COUNTRY REPORT: BOTSWANA
A New Environmental Impact Assessment Law for Botswana

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Introduction

Since the 1972 United Nations Conference on Environment and Development (UNCED) held in Stockholm, environmental impact assessments (EIAs) have assumed an increasingly important status in domestic and international law. Their significance lies in them having utility for promoting the integration of environmental considerations into socio-economic development and decision-making processes.

As a measure of precaution, EIAs have assumed the status of binding legal rules faster than many other principles on environmental law, in particular the precautionary principle, on which, one would argue, EIAs are based. The reason for this is not difficult to find. Although there is a view that EIA is an emerging principle of international environmental law,[1] EIAs are often required as a matter of domestic law with many countries enacting dedicated EIA. This reflects the obligations enshrined in the 1992 UNCED in Rio de Janeiro. One of the instruments adopted was the *Rio Declaration* which provides:

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.[2]

Botswana is a signatory to the United Nations *Convention on Biological Diversity* that requires state parties, among other things, to adopt and implement EIA legislation. It provides in part:

> Each Contracting Party, as far as possible and as appropriate, shall:
>
> (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse

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[1] *Experts Group on Environmental Law of the World Commission on Environment and Development* (1986).
[2] *Rio Declaration*, Principle 17.

> (b) on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures:
> (c) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have adverse impacts on biological diversity are duly taken into account.[3]

It was not until 2005 that Botswana enacted such a law, which did not come into force until it was replaced by another in 2011, becoming operational in June 2012.

Defining Environmental Impact Assessment

Definitions of EIA abound,[4] and it is not the purpose of this Report to reconcile definitions. The definitions do converge in respect of objectives. These require that any developer must ensure that environmental effects should be taken into account before decisions are taken to allow certain activities, and that procedures for the implementation of national impact assessment be spelt out. Most international instruments do not define what an EIA entails or the particular elements that have to be satisfied, nor set the threshold of harm that an activity may produce in order to require an EIA. They encourage reciprocal procedures for notification, information, exchange and consultation in respect of activities that are likely to have significant transboundary effects.[5] Exactly how the process operates in practice is described by Sands:

> 'An environmental impact assessment describes a process which produces a statement to be used in guiding decision-making, with several related functions. First, it should provide decision-makers with information on the environmental consequences of proposed activities and, in some cases, programmes and policies, and their alternatives. Second, it requires decisions to be influenced by that information. And third, it provides a mechanism for ensuring the participation of potentially affected persons in the decision-making process.'[6]

Several ideas stem from this definition. The process must produce a statement. This is the statement that is going to be assessed for compliance. It is required that decisions (whether to permit development or not, or to permit it under restricted conditions) be

[3] Article 14 (a) and (b).
[4] For generally: R. Munn, *Environmental Impact Analysis* (1979); P. Wathern (ed), *Environmental Impact Assessment, Theory and Practice* (1988); P. Sands, *Principles of International Environmental Law - Frameworks, Standards and Implementation* (1995) Manchester University Press, Manchester; Glasson et al, *Introduction to Environmental Impact Assessment* (1999) UCL Press, London.
[5] UNEP, *Goals and Principles of Environmental Impact Assessment* (1987).
[6] Sands (supra note 4), 579.

influenced by information covered in the statement. It would seem that the decision maker must be allowed some measure of flexibility, to the extent of even deciding against the statement. Cogent considerations ought to prevail if it is intended not to follow the statement. The process should require the participation of the public, or at least those potentially affected, in the process leading to the production of the statement. This is frequently referred to as public participation. It is against the above expectations that the legislation in Botswana will be considered.

Environmental Impact Assessment Act (2005)

This Act was passed in 2005 with the objective of providing for environmental impact assessment "to assess the potential effects of planned developmental activities; to determine and to provide mitigation measures for effects of such activities as may have a significant adverse impact on the environment; to put in place a monitoring process and evaluation of the environmental impacts of implemented activities; and to provide for matters incidental to the foregoing".[7]

Its date of commencement was to be 27 May 2005. However, the Act provided that it applied to a list of activities prescribed by the Minister by way of regulations.[8] By the time of its repeal in 2011, these regulations had not yet been prescribed. Notwithstanding, developers routinely presented impact assessment reports to the Department of Environmental Affairs for evaluation. No legal challenge was ever brought as to the legality or otherwise of the demand for reports. Whatever uncertainties existed, they have now been laid to rest by a new law.

The previous Act was called the *Environmental Impact Assessment Act*. The new legislation is called *the Environmental Assessment Act*. The word impact has been omitted from the title, although no reasons therefore have been given. In some quarters it was felt that the word 'impact' was politically sensitive and negative, tending to presume blame.[9] In the situation of Botswana, it does not appear anything was achieved by the new terminology as the legislation has re-enacted the provisions of the previous Act.

[7] Long Title of the Act.
[8] Section 3.
[9] Glasson *et al* (supra note 4), 3.

The Main Provisions of the Act

The Act applies to "the activities in respect of which the Minister, may, after screening, prescribe by regulations".[10] In line with the position in many countries, the process of screening is a pre-condition for the application of the Act. The understanding is that not all activities require an EIA. It has been said that project screening narrows the application of the Act to those activities or projects that may involve a significant environmental impact.[11] On its own, this process has inherent problems, for it seeks to determine, *a priori,* that certain activities will or are likely to have a significant impact on the environment while others would not, before the EIA itself is done. It would be better to have the EIA itself discount the likelihood of harm. Further, the activities to which the Act applies must be prescribed by regulation. The regulations are thus a *sine qua non* for the coming into force of the Act. This was one of the shortcomings of the previous legislation because for about 6 years, the regulations were not promulgated.

Minister

The Minister is the central authority responsible for implementing the Act. He prescribes which activities are to be subject to an EIA. The Minister is therefore afforded a wide discretion. He prescribes the form of the statement to be submitted by a development proponent to the competent authority wherein an evaluation of the likely impacts is to be made.[12] He establishes an Appeal Committee which adjudicates on appeals lodged by persons aggrieved by decisions of the competent authority.[13] He has appointing powers over some members[14] of the Environmental Assessment Practitioners Board,[15] and may remove any member of the Board from office on the occurrence of certain events.[16] Where a proposed activity is likely to have significant adverse effects in another country, the Minister is the authority responsible for notifying, through the Minister responsible for foreign affairs, the concerned country's Minister responsible for foreign affiars. th. Certain activities have been exempted from the application of the Act. These are activities implemented by members of specific forces[17] or any other security organ of the state where national security

[10] Section 3.
[11] Glasson *et al* (supra note 4), 4.
[12] Section 9(4).
[13] Section 13.
[14] Section 22(b).
[15] Established under section 20 of the Act.
[16] Section 27.
[17] The Botswana Defence Force, the Directorate of Intelligence and Security, the Botswana Police Service and the Prison Service.

may be compromised.[18] The Minister may establish a special committee called the Environmental Impact Special Committee to determine the environmental impact of the activities carried out by these organs.

Although the intention was to leave assessment of environmental impacts to competent authorities, the Minister has retained a foothold on some important matters and can be said to have overall powers.

Competent Authority

The Department of Environmental Affairs is the authority responsible for implementing and ensuring compliance with the objectives of the Act. It is the Department that considers applications for proposed activities. It considers environmental assessment statements and decides on whether or not to grant authorization, and may conduct public hearings.[19] It can accept or reject a statement, and may impose conditions that it considers appropriate.[20] It may modify or revoke any authorization previously granted where there is an unanticipated irreversible adverse environmental impact, or where a developer fails to comply with any term or condition.[21] In view of these wide powers, the Legislature considered it necessary to provide a window of redress to aggrieved persons, in the form of an Appeals Committee. This is supplemented by the possibility of a review under common law, which applies to all decisions of public authorities.[22]

Environmental Assessment Practitioners Board

The Act requires that an Association of Environmental Assessment Practitioners be formed. It must be registered under the *Societies Act*,[23] and must demonstrate to the Minister that it is representative of practitioners practising in Botswana. There is no specific provision which establishes the Association. The act does however contain provisions governing the formation of the Board described above,[24] with a corporate status, and whose membership is composed of: members elected by the Association; members appointed by the Minister; and

[18] Section 76.
[19] Section 11.
[20] Section 12.
[21] Section 15.
[22] See: *Tsogang Investments (Pty) Ltd* vs *Phoenix Investments (Pty) Ltd and Another* [1989] BLR 512; *National Development Bank* vs *Thothe* [1994] BLR 94; and *Attorney General and Another* vs *Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234.
[23] Cap 18:01.
[24] Section 20.

a legal adviser nominated by the Association.[25] The main function of the Board is to: regulate the practice of environmental assessments by registering and certifying practitioners; provide quality assurance in the practice, prescription and enforcement of a code of conduct for practitioners; enforce discipline; and generally regulate of the practice.[26] It has very wide powers. In its make-up, it evidences a clear case of statutory self-regulation. The establishment of the Board with regulatory responsibilities over the profession is an innovation not contained in the original law enacted in 2005.

Assessment of the Act

The Act does satisfy international best practice for EIA. On the whole, the main elements recognized internationally as proper thresholds for an EIA regime seem to be in place. These are discussed below.

Production of a Statement

This refers to the report of an environmental assessment study.[27] This statement is mandatory for all activities that are likely to cause significant adverse effects on the environment,[28] included in a list of activities prescribed by the Minister.[29] The format of the statement is also prescribed by the Minister. The first requirement is therefore satisfied.

Impact of Statement on Decision-Making

The competent authority is under an obligation to assess the statement for compliance with the format prescribed by the Minister. There is a further obligation imposed on the competent authority to subject the statement to public review, a process facilitated in terms of logistics, by the competent authority itself. It is after all inputs have been received that the competent authority considers the adequacy of the statement.[30] To this extent, and to the extent that the decision to grant authority to develop, or to reject the statement, is based on the information contained in the statement and views stemming from a public review of the statement, the decision is indeed influenced by the statement. This requirement is also satisfied.

[25] Section 22.
[26] Section 24.
[27] Section 2.
[28] Section 3.
[29] These activities are listed at Schedule 1 of Regulation 3.
[30] Sections 10-12.

Public Participation

The Act requires an applicant for a proposed activity, to engage a practitioner to do a scoping exercise, before undertaking or implementing an activity.[31] During the scoping exercise, the applicant is under an obligation to publicize, in the mass media, in all official languages, the intended activity, its effects and benefits, and to hold meetings with the affected people or communities, at which meetings he shall explain the nature of the activity and its effects.[32] The significance attached to public participation is highlighted by numerous provisions of the Act. Even where the statement submitted by the developer complies with the requirements prescribed by the Minister, the competent authority is required to place a notification in the *Gazette* and in a weekly newspaper, in the official languages, for four consecutive weeks, inviting comments or objections from those most likely to be affected and other interested persons.[33] The invitation of comments or objections from *other interested persons* in addition to those most likely to be affected by the development/activity, has the effect of obviating the problems associated with restrictive *locus standi* rules.[34] In matters of the environment, where effects may not easily be localized, everybody is a potentially affected person. In its decision making, the competent authority must consider these comments and objections.[35] The authority is allowed to hold a public hearing if after examining the statement, he/she is of the opinion that the public should have the opportunity of making submissions and comments at a public hearing.[36] In considering applications for renewal of authorization, the competent authority is obliged to take into account the comments and objections of interested persons and the public.[37] These provisions seem to satisfy the general requirements for public participation,[38] and are in line with similar obligations in Europe.[39] The Act this complies with general international law.

Appeals

[31] Section 7.
[32] Ibid.
[33] Section 10.
[34] See in this regard B. Maripe, '*Locus Standi* and Access to Judicial Review: Statutory Interpretation and Judicial Practice in Botswana' 1999 (62) *THRHR* 390.
[35] Ibid.
[36] Section 11.
[37] Section 17.
[38] See B. Clark, 'Improving Public Participation in Environmental Impact Assessment' (1994) 20(4) *Built Environment* 294-308.
[39] See for example Article 6 of the EC Directive 85/337.

Under the Act, appeals lie to an Appeals Committee established by the Minister.[40] The Act does not prescribe the criteria for appointment to the Committee. It is hoped that the appointments will not be based on any consideration other than competence, expertise and general knowledge of the issues involved.

Conclusion

It has taken a long time for Botswana to discharge its international obligations by enacting and operationalizing environmental impact legislation. To do so is commendable. However, enactment of legislation is not enough. That legislation must meet the general purposes of impact legislation. Botswana's new EIA regime seems to meet these expectations. The implementation of the legislation must now achieve the purposes of impact legislation. Because the law has only recently come into force, one is not able to make an informed assessment as to whether or not the law will achieve its ends. It is hoped though that practice will reflect the lofty ideals that underpin the enactment of the law.

[40] Section 13.