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Strategic Planning and Implementation of Public Involvement in Environmental Decision-Making as they Relate to Environmental Impact Assessment in Kenya

Dr Patricia Kameri-Mbote

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I. Introduction

Over the years the World Bank has been at the forefront of initiating development projects as well as working with its development partners in the Bank's client countries. As part of its efforts to improve environmental assessments the World Bank envisaged a project aimed at enhancing the effectiveness of public consultations in those projects that are likely to pose significant impacts on the environment.

This report analyses the legal and institutional frameworks on public involvement in environmental decision-making in Kenya. It particularly focuses on environmental impact assessments (EIAs) in the World Bank projects. EIA is a process that is designed at the project planning stage to gather information about the potential impact of the proposed development activity on the environment and the use of that information in the decision-making process.

A. The Development of Regulatory Regimes Governing EIA

Environmental input as a policy requirement of the planning machinery of Kenya is captured in the country's 1965 African Socialism Paper. The Paper stated:

Practices tending to harm rather than to conserve our physical environment must be curbed through education and legislation.¹

The 1980s saw increased Government commitment to improving environmental impact assessments. The 1979-1983 Development Plan² contained elements of the concept of EIA.³ However, for a long time there has been a lack of legal institutionalisation of formal EIA. Thus these policy considerations have rarely been replicated in practice.

B. Definition and Requirements of EIA

EIA is usually carried out by two entities: the developer and the planning authority. The developer/project proponent gathers information about the potential impact of a given project on the environment. This is done through what is referred to as the environmental impact study (EIS). The planning authority and other relevant authorities then takes into account that information in decision-making. This is called the assessment. Throughout these processes the interested and affected parties as well as the general public should be involved.

EIA is ordinarily carried out in a number of stages. No matter what form the EIA takes there are certain essentials that must be followed. One principal component of an EIA is a scoping mission. The scoping mission determines the extent of and approach to the EIA. It delineates what should be carried out in the study, the alternatives and issues that should be investigated, the procedure that should be followed and the requirements of the report.

The second component of an EIA is the project brief otherwise known as the initial assessment. This is a brief account of the expected impact of the project based on its location, magnitude and on the nature of the proposed activities. This brief enables the relevant authorities and the proponent to decide whether a full EIA is required. This is likely to be the case if the initial assessment indicates that the proposal will result in significant impacts.

The full EIA involves field studies after which the report is compiled. The report identifies among other things the potential impacts and the mitigating measures. It is submitted to the planning authority for review.

The object of review is to verify the report and test it for the adequacy and soundness of the information. It is usual practice for the report to be availed to the public for comment and scrutiny.

II. The Legal and Institutional Frameworks on Public Involvement

A. International Legal Provisions

Most of the international legal provisions on the environment constitute generally accepted principles of law and represent fundamental considerations of humanity.⁴ Although most of these international legal instruments are not legally binding nationally, most African countries including Kenya have ratified them. Domestic legislation in Kenya largely borrows from international legal provisions. Some of them, especially those that relate to the environment, could be construed as granting the citizens of Kenya the right to protect the environment.

Of the international legal provisions on the environment, those on procedural rights are critical especially in relation to the role of civil society in environmental management. These procedural rights include the rights of access to information, participation in decision making, freedom of association and access to justice.⁵

B. World Bank Requirements for Public Participation

World Bank rules require the incorporation of environmental concerns in all Bank financed projects and activities. This requirement involves the screening of all activities for their environmental impacts. The major aim of the assessment is to avoid harm both to the environment and the local populations.

Since 1989 the World Bank adopted formal policies and procedures on environmental assessment via an Operational Directive to its staff in October 1989. The directive states:

The Bank expects the borrower to take the views of affected groups and local NGOs (nongovernmental organizations) fully into account in project design and implementation, and in particular in the preparation of EAs.⁶

Two years later the Bank published the *Environmental Assessment Sourcebook Volume I: Policies, Procedures, and Cross-sectoral Issues*, which provided guidelines on EIA. The 1989 Operational Directive was revised in October 1991. The essence of the revision was to refine the project classification system and strengthen public consultation procedures.⁷ Public consultation is a key issue not only in the identification of environmental impact but also in designing mitigation measures.

The current project classification system has projects classified in three major categories depending on their potential impacts on the environment.⁸ Category “A” projects are those that are expected to have adverse negative impacts. Such projects require full EAs to be undertaken. Category “B” comprises those projects that pose less significant impacts and require equally less extensive EAs. The projects falling in category “C” have insignificant impact and consequently require no environmental analysis.⁹ There are three main groups of Category “A” projects. They include the agriculture sector, the energy/power and the infrastructure sector (comprising transportation, water and urban development).

Public consultation is recommended to take place during at least two stages. First, at the scoping stage, affected groups and local NGOs should be consulted shortly after the classification of the project. Second, consultation should be made once a draft of the EA has been completed.¹⁰ Throughout the preparation of the EA active public consultation is encouraged to continue.

C. Institutional Accountability

Responsibility to ensure that public participation occurs in specific projects lies with the borrower (borrowing member government). The Bank expects the borrower to take all necessary steps to ensure that consultations are made. Toward this end the Bank often requires special undertakings in the form of agreements or gives this work to its task manager. The responsibility ultimately falls upon the government's EA specialists.

The main responsibility of the Bank is usually that of appraising project proposals and supervising implementation. Supervision naturally involves ensuring the community participation aspects of the EA.¹¹ Thus even where the borrower engages consultants to carry out EA, the Bank staff would still have to approve the choice having regard to the consultants' knowledge and experience especially with consultation requirements.

Borrowers who fail to comply with Bank policy on EA requirements risk being abandoned due to refusal of the Bank to continue with that project. The borrowing government draws up the terms of reference (TORs), selects the EA team and provides it with the means to undertake the study and ensures compliance with Bank requirements and other applicable laws and regulations. The report is then submitted to the Bank for appraisal.

Under the Kenya's Environment Management and Coordination Act the EIA is undertaken by the project proponent at her/his own expense. The EIAs are, however, required to be conducted by experts authorised by the National Environment Management Authority (NEMA).¹² NEMA is empowered to set up a technical advisory committee to advise it on EAs. Besides, there are also lead agencies which may submit written comments on EAs upon request. These agencies consist of organizations and institutions in which the law vests functions of control or management of aspects of the environment. The Environment Management and Coordination Act further states that non-compliance with the EIA requirements may give rise to an offence.

D. Kenya Laws on Public Involvement in Environmental Decision-Making

1. Constitutional Law, Civil Rights and Administrative Law Provisions

The current Constitution¹³ does not have direct environmental provisions. It does, however, place importance on the right to life and experts argue that this right to life encompasses the right to a clean and healthy environment.¹⁴ The Constitution of Kenya makes provision for the protection of fundamental rights and freedoms of the individual. Some of these provisions are of direct relevance for public participation in environmental decision-making. These are mainly the provisions dealing with the freedoms of speech, assembly and association; and the right to life and the right to secure protection of the law. These fundamental rights and freedoms of the individual are protected under Chapter V of the Constitution. Of particular significance is Section 80 which provides for the protection of the freedom of association and assembly. Under this section every person is guaranteed the right to assemble freely and associate with other persons. This includes the right to form or belong to associations. The Constitution includes the right of access to the High Court for redress in respect of enforcement of fundamental rights and freedoms of the individual.

These rights and freedoms are subject to respect for the rights and freedoms of others and for the public interest. These limitations must be provided for under the law. Such law must be reasonably justifiable in a democratic society. Thus the freedom of assembly and association may be curtailed for the protection of public defence, public safety, public health, public order, public morality, rights and freedoms of other persons or for imposition of reasonable conditions relating to, for example, registration and martial law.¹⁵

The right of freedom of expression and freedom of assembly and association are inextricably linked to the right to information. However, there are numerous obstacles to accessing environmental information. In the constitutional context there is no express provision on the right to information in Kenya. This right is only implied in the provisions for the protection of fundamental rights and freedoms of the individual. Indeed the Government has not, until recently, played an active role in informing the public about the pertinent issues relating to public

participation and decision-making in the environment and natural resources fields.

The Government's failure to avail environmental information has mainly been attributed to constitutional weaknesses.¹⁶ This is partly because the Constitution does not provide a positive constitutional duty on the part of the Government to collect and disseminate the relevant information. Further, the claw-back provisions of the constitution effectively relegate access to information clauses to legal inferiority. This prevailing situation apparently results in an atmosphere between Government and citizens seeking the information on the one hand and the use of the legal loopholes by government bureaucrats to restrict information flow on the other.

The Constitutional provisions for the protection of fundamental rights and freedoms of the individual cover both natural and legal persons. The word "person" is defined in the Constitution to include "any body of persons corporate or unincorporate".¹⁷ There has been detailed judicial pronouncement on what may be regarded as a "person" within the meaning of the fundamental rights provisions or the Constitution. This was in the case of *Shah Vershi Devshi & Co. Ltd. v. The Transport Licensing Board*¹⁸ The High Court of Kenya held in this celebrated case that the constitutional references to "person" covered both natural and legal persons. The applicant company had been refused renewal of licence under the policy of Africanisation. It appealed to the High Court claiming breach of its fundamental rights. The court observed:

... a company is a "person" within the meaning of Chapter V [of the Constitution of Kenya] and would be entitled to all the rights and freedoms given to a "person" which it is capable of enjoying". If a right or freedom is given to a "person" and is, from its nature, capable of being enjoyed by a "corporation" then a "corporation" can claim it, although it is included in the list of "rights and freedoms of the individual". The word "individual" like the word "person", does, where the context so requires, include a corporation.¹⁹

Accordingly public participation rights accrue to all persons in law. There is currently an ongoing Constitutional review process that it is hoped will give a more explicit basis for environmental assessments for development projects.

2. Specific laws dealing with EIA

Kenya's environmental legislation is scattered in a multiplicity of over 77 resource/sector specific laws.²⁰ The provisions of most of these Acts (for instance, the Water Act; the Physical Planning Act, Act No. 6 of 1996 and the Pest Control Products Act Cap 240) are wide enough to accommodate EIA requirements. The main piece of legislation in this field that adopts a centrally directed environmental scheme is the Environment Management and Coordination Act, 1999. This Act confers locus standi on individuals to enforce the environmental rights. It also establishes a right to a clean and healthy environment and makes provision for the carrying out of EIA.

The National Environment Secretariat (NES) was created by presidential fiat in 1974. Until the new law on EIA came into operation in early 2000 the Planning and Environmental Impact Assessment (PA) Unit of NES was charged with the role of appraising projects and giving advice. This agency issued EIA regulations and guidelines to be followed by project proponents. The creation of NES was supposed to elevate environmental management and coordination from its traditional sectoral premises to the formulation of a national policy approach.

Although NES did spell out its national EIA functions through structural organisation and the subsequent setting up of the Planning and Environmental Impact Assessment (PA) Unit with wide enforcement and prescriptive powers, it had no clear legal basis.²¹ Consequently, the powers of NES were not reconciled with those of existing agencies.

a) The Physical Planning Act, 1996

One of the specific legal methods used in the prevention of environmental degradation is through physical planning. The Physical Planning Act 1996 came into effect in November 1998 partly due to clamour by policy-focused environmental NGOs. It repealed and replaced the Land Planning the Town Planning Acts.²²

Under the Physical Planning Act, physical development activities are supposed to be carried out according to physical plans. Accordingly the process of physical planning involves two stages: the plan making stage and the development control stage. The former involves drawing up the actual plan to indicate the various activities and zones whereas the latter involves the process of determining applications by developers to carry out specific development activities.

Physical planning is the function of the Director of Physical Planning. The office of the Director of Physical Planning is established in the Ministry of Lands and Settlement. There is therefore little local participation as this is a national office. Nevertheless, the Act creates liaison committees at various administrative levels including at the district level thus involving local authorities (not communities) but their role is restricted to hearing appeals against decisions of the Director of Physical Planning. There is only one private sector representative from the Institute of Physical Planning and Surveying of Kenya.

Physical plans fall into two categories: regional plans and area plans. Regional plans cover vast regions such as provinces. On the other hand area plans are more detailed and specific as they cover local areas administered by local authorities. This provides opportunity for public participation and input in drawing up the plans.

The Physical Planning Act provides for environmental impact assessments (EIAs). Section 36 states:

If in connection with a development application a local authority is of the opinion that proposals for industrial location, dumping sites, sewerage treatment, quarries or any other development activity will have injurious impact on the environment, the applicant shall be required to submit together with the application an environmental impact assessment report.

There appear to be no regulations or official documents implementing or interpreting the above provision. The Act provides no details nor regulations and guidelines to be followed in the EIA. Pertinent implementing regulations have evolved from practice and require the EIA be done in accordance with the generally accepted principles of EIA.

The essence of EIA is to gather information and use that information in the decision-making process. It is therefore an integral part of plan making. Although EIA can be carried out in respect of any development activity, it may not be practical to undertake EIA in all proposed activities. The local authority determines whether an EIA is to be undertaken or not. It is supposed to require a developer to undertake an EIA in relation to all proposed projects with potential environmental impacts.

The Environmental Management and Coordination Act 1999 identifies the areas in which EIA must be carried out²³ but the Physical Planning Act appears to leave it to the local authority to decide whether to ask for an EIA or not. Although public participation in the EIA process is required by the law, this requirement is not always adhered to.²⁴

Most local authorities lack the expertise to carry out an in-depth review. Hence these authorities use panels of experts made up of people who do not work within their departments to review the EIA report. If upon conclusion of the review the local authority decides that the project is to go on, it issues an environmental permit.

As indicated above the requirements of the Physical Planning Act relating to environmental impact assessments obligate developers to seek and obtain plan information from the relevant local authorities. Local authorities are empowered to demolish buildings put up without the permission of the authority of the area. These planning requirements received judicial recognition in *Momanyi v. Bosire*.²⁵

b) The Environmental Management and Coordination Act, 1999

The Environment Management and Coordination Act, 1999 (EMCA) creates an overhead and all-embracing agency for the management of the environment as opposed to hitherto existing legislation that set up sectoral agencies often leading to regulatory competition. It also provides for public participation in environmental law. The Act establishes the National Environment Council (NEC); the National Environment Management Authority (NEMA); the Provincial and District Environment Committees; and the Public Complaints Committee. In all these administrative structures provision is made for public participation.

The EMCA provides for the right of every person to a clean and healthy environment. It also makes it the obligation of every person to protect and manage the environment. Any person may bring an action in the High Court to enforce the right to a clean and healthy environment. Redress may be sought if the right has been violated, is being violated or is likely to be violated. In determining the dispute the Court will be guided by the principles of sustainable development such as public participation in the development policies, plans and processes for the management of the environment.

One great innovation of the EMCA is that it overcomes most of the limitations on standing to sue. It explicitly provides that an aggrieved person need not show special damage or peculiar injury beyond that which is suffered by other affected people. Effectively, this provision grants to every person the right to protect the environment.

The National Environment Council (NEC) is a top policy making body under the Act charged with the responsibility of formulating policy on matters relating to environment management in Kenya. Those who sit on the Council include two representatives of public universities in Kenya, two representatives of specialised research institutions in Kenya, three representatives of the business community and two representatives of NGOs active in the environmental field. The Council regulates its own procedure and may invite any person to attend and participate in its deliberations but the invited person is not entitled to vote.

The National Environment Management Authority (NEMA) is the principal Government institution responsible for the implementation of all policies relating to the environment. The Authority is the one responsible for dealing with EIA. The Board of the Authority includes at least seven members who are not public servants.

The following civil society and business sector representatives sit on the Provincial Environment Committees: a representative of each local authority within the Province; two representatives of farmers or pastoralists, two representatives of NGOs involved in environmental management programmes in the Province, a representative of every regional development authority in the Province.

The District Environment Committees also include a representative of each local authority within the district, four representatives of farmers, women, youth and pastoralists; two representatives of NGOs involved in environmental management programmes in the district; two representatives of community-based organisations involved in environmental management programmes in the district; and two representatives of the business community in the district. The function of the Provincial and District Environment Committees is the proper management of the environment within the provincial and district.

The Public Complaints Committee is concerned with investigation of complaints relating to environmental damage and degradation generally. Its members include representatives of the Law Society of Kenya (LSK), the NGO sector and the business community.

The EMCA also establishes the National Environment Action Plan (NEAP) Committee. This cross-sectoral committee prepares the national environment action plan. It consists of, among others, representatives of the public universities and research institutions of Kenya, the NGO sector and the business community.

EIA MECHANISMS UNDER THE ENVIRONMENTAL MANAGEMENT AND COORDINATION ACT, 1999

As pointed out, the Act is the principal national legislation dealing with EIAs. It imposes on project proponents the obligation to conduct EIAs and grants all persons the right to participate in the EIA process.²⁶ The Act states:

Notwithstanding any approval, permit or licence granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.²⁷

If, after studying the report, it becomes clear to the Authority that the proposal will result in or is likely to have significant impacts on the environment, then an EIA must be undertaken.²⁸ No other licensing authority can lawfully issue any licence in respect of a project for which an EIA is required under the Environment Management and Coordination Act. Only a licence issued by the Director General of NEMA would be valid.²⁹ The costs of the EIA are borne by the project proponent.

The categories of projects under the Second Schedule that must undergo EIA are broadly defined. They include urban development, major roads, storage dams, river diversions, aerial spraying, mining, clearance of forest areas, irrigation, use of pesticides, processing and manufacturing industries, electrical infrastructure, waste disposal, nature conservation areas and major developments in biotechnology including the introduction and testing of genetically modified organisms. The Minister responsible for matters relating to the environment has powers to amend the Schedule after consultations with the key actors in the environmental field.

The EIAs are required to be conducted by experts authorised by the Authority. Provision is made for the inspection of the register of the EIA experts by the general public upon payment of a prescribed fee. Under section 59, the public should be notified of the intention to carry out an EIA. The notice is required to contain the following information:

- ✓ A summary of the project;
- ✓ The place where the project is to be carried out;
- ✓ The place where the EIA report may be inspected; and
- ✓ A time limit not exceeding 60 days within which public comments may be submitted.

This time limit may be extended to afford reasonable opportunity for submission of comments. NEMA also has powers to set up a technical advisory committee on EIAs.³⁰ It can also require the developer to provide further information in order to ensure accuracy and adequacy of the reports.

If the Authority decides that the project is to go on upon conclusion of the review, it then issues an environmental impact assessment licence. The licence may be given with conditions and the Authority may give other directives at any stage of the project. The register of EIA licences is maintained by the Authority as a public document and is open to inspection upon payment of a fee. It is important to note that the requirement for payment of a prescribed fee may act as an impediment to public participation in instances where members of the public are unable to raise the fee which is not a far-fetched possibility.

3. General laws dealing with EIA

The sectoral approach to resource management issues characterised the development of EIA as a legal mechanism in Kenya. The EIA typologies as found in the structures and mechanisms under the Water Act attest to this. The Act sets up a Water Authority for the management of water resources. Under the Act, the Water Resources Authority may require any person to furnish information regarding any proposed water works including information as to the use of and demand for water supplies. The Act further provides that water undertakers may construct and maintain dams, sewers and other works for intercepting, treating or disposing of water flowing upon any land. This is subject to the requirement that before constructing such works, if those proposed works will affect or are likely to affect any body of water in the area, the consent of the Water Board must be obtained.

The public can express their views on the implications of the projects. Public participation is through objections and occurs at two levels. Upon receipt of an application, the Board is required to avail it for public scrutiny after which objections may be filed. The Board takes these objections into consideration in making a decision on the project. The Board may then grant a conditional approval and invite any other or further objections from the public. At this stage an enquiry may be held before the final decision is made. Studies show that most of the objections raised under the Water Act are not on environmental issues.³¹

Under the Pest Control Products Act Cap 240 the Pest Control Board is to assess and evaluate pest control products in accordance with regulations made thereunder. Applications to the Board are to satisfy it on efficacy, safety, quality and economic value before it is registered. It has power to refuse registration if the information provided is insufficient for assessing and evaluating the pest control product. It would also refuse registration if the use of the pest control product would lead to an unacceptable risk or harm to public health, plants, animals and the environment.

C. EIA Regulations

The issue at this point is whether the EIA regulations in the books are capable of delivering the right of public participation in environmental decision-making. Regulations or official documents implementing or interpreting the above laws include the Environment Management and Coordination Act 1999 which provides that the EIA shall be done in accordance with the EIA regulations and guidelines to be issued by the National Environment Management Authority and that the EIA report shall be availed for public scrutiny and input.³² The Authority is yet to be constituted and thus no EIA regulations and guidelines have been issued. We have pointed out above that laws promulgated before this framework legislation providing for public participation in EIA have not been as effective as would be expected.

III. Case Studies

A. World Bank Financed Projects

A survey of the Bank-financed projects in Kenya by the end of the fiscal year 1996 indicates that none of those projects falls in category “A”.³³ However, most of the projects were subject to some degree of environmental analysis. A number of category “A” projects were either in the pipeline or had been approved by the end of the decade of the nineties. The International Development Association (IDA), an arm of the World Bank, currently supports 12 projects in Kenya with over 65% of these falling under the infrastructure sector (comprising transportation, water and urban development).³⁴ By dint of the EMCA Second Schedule’s provisions, these would be subject to EIA.

1. Energy Sector Reform and Power Development Project

This is an example of those projects falling in category “A. It is dubbed *Kenya: Energy Sector Reform and Power Development Project* of 1997.³⁵ It consists of various components including power system expansion and upgrading and geothermal resource development. It comprises the NE Olkaria Geothermal and two Kipevu Diesel plants.

A participatory approach was adopted in this project right from the beginning. Project preparation was undertaken with collaboration between the Bank and the Government of Kenya. The Government took the leading role. While reliance in most of the projects prior to this one had been placed on external consultants to produce the EAs, local consultants participated in and contributed extensively in the preparation of environmental studies in this project. The consultative process with NGOs was encouraging especially regarding the reviews of environmental impact assessments.³⁶ Both local and international NGOs and other civic organizations also attended meetings with the IDA and donors.

EAs were carried out for the NE Olkaria Geothermal and two Kipevu Diesel plants. The NE Olkaria Geothermal site is rich in wildlife and serves as a grazing area for local people such as the Maasai pastoralists. During consultations, the affected people were mostly represented by the Kenya Wildlife Services (KWS). This raises the issue of whether KWS can effectively represent the needs of local people while its chief objective is to manage Kenya’s wildlife. It is however clear that the involvement of KWS in the negotiations diffused the tension and reduced grievances of local people by for instance, ensuring that livestock continued to access most of the project area.

One of the crosscutting hurdles in the participatory approaches in the country is the means of conveying information to the local communities. For example the notice of an environmental action plan (EAP) for the Kipevu II Power Project component of the *Energy Sector Reform and Power Development Project* was available for public review at Nairobi and Mombasa only. No provision was made for availing the same at the site location or other place closer to the affected people.³⁷ Needless to state, the location of the information may indeed act as an active barrier to public participation.

2. Second Mombasa and Coastal Water Supply Engineering and Rehabilitation Project

Another example of category “A” projects is the *Kenya: Second Mombasa and Coastal Water Supply Engineering and Rehabilitation Project* of 1991.³⁸ This project was implemented by the National Water Conservation and Pipeline Corporation (NWCPC) that was also the beneficiary. It consisted of three main components, that is, institutional support to the NWCPC; engineering designs for the extension of the Mombasa and Coastal Water Supply system and the related waste water disposal systems; and the rehabilitation and augmentation of existing facilities.

The follow-on Mombasa and Coastal Water Supply system main project would have adverse environmental impacts and as such it was classified under category “A” projects while the other components, for instance, the augmentation works fell under class B. Some of the main activities undertaken in the implementation process included sewerage, drainage, building works, rehabilitation of other schemes, land acquisition, and other physical works.

Accordingly, the category B component was subjected to a limited environmental impact assessment whereas the main project underwent a full environmental assessment. In addition to the World Bank’s Operational Directive 4.00, Annex A: “Environmental Assessment,” October 1989, the full assessment was also in line with other World Bank requirements for public participation such as the Environmental Policy for Dam and Reservoir Projects.

The NWCPC was assisted by the World Bank appraisal mission in preparing documentation for the environmental impact assessments particularly the TORs for the EIA studies. Key players in the environmental field in the country were involved in the Environmental Advisory Panel. These included government institutions, NGOs, etc. The consultations involved participation in meetings.

One of the main obstacles to public participation in environmental decision-making regarding this project relates to inconsistencies in project screening and classification. For example, this complex project was initially classified as category “C” (needing no assessment) then later the rehabilitation and augmentation component was changed to category “B” (likely to have limited negative environmental impacts and hence requiring equally less extensive EIAs). Certain major components of the project (forming the second phase of the project) were a category A component (needing full assessment). These EIA classification changes were done at various stages in the course of implementing the project and may have hampered information flows. For instance, the TORs for the EIA studies were prepared at a time when the major components of the proposed project had not yet been agreed upon. This meant that the EIA requirements would remain uncertain till such agreement was reached.

Another potential obstacle related to the foregoing is the implementation of EIAs by single isolated actions thus providing a restricted basis for participation. Under the project in question, for example, the component-based EIAs provided no mechanism for integrated assessment of the overall impacts of the three related components or the two phases. Consequently, public participation and input on the cumulative effects and evaluation of alternatives is severely encumbered.

Experience in Kenya suggests that such large and complex projects are largely implemented without effective participation by the public partly due to inadequate information. The TORs for the EIA study shows that during the process of the assessment and decision-making, economic considerations are given more prominence and tend to prevail over environmental issues.³⁹

3. Roads 2000 - District Rural Road Network Rehabilitation Project

This project was classified as a category “B” project as it does not require construction of new roads. The EAs were prepared and reviewed by IDA to its satisfaction. Since this is a district based project it was easy to involve the affected people. This was done by consultations with the district development committees (DDC) and other stakeholders including women and farmers’ groups. Particularly, district project committees were seen as the most appropriate means of achieving a participatory approach. These groups were instrumental in assisting with the monitoring and implementation of the project.⁴⁰

The project experienced problems of accountability and transparency especially relating to tenders. This was seen as a thread running throughout the project and thus involving environmental impact assessment irregularities.⁴¹

4. The Lake Victoria Environmental Management Project

This project was part of a regional environmental action plan for Lake Victoria and was classified as a category “B” project so as to give adequate attention to the environmental analysis.

The project started off well with the involvement of all actors. The Bank’s conditions and policy requirements relating to public participation were followed. However, the continuity of the project was fraught with wrangles between the Bank, Government and the local people on one hand and NGOs on the other. The NGOs complained that although they had particular concerns and expertise regarding the project (since they are representatives of the people and friends of the environment), they had been isolated from participating in it by the implementing agencies particularly the Lake Victoria Environmental Management Programme (LVEMP) National Secretariat.

The responsibilities of LVEMP secretariat include coordination at grass-roots level and ensuring compliance with Bank policy. For instance it ensures that local communities and NGOs are involved in the water hyacinth control interventions.⁴² As a result of the consultations peoples’ participation in the project was enhanced through for example, initiation of twenty-two community micro-projects and training of the communities to manage these projects.

Most of the matters concerning the project were discussed through the district development committees. The

committees expressed the view that they were satisfied that all affected groups were invited to attend meetings and participate in sharing of views. NGOs were said to have ignored most of these meetings.⁴³ The participatory process was also marred by the politicisation of the project. Political parties joined the wrangles and took sides either with the government or with the NGOs.

5. Protected Areas and Wildlife Service Project

This project was approved in 1992. It was classified as a category “D” project because it was expected to have positive environmental benefits overall. This classification exempted the project from the requirement for EA. In spite of this fact, there was recognition of specific risks to be taken into account during the course of implementation. Some of these risks included the issue of wildlife-based tourism. Thus an environmental impact assessment was undertaken in this respect.

The project also noted the impact of the activities on the local communities as a potential issue for consideration along the Bank’s policy. Bank policy requires that the people who are likely to be affected by a project should be given opportunity to air their views and participate in making decisions. There was an undertaking that the project would ensure the local communities had input into the process. This would be the responsibility of the Kenya Wildlife Service (KWS).⁴⁴

The implementation of the project has been hampered by controversy surrounding the lack of involvement of the local communities. About 40,000 squatters in the area claim that they were not consulted on major decisions such as resettlement of communities. The local civic leaders who would ordinarily have been involved in the district development committees (DDC) meetings insist that they were not consulted either. They argue that the affected people are being intimidated and coerced into accepting the project without participation.⁴⁵

While the implementing agency, Kenya Wildlife Service toured the project site on appraisal missions, it reportedly never consulted the affected local people. As a result the project faces hostility and threats. Eight years down the line the implementation process still drags on and now the Bank likely to withdraw.

B. Non-World Bank Projects

In addition to the World Bank projects, there are other projects that illustrate the extent of public participation in EIA and project implementation generally in Kenya. Two of these, one relating to hydroelectric power generation and the other to titanium mining, deserve mention here.

1. Sondu Miriu Hydro Electric Power Project in Nyanza Province

This is a 9 billion Kenya shillings power project supported by the Japan Bank for International Cooperation (JBIC). The implementing agency and borrower is the Kenya Electricity Generating Company (KenGen) Limited. Investigation was undertaken to obtain information to determine whether or not there would be significant impacts on the environment. The EA indicate that the overall negative environmental impact of the project would be negligible.⁴⁶

Most emphasis was put on consultation directly related to resettlement of affected people than consultation associated with other environmental issues such as pollution.⁴⁷ Community participation was also seen as a way of articulating the economic interests of the locals through securing employment. To be sure, this particular issue formed a great part of the debate in public meetings held on the project.⁴⁸ The implementing agency stated explicitly that “the whole exercise from negotiations through evaluations was above board”.⁴⁹ What ultimately emerged from this however, was the fact that the local people hardly got the necessary information to enable them make informed decisions. Contentions over this project are still ongoing as the locals, at the behest of the members of Parliament and interested NGOs, wake up to the real effects of the project on the lives.

2. The proposed Titanium Mining Project in Kwale District

The Titanium Mining Project in Kwale District is proposed to be carried out by a Canadian company, Tiomin Resources Incorporated. EAs were undertaken separately by South African consultants⁵⁰ for Tiomin and local consultants (from Kenyatta University⁵¹) for environmental lobby groups.⁵² The EA by the lobby groups was necessitated by reports that the environmental impact assessment for this project proposal had not been undertaken by a competent party in terms of both necessary expertise and independence.

Compensation schedules and agreements were signed before the approval of the environmental assessment and mining went on before the EA report was released. After the environmental impact assessment for this project proposal had been undertaken by Tiomin's consultants it was taken to the local people for approval.⁵³ But the well informed residents demanded a new EA which involved them in the entire process.

The environmental lobby groups were fronted by the Kwale District Mining Forum which commissioned the undertaking of independent EIAs in respect of the proposed Titanium Mining Project in Kwale. The controversy over this mine is still ongoing. It is complicated by the fact as the representatives of the local community push for their concerns to be addressed, the government functionaries have issued statements that render these initiatives moot at best.

IV. Trends and Experiences in Kenya

A. Overall assessment of public participation in environmental decision-making.

Although regulations on the right of public participation in environmental decision-making have been promulgated, overall assessment indicates that these rights have not been realised in practice. Even where public consultations have been carried out the views of the consulted actors are rarely fully taken into account.⁵⁴ Consequently public opposition to projects threatening the environment abound.

Two experiences are particularly significant in illustrating this trend in public involvement in environmental decision-making in Kenya. First, is the ongoing Sondu Miriu Hydro Electric Power Project in Nyanza Province. It has been argued that the investigation which was undertaken to obtain information to determine whether or not there would be significant impacts on the environment did not elicit enough information. Consequently, no concrete decision could be made from the information provided. In addition, public participants question the adequacy and accuracy of the assessment. They feel that they cannot make an informed decision on the project because they lack useful information about it.⁵⁵

Up to now, the main problem with regard to the Sondu Miriu Hydro Electric Power Project has to do with the EIA. There is evidence that the developers have failed to curb alleged adverse environmental impacts (e.g. dust and water-borne diseases; vanishing streams and rivers; indiscriminate destruction of forests; and destabilisation of water sheds) resulting from the project activities.⁵⁶ However, these allegations have been denied by the developers who in turn argue that the NGOs and other civic society leaders have no mandate to speak for the affected communities and that in any event the communities were compensated. This stance is grossly misinformed in light of the EMCA provisions on standing outlined above.

The poverty of the local communities coupled with their lack of accurate and adequate information makes it almost impossible for them to effectively participate in the decision-making process. Hence when it comes to issues of compensation and the environment the vast majority would readily go for the money despite the threat of possible adverse environmental impacts.

The second case concerns the proposed Titanium Mining Project in Kwale District. There have been reports that the environmental impact assessment for this project proposal was not undertaken by a competent party (in terms of both necessary expertise and independence).⁵⁷

Some encouraging trends in the recent past have however emerged. They include the legal development in the environmental field that saw the increasing recognition of the principle of public participation in environmental decision-making in Kenya. NGOs have also assisted citizens and especially local communities to be aware of the environmental issues concerning them. The National NGOs Council in partnership with other local NGOs have been very instrumental in championing environmental justice in relation to the Sondu Miriu Hydro Electric Power Project in Nyanza Province. The Kwale District Mining Forum has even gone a step further and undertaken independent EIAs in respect of the proposed Titanium Mining Project in Kwale.

Overall, there tends to be stronger consultation with NGOs than with the local representatives of the affected communities as evidenced in the Lake Victoria Environmental Management Project. This is perhaps because of the NGO greater voice and influence. However, there is limited progress in reaching the poor including women and other marginalized sectors of the community in the quest for ensuring public participation.

NGOs that have been involved in assessing the environmental impacts of Government sponsored projects face hostility and threats.⁵⁸ Furthermore instances of opposition to projects (in the form of strikes; demonstrations) have been dealt with violently by those in the Government. A number of the policy focused NGOs operating in the field of environment in Kenya have criticised the manner in which the Government and the World Bank handles projects in the country. The main issues of contention are the isolation by Government and the Bank of NGOs from the projects and the application of wrong solutions in carrying out the projects. An example is the World Bank funded Lake Victoria Basin integrated project. Local NGOs including Reconcile, Osienala and Ecovic protested to the Bank accusing it of breaking its own rules.⁵⁹ The Bank's policy as captured in the operational directive requires the Bank's staff to develop contacts and operational collaboration with NGOs. Somewhat surprisingly, the Bank staff did always follow this policy in the Lake Victoria Basin integrated project.

The Bank requires intensive consultation with communities which may be affected by resettlement.⁶⁰ The ongoing Sondu Miriu Hydro Electric Power Project in Nyanza Province and the proposed Titanium Mining Project in Kwale District highlight the challenging tasks of intensive consultation with communities which may be affected by resettlement. In both cases, the affected people complained that although relocation had been determined to be necessary and justified, their views on how to carry out the resettlement and how to compensate for the attendant impacts were either not sought or totally disregarded.

B. Non-legal action

There are also cases of opposition to projects in the form of strikes and demonstrations. In the Sondu Miriu Hydro Electric Power Project it was reported that the local community was gearing up for violent confrontations with the developers. Indeed, demonstrations and protests have been witnessed in the recent past and they have threatened to derail the project further. The local people have organised themselves in groups such as the Sondu Miriu River Community Advocacy Group and the African Water Network.⁶¹ In March 2000, over 600 people from Nyando District in which the Sondu Miriu Hydro Electric Power Project is located, held protests against what they called the devastating effects of the project and their exclusion from participating in it. Surprisingly, their meetings were declared illegal and their officials arrested for alleged incitement of the otherwise "very happy" people affected by the project.⁶²

Other forms of opposition to projects or airing concerns by the local people include writing protest letters. This method is receiving increased popularity. It has been used in several projects such as the Lake Victoria Environmental Management Project and the emergency dyke construction project in Budalangi. In the latter case the local people organised under the Busia Community Development Group wrote an open letter to the Government Project Management Unit and the Bank expressing fears over the implementation of the project.⁶³

C. Obstacles to public participation in environmental decision-making.

As indicated above, there are numerous obstacles to accessing environmental information in Kenya. Besides the constitutional weaknesses, other specific barriers to the practical implementation of public participation in environmental decision-making are various pieces of legislation especially those relating to national security. Most of these laws deal with the press.

Until late 1997 Kenya's law relating to the crime of sedition defined it in such broad terms that the publication of information that criticised the Government was seen as calculated to bring the Government into disrepute and therefore criminal. Other laws that may have the effect of restricting the right of accessing environmental information include the Official Secrets Act which is also based on national security and public order.

While section 36 of the Physical Planning Act provides for environmental impact assessments (EIAs), public access to the records is restricted. Only a few persons, namely, the Director of Physical Planning, an officer and a local authority can lawfully access records in which are contained particulars of any land or property affected by any physical development plan.⁶⁴

Even when the information is so obtained the law obliges these holders of that information not to divulge it to any person except by an order of a court of law. Where an order of a court of law is issued to compel release of the information then another law, the Official Secrets Act comes into play.⁶⁵ Nonetheless, the Act makes provision for the publication of notices in the Government Gazette and in at least two local dailies in both English and Kiswahili. The notices are also to be displayed at the offices of chiefs.⁶⁶ There are concerns that this still provides for insufficient consultation as simply making the EA report available in a public place is not as effective as open and interactive approaches such as public meetings and discussions with broad participation secured through individual invitations, the press and other mass media. Most people do not have access to newspapers, radio or television and some cannot read and understand the notices.⁶⁷ Thus civil society generally faces monumental operational constraints in accessing information and meaningfully participating in EIA processes despite constitutional and other guarantees on the protection of the freedom of association and assembly.⁶⁸

The fact that pertinent implementing regulations are absent and that they usually take so long to be promulgated makes the practical implementation of the procedural rights considerably difficult. For instance, the Physical Planning Act was enacted in 1996 but came into effect in November 1998 due pressure from policy-focused environmental NGOs.

Lack of sufficient, qualified human power and technical resources is another obstacle to public participation in environmental decision-making. In NES, for instance there were some technical support units for EIA manned by only three personnel.⁶⁹ These institutional and technical weaknesses often lead to opposition by other institutions and lack of cooperation hence information flow is hampered. In addition most consultation is made following release of the draft assessment report. This means that EIAs are used reactively thus denying extensive participation by affected populations especially at the scoping and drafting stages.⁷⁰ It would appear that this practice is in line with the Bank's policy. The tradition of the Bank is to engage in tripartite consultations involving the borrower, an outside expert and Bank staff to identify and plan projects. This includes the drafting of EA Terms of Reference. These procedures are not supportive of participatory processes and run counter the spirit of the Bank's policy. Indeed, the policy of the Bank on the public consultative process is clear:

By far the most important point here is that such consultations have to start very early on if they are to be meaningful and in order that such views can influence decisions which will affect their lives. The views of the affected people and the local NGOs should be solicited no later than the start of the scoping process.⁷¹

However, consultation after EA finalization provides a further opportunity for comment and influence although there is limited leeway for changes. In the case of Tiomin the comments on the completed report led to the carrying out of independent assessments and the emergence of new information of direct relevance for the project.

D. Inconsistencies in Project Screening and Classification

There are cases of inconsistencies in project screening and classification. For example, where a project was initially classified as category “C” then later changed to category “B”! Although this may be seen as an indicator of the effectiveness of the EA process, EA classification changes may as well mean that the local populations’ input is sidelined especially in light of the fact that information flows are hampered. In addition, poor public consultation cannot easily be remedied once the EA report is completed. This is compounded by the problem of delay in submission and release of findings for public input. For example, the Government instituted an independent EA process on Ololua Forest. Upon completion of its work the team was to hold public meetings in the form of workshops to present the findings. The team did not meet the deadline thus posing an obstacle to effective public input.⁷²

Further general EA guidance is not widely disseminated. Inconsistent legal EA requirements are a source of disagreements. For instance in the proposed Titanium Mining Project in Kwale District there was a dispute revolving around the rules and guidelines adopted in the two EAs undertaken separately by the South African consultants for Tiomin and local consultants (from Kenyatta University) for environmental lobby groups.

Lack of political consensus giving rise to unwarranted fears, suspicions and delays is also a problem. This is particularly evident in the Sondu-Miriu project. The role of political parties and party structures especially relating politicisation of issues is a related hurdle to effective participation. This has often involved the use of the provincial administration to force the local people to accept the project proposals and to silence lobbyists through arrests.⁷³

Most EAs involve large components of desktop research thus little contact with affected populations through surveys. Generally there is little relevant national experience and open consultative processes in the legal and political system. There is to some extent negative attitude on the part of Bank staff who view consultation as barrier to expeditious implementation of projects hence raising tension and grievances.

VII. Some Indicators of Effective Public Participation

From the foregoing, the following emerge as indicators of effective public participation:

- (i) Training for staff and local consultants, local populations and NGOs on the importance of public participation.
- (ii) Clear documentation of the consultation process including the EA team’s experiences.
- (iii) Capacity of implementing agencies in borrower countries (core staff of professionals and basic administrative infrastructure) to ensure public participation.
- (iv) Records of people interviewed, invited to public meetings and those who attended.
- (v) Continued feedback from and with the community.
- (vi) Good quality of completed projects and timely implementation as there are no delays occasioned by protests.
- (vii) Access to information (language and mode of publication).

VIII Conclusions and Proposals for Reform

Evidence from projects approved in the past shows that practical effectiveness of public participation has not been fully realised. Public participation in most projects is either weak or disappointing. This is largely due to lack of consultation with affected communities and local misconceptions of public consultation. Further, the choice of units as representatives of local communities (KWS or District Development Committees) has not always ensured that the voices of all interested persons are heard. It is hoped that the introduction and strengthening of public consultation and disclosure requirements under the Environmental Management and Coordination Act 1999 will help realize sufficient consultation.

A. Legislative Reform

There is need to improve access to environmental information by revising the relevant legal instruments especially the Constitution with a view to making the right to information explicit as well as removing all the clawback clauses. The Government should be obligated to collect and distribute environmental information.

While in certain areas of the law restrictions on the freedom of access to information helps secure national security, when applied to environmental justice, access to information if not liberally granted and interpreted can lead to the covering up of abuse and mismanagement. This is particularly so because public participants feel that they cannot make an informed decision on projects because they lack useful information say on the question of the adequacy and accuracy of assessments. The restrictive laws must thus be repealed or amended accordingly. Only in exceptional circumstances should Government documents be exempt from public scrutiny.

Recognising that environmental protection and conservation are a prerequisite for sustainable development, greater emphasis must be placed on specific actions including establishing national requirements for EIAs of projects and environmental strategies for particular sectors, especially those that pose significant impacts on the environment. The development of these policy should be a joint effort from Government, the civil society, business community and local communities. It should focus on sectoral cooperation as part of the National Environment Action Plan (NEAP) within the framework of the Environment Management and Coordination Act, 1999.

The project preparation schedules should be adjusted to cater for the effective public participation. For example, the EA process ought to start early enough and be reasonable long to facilitate local input. The legal and institutional mechanisms for consultation and participation under the Environment Management and Coordination Act, 1999 should be clarified and strengthened for instance, by encouraging consultation during scoping and defining what constitutes sufficient public participation and how to carry it out (including how to document consultation activities). Sufficient time should be allowed for those involved to review the EA reports and prepare comments.

Besides, legislation should be followed by concrete actions to ensure that the rules are adhered to in practice and the local views taken into account. Toward this end democratic institutions and processes should be nurtured to ensure increased participation say through lobbying, campaigns, and mass media.

B. Strengthening Civil Society

NGO laws and activities in Kenya should be reviewed in order to capture the spirit of the right of the freedom of association. The Government should create an enabling social, political and economic environment that enhances civil society work by fully implementing the obligations under international and regional legal instruments and respecting human rights, fundamental rights and the rule of law. The Government bureaucrats should foster cooperation and mutual trust with the general public. This could entail involving civil society in the mechanisms for environmental decision-making, conducting public education and outreach activities and information dissemination.

Procedural rights are indispensable in implementing and enforcing substantive rights. They are particularly important in relation to the role of civil society in environmental assessments. These procedural rights of access to information, participation in decision-making, freedom of association and access to justice are therefore indispensable to environmental assessment. The state should be obligated to facilitate and ensure public participation and civic involvement in decision-making both at the national level and at the community (regional) level. A prerequisite of this is a strong and vigorous civic sector that is well informed so as to influence decision-making. Environmental NGOs must have access to environmental information, be able to freely associate and exchange speech to be able to access environmental justice through the courts and other related avenues.⁷⁴ Consultation with NGOs should specifically involve determination of the scope and content of the EA.

Similarly there is urgent need to develop a clear policy framework on stakeholder participation and mechanisms to ensure involvement of stakeholders as this is an essential prerequisite for the enjoyment of the right of the freedom of association. Institutions financing projects should adhere to set benchmarks to ensure that there is effective public participation in public design and implementation and to minimize negative environmental and social effects.

C. Strengthening implementing institutions

There is also need to build the capacity of borrowers through institutional support, technical assistance, and in-country training to strengthen the involvement of local views in national environmental decision-making. The evidence in the EA revealed the need for assistance to train local EA consultants in participatory techniques. Financiers such as the World Bank can positively enhance public participation through contributing to strengthening national EIA implementing institutions. Indeed the greatest challenge to effective public participation in Kenya even in light of an enabling law is the lack of institutional and human resource capacity to translate the legal provisions into practice.

Bank task managers and borrowers should also be provided with clearly defined procedural tools for consultation and training courses on public participation. The effectiveness of these will to a large extent depend on the context within which public participation is sought to be engendered. This calls for tools and training courses tailored to local contexts. Competent staff should be hired and equipped with appropriate institutional resources to facilitate effective consultation.

The consultation requirements of the Bank's Operational Directive on EAs require huge sums of money for its meaningful realization. It is important that sufficient funds are provided to effectuate these and other consultative processes if effective public participation is to be realised. This would go a long way in meeting such expenses as equipment, transport, procuring advice from technical experts to help communities in formulating responses and facilitate consultative processes.

Appendices

Main Laws in Kenya Affecting EIA

Constitution (Act No. 5 of 1969 last amended in 1992 and revised in 1998)

Physical Planning Act 1996 (came into effect in 1998)

Environmental Management and Coordination Act, 1999

Water Act

Pest Control Products Act

Official secrets Act

Relevant International Legal Instruments

Agenda 21

African Charter on Human and Peoples Rights (Adopted June 1981, Nairobi; came into force October 21, 1986).

Universal Declaration of Human Rights, 1948.

Freedom of Association and Protection of the Right to Organize Convention, 1948 (adopted by the General Conference of ILO on July 9, 1948)

Universal Declaration of the Rights of Peoples, Algiers, 1976

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

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Relevant Cases

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Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples Rights
DDC	District Development Committee
EA	Environmental Assessment
EAC	East African Community
EAP	Environmental Action Plan
EIA	Environmental Impact Assessment
EIS	Environmental Impact Study
EMCA	Environmental Management and Coordination Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant of Civil and Political Rights
IDA	International Development Association
IMF	International Monetary Fund
JBIC	Japan Bank for International Cooperatio
JICA	Japan International Cooperation Agency
KWS	Kenya Wildlife Services
LSK	Law Society of Kenya
LVEMP	Lake Victoria Environmental Management Programme
NEAP	National Environment Action Plan
NEC	National Environment Council
NEMA	National Environment Management Authority
NES	National Environment Secretariat
NGO(s)	Non-Governmental Organization(s)
NNGOs	Northern Non-Governmental Organization(s)
SAPs	Structural Adjustment Programmes
SNGOs	Southern Non-Governmental Organization(s)
UDHR	Universal Declaration of Human Rights
WB	World Bank

Endnotes

- 1 Government of Kenya (1965) African Socialism and Its Application to Planning in Kenya Sessional Paper No. 10 of 1965, Government Printer, Nairobi, p. 24, quoted in Okoth-Obbo, G. W. (1985) A Conceptual Analysis of Environmental Impact Assessment as a Legal Mechanism for the Protection and Management of the Environment: The Case of Kenya unpublished University of Nairobi LL. M. dissertation, p. 12.
- 2 Government of Kenya (1978) 1978-1983 Development Plan, Part 1, Government Printer, Nairobi.
- 3 The Plan stated that environmental considerations would be taken into account in development and made references to such terms as “Environmental Impact Reports”. On this see, Government of Kenya (1978) 1978-1983 Development Plan, Part 1, Government Printer, Nairobi, especially pp. 57-60.
- 4 Brownlie, I. (1983) Basic Documents in International Law Oxford University Press, Oxford, p. 250.
- 5 These normative principles are contained in Principle 10 of the 1992 Rio Declaration and in Agenda 21. Kenya subscribes to this Declaration. For a discussion of these principles in the context of environmental litigation in Kenya see Kameri-Mbote, P. (2000) “Recent and ongoing cases in the environmental field: Pursuing sustainable environmentally sound development” Paper presented at the ELAW Meeting, July 2000, Arusha, Tanzania.
- 6 World Bank’s Operational Directive 4.00, Annex A: “Environmental Assessment,” October 1989, (para 12), quoted in World Bank (1994) Environmental Assessment Sourcebook Volume I: Policies, Procedures, and Cross-sectoral Issues, World Bank Technical Paper No. 139, Environment Department, Washington, DC, p. 191.
- 7 World Bank (1996) The World Bank and the Environment: Fiscal 1993 World Bank, Washington, DC.
- 8 The number of EA categories was reduced from four to three under the 1991 operational directive in a bid to reduce inconsistencies in project classification.
- 9 World Bank (1996) The World Bank and the Environment: Fiscal 1993 World Bank, Washington, DC, pp. 57-58.
- 10 World Bank (1996) The Impact of Environmental Assessment: A Review of World Bank Experience World Bank Technical Paper No. 363, Environment Department, Washington, DC, p. 35.
- 11 World Bank (1994) Environmental Assessment Sourcebook Volume I: Policies, Procedures, and Cross-sectoral Issues, World Bank Technical Paper No. 139, Environment Department, Washington, DC, pp. 191-2.
- 12 NEMA is the principal Government instrument responsible for the implementation of all policies relating to the environment including taking responsibility for dealing with EIA.
- 13 Act No. 5 of 1969 last amended in 1992 and revised in 1998.
- 14 Wamukoya, G.M. & Situma, F.D.P. (eds.) (2000) Environmental Management in Kenya: A Guide to the Environmental Management and Coordination Act, 1999 Centre for Research and Education Environmental Law (CREEL), Nairobi, p. 2.
- 15 Section 80 (2) Constitution of Kenya.
- 16 Ringia, D. et al (1999) “Legal hurdles to accessing environmental information” in Innovation Vol. 6, No. 2, October, 1999, pp. 16-18.
- 17 Section 123.
- 18 1971 EALR 289.
- 19 1971 EALR 289, p. 298.
- 20 Ojwang, J. B. (1993) Environmental Law and the Constitutional Order ACTS Press, Nairobi.
- 21 Okoth-Obbo, G. W. (1985) A Conceptual Analysis of Environmental Impact Assessment as a Legal Mechanism for the Protection and Management of the Environment: The Case of Kenya unpublished University of Nairobi LL. M. dissertation, p. 133.
- 22 Section 53.
- 23 These are specified in the Second Schedule to the Act.
- 24 Section 52 provides a basis for public participation.
- 25 Unreported High Court of Kenya Civil Case, 1996 (Decision of Hayanga, J.). In this case, Momanyi was a resident of Imara Daima Estate in Nairobi. Bosire obtained plan information to put up a kiosk at the entrance of the Estate. He, however, constructed a resort for the use of selling liquor and other related products. The plaintiff and others instituted a suit against Bosire and the Nairobi City Council. The court held that Bosire was in breach of the Physical Planning Act requirements relating to plan information. Similarly, the city council were in breach of their statutory obligation for failing to demolish the building as it was put up without plan information. Accordingly, the resort was pulled down,
- 26 It is worth noting that this Act came into effect in 2000 and therefore it not possible to know how effective it is. Indeed most of its provisions are yet to be operationalised. Nevertheless, there have been suggestions that since the Bill that was finally enacted into this law had been pending for several years, all recent project proposal applicants and developers ought to have foreseen its promulgation and acted in accordance with its provisions. This is particularly the case in the Kwale Titanium Mining Project where the developers were specifically given the Bill for consideration in carrying out the EIA. [based on media reports especially Kenya Television Network (KTN) Breakfast Shows of September 2000].
- 27 Section 58(1).
- 28 Section 58(2).
- 29 See section 148.
- 30 Section 60.
- 31 Okoth-Obbo, G. W. (1985) A Conceptual Analysis of Environmental Impact Assessment as a Legal Mechanism for the Protection and Management of the Environment: The Case of Kenya unpublished University of Nairobi LL. M. dissertation, p. 97.
- 32 See Sections 58(7) and 59.
- 33 Out of a total of 109 category “A” projects approved by 1996 in a wide variety of countries non were in Kenya. For further details on this, see Annex 1: Category A Projects: FY93-96 in World Bank (1996) The Impact of Environmental Assessment: A Review of

- World Bank Experience World Bank Technical Paper No. 363, Environment Department, Washington, DC.
- 34 Otieno, J. "IMF's views on mismanagement" Sunday Nation (Nairobi) July 2, 2000, p. 20. Because of this limited experience with Bank-financed category "A" projects, we will also consider category "B" projects as well as other relevant projects which though not financed by the Bank, may have cross-cutting participatory process issues. Such projects include the ongoing Sondu Miriu Hydro Electric Power Project in Nyanza Province and the proposed Titanium Mining Project in Kwale District
- 35 World Bank (1997) Staff Appraisal Report, Kenya: Energy Sector Reform and Power Development Project Report No. 16001-KE, Eastern and Southern Africa Department, Africa Region.
- 36 World Bank (1997) Staff Appraisal Report, Kenya: Energy Sector Reform and Power Development Project Report No. 16001-KE, Eastern and Southern Africa Department, Africa Region, p. 29.
- 37 For a look at the published notice see Daily Nation (Nairobi) March 1, 2000, p. 22.
- 38 World Bank (1991) *Staff Appraisal Report, Kenya: Second Mombasa and Coastal Water Supply Engineering and Rehabilitation Project* Report No. 10093-KE, Infrastructure Operations Division, Eastern Africa Department.
- 39 For example, the objectives of the EIA of the *Second Mombasa and Coastal Water Supply Engineering and Rehabilitation Project* focus strongly on the water producing capacity of the site and the scope of work is largely limited to the tourism economy (particularly the effects of inadequate water supply on the industry if the project is not implemented). This style of presentation of TORs has overtones of positive findings from the outset as it tends to justify rather than assess the issues.
- 40 World Bank (1998) Project Appraisal Document on a Proposed Credit for the Amount of US\$ 30.0 Million Equivalent to the Republic of Kenya for a Roads 2000 - District Rural Road Network Rehabilitation Project, Country Department 4, Africa Region.
- 41 Opala, K. "Big controversy over city road repair tenders" Sunday Nation (Nairobi) October 17, 1999, p 14; Wackman, H. "World Bank rules not flouted in road works" Sunday Nation (Nairobi) May 30, 1999, p 10; Ngai, M. "Two officers whom World Bank needed" Sunday Nation (Nairobi) February 14, 1999, p 10; Daily Nation "Experts accuse World Bank of flouting rules" Daily Nation (Nairobi) May 19, 1999, p 18.
- 42 Sunday Standard "Lake Victoria Environmental Management Programme" Sunday Standard (Nairobi) June 25, 2000, pp. 22-3.
- 43 Radoli, M. "Rivalry threatening L. Victoria projects" Daily Nation (Nairobi) February 17, 2000, p. 23.
- 44 World Bank (1992) Staff Appraisal Report, Kenya: Protected Areas and Wildlife Service Project Report No. 9981-KE, Eastern Africa Department, Africa Region, pp. 41-2.
- 45 Olira, A. (1999) "KWS primate project runs into another hurdle" People Daily August 15, 1999, p. 3.
- 46 Ojanji, W. "Sondu Miriu power project safe - study" Daily Nation (Nairobi) March 16, 2000, p. 25.
- 47 See further discourse on this under Part 4 (i) on assessment of public participation.
- 48 Oywa, J. & Odhiambo, A. "Sh 7b power project sparks controversy" Daily Nation (Nairobi) February 19, 2000, p. 5.
- 49 Radoli, M. "KenGen project 'no threat'" Daily Nation (Nairobi) March 3, 2000, p. 21.
- 50 Coastal and Environmental Services (CES)
- 51 The experts were from the Faculty of Environmental Studies and led by Dr. Wellington Wamicha.
- 52 Ng'ang'a, A. "Titanium mining could hit snag" People Daily June 26, 2000, p. 11.
- 53 Mungai, N. "Environmental fears mar titanium mining" People Daily April 13, 2000, p. 12.
- 54 For example, an investigating committee found out that a company had failed to comply with EIA requirements for effluent standards and recommended to the Ministry that the operations of the company be closed. Although the committee had been set up and its recommendations accepted by the Ministry, the Minister refused to withdraw the company's licence and the Government did not intervene. On this case see, Okoth-Obbo, G. W. (1985) *A Conceptual Analysis of Environmental Impact Assessment as a Legal Mechanism for the Protection and Management of the Environment: The Case of Kenya* unpublished University of Nairobi LL. M. dissertation, pp. 111-117.
- 55 This is based on media reports. See, for instance, Tanui, K. "KenGen criticised over Sondu Miriu" Daily Nation (Nairobi) September 27, 2000, p. 12.
- 56 Tanui, K. "KenGen criticised over Sondu Miriu" Daily Nation (Nairobi) September 27, 2000, p. 12.
- 57 See for example, Kusimba, S. "Why is the govt mum over titanium deal?" People Daily June 21, 1999, p. 19.
- 58 Radoli, M. "Project critics anger leaders" Daily Nation (Nairobi) March 4, 2000, p. 16.
- 59 See Radoli, M. "Rivalry threatening L. Victoria projects" Daily Nation (Nairobi) February 17, 2000, p. 23.
- 60 World Bank Operational Directive on Involuntary Resettlement (OD 4.30, June 1990).
- 61 Okebe, B. "KenGen takes issue with MP over allegations" People Daily March 3, 2000, p. 4.
- 62 Radoli, M. "Protests over power project" Daily Nation (Nairobi) March 1, 2000, p. 19; Daily Nation "KenGen to look into protests" Daily Nation (Nairobi) March 17, 2000, p. 20.
- 63 This is a World Bank financed project (IDA credit No. 3120-Ke), see Ng'ang'a, A. "Rural organization cries foul over stalled project" People Daily (Nairobi) May 4, 2000, p. 12.
- 64 Section 43 of the Physical Planning Act.
- 65 Section 44 of the Physical Planning Act.
- 66 Section 52 of the Physical Planning Act.
- 67 For some examples of the publication of notices in the local dailies see Daily Nation (Nairobi) August 11, 2000, p. 8 (notice under the Physical Planning Act 1996); and Daily Nation (Nairobi) March 1, 2000, p. 22 (notice of an environmental action plan (EAP) for the Kipevu II Power Project component of the Energy Sector Reform and Power Development Project).
- 68 Kameri-Mbote, P. (2000) "The Operational Environment and Constraints for NGOs in Kenya: Strategies for Good Policy and Practice" Draft Research Report Prepared for the East African Regional Workshop on Procedural Environmental Rights, Organized by Advocates Coalition for Development and Environment (ACODE), Kampala, Uganda, November 23-24, 2000
- 69 Okoth-Obbo, G. W. (1985), *supra*, p. 148.
- 70 For instance, under the Environment Management and Coordination Act, 1999 the EIA is undertaken by the project proponent. The public is then notified of the EIA (section 59). The notice contains the following information: a summary of the project; the place

where the project is to be carried out; the place where the EIA report may be inspected; and a time limit not exceeding 60 days within which public comments may be submitted.

- 71 World Bank (1994) Environmental Assessment Sourcebook Volume I: Policies, Procedures, and Cross-sectoral Issues, World Bank Technical Paper No. 139, Environment Department, Washington, DC, p. 193.
- 72 Aghan, D. "Team on Ololua fails to submit report on time" Daily Nation (Nairobi) January 13, 2000, p. 19.
- 73 Daily Nation "Sundu-Miriu pay attention to locals" Daily Nation (Nairobi) March 8, 2000, p. 6.
- 74 Kameri-Mbote, P. "The operational environment and constraints for NGOs in Kenya: strategies for good policy and practice" Research Report Prepared for the East African Regional Workshop on Procedural Environmental Rights, Organized by Advocates Coalition for Development and Environment (ACODE), Kampala, Uganda, November 23-24, 2000.

