

THE NEW "PUBLIC"

The Globalization of Public Participation

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PUBLIC INVOLVEMENT IN THE EAST AFRICAN COMMUNITY

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In 1998, the East African governments of Kenya, Tanzania, and Uganda adopted a Memorandum of Understanding (MOU) for Cooperation on Environment Management.¹ This MOU established a regional framework for continued cooperation of Kenya, Tanzania, and Uganda (known as the partner states) in the management and use of the countries' natural resources.

The East African MOU was developed at a time when there were accelerated efforts to revitalize the East African Community. The Treaty for the Establishment of the East African Community (EAC Treaty)² was adopted one year later after the MOU entered into force. Chapters of the EAC Treaty address environmental and natural resources management, wildlife management, and legal and judicial affairs.³ While these chapters provide a framework in which public involvement may be advanced, particularly in the context of environment and natural resources, the MOU is much more explicit in promoting public involvement.

Developed under a UNEP/UNDP/Dutch Initiative, the MOU is the first such instrument to be assembled and agreed to in Africa. It covers a diverse range of topics from "Development and Enforcement of Environmental Legislation" (Article 7) to "Management of Lake Victoria Ecosystem" (Article 8), and "Development and Harmonization of Environmental Impact Assessment" (Article 14) to "Capacity Building and Supporting Measures" (Article 16). Throughout the MOU, provisions set forth specific standards and approaches for the partner states to ensure public access to information, participation, and justice.

The East African MOU includes both substantive and procedural rights that strongly support environmental rights and protection, and in many cases go beyond the scope of existing national legislation in the three

countries.⁴ Substantive rights, such as "the right of the people of the Partner States to a clean, decent, and healthy environment," are clearly and explicitly framed as citizen rights.⁵ Procedural rights are framed as obligations of the partner states, and language throughout the MOU highlights the partner states' commitment and agreement to promote and ensure public participation, access to information, and access to courts.

Transboundary issues, and the need for public involvement in managing them, are at the core of the East African MOU. The Lake Victoria ecosystem is encompassed within Kenya, Tanzania, and Uganda, just as it joins the three countries. Lake Victoria, the second largest freshwater lake in the world and the largest in Africa, is known internationally for its biological wealth and threatened status. In recent years it has become apparent that citizens of these three countries must work together to effectively manage the watershed and the valuable resources found in it.⁶ Management of fisheries, mining resources, land use, water quality and quantity all require the joint input, cooperation and dedication of the partner states.⁷ One country's abuse or misuse of the shared natural resources could have negative impacts on the citizens in the other countries who depend upon the same resource to maintain their existing sustainable lifestyles and industries.

Wildlife migration is another issue with enormous transboundary implications. Mass migrations of savanna species, including wildebeest, zebra, gazelles, and their predators traverse Tanzania and Kenya, paying no heed to national borders. The magnitude of this event, and the economic benefits that it brings to communities in both countries, provide an important incentive

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¹ Memorandum of Understanding Between the Republic of Kenya and the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management, done at Nairobi, Kenya on Oct. 22, 1998 [hereinafter East African MOU].

² Done at Arusha, Tanzania on Nov. 30, 1999.

³ *Id.* chs. 19, 20, 24.

⁴ With the addition of the East African MOU to the East African Community Treaty as an appendix, it has gained the force of law.

⁵ East African MOU, *supra* note 1, art. 7(1)(a). The right to a healthy environment has been enshrined some of the national constitutions and laws in East Africa. See, e.g., Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131 (2002); The [Kenya] Environmental Management and Co-ordination Act, 1999, No. 8 of 1999, sec. 3.

⁶ See GLOBAL ENVIRONMENT FACILITY, KENYA, TANZANIA, UGANDA: LAKE VICTORIA ENVIRONMENTAL MANAGEMENT PROJECT, PROJECT DOCUMENT (Report No. 15541-AFR, 1996); see also Carl Bruch, *Charting New Waters: Public Involvement in the Management of International Watercourses*, 31 ENVTL. L. REP. 11389 (2001).

⁷ East African MOU, *supra* note 1, art. 8(a) (mentioning these resources and others of the Lake Victoria ecosystem).

for these countries to cooperate on environmental management of the region. In order for Kenya, Tanzania, and Uganda to continue to develop sustainably, with the wildlife and overall ecosystem in mind, formal cooperation measures need to be put in place.

I. ACCESS TO INFORMATION

Access to information is provided for broadly and specifically in the East African MOU. In Article 16(2)(a) the Partner States agreed to “promote public awareness programmes and access to information” on environmental issues and management, without noting any limits or exceptions to access.⁸ The breadth of this statement, and the lack of a limiting definition of “information,” could be used by citizens and advocacy organizations to obtain access to a range of environmental and natural resource information.

Other articles of the MOU specifically mention information exchange with regard to forest resources,⁹ wildlife resources,¹⁰ the marine and coastal environment,¹¹ and hazardous waste.¹² In these cases, some specification is given as to the nature of the information to be shared. For example, in Article 12, the partner states agree to “share information on hazardous wastes including their transboundary impacts, importation, exportation, manufacture, transportation, storage and use.”¹³ In other cases, however, the nature of the information to be exchanged is more vague. While many of these provisions appear to focus on generating and exchanging information between states, these provisions should be construed in the broader picture in which generalized access to information should be institutionalized and guaranteed. Moreover, these provisions are important for articulating specific types of information that the partner states commit to collecting, analyzing, and ultimately—through Article 16(2)(a), if not elsewhere—releasing and disseminating to the public.

The East African MOU does not explicitly provide measures for passive or active access to information. However, the partner states have agreed to establish resource centers on environmental management, which would provide one mechanism for making environmental information available to the public (at least those who can travel to the center).¹⁴ The partner states also agreed to use environmental impact assessments (EIAs) to involve the public in collecting and recording environmental information necessary for assisting in mak-

ing development decisions that are expected to impact the environment.¹⁵ Active dissemination of information relating to EIAs is deemed a “necessary regulatory measure for sustainable development.”¹⁶

The discussion of EIA techniques, in Article 14 of the MOU, is framed by the responsibility of each partner state to “develop regulations and guidelines on environmental impact assessment,”¹⁷ to “enact legislation to regulate environmental impact assessment,”¹⁸ and to “develop programmes and procedures for dissemination of information on the operation and use of environmental impact assessment.”¹⁹ The MOU does not, however, mandate specific EIA procedures that are binding on the partner states.

II. PUBLIC PARTICIPATION

Provisions regarding public participation are presented throughout the East African MOU in varying degrees of specificity. The section on capacity building includes the broadest statement, declaring that the partner states agree to “promote . . . measures aimed at enhancing public participation on environmental management and issues.”²⁰ Public participation is further articulated in sections on the development and enforcement of environmental legislation;²¹ management of forest resources;²² and the development, planning, and implementation of environmental impact assessment.²³

However, the MOU does not provide many specific details regarding who has the right to participate, how they can participate, when the public should be involved, or who coordinates the participation. In Article 14, on environmental impact assessment, there is mention of the need for “enabling public participation at all stages of the process related to environmental impact assessment,” giving some indication of the times at which public participation is invited.²⁴ This implicitly acknowledges international EIA standards that require the public to be involved at all stages of the EIA pro-

⁸ *Id.* art. 16(2)(a).

⁹ *Id.* art. 9(a).

¹⁰ *Id.* art. 10(1)(c).

¹¹ *Id.* art. 11(b).

¹² *Id.* art. 12(e).

¹³ *Id.*

¹⁴ *Id.* art. 16(2)(b).

¹⁵ *Id.* art. 14(1).

¹⁶ *Id.* art. 14(3) (“The Partner States further agree to develop common programmes and procedures for the dissemination of information on the operation and use of environmental impact assessment as a necessary regulatory measure for sustainable development.”).

¹⁷ *Id.* art. 14(1).

¹⁸ *Id.* art. 14(2).

¹⁹ *Id.* art. 14(3).

²⁰ *Id.* art. 16(2)(a).

²¹ *Id.* art. 7(1)(i) (“full involvement of their people in the sustainable use and management of environment and natural resources.”).

²² *Id.* art. 9(f) (“institute new techniques or measures which enhance compliance and provision of incentives and partnerships with local people”).

²³ *Id.* art. 14(2).

²⁴ *Id.* art. 14(2).

cess, including at the scoping phase when all the options remain open.²⁵

With regard to the coordination of participation, the Committee on Environment—the regional committee charged with the oversight of the measures set forth in the MOU—is described in Article 4. Although many of these points are vague, they do establish some basic principles and mechanisms that will promote and help to ensure public involvement in domestic and transboundary matters.

III. ACCESS TO JUSTICE

The East African MOU makes a number of specific strides toward setting guiding principles for enabling access to justice. The Partner States agree to “develop measures, policies and laws which will grant access, due process and equal treatment in administrative and judicial proceedings to all persons who are or may be affected by environmentally harmful activities in the territory of any of the Partner States.”²⁶ The implication of this provision would be to significantly lessen the burden that is often placed on citizens to demonstrate standing to sue (that is, their ability to be in court), particularly where their injury is shared by others as is typically the situation in environmental cases.²⁷

The MOU is nondiscriminatory in who qualifies for access, due process, and equal treatment, in stating that “all persons who are or may be affected” must enjoy these rights. Article 16(3) expands on this nondiscrimination requirement, committing the partner states to “grant rights of access to the nationals or residents of the other Partner States to their judicial and administrative machineries to seek remedies for transboundary environmental damage.”²⁸ Thus, in cases with potential transboundary implications, citizens of the other countries must be accorded the same rights to seek judicial redress as are accorded the citizens of the country in national jurisdiction. So, if the effluent from a gold mine in, say, Tanzania could harm fisheries in Lake Victoria, then citizens from Uganda and Kenya would be able to go to court in Tanzania to seek compensation and injunctive relief if they satisfy the same requirements that Tanzanian citizens would have to meet.

The partner states also agreed to “harmonize their definition of environmental offences, judicial and administrative procedures to promote consistency in compliance and enforcement.”²⁹ This standardization of

definition and procedure is important given the regional nature of the MOU, the shared natural resources, the legal and economic integration in East Africa, and the need for common rules to apply to citizens of all three countries.

IV. IMPLEMENTING AND ENFORCING THE PROCEDURAL RIGHTS OF THE MOU

The East African MOU plays an important role in assigning both substantive and procedural rights to the citizens of Kenya, Tanzania, and Uganda. This is significant, as Kenya does not provide for substantive right to a clean and healthy environment in its constitution,³⁰ and Tanzania’s environmental provision is of questionable utility.³¹ And, while both Uganda and Kenya provide for the right to a clean and healthy environment in their framework legislation, Tanzania is still debating the possibility of enacting such legislation. As a binding, regional instrument the MOU is then able to provide citizens with powerful tools to use in advocacy work, tools that potentially could allow for new and stronger interpretations of existing national legislation and constitutional rights. The MOU is a compelling tool that can add strength to citizen advocacy work when existing constitutional and national legislation is lacking.

At the national level, Uganda and Kenya have made legislative progress on the procedural rights of access to information and public participation, while in Tanzania, much is dependent on the pragmatic interpretation of existing legislation. With regard to access to justice, the regional access rights regime put in place by the East African MOU is far ahead of the national legal frameworks and practice.

As these examples demonstrate, East African countries have made commitments to implement the environmental governance norms agreed upon in Principle 10 of the Rio Declaration. However, the practice is still mixed, and there are significant financial and technical capacity constraints to fulfill these commitments.³²

The enforceability of the East African MOU as a regional instrument was boosted by its incorporation as an annex to the East Africa Community Treaty. Furthermore, the East African Court of Justice was empanelled at the beginning of 2002, and it has origi-

²⁵ See, e.g., Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ENVTL. L. REP. 10428, 10447-48 (2002).

²⁶ East African MOU, *supra* note 1, art. 16(2)(d).

²⁷ See Bruch & Czebiniak, *supra* note 25, at 10442.

²⁸ East African MOU, *supra* note 1, art. 16(3).

²⁹ *Id.* art. 16(2)(e).

³⁰ It is only recently that the right to a clean and health environment was provided for in Kenya’s Environmental Management and Co-ordination Act, *supra* note 5.

³¹ In the ongoing constitutional review process in Kenya, however, there appears to be significant interest in amending Kenya’s constitution to include a substantive right to a healthy environment.

³² For example, most public interest litigants risk having to pay the attorneys’ fees and courts costs if they lose, and they do not have the opportunity to recoup their fees and costs against the government if they win.

nal jurisdiction over matters relating to the implementation of the EAC Treaty. This creates tremendous opportunities for seeking redress based on the principles set out in the MOU in the absence of adequate enforcement mechanisms at the national level. However, there has yet to be a test case at the domestic level or before the East African Court of Justice. So, the practical import of the MOU at the national and sub-regional level remains uncertain.

There is also some question, particularly from government officials, regarding how much procedural rights

in the MOU can be strengthened at this time. In fact, this highlights the broader issue of the meaning of the MOU, which was the result of a largely nonconsultative process. While the MOU may have been intended to lay the ground for an environmental protocol to the EAC Treaty, such a protocol has failed to materialize.

There remains much to be done in implementing, clarifying, and enforcing the measures set forth in the MOU. Awareness of the East African MOU is gradually growing, though, and the MOU has allowed for significant progress to be made.