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Assessing the Utility of Environmental Impact Assessments as a Strategy for Global Sustainable Development.

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Abstract

This thesis discusses the role of Environmental Impact Assessments in the implementation of the concept of sustainable development within the realm of North-South tensions regarding responsibilities for environmental conservation. Environmental Impact Assessments provide opportunities for realizing sustainable development not only because they operationalize the integration principle of sustainable development by facilitating the equilibrium between development and environmental conservation objectives, essential for ecological sustainability, but also because, in allowing for public participation in the assessment process, they promote the realization of the civil right of participation in public affairs, an essential component of good governance required for sustainable development to thrive. However, the thesis scrutinizes the reality in developing countries of adopting Environmental Impact Assessments. They are not yet accorded a lot of value because it is foreign technology imported from the North, which must be adopted often as a conditionality to that much needed development assistance, which often does not take into account cultural realities in developing countries and which inadvertently plays a role in the growth of Third World debt, corruption and erosion of sovereignty in the Third World. It argues, therefore that the utility of Environmental Impact Assessment in the realization of global sustainable development is limited by the existence of these realities unless modifications are made in the implementation of Environmental Impact Assessments in developing countries.

Résumé

Cette thèse analyse le rôle des évaluations des impacts sur l'environnement dans le processus d'implémentation du concept de développement durable dans le cadre des tensions Nord-Sud, en ce qui concerne les responsabilités au sujet de la conservation de l'environnement.

L'auteur soutient que les évaluations des impacts sur l'environnement créent des opportunités pour la réalisation d'un développement durable, non seulement parce qu'elles rendent opérationnel le principe d'intégration d'un développement durable, en facilitant la mise en place d'un équilibre entre les objectifs de développement et de conservation de l'environnement, essentiels pour le maintien d'un équilibre écologique durable, mais aussi, parce qu'en permettant la participation du public dans le processus d'évaluation, elles promouvaient la réalisation du droit civique, qu'est la participation aux affaires publiques, une composante essentielle à la bonne gouvernance, requis pour la réussite d'une politique de développement durable.

Cependant, cette thèse examine les réalités auxquelles font face les pays en voie de développement dans le processus d'adaptation des évaluations des impacts sur l'environnement. Les évaluations des impacts sur l'environnement n'ont pas encore reçu toute l'attention qu'ils méritent parce qu'elles représentent une technologie importée du Nord, ce qui implique qu'elles doivent souvent être adoptées sous la condition d'une aide au développement, qui souvent ne prend pas en compte les réalités culturelles des pays en voie de développement et qui, par inadvertance, joue un rôle dans la croissance de la dette du Tiers-Monde, de la corruption et de l'érosion des souverainetés nationales.

Cette thèse conclue alors que l'utilité des évaluations des impacts sur l'environnement dans la mise en place d'un développement durable mondial est limitée, par l'existence même de ces réalités; à moins que, des modifications ne soient apportées dans le mode d'implémentation des évaluations des impacts sur l'environnement dans les pays en voie de développement.

Dedication;

To “*Jajja Mummy*”, who brought us to the present and Nanziri, our first sight of the future.

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In spite of all the contributions mentioned above, and while all effort has been made to ensure the accuracy of this work, the opinions expressed in this work are mine and I remain solely responsible for any errors that may be contained herein.

D. Akol,
Montreal, 2001

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ASSESSING THE UTILITY OF ENVIRONMENTAL IMPACT ASSESSMENTS AS A STRATEGY FOR GLOBAL SUSTAINABLE DEVELOPMENT.

INTRODUCTION

The pursuit of the right to development and the obligation of environmental protection have for decades, fuelled debate in international environmental circles. The view that they can be combined through the concept of sustainable development has now been accepted.¹

The concept of sustainable development emerged within the realm of environmental conservation, against the backdrop of tensions between the developing nations of the south and the developed nations of the north regarding their aspirations for development and their responsibilities for environmental conservation, as a compromise position that recognised that there exists a difficult choice between conservation and development, particularly for developing countries, and which accordingly, advocates a development process that must now possess both economic and ecological integrity. Sustainable development, therefore, inherently has wider implications for environmental justice, national development strategies, and more recently, good governance issues.

This is the context within which this work will employ the concept of sustainable development and within which I will argue that environmental impact assessment (EIA) is a useful tool by which sustainable development can be achieved, not only because it allows for the integration of environmental considerations into development plans and policies, but also because it provides a perfect opportunity for good governance objectives by providing for the civil right to participation in political decisions through its requirement for public participation.

¹Judge Weeramantry expressed a personal opinion in the *Gabčíkovo-Nagymaros Project* case between Hungary and Slovakia at the ICJ that sustainable development was that principle of international law that could reconcile the tensions between development and environment objectives. See summary of Judgment in 1997 *I.C.J.* 6 (September 25, 1996)

Within the context of developing countries, whose priorities are still geared to the attainment of economic development, before environmental conservation, I will argue that they can use the EIA to achieve their economic goals while maintaining the integrity of their natural resource bases. The other side of the spectrum is that more often than not, for developing countries, EIAs are carried out to meet conditions demanded by development assistance and on a project by project basis, and are often seen as an end rather than a means to ensure better environmental protection² and are more or less adopted as standardised procedure, with very little modification. Within this context therefore, I will assess the realistic utility of environmental impact assessment as a strategy for global sustainable development.

Chapter One explores, as a background to this study, the various facets of the concept of sustainable development as an emerging principle of international environmental law. I will argue that sustainable development encourages environmental justice or equity through the principle of common but differentiated responsibilities and also advocates a marriage between economics, social welfare and environmental conservation through the principle of integration of environment and development. Following the thread of integration, Chapter Two will discuss the place that EIAs hold in the aspirations for sustainable development, and analyse how EIAs have been so widely accepted, whether through compliance of international customary obligations to conduct EIAs or whether through the influence of multilateral development organisations and multilateral environmental agreements.

Chapter Three will veer into the good governance realm of EIA for sustainable development. I examine the relationship, albeit imprecise and still under debate, between human rights and environmental protection and discuss particularly, the civil right of public participation in environmental management. Against this backdrop, I discuss the opportunity that EIA provides for public participation and argue that EIA plays a central role in involving the public in the environmental decision making process.

Chapter Four critically analyses the implications for developing countries, of the adoption of EIAs. I argue that while EIAs provide an opportunity for developing countries to further their economic

² A.K Biswas & S.B.C Agarwala, *Environmental Impact Assessment For Developing Countries*, (London: Butterworth-Heinemann, 1992) at 19 (Hereinafter, Biswas & Agarwala)

development priorities while protecting the environment, and aspire to the greater goal of sustainable development, they are generally of very limited value because they are foreign technology adopted from developed countries, and are sometimes started well after projects are implemented. The link between EIAs and development assistance in developing countries has implications for perpetual indebtedness of these countries for both present and future generations, particularly in light of the persistent institutionalised corruption existing in most of these countries, a position that is inconsistent with the aspirations of sustainable development. I argue also in chapter four that the reality of the public participation on the EIAs process is inadequate in developing countries thus further 'watering down' the sufficiency of the EIA as a previously perceived viable strategy for sustainable development.

My conclusions demonstrate that although in principle EIA is a useful strategy for sustainable development. It is unlikely to meet the requirements for the attainment of global sustainable development, unless certain modifications are made. I recommend ways in which EIA could realistically contribute to the attainment of global sustainable development, particularly within the context of developing countries.

PART ONE: ENVIRONMENTAL IMPACT ASSESSMENT AS AN ELEMENT OF SUSTAINABLE DEVELOPMENT.

CHAPTER ONE: THE CONCEPT OF SUSTAINABLE DEVELOPMENT

It is now widely understood that sustainable development is a concept constituting a norm in international environmental law and this position is evident from the appearance of the concept in a vast number of treaties, resolutions, recommendations, guiding principles, studies and documents. However this concept still defies standardised definition. This is because sustainable development means different things to different people or is often approached from different standpoints. Generally, however, the impetus for the emergence of the concept has come from the desire to strengthen rules for the protection of the environment.³

This chapter sets the scene for the thesis by introducing the concept of sustainable development as it is portrayed in international environmental law. I begin by discussing the problem between environmental conservation and development and analysing the North-South debate over who bears the responsibility for environmental degradation and the corresponding obligations for its conservation, against the background of the struggle for a New International Economic Order by the developing countries, a struggle that began in the decade of the 1970s but which dwindled after the end of the cold war. This analysis leads to a discussion of issues relating to environmental equity, which pervade sustainable development concerns. I then discuss certain recognised facets or principles of sustainable development.

1.1 The Problem: Environmental Conservation versus Economic Development.

For decades now, there has existed a relationship between environment and development. Industrialisation made the world a better place to live in, in many respects. However, during the industrialisation process, the environment was viewed as an inexhaustible source of supplies, as well as a bottomless sink for the harmful products of development. The result was serious environmental

3P. Sands, "International Law in the Field of the Sustainable Development" (1994) 65 *The British Yearbook of International Law* 303 at 306. (hereinafter Sands)

damage and atmospheric pollution. In addition, particularly in developing countries, national economic development objectives or daily survival practices lead to continued destruction or degradation of natural systems. Unsustainable agricultural practices, for example, contribute to desertification, loss of fertility and groundwater pollution.⁴ The indiscriminate use of fossil fuels such as coal and oil for energy is adding greenhouse gases to the atmosphere, seriously impacting on global climate and threatening to raise sea levels and inundate low-lying island areas.

Environmental consciousness developed largely in recognition of these problems and efforts were made to deal with, particularly problems of pollution. Soon, this new environmental awareness quickly expanded from national to international levels.⁵ Hence we see the beginning of the proliferation of treaties in the decade of the 1960s, primarily geared at liability for pollution.

However, it was at the Stockholm Conference on the Human Environment that the intricacies of this awareness manifested themselves. The conference was convened with the objective of providing a framework or the comprehensive consideration within the United Nations of the problems of the human environment. At the Stockholm Conference, two conflicting viewpoints were present. While developed countries pushed for environment protection initiatives, developing countries resisted highlighting environmental issues because they were afraid that it would impede their economic development. The first perspective, mainly from developed countries, was that the primary concern of the conference was the human impacts on the biophysical environment with emphasis on the control of pollution and the conservation of resources. The second viewpoint, held by the developing countries was that social and economic development was the real issue. To bridge these differences, the concept was advanced that environmental protection was an essential element of social and economic development.⁷ Thus developed that intricate relationship between environment and development and the new paradigm that would henceforth pervade international environmental protection discourses.

⁴World Commission on Environment and Development. *Our Common Future*, (Oxford University Press, 1987) at 122-28.

⁵L. Caldwell, *International Environmental Policy: From the Twentieth to the Twenty-First Century* (Duke University Press, 1996) at 29. Rachel Carson's book *Silent Spring* is said to have raised awareness to pollution and is believed to have started what is now termed as environmental consciousness.

⁶Draft Resolution 2398 (XXIII)

⁷Caldwell, *supra* note 5 at pg. 64

1.1.1 The New International Economical Order: Background to the Conflict.

The struggle for the establishment of a New International Economic Order was a continuation of the process of de colonization in the economic sphere and negation of domination and neo-colonialism in international economic relations.⁸ Even though they enjoyed political freedom, as most of them had recently emerged from the clutches of colonial empires, most developing countries continued to live in conditions of economic backwardness, in a perpetual struggle against new forms of neo-colonialism characterized by inequality in all spheres between the industrially developed and developing countries. Therefore, the newly independent states sought to reshape the international order of relationships and develop new principles in order to assert and strengthen their position in international relations. They united to lobby for what they called a New International Economic Order based on equity, sovereign equality, interdependence, common interest and co-operation among all states, irrespective of their economic and social systems, intended to correct inequalities and redress existing injustices, and to eliminate the widening gap between the developed and developing countries and ensure steady economic and social development and peace and justice for present and future generations.⁹ In essence concerns for equity were at the center of the New International Economic Order as developing countries regarded this as the standard for ensuring fairness in international economic relations and the distribution of benefits of environmental, financial, and technical resources among nations.¹⁰

This initiative came not very long after the United Nations General Assembly adopted the Resolution on Permanent Sovereignty Over Natural Resources¹¹ aimed at asserting the rights of the developing countries and newly independent states to maximizing the benefits of resource exploitation and to free disposal of their natural resources and the wealth within their national jurisdictions without infringement from foreign states or companies. The resolution was an effort at obtaining greater control over natural resources geared at the realization of state economic sovereignty and the promotion of economic development.¹² Subsequent to the New International Economic Order declaration, The United Nations General Assembly adopted the Charter of Economic Rights and

8 M. Bulajic, *Principles Of International Development Law: Progressive Development of the Principles of International Law Relating to the NIEO*. 2nd ed. (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993) at 4

9 Preamble, *Declaration on the Establishment of a New International Economic Order*, GA Res. 3201(S-VI) UN GAOR, 6th Spec. Sess., Supp. No 1 UN Doc A/9559, (1974)

10 N.M Eejima, "Sustainable Development and the Search for a Better Environment, A Better World: A Work in Progress" (2000) 18 UCLA J Env'tl. L & Pol'y 99 at 111

11 GA Res. 1803, UN GAOR 17th Sess. Supp. No. 17 UN Doc A/5217(1962)

12 Eejima, *supra* note 10 at 110

Duties of States also intended to foster the establishment of a "new system of international economic relations based on equity"¹³

These initiatives are evidence that the North South conflict or opposite perspectives regarding the importance of environmental conservation, particularly in the role of developing countries is a reflection of a struggle for equity in international relations by the developing southern countries that started a long time back and it is in this context that an analysis of the North-South paradigm to environmental conservation is important.

1.1.2 North and South: Different Priorities, Responsibilities and Attitudes.

The position of developing countries is rooted in the argument that the deterioration of the environment was the responsibility of the developed countries. This too is mirrored in the statement of the then Prime Minister of Sweden, the late Olaf Palmer, while addressing the Stockholm Conference. He declared that it was an

inescapable fact that each individual in the industrialized countries draws on the average, thirty times more heavily on the limited resources of the earth than his fellow individual in the developing countries.¹⁴

Developing countries felt therefore that their quest for economic development and solutions to poverty should not be constrained by environmental conservation policies that the developed world did not 'suffer' while it was developing. Developed countries, on the other hand, having realized that industrialization had put immense pressures on the environment, were concerned that western style industrialization in the developing world would ruin the environment completely, and prescribed that developing countries should learn from the mistakes of the North and avoid industrialization¹⁵, or as one writer sarcastically stated "For the survival of mankind (sic) the poor developing countries should remain in a state of underdevelopment because if the evils of industrialization were to reach them, life on the planet would be in jeopardy."¹⁶ The enthusiasm of the developed countries was, however, not shared by the developing countries, which faced the dilemma of choosing between conservation, and

¹³ Preamble, *Charter on Economic Rights and Duties of States*. G.A Res. 3281, UN GAOR 29th Sess. Supp No 31, UN Doc A 9631(1974)

¹⁴ *Ibid.* at 64 quoting Olaf Palmer

¹⁵ K. Mickelson "Rhetoric and Rage: Third World Voices In International Legal Discourse" (1998) *Wisconsin International Law Journal* Vol. 16 No. 2, 353 at 394

¹⁶ R.P Anand "Development and Environment: The Case of the Developing Countries" (1980) 24 *Indian Journal of International Law* 1 at 8

fulfilling their economic development needs which revolve around the eradication of poverty. This dilemma was forcefully presented by former Prime Minister of India, the late Indira Gandhi, who said;

The rich countries may look upon development as the cause of environmental destruction, but to us, it is one of the primary means of improving the environment of living, of providing food, water, sanitation and shelter, of making the deserts green and the mountains habitable. We do not want to impoverish the environment any further and yet we cannot for a moment forget [the] grim poverty of the large numbers of [our] people. When they themselves feel deprived, how can we urge the preservation of animals? How can we speak to those who live in villages and in slums about keeping the oceans and the air clean when their own lives are contaminated at the source? The environment cannot be improved in conditions of poverty nor can poverty be eradicated without the use of science and technology.¹⁷

In addition, the head of the Brazilian delegation observed that;

It is economic growth that has allowed developed countries to make great advances in the eradication of mass poverty, ignorance, and disease and as such to give a high priority to environmental consideration. Mankind has legitimate needs that are material aesthetic and spiritual. A country that has not yet reached minimum satisfactory levels in the supply of essentials is not in a position to divert considerable resources to environmental protection.¹⁸

The different priorities placed on environmental concerns were even anecdotally represented in the media thus;

Arguments between developing and industrialized countries were so divisive that even the name of the document could not be agreed upon. Eventually the developing countries led by the G-77, won out and the name was changed to the Rio Declaration on Environment and Development. The developing countries felt that the name Earth Charter put too much emphasis on the environment. The G-77 has said all along that the Earth Summit was dominated by environmental issues, especially in Western industrialized nations, and not enough concern has been given to development problems.¹⁹

These two differing perceptions to environmental conservation notwithstanding, the recognition that environmental problems are oblivious to geo-political borders led to the realization of the need for universal participation in tackling global environmental problems and that the involvement of developing countries was essential to ensure the success of international efforts for the protection of globally sensitive natural resources.²⁰ There is incentive for all countries to reach consensus on an

¹⁷Statement by Indira Ghandi, in Tolba, M, *Evolving Environmental Perceptions: From Stockholm To Nairobi*, (London: Butterworth, 1988) at 97

¹⁸Statement of the head of the Brazilian Delegation at the Stockholm Conference in *ibid.* at 135

¹⁹“UNCED: Negotiators Set to Grapple with Environment Issues as Nations Assemble for Earth Summit in Rio de Janeiro.” *Int’l Env’t Daily (BNA)*, 2 nd June 1992. quoted by Kirsten Bishop “Fairness In International Environmental Law: Accommodation of the Concerns Of Developing Countries in the Climate Change Regime” LLM Thesis, McGill University, 1999[unpublished], (hereinafter, Bishop) at 61

²⁰A.M Halvorssen, *Equality Among Unequals in International Environmental Law* (Connecticut: Westview Press, 1999) at

equitable and effective basis for allocating responsibility for maintaining the planet.²¹ In fact the environment is constantly used as a bargaining chip by the South to capitalize on the North's concern for the environment in order for them to obtain their due.²² Developing countries assert that it is not economically possible or feasible for them to undertake the environmental obligations being forged at the international level without extensive outside assistance in form of technology transfer and financial assistance.²³ Consequently, concerns about equity have now become the focus of negotiations and implementation of international environmental instruments. Equity in the environmental law context means environmental justice,²⁴ or according to Halvorssen, how to allocate future responsibilities for environmental protection among states that are at different levels of economic development, and have different environmental and developmental needs and priorities.²⁵ Indeed some of the equity issues that are most controversial in the international community concern responsibility for the prevention of harm to global resources and liability for damage to them.²⁶ Equity therefore, in this context means the recognition or an acknowledgement of the different situations of the developing southern hemisphere countries if they are to be encouraged to take part in international environmental conservation initiatives.²⁷, or as stated by Ebbeson,

it seems unrealistic to expect that countries with international debts, where the interest payable sometimes forms a major part of the gross national product, should rank long term environmental protection highly while acute problems such as malnutrition, starvation and inadequate social standards are a part of daily life.... it is equally clear that an increase in consumption and resource exploitation in the south to the current levels in the north would involve placing excrete stress on the quality of the global environment and natural resources²⁸.

Therefore, in this context, equity has been interpreted to mean that the developed countries are under obligation to take far stricter measures to prevent their share of pollution than the south and also that they are under obligation to assist the developing countries in their environmental protection measures.

⁴⁴ (hereinafter, Halvorssen)

²¹ E. B. Weiss "International Environmental Law, Contemporary Issues and the Emergence of a New World Order." (1993) 18 Geo L.J. 675 (hereinafter Weiss E.B) at 706

²² Mickelson, *supra* note 15 at 388

²³ G. Handl "Environmental Protection and Development in the Third World countries: Common Destiny, Common Responsibility" 1988 20 N.Y.U.J. Int'l L & Pol. 603 at 608.

²⁴ *Ibid.* at 17

²⁵ Halvorssen *supra* note 20 at 28

²⁶ E.B Weiss "Environmental Equity: the Imperative for the Twenty-First Century" *Sustainable Development And International Law* W. Lang (ed). (London: Martinus Nijhoff, 1992) (hereinafter Weiss), at 19

²⁷ Halvorssen *supra* note 20 at 3

²⁸ J. Ebbeson, *Compatibility Of International and National Environmental Law* (Dordrecht: Kluwer Academic Publishers, 1996) at 236 (hereinafter Ebbeson)

Ebbesson has argued further that considering the interest paid by the south to the north, and the low cost exploitation by the north of the south natural resources, in some situations²⁹, such assistance is tantamount to compensation rather than aid to the south.³⁰

Contemporary environmental law making has adopted this meaning of equity which now influences global treaty making particularly by creating differentiated responsibilities or double standards for the north and south.³¹ This is evident from recent environmental agreements.³²

1.2 The Strategy; Sustainable Development.

It has been opined that in considering sustainable development, priority should be given to addressing concerns about equity³³ and also that equity is an imperative of sustainability in that it involves the regulation of the developed and developing regions of the world, according them equal treatment³⁴. Before I deal with the question of how this relates to sustainable development, an understanding of what the concept of sustainable development means is essential. The concept of sustainable development, which is reflected in international environmental instruments came into common usage in the decade of the 1980s³⁵ Initially known as eco-development,³⁶ the concept symbolized a synthesis between development and environment protection and was re-christened sustainable development in the first World Conservation Strategy of 1980.³⁷ The 1987 World Commission on Environment and Development, (The Brundtland Commission) popularized the term and defined sustainable development in its report³⁸ as development that meets the needs of the present without compromising

²⁹*Ibid.* In reference to former colonies and colonial powers

³⁰Ebbesson, *supra* note 28

³¹*Ibid.* at 237

³²The Convention on Biological Diversity, articles 16(2,3), 17(1), 18(2), 19(1,2) and 20(1,2,3), The United Nations Framework Convention on Climate Change articles 3 (5) all have provisions on common but differentiated responsibilities of developed and developing countries. The Rio Declaration also addresses the issue in its reference to "common but differentiated responsibilities arising from the different contributions to global environmental degradation" (Principle 7 of the Rio Declaration) and the Kyoto protocol to the United Nations Framework Convention on Climate Change, 11th December 1997 at article 2

³³Weiss, *supra* note 26 at 17

³⁴ N. Singh "Sustainable Development as a Principle of International Law" *International Law And Development* (London: Martinus Nijhoff, 1988) at 4

³⁵Although Philippe Sands opines that the term predates this era and originates in the early conservation agreements intended to protect fisheries, flora and fauna. See Sands, *supra* note 3 at 306

³⁶So christened by Maurice Strong then serving as Secretary General of the Stockholm Conference,

³⁷Caldwell, *supra* note 5 at 243

³⁸ *Our Common Future* *supra* note 4

the ability of future generations to meet their own needs.³⁹ This definition has come under criticism for being too vague and yet it is this for this very reason that the Brundtland commission definition has been so widely accepted.⁴⁰ Many definitions have since been proffered to clarify this vague and still widely debated concept. However, standardized definition still remains elusive and this renders it difficult to design policies to achieve sustainable development.⁴¹ According to Leon Braat, "The concept combines two basic notions of economic development and ecological sustainability. Ecological sustainable economic development can be thought of as the process of ... structure, organization and activity of an economic ecological system, directed towards *maximum welfare*, which can be sustained by the resources to which that system has access. (Emphasis added).⁴² According to the World Bank, sustainable development means basing developmental and economical policies on a comparison of costs and benefits and on a careful economic analysis that will strengthen environmental protection and lead to rising and sustainable levels of welfare.⁴³

In the context of developing countries, where the main catalyst for the utilization of natural resources for human consumption is economic development, the concept of sustainable development calls for the linking of the economic plans of developing nations with environmental action plans in order to obtain the desired solutions to the problems of poverty and underdevelopment⁴⁴. For example, Barbier notes;

The concept of sustainable economic development as applied to the Third World ... is therefore directly concerned with increasing the material standard of living of the world's poor at the 'grass roots' level which can be quantitatively measured in terms of increased food, real income, educational services, health care, sanitation and water supply, emergency stocks of food and cash, etc, and only directly concerned with economic growth at the aggregate, commonly national level. In general terms, the primary objective is to reduce the absolute poverty of the world's poor through providing lasting and secure livelihoods that minimize resource depletion, environmental degradation,

³⁹*Ibid.* at 43

⁴⁰ Meyers, Gary and Muller, Simone, "The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable development as national and International Policy" 4 *Buff. Envtl. L. J.* 1 at 11

⁴¹ *ibid* at 4

⁴² "The Predictive Meaning of Sustainability Indicators" in Orno Kuik and Harman Verbruggen *In Search of Indicators of Sustainable Development*. (Dordrecht: Kluwer Academic Publishers, 1991) at www.sustainableliving.org/appen_.htm. (Date accessed: October 5th 2000)

⁴³ World Bank, World Development Report 1992 Development and the World Bank. Oxford University Press at www.sustainableliving.org/appen_a.htm. (date accessed: October 5th 2000)

⁴⁴ V.U. James *Sustainable Development in Africa; Prospects For The 21st Century*, (New York: International Scholar Publications, 1999) at 2

Clearly, judging from the Brundtland Report and the many other definitions of the concept, sustainable development is not a pre-packaged program but an aspiration as to what a perfect development module should be. What stands out as important is the emphasis on needs and welfare, particularly of the world's poor and that of future generations. These could be very widely interpreted to include, economic, social, health, cultural, aesthetic demographic and political all of which, for both present and future generations, should be realizable while endeavoring to maintain the integrity of the natural systems that support life on earth. Thus, policies and programs to achieve sustainable development might include eliminating poverty, maintaining the ability of the environment to support human communities, a commitment to international thinking without borders, and the protection of human societies and their dependence on the natural resources.

The problems of Third World are exacerbated by the cycle of indebtedness that plagues most of these countries. In this regard it has been observed that

[t]he attempts by developing countries to meet their international debt obligations may lead to environmentally destructive economic activities. Many of these nations are forced to utilize a substantial portion of their export earnings to serve foreign debt. The diversion of resources from the poorer countries to the richer countries to service this debt has taken a toll not only on the people of developing countries, but also on the land itself.... Clearly the present levels of debt service of many poorer countries are inconsistent with sustainable development.⁴⁶

Therefore, I hasten to include a commitment to transparency and minimization of Third World debt. Other academics certainly agree that sustainable development encompasses more than environment and broadens the perspectives by considering such issues as poverty alleviation.⁴⁷ The concept therefore proposes a marriage of sorts between economic objectives welfare objectives and environmental conservation objectives. This is the context within which this study will consider sustainable development.

⁴⁵ E. Barbier, "The Concept of Sustainable Economic Development" (1987) 14 *Environmental Conservation* 101 at 103

⁴⁶ J. L. Dunoff "Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?" (1992) 49 *Wash & Lee L. Rev* 1407 at 1441 (citing Alan B Durning "Ending Poverty" in Brown, *et al*, *State of the World* 1990, a World Watch Institute report on the Progress toward a Sustainable Society. (Washington D.C.: World Watch Institute, 1990) 135 at 140.

⁴⁷ Halvorssen, *supra* note 20 at 44 also considers sustainable development to be a new overarching branch of law which includes international environmental law, international development law, labour law and all the areas mentioned in Agenda 21

While the principle of sustainable development has an impact on industrialized nations, as well as developing countries, it is in respect of the latter group that it most clearly implements a conception of equity. This is because, since the developing countries have traditionally advocated development needs as a priority over environmental preservation, sustainable development amounts to a legitimization of their development claims to the extent that it provides a means with which they may enter development avenues and remain within the environmental arena.⁴⁸

Sustainable development therefore, is an objective toward the satisfaction of all⁴⁹ human needs and aspirations. Correspondingly, it is clear that the attainment of global sustainable development requires a change in attitudes and policies in order to expand and sustain the ecological basis of development.⁵⁰ The Brundtland Commission noted one way of doing this, that is, by integrating environmental considerations into all policy making and planning. The other method has been the definition of equity for sustainable development. This is based on the recognition that the global environment transcends geo-political boundaries and that both developed and developing countries have control over resources that they both need,⁵¹ and that future generations, whose interests cannot be sufficiently represented, need to be protected.⁵² With the international environmental conventions adopted at UNCED, emphasizing common but differentiated responsibility and integration of environment and development, it is said that the ambiguity surrounding the concept of sustainable development has been removed and that the concept has become more operational.⁵³ These definitions, to wit, the principle of integration of environment and development, the principle of inter-generational and intra-generational equity and the principle of common but differentiated responsibility have come to comprise some of what are now recognized as the principles of sustainable development.⁵⁴

⁴⁸The unyielding insistence of the developing countries to legitimize the environment development linkage that they fought so hard to establish at the Stockholm Conference led to the focus on development issues at the Earth Summit at Rio. see generally Bishop, *supra* note 19 at 76.

⁴⁹All is used in the context of all peoples of the world, rich and poor and present and future generations.

⁵⁰Halvorssen *supra* note 20 at 42

⁵¹Developing countries control much of the global natural resources while developed countries have the technology and finances that developing countries need.

⁵²E. B. Weiss *supra* note 21 at 707

⁵³Halvorssen, *supra* note 20 at 43

⁵⁴There is still debate as to the significance or place of principles in international law. In the *Gentini case, (Italy Vs Venezuela)* Mixed Claims Commissions, 1903), the term principle was used to express "a general truth which guides our actions, serves as a theoretical basis for the various acts of our lives and the application of which to reality

1.2.1 The Principle of Common But Differentiated Responsibility.

The principle of common but differentiated responsibility comprises two elements, first that all states share the common responsibility for the protection of the environment and secondly, that there is need to take into account the different economic, social and other circumstances, particularly in relation to each states responsibility, for the creation of a particular problem and its ability to respond, to prevent, and control the threat.⁵⁵ In practical terms, the application of the principle is manifested in two ways. Firstly, it entitles all concerned states to participate in international measures aimed at addressing environmental obligations. Thus we see all countries participating in negotiation of international instruments. Secondly, it results in the elaboration, adoption and implementation of environmental standards that impose differing commitments between and among different states. For instance, under the terms of the 1992 Framework Convention on Climate Change, the principle translates into specific commitments, only for the developed country parties and the European community, on the mitigation of climate change and differentials in reporting requirements.⁵⁶ It also guided the establishment of special institutional mechanisms to provide financial, technological and other technical assistance to developing countries to help them implement the obligations of particular treaties.⁵⁷

Principle 7 of the Rio declaration endorsed the principle of common but differentiated responsibilities but seems to restrict its application to environmental problems. It provides;

In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development and of the technologies and financial resources that they command.

The underlying base of the principle is that economic inequity which exists between the developed and developing countries and the disproportionate role that each played in contributing to environmental degradation, and more so, the fact that developing countries which are economically compelled to rely

produces a given consequence." According to D Bodansky, "principles embody legal standards but the standards they contain are more general than commitments and do not specify particular actions" D. Bodansky "The United Nations Framework Convention on Climate Change" (1992) *Review of European Community and International Environmental Law*, at 270

55P. Sands, "International Law in the Field of Sustainable development: Emerging Legal Principles" *Sustainable Development and International Law*. W Lang (ed). (London: Martinus Nijhoff, 1992) (hereinafter Sands) at 64

56Articles 4 and 12

57Article 11

on environmentally unfriendly technologies need economic assistance to 'clean up their act'.⁵⁸ However, the principle of common but differentiated responsibilities does not exempt developing countries from participating in environmental conservation initiatives. It recognizes that developed countries had a head start over developing countries in both environmental degradation and environmental preservation and recognizes further the special needs of the developing countries for financial and technological assistance if they are to catch up with industrialized nations, and makes allowance for these issues. It does not justify or excuse viewpoints that are blatantly environmentally insensitive.⁵⁹ This redistribution of responsibilities simply ensures that all relevant interests are represented in the participation of states in the international environmental arena and that financial and other benefits of development are appropriately distributed, particularly to those who need them most, hence the relationship between equity and sustainable development. The United Nations Framework Convention on Climate Change and its Kyoto Protocol have been the first real attempts at operationalizing the principle of common but differentiated responsibilities. The two instruments require the developed countries to assist the developing countries to implement the obligations of the convention. Article 4 (7) of the UNFCCC explicitly provides

The extent to which developing country parties will effectively implement the commitments under the convention will depend on the effective implementation by the developed country parties of their commitments under the convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of developing country parties.

The Kyoto Protocol implements the principle by obliging the most developed country parties to promote, facilitate and finance, as appropriate, the transfer of, or access to environmentally sound technologies and know-how to developing countries⁶⁰ and by creating different implementation mechanisms such as the joint implementation mechanism, also known as bubbling, under which a group of nations of the European Union can jointly aspire to reduce their emissions by a certain amount; emission trading which provides developed countries with an alternative to domestic implementation of climate change mitigation measures and involves the trading of emission reduction units for environmentally sound technologies between developed and developing countries; and the clean development mechanism under which a country or countries with high costs of pollution abatement or environmental conservation invests in a country with lower costs and recovers credit for

58 J. Brune, "Environmental Security in the Twenty-first Century: New Momentum for the Development of International Environmental Law?" (1995) 18 Fordham Int'l L.J. 1742 at 1746

59 A. Gillespie *International Environmental Law, Policy and Ethics*, (Oxford: Clarendon Press, 1997) at 101.

60 Article 10 (c) Kyoto Protocol

some or all of the resulting reduction in emissions.⁶¹

1.2.2 Integrating Environment and Development.

Sustainable development is also based on the assumption that underdevelopment and poverty lead to the rapid deterioration of the environment that may in turn be a considerable obstacle to future development itself. Hence economic development must be achieved in a manner consistent with the sound management of natural resources. Environmental protection and development are consequently mutually supportive rather than conflicting objectives. Equilibrium between them is the condition for the survival of both and this is the principle underlying integrating environment and development, that economic development must go hand in hand with the protection of the environment in order to stay at a sustainable level, where the environment has the capacity to renew itself.⁶² The integration of environment and development objectives serves to bridge that gap between conservation and development, particularly for developing countries, in order that they can have both conservation and development if the right strategies are adopted.⁶³

Principle 4 of the Rio declaration endorses this principle when it states that “in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

Really what the integration principle means is that development decisions which fail to take any or adequate account of environmental impacts could never contribute to sustainable development. It has also been argued that integration might mean that environmental considerations should not be used to limit developmental decisions, which aim to address fundamental human needs, such as the provision of clean water or adequate housing.⁶³ However, for the purpose of the arguments in this study, I will use the previous stated meaning of integration.

Agenda 21 also endorses integration as a means “to lead to the fulfillment of basic needs, improved

⁶¹ K. Bishop, *supra* note 19 at 100

⁶² According to P. Sands, *supra* note 55, Linkage between conservation and development was made at the first UN Conference on conservation in 1949 and in 1971, the UN General Assembly expressed its conviction that development plans should be compatible with a sound ecology and that adequate environmental conditions can best be ensured by the promotion of development. (UNGA Resolution on Development and the Environment G.A. Res. (XXVI), (20th December 1971)

⁶³ Sands (a), *supra* note 3 at 338

living standards for all, better protected and managed ecosystems and a safer more prosperous future.”⁶⁴ There is consensus that the practical implementation of the principle of integration requires the collection of appropriate environmental information and its dissemination and the conduct of *appropriate* environmental impact assessments (emphasis mine) This thesis will focus mainly on the conduct of environmental impact assessments and proffer the argument that environmental impact assessments are a useful method of achieving sustainable development because of their implications for integrating environment and development.

Environmental concerns and developmental objectives are so intertwined under this principle that it seems unlikely that the two objectives could ever be separated. We now see this manifested in recent changes which reflect this new interdependence, including the convergence of trade and environment issues in the GATT and the decision to include environmental language into the preamble of the WTO, the development of environmental jurisprudence in areas such as competition, subsidies, and intellectual property law and the establishment of an environmental department at the World Bank in addition to the adoption of environmental assessment and other environmental procedures.⁶⁵

Within the context of multilateral development assistance, the principle of integration has been interpreted as requiring multilateral development banks or other lending organizations to attach green conditionalities on their development assistance⁶⁶. The conditions refer to mechanisms that will take environmental considerations into account. A good example of such a conditionality, which will also be analyzed in this study, is the environmental impact assessment which is required for externally aided development projects.⁶⁷

⁶⁴Agenda 21 UN Doc. A/CONF.151/26/Add.1 (1992), para. 1.1

⁶⁵P. Sands *supra* note 55 at 61

⁶⁶Sands *supra* note 3 at 338

⁶⁷ For instance, in 1991, environmental assessments were made formal requirements under the World Bank Environmental Assessment Operational Directive for all World Bank operations that are expected to have significant adverse environmental impacts that are sensitive, diverse or unprecedented. Other MDBs requiring EIA include the European Bank for Reconstruction and Development, The African Development Bank, The Caribbean Development Bank, and the Inter-American Development Bank.

In summary, chapter one set the scene for the study by exploring the concept of sustainable development. In the chapter, the problems leading to the definition of the concept are discussed, particularly, the environment-development dichotomy and the equity debate regarding the north and south differences. This discussion led us into a deeper discussion of the facets of sustainable development that is some of the ways in which the concept has been defined, its wider meaning and how it is being implemented in international environmental lawmaking. Focus was placed on the principles of common but differentiated responsibilities and integrating environment and development.

The latter principle is particularly relevant to this study because environmental impact assessments, which are the subject of this study, are viewed as an excellent avenue for integrating environment and development. It also sets the ball rolling for the analysis of the modalities and intricacies of this avenue of integration, which is the focus of chapter two and the meaning it has for global sustainable development.

CHAPTER TWO: THE ENVIRONMENTAL IMPACT ASSESSMENT APPROACH TO SUSTAINABLE DEVELOPMENT

The Brundtland report recognised the interdependence of the ecology and the economy on all fronts as “a seamless net of causes and effects...” and called for the integration of environmental and developmental considerations as one of the strategies for achieving sustainable development. In chapter one, I noted that the practical implementation of the principle of integration of environment and development objectives requires *interalia*, the conduct of appropriate environmental impact assessments. On the basis of this observation, this chapter will examine the role, necessary or otherwise, that EIAs play in the attainment of the goal of global sustainable development.

Firstly, the chapter explores the concept of EIA, its definition, its meaning and its practical requirements and its implications for realizing full and effective integration of environmental considerations in development plans, policies and projects. An analysis will be made of the global acceptance or conversion to the concept of EIA, through the effect of international customary law obligations and through the influence of international organizations and multilateral lending or aid institutions and international conventions. Lastly, the chapter will critique the role that this acceptance of EIA plays in the realization of global sustainable development. The thesis of chapter two is that while EIA is widely perceived as an excellent tool of operationalizing the integration principle of sustainable development, its global acceptance has not necessarily been in recognition of this attribute and that this particular fact has questionable implications for global sustainable development, in the North as well as in the South.

2.1 Definition of Environmental Impact Assessment.

Just like the concept of sustainable development, many attempts have been made to define EIA and these have all arrived at different results. According to the United Kingdom Department of the Environment, EIA

...is essentially a technique for drawing together in a systematic way, expert qualitative assessment of a project's environmental effects and presenting the results in a way that enables the importance of the predicted effects and the scope for integrating or mitigating them, to be properly evaluated by the relevant decisions making bodies before a decision is given.⁶⁸

⁶⁸ United Kingdom Department of the Environment “Environmental Assessment” Circular 15/1988 (London: HMSO, 1988) at Para 7

Elsewhere, EIA has been similarly defined as “a technique and a process by which information about the environmental effects of a *project* (emphasis mine) is collected, both by the developer and from other sources and taken into account by the decision making authority in forming a judgement on whether the development should go ahead.”⁶⁹

These definitions from varied sources, both place emphasis on the environmental effects of ‘projects’ and consideration of these effects by decision-making authorities. In this sense therefore, EIA is considered a planning tool used in evaluating the feasibility of development projects. These definitions provide one meaning to EIA. They however, provide a very limited scope for the application of EIA, that is, only to projects. In most environmental impact assessment legislation, project is a defined term. *The Canadian Environmental Assessment Act* (CEAA) for instance, defines project as a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or where prescribed by regulation, a physical activity not relating to physical work.⁷⁰ Thus, the definition of project is clearly limited to physical changes, not plans or transactions.⁷¹ *The Uganda National Environment Statute 1995* also defines ‘project’ to include projects and policies that would lead to specific projects that may have an impact on the environment.⁷² While mention is made of policies, in practice the emphasis is on ‘tangible’ projects.

These definitions of project render EIA quite incomprehensive in so far as its integrative role is concerned and its wider implications for sustainable development as defined in this thesis, in that they exclude environmental impacts arising out of activities which may not fall within the meaning of projects for EIA purposes, but which nevertheless, impact heavily on the environment, such as policies mandating trade in hazardous wastes or legislation degazetting forest reserves.⁷³

69 V. Macha & R. Makaramba, “The Development And Harmonization Of EIA Regulations –Tanzania Country Report” in *The Development and Harmonisation of Environmental Laws in East Africa: Development and Harmonisation of EIA Regulations*. (UNEP/UNDP Joint Project on Environmental Law And Institutions In Africa-The African Sub Regional Project Nairobi, 1999) at 117

70 *Canadian Environmental Assessment Act*, 1995, S.C. Bill c-13, s.2.

71 R. Northey, “Overview of the Canadian Environmental Assessment Act” in *The 1995 Annotated Canadian Environmental Assessment Act and EARP Guidelines Order*, (Toronto: Carswell Thomson Professional Publishing, 1997) at 593

72 *National Environment Statute 1995*, Laws of Uganda, Statutory Supp. Statute No. 4 of 1995, s.2

73 as was the case in Uganda where a large tract of Namanve forest reserve was degazetted to create an industrial park. Arguably, while this was done before the enactment of the EIA regulations, it would still not have qualified for environmental assessment under the EIA regulations because the degazetting action and

Noteworthy in these definitions also, is the common reference to the 'environment', a term which is not usually defined and which is bound to be interpreted subjectively. Therefore there is always a risk of assessing only those impacts that relate to the biophysical environment and its components and leaving out other components of the environment which impact on sustainable development such as cultural and heritage sites, indigenous peoples, rights, and all those other precepts that contribute to human well being.

However, According to the Canadian Environmental Assessment Research Council (CEARC),

Environmental Impact Assessment should be a process that attempts to identify and predict the impacts of legislative proposals, policies, programs, projects, and operational procedures on the biogeophysical environment and on human health and well being. It should also interpret and communicate information about those impacts and investigate and propose means for their management.⁷⁴

This definition provides a wider scope of application to EIA. Not only should it apply to specific projects, as suggested by the two previous definitions, but also to policies, programs and legislative proposals. Further, this definition also demonstrates that contrary to its earlier definitions, EIA can and should evaluate potential health as well as social effects.⁷⁵ Further more, in addition to being a planning tool, EIA serves as an information-gathering tool, for decision-making and other stakeholders about the likely environmental consequences of a particular planned activity.⁷⁶

Traditional notions of sustainable development have included an economic dimension dealing with the creation of wealth and improved conditions of material life, a social component measured as well being in nutrition, health, education and housing; a political dimension pointing to such values as human rights, political freedom, security, participation; a cultural dimension in recognition of the fact that cultures confer identity and self worth to people; and an ecological component that recognizes the primacy of conserving the life giving natural resources and processes on which all progress depends. Environmental assessments integrate environment and development concerns by addressing mostly the

regulations do not fall within the meaning of project under the EIA legislation; degazetting refers to a legislative process in Uganda, usually by statutory instrument, that removes special protected status from previously reserved lands, forest or game reserves.

⁷⁴ Canadian Environmental Assessment Research Council, *Evaluating Environmental Impact Assessment: An Action Prospectus*, (Ottawa: Minister of Supply and Services, Canada, 1988) at 1

⁷⁵ N. Bomo, *The New Federal Environmental Impact Assessment Process in Canada: A Step Towards Sustainable Development?* LLM Thesis, McGill University, 1992 [unpublished] at 17

last dimension but in order for EIA to fully impact on sustainable development, it is necessary for the process to incorporate the political and cultural dimensions as well.⁷⁷

EIA is an environmental management and early warning process in the sense that it is based on predictions.⁷⁸ Its aim is to balance the environmental interests in the larger scheme of developmental issues and concerns. The primary objective of EIA is to ensure that potential problems are foreseen and addressed at an early stage of project planning and design. While contemporary opinions suggest that EIA should be an assessment of the potential negative or adverse impacts of a project, a consideration of positive or beneficial environmental impacts of a project or stipulated activity, in addition to the negative impacts, is necessary for a wholesome process. Therefore, the assessment should provide information on the environmental, social and economic benefits of proposed activities to assist the decision makers and the general public to determine whether and in what form a project should be implemented, and how its expected benefits can be achieved and sustained without causing significant adverse environmental impacts.⁷⁹

Holistically, therefore, the purpose of EIA is to assess how the potential impacts both beneficial and adverse, of a planned action, can affect the biogeophysical, socio-economic, cultural, spiritual or aesthetic elements of the environment and their interactions, and if such potential is found to exist, to devise ways and means to achieve and sustain the benefits and to identify alternatives that will eliminate or minimize potential adverse impacts, while realizing the planned action. The merit of this definition is that it widens the scope of the environmental assessment process, in that it does not restrict it to projects only but extends it to all planned actions. In addition, the assessment of environmental impacts is more rounded in that it envisages both positive and negative impacts and considers all facets of the environment and not just the biogeophysical environment. Adopting such a holistic approach would satisfy both the environmental and developmental aspirations of planned actions and make the EIA a more wholesome process geared towards the ultimate goal of sustainable development.

⁷⁶ *ibid*

⁷⁷ J. McNeely, "Environmental Assessment in Support of Sustainable Development" in *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future. A Background Paper*, Jacobs & Sadler, (eds) (Ottawa: CEARC, 1991) at 107-108

⁷⁸ Y. Ahmad & G.K. Sammy (eds) *Guidelines to Environmental Impact Assessment in Developing Countries*. (London: Hodder and Stoughton, 1985) at 2

⁷⁹ P. Modak, & A.K. Biswas, *Conducting Environmental Impact Assessments for Developing Countries*. (Tokyo: U.N.U

The EIA process, however, suffers certain limitations as a tool for sustainable development. Firstly, inherently, the EIA process is not a creative process. It is merely a process of analysis and criticism and it is not intended to generate solutions but merely to discuss alternatives.⁸⁰ Solutions are expected to be devised through other mental processes, perhaps of project redesign. A second limitation of EIA derives from the minimal role it plays in the complex issue of world trade in the context of sustainable development. While the WTO agreement provides in its preamble that expansion of production and trade in goods and services should be qualified by measures allowing for the optimal use of the world's resources in accordance with the objectives of sustainable development, it at the same time raises questions as to the technicalities of the recognition of the principle of sustainable development in the WTO. Whereas arguments on environmental degradation were considered restraints to freedom of trade, the new approach is to consider the preservation of the environment as a 'legitimate objective' of exceptions to obligations under the WTO.⁸¹ This approach brings to the fore issues of legitimate exceptions and how they shall be determined in order to prevent protectionist tendencies under environmental disguise. The workings of this uneasy relationship between trade and sustainable development are still unclear. However, the existence of the relationship becomes relevant for EIA processes relating to Customary International Law, projects or activities designed for export.⁸²

2.1.1 Rationale for EIA and the nexus of EIA and Sustainable Development.

Current trends in environmental management emphasize the need to enhance or develop measures geared to the prevention of degradation of the environment. The monitoring of *ex post facto* pollution, while remaining an important issue has nevertheless given way to these trends. The principal reason for this change is the realization that preventing environmental degradation is far more cost effective than repairing environmental damage.⁸³ EIA is now recognized in many jurisdictions and is increasingly being adopted as one of the most effective tools in this preventive approach to environmental degradation.

Press, 1999) at 112

80 S. Holtz, "Environmental Assessment and Sustainable Development: Exploring the Relationship" in Jacobs and Sadler, *supra* note 77 at 103

81 W. Benedek, "Implications for the Principle of Sustainable Development, Human Rights and Good Governance For The GATT/WTO" *Sustainable Development and Good Governance*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers 1995), at 278

82 Holtz, *supra* note 80 at 104

83 J. Ntambirweki "Development and Harmonization of EIA Regulations for Uganda." Development and

EIA enables reliable prediction through study, the environmental effects of a given action, which can be foreseen within the limits of existing scientific and social knowledge. This prediction further enables decision-making and choice of alternatives compatible with sustainable development and the ability of a given society to afford such alternatives. Seen in this context therefore, EIA conforms to the aspirations for sustainable development by encouraging the development of projects that are compatible with the socio-economic-cultural development and environmental conservation objectives of the project recipient communities, which are at the same time economically viable for the project proponents.

A frequent opinion however, is that EIA is more of a development friendly gimmick than it is an environmental management and conservation tool. Many authors on EIA agree that the main objective of EIA is not to prevent development activities from being carried out,⁸⁴ but rather to ensure the best alternative is selected and or that EIA does not eliminate projects that have adverse impacts on the environment altogether. It only avails both the developer and national authorities (decision-makers) the opportunity to choose development projects with full knowledge of their impacts on their environment.⁸⁵ Further more, often times, legislation mandates the developer to be responsible for conducting the EIA instead of the national authorities. The EIA process is therefore more likely to be more 'pro-project proponent' than 'pro-environmental conservation' particularly since the cost of the EIA is discounted as a business expense. In this context therefore, it is questionable the impact that such designed EIA systems and processes will have on sustainability.

It has been argued that EIA by itself is not enough to ensure sustainability, firstly because in most cases, EIA applies only to new and not existing projects or activities, therefore it would be important to devise other ways and means of encouraging or ensuring the sustainability of existing activities or projects. A viable option is to subject all major changes to existing projects to EIA processes.⁸⁶ In addition, the EIA process simply or ideally identifies environmental impacts so that decisions about proposed activities are taken in the knowledge, of their environmental consequences. The EIA process

Harmonization of EIA Regulations *supra* note 69 at 187.

84 V. Macha & R. Makaramba, *supra* note 69 at 56

85 Ntambirweki *supra* note 83 at 185

86 P.S. Elder & W. Ross, "How To Ensure That Developments Are Environmentally Sustainable" in Jacobs

is not meant as a fool proof guarantee that all proposed activities or projects will be free of environmental problems – only that to the extent reasonably possible, the consequences will have been considered in making the decisions regarding the proposals.⁸⁷ Therefore, if the EIA process is to contribute meaningfully towards sustainable development, since there is not a standard definition of EIA, it should be adapted according to prevailing circumstances to incorporate firstly, existing activities, and secondly, mechanisms to evaluate full effects of development projects or activities, or to incorporate measures to mitigate environmental harm.

2.2 The Conversion to EIA; The Increased Acceptance of EIA.

The EIA process is now an accepted and established environmental management/economic planning process around the world. From its birthplace in the United States,⁸⁸ EIA has spread to several jurisdictions around the world, in both the developed and developing countries alike. In nations such as Australia, Canada, and the US, it is well developed both at the federal and provincial or constituent levels. In the European Community, by a directive adopted in 1985, ⁸⁹ EIA is required for all large projects. Developing countries too have, jumped on the EIA bandwagon, in some cases, even faster than some developed countries.⁹⁰ For instance, the Philippines required EIA for certain projects since 1977 compared to Germany whose EIA institutions are more recent.⁹¹

Caldwell attributed this far and wide reaching conversion to and acceptance of EIA to the increased perception of the need to protect the environment to ensure human survival. He stated,

Legislation such as NEPA has been accepted because we are environment-shaping animals sufficiently intelligent to recognize that our survival requires self-discipline. In this perception of our need to supplement our inherent nature with social inventions designed to protect us against susceptibility to error may lie our best hope.⁹²

and Sadler *supra* note 77 at 128

⁸⁷ *ibid* at 130

⁸⁸ In 1970, The US Congress adopted the *National Environmental Policy Act*, (NEPA), United States, U.S.C 42, 4321, which in its s. 102(2)(c), required all federal agencies to prepare a detailed written statement about the impact of all their actions that significantly affected the environment

⁸⁹ EEC Council Directive of 27 June 1985, 85/337/EEC; 7 July 1985

⁹⁰ C. J. Barrow, *Environmental and Social Impact Assessment: An Introduction*, (London: Arnold 1997) at 171

⁹¹ G. Werner, "Environmental Impact Assessment in Asia: Lessons form the Past Decade" in Biswas & Agarwala (eds) *supra* note 2 at 16

⁹² L.K.Caldwell, *Science and the National Environmental Policy Act*, Alabama: University of Alabama Press, 1982, quoted in *The Legal Challenge of Sustainable Development: Essays From the Fourth Institute Conference on Natural Resources Law*, J. O. Saunders, (ed), (Calgary: Calgary Institute of Natural Resources, 1990), at 22

While I agree that EIA has been accepted because of its environmental importance, I am hesitant to accept that this is true on the global scale, particularly in the context of developing countries. Developing country governments wish to promote economic development and often with less enthusiasm, protect the quality of the environment. International development agencies wish to ensure that their funding activities give value for money and do not cause environment or socio-economic damage and in some cases, would like to promote environmental concerns.⁹³ This 'scratch my back and I'll scratch yours' relationship between developing countries and the developed world, through its development assistance agencies, is, apparently, the primary reason for the spread and conversion to EIA in developing countries.

This section attempts to analyze the causes and effects of the global conversion to EIA. I will argue that the EIA movement is a result of the increased role of international organizations, funding bodies, and multilateral lending agencies in environmental mandates, and on another scale, the relevance of customary international law obligations to prevent environmental damage and the influence of multilateral environmental agreements and that this has positive implications for sustainable development in that as a result, EIA concepts will now form part of the natural planning and legislation in many jurisdictions as well as international law.

2.2.1 The Relevance of Customary International Law to the Global Acceptance of EIA.

The international society of nation states is not a homogeneous community but rather an amalgam of nations with widely different cultures, histories, values and interests. In this context, identification of shared values and perceptions is essential to the formation of customary norms.⁹⁴ This behavioral pattern of shared values is what is commonly referred to by international law lingua as state practice. Secondly, the general acceptance of a norm as law provides customary norms with authority and legitimacy. Without this, state practice is a mere habit or convenience but not law⁹⁵. This is what international lawyers call *opinio juris*. The orthodox description of customary international law is created

⁹³ C.J. Barrow, *supra* note 90 at 195

⁹⁴ J.P. Kelly, "The Twilight of Customary International Law" (2000) 40 (2) Va Journal of Int'l Law 449 at 467

⁹⁵ *ibid.* The ICJ agreed with this. In *The North Sea Continental Shelf Cases*, the court defined *opinio juris* and emphasized its necessity when it required that state practice "be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it ...the states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not itself enough." *North Sea Continental Shelf cases. (F.R.G Vs Den/ F.R.G vs. Neth.)* 1969 ICJ 3 at 44

when nations consistently adhere to a legal principle with the belief that they are legally bound by it⁹⁶. This description incorporates the two basic ingredients of customary international law, that is, state practice and *opinio juris*. Therefore, in determining whether a particular norm has ascended to the status of customary international law, orthodox interpretations of international law require that there must be state practice of the norm and that this practice is influenced by the belief that it is a legal obligation.

2.2.1.1 The 'New Customary International Law' Perspective

However, this traditional notion of customary international law has come under criticism because its two requirements or prerequisites, that is, state practice and *opinio juris* are argued not to be conclusive measures of normative behavior concomitant to custom. Bodansky notes that in saying that customary rules represent regularities in behavior, or vice versa, the approach is more empirical than normative⁹⁷ in that behavioral regularities are perceivable as such by external observation and are thus subjective in nature and that while they represent regularities in behavior, customary rules do not necessarily represent uniformities of behavior.⁹⁸ Separately, it has been argued that that in virtue of the fact that the interpretation of state practice depends upon perception, cultures with different histories and values have different interpretations of the same events and therefore, that practice is interpreted through the lens of culture and interest.⁹⁹ Moreover, that what one perceives as state practice, in the habitual practice of states or even that of a majority of states within their own jurisdictions may actually be a reflection of domestic policy preference and not necessarily practice in obedience to a sense of international obligation.¹⁰⁰ These factors have been said to undermine the authority of traditional customary international law indices.

In light of some of these arguments, some scholars are currently debating, and perhaps advocating what they describe as the new customary international law. Perhaps the most prominent feature of this new customary international law is that it is less tied to state practice and is expanded to include norms articulated in non-binding resolutions by the majority of states at international fora and to norms in

96 B. R. Popiel "From Customary International Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States. (1995) 22 B.C. Env'tl. Aff. L.Rev. 447 at 450.

97 Bodansky. *infra* note 118 at 109

98 *ibid.*

99 J.P. Kelly *supra* note 94 at 467.

100 *Ibid.*

multilateral treaties even though not agreed to by all.¹⁰¹ This position is substantiated by the argument that the ICJ now relies on UN General Assembly resolutions and multilateral treaties and other international pronouncements as evidence of customary international law, without rigorous examination of whether these pronouncements reflect the actual practice of states.¹⁰² In *The Military and Paramilitary Activities in and Against Nicaragua case (Nicaragua case)*¹⁰³ for example, the court relied heavily on General Assembly resolution and multilateral treaties as evidence of customary international law rules concerning limitations on the allowable use of force and the principle of non intervention. However, in a subsequent decision, the ICJ seemed to adopt a more cautious approach. It noted that whereas it was not certain that the non recourse to nuclear weapons over the past fifty years amounted to an expression of *opinio juris*, the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653(XVI) and requesting member states to conclude a convention prohibiting the use of nuclear weapons in any circumstances, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step along the road to complete nuclear disarmament.¹⁰⁴

The premise of this new customary international law feature is that unanimous and near unanimous decisions resolution and declarations of the United Nations General Assembly and other international fora constitutes a consensus on legal norms providing clear evidence of the *opinio juris* of nations.¹⁰⁵ The ICJ seems to agree with this position in the *Nicaragua case* when it declared that *opinio juris* could be deduced from the attitude of nations to non-binding General Assembly resolutions.

The effect of consent to the text of such resolutions ... may be understood as an acceptance of the validity of the rules or set of rules declared by the resolutions by themselves.¹⁰⁶

The other feature of this new customary international law is that it can develop very rapidly and does not require the requirement for long passage of time for it to become a recognized rule of customary international law. The ICJ has declared that the passage of only a short period of time is not

¹⁰¹ *ibid* at 484

¹⁰² C.A Bradley & J.L. Goldsmith " Customary International Law As Federal Common Law: A Critique of the Modern Position. (1997) 119 Harv. Law Review, 815 at 839

¹⁰³ *Nicaragua v. USA* 1986 ICJ 14 (June 27)

¹⁰⁴ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, June 8, 1996, accessed at www.ici-cij.org/iciwww/idecisions/isummaries/junanaummary960708.htm. (Date accessed: February 20, 2001)

¹⁰⁵ Kelly, *supra* note 94 at 484. See also L. Sohn, "Generally Accepted International Rules (1986) 61 Washington Law Review 1073, 1074 who notes that a resolution of an international organization adopted by consensus or near unanimity, may declare a rule that is generally accepted.

¹⁰⁶ *The Nicaragua Case supra* note 103 at 100

necessarily, or of itself, a bar to the formulation of a new rule of customary international law¹⁰⁷.

This new customary international law perspective becomes relevant to EIA in the attempt to declare EIA a principle of customary international law because of the fact that the obligation to conduct EIA became so widely recognized or acknowledged as a result of non binding resolutions and declarations of international fora and subsequently, Multilateral Environmental Agreements (MEAs). Provisions requiring or mandating EIAs are found in the Stockholm Declaration¹⁰⁸, the UNCED instruments¹⁰⁹, UNCLOS,¹¹⁰ CITES¹¹¹ as well as in the Operational Guidelines of multilateral lending organizations such as the World Bank¹¹² and the OECD.¹¹³ In addition, international obligation to conduct EIA may be traced back to nearly three decades ago. While this may arguably be "a long passage of time" qualification to meet the traditional customary international law requirement, new customary international law would render this requirement irrelevant.

While the new customary international law theory may help to place EIA within the realm of customary international law, it is however, constantly under criticism. Some of the major criticisms include the argument that it is not based on general and consistent state practice but rather on non-binding verbiage;¹¹⁴ or that the new customary international law is premised on resolutions and declarations which are all aspirational and neither create nor promise legal obligations.¹¹⁵ Kelly argues further that these aspirational soft law instruments are enacted because states remain unwilling to sign concrete treaties and that this provides compelling evidence of the fact that states lack the normative conviction

107 *North Sea Continental Shelf Cases* (F.R.G. V's Den., F.R.G. V's Neth.) *supra* note 95 at 44

108 *Declaration of the United Nations Conference on the Human Environment* (Stockholm) UN. Doc A/CONF/48/14/REV 1

109 *The Convention on Biological Diversity, The United Nations Framework Convention on Climate Change, The Forest Principles. The United Nations Declaration on Environment and Development and Agenda 21*

110 *The United Nations Convention on the Law of the Sea* (Montego Bay) (1982) 21 I.L.M. 1261 (not in force)

111 *Convention on International Trade in Endangered Species of Wild Flora and Fauna* (Washington DC) (1973) 12 I.L.M. 1085

112 *infra* notes 151 and 152

113 *infra* notes 144 and 145

114 Bradley & Goldsmith *supra* note 102 at 839-40

115 Kelly *supra* note 94 at 487 see also P.M. Dupuy "Soft Law and The International Law of the Environment, (1991) 12 Mich. J. Int'l L. 420, 428 who notes that soft law delineates goals, not obligations, and M. Pallemmaerts, *International Environmental Law From Stockholm To Rio: Back To The Future?*" (1992) 1 RECEIL 254, who noted that Stockholm Conference sought to create a document that reflected the aspirations for a better environment

necessary to create customary obligations.¹¹⁶

Nevertheless, arguments have been made that EIA is becoming a customary rule in the traditional sense.¹¹⁷ While this is still under debate, it is most definitely arguable that certain relevancies attach to EIA from customary international law principles. In this section, it is proposed that the relevance of customary international law to EIA derives from two frontiers. Firstly, the progression in international law of the customary international law principle of *sic utere tuo*, and secondly through the still debatable customary international law precautionary principle¹¹⁸ both of which by extension, mandate the conduct of EIA.

2.2.1.1.1 The *Sic Utere Tuo* Principle Of Customary International Law.

The principle of *sic utere tuo ut alienam non laedas* mandates a conscious effort to avoid transboundary pollution. Translated literally, the principle states that one must use one's property so as not to injure that of another.¹¹⁹ In the context of customary international law, the principle prescribes that no state may use its territory, or allow the use of it in a way that causes serious damage to the territory of another state.¹²⁰ The principle has been applied many times in cases and arbitrations. *The Trail Smelter Arbitration*¹²¹ between Canada and the US introduced the principle into international environmental jurisprudence. The arbitration dealt with damage in the form of air pollution by sulphur dioxide caused by a zinc and lead smelting plant operated by a Canadian company in Trail, British Columbia that spread to and affected areas of northern Washington State between 1925 and 1937. These emissions

¹¹⁶ Kelly *supra* note 94 at 487

¹¹⁷ N. A Robinson, "International Trends in Environmental Impact Assessment (1992) B. C. Env'tl Aff. L. Rev. 591, 591, also Judge Weeramantry stated in his separate opinion in the *Gabikovo-Nagyamaros case (Hungary/Slovakia)* 1997 ICJ 6 September 25 1997, in reference to his earlier opinion in the *Nuclear Test Cases*, (*infra* notes 46 & 47) that EIA had assumed such a role in international environmental law that required the court to take notice of it.

¹¹⁸ The precautionary principle states that when there is a threat of serious or irreversible environmental harm, lack of full scientific certainty should not be a reason to postpone action. Some scholars have argued that the precautionary principle is part of Customary International Law, e.g. J. Cameron & J. Abouchar "The Precautionary Principle: A Fundamental Principle of Law and Policy For The Protection of the Global Environment." (1990) 14 B.C Int'l and COMP. L. Rev 1,20-21; while others have remained skeptical about this. See D.M. Bodansky "Scientific Uncertainty and The Precautionary principle (1991) 33 Environment 4 and D. Bodansky "Customary and Not so Customary International Environmental law" (1995) 3 Global legal Studies Journal 105 at 107.

¹¹⁹ *Ballentine's Law Dictionary*, 3rd ed, 1969, at 1178

¹²⁰ J. Brunee, "Beyond Rio? The Evolution of International Environmental Law, 20 *Alternatives* (University of Waterloo Canada Nov/Dec 1993) 14 at 16

¹²¹ (1939) 3 Am J of Int'l L 182

were found to be responsible for substantial damage to forests and farmlands in the lumber and agricultural regions along Washington's Columbia River. The tribunal held that under the principle of international law, no state had the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another state.¹²²

In another dispute, the international court of justice held, under reasoning similar to that used in the *Trail Smelter Arbitration*, although not strictly in the environmental context that if a nation knew that harmful effects may befall other nations due its actions, or its failure to act, and it did not disclose this knowledge, then that nation would be responsible to those who suffered damage.¹²³ Similarly in the *Lac Lanoux Arbitration* between France and Spain, the tribunal held that customary international law principles mandated that a state has a duty to notify other states when its actions may impede their environmental enjoyment.¹²⁴

The *sic utere tuo* principle was embraced and codified in the *Stockholm Declaration on the Human Environment*¹²⁵ and as Principle 2 of the *Rio Declaration on Environment and Development*, making states responsible for actions that occur in their territory and damage the territory of others.

It has been opined that the duty of a state to assess environmental impact implicit in the substantive environmental law doctrine proscribing the causation of serious environmental injury to the territory of another state¹²⁶ is expressed in the *sic utere tuo* customary law principle and Principle 21 of the Stockholm Declaration.¹²⁷ Popiel states that

indeed it may well be impossible to comply with the *sic utere tuo* principle and ensure against transboundary environmental harm without evaluating the potential for damage from actions within a state's territory.¹²⁸

In this era of aspiration to sustainable development, *sic utere tuo* can better serve the environment if it is

¹²² *ibid*, Final decision, (1941) 35 Am J of Int'l L at 716.

¹²³ *The Corfu Channel Case*, (1949) ICJ 1

¹²⁴ *Lac Lanoux Arbitration* (1957) 24 ILR 101

¹²⁵ Principle 21

¹²⁶ C. Cooper "The Management of International Disputes in the Context of Canada -United States relations: A Survey of Techniques and Mechanisms, 1986 Can. Y. B Int'l L 247 at 303

¹²⁷ B.R Popiel, "From Customary International Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage between Canada and the United States" (1995) 12 B.C Env'tl. Aff. L. Rev 447 at 461.

¹²⁸ *Ibid*.

employed proactively rather than reactively, that is, in prevention of environmental damage rather than as a cure for pollution through the imposition of state responsibility. When used as a proactive measure, *sic utere tuo* requires that a state should not use or permit the use of its territory to cause transboundary environmental harm. In order to fulfill this mandate, preventable environmental harm must be avoided. It follows then that to prevent adverse effects, one must anticipate them before they occur. Such foresight can only be realized by assessing the potential environmental impact of a proposal before any action is undertaken.¹²⁹ Herein lies the relevance of *sic utere tuo* and customary international law to environmental impact assessments.

2.2.2.1.2 The Precautionary Principle Perspective.

The precautionary principle imposes an obligation to prevent harm to the environment. Principle 15 of the Rio Declaration reflects the concept of the precautionary principle. It provides;

In order to protect the environment, the precautionary approach shall be widely applied by states according to their abilities, where there are threats of serious or irreversible damage lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

The spirit of the precautionary principle is in the evaluation of the risk threatening the environment. Precaution comes into play when the risk is high – so high in fact that full scientific uncertainty should not be required prior to the taking of remedial action. It applied in those cases whenever activity may result in long lasting or irreversible damage to the environment as well as to those cases where the benefit to be derived from a particular activity is completely out of proportion to the negative impact which that activity may have on the environment.¹³⁰

The debate continues as to the status in international law of the precautionary principle, that is, whether or not it is a customary principle of international law. For instance, according to Sands,

The legal status of the precautionary principle is evolving. At a minimum however, there is sufficient evidence of state practice to justify the conclusion that the principle as elaborated in the Rio Declaration and the Climate Change and the Bio Diversity Convention, has now received sufficiently broad support to allow a good argument to be made that it reflects a principle of customary international law.¹³¹

¹²⁹ *ibid.* also Cooper, *supra* note 126 at 303

¹³⁰ A. Kiss, "The Rights and Interests of Future Generations and the Precautionary Principle", in *The Precautionary Principle and International Law. The Challenge of Implementation*. D Freestone & E Hay London, (eds), (The Hague, Boston: Kluwer Law International, 1992) at 27

¹³¹ P Sands, *Principles of International Environmental Law 1: Frameworks, Standards and Implementation*. (Manchester: Manchester University Press 1995) at 213.

Other authors are however more cautious about proclaiming it so. Birnie & Boyle state;

Despite its attractions, the great variety of interpretations given to the precautionary principle and the novel and far reaching effects of some applications suggest that it is not yet a principle of international customary law. Difficult questions concerning the point at which it becomes applicable to any given activity remain unanswered and seemingly undermine its normative character and practical utility, although support for it does indicate a policy of great prudence on the part of those states willing to accept it.¹³²

Cameron and Abouchar opine that the fact that the principle was embraced at UNCED and included in four of the five environmental instruments signed and acceded to by the majority of the heads of states and governments present is an indication of its status as international law or its overall usefulness as a tool for environmental regulation.¹³³

The concept of EIA and the spirit of the precautionary principle both of which are intended to evaluate and minimize the threats to the environment before they occur is the primary point of relevance between the precautionary principle and EIA. On the international law plain, this relevance has been acknowledged. In *The Nuclear Tests cases*, New Zealand asserted that under the precautionary principle, France was obliged to demonstrate that the tests would not result in the introduction of radioactive material to the environment and that therefore there was an underlying obligation on France to conduct an EIA. Although the ICJ did not consider the arguments,¹³⁴ Judge Weeramantry, in his dissenting opinion, stated that the principle of EIA, being ancillary to the precautionary principle was gathering strength and international acceptance and had reached a level of general recognition that the court should take notice of it. ¹³⁵ Elsewhere, the United Nations General assembly declared EIA to be a principle equivalent with, among others, the precautionary principle,¹³⁶ while others have argued that it is the precautionary principle that has fuelled procedural requirements such as environmental impact assessments and the use of 'best available technologies'.¹³⁷

¹³² P. Birnie & A. Boyle, *International Law and The Environment*. Oxford: Clarendon Press 1992 at 98

¹³³ J. Cameron & J. Abouchar "The Status of the Precautionary Principle in International Law, in Freestone and Hay (eds). *supra* note 130 at 37-38

¹³⁴ *Request for an Examination of the situation in accordance with paragraph 63 of the courts judgement of 20 December 1974 - The Nuclear Test Case (N.Z Vs Fr)* 1995 106 I.L.R 1 at 344 The majority of the court dismissed the application on procedural grounds concluding that the parties request of an examination of the situation pursuant to an earlier judgment did not fall within their mandate, thereby preventing the exercise of the courts jurisdiction.

¹³⁵ *ibid*

¹³⁶ Programme for the Further Implementation of Agenda 21 UNGA OR, 19th Spec. Sess., Annex Agenda Item 8 UN Doc A/5-19/29 (1997)

¹³⁷ J. Bruinee and S. Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" (1994) 5 YbIEL 41 at 69

On the basis of the above evidence, I argue that the message of the precautionary principle has helped the spread of or conversion to EIA. The concept of EIA, that is, the assessment of potential environmental impacts or risks of particular activities, is arguably, a procedure for implementing the precautionary principle, because it is modeled around the need for the precaution and the acquisition of available information, geared at preventing avoidable harm to the environment, which is the punch line of the precautionary principle.

2.2.2 Role of International Organizations in Promoting EIA

As mentioned at the beginning of this section, EIA has spread far and wide to developed and developing countries alike. In this section, I proffer the argument that while in many countries, particularly developed countries, EIA developed in recognition of its opportune role in the aspirations for a better environment, in many others, particularly the developing countries, it has been largely through the influence of multilateral development assistance organizations, particularly the World Bank, which have pegged the conduct of EIAs to their development assistance in their mandate to realize sustainable development.

Foreign aid or development assistance is one of the primary modes of export of capital to developing countries through the efforts of multilateral and bilateral development agencies. Development assistance is intended to be a means for poorer countries to improve their quality of life.¹³⁸ Aid may cause unwanted impacts or be upset by unexpected events. Impact assessment can help foresee and reduce the chance of such problems and is, in this context of great importance to aid organizations.¹³⁹ Accordingly therefore, some have argued the emergence of an international norm of eco-development which merges environment and development concerns and which obliges all states, international development agencies, and other development actors to integrate environmental considerations into their development activities.¹⁴⁰ For development aid agencies, this translates into creating a linkage between development assistance and sustainable development. Many developed countries now have a

¹³⁸ P. Muldoon, "The International Law of Eco-development: Emerging Norms for Development Assistance Agencies" (1987) 22 Tex. Intl L.J. 1 at 2

¹³⁹ C.J. Barrow, *supra* note 90 at 202

¹⁴⁰ P. Muldoon, *supra* note 138 at 8

bilateral aid agency, which distributes development assistance to developing countries.¹⁴¹ These bilateral agencies and other multilateral funding agencies such as the World Bank have now made operational guidelines for impact assessment of their development activities or projects.

In 1986, the Canadian International Development Agency (CIDA) adopted a comprehensive environmental policy, one of whose objectives is the conducting of environmental impact assessments on all proposed projects that are likely to involve environmental risks.¹⁴² The Inter American Development Bank issued environmental assessment procedures in 1990, which propose to ensure that all bank operations include the investments and other actions necessary to prevent, control and mitigate negative environmental impacts and improve environmental quality.¹⁴³ The Organization for Economic Cooperation and Development (OECD) has a record in adopting environmental impact assessment procedures. In 1985, it adopted a non-binding recommendation on environmental assessment of development assistance projects and programs, listing categories of projects and programs most in need of EIA. ¹⁴⁴These guidelines were upgraded to a manual in 1986, elaborating standards for the preparation and content of EIA of aid projects and programs¹⁴⁵and since 1992, the OECD has used EIAs when granting aid to developing countries.¹⁴⁶ It has been stated that the OECD together with the World Bank and USAID have supported worldwide promotion of

¹⁴¹ for instance, there is the US Agency for International Development(USAID), the UK's Overseas Development Agency(ODA), Canada's International Development and Research Center(IDRC) and the Canadian International Development Agency(CIDA), Japan's Japan International Cooperation Agency,(JICA), the Norwegian Agency for International Development(NORAD), the Swedish International Development Agency,(SIDA), The Danish International Development Agency(DANIDA) etc. C.J Barrow *supra* note 90 at 202

¹⁴² CIDA, *Environment and Development: The Policy of the Canadian International Development Agency* Ottawa CIDA, 1987. For developments in CIDA's mandate, see F Bregha "Aid and the Environment: The Canadian Approach" in, *The Legal Challenge of Sustainable Development*, (ed) J Saunders, *supra* note 92 at 325

¹⁴³ Inter-American Development Bank, *Procedures for Classifying and Evaluating Environmental Impacts Of Bank Operations* (1990) quoted in T.M Kerr, "What's Good for General Motors Is Not Always Good For Developing Nations: Standardizing Environmental Assessment Of Foreign Investment Projects In Developing Countries" (1995) 29 *International Lawyer* 153 at 165

¹⁴⁴ OECD Doc. C (85) 104, S. 1(a) reprinted in *OECD and the Environment* at 30; see D.A Wirth, "International Technology Transfer and Environmental Impact Assessments" in G. Handl & R.E. Lutz eds *Transferring Hazardous Technologies and Substances: The International Legal Challenge*, (London: Graham & Trotman /Martinus Nijhoff, 1989) at 85

¹⁴⁵ OECD, *Environmental Assessment and Development Assistance*, OECD, Doc c (86) 26 (Paris: OECD 1986)

¹⁴⁶ *Good Practice For Environmental Impact Assessment of Development Projects. Guidelines In Environment and Aid*, (Paris: OECD, 1992)

The multilateral development banks (MDBs) also provide development assistance in the form of funding activities that can have harmful environmental consequences. For example in December 1987, the World Bank approved a controversial \$85 million credit to the Sudan for the purchase of dangerous chemical insecticides and herbicides despite the existence of clear bank policy recommending alternative pest management techniques.¹⁴⁸ This funding is provided to developing countries more often as loans rather than as grants and often these institutions may require the performance of an environmental impact assessment as part of the approval process or may attach environmental conditions to the loan.¹⁴⁹ In fact, this procedure became standard practice in 1980 when six MDBs, that is, The World Bank, The African Development Bank, The Asian Development Bank, The Inter-American Development Bank, The Arab Bank for Economic Development in Africa and The Caribbean Development Bank signed a declaration of environmental policies and procedures relating to economic development, in conjunction with the UNDP, UNEP and the European Community. Specifically, they pledged to

institute procedures for systematic examination of all development activities, including policies programs and projects, under consideration for financing to ensure that appropriate measures are proposed to mitigate or eliminate adverse environmental effects.¹⁵⁰

It is the World Bank though that has taken the lead in integrating environmental considerations in its lending process, at least as far as operational guidelines are concerned. The Bank created an environmental department in 1987 and in 1989, the Bank issued its first operational directive which mandated environmental assessment for all projects likely to have significant effects on the environment.¹⁵¹ A further operational directive strengthened assessment procedures to ensure that all World Bank supported developments that might have significant negative impact were subjected to environmental impact assessment to ensure that they were environmentally sustainable. ¹⁵² The scope

¹⁴⁷ Barrow, *supra* note 90 at 206

¹⁴⁸ World Bank, Report and Recommendations of the president of the International Development Association to the executive director on the proposed credit of DR 64.4 Million to the Republic of the Sudan for the Agricultural Rehabilitation Project III (1987); World Bank Guidelines for the Selection and use of pesticides in bank financed projects and their procurement when financed by the banks (1985); see D. Wirth *supra* note 144 at 95

¹⁴⁹ *ibid*

¹⁵⁰ see Declaration signed Feb 1 1980, reprinted in (1980)19 I.L.M 524, *ibid* at 96

¹⁵¹ World Bank, *Environmental Assessment; Operational Directive 4.00* (Washington D.C: World Bank 1989)

¹⁵² World Bank, *Environmental Assessment Operational Directive 4.01* (Washington DC: World Bank 1991);

of EIA in the Operational Directive is quite broad covering the natural environment (air, water and land), human health and safety social aspects (involuntary resettlements, indigenous peoples and cultural property) and transboundary and global environmental aspects.¹⁵³ This reflects the wide range of activities in which the World Bank is involved, which may potentially interfere with the non-traditional aspects of the environment. To quote one commentator,

the parameters of the EIA process are widened to reflect the multidimensional character of economic development in most non-industrialized countries.¹⁵⁴

Under the Operational Directive, EIAs are prepared by the borrower and then submitted to the bank for review by their own environmental specialists. If they are found satisfactory the World Bank then proceeds to appraise the project. It is at this stage that funding is approved, making provision for an adequate budget for mitigation. The borrowing nation must constantly adhere to any agreements arising from the EIA process, although the World Bank supervises the implementation of the environmental aspects of the project¹⁵⁵ The directive also provides that decision making be consultative, involving all affected groups and local NGOs while projects are coordinated with agencies in the host country.¹⁵⁶ The World Bank approach to environmental assessment in development assistance has been adopted by many international institutions¹⁵⁷ and is therefore, arguably, of global proportions, judging from the various countries in which the World Bank has financed projects, its participation in other funding mechanisms like the Global Environmental Facility (GEF) and its influence on other lending institutions, to the extent that it is now believed by some that

Requiring an EIA for World Bank financed projects has resulted in the adoption of improved host country EIA procedures. The host developing countries would benefit through improved development planning and environmental management from increased use of World Bank EIA procedures ¹⁵⁸

2.2.3 Role of International Conventions in EIA Acceptance.

A number of international agreements provide for environmental impact assessment. The UN Convention on the Law of the Sea (UNCLOS) contains a binding obligation on states to perform environmental impact assessment when they have reasonable grounds for believing that planned

¹⁵³ *ibid.* at 3 see K. Gray "International Environmental Impact Assessment: Potential For A Multilateral Environmental Agreement" 2000 Colo. J. Int'l L. & Pol'y 83 at 109

¹⁵⁴ *ibid.*

¹⁵⁵ Operational Directive *supra* note 152 at 4-5,20

¹⁵⁶ *ibid.* at 15

¹⁵⁷ T. M. Kerr *supra* note 143 at 169

¹⁵⁸ *ibid.* at 170

activities under their jurisdiction or control may cause substantial pollution of, or significant and harmful changes to the Marine Environment, including the environment outside the jurisdiction of the authorizing state.¹⁵⁹ Several regional seas agreements negotiated under the auspices of UNEP contain similar binding requirements.¹⁶⁰

The Convention on Biological Diversity (CBD) provides *inter alia*, that each contracting party shall as far as possible and as appropriate, introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant effects on biological diversity with a view to avoiding or minimizing such effects and where appropriate, allow for public participation in such procedures.¹⁶¹ However, the 1991 Convention on Environmental Impact Assessment in Transboundary Context (The Espoo Convention) represents the first ever international convention devoted exclusively to EIA.

The ESPOO Convention was agreed in Espoo, Finland on 25th February 1991, under the aegis of the United Nations Economic Commission for Europe (ECE) whose members include the European countries, Canada and the United States of America. Its aim is to enhance international cooperation in assessing environmental impact, in particular in a trans-boundary context. It is so far the only international convention on EIA, although it is not yet in force. The ESPOO Convention emphasises that EIA is more importantly a procedure than a document and it imposes an obligation on State Parties, either individually or jointly, to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities. It obliges contracting states to;

ensure that ...an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix 1 that is likely to cause a significant adverse transboundary impact¹⁶²

¹⁵⁹ *United Nations Convention On the Law of the Sea* Dec 10 1982, article 206, reprinted in (1982) 21 I.L.M 1261
¹⁶⁰ for instance, *The Convention for the Protection of the Marine Environment of the Wider Caribbean Region*, Mar. 24 1983, article 12(2) reprinted in (1983) 22 I.L.M 227 and *the Convention for the Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region*, Mar. 23, 1981 article 13(2) reprinted (1981) 20 I.L.M 746

¹⁶¹ June 16 1992, Article 14(1)(a) downloaded from www.biodiv.org/CBD (date accessed: November 28, 2000)

¹⁶² Article 2(3)

The Convention requires that EIA shall, as a minimum requirement, be undertaken at the project level. It states also that parties shall endeavour to apply the principles of EIA to policies, plans and programmes and that the opportunity to participate should be granted to the public in other states since it governs EIA in a transboundary context. Whereas it is regarded as a comprehensive instrument on EIA, the Espoo Convention is not likely to have very widespread impact. Since it was enacted under the aegis of the United Nations Economic Commission for Europe, its principal area of coverage therefore is the member states of the UNECE. This leaves the developing countries out of the picture and consequently, however effective it is; its impact cannot be directly felt globally.

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is another, more recent international convention governing aspects of EIA, particularly public participation in environmental decision-making. The impact of this convention is also thought to be very weak because of the discretion in many of the provisions particularly regarding the public participation and access to justice pillars. Some have regarded this flexibility as a scandalous failure of the convention.¹⁶³ Additionally, the same argument applies to this convention just as to the Espoo Convention regarding its relative global ineffectiveness considering it is targeted at the developed nations.

2.3. The Impact of EIA Acceptance on the Achievement of Global Sustainable Development.

The objective of the extended meaning of sustainable development adopted in this thesis is not merely the long-term preservation of the ecosystem but also the sustained increase in the level of human welfare. Within this context, the issue becomes one of how EIA acceptance impacts on global sustainable development. Certainly in sustainable development there is emphasis on natural resource conservation to prevent or to compensate for the loss of a natural resource base upon which future development and meeting the needs of future generations depends. There is therefore much scope for better management of the use, renewal and conservation of natural resources through the EIA process.¹⁶⁴ However, certain vital aspects of sustainable development will invariably escape the traditional EIA net, for instance the consideration of the economic, social, environmental and perhaps

¹⁶³ S.T. McAllister, "The Convention on Access to Information, Public Participation in Decision making, and Access to Justice in Environmental Matters" (1998) Colo. J Int'l Envtl. L & Pol'y 187 at 191

¹⁶⁴ A. Gilpin. *Environmental Impact Assessment: Cutting Edge For The 21st Century*, (Cambridge: Cambridge University Press, 1995) at 10

political aspects of a project might not exhaust all the aspirations for desirable human welfare. There might be very little room within a particular EIA process, for instance, to impact on housing needs, spiritual influences or working conditions of the affected community and yet improvements in the quality of that community's lives may be dependent on these. Thus, the conduct of EIA in such a situation would tackle simply one, though important aspect of sustainable development.¹⁶⁵ Suffice it to note, however, that EIA is not meant to be a panacea for global environmental problems but is only advocated as one important strategy towards the possible realization of global sustainable development.

Judging from the means by which the gospel of EIA has been preached, particularly in the context of the development assistance connection, EIA stands the risk of being accepted as a means rather than an end in developing countries.¹⁶⁶ Borrower nations will undertake EIA to satisfy donor agencies that they are worthy of their development loans, and while this might actually achieve the intended objective of EIA, that is, integrating environment and development considerations, the possibility of conducting 'sweetheart assessments'¹⁶⁷ as a gesture to environmentalists or a necessary hurdle to be overcome in the development process or loan acquisition process, should not be underestimated and its existence would mean perhaps that the real aspiration for sustainable development is lacking and this has serious negative implications for global sustainable development. This however, is the 'devil's advocate' perspective. The positive impact that the development assistance connection has lies in the analogy of conversion to a *concept* (emphasis added) that aims at finding out the effect of proposed projects, program and other activities on the environment. My emphasis is on concept and not the pre-packaged exported process, because a process which is good or appropriate for Canada, for instance, may not necessarily be so for Uganda, because of the very different circumstances of the two countries. Developing countries therefore, need to devise processes that will suit their peculiar geographical, legislative, institutional and decision-making circumstances.

However, on a more practical note, the marriage between development assistance and sustainable development, particularly by the MDBs, has proved in many cases to produce results quite contrary to its intended purpose. I focus on examples from the World Bank in this argument because it is the

¹⁶⁵ *ibid.*

¹⁶⁶ A.K. Biswas & S.B.C. Agarwala, *supra* note 2, at 8

¹⁶⁷ J. McNeely "Environmental Assessment in Support of Sustainable Development" in *Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future*, *supra* note 77 at 105

largest and most influential of the MDBs.¹⁶⁸ The World Bank has formulated environmental guidelines but existing literature suggests that World Bank financed development projects simply pay lip service, or none at all, to integrating environmental integrity and social concerns in their operations. Perhaps the most widely documented fiasco of the World Bank development assistance vis-à-vis its environmental policies is the Sardar Sarovar Dam project in India. The Indian Government proposed to construct a series of dams along the Narmada River with help from financing from the World Bank. The effect of the dam construction would be the inundation of the Narmada valley and the towns therein, for instance, the town of Harsud with more than 23,000 inhabitants would be totally inundated by the Narmada Sagar dam, one of the project dams to be built. The bank did not carry out any critical environmental studies and a resettlement program for the people who would be displaced. The Government of India Department of Environment and Forests even denied legal clearance for the project because eight requisite environmental and social studies dealing with afforestation of the reservoir, public health and resettlement were not completed.¹⁶⁹ The World Bank nevertheless continued to approve the loans. This created tremendous acrimony among the locals, who, of course influenced by a few environmentalists and human rights activists, protested against what they called “destructive development”. The Movement Against Destructive Development founded by a number of environmental and social activists declared, regarding the Sarovar project,

... the Movement... is not against development. Rather it maintains that much of what today goes under the name of development is not genuine development but is in fact, socially disruptive, biologically and genetically homogenizing and environmentally destructive. The Andolan's demand is for real development in which the overriding objective is not just a higher growth rate regardless of its human and environmental cost, but the fulfillment of basic human needs and the creation of just and human conditions of life for all our people.¹⁷⁰

Even though the Bank's policy on resettlement required the bank to ensure that a comprehensive resettlement and economic rehabilitation plan acceptable to those who would be displaced be prepared, no such plan was made or completed when the bank approved the Sardar Sarovar loans in 1985, even up until 1987 and yet the Bank continued to disburse funds under the project.¹⁷¹

Another example of the World Bank's bizarre way of doing environmental business is the Global

168 B. Rich, “The Multilateral Development Banks, Environmental Policy and The United States” (1985) 12 Ecology L.Q. 681 at 685

169 B. Rich, *Mortgaging the Earth The World Bank, Environmental Impoverishment and the Crisis of Development*. (Boston: Beacon Press, 1993) at 152

170 (1990) *Lokayan Bulletin*, Vol. 8 No. 1(1990) 69-73, quoted in Rich, *ibid.* at 153

Environmental Facility¹⁷² funded Congo Natural Resources Management Project, whose main purpose was the reinvigoration of forest exploitation in order for it to regain its former place as the most stable foreign exchange earner for the Congo.¹⁷³ The proposed loan was intended to fund infrastructure roads and technical support to remove transportation obstacles with the goal of increasing logging exports. Surprisingly, the World Bank's partner in the GEF, the UNDP criticized the Bank project proposal as one that would open up a hitherto intact isolated rainforest to logging and encroachment pressures, under the pretence of protecting it.¹⁷⁴ According to the UNDP the major threat to the Nouabele Reserve and surrounding areas was ironically, the GEF project itself with its proposed road building, tourist safaris and logging concessions.¹⁷⁵ Most surprising however, was the environmental impact assessment commissioned for the project by the Bank which was prepared by a US consultant from his Nebraska office and who was denied access to the documents relating to the Congo Natural Resources Management Project and a site visit¹⁷⁶ compelling him to suggest to the World Bank that it might be more useful if the preparers of the ELA had been allowed to visit project sites and allowed access to more information in bank files.¹⁷⁷ According to a leading commentator critic of the World Bank,

The Congo GEF Project is a startling example of the bank's negative environmental alchemy-its uncanny ability to present proposals whose underlying thrust is the conversion and partial destruction of ecosystems as unadulterated exercises in environmental protection.¹⁷⁸

That sounds perhaps, too harsh a criticism. However, the gist is that as a leader among other multilateral lending institutions in the adoption of environmental protection policies, the practice of the World Bank leaves a lot to be desired if it is ever to realize its sustainable development mandate.

Multilateral Environmental Agreements might be an important source of inspiration in the struggle for the realization of global sustainable development but their actual impact is dependent on more than the

¹⁷¹ Rich, *supra* note 169 at 153

¹⁷² The GEF is the main international funding mechanism through which developed countries transfer technology and financial assistance to developing countries in an attempt to address global environmental problems such as climate change and destruction of biodiversity. It is the main financial mechanism under the CBD and the UNFCCC and is operated by the World Bank, UNDP and UNEP.

¹⁷³ Rich, *supra* note 169 at 173

¹⁷⁴ United Nations Development Programme, "GEF, Projet d'Amenagement" at 3 quoted by Rich, *ibid* at 179

¹⁷⁵ *ibid*.

¹⁷⁶ *ibid*. at 180

¹⁷⁷ John G. Sidle, US Fish & Wildlife Services, Nebraska/Kansas Field Office, Grand Island, Nebraska, letter to Jean Claude Balcet, Environmental Department, World Bank, Washington DC, 12 May 1992, quoted by Rich, *ibid*.

¹⁷⁸ *ibid*.

mere act of ratification or accession. Ratification of conventions is more a political act than a policy statement. Moreover, in many jurisdictions, ratification of conventions must be followed by national legislation in order for the Convention to become national law.¹⁷⁹ This is largely dependent on political priority being accorded to the aspirations for sustainable development, which may not be uniform globally. This aspect may also impact negatively on realization of global sustainable development.

The Chapter has expounded the opportune role that Environmental Impact Assessment can play in the aspiration to sustainable development, particularly in light of the widespread acceptance of the concept as an environmental management and planning tool. However, the argument made is that EIA should be accepted and adopted for its environmental importance as a concept but not as a pre-designed process or merely as a prerequisite for development assistance in order for it to truly have real positive implications on global sustainable development.

¹⁷⁹ e.g. The requirements of the CBD became applicable in Uganda by virtue of the *National Environment Statute 1995* (Statute 4 of 1995) even though Uganda ratified the Convention in June 1992. Articles 79 and 123 of the *Ugandan Constitution*, read together, require an Act of Parliament to be passed before a ratified treaty can become applicable nationally.

CHAPTER THREE: SUSTAINABLE DEVELOPMENT THROUGH PUBLIC PARTICIPATION: A ROLE FOR HUMAN RIGHTS IN SUSTAINABLE DEVELOPMENT

It is beyond dispute that one of the major contributions of the EIA process to sustainable development is its requirements for and incorporation of public consultation and public participation. As one author stated, EIA is not EIA without consultation and public participation.¹⁸⁰

This chapter presents an examination of the role that public participation in the EIA process plays in the aspirations for sustainable development. The chapter will explore the conceptual role that human rights concepts play in environmental protection and sustainable development generally. It then advances an examination of the civil right of political participation, which, for the purpose of this study, creates a link between human rights and environmental management objectives, by guaranteeing the civil right of public participation in environmental management. Furthermore, the chapter will discuss the opportunity that EIA provides for public participation. It argues that EIA has positive implications for the realization of sustainable development because the EIA process provides for public participation in environmental decision making, thereby guaranteeing the civil right of participation in public affairs. The basis for this chapter lies in the conceptual definition and wider meaning of sustainable development adopted in this thesis, as an aspiration for the maximum welfare and satisfaction of all human needs of present and future generations. This aspiration implies the realization of human rights and freedoms as an essential component of sustainable development.

3.1 The Human Rights Approach to Environmental Protection.

Despite that protection of human rights and environmental protection are viewed and have previously been dealt with as separate fields of international law, the recognition of the linkages that exist between them is beginning, although the Rio Declaration's failure to give greater explicit emphasis to human rights is indicative of continuing uncertainty and debate about the proper place of human rights law in the development of international environmental law.¹⁸¹ The relationship between human rights and

¹⁸⁰ C. Wood "Consultation and Participation" in *Environmental Impact Assessments: A Comparative Review* (London: Longman Scientific and Technical, 1995) at 225

¹⁸¹ A. Boyle, "The Role of International Human Rights Law in the Protection of the Environment." In A. Boyle, ed. *Human Rights Approaches to Environmental Protection*. (Hereinafter Human Rights Approaches) (Oxford: Clarendon

environmental protection can on the general plain be described in two ways. Since degraded physical environments infringe directly on the human rights to health and life, activities causing environmental degradation may be viewed as being in violation of recognized fundamental human rights. Therefore, environmental protection may be a means to the end of fulfilling human rights standards¹⁸² Secondly, a society that guarantees the realization of so-called first and second generation rights would enjoy a socio-political order in which claims for environmental protection are more likely to be respected and prioritized.¹⁸³ The linkage between human rights and environmental conservation has also been illustrated by the observation that societal inequality is accentuated by environmental degradation, as only the rich will have the means to escape the effects of pollution and create a healthier way of life for themselves, and therefore that the quality of the environment has implications for equality between human beings which is a fundamental principle of human rights.¹⁸⁴

The relationship between the enjoyment of human rights and the quality of the environment is said to have first been pronounced at the Stockholm Conference in the *Stockholm Declaration on the Human Environment*¹⁸⁵ While the Stockholm Declaration did not proclaim the right to the environment per se, "it emphasized that the full enjoyment of human rights required the protection and improvement of the quality of the environment."¹⁸⁶ Basically, this relationship between human rights and environmental protection has been viewed to be manifestable in three ways:

- Substantive 'environmental rights'
- Procedural 'environmental rights'
- Conceptual 'environmental rights'

3.1.1 Substantive 'Environmental Rights'.

The first view of substantive rights is based on the precept that environmental protection is a

Press, 1996) 41 at 43

¹⁸²M. Anderson, "Human Rights Approaches to Environmental Protection An Overview" in *Human Rights Approaches supra* note 181 at pg. 3

¹⁸³*ibid*

¹⁸⁴Kiss A, *Droit International de l'Environnement*. (Paris: Pedone 1989) at 21

¹⁸⁵R. Desgagne "Integrating Environmental Values into the European Convention on Human Rights" (1995) 89 Am. J. Int'l L 263 (hereinafter Desgagné)

¹⁸⁶*ibid*. Principle 1 reads; "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well being and he (sic) bears a solemn responsibility to protect and improve the environment for present and future generations." Principle 1 *Stockholm Declaration on the Human Environment* (16 June, 1972) in *Report of the United Nations Conference on the Human Environment*, UN Doc.

prerequisite for the exercise of fundamental human rights to life, health, and an adequate standard of living. Another perspective to the same view regards environmental protection not as a prerequisite but as an integral part of their enjoyment.¹⁸⁷ However, the international conventions that provide for the right to life do not explicitly define what this right encompasses. The *Universal Declaration on Human Rights* provides that “everyone has the right to life, liberty and security of the person.”¹⁸⁸ Similarly, the *International Covenant on Civil and Political Rights* provides that “every human being has the inherent right to life” and that “no one shall be arbitrarily deprived of his life.”¹⁸⁹ The debate rages on as to what the “right to life” really means, that is whether it is realized in the “the mere fact of the existence of life as opposed to death”¹⁹⁰ or whether as Gros Espiel, among others, have argued that the existence of that right [to live] may be inferred from a general and systematic interpretation of all these instruments which guarantee the civil, political, economic, social and cultural rights of all human beings without discrimination of any kind.”¹⁹¹

A resolution of the complexities of the definition and meaning of the right to life is far beyond the scope of this thesis. However, suffice it to note that advocates for the interrelationship of human rights and environment argue their cases by examining environmental matters in the context of enforcing the right to life and have stated that the right to life includes the right to live in a healthy, pollution free environment and an environment in which ecological balance is protected by the state.¹⁹² Therefore, the quality of the environment is directly related to the full enjoyment of the right

A/CONF. 48/14/Rev-1, Sec.1 (1972) 11 I.L.M 1416 (1972)

187 D. Shelton, “Human Rights, Environmental Rights and the Right to the Environment.” (1991) 28 Stan J Int’l 103 at 115 (hereinafter Shelton)

188 Art.3 *Universal Declaration of Human Rights* UN Doc. A/810 (1948)

189 *International Covenant on Civil and Political Rights*, 19 December 1966, G.A. Res. 2200A, UN Doc A6316 (1966) (entered into force 23 March 1976) art (1)

190 D. Short, *A Human Rights Approach to International Environmental Protection*. (LL.M Thesis, McGill University, 1996) [unpublished] (hereinafter Short) at 21

191 Hector Gros Espiel “The Right to Life and the Right to Live” in D. Premont, ed, *Essais sur le concept de ‘Droit de vivre’ en memoire de Yngindra Khushalani*. (Bruxelles: Bruntlant 1988) quoted in Short *ibid*. A.A Cancado Trindade has also similarly opined that “taken in its wide and proper dimension, the fundamental right if life comprises the right of every human being not to be deprived of his life (right to life) and the right of every human being to have the appropriate means of subsistence and a decent standard of living (preservation of life, right of living)” see A.K Trindade “The Contribution of Human Rights Law to Environmental Protection With Special Reference to Global Environmental Change.” In E.B Weiss ed. *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: UN University Press 1992), at 272

192 Anderson. *supra* note 182 at 7

to life.¹⁹³ However, it may also be argued that a healthy, wholesome environment is a condition precedent to the enjoyment of all other human rights. For instance, the enjoyment of minimum standards of health require a wholesome unpolluted environment a guarantee of the human right to food also requires an environment in which food can be produced and made available. Therefore, while the basis for a right to a healthy environment may be attributed to the most fundamental human right that is the right to life, the enjoyment of other human rights, such as the right to food, shelter, an adequate standard of living, suitable working conditions and to culture and indigenous rights, are all dependent on or benefit from a wholesome environment, both natural and man made.

The other substantive rights that contribute to environmental protection are the perceived second generation rights to health, decent working conditions, cultural rights which contribute mainly through guaranteeing standards of human welfare and well being, for example, the right to education may help to raise environmental awareness and equip disadvantaged people with the skills required to combat ecological damage in political fora¹⁹⁴. The disadvantage with this genre of rights is that they are construed narrowly and are only interpreted for environmental reasons less directly than the civil and political rights, which provide guarantees to process and participation. The other disadvantage is that these rights tend to be interpreted as aspirational benchmarks that should be achieved over time, or their enjoyment perceived as an evolutionary process.

3.1.2 Procedural 'Environmental Rights'.

Environmental linkages with procedural or derivative rights human rights is based on Dicey's dictum that a practical procedure is worth a thousand pious announcements of principle and therefore, that for environmental rights to be truly effective, they must be procedural.¹⁹⁵ Arguments for procedural environmental rights derive from the interpretation that the right to environment is not the right to an ideal environment but a right to have the present environment conserved and improved, and that the implementation of this right cannot be left to governments alone but can only be ensured through procedural environmental rights like the notions of civic participation.¹⁹⁶ These procedural rights

¹⁹³ Desgagne, *supra* note 185 at 266

¹⁹⁴ Anderson, *supra* note 182 at 6

¹⁹⁵ *ibid* at 9

¹⁹⁶ Desgagne, *supra* note 185 at 285, quoting Kiss Alexandre "Le Droit a la Conservation de l'Environnement" (1990) 2 *Revue Universelle Des Droits de l'homme* (RUDH) 445, at 446 see also A. Boyle, "The Role of International Human Rights Law in the Protection of the Environment" in *Human Rights Approaches* *supra* note 181 at 60

manifest themselves in the right to receive and disseminate information concerning the environment, the right to participate in planning and decision making processes, including environmental impact assessments, the right to access to environmental justice, that is effective remedies and redress for environmental harm to administrative or judicial proceedings.¹⁹⁷

The *Rio Declaration on Environment and Development* endorses the notion of procedural environmental rights in its principle 10, which states;

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.¹⁹⁸

Important advantages of procedural environmental rights lie in their implications for democratic governance. In addition, procedural environmental rights avoid problems of anthropocentricity since they are not exercised solely for human benefit but also for the benefit of the environment and its non-human components.¹⁹⁹ Anthropocentricity is seen as a problem because it is viewed by some as going against the crux of what environmental protection is for, that is, it propagates the ideology that the environment and its natural resources exist only for human benefit. Those in favor of eco-centricity place the environment in the center of their ideology by recognizing the intrinsic or inherent value of the environment and the other species that form part of and interact with the environment. This ideology has led to the emergence of what I refer to in this thesis as 'conceptual environmental rights', that is, rights that the environment possesses, rather than the right of humans to a healthy environment.²⁰⁰ Arguments have also been made that procedural environmental rights are exercised for and in the interests of future generations in *Rural Litigation and Entitlement Kendra V's State of Uttar Pradesh* ²⁰¹and in *E.H.P V's Canada*²⁰² In the latter case, an individual filed a complaint against Canada

¹⁹⁷ Boyle *ibid* at 61

¹⁹⁸ *Rio Declaration on Environment and Development*. Similar provisions exist in Agenda 21 chapter 23 at Para. 23.2

¹⁹⁹ Arguments for substantive human rights meet resistance on the ground of anthropocentricity since they revolve around the human being.

²⁰⁰ Shelton, *supra* note 187 at 117

²⁰¹ (1987) A.I.R.S.C 359

²⁰² See United Nations, 2 *Selected Decisions of the Human Rights Committee Under the Optional Protocol* U.N. Doc. CCPR/C/OP/2 at 20 (1990)

on her own behalf as chairperson of the Port Hope Environmental Group and on behalf of present and future generations of Port Hope Ontario, alleging that dumping of nuclear wastes within the town, caused large scale pollution of residences and other buildings which pollution threatened the lives of present and future generations. Although the action was dismissed for failure to exhaust local remedies, the Human Rights Committee observed that the reference to future generations was included mainly as an expression of concern purporting to put into due perspective the importance of the matter raised in the communication regarding the effects of the pollution. Lastly, focusing on procedural rights helps shape domestic environmental policy through the giving or placing of adequate importance on the elaboration of those indicators of these procedural rights previously mentioned. 203

3.1.3 Conceptual 'Environmental Rights'.

While the previously described genre of rights revolve around human beings, and their prerogatives vis-à-vis their place in the environment, this class of environment rights is geared at the rights of the environment. The base line for this is that human beings are merely one element of a complex, global ecosystem that should be preserved for its own sake. Under this approach, human beings are subsumed under the primary objective of protecting nature as a whole.²⁰⁴ Proponents of this ecosystem based conceptual shift argue that an anthropocentric, utilitarian view of environmental law regards all non-human aspects of the ecosystem in terms of their economic value to humanity and that this is the cause of resource over exploitation and environmental deterioration.²⁰⁵ By focusing on the intrinsic value of the environment, arguably, it is possible to view these environmental rights as rights of 'exploited nature'.²⁰⁶

The debate however ensues on whether such a regime of rights is tenable. Merrills argues that

rights cannot exist as free floating abstractions, but need rights holders, for the functions of rights we have seen is to mark out protected areas for the benefit of some one or something and so the concept of a right without a rights holder is a contradiction in terms. The identity of the rights holder is clearly crucial to the content of the right in a given case.²⁰⁷

In this context, therefore, the issue becomes one of whether the environment as an ecosystem, an

203 see *supra* note 197

204 Shelton, *supra* note 187 at 104

205 see D. Enrenfeld, "The Conservation Dilemma" in *The Arrogance of Humanism* (1978) at 176-211, quoted by Redgewell, *infra* note 206 at 74; also L. H. Tribe, "Ways Not To Think About Plastic Trees: New Foundations for Environmental Law", (1974) 83 Yale L.J 1315.

206 C. Redgewell "A Critique of Anthropocentric Rights" in *Human Rights Approaches*, *supra* note 181 at 79

inanimate amorphous object or undefined concept, can have rights attaching to it which can be or should be protected. A possible solution to this issue could lie in the explanation that an explanation for the existence of a right does not depend on establishing on who the right belongs but that it is also necessary to establish who has an obligation by virtue of the right. In the context of the environment, legal obligations in relation to the environment are viewed as obligations *erga omnes* and therefore, owed by the state and the international community as a whole, while moral responsibility also extends to the individual, corporation and others whose activities can adversely affect the environment.²⁰⁸ Consequently, the concept of environmental rights becomes a redefinition or reformulation of the existing human rights and duties within the perspective of protecting the environment and not the individual.

The most far-reaching case of environmental rights is in the form of a substantive environmental right, which involves claims to a decent and healthy environment, that is, the promotion of a certain level of environmental standard or quality. However, this notion has suffered relative inacceptance because of perceived definitional problems particularly regarding the ambiguity of what constitutes a 'satisfactory', 'healthy', 'decent' or 'viable' environment. Boyle argues that "at best it may suffer from cultural relativism, particularly from a north-south perspective and lack the universal value normally thought to be inherent in human rights"²⁰⁹ These uncertainties notwithstanding, the right to a healthy environment per se, has been adopted in many national constitutions and international instruments in various forms

Human rights and environmental protection are fundamental concerns of modern international law and linkages are increasingly being recognized partly because they represent socio-political values with a core of common goals, that of ensuing a life of dignity and well-being for humanity. However, distinct differences remain between the two concepts, for instance, in enforcement and justiciability. Given its emphasis on the human being, a system for the protection of human rights is not the best forum to further objectives that go beyond individual interests, and yet environmental protection involves prerequisites which are more collective than individualistic. This position remains debatable, however, in the context of the recognition under international law of group or collective rights, such as those

²⁰⁷ J.G. Merrills "Environmental Protection and Human Rights: Conceptual Aspects" in *ibid* at 31

²⁰⁸ *ibid* at 34-35

enunciated under the African Charter on Human and Peoples' Rights.²¹⁰ Among the peoples' rights covered under the African Charter are the right to existence and the right to struggle against all forms of colonial domination,²¹¹ the collective rights to development,²¹² to peace and security,²¹³ and to a general and satisfactory environment²¹⁴. The African Charter is viewed as the first international instrument to lay down those rights in a legally binding fashion.²¹⁵ In addition, problems of *locus standi*, or standing still arise when it comes to determining who can pursue claims to the right to environment before competent judicial and/or administrative tribunals.

3.2 The Notion of Public Participation in Environmental Management.

Public participation or popular participation as it is also known is regarded to be central in the exercise of human rights. The human being, being the central subject of human rights and freedoms, naturally should be the principal beneficiary of and should participate actively in the realization of the rights and freedoms. Public participation is defined as the principal means by which individuals and peoples collectively determine their needs and priorities, and ensure the protection and advancement of their rights and interests²¹⁶ or separately as "purposeful activities in which citizens take part in relation to government."²¹⁷ Public participation has become a topical issue in the international environmental law and policy arena. This is due in large part to the influence of the Brundtland Commission Report that linked public participation to the realization of sustainable development.²¹⁸ Following on this, participants at UNCED acknowledged this linkage and endorsed the notion of public participation in environmental management enacting it as Principle 10 of the *Rio Declaration on Environment and Development*.²¹⁹ Public participation in environmental decision-making is a form of and a wider

209 A. Boyle *supra* note 181 at pg. 50

210 OAU Doc. CAB/LEG/67/3/Rev. 5 (1981) reprinted in (1982) 21 I.L.M 59

211 *ibid.*, article 20

212 *ibid.*, article 22

213 *ibid.*, article 23

214 *ibid.*, article 24

215 J. Oloka Onyango, "Human Rights and Sustainable Development in Contemporary Africa: A new dawn or Retreating Horizons?" (2000) Buffalo Human Rights Law Review, 39 at 57

216 *Global Consultation on the Right to Development* E/CN.4/1990/4 Rev. 1 of Sept 26 1990 quoted by C. Taylor, in "The Right to Participate in Development Projects" in K. Ginther, E. Denters & P. de Waart, eds. *Sustainable Development and Good Governance*, *supra* note 81 at 205

217 N.P. Spryke, "Public Participation in Environmental Decision Making at the New Millennium: Structuring New Spheres of Public influence" (1999) 26 B.C Env'tl. Aff. L. Rev 263 at 266

218 J. Ebbesson, "The Notion of Public Participation in International Environmental Law" (1997) 8 YbIEL 51 at 52

219 see *supra* note 198 for full text.

definition of the civil right to political participation.²²⁰ This section will explore the status and facets of the civil right to participation in environmental decision making and to analyze the requisites and intricacies of effective participation.

3.2.1 Right to Participate.

The right to participate calls into question and works against the natural law principle that only those people whose rights or property are significantly affected, that is, affected to a greater degree than those of the general public, are entitled to protection by virtue of natural justice. This principle has been previously construed as a bar to 'intrusion' and participation by other people in such matters.²²¹ Public participation is also premised on an understanding that a social contract must be drawn up on the basis of the interests for whom the contract is responsible. Therefore, government agencies and administrations, in meeting their end of the contract, must establish mechanisms to ensure that the interests of their citizens are "informed, heard and heeded"²²²

The right to political participation²²³ is provided for in leading human rights instruments. *The Universal Declaration of Human Rights* provides that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives."²²⁴ Similarly, the *International Covenant on Civil and Political Rights*²²⁵ proclaims that "[e]very citizen shall have the right and opportunity...without unreasonable restriction, to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote in and be elected at genuine periodic elections..."²²⁶ The more widely accepted element of the right to participate is the right to vote and be voted in elections. While it is essential, it is by no means exhaustive of the right to participate. In the context of civil and political rights, the right to participate encourages the involvement of the citizen in the formation and conduct of political or public affairs at all levels. This contemplates the use of additional means, other than periodic elections, of influencing public policy. This might include participation in fora such as local school boards, town meetings, or advocacy groups. A broader definition of public affairs might include

²²⁰ Ebbesson, *supra* note 218 at 70.

²²¹ R. Parenteau, *Public Participation in Environmental Decision Making* (Ottawa: FEARO 1988) at 2

²²² *ibid*

²²³ Used synonymously with the right to popular participation and the right to participate.

²²⁴ Article 21 *Universal Declaration of Human Rights*, *supra* note 188

²²⁵ see *supra* note 189

²²⁶ *ibid.*, Article 25

participation in labor unions, political parties or other institutions wielding influence over policy.²²⁷ Effective political participation also requires and enforces the freedoms of speech, expression, assembly, and a free press because it involves the holding and imparting of opinions, ideas and information.²²⁸ Within the economic and social and cultural rights sphere, participation encourages the citizenry to have a voice in activities affecting their livelihood and communities, enabling them to protect their interests and promote their own well-being.²²⁹ General goals of the right to participate include positive changes in government policy and in citizen attitudes towards government, which ultimately reflects on improved government and strengthening of local communities, by fostering a sense of empowerment. This interpretation of the right to political participation supports, or is the basis for the notion of public participation in environmental decision-making.

3.2.2 Public Participation in Environmental Affairs.

Public participation mandates in areas concerning the environment have become so prevalent, almost to the level of being a “buzz word”. Participants at UNCED seem to have immortalized this concept when they enshrined it in the Rio Declaration and Agenda 21 that similarly proclaim that environmental issues are best handled with the participation of all concerned citizens at the relevant level. Following in this vein on the regional plain, the Arab Ministerial Conference on Environment and Development issued an Arab Declaration on Environment and Development and Future Perspectives²³⁰ (the Arab Declaration”) which affirmed the right of individuals and non-governmental organizations to acquire information about environmental issues to have access to data and to participate in the formulation and implementation of decisions that may affect the environment.²³¹ An elucidation of the Arab declaration reveals that due attention ought to be given to popular participation by associating individuals, local organizations, and NGOs and the involvement of Arab Women in environmental protection in order to ensure sound environmental education for future generations.²³² Although these ‘soft law’ instruments do not purport to create enforceable obligations, they are evidence of some international consensus on this issue and also provide valuable insight into the elements or

²²⁷ Fox, “The Right to Political Participation in International Law. (1985) 17 Yale J. Int’l Law 539 at 555

²²⁸ Article 19 Universal Declaration of Human Rights, *supra* note 228

²²⁹ C. Taylor, *supra* note 216 at 206

²³⁰ Letter of the Conference on Environment and Development 46th Sess. U.N Doc. A/46/632 (1991)

²³¹ Popovic, “The Right to Participate in Decisions that Affect the Environment”(hereinafter Popovic) (1993)10 Pace Env’tl L Rev. 683 at 689 quoting the Arab Declaration. *ibid.* Agenda item 34 paras. 77(e)-(h), 78 and 79.

²³² *Ibid* at 690

requirements of how the right to public participation in environmental affairs can be made operative. In addition, the International Labor Convention 169²³³ adopted by the General Conference of the International Labor Organization is one of the only international instruments in force that deals explicitly with the rights to indigenous people to natural resources pertaining to their lands. The convention encompasses two principles; respect for the culture, way of life and traditional institutions of indigenous and tribal peoples, and effective involvement of these peoples in decisions that affect them. Thus it has been said, that at the moment, it provides one of the few positive legal bases for defending indigenous land and resource rights.²³⁴

3.2.3 Requirements for Effective Public Participation in Environmental Affairs.

Recognition of a right to participate does not in itself ensure effective participation. On the contrary it begs the question of what effective participation means and what it requires.²³⁵

3.2.3.1 Access to Information

The phrase "knowledge is power" amply expresses the importance of information as a prerequisite for any form of participation. In fact without information there will be no reason or basis to participate. Therefore, a major requirement for popular participation in environmental affairs is the provision of adequate, 'user-friendly', comprehensible, relevant accurate affordable timely and accessible environmental information. This requirement becomes even more relevant when it is the government or a related public institution that must provide the information or access to the information. Often times, though, governments or other public authorities might put up disclaimers on their obligation to provide the required information on grounds of sensitivity or national security. While this may, more often than not just be, to borrow a synonym from world trade lingua, "non-tariff barriers" to access to information, where such claims are genuine, the government should be given a margin of appreciation to protect certain national interests, or perhaps to protect recognised intellectual property.²³⁶ This should however not be done with the intention to frustrate public participation.

A number of international instruments have provisions that treat the right to obtain information about the environment as an important component of public participation.. One such example is the

²³³ ILO Gen Conf. 75th Sess. Rep VI(I), June 27, 1989, entered into force September 5, 1991

²³⁴ L. Sargent, "The Indigenous Peoples of Bolivia's Amazons Basin Region and ILO Convention 169: Real Rights or Rhetoric?" (1998) 29 U. Miami Inter-Am. L. Rev. 451 at 457.

²³⁵ Popovic, *supra* note 231 at 691

UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*.²³⁷ It provides that member states under take to keep the public broadly informed of dangers threatening the natural heritage..."²³⁸It also addresses both the passive and active obligations of the government to respond to requests for information and to place information into the stream of public participation.²³⁹ The advent of the electronic information age certainly facilitates quick and timely accessibility to information but it is dependent on 'computer literacy', access to computers and the World Wide Web. It thus remains out of reach of the majority who do not own computers or have access to the Internet.

3.2.3.2 Environmental Education and Sensitization

Widely publicized and available environmental information is useless to an ignorant public. In this context, therefore, environmental education is a pillar in effective public participation in environmental decision-making. Environmental education, first and foremost, furnishes the public with knowledge about the environment's importance and the need to preserve it from degradation. Secondly, it equips the public with the interest and sometimes, the skills to analyze explanations, proposals and possible alternatives presented to it regarding particular environmental scenario. The question then becomes what form should environmental information take? The most obvious answer would be the incorporation of environmental related subjects in the formal school curricula. However, this form alone would alienate the public that is not enrolled in school, which, particularly in developing countries, form the larger part of the public. Therefore, education at a more general level is required. This is perhaps best done through the popular media. Media presentation of environmental news and information can reach a broad audience and can also provide continuing environmental education for persons outside the formal school system. In order to be fully effective, this presentation must be done in languages that will be understood by its intended audience. Environmental education therefore includes formal school curricula, media coverage of environmentally significant events, and when tied with the obligation to provide information, the official dissemination of relevant adequate and comprehensible information. Effective environmental information allows the public the opportunity to participate in the environmental decision making process by teaching them the 'whys and wherefores' of environmental participation. The role of NGOs, both national and international, is considered

²³⁶ The Aarhus Convention on Access to Information provides for this exception to government obligations,

²³⁷ *United Nations Educational, Scientific and Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage*, Nov 16, 1972, 11 I.L.M 1358

²³⁸ *ibid* article 27

²³⁹ Popovic *supra* note 231 at 695

crucial in the provision of education or support for environmental education because of their perceived proximity to the public and also because of their perceived "vital role in the shaping and implementation of participatory democracy".²⁴⁰

3.2.3.3 Voice and Access to Justice and Effective Remedies.

Educated and equipped with information, the public requires a forum in which or before which it can express its concerns, "a place to make something happen, to step into the decision making process, or in some ways to get a decision making process started,"²⁴¹ The civil rights and freedoms of speech and expression epitomize the heart of the public voice. With these foundational rights, the public can speak out and collectively organize to influence environmental decisions. Public voice may also take the form of litigation particularly class actions and public interest litigation. Typically these involve cases brought by or on behalf of groups of people or else the whole of society, against the government or a powerful interest. Public interest litigation is an important feature of access to environmental justice whether in the form of class actions or by giving *locus standi* or rights of intervention to interested members of the public in whatever form they may be, that is whether as individuals, private corporations, or NGOs, without necessarily having to prove a relationship with the environmental crisis. For instance, in India, procedural innovations under the banner of public interest litigation included (i) the liberalization of the rules of standing to permit either representatives or public interest actions by third parties, (ii) the conversion of letters and telegrams from citizens into writ petitions (iii) judges acting on their initiative and without being petitioned to enforce rights and (iv) in order to monitor enforcement, courts retained jurisdiction over cases long after orders had been given.²⁴² The credibility of the public voice however, is dependent on an interested, capable and flexible judicial system that will provide fora to entertain public expression and that will guarantee the rights of expression.

The notion of public participation in environmental matters brings to the fore the question of who the public is and when is there deemed to be public participation. This question becomes particularly relevant in the context of developing countries in which poverty is one of the greatest impediments to sustainable development. The stereotypical position commonly advanced is that when people are caught up in the daily efforts of survival, they have neither the time nor the inclination to be bothered

²⁴⁰ Agenda 21, para. 27.1, chap 27

²⁴¹ Popovic, *supra* note 231 at 698

²⁴² For a fuller discussion on public interest litigation in India, see M. R. Anderson, "Environment Protection

by environmental issues. Therefore, they are less likely to be involved in any activities or organizations against environmental destruction. Further that, illiteracy in these countries is a major hindrance to public participation, and many environmental threats, often being of a technical nature, for instance, excesses of chemical contaminants above a prescribed standard, or the dangers of electro-magnetic fields caused by electrical pylon lines passing through inhabited neighborhoods, illiterate people are not able or cannot be bothered to comprehend the implications of these dangers to their health. They may not even know of the existence of any prescribed standards. It is therefore difficult for them to become involved in environmental decision-making processes, or even conceptualize the need for the process. This position creates the perfect setting for the entry of NGOs into the picture. Many environmental NGOs have been created to take up the interest and views of grassroots communities, which because of such reasons as those mentioned above, "cannot" get involved. Infact, one author has stated, in the context of Africa, and International NGOs (INGOs) that "one can even say that they are not just part of the landscape anymore, they are the landscape itself.... So pervasive is their presence that there is virtually not a single district in most parts of Africa that does not have some sort of contact with them."²⁴³ On the other hand, Burhenne has stated that as a result of UNCED, NGOS are beginning to achieve a higher profile as an indispensable source of expertise and support and that the need to involve NGOs in relevant decision making processes is now well accepted.²⁴⁴ Does this replacement of the public for NGOs amount to effective public participation? I think not in all cases would the answer to this question be in the affirmative. However, an understanding of the nature of most of these NGOs, particularly INGOs, is crucial. Many of them are controlled, financed and mainly staffed by Europeans and North Americans. The wealth and direct or indirect backing they receive from their governments and citizens puts them way above the local government or community groups, even local NGOs in their host countries.²⁴⁵ They in turn financially and technically support the local NGOs often providing 'expert' advice. Consequently, when these bodies are called upon to present their views, it is not surprising that they will push for the policies of their governments. Similarly, the local NGOs are more inclined to advance ideas or alternatives that toe the line of their benefactors rather than those of the communities they 'represent'.

in India" in *Human Rights Approaches* *supra* note 182 at 210-211

²⁴³ T. Abdul-Raheem, "Impact of Angels" *New Internationalist* 8: 326 5 August 2000 20 at 21

²⁴⁴ Wolfgang Burhenne, "The Role of NGOs" in W. Lang, ed. *Sustainable Development and International Law* at 207-208

In addition, NGOs, being not for profit organizations, cannot in many jurisdictions incorporate as corporate entities. As such they are not bound by corporate law principles of accountability both financial and directorial. They are only bound by the NGO constitution and not by shareholder resolutions. Consequently, the views they present are mostly 'top-down' positions, often not subject to scrutiny or approval from the communities whose views they purport to be. In fact one writer observed in this regard that the fact that NGO leaders are not elected by the members of the organization leads to the belief that NGO leaders enjoy virtual potentate status and that members are unlikely to investigate policy matters with any great depth or skepticism. The resulting structure gives the leadership nearly uncontested discretion as to what concerns the NGO will pursue and in what capacity.²⁴⁶ Therefore, if the NGO leadership adopts a policy that is not representative of community interests, it is not likely that this policy will be contested and changed in the community's interests. This is one weakness that might work against effective community participation through representation by NGOs.

Moreover, the working methods of most northern NGOs, adapted from donor agencies, are inflexible in their implementation processes which works against some of the inherent aspects of real community participation. For instance, to quote one author on NGOs, any NGO receiving more than \$25000 from USAID must comply with auditing requirements so complex that a 70 page explanatory booklet is needed to understand them.²⁴⁷ Consequently, their activities and programs will likely be designed to comply with the auditing requirements and not necessarily to incorporate real community participation. "...real life does not unfold according to the dictates of a logical framework analysis and participation does not come out of a jar."²⁴⁸ Also because current development rhetoric says it is important, NGOs strive to promote that thing called participation. While participatory techniques are important in empowering the public in environmental decision making, in the context of legitimizing NGO efforts, there is a danger that participation will remain illusory, mere techniques, an input rather than a result, a

245 T. Abdul-Raheem, *supra* note 243

246 S. Al-Jurja, "Participatory Development and NGOs: A Look at the World Bank" (1999) 9 *Transnat'l L & Comtemp. Problems* 175 at 183

247 I. Smillie, *The Alms Bazaar Altruism Under Fire - Non Profit Organizations and International Development* (Ottawa: International Development and Research Center, 1995) at 225

248 *ibid.*

methodology rather than the institutionalized involvement that contributes to long-term sustainability.²⁴⁹

However, it would be totally unfair not to acknowledge that the legitimacy of the NGO movement, both northern and southern, derives from the fact that they are community based and work directly with the communities, often in rural areas. Many too have based their interventions on participation and on respect for the local traditions and technologies.²⁵⁰ For instance, as Smillie, acknowledged,

the Agakhan Rural support Programmes in Pakistan starts with a series of dialogues between organizers and villagers. Meetings are held outdoors so that the entire village can hear and comment on what is being said. While the Sarvodaya became one of the largest NGOs in Asia, basing its self help *shramdama* philosophy on traditional Sri-Lankan and Buddhist concepts of social development, strengthening the village as a social entity and building on prevailing cultural patterns and value systems rather than imported models.²⁵¹

Examples such as these demonstrate that NGOs are the better devil that we know when it comes to representing the public in environmental decision making, than any other angel we may hear about.

In addition to issues of who comprises the public, determining the relevant level of public participation also raises important concerns. Wabunoha argues that public participation in resource management should be at the lowest level possible but concedes however, that participation requires that all those concerned be involved.²⁵² In this context therefore, which is the most effective level of participation?

Does involving the lowest level possible require consultations with local chiefs and opinion leaders of indigenous communities or their elected representatives in parliament or higher offices? How are other pertinent views, perhaps held by experts, academics, or government departments, which may not necessarily be identical or compatible to those of the communities to be incorporated? These questions underscore the difficulty of determining which level comprises the 'public' for the participation to be effective and meaningful. Therefore in order to be result oriented, public participation should encompass that section of the public that are more likely to provide meaningful productive involvement and not necessarily all the members of the public.

²⁴⁹ *ibid.*

²⁵⁰ I Smillie, *supra* note 247 at 223

²⁵¹ *ibid.*

²⁵² R. Wabunoha, "Popular Participation: A Pre Condition for Sustainable Development Planning. The Experiences in Uganda." in *Sustainable Development and Good Governance supra* note 81 at 233

Public Participation in environmental matters is crucial in the realization of democratic principles, and good governance objectives. By granting the public a say in the stewardship of their environment. Public participation can take various forms. In its broadest form, it may include education, information dissemination, which occurs when the proponent provides information to stakeholders²⁵³, dialogue, also known as consultation, which involves information exchange between the proponent and stakeholders and reaction, perhaps through legal/administration action. Whatever form it takes, however, public participation echoes democratic values and good governance objectives. Because power is derived from the people, it is only proper that citizens have the right to influence governmental decision making and further that the government or similar authorities should account to the people. Exercise of the right to participate exposes decision makers to a wide and healthy variety of perspectives, including perhaps those not previously perceived, which significantly improves the decision making process. Even though ultimately, one viewpoint will prevail, the democratic process of incorporating all views fosters inclusiveness and ownership of the final decision.²⁵⁴

3.3 Environmental Impact Assessments and Public Participation.

The clearest example of the public right to participate in decision-making is expressed in an agreement that grants the public rights to participate in project development through environmental impact assessment procedures. Recall that an Environmental Impact Assessment describes a process that produces a statement to be used in guiding decision making. Since the general public is the ultimate recipient of the economic benefits and environmental damage arising out of development projects, it is only proper or fair that the public should be involved in every EIA process as part of the decision making process of project development. Sheate argues that

by involving the public, as early as possible, issues may be identified which experts had not considered important but which could prove to have a degree of importance out of all proportion to the magnitude of the impact.²⁵⁵

²⁵³ 'Stakeholders' is a term widely used in EIA to refer to local people and communities likely to be affected by the project, the project beneficiaries whether local or not, national and local governments agencies with the responsibility for the management of natural resources and/or responsible for the welfare of the communities likely to be affected by the project and the interested public. This may include NGOs, experts, academics and politicians.

²⁵⁴ N.P.Spyke *supra* note 217 at 269

²⁵⁵ W. Sheate, "Public Participation: The Key to Effective Environmental Assessment" (1991) *Environmental Policy and Law* 21 at 156-160

Public participation in environmental impact assessment procedures is therefore a mechanism partly intended to assure the full participation of the public and other potential affected persons in decision making related to the projects likely to affect them and their environment.²⁵⁶

Once again in the context of EIA, who comprises the 'public' becomes an issue to be resolved to determine participation. The public may be the people affected by the development or it may be other groups such as pressure groups, members of NGOs, public committees or the media. Ideally though, the public should comprise the 'locals' who are in closest proximity to the project, as part of the ecosystem at stake. ²⁵⁷ Although the specific nature of public participation in the environmental impact assessment process can vary, it usually take the form of access to information gathered during the assessment process, contribution of information to the assessment process, and a right to challenge decisions made during the assessment process²⁵⁸ through litigation.²⁵⁹

While it is desirable that the public participate fully in the EIA process to impact positively the decision making process, it is not unusual for such participation to be used to serve other interests. The EIA process may be used to frustrate or delay development projects; for instance, the construction of an airport in Tokyo was delayed by about five years by protestors in the early 1970s,²⁶⁰ or to promote profitable private ventures; for instance in Uganda, one of the loudest critics of the Bujagali hydro power project by AES Nile Power are Adrift Uganda "one of the largest of the white water rafting companies operating ion the affected stretch of the Nile".²⁶¹ Using the national media, Adrift incited public debate over the dam. They argued that if equitable and sustainable development was the goal behind hydropower development on the Nile, these aims would be better reached through switching the investment to Karuma falls (further downstream the River Nile) rather than building a third dam in Jinja (close to the Source). They argued that this switch would allow white water rafting at Bujagali falls to contribute its worth to tourism in Uganda. This position is made against the background that white

²⁵⁶ P. Sands and J. Werksman, "Procedural Aspects of International Law in the Field of Sustainable Development. Citizen's Rights *Sustainable Development and Good Governance supra* note 81 at 188

²⁵⁷ Women usually make up a considerable proportion of the public affected by development projects and it is crucial that they are be involved for their perspective. The Arab Declaration recognizes this cruciality and provides for the participation of women groups in environmental decision-making. See *supra* note 230

²⁵⁸ P. Modak & A. Biswas *Conducting EIA For Developing Countries* (New York: UNU Press 1999) at 167

²⁵⁹ N. P. Spyke *supra* note 217 at 267

²⁶⁰ C. J. Barrow, *supra* note 90 at 75

²⁶¹ S. Frankland, "Empty Promises Bought Bujagali Dam Support" *The Monitor* 4 October, 2000 at

water rafting on the Victoria Nile is a top foreign exchange earner for the country in the tourism sector.

Obviously, therefore while Adrift Uganda were seemingly concerned about the prospects for equitable and sustainable development in Uganda, they were likely more concerned about protecting their profitable white water rafting investment on Bujagali falls which is threatened by the Hydro power project.

Similarly, too a mere semblance of public involvement may be arranged to fulfill EIA requirements for public participation and yet in effect, the reality or quality of the participation will be minimal. This may happen when decisions have already been made by the developers and the public is used to rubber-stamp these decisions to legitimize them, or when misleading information is given to the public to win their support for the project. To quote a commentator on the process surrounding the AES Nile Power Bujagali hydropower project,

Rather than following correct procedures, AES went directly from government negotiating rooms to the villages in the affected areas. They did this without first approaching the local political and cultural leaders of the districts directly affected by the dams construction AES therefore created a situation where there was little awareness of any negative factor associated with the dam. Rather than being better informed, the people appeared misinformed. They were promised through the dam project, 'free power, new schools and health clinics and jobs for the young.' This blanket of misinformation covered the local population.²⁶²

Moreover, public participation in the EIA process may be viewed by both the developers and the public as an adversarial process or as an exercise in confrontation in which both sides view each other as adversaries rather than as partners,²⁶³ particularly since an informed and educated public could resort to litigation or effective protest.²⁶⁴ As mentioned earlier, sometimes public participation involves expert opinion. While this is common and required in EIA, it can be divorced from real life experiences and this significantly affects the legitimacy and acceptability of decisions based on unrealistic opinions. Public participation may also slow down the EIA process and consequently significantly increase the cost of the project public involvement in the EIA process itself causes impacts the biggest one being speculation, for example awareness of an impending development project might encourage land speculation and opportunistic squatter settlement.²⁶⁵ Recently the Uganda Minister in charge of Works, Transport and Communications announced that the proposed bypass route

www.monitor.co.ug/commentary (date accessed: October 4, 2000)

²⁶² *ibid.*

²⁶³ N. Spyke, *supra* note 217 at 292; P. Modak & A. Biswas, *supra* note 79 at 168

²⁶⁴ C. J. Barrow, *supra* 90 at 75

connecting the city to the northern highway would be relocated to an undisclosed route because the public had settled along the previously marked route in order to join the ranks of those to be compensated, which costs of compensation would be too high.²⁶⁶

These difficulties serve to show that the reality of public participation is not always consistent with its intended purpose. The problems do not however outweigh the benefits that are to be garnered in an EIA process that adequately and effectively involves the public.

Since the environmental process is intended to generate quality information, about potential environmental impacts of a given project, involvement of the public in the process improves the quality of the information needed by the project proponent and decision makers. Public participation deserves attention because the degree of participation affects the quality of the environmental impact assessment process, which in turn, affects the quality of the decision making about a project. Broader participation creates more information and alternatives to be presented to decision makers.²⁶⁷

Public participation is important in the EIA process because increased participation can result in meeting peoples' needs, better public access to information and better development decisions. Most importantly, participation leads to the credibility of the entire EIA process because it would have incorporated local and unsophisticated values rather than rely on only the technical evidence.²⁶⁸

Perhaps the weightiest argument in support of public participation is that an involved public is more inclined to support a development project. Without effective public involvement and participation, in the EIA process, development projects stand the risk of being alienated by the public for whom they are intended, thus hindering or frustrating their implementation. The Kampong Improvement Program implemented in Indonesia in the 1970s demonstrates this. A consultant who was required to examine the role of public participation in the project was quoted thus.

²⁶⁵ *ibid*

²⁶⁶ see *The New Vision*, 26 October 2000 at www.newvision.co.ug. (date accessed: October 26, 2000)

²⁶⁷ W. Tillemen, "Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessments in Canada, the United States and The European Community." (1995) 33 *Colum J Transnat'l L* 337

²⁶⁸ Tillemen, *supra* note 267 at 343

The Kampong Improvement Program has almost a top-down operation (...) neither the residents nor their elected neighbourhood representatives have had any appreciable say (...). No input from below was obtained in the planning stages, (...) since the people were never involved or consulted from the start they see the project as an imposed package and take a passive stance in terms of preserving its components.²⁶⁹

The advantage for the developer is that participation contributes towards legitimization of the decisions, or the determination of viable alternatives. From the good governance perspective, public participation may make planners and decision makers more accountable in that they must explain their options or actions to the public, while the public feel empowered through their involvement. But perhaps the base line is in the implications for sustainable development. The quest for sustainable development is less likely to fail where the public are kept informed, are involved and consequently support all efforts at its attainment. In this context, EIA has a lot to offer in the search for sustainable development.²⁷⁰

On the basis of all the above, I argue that the EIA process has good implications for the realisation of sustainable development because of its requirement for public participation. If properly implemented, public participation in the EIA process guarantees, firstly, the exercise of human right of political participation in civil and public affairs. This human rights perspective fits fairly and squarely within my definition of sustainable development, which incorporates the full realisation of human rights and freedoms. Secondly, public participation in the EIA process contributes to sustainable development through good governance in that the public is given a voice with which they can make their interests known either through consultation or litigation. The arbitrariness of government decision-making is eliminated by transparency and accountability in the process. Thirdly, in virtue of the fact that the public are incorporated in the process of development, they own the process and they will likely identify with the process of development and will guard it jealously in trust for themselves and for posterity. Lastly, since EIA is one of the best ways of integrating environment and development objectives, this will reflect on the ability of future generations to enjoy the benefits of development processes initiated by present generations in an environment which is reliably wholesome, which is the punch line of sustainable development as defined by the Brundtland Commission.

²⁶⁹ R. Ayes, *Banking On The Poor*, (MIT Press 1983) at 189, quoted by C. Taylor *supra* note 216 at 207

²⁷⁰ Barrow, *supra* note 90 at 77

Effective impact assessment requires broad definition of the meanings of impact and environment. To avoid unrealistic results from impact assessments, a common all embracing definition of what comprises the environment must be agreed upon by all. What the developers regard as the environment for the purpose of their project may not necessarily be all inclusive of what the locals agree is the environment. Therefore, involving the public ensures that consideration of all types of impact, direct and indirect, environmental and socio-cultural –economic is taken into account. Environmental impact is better understood when many and wider sources are consulted. When proponents consult with scientists, experts, from industry, labour, conservation organizations, educational institutions, government and community representatives, based on this consultation, they are likely to come to informed conclusions about the environmental impacts and the acceptability or otherwise of their projects.

3.4 International Provisions for Public Participation in EIA

3.4.1 Espoo Convention on Environmental Assessment in a Trans-boundary Context

The ESPOO Convention was agreed in Espoo, Finland on 25th February 1991, under the aegis of the United Nations Economic Commission for Europe (ECE) whose members include the European countries, Canada and the United States of America. Its aim is to enhance international cooperation in assessing environmental impact, in particular in a trans-boundary context. It is so far the only international convention on EIA, although it is not yet in force. Parties are required to take the necessary legal, administrative or other measures, *inter alia*, to establish an EIA procedure that permits public participation in areas likely to be affected and in preparation of the stipulated environmental assessment document. The Convention lists in Appendices activities likely to cause significant adverse trans-boundary impact that should be subjected to EIA, and the documentation that should be prepared.

The Convention requires that parties shall endeavour to apply the principles of EIA to policies, plans and programmes and that the opportunity to participate should be granted to the public in other states since it governs EIA in a transboundary context. However it prescribes neither the form nor the intensity of the requisite public participation and seemingly leaves this to the discretion of the individual contracting parties. This flexibility has been criticised on the grounds that it can be used to limit public

access to important governmental bodies that make environmental decisions and the information they hold. However it has been opined that considering the underlying objective of the Espoo Convention, that is to provide an adequate basis for the serious participation of the public, whether as individuals or NGOs, implies more than merely a provision for individuals to send comments to the licensing authority regarding a planned installation or project.²⁷¹

The Convention protects the right of parties to implement national laws, regulations and administrative provisions or accepted legal practices protecting information, the supply of which would be prejudicial to industrial and commercial secrecy or national security. It also preserves the right of Parties to implement more stringent measures than those it imposes.

3.4.2. The Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters.

The objective of the convention is to contribute to the right of every person of this and future generations to live in an environment adequate to his or her well being and in this context it is regarded as being the first binding international instrument attempting to address comprehensively and exclusively the issue of such a human right.²⁷² The core of the convention covers three main issues; access to, and dissemination of environmental information, public participation in environmental decision-making and access to environmental justice. The convention regulates the issue of access to information by differentiating between passive²⁷³ and active disclosure of information. ²⁷⁴ The definition of environmental information is very broad in the convention ²⁷⁵ The convention applies

²⁷¹ J. Ebbesson, *supra* note 28 at 189

²⁷² J. Jendroska, "UNECE Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe." (1998) 13 No. 6 NAAG Nat'l Envtl. Enforcement J. 32

²⁷³ Article 4

²⁷⁴ Article 5

²⁷⁵ According to the definition article 2, environmental information covers any information in written, visual, aural, electronic or any other material form on:

- a) the state of the elements of the environment such as air atmosphere, water, soil, land, landscape and natural sites biological diversity and its components, including genetically modified organisms and the interaction among these elements.
- b) Factors such as substances energy, noise radiation, and activities or measures including policy and legislation, likely to affect the elements of the environment in (a) and the cost-benefit and economic analyses and assumptions used in environmental decision making
- c) The state of human health and safety, cultural sites and built structures, in as much as they may be

equally to natural and legal persons with public responsibilities for the environment and makes allowances for the denial of access to information in cases of protection of international relations, national defence or public security, confidentiality of commercial and industrial information²⁷⁶ However, it provides that denial of access shall be interpreted strictly taking into account the public interest served by the disclosure and whether the information relates to emissions into the environment.

The convention addresses the issue of public participation by establishing an elaborate set of procedural rules to be followed by authorities while making decisions to authorize certain activities. However as far as public participation in policy and lawmaking is concerned, the provisions of the convention are rather limited leaving it to the parties to determine the scope of the public to be consulted.

The scope of access to environmental justice addresses basically the right of legal redress and the right to file genuinely public interest litigation in relation to access to information and the public participation in environmental matters provisions. Provisions guarantee that members of the public should have access to administrative or judicial procedures to challenge acts and/or omissions by private persons and public authorities, which contravene national environmental law.²⁷⁷ The convention also requires parties to establish mechanisms to remove financial and other barriers to access to justice.²⁷⁸

Some have regarded this flexibility as an avenue for governments to restrict access to information it holds which may be crucial in decision-making. However, even among the developed world, concerns about the convention's weight remain due to the non-participation of Canada and the United States.²⁷⁹

Whereas public participation is considered to be one of the least developed means for pollution control in the international context,²⁸⁰ the introduction of a plethora of legal provisions ensuring public participation, nationally or internationally will serve little purpose as long as neither the public nor

affected by the state of the elements of the environment, or through these elements by the factors, activities or measures referred to in (b).

²⁷⁶ Article 4(3) provides the comprehensive listing of the circumstance under which access to information may be denied.

²⁷⁷ Article 9(3)

²⁷⁸ Article 9(5)

²⁷⁹ *ibid*

public officials see the need for it.²⁸¹ Most efforts to raise awareness of the potential benefits of public participation are directed towards the public or in their stead, NGOs. However, the vast majority of public officials charged with environmental protection need to appreciate the importance of making room for public input in the decision making process.

In this chapter, I have established that human rights principles contribute to the realization of sustainable development when employed in environmental protection generally, and in EIA particularly.

This is through the civil right of public participation in environmental decision-making which is guaranteed by an effective EIA process. I discussed the relationship between human rights concepts and environmental protection and made the connection by expounding the modalities intricacies and benefits of public participation in environmental decision-making and EIA particularly. I also briefly mentioned the international legal regime for public participation in EIA, which unfortunately leaves the developing nations of the world out of the scope of application. The point made in this chapter is to explain that in addition to its integration principles, the public participation pillar of EIA contributes to sustainable development that is by guaranteeing human rights and good governance objectives.

²⁸⁰ J. Ebbesson, *supra* note 28

²⁸¹ J. Caddy, "Public Participation in Environmental Decision Making in Central Europe" *Newsletter of the Working Group on Environmental Studies*, Issue 16, Fall 1996 at 2

PART TWO: ENVIRONMENTAL IMPACT ASSESSMENT IN DEVELOPING COUNTRIES

The overall message of the first part of this thesis has been to identify the meaning and workability of the concept of sustainable development as seen through the environmental impact assessment lens. Part II will take this examination a little further by putting particular focus on the meaning of the concept for the southern developing countries of the world, especially in light of the now abandoned struggle for equity in a New International Economic Order. The issue to be discussed is whether the concept of sustainable development generally, as variously interpreted and particularly as interpreted in this thesis, satisfies the sentiments behind the desire for a New International Economic Order, and what role if any, do environmental impact assessments have to play in this meaning of sustainable development for developing countries. It is in this context that a study of the developing countries' take on the environmental impact assessment movement is useful, that is, regarding the realization of equity between the north and the south and the potential for sustainable development.

CHAPTER FOUR: THE IMPACT OF ENVIRONMENTAL IMPACT ASSESSMENTS ON THE SUSTAINABLE DEVELOPMENT OF DEVELOPING COUNTRIES.

Chapter one addressed the reasons for the standoff between developed and developing countries regarding the obligation for environmental conservation, and these were rooted in the anxieties felt by the developing countries that they would be denied the fruits of economic development if they chose to follow the environmental conservation route. The concept of sustainable development seemingly addresses these anxieties through, its operational principle of integrating environmental and developmental objectives by among others, the use of the EIA technique. This chapter, which also forms part two of the thesis, analyses the real impact of this EIA technique on developing countries, particularly in light of their development priorities, and generally, their aspirations for sustainable development.

Firstly, the chapter explores the opportunities that EIAs provide for the realization of eco-centric economic development in developing countries. The discussion then shifts to the flip side of the coin, that is, by analyzing why developing countries still lag far behind their developed country counterparts in the use of EIAs. Further analysis is made of the impact of the EIA-development assistance connection for developing countries and its real meaning for sustainable development in those countries. The chapter will also include a comment on the realities of public participation in the EIA process in developing countries. The objective of part two and chapter four of the thesis is to extrapolate that even though EIA is a useful strategy and provides significant opportunities for achieving sustainable development, its contribution to the realization of this goal, particularly on the global plain is likely to be minimal in its present form because of the developing country question.

4.1 Opportunities for Developing Countries in Environmental Impact Assessment.

4.1.1 Integrating Environment and Development Concerns

The issue of paramount importance in the North-South debate over environmental conservation was the developing countries' worry that their quest for economic development and solutions to poverty would be constrained by environmental conservation policies. The principle of integration of environmental and developmental objectives addresses this problem in that it emphasizes that economic development and environmental consciousness are mutually supportive and that they must go hand in hand for sustainability to prevail. Thus, the greatest opportunity for developing countries is to operationalize the principle of integration through the use of EIA. As earlier defined, EIA enables the review of the impacts of development activity on the environment in order that the best alternatives are chosen and adverse impacts mitigated. In this way, ideally only those development activities that are environmentally feasible are undertaken while maintaining ecological integrity. EIA is therefore a useful strategy that developing countries could use to realize economic development while maintaining the integrity of their natural resource bases.

Relatedly, EIA provides an important opportunity for the acquisition by decision-makers, of a clear understanding of the relationship between the economy, society and the environment and offers positive measures of harmonizing these relationships.²⁸² Traditional patterns of development

²⁸² Geping, "The Role of Environmental Impact Assessment in Economic Development" in A. K Biswas & Qu Geping (eds) *Environmental Impact Assessment for Developing Countries*. Vol.19 Natural Resources and the Environment Series, (London: Tycooly International, 1987), 219 at 221

emphasized immediate and direct economic returns with little regard for environmental protection with the inevitable result of pollution and environmental damage. ELAs provide an opportunity for changing this pattern in developing countries by coordinating the development of the economy and the environment by reconciling economic concerns and environmental considerations. Through carrying out ELAs, people deepen their understanding of the mutually interdependent relationship between the biological habitat and human economic activities and this awareness enables policies geared at a proportionate relationship between human activities and the natural resource base, which is an important benchmark for sustainable development.²⁸³

One of the biggest constraints to environmental management in developing countries is the lack of important baseline data on the structure and functioning of important ecosystems vis-a-vis social systems²⁸⁴ especially in the context of devising appropriate environmental protection policies and implementing sound scientific management. Through its technical procedures, EIA provides an opportunity for information gathering, collating and storage to guide decision making for particular and future projects and for strengthening environmental planning and management.

As discussed in the previous chapter, the opportunity that EIA provides for public participation and involvement of local communities in decision making and the benefits associated with this is good for the realization of good governance objectives. Many developing countries are coming under increased scrutiny and pressure to observe good governance policies and adopting ELAs, as an environmental management tool certainly will help them along in this direction.

4.1.2. The Expanded Definition of the Environment.

One significant opportunity that EIA can offer developing countries derives from the broadening definition of the 'environment'. Previously, the term 'environment' was used without much thought for its implications. It simply meant the biophysical surroundings excluding the human beings and their constructed habitat.²⁸⁵ The term 'environment' then embodied the worldview of a human species set apart from its living habitat. Increasingly, however, the perceived gulf between human beings and the

²⁸³ *ibid* at 220

²⁸⁴ R. Bisset, "Devising an Effective Environmental Impact Assessment System for a Developing Country: The Case of the Turks and Caicos Islands" in Biswas & Agarwala (eds) *supra* note 2 at 215

²⁸⁵ S. Holtz, "Environmental Assessment and Sustainable Development: Exploring the Relationship" in Jacobs & Sadler (eds) *supra* note 77 at 96

biosphere is disappearing and human beings are now recognized as part of the biosphere. This change in perception is reflected in the newer definitions of the environment, which explicitly includes cultural, social and economic concerns in discussions about the environment.²⁸⁶ Accordingly, therefore, in considering environmental impacts, the term 'environment' should be broadly interpreted to include the aggregate of all the external conditions and influences that affect the life and development of all forms of organisms²⁸⁷. Living species and their physical environments must be recognized as interconnected and it is important to focus on the interaction between these different subsystems and how they respond to stresses resulting from human activity. This is particularly important because it will engender consideration of the ecosystem in its entirety rather than the individual components within the ecosystem.²⁸⁸ Thus a consideration of the 'environment' must be within the perspective of the environment as an ecosystem. Gilpin provides a checklist of thirteen elements that are ingredients of the word 'environment' as reflected in most national legislation.²⁸⁹ These include natural resources including air, land and water; social, economic and cultural circumstances; identified natural assets such as natural beauty, outlooks and scenic routes; identified historical heritage assets; identified cultural and religion assets; public health characteristics and aesthetic assets. The implication of the widening perception is favorable to developing countries many of which place significant importance on the cultural and spiritual values of their communities and natural resources. For instance, one significant bottleneck to AES Nile power, an independent US power company that is set to construct a dam on the Bujagali Falls along the White Nile is in regard to culture, traditional religion and cosmology.²⁹⁰

The EIA for the project did not take into account the cultural significance of the falls and the spiritual importance of the living Bujagali, the spiritual medium and caretaker of the falls.²⁹¹ This created tension

²⁸⁶ For instance, the Canadian caucus of environmental groups participating in the federal Environmental Assessment Review Process review stated in their position paper that the 'environmental' must be defined broadly to include biophysical, socio-economic, spiritual and cultural elements and their interactions. See Holtz *ibid*.

²⁸⁷ V. Macha and R. Makaramba, "The Development and Harmonization of EIA Regulations- Tanzania Country Report" in *The Development and Harmonization of EIA Regulations*. *supra* note 69 at 53

²⁸⁸ J. Brunee & S. Toope, *supra* note 137 at 55

²⁸⁹ A. Gilpin *Environmental Impact Assessment: Cutting Edge for the 21st Century*. *supra* note 164 at 2

²⁹⁰ S. Frankland, "Empty Promises Bought Bujagali Dam Support" sourced at www.monitor.co.ug *supra* note 261

²⁹¹ Various rituals, some of which are reportedly done at Bujagali Falls, precede the installation of traditional rulers in that region of Uganda. See the National Association of Professional Environmentalists (NAPE) Report of the Proposed Bujagali Power Development Project, Report of the on the spot assessment done on Sunday February 28, 1999, accessed on www.uganda.co.ug/bujagali/nape_report.htm (date accessed: October 4, 2000)

between the AES Nile Power on the one hand and Bujagali and the surrounding communities on the other, for whom the construction of the Dam on the fall was tantamount to invoking the wrath of the gods. The communities were particularly concerned as to how their culture would be compensated.²⁹²

Suggestions by AES Nile power to relocate the spirits were scoffed at because as one commentator so aptly put it,

from an anthropological perspective, the cultural association with the falls cannot simply be moved to another place ... a shrine is not comparable to a church. Relocation is a western solution to an issue rooted in a non-western system of belief.²⁹³

Efforts to compensate Bujagali for the shrines have to date come to naught since at this point in time, there is no cultural precedent for the relocation of spirits or the compensation of shrines in any of Uganda's cultures.

This particular project came under a lot of public criticism and opposition also because of the sheer beauty of the Falls that will be lost when the falls are inundated by the dam. Perhaps if the developer had from the outset addressed the impacts on the cultural and aesthetic significance of the dam, there might have been a smoother process of project implementation. Therefore, evaluation of the impacts to the environment in its wider sense engenders more holistic and wholesome EIA process and ultimately, more environmentally sound and acceptable processes of economic development.

4.1.3 Greater Goal of Sustainable Development.

Accordingly therefore, I argue that the struggle for sustainable development as envisaged in this thesis can be greatly aided by the adoption of the EIA technique in environmental planning and management by developing countries, in that EIA will ensure that present economic development and poverty alleviation needs of the worlds' poor, most of whom live in developing countries will be met through the encouragement of environmentally sound development activities. This also guarantees that future generations will inherit an ecological system whose integrity has not been eroded by present development activities. The one loophole in this equation however lies in the financial baggage that comes with EIA. As noted in chapter one, the problems of developing countries are exacerbated by the indebtedness in which most of these countries wallow. In this context, the EIA development assistance arranged marriage spells further doom for the realization of real sustainable development in these countries.

²⁹² *ibid.*

²⁹³ Frankland, *supra* note 261

4.2 Implications of the Nexus Between EIA and Development Assistance on Sustainable Development of Developing Countries.

It has been asserted that one way that developed countries can address the environmental problems in the developing countries is to ensure that development projects started as part of technology transfer pay greater heed to the environment and that a major element in this endeavor is to carry out proper environmental impact assessments of all programs and projects which may affect the environment.²⁹⁴ Similarly Agenda 21 calls upon, *inter alia*, multilateral development banks (MDBs) to ensure that development funding "contribute to economic growth, social development and environmental protection in the context of sustainable development".²⁹⁵ Therefore, in the effort to comply with their sustainable development, mandates, or to ensure that that their development assistance is environmentally sound, multilateral lending agencies and other development assistance agencies are increasingly insisting on environmental impact assessment for their development projects. While this is an ingenious strategy for ensuring greater consciousness to sustainable development objectives, it does not come unencumbered.

4.2.1 on the Intended Role of EIA and Increased Indebtedness.

Perhaps its greatest weakness as earlier mentioned lies in the risk that EIA may be perceived more as a procedural obstacle, easily overcomeable, that stands in the way of the acquisition of aid, thereby encouraging the so called "sweetheart assessments". However, relatedly, its real danger lies in the implications it has on the increases in Third World debt. Certainly, the primary reason for the EIA partnership with development assistance is to engender a process of development that conforms to ecological integrity for the benefit of, and to be enjoyed by both present and future generations. It may be argued, in this context, that higher debt may be the price to pay for such eco-centric development, however, the realities of the levels of Third World debt and its effect on Third World economies and poverty render this argument rather theoretical. By end of 1995 alone, developing countries owed some \$2067.7 billion to banks and international lending institutions.²⁹⁶ In 1998, Sub-Saharan Africa

²⁹⁴ P Wranmer, "Environmental Impact Assessment of Development Projects: Experiences for Nordic Aid". in Biswas and Agarwala, (eds) *supra* note 2 at 168

²⁹⁵ see Programme for the Further Implementation of Agenda 21, GA Res. S-19/2, UN GAOR 19th spec Sess., Annex (1997) reprinted in (1997) 36 I.L.M 1639 quoted by G. Handl, "The Legal Mandate of Multilateral Development Banks as Agents For Change Towards Sustainable Development" (1998) 92 Am. J. Intl L 642

²⁹⁶ World Bank, World Debt Tables 1996 Extracts at 5 Washington D. C sourced from www.worldbank.org/html/estpb/WDT95ENG/english.pdf. (Date accessed: January 31, 2001).

alone owed \$176 billion, 96% of which was owed to official creditors²⁹⁷ and the debt to GNP ratio- the dollar value of outstanding and long-term debt as a percentage of GNP- is nearly 40% in the developing world and as high as 80% in the poorest African nations.²⁹⁸ Whereas Agenda 21 called for a doubling of overseas development assistance to \$125 billion a year for ten years²⁹⁹, traditional development assistance and the corresponding indebtedness is increasingly being viewed as a yoke that developing countries will continue to bear and which will invariably be inherited by future generations.

4.2.2 on Increased Corruption

Furthermore, development assistance is increasingly being criticized for fuelling corruption in that while the donor party may not be involved in the graft, the aid is siphoned off by corrupt officials in recipient nations,³⁰⁰ or otherwise mismanaged, misuse which goes undetected due to inadequate checks and balances and limited adherence to measures intended to promote accountability and transparency.³⁰¹ Corruption in the use of development assistance funds not only undermines the utility of such funds but also erodes support for aid, both in the countries providing the assistance and to a lesser extent, those receiving the aid.³⁰² Although the direct cost of corruption may be high in terms of lost revenue or funds diverted from their intended use, the indirect costs in terms of economic distortions, inefficiencies and waste resulting from corrupt practices are more problematic over the long-term and also more difficult to address. Particularly in the Third World, the social and economic costs of corruption disproportionately affect the poor, who not only suffer from the lack of services and efficient government, but who are also powerless to resist the demands of corrupt officials, and the cost is not just monetary. For instance, between 1970 and 1985, Uganda's wildlife was virtually decimated partly as a result of collusion between corrupt game warders, military personnel, poachers and international dealers.³⁰³ A similar situation happened in the Democratic Republic of Congo³⁰⁴. These particular examples also show how corruption may affect the environment and more so how this status

297 World Bank Global Development Finance 1999 Washington D. C sourced at www.worldbank.org/prospects/gdf99/africa.pdf (date accessed: January 31, 2001)

298 G.C. Bryner, "Implementing Global Environmental Agreements in the Developing World" (1997) Colo.J. Int'l Env't. L & Pol'y, 109

299 *Agenda 21*, *supra* note 64 Chap 33, Para 33.18

300 Bryner, *supra* note 298 at 112

301 Global Coalition On Africa, Policy Forum "Corruption and Development in Africa"

GCA/PF/N.2/11/1997 November 1997 at 9 sourced www.gca-cma.org/epfdoc97.htm (date accessed: January 25, 2001)

302 *ibid.*

303 Global Coalition on Africa, *supra* note 301 at 11

304 *ibid.*

quo does not augur well for sustainable development. However, the problem lies not in the provision of the aid, *per se* but really in the absence of national institutions of governance, and political will in many developing countries that are committed to decisively tackling the problem of corruption. While corruption in Third World countries may not be directly linked to the EIA-partnership with development assistance, EIA may arguably have an indirect effect on boosting corruption in that more assistance funds will normally be provided when EIAs of the concerned projects are conducted. More relatedly, however, corruption in the EIA process, that is the deliberate overlooking of dangerous environmental impacts influenced by monetary gain, has dire consequences on the integrity of the EIA process or ultimately, on the preservation of ecological integrity.

4.2.3 on the Perceived Loss of Sovereignty

The EIA conditionality in development assistance projects has also been criticized as potentially or actually infringing on the sovereignty of recipient developing countries³⁰⁵ in that the recipients will often structure or modify their development policies and priorities in response to the suggestions and requirements of the assistance provider³⁰⁶. Clearly it may be argued that this should not be perceived as a problem since the interventions that might cause a restriction in sovereignty for developing countries are for a good cause, that of engendering better environmental management. However, it should be kept in mind that a major concern for developing southern countries both in the debates over a New International Economic Order and for equity in the international environmental arena, centered around the disparity between North and South in international law and such intervention undermine any efforts at realizing the much sought after equity in international relations.

4.2.4 on Sustainable Development of Developing Countries.

Aspirations for sustainable development as identified in this thesis include the elimination of poverty, the improvement in the needs and welfare of the worlds' poor, the realization of equity between and within generations, all of this while maintaining ecological integrity. Accordingly, therefore, the EIA-development assistance relationship seemingly spells doom for these aspirations in that the debt question encourages inequity between the present generations, as financial payments continue to be made to the North from the South in the form of debt payments, and transfers a burden to future

305 C. Klein-Chesivoir, "Avoiding Environmental Injury: The Case for Widespread Use Of Environmental Impact Assessments in International Development Projects." (1990) 15 Va. Journal of Intl Law 517 at 528

306 This particular reason accounts for much of the criticism leveled against the conditionalities imposed by the Structural Adjustment Programmes (SAPs) of the Bretton Woods Institutions.

generations, which will be bound to pay off the debts incurred for eco-centric development by present generations. Corruption skews economies against the poor, deepens poverty and exacerbates inequalities,³⁰⁷ and the EIA conditionality in development assistance is relevant to sustainable development because it perpetuates inequality between the Northern countries, which are the aid providers and the Southern countries, which are the recipients, all of which are a state of affairs reminiscent of those that motivated the attempt at a New International Economic Order. Thus, on the basis of the above, while ecological integrity may be promoted under development assistance arrangements, it is difficult to see how the other aspirations for sustainable development will be realized under the same arrangement.

4.3 Limited value of EIAs in Developing Countries

EIAs can be used for two principal functions, as a decision making instrument to decide upon the acceptability of a project based on its environmental costs and as a planning tool to minimize adverse impacts caused by a project.³⁰⁸ However, the practical use of EIA in many developing countries creates the impression that the mere conduct of EIA is considered enough evidence of environmental consciousness rather than a means to better environmental management. Werner cites the examples of Thailand and the Philippines, two Asian countries that have the longest experience with EIA, showing that as of 1992, out of several thousand impact statements, processed during the past decade, not one single project was denied clearance for environmental reasons³⁰⁹ and apparently this means that these countries used EIAs to merely legitimize development projects. Other writers concur that often in developing countries, impact assessment is seen as a way of justifying development rather than reducing environmental problems and maximizing benefits.³¹⁰ The same impression is however increasingly being created by some in the Ugandan business community who on being challenged on the environmental consequences of their projects argue that after all an environmental impact assessment had been prepared and approved by the National Environmental Management Authority, the regulatory authority. A case in point is the recent standoff between environmental groups and the company constructing a hotel complex in possibly the largest wetland in Kampala. The company

307 J Githongo, Executive Director Transparency International Kenya, "Corruption as a Problem in the Developing World: Effects on the Economy and Morale" Presentation at the seminar on corruption and development cooperation held by the Government of Finland, May 2000 sourced at www.transparency.de/documents/speeches/githongo.html. (Date accessed: January 4, 2001)

308 G Werner, *supra* note 91 at 19

309 *ibid.*

310 C. J Barrow, *supra* note 90 at 197

consistently argued that they had prepared an Environmental Impact Statement, which was presented to and approved by the regulatory authority. It did not seem to matter to them that nevertheless, their project would reclaim one of Kampala's last remaining wetlands and green spaces or even severely disrupt the water drainage functions that this wetland was important for. The fact that they had prepared an Environmental Impact Statement was supposed to silence all protest.³¹¹ Perhaps the decision-making authority shares the blame in this case for approving the project despite the glaring adverse environmental consequences and in light of the public outcry.

Examples such as these indicate that perhaps in developing countries, the importance of EIAs is more in facilitating or legitimizing development than in better environmental management for which it is intended. In this sense, EIA is considered more an end rather than a means³¹² or as a 'paper tiger' in that "an action is proposed, designs are made, an environmental report is written to justify the designs, the report is filed away and the action proceeds as originally envisaged." ³¹³

4.3.1 Foreign Technology

Environmental impact assessment is a process that was conceived and borne in the National Environmental Policy Act of the United States and therefrom, spread to the rest of the world. The EIA procedure as it is presently used comprises a set of standardized procedures of screening, scoping, impact statement preparation, review and final decision³¹⁴ and it is in this form that it has been imported into developing countries which must adopt it as such to 'fit in' with the rest of the world. However, the issue is whether a system designed in a developed country for circumstances peculiar to developed countries is appropriate in developing countries. While it is true that, judging from the present fragility of the environment, developing countries cannot afford to make the same mistakes made by the developed countries, ironically, it is more so that technology transferred from industrialized countries and adopted in developing countries without modification on a 'trial and error' basis increases the likelihood of mistakes or will simply not work as well as expected. In the EIA context, the procedures that comprise what is now known as EIA are technical often scientific procedures that require formally trained personnel to carry them out. Needless to say that it is often

³¹¹ The EIS for this particular project is being judicially challenged by a local environmental NGO (Advocates Coalition on Environment and Development (ACODE), which filed a class action against the company.

³¹² Werner, *supra* note 308 at 18-19

³¹³ Y. Ahmad & G.K. Sammy (eds) *supra* note 78 at 8

³¹⁴ Werner, *supra* note 308 at 17

expatriate consultants who carry them out. This presents a double edged sword to developing countries which remain dependent on the North for 'know-how' in the form of consultants and training of local personnel and correspondingly bear the increased costs of engaging consultants. It is also partly for this reason that the cost of conducting EIA is a genuine concern of many decision makers and developers in developing countries.³¹⁵ In addition, while the consultants are capable and very knowledgeable in their fields, they are often lacking in experience of local circumstances and the traditions of the locality under study.³¹⁶ The Bujagali example cited before attests to this.

4.3.2 Little Political Priority

The little value accorded to EIA in many developing countries is a reflection of the lack of political priority accorded to the environment in general.³¹⁷ This lack of political will is allied to the environment versus development debate. Many political leaders are concerned with the poverty alleviation and improvement in socio-economic welfare and still regard environmental protection sentiments as unwelcome detractors of their goals. Therefore, while environmental officials and academics might appreciate the relationship between rational sustainable environmental management and long-term economic development, the politicians might not be so enthusiastic and these issues will not be effectively represented politically.³¹⁸ The result too is that due to the lack of interest on the part of the politicians, the public will not be exposed to these issues as well as they should and any discussion of the issues is considered of academic interest only. For these reasons, as Rayner noted,

For the third world, EIA remains at best a Band Aid to mitigate the worst consequences of rapid industrial development because it is wealth not legislation that leads to indigenous demands for clean energy, stable populations and stewardship of land and water.³¹⁹

Nevertheless, the fact that at least EIA forms part of policy and legislation in many developing countries is an indication of a willingness to take advantage of its environmental protection attributes.

4.4 The Reality of Public Participation in Environmental Impact Assessment in Developing Countries.

It has already been discussed how the EIA process encourages and facilitating public participation in

³¹⁵ Ahmad & Sammy, *supra* note 313 at 6

³¹⁶ Barrow, *supra* note 90 at 197; that a joke is often told in Uganda of a consultant who recommended different action strategies for the winter and summer seasons!

³¹⁷ C. Wood, "Environmental Impact Assessment in Developing Countries" in *Environmental Impact Assessment: A Comparative Review*, *supra* note 180 at 301

³¹⁸ *ibid* at 302

³¹⁹ S. Rayner, "Introduction: The International Influence of NEPA" in Hildebrand and Cannon (eds) *Environmental Analysis, The NEPA Experience*. (Boca Raton FL: Lewis, 1993), quoted in Wood, *ibid*.

environmental decision-making, and the positive implications that this attribute has for good governance. Similarly, effective public participation is crucial in order to promote efficient EIA systems, since the project recipients are best placed to contribute to the assessment process. However, in the developing country context, issues arise as to whether the nature of public participation is that which is appropriate for developing country EIA systems. Specifically, issues arise regarding the role of non-governmental organizations (NGOs), the utility of public hearings and the question of access to information.

4.4.1 Non-Governmental Organizations

Non-Governmental organizations (NGOs) both international and local, have come to prominence in the global community for the roles they have played in advancing many global concerns, including human rights and environment issues. NGOs wield significant influence because they reflect the great masses of civil society and are able to organize at the grass root level.³²⁰ Suddenly, the previously voiceless masses can voice their opinions on issues important to them. For example, WAHLI, an Indonesian NGO, was permitted by the Supreme Court of Indonesia to file a complaint against President Suharto for his alleged diversion of nearly \$200 million designated for reforestation projects to a budding aircraft industry.³²¹ NGOs also provide technical expertise to governments and international organizations and this is reflected in the partnerships they have with virtually all the significant international organizations such as the United Nations and the World Bank.

In the developing countries, NGOs have taken up the provision of many social services that are traditionally a responsibility of the state but which, due to political upheavals, civil strife and the effects of austere structural adjustment, the state no longer has the capacity to provide. Not surprisingly therefore, that the environmental conservation movement in the South is fuelled by NGOs.

In the EIA context, the presence and influence of NGOs is manifested in public participation. For instance, the World Bank Operational Directive requires that decision-making adopt a consultative role involving affected groups and local NGOs.³²² However, experience shows that it is usually the NGOs

³²⁰ S. Al-Jurja, "Participatory Development and the NGOs: A Look at the World Bank" *supra* note 246 at 173
³²¹ *ibid* at 176-177

³²² World Bank, *Environmental Assessment; Operational Directive 4.01* *supra* note 152 at 15; see K Gray, *supra* note 153

as opposed to community representatives, who participate in the consultative process.³²³ In the Central and Eastern Europe Countries, NGOs are playing a critical role both in advocating the need for reforms and in proactively establishing new practices in public participation. In the Czech Republic, a case study of the Rajchetrov Recreational Park revealed the significant influence of two Czech NGOs, The Czech Public Environmental Assessment Center (PEAC) and the Center for Community Work (CCW) in promoting public debate about the proposed development by organizing parallel public participation hearings alongside the formal EIA process.³²⁴ It has also been opined that public hearings are often held in capital cities to ensure NGO input.³²⁵

The strongest advantage of NGO participation in the EIA process lies in the empowerment of local grass root communities, which are given a voice and influence to make themselves heard. The strongest disadvantage lies in the viewpoint held by some that, quoting a commentator writing in the African context, their continued rise and influence over civil society is representative of the current epoch which is characterized by re-colonization through the IMF, World Bank and western NGOs³²⁶ and that therefore, their perceived advantages should be taken with the proverbial pinch of salt.

4.4.2 Public Hearings

In a typical public hearing, there are often two extreme sides, the project proponent or developer on the one hand and the environmentalists, whether in form of a government department, a NGO or academics, on the other. The so-called recipient or victims of the development project e.g., the local communities that are to be resettled when their land is inundated by a hydropower reservoir, or the beneficiaries of increased electricity output are not involved.³²⁷ In the public hearing concerning the use of Chemicals for the Eradication of the Water Hyacinth on Lake Victoria held in Kampala in 1998, the proponents were the National Environmental Management Authority and the Ministry of Agriculture, Animal Industry and Fisheries. The 'accusers' comprised largely members of the academic and scientific community. Significantly absent were significant members/players in the ecosystem, that

323 C. Cook & P. Donnelly-Roark, "Public Participation in Environmental Assessments in Africa" in R. Goodland & V. Edmundson (eds) *Environmental Assessment and Development*, 1994 at 84, 90-91

324 For a fuller discussion of Parallel Public Participation (PPP) see T. Richardson, J. Dusik, & P. Jindrova, "Parallel Public Participation: An Answer to Inertia in Decision-Making." (1998) 18 *Environmental Impact Assessment Review*, 201-216

325 Gray, *supra* note 153 at 113

326 T. Abdul Raheem, "Impact of Angels" *supra* note 243 at 20

327 N.C Thanh and D.M Tam, "Environmental Protection and Development: How to Achieve a Balance?" in

is, of the fishing community whose livelihoods were at stake, both by the continued presence of the waterweed on the Lake and by the suggested use of the chemicals to destroy the weed.

In addition, public hearings, as a sole method of public consultation or involvement, does not take into account local decision making techniques, perhaps involving community elders and opinion leaders, or cultural dictates that discourage public appearances or expression by women and other disadvantaged groups. In a multi-cultural and linguistic setting, communities that are illiterate in the medium of communication at the hearing will be left out of the process. All these are attributes peculiar to many developing countries and which correspondingly impact on the usefulness of public participation techniques commonly used in the EIA process.

4.4.3 Access to Information.

Effective public participation requires easy access to and availability of data. In contrast to developed countries, availability of information and background data in developing countries is limited. This is largely due to the poor data retrieval and management systems, inter-ministerial/departmental/institutional rivalries on roles and the unnecessary classification of data as secret or confidential.³²⁸ As a result, public involvement strategies are more of a learning opportunity for the public than they are an advocacy, lobbying or consultative opportunity. This significantly dilutes the value of public participation in the EIA process in developing countries.

This chapter has presented the alternative view of environmental impact assessment as a strategy for global sustainable development by focusing on the developing countries' take on the concept. Judging from the above analyses, it is apparent that perspectives on environmental impact assessment differ across the board between the developed and developing countries. This however is not surprising due to the development gap between the two parts of the world and correspondingly, is a reflection of their dissimilar priorities. But perhaps, most importantly, the recognition that of the importance of EIA in integrating environmental considerations in development plans, policies and projects, which is central to sustainable development, has been realized in the South and what is necessary is the adjustment of the application of the concept to address the concerns that are pertinent to developing countries and the adaptation of the concept to circumstances that are peculiar to these countries.

Biswas & Agarwala, *supra* note 2 at 10
328 C. Wood, *supra* note 180 at 305.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

The concept of sustainable development aims at influencing a pattern of development that will not deplete the natural resource base but which will improve, as a matter of priority, the welfare of standards of living of the worlds' poor. In the context of developing countries, this thesis has considered the concept of sustainable development to require the linkage of economic and environmental action plans in order to rectify the problems of poverty and underdevelopment while minimising resource depletion and cultural disruption. Included within the poverty spectrum for developing countries are the problems of the ever-increasing Third World debt, minimal standards of transparency and accountability and corruption. In addition, the concept of sustainable development developed as a compromise position in the standoff between the North and the South over responsibilities for environmental degradation and the corresponding obligations for conservation. This chapter will summarise the content of the main chapters of the work, which scrutinizes the utility of Environmental Impact Assessments as a strategy for the attainment of global sustainable development, and will state the deductions made from the study. The chapter will also provide some suggested recommendations that might help in downsizing some of the problems identified in the study.

5.1 Summary of Chapters and Deductions

The premise of this thesis has been to show how adopting the environmental planning and management tool of environmental impact assessment is a useful strategy in the effort to realize global sustainable development, that is both in the North and South, because it facilitates the integration of the development and environmental objectives. Discussions of other attributes of environmental impact assessment also indicate how EIA aids the realization of other aspects of sustainable development, such as transparency in decision-making, through the involvement of the public in the EIA process. However, in light of the disparities in the development and international relations between the developed and developing countries, a well rounded analysis is bound to reveal that EIA does not have the same total effect North and South of the tropics and ultimately, the result of these disparities imply on global sustainable development, in that it will not be realized in the same way in the developing and developed countries of the world.

Chapter one discussed the concept of sustainable development within the context of North-South

priorities and attitudes regarding environmental conservation. An important emerging concern that now pervades the international environmental law and policy arena is that of equity, that is, concerns on how to allocate future responsibilities for environmental protection among states that are at different levels of economic development or for environmental justice. The concept of sustainable development acknowledges these concerns and requires in its practical implementation, an acknowledgement of the different situations of the developing southern countries if they are to usefully take part in international environmental initiatives. The practical operation of this acknowledgement manifests itself in the principle of common but differentiated responsibilities, which among others, encourages the transfer and financing of environmentally sound technologies to the developing countries. *The Kyoto Protocol to the United Nations Framework Convention on Climate Change* has established mechanisms to implement this within the context of the climate change regime.

In the context of environmental impact assessment, which is the focus of this study, the principle of common but differentiated responsibilities is implemented in the transfer to developing countries of the EIA technique, in most cases as a conditionality to development assistance from developed countries and multilateral lending organizations, such as the World Bank. Agenda 21, the blue print for operationalizing the concept of sustainable development, mandated this strategy.³²⁹

Another practical aspect of the concept of sustainable development is the integration of environment and development objectives. This is based on the now accepted tenet that environment and development are mutually supportive rather than conflicting objectives, and that equilibrium between them is a pre-requisite for their optimal existence. The principle of integration works on the recognition that humans are just one of the many citizens in the ecosystem and that for sustainability to prevail, it is prudent for human activities geared at economic development to be consistent with ecological integrity.

The practical implementation of the principle of integration requires, among others, the conduct of environmental impact assessments, and it is for this attribute that environmental impact assessments are recognized as a viable strategy for the realization of sustainable development. This is because an EIA is a procedure for an early evaluation in the planning process, effects or impacts of an activity, whether policy proposal or project, on the environment, through the gathering of all relevant information from

³²⁹ *supra* note 64 para. 33.7 and 33.13.

all stakeholders, and the use of this information in forming a judgment on whether the activity should proceed, designing other possible alternatives to the proposed activity, and any necessary mitigation arrangements that might be undertaken should the activity be approved. The primary objective of EIA is to ensure that potential adverse impacts are foreseen and addressed or mitigated at the planning stage.

EIA is, therefore a precautionary measure to ensure that development activities do not adversely affect ecological integrity and to ensure that only those activities that are environmentally sound are allowed to continue. It is premised on the reasoning that prevention of environmental degradation is more desirable and cheaper in the long run, than repairing environmental damage.

Chapter two makes an analysis of the factors that influenced the spread of EIA around the world. With regard to developing countries, the primary point made is that the spread of EIA to developing countries is attributable to the influence of international organisations and multilateral lending institutions. This analysis helps to explain the dynamics in international relations between North and South and how they impact on sustainable development, in that developing countries are the recipients of a process designed in the North as an environmental management tool, which they need to adopt to ensure that their development activities are environmentally sound, but which, however, due to the means by which it is advocated, adopt the process, not for its environmental management attributes, but as a means to the end of aid acquisition. While it may be argued that for developed nations, the end of ensuring that their development assistance is sustainable, justifies the means of attaching the requirement for EIA as a conditionality to that development assistance, it is also arguable that this encourages in developing countries, a lackadaisical attitude to EIA, as a hurdle to aid, rather than as a tool to lead to the much needed sustainable development of their economies. The implications of such an attitude on sustainable development is serious because it is an indication that the real aspiration for sustainable development is lacking. Nevertheless, the fact that EIAs are being conducted in developing countries, albeit under foreign influence, is encouraging because it means, ideally at least, that much of the development activity going on has been sanctioned as being environmentally sound, or at the very least, not potentially dangerous to the ecological ecosystem.

Chapter two also explores other important rationales for the adoption of EIAs. It notes, *inter alia*, that a holistic environmental assessment process should be based on the realisation that the environment is an ecosystem that comprises biogeophysical, socio-economic, cultural, spiritual and aesthetic elements and

all their interactions and accordingly environmental impacts, both positive and negative, should be assessed in this context. This point is underscored in chapter two and further in chapter four which calls for an expanded definition of the environment for EIA purposes, particularly in developing countries to ensure a more wholesome assessment process.

Frequent criticisms of the EIA process, however state that EIA is geared more at facilitating development rather than environmental conservation because the intention of the process is not to eliminate development projects but to adopt them with full knowledge of their impacts on the environment and with planned mitigation measures and further that since the EIA process is the responsibility of the project proponent, it is more likely that it will be structured to favor the development project. In other words, a project proponent cannot be impartial in so far as an objective assessment of the environmental impacts of their project is concerned. This particular point is crucial in assessing the utility of EIA in realizing sustainable development, because it implies that the real reason for the conduct of EIAs is to facilitate development *per se*, rather than to realize ecological sustainable development.

Chapter two also notes that while existing Multilateral Environmental Agreements may provide inspiration for the adoption of EIA as a strategy for sustainable development, they are mere dead letters if they are not ratified or adopted as part of national legislation. This however, is dependent on political priority being attached to environmental conservation objectives.

The realization of sustainable development is dependent on a system that gives importance to good governance objectives. The EIA process is such a system in that it provides for public participation in environmental decision making, thereby guaranteeing the civil right of political participation. Chapter three examines the linkage between EIA and the guaranteeing of human rights and freedoms and its meaning for sustainable development.

Human rights concepts and sustainable development objectives are similar in nature in that they both aspire to provide for the human being a wholesome standard of life. They both aspire to ensure a system that fosters equality between human beings. As such, it is not surprising that the linkage between human rights and environmental protection objectives are strong. For instance, as observed in chapter

three, it is generally accepted that a wholesome or healthy environment is a pre-requisite for the enjoyment of substantive human rights to life health, food, and practically all the other ascertained rights that contribute to human welfare. In addition, procedural human rights such as the right to access to information, to judicial/administrative redress and effective remedies for infringement and to participation in public affairs, contribute to the realization of the desire to have the environment conserved and improved. In the environmental sphere, these rights are manifested in the participation on the public in environmental decision making processes, but more relatedly, in environmental impact assessment processes.

The criticism that the linkage between human rights and environmental rights is too anthropocentric, that is, revolves around the idea that the preservation of the environment is only for human benefit, is not uncommon. Therefore, the thesis examined that genre of rights, referred to as conceptual environmental rights, and which are identified as rights attaching to the environment as an ecosystem, which needs protection from the deleterious effects of human activities. These rights focus on the need to recognize the intrinsic value of the environment before resource over exploitation and general environmental deterioration can be overcome. It was noted that the best expression of this type of rights comes in the form of a claim for a decent and healthy environment, which forms part of constitutional and legislative provisions in some jurisdictions³³⁰. This notion however still suffers from problems of ambiguity as to what comprises a 'healthy', or 'decent' environment.

Chapter three also discussed the notion of public participation in environmental affairs and its pre-requisites and noted that a system or process that allows for public participation, guarantees the so-called first generation civil right of participation in public affairs. It was noted that the EIA process assures the full participation of the public as part of a wider ecosystem, in decision-making that affects that ecosystem and that involving the public has decided advantages, such as, empowerment of the public who will own the assessment process and thereby be more likely to accept the outcome of the process, in addition to harvesting a wide variety of views that help decision makers arrive at a well informed decision. However, public involvement does not come without problems some of which include deciding on the appropriate composition and level of the 'public' to be involved in the process and whether the public actually involved, particularly in the context of NGOs in developing countries,

³³⁰ The Ugandan and South African Constitutions provide for the right to a clean and healthy environment.

are really representative of the views of the stakeholders. However, the advantages of involving the public far outweigh the disadvantages and it was noted that the EIA process, in guaranteeing public participation, contributes to sustainable development through good governance in that the public is given a voice by which they can make their interests known in a transparent and accountable manner.

Mention was also made of two international conventions that provide for participation in the EIA process but it was noted that the influence of these conventions is minimal not only because they are targeted at the developed countries and do not involve developing countries, but also because they have not been enthusiastically ratified by the developed countries.

Chapter four presents a down to earth analysis of the meaning of EIA for developing countries. It is made against the background of the history of developing countries that is regarding their struggle in the decades of the 1970s and 1980s for a New International Economic Order, aimed at restoring equity and equality in international political relations after the period of colonization out of which many of these countries had just emerged, and in the face of new forms of neo-colonialism, particularly in international economic systems. This analysis is relevant because it bears on the North-South conflict. The chapter also analyses the meaning of the substance of EIA for developing countries, that is, regarding its adoption and its limited value in developing countries and the reality of public participation in EIA in developing countries. In making a linkage between the EIA-development assistance relationship, on the one hand, and increased debt burdens, corruption and reduced sovereignty, on the other hand, in developing countries, the chapter reveals that the repercussions on developing countries of the adoption of EIA concept are not always in conformity with sustainable development aspirations of equity and the improvement of the welfare of the worlds' poor. In addition, the present scenario is that EIA has a much more limited value in developing countries which seem to utilize it more to legitimize development projects rather than to seriously plan for sustainable ecological development. Further, being technology imported from the north, EIA tends to perpetuate the dependence of the South on the North for know-how in the form of expensive expatriate help to conduct the process, and often does not take into account the significance of many cultural realities whether in the form of involvement or expression in public hearings or the importance of cultural sites. These factors notwithstanding, it is not in dispute that the benefits that EIA offer are worth the inconveniences or 'sacrifices' that are being suffered by developing countries now to ensure an environment that will stand

the test of time or the benefit of both present and future generations. Certain modifications are suggested in the implementation of EIA that might reduce on the inconveniences of debt and corruption in third world countries.

5.2 Suggested Recommendations.

5.2.1 The Establishment of a Strong Legal and Institutional Framework for the Efficient Functioning of EIA.

One reason why EIAs are not very successful in developing countries is the absence of a strong and mandatory legal framework in most of these countries.³³¹ Therefore, firstly, and perhaps most importantly, a successful EIA regime in developing countries would benefit from the establishment, implementation and enforcement of a legal and institutional framework. This could be in the form of a specific, all encompassing EIA legislation as is the case of the *Canadian Environmental Assessment Act*, or as EIA regulations to a framework environmental legislation as is the case of the *Environmental Impact Assessment Regulations* to the *National Environment Statute* in Uganda. Complementary to this is the need to strengthen the departments established to enforce EIA by providing adequate funding, training and significant political clout geared at giving them 'teeth'. However, in order for this to happen, there must be sufficient political will and this can be secured through increased lobbying of politicians by sections of the environmental conscious public.

5.2.2 Capacity Building.

Most commentators on EIA in developing countries agree that one of the biggest setbacks to successful EIA is the dearth of local expertise to conduct and review EIAs.³³² Accordingly, the need to focus both on capacity and on training, to create local centers for environmental assessment cannot be underscored. Such training should be targeted at officials in government environmental departments, personnel in environmental consultancies and research institutes.³³³ It would also be more productive if this training were provided in the home country. This is largely because, aside from being cost effective,

training in the home country makes it nearly impossible for trainers to ignore cultural differences that influence the effectiveness of training. [Therefore,... to provide training for those from developing countries, [trainers should] go there.³³⁴

³³¹ C. Wood, *supra* note 180 at 302.

³³² Ahmad & Sammy, *supra* note 78 at 44, C. Wood, *ibid* at 304, Biswas & Agarwala, *supra* note 2 at 243

³³³ Wood, *ibid*

³³⁴ J. F McCormick, "Implementation of NEPA and Environmental Impact Assessment in Developing

Training should also focus on the operational aspects rather than the theory of EIA in order for the whole process to be appropriate for the peculiar circumstances of the jurisdiction where the EIA will be conducted. This will reduce on the use of “inappropriate, imported methodologies for EIA reports which are too academic, bureaucratic, mechanistic and voluminous”³³⁵ and which dilute the effectiveness of the EIA process, in that very few people will have neither the time nor the enthusiasm to read these reports and implement their recommendations, and which contribute to the cost of conducting EIAs since they will require the engagement of a consultant.

5.2.3. EIA Follow up-Monitoring and Audit.

EIA as it is presently practiced in developing countries often ends after receipt of the environmental clearance of the proposed activity and neither the project proponents nor the government officials carry out any post assessment monitoring. The greatest problem with this lies in the reality of prediction inaccuracies. In most major projects it is difficult to predict with complete reliability all potential environmental impacts, their magnitudes and times of occurrence. Furthermore, it is impossible to determine the overall effectiveness of any particular EIA immediately after its completion.³³⁶ Therefore, in order for EIA to contribute effectively to sustainable development, there is need for constant follow-up, monitoring and audit of the process and the project for which it was done, to ensure that the impacts are still those predicted in the EIA, and to ensure that any new unforeseen impacts or developments in the projects are assessed. It is also important to audit the whole process to determine whether all the relevant issues were addressed, and to ensure that the recommendations in the environment impact statement were implemented.³³⁷

5.2.4 Public Participation

This thesis has discussed the importance of public participation as a requirement for EIA. Therefore, for it to realize its full potential, public participation must be effective, that is, must involve to the greatest extent possible the most basic stakeholders in the process- the grassroots communities whose homes, livelihoods, health, culture, right to religious rituals etc, are at stake because of the proposed activity. In cases of illiteracy in the official languages, efforts must be made to make the usefulness,

Countries” in S. G Hildebrand and J. B Cannon (eds) *supra* note 319, quoted by Wood, *ibid*

335 Biswas & Agarwala, *supra* note 2 at 240, Wood *ibid*.

336 Biswas & Agarwala, *ibid* at 241

337 *ibid*.

technicalities, and complexities of the process clear by disseminating the information in local languages.

5.2.4.1 The Role of women.

Especially the roles and involvement of women in the process should be enhanced. In many developing countries today, women are increasingly playing key, influential roles in society but yet still suffer most from the hardships of underdevelopment.³³⁸ *The Arab Declaration*³³⁹ recognized this and advocates for the increased participation of women in environmental decision-making. In many societies too, women and other groups in society such as the youth are not permitted to speak or advocate publicly and yet they may have very practical ideas to put across, while in others yet, in order for decisions to be accepted they must have significant input from the cultural elders. Therefore public participation techniques should take into account these realities and incorporate the views of these groups in the process.

5.2.5. Interdisciplinary Participation.

The observations in this thesis have indicated that for a wholesome EIA process, it is desirable for the process to cover more than biogeophysical impacts. Correspondingly, it is now recognized that people from various other disciplines should be involved in the EIA process in order that all potential impacts are predicted and addressed. Such other disciplines include, economic planners and analysts, sociologists, administrators, cosmologists where necessary, people involved in community development, women-in-development, public health and public information.³⁴⁰

5.2.6 Good Governance.

Effective EIA and good governance are mutually supportive. Good governance has been defined as the ability of government to manage through the civil service, parliamentary functions and the electoral and other participatory processes, the affairs of a nation in a transparent, accountable, responsible, and effective manner.³⁴¹

Aside from stakeholder participation, Kakonge states that well conceived EIA mirrors many of the elements of good governance, namely transparency, sufficient information flows, accountability and

³³⁸ N.C Thanh & D.M Tam, *supra* note 327 at 11

³³⁹ see *supra* note 230 and notes accompanying note 257

³⁴⁰ N. C Thanh & D.M Tam, *supra* note 327 at 11

³⁴¹ J .O. Kakonge, "EIA and Good Governance: Lessons from Africa", (1998) 18 *Environmental Impact Assessment Review*, 289 at 295, quoting from Baroness Lynda Chalker's (the former British Minister for Overseas Development) address on September 18, 1994 at Maseru, Lesotho

responsibility.³⁴² Many of these elements are still not fulfilled in many developing countries. Information relating to environmental impact assessments of projects is not easily accessible and in many cases, particularly when major projects are involved, is treated as confidential information and is not available to members of the public.³⁴³ Thorough EIA may not be done due to the misappropriation of the funds set aside for the process, and other corruption related reasons. Therefore, efforts to decisively tackle the problem of corruption by toughening the laws and institutions that punish such corrupt tendencies, and the appointment of an impartial ombudsman is crucial. Good governance also thrives when judicial and administrative processes are strengthened. The public must have confidence in the judicial and administrative tribunals and judicial officers in order for them to bring litigation before them.

5.2.7 The Role of Development Assistance.

The reality of international development is such that the development assistance feature is not likely to end soon. Therefore, developing countries need to make the best of it and utilize it for its intended purpose. In addition, where conditionalities are attached to the assistance, they should be promoted for their inherent value and not merely be enforced as conditionalities. In the EIA context, there is need to promote EIA more as an environmental management tool with unique opportunities for the realization of sustainable development rather than as a compulsory conditionality without explaining why it is important that it be done.

Leaders of developing countries should ensure that development assistance funds are properly utilized so that the inevitable debt burden can be better rationalized, and so that the expensive process of realizing ecologically sustainable development can be meaningful to future generations, and be worth while as they struggle to pay off the debt. In addition, there must be more emphasis on projects aimed at alleviating poverty and improving human welfare in fields such as education, health, agriculture, housing, and water distribution, which are more relevant to developing countries than industrialization, urbanization and defence. Such strategies might ensure that the conflicts between environment and development become extraneous because the primary cause of the conflict, that is, poverty, will have been addressed.

³⁴² *ibid.*

³⁴³ R. Bisset, *supra* note 284 at 217.

It would be helpful too if development assistance were provided in forms aimed at reducing debt. An example of this form is the debt for nature agreements. These could be used together with, for instance the HIPC Initiatives³⁴⁴ aimed at writing off the debt of highly indebted poor nations. Agenda 21 also requires developed countries and multilateral lenders to take advantage of such initiatives.³⁴⁵

5.2.7.1. Debt for Nature Agreements

Debt for nature agreements are an effort to reduce the dual crisis of massive environmental degradation and catastrophic debt burdens. They have been defined as those transactions where environmental organizations exchange developing country debt for developing country conservation measures. Debt for nature agreements are mechanisms requiring developing country governments, through their own environmental organizations, to set aside conservation mechanisms to be used for sustainable development projects. In exchange, portions of the developing country debt are cancelled.³⁴⁶

A typical debt for nature agreement would involve the developing country government, the central bank in the developing country, a private conservation organization based in the developing country that manages the funds and the agreed upon projects, and an international organization willing to buy a portion of developing country debt. The first step is the decision by a national government or national NGO interested in environmental conservation in a developing country to engage in a swap. This host organization contacts the international organization interested in conservation and willing to buy the developing country debt, which searches for the funds required to purchase the debt on the secondary market.³⁴⁷ The host organization obtains the necessary approvals from the developing country government and central bank. The host organization and international organization then agree on a project to be funded, for instance, in the case of EIA, an EIA of a proposed project. This project must also meet the approval of the developing country government and central bank.³⁴⁸ The swap transaction actually begins when the International organization purchases the host country's debt instruments through a broker on the secondary market. It will then deliver them through the host organization to an intermediary bank in the developing country appointed by the central bank, which

³⁴⁴ Highly Indebted Poor Countries

³⁴⁵ Agenda 21, *supra* note 64 Para 33.16

³⁴⁶ P. Alagiri, "Give Us Sovereignty or Give Us Debt: Perspectives on Debt for Nature Swaps" (1992) 41 Am U. Law Rev. 485

³⁴⁷ S. M. Neal, "Bringing Developing Nations on Board the Climate Change Protocol: Using Debt for Nature Swaps to Implement the Clean Development Mechanism." (1998) 11 Geo. Int'l Env't'l L. Rev. 163 at 171

³⁴⁸ *ibid*

then issues local currency instruments, and deposits these into a trust fund managed by the host organization for the benefit of the conservation project. The host organization will then oversee the conservation project following regulations promulgated by the natural resources authority of the developing country government.³⁴⁹

An example of a swap was done in the Ecuador in 1987. In a complex agreement World Wildlife Fund arranged to purchase \$1 million of Ecuadorian debt for \$354,000.³⁵⁰ The debt was converted to nine local currency bonds with the interest payable to Fundacion Natura, a leading Ecuadorian conservation organization. Fundacion Natura used the funds to finance a broad range of conservation activities in Ecuador national parks. In return, the Ecuadorian government agreed to preserve land and implement land management plans, which included the acquisition of small nature reserves and the training of environmental personnel.³⁵¹

Debt for nature agreements are viewed as steps toward the protection of the global environment. For developing countries, debt for nature swaps help reduce external debt.³⁵² Debt for nature swaps retired US\$ 1 trillion of debt 1987 and 1994 as a result of twenty-six swaps entered into by developing countries.³⁵³ In addition, by converting debt obligations into local currency, developing country governments do not suffer the hurdles associated with repayment of debts in 'hard currency'. However, debt for nature agreements do not come without difficulties and costs.

The loudest criticism comes in the claim of violations of debtor country sovereignty. While technically, the agreement does not violate the sovereignty of the developing country because it would have entered into it voluntarily and no title in local property is ever transferred to the international organization, in reality, it is argued that the arrangement allows the creditor country to control the natural resources of developing countries in that they would dictate the decisions on how they would be managed, and considering , that the international organization or creditor country would have an upper hand in deciding which projects would be funded under the agreement. A stronger criticism perhaps is related to the violation of sovereignty of indigenous peoples, in that when the agreements are concluded, their

³⁴⁹ *ibid* at 172

³⁵⁰ P. Alagiri, *supra* note 346 at 496

³⁵¹ *ibid*.

³⁵² Neal *supra* note 347 at 175

input is never sought.³⁵⁴

This also causes difficulties in enforcement of the agreements in the sense that once the money is handed over, the creditor country has no recourse against the debtor country in case of default since usual enforcement measures may be seen as offending debtor country sovereignty rights.³⁵⁵ Another criticism lies in the inflationary potential of local currencies of developing country nations.

It is perhaps for these reasons that debt for nature swaps have not been very popular economic mechanisms but also because it is easier to secure environmental conservation by mobilizing necessary the funds through direct aid. However, it might be really beneficial to developing countries and their development assistance partners to look into this mechanism not as a foolproof alternative, but as a way out of the catastrophic debt situations they presently face.

In conclusion, while there is still no standard definition of sustainable development, it is widely accepted that the concept requires, among others, the reconciliation of environmental protection and economic development objectives. Within the context of developing countries, obligations to sustainable development require the finding of solutions the problems of inequity, poverty, good governance, and Third World debt, all of which put together, would significantly improve the welfare of present and future generations.

Environmental Impact Assessments are an opportune strategy in this reconciliation process because they are modeled around integrating environmental considerations into economic developmental plans, policies and activities. They also allow for transparency and accountability by requiring the participation of the public in the decision-making process.

The conversion to EIA has not been uniform globally. While in the North, EIA was developed as an environmental and planning tool geared at ecologically sustainable development, and spread as such, its acceptance in the South has not been only in recognition of these attributes, but also due to the

³⁵³ *ibid.*

³⁵⁴ A. Lewis, "The Evolving Process of Swapping Debt for Nature (1999) 10 *Colo J. Int'l. Envtl. L. & Pol'y* 431 at 434

³⁵⁵ *ibid.*

influence of development assistance, which often requires conducting EIA as a condition to its being offered. The result of this relationship in the South are half-hearted attitudes which regard the EIA process mostly as a means to the end of aid acquisition rather than that of sustainable development. In addition, the conduct of EIA in the South, in the same standardized scope and procedure used in the North, alienates acceptance of EIA as appropriate technology for the different and varied circumstances in the South vis-à-vis the North, and these, put together, severely impact the value of EIA in developing countries. Therefore, its worth in the effort for global sustainable development is limited. Furthermore the catastrophic levels of Third World debt are indirectly affected by the EIA-development assistance relationship. It would therefore be necessary for development assistance providers to explore other avenues of promoting EIA implementation, which do not escalate the debt crisis but which, perhaps, actually reduce debt burdens. The debt for nature agreements are discussed in this context as one such option. Moreover, the problem of corruption threatens the realization of the intended objectives of development assistance and exacerbates poverty. It is therefore imperative for the leaders of developing to find a decisive solution to this problem, so that the tradeoffs made for eco-development can be rationalized.

The above solution calls for modifications in the implementation of EIA in developing countries to make it a more homegrown process than it presently is. Impact assessment must therefore be based on certain qualities in order for it to be suitable for the circumstances of developing countries. These include, firstly the existence of a political will to incorporate impact assessment into planning and decision making, simplicity, in the sense of cutting down the process to the basic appropriate and relevant steps, flexibility, that is the ability to adapt to circumstances as necessary, incorruptibility, to ensure the integrity of the process, low cost and inexpensiveness, to address the view that EIA costs exceed the benefits, and the ability for its implementation using the limited available local expertise.³⁵⁶

The methods of public involvement should be inclusive and representative of all samples of society. In addition, environmental impact assessment will continue to be of limited value unless it incorporates measures for post assessment and monitoring and managing the environmental problems as they occur during the life of the project, policy, program or plan.

Therefore, while it is promising for global sustainable development that EIA are being conducted in the

³⁵⁶ C.J. Barrow, *supra* note 90 at 201

North as well as in the South, the existence of those realities in the developing countries provide dull prospects for the useful contribution of EIA to realization of sustainable development in the South. Consequently, changes in the implementation of EIA in developing countries are vital if real progress towards global sustainable development is to be made.

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