Orange-Senqu River Basin

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Governments of Botswana, Lesotho, Namibia and South Africa

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Transboundary EIA Guidelines for ORASECOM

Scoping Paper

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Scoping Paper

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1. Context

The carrying out of an Environmental Impact Assessment (EIA) prior to the implementation of (large-scale) projects is a procedure required by most countries' legislation and a standard requirement for grants or loans from most development agencies and multilateral development banks. Over the past few decades EIA has become one of the most developed fields of environmental law and practice and national EIA legislation and practice, in many countries globally has become increasingly sophisticated.

As part of the development of EIA law and practice the aspects of adequately accounting for transboundary and cumulative impacts have increasingly been made an integral part of EIA procedures. A growing number of national EIA legislation now requires the consideration of transboundary and cumulative impacts. However, in practical terms it is often difficult to adequately assess potential transboundary impacts of a project within the scope of national legislation and with the information available nationally. Regularly, the assessment of potential transboundary impacts requires cooperation between the state planning and approving the project and potentially affected states. This has led to the development of procedures for EIA in a transboundary context. Globally the most significant legal instrument in this regard is the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (so-called Espoo Convention), which establishes an elaborate legal regime for EIAs in a transboundary context. While open to non-European signatories the Espoo Convention is an instrument that to date is primarily used by European states. Similar legal frameworks have not emerged in other regions, including the Southern African Development Community (SADC).

The Orange-Senqu Basin States have recognised the need for developing procedures for EIA in the context of the development and management of the Orange-Senqu River Basin and lend their political support to the development of such.

In this context this scoping paper undertakes a brief review of the current EIA regime in the four basin States with respect to the consideration of transboundary and cumulative impacts, thereby highlighting differences and commonalities between the respective national legal instruments. Likewise, the paper discusses existing regional approaches to EIA in a transboundary context with a view of drawing lessons for establishment of such guidelines for the Orange-Senqu River basin. The paper then discusses the procedural and substantive requirements for EIA in the context of the notification obligation set forth in the ORASECOM Agreement, the Revised SADC Protocol on Shared Watercourses and the UN-Convention on the Non-navigational Uses of International Watercourses. The paper concludes with proposing a possible approach for developing guidelines for EIA in a transboundary context for ORASECOM.

2. Transboundary Impacts in National EIA

2.1 EIA Considerations

The primary rules for conducting an EIA in any country are the respective EIA legislation, regulations and guidelines applicable in that jurisdiction. It is necessary to clarify at this stage the term "transboundary EIA". Most countries legislation and practitioners recognize that an EIA needs to broaden its scope if transboundary impacts are likely to occur. The key to this is to ensure that the Terms of Reference (ToR) for the EIA stipulate the need for transboundary assessment (UNEP, 2007). The term transboundary EIA is commonly used in cases of large-scale projects such as dams that are likely to have impacts on other countries and where these countries jointly participate in the EIA. Transboundary EIA is thus not a separate assessment type, but refers merely to the geographical scope of the assessment. the Espoo Convention, which is the most prominent legal instrument concerning the matter, more accurately uses the term "EIA in a transboundary context" instead of transboundary EIA. However, these terms are effectively used interchangeably.

The starting point for an analysis of the role and applicability of guidelines for EIA in transboundary context is therefore an assessment of the applicable national legislation. Questions guiding this assessment are:

- Does the national EIA legislation require the consideration of transboundary impacts?
- Does the national EIA legislation prescribe any procedures for the assessment of transboundary impacts (directly in the legislation or by reference to an international instrument)?
- If the national EIA legislation does not prescribe procedures, does it permit the (case specific) adoption of jointly agreed external sets of rules for a particular transboundary EIA?

2.2 Botswana

In 2005, the Government of Botswana enacted the Environmental Impact Assessment (EIA) Act, which provides the legal framework for assessing the potential effects of planned developments. The Act further regulates how to determine and to provide mitigation measures for effects of activities that have a significant adverse impact on the environment, and how to put in place a monitoring and evaluation process for the environmental impacts of implemented activities. Specifically the Act:

- Designates the Department of Environmental Affairs as the competent authority to administer EIAs.

- Provides for the development of regulations, listing activities for which an EIA is mandatory, the locations that may be environmentally sensitive and determining the thresholds with respect to all listed activities.
- Outlines the process of conducting an EIA in Botswana, from submitting a preliminary assessment to obtaining an authorization from the competent authority to commence the project.

The Act makes specific reference to the consideration of transboundary impacts. Section 10(1) (n) requires a description of the potential transboundary environmental impacts of an activity to be included in the Environmental Impact Statement (EIS). Section 28 provides some procedural guidance in stating that where a proposed activity is likely to have a significant adverse environmental impact in another country, the Ministers of Environment and Foreign Affairs must be informed, and the latter will send the TOR and the EIS to the counterpart in the potentially affected country.

The applicable procedure for the adequate consideration of transboundary impacts is further elaborated in the Botswana EIA Guidelines. The Guidelines contain a list projects that are classified into the Mandatory Lists for which EIA is necessary regardless of the location. Under the Mandatory list, projects are categorised into the type (nature) and the size (area of extend). By their nature, the implementation of such projects is deemed to cause significant environmental impacts and is likely to cause transboundary impacts.

Botswana sets two distinct scenarios for assessment of transboundary impacts:

- The activity is recognized as national and the neighbouring countries do not wish to take part directly in the EIA process, even though its impact extends beyond the national border to their territories, preferring to exercise their right as interested and affected parties only. Under this scenario, the country of origin will share information on its EIA process in a transparent manner and take the concerns of its neighbours into consideration.

- Neighbouring countries, recognising that the proposed activity's impact will affect them too, may decide to take part in the EIA process directly with the proponent country. In this case, the EIA will be carried out under negotiated terms based on a common international convention to which all the parties are signatory e.g. the Revised Protocol on Shared Water Resources or the respective national EIA processes.

The Guidelines further prescribe that where a project is likely to have an impact outside the Botswana borders, the scoping should reflect this by identifying and consulting interested and affected parties in the neighbouring countries. Department of Environmental Affairs (DEA) will to make contact with counterparts in the neighbouring countries. While public consultations in the manner prescribed in the EIA Act may not be feasible in the affected countries, it may be possible to obtain their input via the counterparts of DEA in those countries.

2.3 Lesotho

In line with Section 36 of the Constitution of Lesotho that provides for environmental protection, Lesotho's first major environmental policy document was the National Environment Action Plan (NEAP) adopted in 1989. The subsequently adopted National Environmental Policy (NEP), 1998 focuses on the social and economic dimensions, the management and conservation of natural resources, and the promotion of community participation. One of the aims of the NEP is to cooperate in good faith with other countries in the Southern Africa Development Community (SADC) region, in Africa, and with international organisations and agencies to achieve optimal use of transboundary shared natural resources and "effective prevention or abatement of trans-boundary environmental impacts".

In terms of legislation, the Environment Act was passed, which required that EIAs be carried out to mitigate the adverse impacts of socio-economic development. Despite the fact that this Act was never formally gazetted all government institutions and environmental practitioners in Lesotho effectively operated under this legislation until the proclamation of the new Environment Act, 2008. In terms of the new Act the former National Environment Secretariat (NES) is now known as the Department of Environment (DOE) and this department is responsible for administering EIAs. The aim of the Environment Act, 2008 is to provide a framework environmental law for the implementation of the National Environment Policy.

The application for an EIA license in Lesotho is based on the requirements of the Environment Act (EA) 2008. A list of types of projects and activities that are subject to EIA under Section 19 (1) of the Act is contained in the First Schedule to the Act. The EIA Guidelines that were promulgated in 2009 in elaboration of the requirements of the Act define eleven steps to be taken in carrying out the EIA process. They are applicable to all types of projects, whether initiated by the public sector (Government ministries) or the private sector, for which EIA is or may be required.

Transboundary impacts of the activity are provided for in Section 21 (5) of the Environment Act 2008, which lists the content of the Environmental Impact Statement (EIS). The section states that "The environment impact statement shall provide an indication of whether the environment of any other state or area beyond the limits of national jurisdiction is likely to be affected and the mitigation measures to be undertaken. However, the EIA guidelines do not provide details on how counterparts in other states will be engaged in undertaking the EIA and how the potential transboundary impacts have to be assessed.

2.4 Namibia

Environmental protection is a constitutional requirement in Namibia. In giving effect to the constitutional mandate the Government of Namibia approved the Environmental Assessment (EA) Policy in August 1994, published as "Environmental Assessment Policy for Sustainable Development and Environmental Conservation". It provides that all policies, projects and programmes should be

subjected to Environmental Assessment (EA) procedures. The Policy recognises that EAs seek to ensure that the environmental consequences of development projects and policies are considered, understood and incorporated into the planning process, and that the term environment is broadly interpreted to include biophysical, social, economic, cultural, historical and political components. The policy defines the required steps for an EIA, the required contents of an EIA report, the need for post-implementation monitoring and the system of appeals.

All these aspects have subsequently been incorporated into the Environmental Management Act (EMA) of 2007, which establishes general principles for the management of the environment and natural resources and promotes the coordinated and integrated management of the environment and sets out responsibilities in this regard. Furthermore, it is intended to give statutory Environmental Assessment Policy, and to enable the Minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions, and to provide for associated matters. The EMA defines EIA as a process of identifying, predicting, and evaluating the significant effects of activities on the environment, as well as the risks and consequences of activities and their alternatives and options for mitigation with a view to minimizing negative impacts, maximizing benefits, and promoting compliance with the principles of environmental management.

Following the promulgation of the EMA, Namibia has developed draft "Regulations for Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA)" and "Draft Procedures and Guidelines for Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP)". The principles and objectives of the draft regulations are based on Environmental Management Act 2007. Part III of the draft regulations stipulates the procedure to be followed when undertaking the EIA. While the regulations have not yet been formally gazetted they will be used for this analysis assuming their coming into force in the near future.

Where the proposed activity is likely to have significant effects on the environment of another State an environmental report will be made available to the counterparts in the other state where impacts are envisaged. The project shall not be determined until the consultations with the neighbouring State have been concluded. The draft regulations provide for Namibia entering into consultations with the neighbouring state concerning:

- The likely transboundary environmental effects of implementing the project; and
- The measures envisaged to reduce or eliminate such effects.

The draft Regulations do not provide detail on how transboundary impacts are to be assessed and how counterparts in potentially affected States are to be consulted.

2.5 South Africa

Environmental protection is a constitutional requirement in South Africa. Section 24 of the Constitution affords everyone the right to an environment that is protected and not harmful to their health and well-being. The National Environmental Management Act of 1998 (NEMA) was promulgated to give effect to that provision. The Act repealed most of the Environment Conservation Act (No. 73 of 1989). Subsequently, NEMA has been amended on several occasions by the National Environmental Management Amendment Act of 2003, the National Environmental Management Second Amendment Act, No 8 of 2004, which came into operation on 7th January 2005 and amends section 24 of NEMA and the NEMA Amendment Act, No 62 of 2008, which came into effect on 1st May 2009. NEMA establishes governmental institutions and processes to ensure proper environmental protection. The Act also establishes environmental management principles which apply to all actions that may have an effect on the environment.

Generally, an Environmental Authorisation is required in South Africa before a developer can undertake activities contained in so-called listing notices. Regularly the need for an Environmental Authorisation is accompanied by the need for an additional operating license for the specific activity. These licenses are issued by the respective Government Department in charge of the respective matter (e.g. Department of Water Affairs, Department of Minerals etc.). In order to obtain and Environmental Authorisation for listed activities the conducting of an EIA is required.

The EIA needs to be carried out in accordance with the EIA Regulations (2010) of the Act, which identify activities that may have a substantial detrimental effect on the environment. The identification of these activities results in the activity being prohibited unless the competent authority has granted a written authorisation after the consideration of an environmental impact assessment or basic assessment. Three listing notices have been published in conjunction with the new regulations:

Listing notices (1) stipulates the activities requiring a basic assessment report (BAR). These are typically activities that have the potential to impact negatively on the environment but due to the nature and scale of such activities, these impacts are generally known.

Listing notice (2) identifies the activities requiring both scoping and an Environmental Impact Report (EIR). These are typically large scale or highly polluting activities and the full range of potential impacts need to be established through a scoping exercise prior to it being assessed.

Listing notice (3) contains activities that will only require an environmental authorisation through a basic assessment process if the activity is undertaken in one of the specified geographical areas indicated in that listing notice. Geographical areas differ from province to province. An example of such a listing will be cell phone masts.

No explicit provisions regarding Transboundary Environmental Impact Assessments are found in both the NEMA and the 2010 EIA regulations. Most development project EIAs must be submitted to the responsible Provincial Departments, as the competent authorities, with the exception of the

following instances, when the Minister takes on the role of the competent authority when the project has implications for national environmental policy or international commitments or relations (e.g. if the project will impact on the SADC Shared Water Resources Protocol or Ramsar obligations); or if the project will affect more than one province or traverse international boundaries (e.g. if a dam for a hydro-electric scheme were to flood areas in two or more provinces The South African regulations do not provide detail on how to determine transboundary impacts and how to consult with relevant stakeholder in the potentially affected countries.

2.6 Key Findings

All four basin States have developed national environmental legislation and recognise the need for undertaking EIAs. Likewise, the need for assessing transboundary impacts is recognized in the legislation of all basin States. However, neither of the countries has in their legislation or accompanying regulations or guidelines developed detailed procedures for the assessment of transboundary impacts and the consultation of stakeholders in the potentially affected states.

Only the new Botswana EIA Guidelines provide slightly more detailed guidance regarding the contacting of stakeholders in potentially affected states and designate the DEA as the responsible authority (through the Ministers of Environment and Foreign Affairs) to contact the other state(s) and ensure consultation of stakeholders in those states at the same level as is required for a national EIA (in Botswana). Whereas the Botswana guidelines go somewhat beyond the scope in which the other three countries' legislation elaborates the procedure for the assessment of transboundary impacts, it still lacks the desired degree of procedural clarity and definition of substantive content of an EIA in a transboundary context.

2.7 Good Practice

In terms of good practice for EIA in a transboundary context, the above-mentioned Espoo Convention is by far the best example of legislative practice internationally. Likewise, the Convention's provisions have been applied in numerous transboundary EIAs between the Parties of the Convention and thus lead to a significant amount of successful practice for EIA in a transboundary context.

The Convention itself, in its appendices that are an integral part of the Convention, provides detailed criteria for the assessment of transboundary impacts, namely a list of activities for which a transboundary EIA is required (Appendix I), the content of the EIA documentation (Appendix II), general criteria for the determination of the environmental significance of activities not listed in appendix 1 (Appendix III), detailed inquiry procedures (Appendix IV), objectives for post-project analysis (Appendix V), elements for bilateral and multi-lateral cooperation (Appendix VI) and arbitration procedures (Appendix VII).

Supporting the implementation of the Convention are numerous guideline documents for practical application. Other examples of multi-national efforts to develop guidelines for EIA in a transboundary context exist. These include for example the Mekong River Commission's "Guidelines on implementation of the procedures for notification, prior consultation and agreement", which to some extent deal with the content of EIA for an adequate notification, the Nairobi Convention "EIA guidelines for impact assessment in the Western Indian Ocean Region" and the East African Community "Transboundary environmental assessment guidelines for shared ecosystems in East Africa". Neither of these instruments is legally binding as the Espoo Convention and their application is currently very limited they are nevertheless worth to be consulted for guidance in the process of developing Tb-EIA Guidelines.

While in Southern Africa formal guidelines for EIA in a transboundary context are still lacking, there are some examples of emerging good practice for EIA in a transboundary context. One such example is the jointly conducted EIA between Angola and Namibia for the Epupa Falls Hydropower project on the Cunene River, which is presented in the following case study text box.

Epupa Falls Transboundary EIA – Case Study

The Epupa Dam project was planned as a joint effort between Angola and Namibia to develop a hydroelectric scheme on the Kunene River, which originates in the Angolan Highlands and flows through the Namibian desert to the Atlantic Ocean. The aim of project emanated primarily out of Namibia's desire to reduce its dependence on imported electricity, and ultimately to achieve energy independence.

In 1990 the two countries agreed to jointly develop a new hydro-electric scheme on the Kunene, at the most suitable site and agreed to carry out an EIA. The Permanent Joint Technical Commission (PJTC) on the Kunene was tasked to oversee the process. The PJTC appointed a technical sub-committee, the Steering Committee for the Feasibility Study (SCFS) and the countries also agreed to appoint an independent external reviewer from IUCN to work with the SCFS. The PJTC appointed a consortium of consultants, (NamAng), to complete the feasibility study for the project, including an assessment of its projected impacts.

After initially considering three alternative dam sites, NamAng narrowed its focus to the Epupa Falls (a spectacular and culturally important site for the local population) and Baynes sites (with a lesser social significance). NamAng concluded that Epupa would generate more hydropower, but that Baynes would cause fewer adverse social and environmental impacts such as impacts on land inundation, CO2 releases, evaporation, loss of riparian vegetation and palms, loss of fish species, and reduced downstream flow.

The divisive politics surrounding the project caused some controversy and significantly undermined the impact assessment process. As a result, NamAng had to submit an incomplete feasibility study to the SCFS in 1997. While the study adequately examined the project's economic and technical feasibility, the Namibian and Angola Governments both agreed that the social and, to a lesser extent, environmental impacts had been inadequately assessed. However, in 2005 the Governments accepted that the Epupa Falls option would never be supported by all stakeholders and agreed to pursue the Baynes option instead. A new EIA was commissioned for the Baynes site and is currently carried out jointly by the countries with active support from both governments and affected stakeholders. The countries have jointly agreed on procedural rules and required content of the EIA that now guides the assessment process and is accepted by all parties to the process.

Lessons learnt

- ***Clear institutional and procedural framework:*** *The existence of the PJTC as a governing body for the proposed venture and the steering committee for feasibility study (SCFS) allowed the countries to agree on the common approach to the transboundary EIA, which led to engagement of one common consultant and one independent reviewer as opposed to independent country assessments.*
- ***Public involvement in decision-making:*** *While there were significant disagreements between some groups of stakeholders and the Namibian Government it was an important experience in engaging the public and communities in environmental decision- making in the region. It appears to have steered the decision-makers toward a better alternative.*

Adapted from Pallett & Tarr (2009).

3. Cumulative Impacts in National EIA Legislation

3.1 Cumulative Impacts

Often closely linked to the aspect of assessing transboundary impacts is the consideration of cumulative impacts. It is increasingly recognized that environmental impacts may not only result from direct impacts from an individual projects, but from the combination of effects from existing developments and individually minor effects from multiple developments over time. The assessment of cumulative impacts recognizes that each additional project represents a high marginal cost to the environment, and that it cannot be considered in isolation. Cumulative effects can have an important role in EIA, particularly when decision makers need to assess the full or "true" impact to society of a proposed project or development, rather than the impacts caused by the single proposed project (Chonguica and Brett, 2003). Given the importance of cumulative effects, it is useful to distinguish between environmental assessments (EA) for specific projects and EA for evaluating cumulative regional effects of development as this potentially bears relevance for the assessment of individual projects planned in the Orange-Senqu basin as well as the planning and management of the basin's resources as a whole.

This section undertakes a brief assessment of national legislation in the four ORASECOM states. The guiding questions are if the national EIA legislation requires the consideration of cumulative impacts, if it prescribes any procedures for the assessment of cumulative impacts, and if the national EIA legislation permits the (case specific) adoption of jointly agreed external sets of rules for the assessment of cumulative impacts (in a transboundary context).

3.2 Botswana

Section 10(1) of the Botswana EIA Act requires the description of potential environmental impacts of an activity in the EIS without making specific reference to cumulative impacts. However, Section 4.5.8. of the Botswana EIA Guidelines on the identification and assessment of impacts explicitly lists and defines cumulative impacts as a category that needs to be considered in order to meet the minimum requirements for an appropriate EIS. The guidelines do not provide further detail or criteria as to how cumulative impacts need to be assessed. Where cumulative impacts are of a (potentially) transboundary nature, the procedure described in section 2.1 of this paper would apply as it applies for non-cumulative impacts.

Specific reference is made in the Botswana EIA guidelines to "integrated catchment management programmes especially as they relate to water development to evaluate cumulative impacts of dam development on the same catchment". This reference is included in the section on Strategic Environmental Assessment (SEA), recognizing the potential impacts of basin-wide planning and

infrastructure development, for which SEA is arguably a better tool than EIA. The section on SEA guidelines then provides further guidance on the procedure and content of an SEA.

3.3 Lesotho

Section 21(5) of the Environment Act 2008 specifies the required content of an EIS and includes cumulative impacts in that list (Sec 21(5)(e)) and the 2009 EIA Guidelines for Lesotho define what cumulative impacts are. As per the guidelines the assessment of cumulative impacts is part of the standard EIA cycle and specific guidance for the assessment of cumulative impacts, nationally or in a transboundary context, is not provided. The Lesotho EIA guidelines recognize SEA as a tool for the environmental assessment of development/ management programmes and plans but do not provide further detail on the undertaking of SEA or how SEAs should be carried out to contribute to assessing cumulative impacts.

3.4 Namibia

In terms of Sec 35 of the Environmental Management Act the Environmental Commissioner must determine the scope of the required assessment. The assessment of cumulative impacts has, already under the 1994 Policy and thus prior to the adoption of EIA legislation, been a standard requirement for EIAs in Namibia. This practice remains in place and has been carried forward into the draft regulations. As in the other basin States the assessment of cumulative impacts is integrated into the general procedure for EIA and no specific detail for the assessment of cumulative impacts is provided. SEA is recognized as a strategic tool for the assessment of development management programmes and plans, including the assessment of cumulative impacts of such developments.

3.5 South Africa

The NEMA makes specific reference to putting in place procedures for "the investigations of the potential impacts, including cumulative effects of the activity and its alternatives on the environment and the significance of that potential impact". The EIA Regulations of 2010 further describe the required content of a basic environmental assessment report including a description and assessment of the significance of cumulative impacts. The assessment of cumulative impacts is integrated into the general procedures for EIA and no specific guidance for the assessment of cumulative impacts is provided. Likewise, a direct link between cumulative impacts and transboundary impacts is not made and the above-said (section 2.4) on transboundary impact assessment in SA applies to cumulative impacts as well where they are transboundary. SEA is recognized as a strategic tool for impact assessment for large scale programmes or plans.

3.6 Key Findings

All four basin States recognize the need for the assessment of cumulative impacts and require a description of potential cumulative impacts in an EIS. At the same time, neither country has in their legislation or accompanying regulations /guidelines developed detailed procedures for the assessment of cumulative impacts, whether on a national or transboundary scale. However, all four states recognize strategic environmental assessment as an appropriate tool for the assessment of cumulative effects of development in a larger geographic context, with the reference in the Botswana EIA guidelines to dam development being the most specific example in this regard.

3.7 Good Practice

Good practice for cumulative impact assessment, particularly in a transboundary context, requires a number of key prerequisites, most importantly:

- A common understanding of concepts of transboundary and cumulative impacts at a basin level is critical and needs to be developed.
- The development of proper cross-border consultation mechanisms is essential.
- Information sharing is critical and transboundary EA plans and reports should be included in appropriate basin environmental information systems specially established for the purpose.

Linking the assessment of cumulative impacts to the concept of SEA and combine the development of Tb-EIA Guidelines with the development of SEA guidelines is therefore worth considering. In terms of practical steps, Sekhesa (2003) has developed a useful set of generic sets for cumulative impact assessment on a project scale, which is presented in the below text box.

Cumulative impact assessment for projects – a generic approach

Step 1. Scoping

- *Establish the geographic boundaries for the analysis. The appropriate boundaries will depend on the resource or system*
- *Establish the timeframe*
- *Identify significant cumulative effects associated with the proposed action*
- *Identify other actions that may affect the resources, ecosystems and human communities of concern.*

Step 2. Description of the affected environment

- *Description of the environment highlighting important environmental characteristics of the area. Develop baseline information and environmental (ecological and socio-economic) indicators that will be used in monitoring and evaluation*
- *Identify how existing conditions of key resources, ecosystems and human communities have been altered by human activities*
- *Identify natural resource and socio-economic issues that arise as a result of cumulative effects.*

Step 3. Assessment

- *Identify important cause and effect relationship between human activities and resources, ecosystems and human communities*
- *Identify additive, interactive and synergistic effects*
- *Address the sustainability of resources, ecosystems and human communities.*

Step 4. Alternatives and mitigation

- *Consider the possibility of alternatives or modification of project to avoid, minimize or mitigate significant cumulative effects.*

Step 5. Evaluation and monitoring

- *Use indicators to monitor possible changes.*

4. Transboundary EIA in the Context of Notification

The principle international water law instruments governing the Orange-Senqu River basin are the Agreement on the Establishment of the Orange-Senqu River Commission (ORASECOM Agreement) and the Revised SADC Protocol on Shared Watercourses. Given the latter's character of a regional framework agreement the ORASECOM Agreement is *lex-specialis*, with the Revised Protocol in this context fulfilling the role of gap filling and providing interpretational guidance. The 1997 UN Convention on the Non-navigational Uses of International Watercourses has been ratified by two Orange-Senqu Basin States, Namibia and South Africa, but is yet to receive the required number of 35 ratifications globally and thus not yet in force. Nevertheless, the UN Convention is widely accepted as the most globally significant set of rules concerning the management of shared rivers. Its principles and procedures have and will continue to serve as a basis for departure for States entering into new bilateral or multilateral agreements and have persuasive effect in disputes over use and management of transboundary waters. This is evident in the SADC region where the Revised SADC Protocol is firmly based on the Convention, following the UN Convention verbatim for most of its provisions.

The duty to notify of planned measures is a core obligations contained in all three of the above-mentioned instruments and the requirements for notification are elaborated in significant detail in either instrument. The duty to notify requires that states must notify other states if they are planning to carry out activities that may cause "significant adverse effects" upon other watercourse states (Art 12 UN Convention; Art 4(1) (b) Revised Protocol; Art 7.5 ORASECOM Agreement). It is important to note in this context that it is incorrect to assume that it is always almost the upstream state that will be potentially adversely affecting the downstream state and thus has to notify. Instead, it is clear the duty to notify also applies to downstream states whose planned development would create "facts on the ground" which could alter the equitable balance of uses between upstream and downstream states (McCaffrey, 2007).

A review of the notification requirements contained in the Revised Protocol and the UN Convention shows that they are virtually identical. A minor difference is note in the wording of the provisions dealing with the extension of the reply period for notification (Art 13 (b) UN Convention; Art 4 (1)(c)(ii) Revised Protocol) where the UN Convention requires "special difficulty" and the Revised Protocol requires "difficulty". It is not obvious though if the change in wording in the Revised Protocol was intended to establish a lower threshold and in the context of the difference does not seem to warrant further assessment.

More significant differences in wording can be found in the ORASECOM Agreement's notification provisions. One such difference is the stipulated recipient of the notification. Whereas the Revised SADC Protocol and the UN Convention require the notification of the potentially affected "Parties", the ORASECOM Agreement stipulates the (ORASECOM) "Council" as the recipient of the

notification. Thus, the ORASECOM Parties opted to designate the Council as appropriate recipient of a notification under the agreement instead of the otherwise common channel of notification of "Parties" through Ministerial channels. This matter is, however, of procedural nature only and does not affect the substantive content of the required notification. As far as the latter is concerned Article 7(5) of the ORASECOM Agreement stipulates that the notifying Party shall "..provide all available data and information…" with regard to the planned project or programme.

An interesting aspect is the relationship between Articles 7(5) and 7(8) of the ORASECOM Agreement. Article 7(5) requires mandatory notification of the Council accompanied by "all available data and information". Article 7(8) requires the provision of "…data and information which are available or obtainable on any planned project, programme or activity which may have a significant adverse effect upon the other Parties" to other Parties (and not Council) on their request. For this case (of Article 7(8)), Article 7(9) stipulates that the required information includes the findings of an "environmental impact assessment addressing the effects on the ecosystem of the watercourse as well as the social, cultural, economic and natural environment". This wording clearly makes the consideration of transboundary impacts essential but is not specifically added to the wording of the notification requirement of Article 7(5).

In both legal interpretation and practice it can be assumed though that the substantive requirements are identical and that any notification to Council needs to contain the findings of an. The ORASECOM Agreement is complemented at regional level by the Revised SADC Protocol and needs to be interpreted in accordance with the latter given its role of a regional framework agreement. Article 4(1)(b) of the Revised Protocol stipulates the results of an EIA as a notification requirement.

Likewise, in practice it is difficult to imagine that if a Party notifies Council a planned measure that could have adverse effects on other Parties, these Parties would not request all necessary information as how the planned measure could affect them. In this case Article 7(8) and 7(9) of the ORASECOM Agreement would come into play, making the provision of the results of an EIA mandatory. Thus, effectively the carrying out of an EIA with adequate assessment of transboundary impacts is an essential and mandatory requirement for adequate notification of planned measures.

Neither the ORASECOM Agreement, the Revised SADC Protocol or the UN Convention though provide any guidance regarding the procedural and substantive content of the EIA and how transboundary and cumulative impacts need to be assessed. There is also no other binding regional legal instrument in the SADC region or other set of rules or guidelines for EIA in a transboundary context that has been commonly agreed by the ORASECOM Member States.

5. Establishing of EIA Guidelines for ORASECOM

5.1 Rationale

The legal rationale and practical need for EIA guidelines for ORASECOM can be summarized as follows:

- Under the ORASECOM Agreement (and Revised SADC Protocol on Shared Watercourses) the basin States are obliged to notify of planned measures.
- A legally adequate notification has to include the results of an EIA.
- The national legislation of each Orange-Senqu basin State requires the consideration of transboundary impacts, but neither of them provides detailed guidelines on how to assess transboundary impacts.
- The ORASECOM Member States are not Party to existing international agreements on EIA in a transboundary context (e.g. Espoo Convention). A regional (i.e. SADC) legal instrument or guidelines for EIA in a transboundary context do not exist.
- In the absence of applicable international legal instruments or guidelines the establishment of Tb-EIA Guidelines is essential if countries are to meet their notification requirements in the future.

As elaborated in section 4 above, the results of an EIA form the substantive core of a notification under the ORASECOM Agreement and Revised SADC Protocol. Thus, the development of Tb-EIA Guidelines could bring two additional benefits:

- The Guidelines can form the core of a broader set of "Notification Guidelines" for ORASECOM that can be developed at a later stage. These notification guidelines would describe in detail the requirements for the entire process of notification and response to notification and assist countries in meeting their notification requirement under the applicable agreement.
- The Guidelines could provide a useful starting point for the eventual development of a regional (SADC) Convention on EIA in a transboundary context if so desired by the SADC states. Thus, the ORASECOM countries could be drivers for the development of a desirable regional environmental convention that would usefully complement the Revised SADC Protocol and other Conventions concluded by SADC States.

The development of broader Notification Guidelines for ORASECOM could be considered as a follow-up activity. These Guidelines could be part of the forthcoming Strategic Action Programme (SAP) for the basin.

It is proposed to develop the Tb-EIA Guidelines in close cooperation with and through the structures of ORASECOM with additional external expertise (consultants). Inputs from a wider range of stakeholders shall be sought at appropriate times during the process.

5.2 Approach, Timeline and Deliverables

The ORASECOM Council decided that the work on the Tb-EIA Guidelines will be under the overall guidance of the Legal Task Team, a sub-committee under the Council.

An ad hoc working group, the Tb-EIA Working Group, with the Executive Secretary of the ORASECOM Secretariat as convener, will provide the basin States' inputs to the drafting the Tb-EIA Guidelines. The Working Group shall include two members per basin State, a senior environmental lawyer, preferably from the respective Environment Ministry/Department as well as one senior water/planning sector professional from the respective Water Department.

A Tb-EIA Consultant will provide technical support to the efforts of the Working Group.

The ORASECOM Council recommended a general timeline with milestones as follows:

- Jun 11: Basin states nominate members to Tb-EIA Working Group; selection of Consultant.
- Jul 11: Inception meeting of Tb-EIA Working Group with Consultant:
    - Review of inception paper of the Consultant;
    - Clarification of scope of Tb-EIA Guidelines
    - Assignment of responsibilities, detailed work plan.
- Aug 11: Working meeting of Tb-EIA Working Group with Consultant:
    - Annotated outline of draft Tb-EIA Guidelines.
- Sep 11: Final meeting of Tb-EIA Working Group with Consultant:
    - Detailed review of draft Tb-EIA Guidelines
    - Recommendation to Legal Task Team.
- Oct 11: Draft final Tb-EIA Guidelines considered at 26th Council Meeting.

Collaborating closely with the Tb-EIA Working Group the Consultant will:

- Draft an Inception Paper. Based on the Scoping Paper produced under a previous consultancy this paper shall cover items as follows:

  1 - Context, problem definition.

  2 - Transboundary EIA: Review of national EIA legislation in the four basin States, communalities and differences; transboundary EIA in national context of the four States; previous regional initiatives on transboundary EIA; regional and international good practice; synthesis of national legislations, listing of key elements of good practice (in the ORASECOM context).

  3 - Cumulative impacts: Similar to chapter 2 above, with: definition of cumulative impacts; recognition of cumulative impacts in national legislations; regional and international experience (in particular the emerging practice in Europe); key elements of good practice.

  4 - Notification: Definition of notification and requirements under UN Convention, SADC Protocol and ORASECOM Agreement; review of regional and international best practice (regional case studies, i.e. Lesotho Highlands Development Project, Neckertal Dam, maybe with a SWOT analysis), key elements of good practice.

  5 - Proposed approach for developing Tb-EIA Guidelines in the context of ORASECOM: scope of guidelines, roles and responsibilities, detailed work plan, any other issues.

- Draft an Annotated Outline for the Tb-EIA Guidelines, following deliberations and guidance received at the Inception Workshop, and in line international good practice (i.e. the scope covered in the Espoo Convention).

- Compile the draft final Tb-EIA Guidelines.

- Facilitate three workshops, including the preparation of deliberations on substantive issues, i.e. through compiling concise issue papers and organising of workshop logistics.

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