 16(1)(a) and (b).

2.8.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

The Policy also provides that any decision that would be taken in the EA process must be subject to an opportunity for appeal through the Commissioner and/or the Board.²⁵⁴ The provisions of the Policy merely indicate the opportunity for public participation which will be provided by the Environmental Management and Assessment Bill which is aimed at implementing the Policy. The Bill states that any person who feels aggrieved by the decision of the Head of the Unit may appeal against that decision to the Permanent Secretary.²⁵⁵ It also provides that the decision of the Permanent Secretary may appeal, against that decision, to the Minister.²⁵⁶ The precise manner of lodging both these appeals, the period within which they must be lodged and the prescribed fee payable will be set out in the Regulations to be published in terms of the Bill.²⁵⁷

The nature of an appeal provided for by the Bill is a wide one. On appeal, the decision-maker may confirm, set aside or vary the decision appealed against, or make such order it, or he or she deems fit.²⁵⁸

The opportunity to appeal against the decisions taken in the EA process is further strengthened by the fact that the Constitution requires administrative bodies and administrative officials to act fairly and reasonably and in compliance with the requirement imposed by the common law and any relevant legislation and further gives a right to persons aggrieved by those decisions to seek redress before a competent court or tribunal.²⁵⁹ The importance of this constitutional provision is that it is part of the fundamental rights and freedoms set out in Chapter 3 of the Constitution. Such rights are fully enforceable.²⁶⁰

Furthermore, the Bill states that “notwithstanding” the opportunity to appeal against the decision in the EA process, any person whose interests are affected by a decision of an administrative body (such as the Head of the Unity) may apply to the High Court to review the decision.²⁶¹ Such a person must request reasons from the decision-maker within 30 days of the record of decision being published in the Government Gazette and

²⁵⁴ Section 10.

²⁵⁵ Section 27(1).

²⁵⁶ Section 27(2).

²⁵⁷ Section 27.

²⁵⁸ Section 27(3).

²⁵⁹ Article 18.

²⁶⁰ Article 25.

²⁶¹ Section 28.

must, within 30 days of receipt of those reasons, approach the High Court for a review.²⁶²

2.9 REPUBLIC OF SEYCHELLES

2.9.1 Brief description of legal framework and applicable laws

The legal system is based on English common law, French civil law and customary law.²⁶³ The Environment Protection Act²⁶⁴ (“EPA”) and the Environment Protection (Impact Assessment) Regulations, 1996, published thereunder provides for the environmental impact assessment process. The Constitution of Seychelles,²⁶⁵ in its preamble, provides for the right of citizens to actively participate in social economic development, to exercise individual rights and liberties and to contribute to the preservation of the environment for the benefit of present and future generations.

2.9.2 Is there a legal obligation to undertake environmental assessment?

There is a legal obligation to undertake environmental impact assessments for activities or projects that are prescribed under the EPA or any projects or activities that is being undertaken in protected or ecologically sensitive areas.²⁶⁶ The Minister may, with the approval of Cabinet, in exceptional circumstances and by notification providing the grounds on which the decision is based, exclude a prescribed project from the environmental impact assessment process.²⁶⁷ The notification shall be made public and any person aggrieved by the decision or order of the authority may appeal to the Minister²⁶⁸ in the prescribed manner²⁶⁹ who may affirm, revoke or vary the decision.²⁷⁰

Any person affected by an enforcement notice may apply to the administrator for an amendment of a notice served under the EPA.²⁷¹ Any person who is aggrieved by a notice made under Part 4 may in the prescribed manner appeal to the Minister who may affirm,

²⁶² Section 28.

²⁶³ <http://www.cia.gov/cia/publications/factbook/geos/se.html> accessed on 12 January 2005.

²⁶⁴ Act 9 of 1994.

²⁶⁵ Dated 08/06/1993 accessed on <http://droit.francophonie.org/doc/html/sc/con/fr/1993/1993dfscgo1.html> on 18 January 2005.

²⁶⁶ Section 15(1).

²⁶⁷ Section 15(11).

²⁶⁸ It is submitted that where the Minister has excluded a prescribed project from the environmental impact assessment process an aggrieved person may not appeal in terms of section 15(13) against that decision to the Minister as the section refers to "competent authority" and allows for appeals to the Minister.

²⁶⁹ Section 15(13).

²⁷⁰ Sections 15(6), (7) and (8) is missing from our copy of the Act. We have requested a response from the Seychelles government regarding this issue but to date have not received any.

²⁷¹ Section 18(1).

vary or revoke the notice.²⁷² This may, where authorisation was granted against a community's or individual's wishes, serve as a way of ensuring compliance with the conditions that may be attached to authorisations. The authority may require any person to furnish reports and other information that may be required for the purposes of the Environment Protection Act and that person shall be bound to do so.²⁷³ Failure to comply is a punishable offence and on conviction a fine of 10,000.00 Seychelle rupees may be imposed.

2.9.3 In what circumstances does that legal obligation apply?

The EPA provides for the EIA of prescribed activities or projects and for the assessment of projects or activities undertaken in largely sensitive areas.²⁷⁴ These are listed in Annex 1 at the back of this guide. Any person in breach of any conditions imposed by the Authority²⁷⁵ or who does not conduct an EIA study where required, is guilty of an offence.²⁷⁶

Regulations referred to as the Environment Protection (Impact Assessment) Regulations, 1996 have also been published. In terms of these regulations an EIA Class 1 or an EIA Class 2,²⁷⁷ may be required where the project or activity is specified in Schedule 1 or it is an activity which, in the opinion of the authority, is likely to have a significant impact on the environment.²⁷⁸ These are listed in a schedule at the back of this guide. The authority must consider the guidelines laid down by the authority and the likely impact that the project or activity may have on the environment when determining whether a Class 1 or Class 2 EIA will be required.²⁷⁹ Where the authority determines that a Class 1 EIA must be conducted the authority must determine the terms of reference of the EIA and where it determines that an EIA Class 2 is required, the authority may undertake the preparation of the EIA or define the terms of reference of the EIA.²⁸⁰

²⁷² Section 20.

²⁷³ Section 37(1).

²⁷⁴ Section 15(1).

²⁷⁵ In terms of the EPA the Ministry or department of the government under the Minister having the portfolio responsibility for environment or a corporate body set up under section 4(2) may be the Authority. Section 4(1).

²⁷⁶ Section 15(1) and (b).

²⁷⁷ No distinction is made in the legislation between an EIA Class 1 or an EIA Class 2 and accordingly we are not able to comment on the different requirements of either the classes.

²⁷⁸ Regulation 3(1)(a) and (b).

²⁷⁹ Regulation 5(2).

²⁸⁰ Regulation 6(2)(a) and (b).

2.9.4 Does the legal framework provide rights and opportunities to participate in the environmental assessment process?

The EPA states that an EIA study shall be open for public inspection at all reasonable times and that the authority shall notify the public of the time-limit for the submission of comments by publishing a notice in two issues of the daily newspaper with an interval of at least seven days between the first and the second publication. This is provided for in section 15 which states that:

- “(5) (a) An Environmental Impact Assessment Study shall be open for public inspection at all reasonable times;
- (b) the time limit for the submission of public comments shall be notified by the Authority by giving a notice to that effect in two issues of the daily newspaper with an interval of at least seven days between the first and the second publications.”²⁸¹

The authority has a discretion when reviewing the EIA in terms of regulation 7(2)(a) (preliminary review) to request any person to submit their observations in writing on the EIA.²⁸² A person requested to review and submit comments may not divulge information contained in the EIA to any other person unless the written consent of the proponent or of the authority has been received.²⁸³

The EIA may be inspected at such place and within such period as may be specified by the authority.²⁸⁴ Only citizens or residents of Seychelles may comment on the EIA, the project or activity within the specified period, or, record the comments in the register kept by the authority.²⁸⁵

The authority may, where it considers it necessary, refer the EIA to An Environmental Appraisal Committee (“EAC”) under section 15(2) of the EPA.²⁸⁶ The EAC²⁸⁷ must consider the EIA, the comments and observations, including public comments that might have been received²⁸⁸ and shall make its recommendations to the authority.²⁸⁹

The authority granting an environmental authorisation must consider the comments made

²⁸¹ Section 15(5)(a) and (b).

²⁸² Regulation 7(4).

²⁸³ Regulation 7(5). A fine of 5000.00 Seychelles rupees or imprisonment for six months may be awarded for contravening regulation 7(5).

²⁸⁴ Regulation 8(1).

²⁸⁵ Regulation 8(4).

²⁸⁶ Regulation 9(1).

²⁸⁷ Regulation 9(3) and (4) is missing from our copy of the Regulations. We have raised this with Mr Rath from the government of Seychelles environmental department, but to date have not received a response.

²⁸⁸ Regulation 9(6).

²⁸⁹ Regulation 9(7).

by the public and the recommendations of the EAC.²⁹⁰ Additional information may be required from the proponent at any time before making its decision in granting the environmental authorisation.²⁹¹ It appears that where the authority refuses the authorisation it need not request or consider additional information.

2.9.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

Any person who feels aggrieved by a decision made by the authority to approve or refuse to grant authorisations may submit an appeal to the Minister, within 30 days from the date of receipt of the decision. The appeal must be submitted in accordance with Form 1 of Schedule 3 which is headed “Form of Memorandum of Appeal”.²⁹² A fee of 250 Seychelles rupees must accompany the appeal.²⁹³

2.9.6 Consideration of ancillary rights and opportunities for participating for environmental assessment decision-making

The Constitution contains both a Charter of human rights and liberties²⁹⁴ and for fundamental duties of citizens.²⁹⁵ The Charter makes provision for the rights of freedom of expression, opinion and information and²⁹⁶ the right to education.²⁹⁷ Importantly, the rights of citizens to live a healthy and clean environment is recognised.²⁹⁸ This details the setting of measures that protect, conserve and improve the environment; to ensure social and economic development by properly managing the countries resources; and to ensure the public is aware of the need to protect, conserve and improve the environment.²⁹⁹ Importantly, the fundamental duties of citizens, include, among other things, to contribute to the well-being of the community, to protect, conserve and improve the environment, and to obey the preamble.³⁰⁰

The rights contained in the Charter may be limited in circumstances where it is in the interest of democracy or, among other things, it concerns public security. The

²⁹⁰ Regulation 10(1)(a) and (b).

²⁹¹ Regulation 10(2).

²⁹² Regulation 11(1).

²⁹³ Regulation 11(2).

²⁹⁴ Chapter III: Part I.

²⁹⁵ Chapter III: Part II.

²⁹⁶ Article 22.

²⁹⁷ Article 33.

²⁹⁸ Article 38.

²⁹⁹ Article 38(a), (b) and (c).

³⁰⁰ Article 40(d), (e) and (f).

implementation and application of these limitations on rights or freedoms guaranteed in the Constitution are further limited in that they may only be applied when they are necessary in the particular circumstances.³⁰¹ Recourse may be had to the Constitutional Court where rights in the Human Rights Charter may or have been infringed.³⁰²

These Constitutional rights and duties may in appropriate circumstances provide for opportunities to participate, not only in environmental assessment decision-making, but in other areas as well.

2.9.7 Is customary law recognised?

The rights of persons to participate cultural life and, as well as the right to promote and protect the traditions and culture of the people of Seychelles is recognised.³⁰³ However, these rights are subject to the restrictions imposed on a democratic society. Furthermore, the State is under an obligation to take reasonable measures to protect the cultural heritage and values of the people of Seychelles.³⁰⁴

2.10 REPUBLIC OF SOUTH AFRICA

2.10.1 Brief description of legal framework and applicable laws

The Constitution of the Republic of South Africa³⁰⁵ is the country's supreme law and all other South African laws are subject to it.³⁰⁶ The Bill of Rights contained in the Constitution, contains an environmental right³⁰⁷ which may only be limited in terms of law of general application where it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.³⁰⁸ Environmental impact assessment is provided for in the Environment Conservation Act³⁰⁹ ("the ECA") and its regulations.³¹⁰

However, EA will, in the near future, be regulated under the National Environmental

³⁰¹ Article 47.

³⁰² Article 46(1).

³⁰³ Article 39.

³⁰⁴ Article 39.

³⁰⁵ Act 108 of 1996.

³⁰⁶ Section 2 of the Constitution.

³⁰⁷ Section 24.

³⁰⁸ Section 36(1).

³⁰⁹ Act 73 of 1989.

³¹⁰ GN R1182 in *Government Gazette* No. 18261 of 5 September 1997, the Minister identified activities which will probably have a detrimental effect on the environment ("listed activities"). Regulations governing the EA procedures were promulgated in GN R1183 in *Government Gazette* No. 18261 of 5 September 1997 ("environmental impact assessment regulations").

Management Act³¹¹ ("NEMA"). Recent legislative amendments have been made to section 24 of NEMA³¹² and new draft EIA regulations have also recently been published for comment.³¹³ They will eventually replace the existing EIA regulations under the ECA. The current position is described below. In addition to these legislative requirements the EA process is also subject to provisions of the common law, especially the *audi* rule.

2.10.2 Is there a legal obligation to undertake environmental assessment?

There is a legal obligation to undertake EA. The Minister has identified activities which will probably have a detrimental effect on the environment as "listed activities"³¹⁴ and which may only be undertaken on receipt of written authorisation.³¹⁵ These are set out in Annex 1 at the end of this guide.

2.10.3 In what circumstances does the legal obligation apply?

As indicated above, where an activity is regarded as a listed activity, there is a legal obligation to undertake an EIA.

Any person may apply in writing to the competent authority, with the furnishing of reasons, for an exemption from the provisions of any regulations published under the ECA.³¹⁶ Application may therefore be made for an exemption from one or more of the EIA regulations. However, although the person may be exempted from the EIA regulations, written authorisation will still be required under section 22(1).³¹⁷

2.10.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

The legal framework provides for rights and opportunities to participate in the EA process. Under the EIA regulations the applicant who wants to conduct a listed activity must appoint an independent consultant who is responsible for the public participation process.³¹⁸ The relevant authority must inform the applicant whether the applicant must advertise the application and the manner in which this must be done.³¹⁹ The EIA Regulations do not prescribe how the public participation process should be conducted,

³¹¹ Act 107 of 1998.

³¹² Act 8 of 2004 which came into effect on 7 January 2005.

³¹³ GN 12 of 2005 in *Government Gazette* No. 27 163 of 14 January 2005.

³¹⁴ Section 21 of the ECA.

³¹⁵ Section 22 of the ECA.

³¹⁶ Section 28A.

³¹⁷ Section 24(7).

³¹⁸ EIA Regulations, regulation 3(1) and 3(1)(f).

³¹⁹ EIA Regulations, regulation 4(6).

but it does require, that when compiling a scoping report, a description of the process followed is incorporated including a list of Interested & Affected Parties ("I&APs")³²⁰ and where an environmental impact report is required, an appendix containing descriptions on the public participation process followed, including a list of I&AP's and their comments is also required.³²¹ The national Department of Environmental Affairs and Tourism has published an environmental impact management guideline document for the EIA regulations published under the ECA.³²² The guidelines make provision for the review of the scoping report by the public³²³ and where an environmental impact report is required it should also be reviewed by I&APs.³²⁴ These guidelines have however been superseded by provisions of the Promotion of Administrative Justice Act ("PAJA") that gives effect to the constitutional right of just administrative action.³²⁵

Furthermore, under the recent amendments to NEMA, every application for environmental authorisation must, as a minimum ensure public information and participation of all interested and affected parties with a reasonable opportunity to participate in such information and participation procedures.³²⁶

2.10.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

Where a record of decision ("ROD") has been issued, any person who feels aggrieved at the decision may appeal in writing to the competent authority³²⁷ against the decision within 30 days from the date on which the ROD was issued to the applicant.³²⁸ An appeal must set out all the facts as well as the grounds of appeal and must be accompanied by all relevant documents.³²⁹ Any person whose interests are affected by a decision of an administrative body may request written reasons and may, within 30 days after having been furnished with those reasons or after the 30 day period expired and no reasons were furnished, apply to the High Court for a review of the decision.³³⁰

³²⁰ EIA Regulations, regulation 6(1)(d).

³²¹ EIA Regulations, regulation 8(c).

³²² Published in April 1998.

³²³ Section 3.2.3.2.

³²⁴ Section 3.2.5.2.

³²⁵ Act 3 of 2000.

³²⁶ Section 24(4)(d).

³²⁷ Who may, depending on the nature of the activity and whether delegation has occurred, be either the National or Provincial Minister.

³²⁸ Section 35(3) of the ECA read together with regulation 11 of the EIA Regulations.

³²⁹ Regulation 11(2) of the EIA Regulations.

³³⁰ Section 36(1) and (2) of the ECA.

In addition to the provisions of section 36 of the ECA, PAJA, which gives effect to the constitutional right to procedurally fair and just administrative action must also be considered. It provides that any person whose rights have been materially and adversely affected by an administrative action may request reasons within 90 days after becoming aware of the action or reasonably having been expected to become aware of the action.³³¹ The administrator must within 90 days after receiving the request give that person adequate reasons for the administrative action.³³² Where an administrator failed to provide adequate reasons and in the absence of proof to the contrary it must be presumed that the administrative action was taken without good reason.³³³ PAJA provides further that any person may institute proceedings for judicial view of an administrative action.³³⁴

2.10.6 Consideration of ancillary rights and opportunities for participation in environmental assessment decision-making.

A number of fundamental rights as contained in the Bill of Rights indirectly provides for appropriate public participation, in that these provisions provide for freedom of opinion,³³⁵ freedom of expression,³³⁶ access to information³³⁷ and just administrative action.³³⁸

2.10.7 Is customary law recognised?

The status and role of traditional leadership is recognised subject to the Constitution.³³⁹ Where customary law applies the Court must apply it when it is applicable.³⁴⁰ The application of customary law is subject to the Constitution and any legislation that specifically deals with customary law.

2.10.8 Is there any land under customary tenure?

There is land under customary tenure. The Communal Land Rights Act³⁴¹ is to provide for, among other things, legal security of tenure by transferring communal land and the

³³¹ Section 5(1) of PAJA.

³³² Section 5(2) of PAJA.

³³³ Section 5(3).

³³⁴ Section 6 of PAJA.

³³⁵ Section 15 of the Constitution.

³³⁶ Section 16 of the Constitution.

³³⁷ Section 32 of the Constitution.

³³⁸ Section 33 of the Constitution.

³³⁹ Section 211(1) of the Constitution.

³⁴⁰ Section 211(3) of the Constitution.

³⁴¹ Act 11 of 2004. The date of commencement is yet to be proclaimed.

democratic administration of communal land by communities.³⁴² Where a community's communal land is registered in the name of the community, community rules must be made, adopted and registered.³⁴³ The Land Rights Enquirer must adopt measures to ensure that the decisions made by a community are informed and democratic decisions.³⁴⁴

2.10.9 Does common law provide additional rights of public participation in the decision-making process?

Of particular importance is the principle of natural justice which requires that a person who is affected by administrative action should be afforded a fair and unbiased hearing before a decision is made that may affect their rights. These principles are expressed in the Latin maxims *audi alteram partem* (hear the other side, a concept discussed in more detail in section 1 of this guide) and *nemo iudex in propria causa* (no one may judge in his own cause).³⁴⁵ The wisdom of the latter principle is self-evident; a person judging his or her own cause is less likely to be impartial. These two principles have largely been incorporated into the South African Constitution and given effect to by the PAJA. Therefore, the public participation process followed in terms of the EIA process must be in compliance with the requirements of natural justice.

2.11 KINGDOM OF SWAZILAND

2.11.1 Brief description of legal framework and applicable laws

Swaziland has a mixed legal system comprising the common law and customary law. The applicable law is the Environmental Management Act³⁴⁶ ("the EMA"). The Constitution of the Kingdom of Swaziland is still in its development stage and is therefore not applicable at the moment.³⁴⁷

2.11.2 Is there a legal obligation to undertake environmental assessment?

The EAs provided for by the EMA are both strategic EAs and EIAs.

2.11.3 In what circumstances does the legal obligation apply?

The requirement to undertake a strategic EA is triggered where the proponent of a Bill, regulation, public policy, programme or plan that could have an adverse effect on the protection, conservation or enhancement of the environment or on the sustainable management of natural resources wants to present the Bill to Parliament, or to make the

³⁴² Long title of the Act.

³⁴³ Section 19(1).

³⁴⁴ Section 17(2).

³⁴⁵ Baxter, L, *Administrative Law* Juta 1984 (third edition, 1994).

³⁴⁶ Act No. 5 of 2002.

³⁴⁷ <http://news.amnesty.org/mavp/news.nss/print/ENGAFR550082004> accessed on 7 December 2004.

regulation, or to adopt the public policy or the programme.³⁴⁸ These are listed in Annex 1 at the back of this guide. Two definitions are important in this regard. A strategic EA is defined as "an assessment of the positive and adverse effects that implementation of legislation or of a public policy, programme or plan is likely to have on the enhancement, protection and conservation of the environment and on the sustainable management of natural resources".³⁴⁹ A proponent is defined as "the government or public body responsible for a Bill, regulation, policy, programme, or plan".³⁵⁰ Once the proponent has received the strategic EA report, it is obliged to review the legislation, policy, programme or plan taking into consideration the Report, and to submit to the Minister responsible for Environmental Affairs, and to the Swaziland Environmental Authority, the report, a document setting out how the report had been considered, and a revised version of the legislation, policy, programme or plan.³⁵¹ The Authority may lodge an objection with the proponent if it is of the opinion that the environmental concerns raised during the strategic EA process are not adequately addressed by the revised legislation, or public policy or programme or plan, in that additional cost-effective measures to avoid or mitigate these adverse effects must be taken.³⁵²

The requirement to conduct an EIA is triggered where a person wants to undertake any project that may have an effect on the environment and has submitted a project brief to the authority containing sufficient information to enable the authority to determine the potential impacts of the project on the environment and the Authority is satisfied that the potential effects on the environment is likely to be more than minimal or insignificant.³⁵³ These are listed in a schedule at the back of this guide. The EMA provides that the Minister may make regulations prescribing categories of projects that are deemed to have an impact on the environment for the purposes of the requirement to conduct an EIA.³⁵⁴ At the moment, these are listed as Category 3 Projects in the regulations promulgated in terms of the previous statute.³⁵⁵

2.11.4 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

In respect of strategic EAs the Authority is obliged to consult with the proponent with a view of reaching an agreement on the amendments to be made to the revised legislation, or public policy, programme or plan in order to give full effect to the purpose and principles of the EMA. If an agreement cannot be reached on the amendments a notice of

³⁴⁸ Section 31(1).

³⁴⁹ Section 31(2)(a).

³⁵⁰ Section 31(2)(c).

³⁵¹ Section 31(7).

³⁵² Section 31(8).

³⁵³ Section 32.

³⁵⁴ Section 33.

³⁵⁵ These regulations are saved from being repealed by section 86.

objection may be lodged with the Minister.³⁵⁶ It is at this stage that the public may have an opportunity to participate in this process. Section 31(10) states that:

“The Minister may order the documents referred to in subsection (7) to be subjected to public review and/or to a public hearing before making a final determination under subsection (9).”

The opportunity is dependant on the discretion of the Minister who may order that the documents that have been submitted as part of this process be subjected to public review and/or to a public hearing before the Minister makes a final determination.

The Authority may require the applicant to conduct an EIA with or without a public hearing. This is clear from the provisions of section 32 which provides as follows:

“(5) If after reviewing the project brief the Authority is satisfied that –

- (a) the potential effect of the project on the environment s likely to be minimal or insignificant, it may approve the project;
- (b) The potential effect on the environment is likely to be more than minimal or insignificant, it may require the applicant -
 - (i) to conduct an environmental impact assessment in relation to the project, with or without a public hearing;
 - (ii) to submit to the Authority an environmental impact statement in accordance with subsection (7); and
 - (iii) to submit to the Authority a comprehensive mitigation plan in accordance with subsection (8).”

Clearly, the opportunity for a public hearing is also dependent on the discretion of the authority. Once an EIA has been conducted, an environmental impact statement and a comprehensive mitigation plan must be submitted to the Authority.³⁵⁷ The Authority then has a number of options. Among these, it may:

- (c) consider the application, and -
 - (i) if it is determined that the project will significantly affect the public interest, require the matter to be subjected to public review and/or request the Minister to convene a public hearing in accordance with section 53; and
 - (ii) if it is determined that the project will not significantly affect the public interest, determine whether to grant the approval and whether to impose any conditions in the approval.”³⁵⁸

Where a public review is to be undertaken the public is given an opportunity to inspect

³⁵⁶ Section 31(9).

³⁵⁷ Section 32(5)(b).

³⁵⁸ Section 32(11)(c)(i) and (ii).

the documents upon which the application is founded. Section 52(1) states that:

“The responsible authority shall, before finalising any document that is required by this Act to be subjected to public review -

- (a) distribute copies of the document to the Ministry, the Authority, and to Ministries and other parties who have an interest in, or are likely to be affected by, the contents of the document; and
- (b) inform the public that the document is being made available for public review by advertising the public review in the Gazette and in a national newspaper circulating in Swaziland at least once a week for two consecutive weeks ;
 - (i) specifying the place(s) and the times where copies of the document will be available for inspection;
 - (ii) inviting interested or affected persons to submit objections, comments or representations; and
 - (iii) specifying the procedure for the submission of objections, comments and representations and the date on which the public review period will terminate, which shall not be less than 20 days calculated from the date of the last notification in the newspaper.”

The Authority must distribute copies of the document to parties who may have an interest in, or are likely to be affected by, the contents of the document; inform the public that the document is made available for public review by advertising in the *Government Gazette* and in a national newspaper circulating in Swaziland at least once a week for two consecutive weeks:

- (a) specifying the place and the time where the copies of the document will be available for inspection;
- (b) inviting interested or affected persons to submit objections, comments or representations; and
- (c) specifying the procedure for the submission of objections, comments and representations and the date on which the public review period will terminate, which must not be less than 20 days, calculated from the date of the last notification in the newspaper.³⁵⁹

The public review process may lead to public hearings. The Authority is obliged to request the Minister to convene a public hearing if a minimum of 10 written and substantiated objections have been submitted during the public review process, and after considering all submissions the Authority is of the opinion that the high degree of public concern over the document, or the sensitive or significant nature of the matters referred to in the document, required that the public must be given an opportunity to make

³⁵⁹ Section 52.

submissions or comments at a public hearing.³⁶⁰ This section 53 is quoted below.

“(1) The responsible authority shall request the Minister to convene a public hearing if at least ten written and substantiated objections have been submitted during the public review process, and after considering all submissions the responsible authority is of the opinion that the high degree of public concern over the document, or the sensitive or significant nature of the matters referred to in the document, require that the public should have the opportunity to make submissions or comments at a public hearing.

(2) The responsible authority shall within 60 days of the end of the public review period, decide whether or not to request the Minister to convene a public hearing and shall notify the authority in writing giving reasons for its decision.

(3) The Authority may, within 30 days of being notified that the responsible authority has decided not to request the Minister to convene a public hearing, apply to the Minister for a review of the decision of the responsible authority in accordance with section 82.

(4) Where the Minister is requested, or decides to convene a public hearing the Minister shall:

- (a) publish a notice, at least once a week for two consecutive weeks, in at least two national newspapers circulating in Swaziland, stating the date and place where the public hearing is to be held at least 15 days before the public hearing is held; and
- (b) display and make available for inspection and copying all relevant reports, documents, and written submissions made during and after the period of public review until the public hearing is finalised.

(5) A public hearing shall be held within 30 days of the date of publication of the last newspaper advertisement in accordance with subsection (4).”

Therefore if the Minister decides to convene the public hearing he or she must give notice of the public hearing and must display and make available for inspection and copies of all relevant reports, documents, and written submissions made during and after the period of public review, until the public hearing is finalised. The public hearing must be held within 30 days of the date of publication of the last newspaper advertisement which gave notice of the hearing and its findings must be submitted to the Minister for a decision within 60 days after the public hearing in a report that is approved by all the appointed hearing officers who participated in the public hearing.³⁶¹ Members of the public have an opportunity to inspect the report since the Minister is obliged to make it available for public inspection for a period of no less than 20 days and to advertise details of where and when it may be inspected and copied.³⁶²

³⁶⁰ Section 53(1).

³⁶¹ Section 54(1).

³⁶² Section 54(2).

2.11.5 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

Once the Minister has granted or refused an approval in respect of a project, any person has an opportunity, within 60 days, to lodge an appeal if that person, objects to approval conditions imposed by the Minister, or objects to the granting of an approval.³⁶³ In addition to this opportunity, there is also an opportunity given to any person who is aggrieved by any decision made by the Authority taken in the exercise of its powers and functions under the EMA to apply for a review of that decision.³⁶⁴ The EMA provides that both the appeal and the review documents must:

- (a) state name and address of the appellant or applicant, as the case may be;
- (b) set out or otherwise identify sufficiently the decision to be appealed or reviewed;
- (c) set out the grounds for the appeal or the review and state briefly the facts on which the appellant or application, as the case may be, relied.³⁶⁵

Importantly, the review application must be lodged within 30 days after the date on which the applicant was given notice of the decision or direction that the applicant once reviewed.³⁶⁶ On review, the Director may reconsider the matter and may make a new decision.³⁶⁷ The same applies to the appeal application. The Director must immediately forward the application, for review or appeal, to the Board of the Authority if the Director does not consider it appropriate to change the original decision or if the Director makes a new decision that is not acceptable to the applicant.³⁶⁸

Importantly, the EMA provides that where the Authority believes that a project is likely to have significant adverse transboundary effect, it must advise the Minister who is obliged to then forward the environmental impact statement and comprehensive mitigation plan and other relevant reports to the relevant department of the country whose environment may be affected and invite comments within a specified period.³⁶⁹ Such comments are then considered in the decision-making process.

³⁶³ Section 32(14).

³⁶⁴ Section 81(1).

³⁶⁵ Section 82(3).

³⁶⁶ Section 82(1).

³⁶⁷ Section 82(4).

³⁶⁸ Section 82(5).

³⁶⁹ Section 32(9).

2.11.6 Consideration of ancillary right and opportunity for participating for environmental assessment decision-making

The EMA allows any person to request from the Minister, the Authority or any other organ of Government any information relating to the environment that could reasonably assist that person in contributing to the enhancement, protection and conservation of the environment and the sustainable management of natural resources.³⁷⁰

2.11.7 Does common law provide additional rights of public participation in the decision-making process?

The common law is discussed in section 1 of this document.

2.12 UNITED REPUBLIC OF TANZANIA

2.12.1 Brief description of legal framework and applicable laws

Tanzania's legal system consists of common law and customary law. The applicable laws are the Constitution or the Republic of Tanzania of 1977 ("the Constitution"), the National Environment Management Act³⁷¹ ("NEMA").

Is there a legal obligation to undertake environmental assessment?

In Tanzania there is no legal obligation to undertake EA. Among other things, the NEMA establishes the National Environment Management Council ("NEMC").³⁷² The functions of the NEMC include advising the Government and evaluating proposed policies and activities of the Government directed to the control of pollution and the enhancement of the environment.³⁷³ In addition, it recommends measures to ensure that Government policies take adequate account of environmental effects and it also fosters co-operation between government, local authorities and other bodies engaged in environmental programmes, and it also stimulates public and private participation in programmes and activities for the national beneficial use of natural resources.³⁷⁴ Importantly, the NEMA does not specifically provide for EAs.

There is a process that has been initiated with a view to pass a comprehensive environmental management statute. While this process is still in its infancy, since the first draft of the proposed statute, the Environmental Management Act, was published for public comments in July 2004, we will however discuss its draft provisions here. In terms of this draft, EA would be provided for in Part VI.

³⁷⁰ Section 51.

³⁷¹ 19 of 1983.

³⁷² Section 3(1).

³⁷³ Section 4.

³⁷⁴ Section 4.

2.12.2 In what circumstances does the legal obligation apply?

At the moment there are no specific activities that trigger an EIA, and therefore there are no procedures laid down for the undertaking of EIAs and the decisions to be made at the end of the process. Under the proposed statute, the requirements for EAs would be triggered where any person wants to undertake a project or undertaking of a type specified in the Schedule to the statute.³⁷⁵ The EIA study is envisaged to be conducted before the commencement or financing of a project or undertaking.³⁷⁶ There is also a requirement that where a Bill is being prepared for enactment to become a law that is likely to have effect on the management, conservation and the enhancement of the environment or sustainable management of natural resources, a strategic EA must be conducted.³⁷⁷ The same requirement applies when promulgating regulations, public policies, programmes and development plans likely to have similar impacts.³⁷⁸

2.12.3 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

The opportunity to participate in decision-making (including environmental) is underpinned by the Constitution, as it provides that every citizen has a right to participate in the process leading to the decision on matters affecting him/her, his/her well-being or the nation. This is provided for in Article 21(2) which states that:

“Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him, his well-being or the nation.”

This opportunity is further strengthened by the provision of the Constitution which provides that "any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him is being or is likely to be violated by any person anywhere in the United Republic may institute proceedings for redress in the High Court."³⁷⁹

Although this is the case, the citizens of Mainland Tanzania may rely on the opportunity to participate in decision-making which is granted by the Constitution. Whenever an EIA is undertaken a decision that may be taken in the process affects people's well-being or their nation. There is a history in Tanzania of EIAs being undertaken in few projects.³⁸⁰

³⁷⁵ Section 81(1).

³⁷⁶ Section 81(2).

³⁷⁷ Section 104(1).

³⁷⁸ Section 104(2).

³⁷⁹ Article 30(3).

³⁸⁰ G. L. Kamukala, *Applications of the Environmental Impact Assessment in the appraisal of major development projects in Tanzania*, page 185, in A.K. Bifwaf and S.B.C. Agarwala, *Environmental Impact Assessment for Developing Country*, (1992), stated that "in a few projects environmental protection measures have been considered as an integral component of the development planning."

For instance Kamukala writing in 1992 stated that "in a few projects environmental protection measures have been considered as an integral component of the development planning"³⁸¹

The envisaged statute provides that comments must be sought from members of the public. In section 89 it states that:

“(1) Without prejudice to Part XIV, the Council shall adopt guidelines on public participation, especially those likely to be affected by the project being the subject of an Environmental Impact Assessment study or review.

(2) Without prejudice to subsection (1), upon receipt of the Environmental Impact Statement, the Council shall -

- (a) circulate it for written comments from various institutions and government agencies;
- (b) notify the public by any appropriate means of the place and time for reviewing the Environmental Impact Statement and submitting written comments in a prescribed manner; and
- (c) solicit oral or written comments by any appropriate means, of the people who will be affected.”

This requirement only applies to EIAs as it requires that, on receipt of the environmental impact statement, NEMC must among other notify the public by any appropriate means, of the place and time for reviewing the statement and submitting written comments in a prescribed manner and solicit oral or written comments by any appropriate means, of the people who will be affected.³⁸²

Section 90 states that:

“(1) Notwithstanding the provisions of Section 87 of this Act and other provisions of this Act, the review of the Environment Impact Statement shall be conducted, inter alia, through public hearings.

(2) The Council shall within thirty days of receipt of an Environmental Impact Statement decide whether or not to convene a public hearing for purposes of collecting submissions or comments on the proposed project or undertaking.

(3) Where the Council decides or is requested to convene a public hearing, it shall display and make available for inspection and copying all relevant reports, documents and written submissions made during and after the period of review until the public hearing is finalised.”

The NEMC is therefore obliged to decide, within 30 days of receipt of a statement, whether or not to convene a public hearing for purposes of collecting submissions or comments on the proposed projects or undertaking.

³⁸¹ G.L.Kamukala, applications of the Environmental Impact Assessment in the appraisal of major development projects in Tanzania, page 185, in A.K. Bifwaf and S.B.C. Agarwala,, Environmental Impact Assessment for Developing Country, (1992).

³⁸² Section 89(2)(b) and (c).

2.12.4 Are there rights of appeal in the event of dissatisfaction of the outcome of the decision-making process?

Currently there are no rights of appeal where one is dissatisfied of the outcome of the decision-making process because there is no law that provides for such rights. The proposed statute would establish the Environmental Appeal Tribunal which would hear appeals lodged to it by any person who is aggrieved by a decision on the EA.³⁸³ The person would have 30 days, from the date on which the decision is taken, to appeal to the Tribunal.³⁸⁴

2.12.5 Does common law provide additional rights of public participation in the decision-making process?

The common law is discussed in section 1 of this document.

2.13 REPUBLIC OF ZAMBIA

2.13.1 Brief description of legal framework and applicable laws

The Zambian legal system is based on English common law and customary law.³⁸⁵ Environmental impact assessment is regulated by the Environmental Protection and Pollution Control Act³⁸⁶ (“the EPPCA”) and the Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations (“the Regulations”).³⁸⁷

The EPPCA establishes the Environmental Council (“the Council”)³⁸⁸ which may do all things necessary to protect the environment in order to provide for the health and welfare of persons, animals and the environment.³⁸⁹ The Council may advise and embark upon programmes educating the public and creating awareness of their role in the protection of the environment.³⁹⁰ The Council may request information on projects undertaken in Zambia and it may publicise all relevant information on any aspect of the environment.³⁹¹

³⁸³ Section 204 and section 206.

³⁸⁴ Section 206(2).

³⁸⁵ CIA - The World Factbook - Zambia at <http://www.cia.gov/cia/publications/factbook/geof/za.html> accessed on 13 January 2005.

³⁸⁶ Act 12 of 1990.

³⁸⁷ Statutory Instrument No. 28 of 1997.

³⁸⁸ "Council" means the Environmental Council of Zambia established under section 3 of the Act or any agent of the Council who has been duly authorised by the Council for purposes of the Regulations. (Regulation 2).

³⁸⁹ Sections 3 read with section 6(1).

³⁹⁰ Section 6(2)(i).

³⁹¹ Section 6(1)(2)(o) and (s).

The EPPCA prohibits the publication or disclosure of information to unauthorised persons that relate to, and which has come to a particular persons knowledge, in the course of their duties under this Act.³⁹²

2.13.2 Is there a legal obligation to undertake environmental assessment?

There is a legal obligation to undertake EA and the Regulations expressly provide for EIA.

2.13.3 In what circumstances does that legal obligation apply?

The legal obligations to undertake environmental impact assessment and the extent of that assessment process arises from whether a project falls within the first or second schedule of the Regulations. The first schedule contains a list of projects that require project briefs. The second schedule provides for projects that require EIA. These are listed in Annex 1 at the back of this guide.

2.13.3.1 Project briefs

Project briefs are required where alterations or extensions are to be made to an existing project listed on the first schedule or any project where the Council determines that a project brief should be prepared.³⁹³ The project brief that has to be prepared by the developer must in a concise manner contain the required information.³⁹⁴ The project brief is to be submitted to the authorising agency³⁹⁵ that is required to comment thereon within 30 days from receiving the project brief.³⁹⁶ The Council, where satisfied that the project will not have a significant impact on the environment or that sufficient mitigation measures will be adopted to ensure the acceptability of the anticipated impacts, may within 40 days of accepting the project brief, issue a decision letter subject to conditions, to the authorising agency.³⁹⁷

2.13.3.2 Environmental Impact Statement

The Council requires an environmental impact statement ("EI statement") for projects that are likely to have a significant impact on the environment.³⁹⁸ Environmental impact statements are therefore required where a project is listed in the second schedule of the

³⁹² Section 12(1).

³⁹³ Regulation 3(2)(b) and (c).

³⁹⁴ Regulation 3(4)(a)-(j).

³⁹⁵ "Authorising agency" means "any Government Ministry or department, public corporation, local authority or public officer in which, or in whom, any law, regulation or by-law vests the powers and functions to authorise, control or manage any aspect of a proposed or existing project". (Regulation 2).

³⁹⁶ Regulation 5(2) and (3).

³⁹⁷ Regulation 6(2).

³⁹⁸ Regulation 7(1).

Regulations, or for any alterations or extensions of an existing listed project specified in the second schedule or for a project which is not listed, but the Council determines that an environmental impact statement should be prepared.³⁹⁹

2.13.4 Does the legal framework provide rights and opportunities to participate in the environmental assessment process?

The developer is responsible for organising the public consultation process in order to determine the scope of the work to be conducted in the assessment and in preparation of the environmental impact statement. This is provided for in regulation 8(2) which states that:

“To ensure that public views are taken into account during the preparation of the terms of reference, the developer shall organise a public consultations process, involving Government agencies, local authorities, non-governmental and community-based organisations and interested and affected parties, to help determine the scope of the work to be done in the conduct of the environmental impact assessment and in the preparation of the environmental impact statement.”

Government agencies, local authorities, non-governmental and community based organisations and I&APs are to be consulted during the preparation of these terms of reference. The developer is responsible for preparing and submitting to Council the draft terms of reference which should take account of the issues contained in the third schedule (issues to be considered in preparing the terms of reference) and the results of the consultations undertaken.⁴⁰⁰ Only once the terms of reference have been approved may a developer begin preparing the environmental impact statement.⁴⁰¹

The EIA must be conducted in accordance with the guidelines contained in the fourth schedule and any other guidelines the Council considers appropriate.⁴⁰² The developer is required to take the necessary measures in seeking the views of the people in the communities which will be affected by the project. This is provided for in regulation 10 which states that:

“(1) The developer shall, prior to the submission of the environmental impact statement to the Council, take all measures necessary to seek the views of the people in the communities which will be affected by the project.

(2) In seeking the views of the community in accordance with sub-regulation (1), the developer shall -

(a) publicise the intended project, its effects and benefits, in the mass media, in a language understood by the community, for a period of not less than fifteen days and subsequently at regular intervals throughout the process; and

³⁹⁹ Regulation 7(2)(a), (b) and (c).

⁴⁰⁰ Regulation 8(3).

⁴⁰¹ Regulation 8(5).

⁴⁰² Regulation 9(4).

- (b) after the expiration of the period of fifteen days, referred to in paragraph (a), hold meetings with the affected community in order to present information on the project and obtain the views of those consulted.”

The proposed project must therefore also be advertised in the mass media in a language understood by the community for a period of not less than 15 days and must also be publicised at regular intervals throughout the process. Meetings are to be held with the affected community, after the expiration of the period of 15 days, in order to present information on the project and to obtain the views of the community.

The guidelines for conducting environmental impact assessment holds the developer and his team responsible for identifying the various alternatives which include sites, technology and design. The team must include at least one person from the potentially affected area.⁴⁰³ The views of the public at this stage may also be important, but is not provided for here in these guidelines. In terms of the guidelines, it appears that the team has to seek the views of only the communities which are likely to be affected by the project and that these views are to be considered in the development of mitigation measures. This appears to be a limitation of the right to public participation in that it is limited to mitigation measures only.

The environmental impact statement must contain information that, among other things, include the socio-economic impacts of the project and an indication of whether the environment of any neighbouring state is likely to be affected.⁴⁰⁴ A copy of the environmental impact statement shall be transmitted to the neighbouring state where the environment may be affected requesting comments to be received within the specified period.⁴⁰⁵

2.13.5 Review process of environmental impact statement

A copy of the environmental impact statement shall be submitted to the authorising agency for comment.⁴⁰⁶ The authorising agency may carry out such other procedures as it may consider appropriate.⁴⁰⁷ It is not clear from the legislation whether this includes additional public consultation processes. The Council is responsible for distributing copies of the environmental impact statement to I&APs, including government agencies. Regulation 16 provides as follows:

“(1) The Council shall -

- (a) distribute copies of an environmental impact statement to relevant ministries, local government units, parastatals, non-governmental and community-based organisations,

⁴⁰³ Fifth Schedule: Stage 1 at No. 3.

⁴⁰⁴ Regulation 11.

⁴⁰⁵ Regulation 13(1).

⁴⁰⁶ Regulation 15(1).

⁴⁰⁷ Regulation 15(3).

interested and affected parties;

- (b) place copies of an environmental impact statement in public buildings in the vicinity of the site of the proposed project;
 - (c) place a notification in at least two national newspapers three times a week for two consecutive weeks, and broadcast a notification on national radio, detailing the place and time where copies of an environmental impact statement are available for inspection and the procedures for submitting comments.
- (2) The Council may organise, or cause to be organised, public meetings in the locality of the proposed project.
- (3) Any person wishing to make a comment on any copy of an environmental impact statement shall send comments to the Council, within twenty days from the date of the last notification issued in accordance with paragraph (c) of the sub-regulation (1).
- (4) The Council may extend the period for receipt of written comments up to a maximum of fifteen days, if the Council considers that -
- (a) many contentious issues have arisen indicating the sensitive nature of the project; or
 - (b) the remoteness of the project location causes logistical problems for the consultation process.”

The Council is therefore required to place copies in public buildings in the vicinity of the proposed site and to place a notification in at least two national newspapers three times a week for two consecutive weeks, and broadcast a notification on national radio detailing where copies of the environmental impact statement may be inspected and the procedures for submitting comments. Public meetings may also be organised by the Council in the locality of the proposed project. Comments on the environmental impact statement are to be submitted within 20 days from the date of the last notification issued under regulation 16(1)(c). This period may be extended up to a maximum of 15 days where the Council considers that contentious issues have arisen or as a result of the remoteness of the project location, logistical problems for consultation may have been experienced.

2.13.5.1 Public hearings

The Council may, after considering the EI statement and all comments received, decide to issue a decision letter or hold a public hearing.⁴⁰⁸ A public hearing may be held on the environmental impact statement if as a result of the comments received, the Council is of the opinion, that a public hearing will allow it to make a fair and just decision or the Council considers it necessary for the protection of the environment.⁴⁰⁹ Regulation 18 provides that:

“(1) Whenever a public hearing is to be conducted under these Regulations -

⁴⁰⁸ Regulation 17(1).

⁴⁰⁹ Regulation 17(2)(a) and (b).

- (a) a notice of the hearing shall be published three times a week for two consecutive weeks in national papers at least fifteen days prior to the public hearing; and all expenses of the notices shall be incurred by the project proponent;
 - (b) all documents shall, from the end of the period of the public review until the end of the public hearing remain available for public inspection accompanied by all written comments at the location specified under regulation 16;
 - (c) such hearing shall begin not later than twenty-five days after the public notification; Provided that if the Council determines that the number and complexity of the issues, to be considered at a hearing, require additional preparations time, on the part of those wishing to make a presentation to the hearing, it may extend this period up to maximum of ten days;
 - (d) the Council shall, where it feels necessary and appropriate, request any relevant persons to be present at the public hearing to make comments or solicit, in writing, for comments from other Government agencies which have expertise or regulatory power over the proposed project, as well as from the authorising agency.
- (2) The Council shall appoint a person who, in its opinion, is suitably qualified to preside over the public hearing and who shall serve on such terms and conditions as may be agreed between the Council and the person so appointed.
- (3) A public hearing shall be conducted at a venue which shall be convenient and accessible to those persons who are likely to be specifically affected by the project.
- (4) On the conclusion of a public hearing the person presiding at the hearing shall, within fifteen days from the termination of the public hearing, make a report of his findings to the Council.”

Therefore, where a public hearing is to be conducted, a notice of the hearing shall be published three times a week for two consecutive weeks in national newspapers 15 days prior to the public hearing. All documents shall remain available for public inspection, including the comments, and the hearing may begin not later than 25 days after the last public notification, which period may be extended to a maximum of ten days. The Council may where it considers it necessary and appropriate, request input from any person or solicit comments from other government agencies. The public hearing is to be conducted at a venue which is accessible to those persons likely to be "specifically affected" by the project. The person presiding at the hearing is required, within 15 days from the termination of the public hearing, to make a report of his findings to the Council. Importantly, any person may attend a public hearing and make presentations.⁴¹⁰ However, the presiding officer has the right to disallow frivolous and vexatious presentations.⁴¹¹

2.13.5.2 Council's decisions

The Council, in making its decision shall, among other things take into account the comments received and, where applicable, the report of the presiding officer at the public

⁴¹⁰ Regulation 19(1).

⁴¹¹ Regulation 19(1).

hearing and other factors the Council considers as crucial.⁴¹² The Council's decision must be made within 30 days after receiving a report from a public hearing or, where there was no public hearing, 20 days from the date on which an environmental impact statement was submitted.⁴¹³ The Council may issue a decision letter approving or rejecting the project, or approving the project, subject to conditions.⁴¹⁴ The Council, in issuing its decision letter, may provide reasons for any rejections or specify the conditions to be attached to any authorisation licence, permit or permission issued to the developer.⁴¹⁵ There appears to be no provisions for reasons where the Council approves the project. The Council's decision must be communicated within 15 days of the decision to all parties concerned.⁴¹⁶

2.13.6 General provisions regarding EIA

Project briefs, environmental impact statements, terms of reference, public comments, presiding officers, reports of public hearings, decision letters and any information submitted to the Council under these Regulations are public documents.⁴¹⁷ Any person who desires to consult any document mentioned above, may inspect such document on the terms and conditions as the Council may determine.⁴¹⁸ Search fees⁴¹⁹ for access to information on environmental impact statements are provided for and there is also a fee for the review of environmental impact statements.⁴²⁰

The Council may consider any claim that a developer makes that the information supplied is proprietary, and where the Council determines that the information is proprietary, such information may be excluded from the project brief or the environmental impact statement, but it will remain available to the Council.⁴²¹ Importantly, where no land preparation or construction has started within three years, the developer must reregister with the authorising agency any intention to develop.⁴²² A developer must inform the authorising agency of any changes to the development and the authorising agency will inform the Council who may decide whether an additional

⁴¹² Regulation 20(1).

⁴¹³ Regulation 20(2).

⁴¹⁴ Regulation 21(1).

⁴¹⁵ Regulation 22(1)(a) and (b).

⁴¹⁶ Regulation 23.

⁴¹⁷ Regulation 26(1).

⁴¹⁸ Regulation 26(2).

⁴¹⁹ The schedule refers to regulation 13 (we are of the view that it should be regulation 14). The fifth schedule refers to regulation 9(3) we are of the view that this is incorrect and that it should be regulation 9(4).

⁴²⁰ Fifth schedule.

⁴²¹ Regulation 27(3).

⁴²² Regulation 30.

environmental impact statement is required or the existing environmental impact statement has to be supplemented.⁴²³

Where an additional environmental impact statement is required, the procedures set out under regulations 8 to 28 must be followed.⁴²⁴ It appears that where a supplement to the environmental impact statement is required, the Council shall circulate the information for review to any relevant government agency and local government authority and on receipt of their comments, the Council shall issue a decision letter within ten days of the close of period set for receipt of their comments.⁴²⁵

2.13.7 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental assessment decision-making process?

Any party concerned may appeal in writing to the Minister against the decision of the Council within a period of ten days after receipt of the Council's decision letter.⁴²⁶ The Minister is required to make a decision within 14 days of receiving the appeal.⁴²⁷ An aggrieved party dissatisfied with the Minister's decision may appeal to the High Court.⁴²⁸ It appears that the appeal to the High Court is limited to aggrieved persons only and is therefore not open to the general public.

2.14 REPUBLIC OF ZIMBABWE

2.14.1 Brief description of legal framework and applicable laws

The Zimbabwean legal system consists of Roman Dutch and English common law as well as statutory law.⁴²⁹

The Environmental Management Act⁴³⁰ ("the EMA") which provides for, among other things, the sustainable management of natural resources and protection of the environment, also regulates EIAs.⁴³¹ Provision is made for environmental rights and principles. Every person has the right to a clean environment that is not harmful to his or her health, to access to environmental information, and to have the environment protected

⁴²³ Regulation 31 and 32(1)(a) and (b).

⁴²⁴ Regulation 32(2).

⁴²⁵ Regulation 33.

⁴²⁶ Regulation 24(1).

⁴²⁷ Regulation 24(2).

⁴²⁸ Regulation 24(3).

⁴²⁹ <http://www.odci.gov/cia/publications/factbook/geos/zi.html> accessed on 8 December 2004.

⁴³⁰ Act 13 of 2002.

⁴³¹ The Act became operative on 17 March 2003.

for present and future generations.⁴³² Every person also has the right to participate in the implementation and publishing of reasonable legislative, policy and other measures that prevent environmental degradation and promote sustainable development.⁴³³

The environmental principles apply to the actions of all persons and government agencies where those actions significantly affect the environment.⁴³⁴ The principles require, among other things, the participation of I&APs in environmental governance and people must be given an opportunity to develop the understanding and capacity necessary for achieving effective participation. Section 4 states that:

“(2) Subject to this Act, the following principles of environmental management shall apply to the actions of all persons and all government agencies, where those actions significantly affect the environment -

...

- (c) the participation of all interested and affected parties in environmental governance must be promoted and all people must be given an opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation.”

Environmental education, creating environmental awareness and the sharing of knowledge and experience must be promoted to allow communities adequately to address environmental issues and adopt behaviour consistent with sustainable environmental management.⁴³⁵ The Minister has a number of general functions, which include the co-ordination and promotion of public awareness and education on environmental management.⁴³⁶ The rules of natural justice must be observed and reasonable steps must be taken to ensure that persons whose interests are likely to be affected are given an opportunity to make representations.⁴³⁷ For example, to hear the other side.

It is important to note that where the EMA refers to appropriate authority it may be one of the following: the Forestry Commission; the Department of National Parks and Wild Life Management; in relation to Communal Land it refers to the Rural District Council where the land is situated and the Minister has assigned environmental management functions to that Council.⁴³⁸

⁴³² Section 4(1).

⁴³³ Section 4(1)(b)(i) and (ii).

⁴³⁴ Section 4(2).

⁴³⁵ Section 4(2)(d).

⁴³⁶ Section 5(1)(e).

⁴³⁷ Section 136 of the EMA.

⁴³⁸ Section 2.

2.14.2 Is there a legal obligation to undertake environmental assessment and in what circumstances does that obligations apply?

There is a legal obligation to undertake EAs, it is triggered by the undertaking of projects as contained in the first schedule of the EMA. These are listed in Annex 1 at the back of this guide. The projects listed in the first schedule of the EMA must not be implemented unless the Director-General has issued a certificate, which certificate must remain valid and the conditions imposed must be complied with.⁴³⁹

Before undertaking an EIA, a prospectus must be submitted to the Director-General. The prospectus must contain information regarding the assessment and the project, as may be prescribed.⁴⁴⁰ The Director-General may determine conditions relating to the scope of the assessment including, the appointment of an independent expert in environmental planning and management to prepare the EIA Report.⁴⁴¹ The Director-General may request further information as may reasonably be required and may, where he is dissatisfied with the prospectus, reject the prospectus and give directions for the preparation of a new prospectus.⁴⁴² In considering whether or not to approve a project to which an EIA Report relates, The Director-General may, consult any authority, community or person who, in his opinion, has an interest in the project. This section is quoted below:

“(3) In considering whether or not to approve a project to which an environmental impact assessment report relates, the Director-General -

...

(c) may consult any authority, organisation, community, agency or person which or who, in his opinion, has an interest in the project.”

This provision is discretionary and it appears that the Director-General may consult persons where he is of the view that they have an interest in the project. However, the provisions of the common law, especially the *audi* rule (i.e. hear the other side) may assist objectors even though the Director-General is not of the view that they have an interest in the project.

2.14.3 Does the legal framework provide for rights and opportunities to participate in the environmental assessment process?

In light of the above, it appears that when the Director-General considers whether to approve a project he/she has a discretion to consult a community or person who has an interest in the project. The EMA provides further that EIA Reports should be open for

⁴³⁹ Section 97(1)(a), (b) and (c).

⁴⁴⁰ Section 98(1).

⁴⁴¹ Section 98(3).

⁴⁴² Section 98(2)(a), (b) and (c).

public inspection at all reasonable times at the Director-General's office. This inspection may be subject to a fee. Section 108 states that:

“An environmental impact assessment report shall be open for public inspection at all reasonable times at the Director-General’s office, on payment of the prescribed fee, if any:

Provided that no person shall use any information contained therein for personal benefit except for purposes of civil proceedings brought under this Act or under any other law in a matter relating to the protection and management of the environment.”

The information contained in the EIA Report may not be used for personal benefit,⁴⁴³ but it may be used for the purposes of civil proceedings relating to the protection of the environment. However, it must be noted, as stated earlier, the EMA specifically requires the observation of the rules of natural justice and that reasonable steps are taken to ensure that every person whose interests are “likely to be affected” by the exercise of the function is given adequate opportunity to make representations.⁴⁴⁴

2.14.4 What rights and opportunities does the legal framework provide for recourse where a person feels aggrieved by the outcome of the environmental impact assessment decision-making process?

Any person who is aggrieved by any decision of any authority under the EMA, may, within 28 days after being notified of the decision/action, appeal in writing to the Minister.⁴⁴⁵ The appeal must, where such a fee is prescribed, be submitted with the prescribed fee. Importantly, the appeal does not suspend the operation of any order or decision of the authority.⁴⁴⁶ It appears therefore, that an objector/complainant would have to turn to the Court in order to get an interdict preventing the developer from proceeding with the project until the appeal has been finalised. The Minister⁴⁴⁷ may, where he is not the authority in the appeal, request reasons for the decision or action and for a copy of the evidence upon which the reasons are based.⁴⁴⁸ The Minister may make such order as he considers just.⁴⁴⁹

An appeal against the Minister's decision may be instituted in the Administrative

⁴⁴³ Personal benefit is not defined in the EMA.

⁴⁴⁴ Section 136.

⁴⁴⁵ Section 130(1).

⁴⁴⁶ Section 130(1).

⁴⁴⁷ The EMA has definitions for “Minister” and “responsible Minister”. Minister means “the Minister of Environment and Tourism or any other Minister to whom the President may, from time to time, assign the administration of this Act” and “responsible Minister” in relation to environmental matters, means “any Minister or Vice-President who, in terms of any enactment, is empowered to or required to exercise any function in respect of the environment”. Section 2.

⁴⁴⁸ Section 130(2).

⁴⁴⁹ Section 130(3).

Court.⁴⁵⁰ This appeal must be made in the form and manner and within the period prescribed in the rules of court.⁴⁵¹ The Administrative Court may confirm, vary or set aside the decision, or make any order as the Court may think just.⁴⁵²

2.14.5 Consideration of ancillary rights and opportunities for participating in environmental assessment decision-making

In terms of the Constitution, every person is entitled to the protection of the law,⁴⁵³ is free to hold opinions and to receive and impart ideas and information without interference.⁴⁵⁴ No person may be hindered in their freedom to assemble and associate with other persons, which include associations for the protection of interests.⁴⁵⁵ Discriminatory laws or laws having such an effect, is prohibited, and persons in public office may not act in a discriminatory manner.⁴⁵⁶ However, the application of African customary law is considered as not being in conflict with the non-discrimination provision.⁴⁵⁷

The Constitution does create an office of the Ombudsman which may investigate any action taken in exercising administrative functions where it is alleged that a person has suffered injustice as a result of that action, and there does not appear to be any remedy reasonably available by means of court proceedings or on appeal from a court.⁴⁵⁸ As there are remedies reasonably available, objectors may not have regard to those provisions

2.14.6 Is customary law recognised?

The Constitution makes provision for the appointment of Chiefs to preside over the tribespeople of Zimbabwe.⁴⁵⁹ It provides for the application of customary law between Africans and persons who consent to its application. The Constitution further provides for the creation of a Council of Chief's which consists of Chiefs elected from each of the various communal land areas.⁴⁶⁰

⁴⁵⁰ Section 130(4).

⁴⁵¹ Section 130(5) refers to section 130(3) (the Minister may make such order as he considers just). There is an Editor's note in our copy of the EMA indicating that the numbering of the subsections may be incorrect, and that the reference should have been to section 130(4) (Administrative Court appeals).

⁴⁵² Section 130(6).

⁴⁵³ Section 18(1).

⁴⁵⁴ Section 20.

⁴⁵⁵ Section 21.

⁴⁵⁶ Section 23(1).

⁴⁵⁷ Section 23(3)(b).

⁴⁵⁸ Section 108(1)(a).

⁴⁵⁹ Section 111(1).

⁴⁶⁰ Section 111(3).

2.14.7 Is there land under customary tenure?

The Communal Land Act,⁴⁶¹ which provides that communal land shall be vested in the President.⁴⁶² A rural district council, when granting its consent to occupy or use any portion of communal land shall have regard to customary law, consult and co-operate with the traditional leaders and grant consent only to persons who, in terms of the community's customary law, may be permitted to occupy and use such land.⁴⁶³ The Communal Land Act allows for appeals by aggrieved persons to the President.⁴⁶⁴ Permits to occupy and use communal land may be issued by the rural district council and any person who is aggrieved by a decision may appeal to the Minister⁴⁶⁵ within the time and manner as may be prescribed by regulation.⁴⁶⁶

Decisions taken in terms of the Communal Land Act will therefore be subject to the customary law of that particular community and participation in decision-making, which may include environmental decision-making, will therefore have to be determined in accordance with those customary laws and traditions.

2.14.8 Are rights of appeal safeguarded under common law in the event of dissatisfaction with the outcome of the decision-making process?

As indicated above, the EMA makes provision for the observation of the rules of natural justice, particularly the right, where interests are likely to be affected, to make representations. This in itself may provide the basis for public participation at the various phases of assessment and implementation of a project.

3 CONCLUSION

It is clear that the countries in SADC region have introduced a number of legislative and other measures to improve public participation in environmental assessment decision-making processes. However, the nature and extent of public consultation and participation varies from country to country. In many instances, public participation is discretionary, or is not provided for sufficiently early in the process for participation to be meaningful. The ultimate goal of an EA process should be, among other things, to provide an adequate opportunity for interested and affected persons to raise their

⁴⁶¹ Act 20 of 1982.

⁴⁶² Section 4.

⁴⁶³ Section 8.

⁴⁶⁴ Section 8(4).

⁴⁶⁵ "Minister means the Minister of Local Government, Rural and Urban Development or any other Minister to whom the President may, from time to time, assign the administration of this Act.

⁴⁶⁶ Section 9.

concerns and views and to have those concerns considered and addressed either by way of altering the proposed project or activity or by refusing environmental authorisation of the project or activity. The needs of interested and affected persons, the developer and the environment must be balanced in such a way that proposed projects or activities ensure sustainable development. This will only be achieved through effective participation in the environmental decision-making processes by all relevant stakeholders.

