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## ZIMBABWE'S ENVIRONMENTAL IMPACT ASSESSMENT POLICY OF 1994: CAN IT ACHIEVE SOUND ENVIRONMENTAL MANAGEMENT?

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### Abstract

*Environmental impact assessment (EIA) constitutes an essential tool for integrating environmental and economic considerations in the planning process. Realising this, the Government of Zimbabwe recently adopted an EIA policy. However, the policy is not yet law and so it is unlikely to have an impact in its present form since no legal compulsion exists for developers and project proponents to follow its mandate. There is an urgent need for a statutory basis to be created for the EIA policy if it is to achieve sustainable management of resources. The article notes that while foreign methodologies are relevant in the search for an appropriate legislative model, they have to be domesticated to suit local environmental problems and priorities.*

AT PRESENT, ENVIRONMENTAL legislation in Zimbabwe is seriously fragmented since several statutes either deal with or are relevant to the management of the environment.<sup>2</sup> To compound the problem, eight different ministries administer this legislation.<sup>3</sup> The unfortunate result of this state of affairs is that decisions concerning development are made by different bodies from those charged with protection of the environment. Obviously, little room is left for overcoming the economic and technological bias inherent in development proposals so as to ensure that environmental concerns are accommodated. One academic commentator has put the dilemma as follows:

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<sup>1</sup> I gratefully acknowledge Jennifer Mohamed-Katerere of the Department of Public Law, University of Zimbabwe, for her useful comments on the initial draft of this article. However, the views expressed in the article remain mine.

<sup>2</sup> D. Henley, 'A Review of Zimbabwe's Natural Resources and Land Use Legislation and Some Options for Implementing an Integrated Approach to Natural Resources to Sustainable Development' (Harare, Ministry of Environment and Tourism, Unpubl., 1990) lists 12 major environmental statutes while *The National Conservation Strategy: Zimbabwe's Road to Survival* (Harare, Ministry of Information, 1987) identifies 18. A recent report prepared for the Ministry of Environment and Tourism, W. N. Chinamora and D. W. Ruhukwa, 'Towards an Environmental Management Act: Review and Revision of Zimbabwe's Environmental Legislation' (Harare, Ministry of Environment and Tourism, Unpubl., 1995) examined 18 statutes having a bearing on the environment.

<sup>3</sup> See Chinamora and Ruhukwa, 'Towards an Environmental Management Act', 4, where a tabular presentation is made of the legislation concerned and the responsible authority.

... policies made and executed by development-orientated administrative bodies often lie at the root of environmental pollution and degradation and depletion of natural resources, problems which have to be addressed by conservation-orientated administrative bodies.<sup>4</sup>

Nonetheless, it is generally considered that an effective planning tool to overcome these shortcomings is Environmental Impact Assessment (EIA) since it strives to ensure that the potential impact of a proposed action upon the environment is identified and disclosed prior to a decision to proceed or desist from the action.<sup>5</sup> In this exercise, a re-ordering of priorities in administrative decision-making becomes inevitable so that:

In each individual case the particular economic and technical benefits of planned action must be assessed and weighed against the environmental costs; alternatives must be considered which would affect the balance of values.<sup>6</sup>

Against a backdrop of environmental legislation bedevilled by fragmentation, the question then is: should Zimbabwe have an EIA policy or legislation on EIA in order to meet the challenges of sustainable development?<sup>7</sup> In fact, in July 1994, the government declared an EIA policy which has since been used on an essentially *ad hoc* and voluntary basis.<sup>8</sup> This contribution will suggest that statutory recognition must be given to the EIA process as a policy *simpliciter* might prove tenuous to enforce.<sup>9</sup>

This is important since EIA plays a crucial role in the development policy of any country especially Zimbabwe. EIA is not meant to stifle development but to study the effects of a proposed action on the environment and to compare the various alternatives that are available for any project or programme. A trade-off is eventually achieved so that adverse environmental impacts may be reduced at higher project cost or economic benefits enhanced at some environmental cost. Therefore the

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<sup>4</sup> M. A. Rabie, 'A new deal for environmental conservation: Aspects of the Environmental Conservation Act 73 of 1989' *THRHR* (1990), LIII, (ii), 5.

<sup>5</sup> See R. E. Munn (ed.), *Environmental Impact Assessment* (New York, John Wiley, 1979); M. A. Rabie, 'Disclosure and evaluation of potential environmental impact of proposed governmental administrative action' *THRHR* (1976), 40; and M. A. Rabie, 'Strategies for the implementation of environmental impact assessment in South Africa' *SA Public Law* (1976), 19.

<sup>6</sup> *Calvert Cliff's Co-ordinating Committee vs Atomic Energy Commission* 449F 2d (DC Cir 1971).

<sup>7</sup> The goals of sustainable development and some strategies for meeting them are more fully dealt with in the World Commission on Environment and Development's *Our Common Future* (New York, O.U.P., 1987).

<sup>8</sup> See *Environmental Impact Assessment Policy*, July 1994.

<sup>9</sup> However, the government has already recognised the need for legislation on EIAs. The current policy is a pre-legislation trial so that problems experienced in practice may be included in the legislation when it is drafted. Nevertheless, even during this trial phase, if developers were to ignore the mandate of the policy, there is no enforcement mechanism.

perception that EIA is a bureaucratic stumbling block in the path of development is misconceived. In fact EIA is a pragmatic tool for development planning and no reasonable person would condemn such a tool, akin to economic analysis, simply because it shows a particular project to be unsound.<sup>10</sup> Thus, if given the necessary legislative teeth, EIA could play a significant role in the development process in Zimbabwe since the decision-maker is, at an early stage, guided away from potential disaster.

It is pertinent first to examine the current planning and environmental legislation so as to identify whether any EIA mechanism exists. Then, the EIA policy will be looked at and an evaluation made on the need for a legislative framework for that policy.

### CURRENT PLANNING AND ENVIRONMENTAL LEGISLATION

#### Planning law

An examination of the main planning statute, the Regional, Town and Country Planning Act,<sup>11</sup> compels the conclusion that it does not pay particular regard to the environment.

While disclosing the objective of planning of regions, districts and local areas so as to conserve and improve the 'physical environment', it does not specifically urge decision-makers to take account of environmental factors. For example, no provision is made for EIA in the preparation of regional, master and local plans, or any town-planning scheme, zoning or subdivision made under the Act. Thus, in various zones, certain uses of land and development are freely permitted while some require the 'special consent' of the relevant planning authority. Nevertheless, special consent has been judicially defined to mean 'no more than the consent required for putting property to a use to which it cannot be put in the zone in which it is situated without such consent'.<sup>12</sup>

Yet, there are certain provisions in the planning law which hold considerable promise for environmental protection and lend themselves very well to implementation of EIA. The relevant Minister is, for instance, empowered to 'make a special order applicable to a specified area' and to impose 'conditions or limitations subject to which any development is permitted'.<sup>13</sup> This opens the possibility for environmental evaluation to be

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<sup>10</sup> Y. J. Ahmad and G. K. Sammy, *Guidelines to Environmental Impact Assessment in Developing Countries* (London, Hodder and Stoughton, 1985).

<sup>11</sup> Act No. 22 of 1976. There are numerous regulations, master plans and approved schemes made or adopted in terms of this Act, in respect of various areas in Zimbabwe.

<sup>12</sup> *City of Salisbury vs Sagit Trust Limited* 1981 ZLR 479 at p. 488.

<sup>13</sup> Section 26 (2) (a) and (b).

done before development in sensitive areas is allowed. In fact, the view expressed here is vindicated by a 1982 amendment to the Regional, Town and Country Planning Act,<sup>14</sup> which introduced 'scenic beauty areas' in the definition section.<sup>15</sup> The Minister became entitled, where he considered that development in an area by reason of its scenic beauty required to be controlled, to declare such an area to be a scenic beauty area.<sup>16</sup>

However, in the absence of a statutory compulsion to carry out EIAs these provisions largely remain of theoretical significance. At the moment, whether a particular development will not be carried out in an environmentally undesirable area is a matter left to the relevant Minister's sole discretion. It is therefore imperative for EIA procedures to be built into the Regional, Town and Country Planning Act. This is urgent because, due to the broad nature of the concept 'environment',<sup>17</sup> planning laws may direct attention at some aspects of the environment, while negating others, resulting in an undermining of the entire conservation effort. Yet planning law should regulate land-use with the purpose of ensuring the health, safety and welfare of society having regard to socio-economic factors.<sup>18</sup> This was described elsewhere as 'environmental land-use planning', which was defined as 'the physical planning of regions, districts and local areas that ensures the prevention of environmental pollution and conservation of natural resources'.<sup>19</sup>

Because of the inadequacies of our planning law, it has been observed that the Regional, Town and Country Planning Act 'requires extensive amendment to capture the goals, objectives and values of sustainable development'.<sup>20</sup> However, what should be done is not so much extensive amendment of the Act, but rather the provision of a statutory foundation to the EIA policy so that it binds all decision-making having an impact on the environment.

A further shortcoming in the planning law is to be found in the Rural District Councils Act<sup>21</sup> which, like the Regional, Town and Country Planning Act, does not provide for EIA when district development plans are drawn. It is essential that EIA permeates decision-making at this stage of planning

<sup>14</sup> Regional Town and Country Planning Amendment Act, No. 9 of 1982.

<sup>15</sup> Section 2 (1).

<sup>16</sup> Section 2 (6).

<sup>17</sup> This has been discussed elsewhere. See W. N. Chinamora, 'Justifying the designation of Churu Farm: An environmental management perspective' *Legal Forum* (1994), VI, (iv), 46.

<sup>18</sup> J. Van Wyk 'Into the 21st century with the reform of planning law' *THRHR* (1991), LI, 283.

<sup>19</sup> See Chinamora and Ruhukwa, 'Towards an Environmental Management Act', 88-89.

<sup>20</sup> Government of Zimbabwe, 'Environmental Assessment in Zimbabwe: Policy Position Paper', July 1994, 10.

<sup>21</sup> Act No. 8 of 1988.

if these pieces of legislation are to fulfil meaningfully their function of planning land use.

In addition, there is little scope for public participation in the decision-making process, even though the public bears the consequences of those decisions. A notable example is the Rural District Council Act,<sup>22</sup> which establishes a District Development Committee to assist in the important function of preparation of district development plans.<sup>23</sup> However, the committee is comprised of the chairperson of all council committees, the chief executive officer of the council, representatives of the Zimbabwe Republic Police, Zimbabwe National Army, the President's Office and all sectoral ministry departmental heads.<sup>24</sup> Such a composition is, as has been noted elsewhere,<sup>25</sup> not representative of district inhabitants and more biased towards sectoral ministry representation. Yet, because EIA is a mechanism for identifying, assessing and communicating the environmental consequences of projects, plans or programmes so as to aid decision-making, public participation is a necessary ingredient.<sup>26</sup>

### Conservation law

The principal resource conservation and utilisation statute, the Natural Resources Act,<sup>27</sup> also does not provide for EIA when decisions affecting the environment are made. For instance, the Act provides that no large dam may be constructed unless the Natural Resources Board has reported to the relevant Minister on 'the state of the catchment area of such large dam'.<sup>28</sup> Similarly, no soil conservation project may be embarked upon unless a report on the effect of the project on the natural resources of the area has been furnished by the Board to the Minister.<sup>29</sup> While these provisions are encouraging from an environmental perspective, instead, an EIA should be undertaken for all projects likely to have a significant impact on the environment. This suggestion is underscored by the fact that, the Water Act<sup>30</sup> as presently constituted introduces little control

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<sup>22</sup> *Ibid.*

<sup>23</sup> Section 60 (5).

<sup>24</sup> Section 60 (1).

<sup>25</sup> P. N. Bradley and K. McNamara (eds.), *Living with Trees: Policies for Forestry Management in Zimbabwe* (Washington D.C., World Bank, 1993), 177.

<sup>26</sup> Munn (ed.), *Environmental Impact Assessment*, 4; A. Lucas, 'The Utah controversy: A case study of public participation in pollution control' *Natural Resources Journal* (1973), XIII, 36.

<sup>27</sup> Chapter 150. However, it is debatable whether in fact this statute is the main resource conservation law since it does not really set out general principles of resource formulation. Other pieces of legislation dealing with natural resource conservation are the Water Act No. 41 of 1976 and the Forest Act, Chapter 125.

<sup>28</sup> Section 4 (2).

<sup>29</sup> Section 14 (3).

<sup>30</sup> Act No. 41 of 1976.

over the construction of dams. No provision is made for submission of a report on 'the state of the catchment' when structures to keep water for stock watering or domestic purposes are constructed.<sup>31</sup>

Hence, it is doubtful whether, even if such a report is compiled, this would comprise an adequate mechanism to guarantee protection of the environment. First, such a report is not an Environmental Impact Report (EIR) and merely describes the state of the catchment. Secondly, when furnished with such a report, the Minister is merely required

to inform the appropriate Minister, or any other person responsible for the dam or project, of any conservation problems identified, the remedial measures necessary and the apportionment of costs as recommended in the report.<sup>32</sup>

It would seem that once the report has been prepared and the Minister has advised the proponent of the contents thereof then *cadit questio*. Regrettably, no provision has been made for the Minister to make sure that the recommendations in the report have been complied with.

### **Regulatory provisions**

In most statutes, particularly those which are germane to the management of the environment, regulatory provisions are those pertaining to licensing and other authorisation of certain action.<sup>33</sup> Unfortunately, existing environmental legislation does not explicitly require the regulated body to conduct an EIA as part of the procedure of application for the required licence. For example, the Fertilizer, Farm Feeds and Remedies Act,<sup>34</sup> which, *inter alia*, provides for the registration of fertilizers, farm feeds, sterilising plants and certain remedies,<sup>35</sup> does not incorporate EIA in applications for registration. The Act provides, however, that the registration should 'not be contrary to the public interest',<sup>36</sup> which could be interpreted to include the environmental public interest. Nevertheless, it would have been desirable to include, as the Americans did in 1972, the requirement that such fertilizer, farm feed, remedy or sterilising plant 'will perform its intended function without unreasonable adverse effects on the environment'.<sup>37</sup>

<sup>31</sup> Section 54.

<sup>32</sup> Section 14 (4) of Natural Resources Act.

<sup>33</sup> The term 'regulatory' has been used more for convenience than to suggest that the provisions in the previous sections are not regulatory. In this context its use has been limited to permit and licence provisions.

<sup>34</sup> Chapter 111.

<sup>35</sup> See Preamble to Act.

<sup>36</sup> Section 4 (2) (a) (II).

<sup>37</sup> See the United States Federal Insecticide, Fungicide and Rodenticide Act of 1947 as amended.

The Atmospheric Pollution Prevention Act,<sup>38</sup> despite purporting in its long title 'to provide for the prevention and control of the pollution of the atmosphere', does not require an applicant for a registration certificate to undertake an EIA prior to the grant of the authority.<sup>39</sup> However, there is some scope for including EIA in decision-making since the Chief Health Officer is enjoined to satisfy himself that:

the specified process in respect of which the application is made may reasonably be permitted to be carried on, having regard to the nature of that process, the character of the locality in question, the purposes for which other premises in the locality are used, whether the carrying on of the process would conflict with any town planning scheme in operation or in the course of preparation in the locality and any other considerations which, in his opinion, have a bearing on the matter.<sup>40</sup>

It should, nonetheless, be specifically stipulated that an EIA be undertaken and a report of the findings therefrom be submitted with an application for a registration certificate. The present regulatory scheme is ineffective as it is highly discretionary: an EIA requirement would considerably eliminate the arbitrariness inherent in the exercise of administrative discretion.

Furthermore, it is disappointing that no EIA is mandated where exemptions from the requirement of authorisation are granted. For instance, the Water Act makes it an offence for anyone to discharge effluent in a watercourse unless authorised by a permit which prescribes standards to be complied with.<sup>41</sup> However, the relevant Minister is empowered, after consultation with the Minister of Health and Child Welfare, to grant exemptions from compliance with stipulated standards.<sup>42</sup> Yet the actions of persons and bodies in respect of which they are exempted from the regulatory requirement may have, and invariably do have in practice, a detrimental environmental impact.

From the above examples, it is evident that the existing legislative machinery does not ensure that the potential environmental implications of proposed actions are placed before decision-makers to enable the matter to be weighed carefully against other relevant considerations. Where an environmental evaluation is performed, it is more incidental than through deliberate legislative compulsion. This is, to say the least,

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<sup>38</sup> Chapter 318.

<sup>39</sup> Such an application is made to the Chief Health Officer in terms of section 7 (1) of the Act.

<sup>40</sup> Section 7 (2) (a) (ii).

<sup>41</sup> Section 101 (1) and (2).

<sup>42</sup> Section 101 (3) (a).



unsatisfactory from the perspective of sustainable development, or rather 'sustainable management',<sup>43</sup> of the resources.

### THE EIA POLICY IN ZIMBABWE

Encouraging steps were taken by the Government of Zimbabwe first, in the form of a White Paper circulated by the relevant ministry inviting public input on a proposed environmental assessment policy.<sup>44</sup>

Secondly, following the consultation process engendered by the White Paper, an EIA policy has been determined as indicated above. Finally, a team of environmental law consultants was contracted to review the existing statutes dealing with, or having an impact on, the environment and, *inter alia*, to suggest how the EIA policy could be given a statutory basis.<sup>45</sup> This has come in the wake of the adoption of a National Conservation Strategy, one of whose mandates to the Ministry of Environment and Tourism was to review all relevant legislation and recommend adjustments necessary to bring them into line with the strategy for an integrated approach to management of the environment.<sup>46</sup>

At the moment, however, environmental impact assessment is principally done unsystematically on the strength of the EIA policy which, sadly, has no force of law.

### THE CASE FOR EIA LEGISLATION

Needless to say, it is undesirable for sound environmental behaviour to be enforced by a policy which has no legislative basis as has been pointed out by academic commentators.<sup>47</sup> One critic has put the case as follows:

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<sup>43</sup> A concept defined in section 5 (2) of New Zealand's Resources Management Act of 1991 in the following terms: 'In this Act, "sustainable management" means the use, development, and protection of natural and physical resources in a way or at a rate which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while

(a) Sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations;

(b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) Avoiding, remedying or mitigating any adverse effects of activities on the environment.'

<sup>44</sup> Prospectus for Environmental Policy in Zimbabwe: Public Background and Discussion Paper' (Sept. 1993).

<sup>45</sup> The team comprises the present author and D. W. Ruhukwa, a Law Officer in the Legal Advice Section of the Attorney-General's Office.

<sup>46</sup> *The National Conservation Strategy*.

<sup>47</sup> Rabie 'A new deal for environmental conservation', 8, 10-12; M. A. Rabie and D. Van Zyl Smit, 'The nature and effect of legislative and quasi-legislative administrative Acts' *SA Public Law* (1988), 193; (1989), 174. See also R. Fowler, 'Legislative bases for environmental impact assessment' *EPLJ* (1985), 11, 200.

Such policy statements are more or less expressions of government concern for environmental degradation and the need for resource conservation and environmental protection . . . Consequently they are not backed by appropriate and effective administrative or legislative actions capable of translating the policy statements into concrete executable decisions.<sup>48</sup>

While the declaration of an EIA policy is a promising development, the enforcement of a policy without the coercive force of law may be attenuated. It is, accordingly, imperative for there to be legislation that makes it mandatory for public and private sector development proposals, programmes and projects to consider the consequences on the environment.<sup>49</sup>

Given the diffuse nature of environmental law in Zimbabwe where there is a wide range of statutes and ministerial regulations dealing with natural resource conservation,<sup>50</sup> it is imperative for the EIA policy to have a statutory framework. Coupled with fragmentation is a multiplicity of institutions administering these statutes. The problem this creates has been highlighted as follows:

The autonomy and independence of government departments have served further to exacerbate the problem, bringing about a situation in which administrative bodies responsible for the making of policy decisions have become institutionally separated from those having to attend to the effects of such decisions.<sup>51</sup>

Put differently, it is not possible in a well-organised constitutional system for the Minister of Environment and Tourism, for instance, to undertake actions relating to another minister's portfolio, however much he might be environmentally motivated.

While policy guidelines may be enforced internally through the remedies for administrative insubordination, they cannot be enforced against the general public as they lack legal foundation.<sup>52</sup> Even statutory bodies like the Zimbabwe Investment Centre (ZIC) have no compulsion, in terms of the statutes creating them,<sup>53</sup> to take into account environmental

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<sup>48</sup> F. S. Ebisemijl, 'Environmental impact assessment: Making it work in developing countries', *Journal of Environmental Management* (1973), XXXVIII, 247, 250.

<sup>49</sup> The Zimbabwe EIA policy document emphatically states: 'Both public and private sector development projects must be subject to EIA.'

<sup>50</sup> It is added that, depending on whether the concept 'environment' is given a limited or extensive meaning, an even greater number than given by Henley, *A Review of Zimbabwe's Natural Resources and Land Use Legislation; The National Conservation Strategy*, or Chinamora and Ruhukwa, 'Towards an Environmental Management Act' could be identified.

<sup>51</sup> Rabie, 'A new deal for environmental conservation', 6.

<sup>52</sup> *Ibid.*, 8.

<sup>53</sup> Zimbabwe Investment Centre Act, No. 16 of 1992.

criteria when evaluating project proposals. Besides, any implied powers can be invoked only if they are consistent with the body's stated objectives. Thus, as a parastatal organisation, ZIC is expected by the Parastatals Commission (Repeals and Consequential Provisions) Act<sup>54</sup> to make profit, an objective which could negate environmental considerations.

Furthermore, certain development projects have a transnational environmental impact. For example, the proposed Matabeleland-Zambezi Water Project is intended to solve the drought problem in Matabeleland by piping water from the Zambezi River. Such a project has to take the local environmental implications into account, as well as the interests of other riparian states.<sup>55</sup> In short, municipal legislation, administrative policies and projects cannot be adopted and/or implemented without accommodating their international dimension. It would not be compatible with international comity for Zimbabwe's environmental conservation policy to be found wanting.

Finally, with the land re-organisation programme in progress, it is urgent for the law to take cognisance of the impact of such land tenure arrangements on the environment. The Government's social engineering goals may not be at confluence with environmental conservation.<sup>56</sup> These considerations suggest the need for the EIA policy to be imbued with coercive force. It is hoped that this will only be a matter of time.

This coercive force, of course, would have to be buttressed by appropriate institutional arrangements for enforcing EIA procedures. A separate environmental agency would have to be set up and tasked to perform reviews of EIA reports prepared by project proponents (be they private enterprise or state agency). Such a reviewing body would have to be multi-disciplinary in order to ensure that there is cross-sectoral coordination. In fact, it has been suggested elsewhere that an Environmental Commission should perform this function.<sup>57</sup>

## CONCLUSION

The EIA policy has been used on a voluntary basis since its adoption in July 1994. Unfortunately, academic comment has rightly noted that today

<sup>54</sup> Act No. 29 of 1990.

<sup>55</sup> See T. Nyapadi, 'Drawing water from the Zambezi River raises international legal issues', *The Sunday Mail*, 24 Oct. 1993; T. Maluwa, 'Towards an internationalisation of the Zambezi River regime: The role of international law in common management of an international watercourse' *CILSA* (1992), XXV, 20. The considerations addressed by the authors could have been the reason for the *Agreement on an Action Plan for the Environmentally Sound Management of the Common Zambezi River System* (1987) between Zimbabwe, Botswana, Mozambique and Tanzania.

<sup>56</sup> In this regard, see C. O'Reagan, 'Informal housing, crisis management and the environment' *SAPL* (1993), VIII, 92.

<sup>57</sup> Chinamora and Ruhukwa, 'Towards an Environmental Management Act', 116-117.

pollution control cannot be achieved through reliance upon the voluntary efforts of polluters.<sup>58</sup> The very fact that Government is investigating ways of giving the EIA policy legislative teeth is a vindication of this observation.

The experience of other countries will be helpful in identifying an appropriate EIA legislation for Zimbabwe. Nevertheless, wholesale imitations may not be ideal for a developing country such as ours. Hence a model will have to be fashioned which ensures that its implementation does not place onerous weight on the priorities and resources of Zimbabwe as a third world country.

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<sup>58</sup> Rabie, 'Legal remedies for environmental protection' *CILSA* (1972), V, 247.