

THE CHANGE TO IMPROVE THE SYSTEM OF EIA IN ETHIOPIA: A LOOK AT THE NEW INVESTMENT PROCLAMATION

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1. INTRODUCTION

It is common knowledge that all countries desire to bring about development (or more specifically economic development). It is equally known that such desire is high in developing countries and very high in the least developed countries like Ethiopia. Hence, while countries generally take many measures to progress economically, developing and the least developed countries seem to turn every stone to bring about development. For instance, as it is easily understandable, Ethiopia's decision to construct the *Grand Ethiopian Renaissance Dam*, which is expected to produce about 6000 MW of electric power, is a manifestation of how desperate the country is to bring about (economic) development.¹

However, at times, some of the measures taken to bring about economic development are not environmentally benign unless some sort of precautionary measures are taken. For instance, it is possible to bring about economic growth by destroying the environment. Yet, for development to be real and meaningful, it has to be sustainable, whereas making development sustainable

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¹The project for the *Grand Ethiopian Renaissance Dam* on *Abbay* River (commonly known as the Blue Nile) was launched on April 2, 2011 by the late Ethiopian Prime Minister, His Excellency Mr. Meles Zenawi.

requires taking environmental values into account.² Of course, in addition to making development sustainable, the consideration of environmental values in decision-making process leads to the achievement of another objective. It is now well accepted that citizens have the right to live in a clean and healthy environment.³ Therefore, the protection of the environment or the consideration of environmental values while adopting a given course of action can facilitate the realization of everyone's right to live in a clean and healthy environment. Consequently, the protection of the environment can be justified not only from the perspective of making development sustainable but also from enforcing a human right.⁴

If environmental protection is necessary because it serves various purposes, the question then is how to protect it. In this regard, while various measures

² More or less, nowadays, the need to protect the environment by using different means such as environmental impact assessment seems settled. In this regard, in addition to the different legal instruments-international, regional and national-demanding environmental protection, a number of writers have been writing to show why the environment has to be protected from different perspectives. For instance, arguments for environmental protection have been put forward from anthropocentric perspective, cultural perspective (indigenous peoples' perspectives) and religious perspectives. There are also arguments that claim that environment has to be protected for its own sake or because other beings in nature have the right to be protected and humans do not have the right to destroy them. This is an eco-centric argument. For more on these points, see generally, Dale Jamieson (ed.), *A Companion to Environmental Philosophy* (Massachusetts: BLACKWELL Publishers, 2001).

³ For instance, FDRE Constitution, article 44; Article 24, African [Banjul] Charter on Human and Peoples' Rights, Adopted June 27, 1981, OAU DOC. CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982), *Entered into Force* Oct. 21, 1986, Article 24 (African Charter *hereinafter*). One can mention provisions from other legal instruments such as the UDHR and the ICESCR which, if interpreted, deliver the right to clean environment.

⁴ In fact, one may mention different ideologies which have been put forward to justify why the environment should be protected such as for its aesthetic values or for nature's sake or as a natural duty of all of us because we do not have any better right to destroy the environment than everything in the environment. But for the purpose of this article, indulgence into such discourses is not necessary.

could be adopted to protect the environment, environmental impact assessment (EIA) is one of the most important mechanisms to serve this purpose because it enables us to examine the possible impacts of a given course of action on the environment before it is adopted.⁵ Indeed, current environmental laws recognize the importance of EIA as a tool capable of ensuring the integration of environmental values into decision-making process thereby promoting sustainable development and the enjoyment of the right to live in a clean and healthy environment.⁶ This is true also in Ethiopia where the EIA Proclamation endorses the need to use such a method by reiterating that EIA promotes sustainable development and fosters the implementation of the constitutionally guaranteed right to clean and healthy environment.⁷ Actually,

⁵ See, for example, David Hunter et al., *International Environmental Law and Policy* 3rd ed. (Thomson West: Federation Press, 2007), p. 531, Lana Roux and Willemien Du Plessis, *EIA Legislation And The Importance Of Trans boundary Application* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 89; Michael Kidd, *EIA And The Four Ps: Some Observations From South Africa* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 181; Michael I. Jeffery, *Environmental Impact Assessment: Addressing The Major Weaknesses* in Nathalie J. Chalifour Et Al. (eds.), *Land Use Law For Sustainable Development* (UK, 2006), p. 451-452.

⁶ Environmental laws aim at restoring, preserving, and protecting the environment, whereas EIA is one of the principles environmental laws recognize to achieve these objectives. See Steven Ferrey, *Environmental Law: Examples and Explanations*, 3rd ed. (Chicago: ASPEN Publishers, et al., 2004), p.1; Thomas F.P. Sullivan ed., *Environmental Law Handbook*, 4th ed. (Maryland, Government Institutes Inc., 1997), p. 1; *The New Encyclopaedia Britannica*, V.18, (2005), p. 468. Incidentally, one should know that environmental law is a public law as its primary purpose is regulating the relationships between individuals and governments (public) with regard to the environment. Duard Barnard, *Environmental Law for All: A Practical Guide for the Business Community, the Planning Professions, Environmentalists and Lawyers* (Pretoria: Impact Books Inc, 1999), p. 14.

⁷ See EIA Proclamation No. 299/2002, paragraphs 2 and 3 of the Preamble. Actually, because Ethiopia has had laws aiming at the protection and preservation of the environment including the EIA Proclamation, it may be argued that the country is deeply concerned about its environment. See, for example, Khushal Vibhute, *Environmental Policy and Law of Ethiopia*, *JEL*(2008), Vol. XXIII, p. 75, 76, 82-83.

because Ethiopia is one of the least developed countries and, as a result, it is taking various developmental measures, the recognition and use of EIA in the decision-making process is an indispensable mechanism for promoting sustainable development.

The government of Ethiopia also seems cognizant of the need to protect the environment to bring about sustainable development. For instance, the Growth and Transformation Plan expressly recognizes that environmental conservation has vital contribution for sustainability of development.⁸ It also states that it is necessary to formulate policies, strategies, laws and standards which foster social and economic development to enhance the welfare of humans and the safety of the environment sustainably, and to spearhead in ensuring the effectiveness of their implementation.⁹ Thus, the relevance of using EIA to achieve the objectives of the GTP is clearly discernable because EIA facilitates environmental protection which, in turn, promotes sustainable development.

What then is EIA? EIA is understood in slightly different ways by different writers. For instance, some define it as a process of anticipating or establishing

⁸ See Section 8.9.1 of the *Growth and Transformation Plan (GTP) 2010/11-2014/15*, p.77, Ministry of Finance and Economic Development, *The Federal Democratic Republic of Ethiopia*, (2010) (GTP *hereinafter*). However, the GTP does not include environmental protection in its pillars. The pillars of GTP are sustaining faster and equitable economic growth, maintaining agriculture as a major source of economic growth, creating favorable conditions for the industry to play key role in the economy, enhancing expansion and quality of infrastructure development, enhancing expansion and quality of social development, building capacity and deepen good governance, and promote women and youth empowerment and equitable benefit. Thus, environmental protection is not listed, at least expressly, as one of the pillars of the GTP.

⁹Id. Section 8.9.2.

the changes in physical, ecological and socio-economic components of the environment before, during and after an impending development project so that undesirable effects, if any, can be eliminated or mitigated.¹⁰ Others define EIA as a process by which information about the environmental effects of a project is collected and taken into account before a decision is made on whether an action should go ahead.¹¹ Still other writers define EIA as a procedure for assessing the environmental implications of a decision to enact legislation, to implement policies and plans, or to initiate development projects.¹² In Ethiopia, it is defined as the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed *project* or *public instrument*.¹³

According to the first two definitions, EIA is necessary to determine the possible impacts of developmental projects on the environment with a view to taking measures either to avoid or mitigate these impacts, as the case may be. On the other hand, the last two definitions provide for a broader meaning of the concept as they conceive EIA as a process necessary not only for an impending development project but also for strategies or public instruments.¹⁴

¹⁰ See generally John Ntambirweki, Environmental Impact Assessment As A Tool For Industrial Planning 75 In Industries And Enforcement Of Environmental Law In Africa (Nairobi, UNEP/UNDP,1997); Duard Barnard, supra note 6, p. 179; D.K. Asthana and Meera Asthana, Environment: Problems And Solutions (India, S. Chand and Company Ltd.), p.336.

¹¹Peter Morris and Rik Therivel eds., Methods of Environmental Impact Assessment, 2nd ed. (London and New York, Spon Press,2001), p. 3.

¹²Peter Wathern, ed., Environmental Impact Assessment: Theory and Practice (London and New York, Routledge Taylor and Francis Groups, 1988), p. 3.

¹³ Environmental Impact Assessment Proclamation, No. 299/2002, article 2(3). (Emphasis added)

¹⁴*Public instruments* refer to policies, strategies, programmes, laws or international agreements. Id. article 2(10).

However, all the definitions share the element that EIA is a tool that enables decision-makers to take environmental issues into account. This is why EIA is said to be a means that authorities can employ to choose actions and make decisions with full knowledge of their impacts on the environment.¹⁵

Now, the procedure of EIA has spread throughout the world and most developed and many developing countries practice some form of EIA.¹⁶ As a result, it is said that the legal requirement of EIA is now one of the principles of environmental law with universal acceptance.¹⁷ What enabled the system of EIA to gain almost a universal acceptance or to be accepted in many legal systems? The answer to this query is very simple: the merits of using EIA made it obtain almost universal acceptance. For example, firstly, since EIA is a study conducted to determine the possible negative and positive impacts of an action, it enables decision-makers to choose actions with full knowledge of their impacts on the environment. This means, EIA enables them to know

¹⁵ Duard Barnard, *supra note 6*, p. 179; see also generally John Ntambirweki, *supra note 10*.

¹⁶ William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 *COLUMBIA JOURNAL OF ENVIRONMENTAL LAW* (2000), VOL. XXV, P. 17; Mark Lancelot Bynoe 'Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy?', *LAW, Environment and Development Journal* (2006), Vol. 2, No. 1, p. 34. available at <http://www.lead-journal.org/content/06034.pdf>.

¹⁷ See generally John Ntambirweki, *supra note 10*; Mohammed A. Bekhechi and Jean-Roger Mercier, *Legal And Regulatory Framework For Environmental Impact Assessments: A Study Of Selected Countries In Sub-Saharan Africa* (Washington, D.C., The World Bank, 2002), p. 6; the Rio Declaration (1992) and the Convention on Biodiversity (1992) which recognizes the requirement of EIA. According to some writer, it is the undeniable benefits of EIA (preventing, reducing or off setting significant adverse environmental effects of development projects and enhancing the positive ones) that has promoted developed countries to make it a mandatory requirement and caused developing country to play catch-up. See Mellese Damtie and Mesfin Bayou, *Overview of Environmental Impact Assessment in Ethiopia: Gaps and Challenges* (Addis Ababa, Melca Mahiber, 2008), p.3-5.

actions that are likely to affect the environment and reject those that deserve rejection, or alternatively, formulate mechanisms for the reduction of their impacts on the environment. In this sense, therefore, EIA serves as a tool that aims at preventing and/or reducing environmental harms thereby facilitating sustainable development. Secondly, EIA helps developers avoid possible litigation by ensuring that they do not undertake obviously environmentally harmful projects. Since EIA involves public participation in deciding whether or not a project is desirable, positive public perception towards the project may be taken as an indication of the project's success.¹⁸ Therefore, the proper use of EIA can bring about many benefits-both to the environment and to the project itself.

However, despite its paramount importance to ensure environmental protection, EIA is sometimes used improperly or it is done for purposes other than environmental protection.¹⁹ For example, in some countries, EIAs were prepared and used to justify environmentally degrading activities. Moreover, some officials use EIA in an attempt to postpone the duty of making decisions. Further, sometimes, officials make decisions and order EIA to be made to determine the validity of their decisions. Likewise, EIA has been used to hide the truth behind reams of paper as the bulkiness of some reports has been used to impress a gullible audience. This is a misuse of EIA which is even worse

¹⁸ For the discussion in this paragraph and more, see generally, National Environmental Management Authority, Handbook on Environmental Law in Uganda, 2nd ed. Vol. 2 (2005), p. 31.; John Ntambirweki, *supra note 10*.

¹⁹ See generally Duard Barnard *supra note 6, p. 179*.

than not using it because it entails waste of time, energy and resources for no good reason.²⁰

2. EIA IN ETHIOPIA

As we have seen before, the legal requirement of EIA is now universally accepted in the sense that most developed and many developing countries have adopted some form of EIA. In this sense, Ethiopia is not an exception.²¹ One of its earliest commitments to undertake EIA came into being when it ratified the Convention on Biodiversity in 1994 to protect and conserve biodiversity.²² Article 14(1)(2) of the Convention requires every contracting party to introduce appropriate procedures requiring EIA of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and also introduce appropriate arrangements to ensure that the environmental consequences of its programs

²⁰Moreover, such use of EIA is contrary to a number of democratic principles. For instance, public participation in the decision-making process is a generally accepted practice. However, if decisions affecting the environment are already made and EIA is done subsequently, public participation in such EIAs does not amount to participation in decision-making; rather, it amounts to commenting on the validity of the decisions. This is clearly contrary to what is known as *environmental democracy*, which may be understood as a system where the public controls those who make decisions that affect the environment or its components. Or, alternatively, it could be defined as a participatory and ecologically rational form of collective decision-making. For more on the meaning of *environmental democracy*, see, for example, Michael Mason, *Environmental Democracy* (London: Earthscan Publications Ltd, 2006), p.1; Susan Hazen (1998), *Environmental Democracy*, <http://www.unep.org/ourplanet/imgversn/86/hazen.html> (accessed on 13 May 2010); Giulia Parola, *Towards Environmental Democracy* (unpublished Thesis, Faculty of Law, University of Iceland, 2009), p. 26-28.

²¹ In fact, as the previous discussion has revealed, although the express recognition of the principle of EIA is a recent phenomenon, one may argue that both the 1987 PDRE and the 1995 FDRE Constitutions have recognized EIA in as long as they require the protection of the environment and environmental protection becomes effective if EIA is recognized and used.

²² Ethiopia signed the Convention on 10 June 1992 and ratified it on 05 April 1994. See the ratification status of the Convention on Conservation.

and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account.²³

There are also other instruments which Ethiopia has ratified and which support the use of the system of EIA. For example, the International Covenant on Economic, Social and Cultural Rights recognizes everyone's right to the enjoyment of the highest attainable standard of physical and mental health and stipulates that this right can be realized by taking different measures including the improvement of all aspects of environmental hygiene.²⁴ Thus, it is not difficult to see how the use of EIA may contribute to the improvement of all aspects of environmental hygiene thereby facilitating the enjoyment of the highest attainable standard of physical and mental health. Moreover, the African Charter on Human and Peoples' Rights recognizes the right of all peoples to have a general satisfactory environment favorable to their development.²⁵ On the other hand, this right could be understood as implying

²³ It is interesting to note that article 14(1)(2) of the Convention requires not only project level EIAs but also strategic EIA by demanding governments to introduce appropriate arrangements to ensure that the environmental consequences of their *programmes* and *policies* that are likely to have significant adverse impacts on biological diversity are also duly taken into account. According to the reviewer of this article, there were projects which were donor driven and subjected to EIA in Ethiopia as early as 1980. For example, the former Ethiopian Valleys Development Authority was one of the institutions that introduced EIA into Ethiopia. Of course, one can imagine how difficult it would be to conduct proper EIA without a proper legal and institutional frameworks being put in place.

²⁴See article 12 of the International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 3 January 1976.

²⁵African Charter, article 24. The Charter recognizes the right to have a general satisfactory environment as a group right than as an individual right. All the same, such recognition of the right does not in any way alter the obligation of a state to take the necessary steps to enforce article 24 of the Charter.

the use of EIA.²⁶ Further, although it is a soft law, article 17 of the 1992 Rio Declaration is also worth mentioning because it specifically requires undertaking EIA for proposed activities that are likely to have a significant adverse impact on the environment.²⁷

However, despite the existence of the above instruments, the express recognition of the requirement of EIA in a domestic instrument in Ethiopia is a recent phenomenon.²⁸ For example, in 1997, Ethiopia adopted its first comprehensive environmental policy, the Environmental Policy of Ethiopia (EPE), which expressly recognizes the need to use EIA for development programs and projects.²⁹ The policy is important, in particular, for its recognition of not only project level EIA but also strategic environmental assessment by emphasizing the need to use EIA for developmental programs as well. However, the EPE does not provide for adequate stipulations to facilitate the use of EIA. Therefore, it was not until 2002, with the enactment

²⁶ Of course, the fact that the recognition and use EIA facilitates the enjoyment of the above right is already recognized in Ethiopia. See EIA Proclamation, No. 299/2002, the Preamble.

²⁷ See Principle 17, the Rio Declaration on Environment and Development, 1992.

²⁸ The 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE) requires the environment to be protected and also recognizes the right of everyone to live in a clean and healthy environment. For example, article 92(2) of the FDRE Constitution states that the design and implementation of programmes and projects of development shall not damage or destroy the environment. Article 92(4) of the Constitution stipulates that the government and citizens shall have the duty to protect the environment. Article 44(1) recognizes everyone's right to live in clean and healthy environment. Therefore, it could be argued that the proper implementation of these constitutional provisions largely depends on the use of EIA as a tool for decision-making whenever appropriate.

²⁹ See Environmental Policy of Ethiopia, 1997, Section 4.9.

of Ethiopia's EIA Proclamation, that EIA became a real legal requirement for projects and public instruments.³⁰

At the moment, the 2002 EIA Proclamation is the single most important domestic legislation Ethiopia has ever had in relation to EIA. It conceives of the EIA procedure as multifunctional. In its preamble, it declares that EIA facilitates sustainable development, fosters the implementation of the right to clean and healthy environment, brings about administrative transparency and accountability, and promotes public participation in decision-making process. In its text, the Proclamation provides for a number of important stipulations pertaining to EIA which, if effectively put into practice, can actually facilitate the achievement of the above objectives.

For instance, the Proclamation recognizes EIA as a tool applicable to both strategies and projects. It declares that actions that are subject to EIA should be determined by the Federal EPA (FEPA) by issuing directives. It also imposes on any licensing agency³¹ the obligation to ensure that an environmental permit or environmental clearance certificate (ECC) is obtained

³⁰ Actually, there was a *de facto* EIA in Ethiopia even before the enactment of the EIA Proclamation because a few land developers, including government owned agencies, were doing EIA and approaching FEPA to review their EIA reports. See, for example, Mellese Damtie and Mesfin Bayou, *supra note 17, p. 1*. This claim seems acceptable in particular when it is seen in light of the issuance of the 2000 EIA Procedural Guidelines of FEPA to ensure that EIA is done although there was no EIA law by then. Moreover, the previous investment law, to be seen later on, required applicants for investment permits to observe environmental protection requirements which were pushing them to use EIA under certain circumstances. Moreover, the fact that institutions like the World Bank started using EIA as a loan condition before 2002 could be taken as another reason why there was a *de facto* EIA in Ethiopia before the enactment of the EIA Proclamation.

³¹ As we will see later on, licensing agencies include Investment Bureaus and Trade and Industry Bureaus.

for a project subject to EIA before issuing an investment permit or a trade or an operating license for any project. Likewise, the Proclamation imposes the duty to do EIA on proponents, not on government while it entrusts the power to ensure that EIA is done and to evaluate reports to environmental protection organs. Moreover, the Proclamation recognizes the relevance of public participation in the EIA process and demands that the public is engaged in the process. Further, the Proclamation gives FEPA and regional environmental agencies (REAs) the mandate to monitor the implementation of the projects they have authorized with a view to evaluating compliance with all commitments made by and obligations imposed on the proponent during authorization.

On the other hand, the Proclamation obliges environmental protection organs to provide incentives, within the limits of their capacity, to projects (not public instruments, though) that are destined to rehabilitate a degraded environment or prevent pollution or clean up environmental pollution. Again, the Proclamation provides for the pecuniary penalty those who violate its provisions and other laws pertaining to EIA will have to face. Finally, the Proclamation authorizes the Council of Ministers and FEPA to issue regulations and directives, respectively, to implement its stipulations.

Therefore, despite its late introduction, the EIA Proclamation attaches great importance to the procedure of EIA. Moreover, it contains a number of important stipulations which aim at making the system of EIA work effectively and produce its intended results. However, the effectiveness of the

Proclamation hinges upon the issuance of subsidiary laws to implement its general and vague stipulations. Besides, there are many gaps in the proclamation which need to be filled by subsidiary laws. In default of such laws, the EIA Proclamation alone can hardly achieve its intended objectives. Mindful of these facts, the Proclamation authorizes the issuance of such instruments by the Council of Ministers and the FEPA.

Nevertheless, there are few subsidiary instruments issued to enforce the EIA Proclamation up to date. For example, the 2003 EIA Procedural Guidelines and the 2008 EIA Directive which contains the list of projects subject to EIA³² are the only ones. Although more than a decade has elapsed since the enactment of the EIA Proclamation, the Council of Ministers has not issued EIA regulation which is necessary for the effective implementation of the Proclamation. Similarly, the Federal EPA has not yet issued a comprehensive directive to implement the Proclamation. Consequently, as it stands now, the EIA Proclamation is not capable of achieving its intended outcomes. This

³²The directive has various defects. One of such defects is that it contains only few projects which are subject to EIA. These projects are mining explorations that is subject to federal government permit, dam and reservoir construction (dam height 15m or more, reservoir storage capacity 3 million m³ or more, or power generation capacity 10MW or more), irrigation development (irrigated area of 3000ha or more), construction of roads (Design and Standard DS1, DS2, DS3) with a traffic flow of 1000 or more, railway construction, taking fish from lakes on a commercial scale, horticulture and floriculture development for export, textile factory, tannery, sugar refinery, cement factory, tyre factory with production capacity of 15,000 Kg/day or more, construction of urban and industrial waste disposal facility, paper factory, abattoir construction with slaughtering capacity of 10,000/year or more, hospital construction, basic chemicals and chemical products manufacturing factory, any project planned to be implemented in or near areas designated as protected, metallurgical factory with a daily production capacity of equal or more than 24,000 Kg, airport construction, installation for the storage of petroleum products with a capacity of 25,000 liters or more, condominium construction, establishment of industrial zone.

means, the legal framework on EIA in Ethiopia is not adequate to ensure environmental protection. This, however, does not mean that there is no EIA in Ethiopia. In fact, however inadequate it may be, the system of EIA is working.

3. SECTORAL LAWS AND EIA IN ETHIOPIA

In order to have an adequate legal framework on EIA, the best thing to do is issuing all the necessary legal instruments the EIA Proclamation authorizes because such instruments will ensure the effectiveness of the system of EIA. However, there are also other ways of contributing to the effectiveness of the system. One such way is mainstreaming the requirement of EIA into sectoral laws. If sectoral laws require the use of EIA for actions that take place in their respective areas, the institutions in charge of overseeing their implementation will ensure that EIA is also used when required. This will, in turn, ensure the consideration of environmental values in decision-making process to ultimately promote environmental protection.

For example, it is possible for any land law to require the preparation of EIA before access is given to land for some projects. Wildlife protection laws could also require the preparation of EIA before actions such as hunting are allowed for tourists. Likewise, investment laws can require the preparation of EIA before investors are issued investment permits. In this regard, some real examples could be given. The recent Ethiopia Mining Operations Proclamation No. 678/2010. Under article 60(1), the Proclamation states:

Except for reconnaissance license, retention license or artisanal mining license, any applicant for a license shall submit an

*environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country.*³³

This implies that anyone, save for artisan miners, who intends to carry out *exploration* or *mining* activity must conduct an EIA and obtain an environmental permit from the relevant federal or regional body before he/it is issued a license. In fact, this Proclamation contains other provisions which attempt to ensure the protection of the environment in the course of undertaking mining activities.³⁴

Therefore, if the other sectoral laws contain similar provisions, it is likely that the system of EIA will be improved in Ethiopia. However, the truth is, many of such laws have thus far failed to contain similar provisions. For example, to take one recent example, the Commercial Registration and Business Licensing Proclamation, Proclamation No. 686/2010 could require the use of EIA but it has failed to do so. In any case, in the following section, we will explore the

³³ Emphasis added.

³⁴ See, for example, articles 34(1)(b), 44(1), (2)(3), and 61(4). At this juncture, it may be relevant to mention that the Urban Planning Proclamation No. 574/2008 contains some provisions which may be used to promote environmental protection through the use of EIA. For example, according to the third paragraph of its Preamble, one of the factors that necessitated the issuance of the Proclamation is the need to ensure that development undertakings carried out both by public and private actors are not detrimental to the protection of the environment. Similarly, article 5(7) recognizes safeguarding the community and the environment as among the basic principles that any process of urban plan initiation and preparation must comply with. Further, article 9(2)(f) requires any structural plan to mainly indicate, among other things, the environmental aspects of the plan. So, although it is not expressly mentioned, one may argue that, based on the above provisions, the Urban Planning Proclamation No 574/2008 may be used to ensure that EIA is done when urban planning takes place.

position of the Investment Proclamation No. 769/2012 and what it may mean for the system of EIA in the country.

4. THE INVESTMENT PROCLAMATION, PROCLAMATION No. 769/2012

So far, Ethiopia has issued many investment laws. The most recent one is Investment Proclamation, Proclamation No. 769/2012. This Proclamation is a substitute for Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003. The latter Proclamation, that is, Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003, did not recognize conducting EIA as a requirement to obtain investment permit. Indeed, its predecessor, Investment Proclamation, Proclamation No. 37/1996, somewhat recognized the need to observe the environmental laws of the country,³⁵ which could be interpreted to include EIA. However, Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003 failed to recognize the need to ascertain the observance of environmental laws before issuing investment permit. As a result, many investment authorities were not, even after the issuance of the EIA

³⁵ Article 14(1) of the Investment Proclamation, Proclamation No. 37/1996, states:

Upon receiving an application for investment permit made in full compliance with the provisions of Article 13 of this Proclamation, and after ascertaining within 10 days that the intended investment activity would not be contravening the operational laws of the country and that, *in particular, it complies with conditions stipulated in environmental protection laws*, the appropriate investment organ shall issue an investment permit to the applicant. (Emphasis added).

However, since there was not EIA law by then, it was not possible to compel investors to do EIA although they could be compelled to observe other environmental laws.

Proclamation, requiring investors to produce environmental permit as one of the requirements to obtain investment permits.³⁶

Nonetheless, unlike Investment Proclamation No. 280/2002 as amended by Investment (Amendment) Proclamation No. 375/2003, the new investment proclamation, Investment Proclamation No. 679/2012, contains some provisions which are pertinent to environmental protection. The question then is whether these articles have resurrected the chance of improving the system of EIA by effectively requiring investment bodies to require the production of environmental permit, for actions subject to EIA, before issuing investment permits. In the following paragraphs, the relevant articles of the new Investment Proclamation No. 679/2012 are identified and analyzed.

Article 38: Duty to Observe Other Laws and Protection of Environment

Any investor shall have the obligation to observe the laws of the country in carrying out his investment activities. *In particular, he shall give due regard to environmental protection.*³⁷

³⁶For example, many projects were implemented without EIA in Amhara, Tigray, Oromia, SNNPRS, whereas virtually no project passes through EIA in Somali and Afar. Similarly, many projects licensed by the federal government bypass the EIA step. This information was obtained from the relevant offices by the writer in the course of writing his PhD dissertation. The dissertation is unpublished yet and available with the writer and the Graduate School, University of Alabama, Tuscaloosa, USA.

³⁷ Emphasis added.

Article 30: One-Stop Shop Service

(4)The Agency [Ethiopian Investment Agency] shall provide the following services on behalf of investors:

- (d) execution of investors' requests for approval of impact assessment studies conducted on their investment projects.

Article 19: Suspension or Revocation of Investment Permit

(1)Where an investor violates the provisions of this Proclamation or regulations or directives issued to implement this Proclamation, the appropriate investment organ may suspend the investment permit until the investor takes due corrective measures.

(2)The appropriate investment organ may revoke an investment permit where it ascertains that:

- (a) the investor obtained the permit fraudulently or by submitting false information or statements.

(6) An investor whose investment permit is revoked may not be issued with a new investment permit before the lapse of one year from the date of revocation.

Now, it is important to realize that, if closely scrutinized, the above provisions could be used to strengthen the system of EIA in Ethiopia.

First, article 38 of the Proclamation attaches greater importance to environmental protection because, although it requires investors to observe all the laws of the country, it in particular requires them to give due regard to environmental protection. On the other hand, investors can give due regard to

environmental protection only if they observe the laws pertaining to environmental protection. At the moment, Ethiopia has myriad of environmental protection laws. Hence, according to article 38, investors must observe any of these laws which they may come across in the course of doing their business.

On the other hand, one of the environmental laws that investors may come across, as we have seen before, is the EIA Proclamation. The Proclamation bans anyone from commencing the implementation of a project for which EIA is necessary before EIA is done and authorization for its implementation is obtained from the appropriate environmental protection organ. As far as the project that is subject to EIA is concerned, the Federal EPA has an EIA Procedural Guidelines which provide for a detailed list of actions subject to EIA. Hence, article 38 of the new Investment Proclamation No. 769/2012 could (should) be understood to require the use of EIA for investment activities subject to EIA. This is so because an investor who fails to do EIA cannot be taken as observing the EIA Proclamation and, hence, the law pertaining to the protection of the environment within the meaning of article 38 of the new Investment Proclamation.³⁸

Second, article 30 of the new Investment Proclamation requires the Ethiopian Investment Agency to provide investors one-stop shop service. This article

³⁸ It is said that EIA is important to ensure environmental protection for it serves as an early warning about the possible impacts of a given course of action so that timely measures can be taken, if need be, to deal with such impacts. See Prasad Modak and Asit K. Biswas, *Conducting Environmental Impact Assessment in Developing Countries* (Tokyo et al., United Nations University Press, 1999), p. 13.

intends to relieve investors from running around to get various services. Then, the Proclamation goes on and, under article 30(4)(d), requires the Agency to execute investors' requests for approval of *impact assessment studies* conducted in relation to their investment projects. This means, investors are not expected to go to the relevant environmental protection organs to have their EIAs reviewed and approved. Instead, they can submit their EIAs to the Agency and the Agency will pass over the report to the appropriate environmental for review and approval.

But the most important point to figure out here is not that the Agency helps investors get the services they need but the message that article 30(4)(d) conveys. The article implies that investors are expected to do EIA when the activities they intend to carry out are subject to EIA according to the relevant EIA instrument. So, it is only after they have prepared their EIAs that this article relieves them of their duty to visit the appropriate environmental protection organs to have their EIAs reviewed and approved. Of course, article 30(4)(d) does not compel investors to do EIA. Yet, the cumulative reading of article 38, as discussed above, and article 30(4)(d) clearly tells that investors are duty bound to conduct EIA whenever it is necessary. This is a major departure that article 30 of Proclamation 769/2012 makes from its predecessor, article 24 of Proclamation 280/2002, which does not make any reference to the environment at all.

Third, article 19(1) and (2) of the new Investment Proclamation 769/2012 provide for the grounds to use to suspend or revoke already issued investment permits. According to article 19(1), an investment permit could be suspended

by the appropriate investment organ if an investor violates the provisions of Investment Proclamation 769/2012 or regulations or directives issued to implement its provisions until due corrective measures are taken. On the other hand, although it is not necessary to ensure the preparation of EIA because the article deals with the situation after investment permit is granted, it is important to ensure that EIA is used in the course of implementing a project. For example, the article is very important to ensure that investors implement the environmental management plan they include in their EIAs to avoid or mitigate the adverse impacts of their actions on the environment. This is part of the EIA process because the EIA process does not stop at the stage where reports are reviewed and approved. In any case, article 19(1) is a key stipulation to monitor how investors go about implementing their projects and whether they are using their EIAs during such period. This will contribute to the effectiveness of the system of EIA.

At this juncture, it is worth remembering that any person, in particular, environmental protection organs can bring to the attention of the investment organs that has issued investment permit any deviation by an investor which affects the environment adversely with a view to have the permit suspended. Then, the suspension can remain in force until the concerned investor takes due corrective measures.³⁹

³⁹ It is interesting to note that the Proclamation does not authorize the revocation of the license if the investor fails to take due corrective measures within a reasonable period of time. Of course, it could be argued that revocation is a logical extension of suspension if the concerned investor does not take due corrective measures within a reasonable period of time. See article 19(2) of the Proclamation on the grounds for revocation of investment permits.

Moreover, article 19(2) of the new Investment Proclamation provides for the possibility of revoking an investment permit. This can happen, for example, if it is proved that the investor obtained the permit fraudulently or by submitting false information or statements. This stipulation is of paramount importance to the quality of the EIA that is done. It is true that there are many investors who submit fictitious EIAs to the relevant environmental protection organs. However, according to this new Investment Proclamation, it is possible to revoke the license of the investor who submitted an EIA that lacks integrity and obtained investment permit. The stipulation clearly has a deterrent effect. It seems that investors will not risk having their licenses revoked if they know that any fraud or misrepresentation in the information they provide to the relevant investment organs, including the information in their EIAs, may cause the cancellation of their licenses.

Another important stipulation in the new Investment Proclamation is article 19(6). This article adds strength to the deterrent effect of article 19(2). It stipulates that investors whose permits are revoked will not be issued new permits before the lapse of one year from the date of revocation. Hence, investors whose permits are revoked must wait until one year passes from the date their permits are cancelled to obtain new investment permits. On the other hand, this is not a risk that rational investors may want to assume. What this means in relation to EIA is that rationale investors will abide by the requirements of the EIA instruments so as to avoid the possibility of having their permits revoked.

In conclusion, there is no question that the system of EIA is now in far better position than it was before the enactment of the Investment Proclamation 769/2012. Similarly, investment organs can no more argue that they have no legal obligation to require investors to produce environmental permits to obtain investment permits. Instead, they will have to receive EIAs from investors and seek the review and approval of same, on their behalf, by the relevant environmental protection organ. Environmental protection organs can also capitalize on this opportunity to work cooperatively with investment organs to ensure the effective use of EIA. For instance, Environmental protection organs, in particular, the FEPA can deposit its EIA Procedural Guidelines with investment organs so that the latter could check which actions are subject to EIA and which are not to ensure adherence to the system of EIA.⁴⁰

Therefore, it could be concluded that the new Investment Proclamation, Proclamation No. 769/2012, has revived and even created more opportunities to improve the system of EIA in Ethiopia. As a result, although the legal framework on EIA is inadequate mainly because some important instruments necessary for its effective implementation are still lacking, the recognition of the need to protect the environment in general and to use EIA in particular in the new Investment Proclamation No. 769/2012 will lessen the impact of such inadequacy.

⁴⁰ This is so because EIA is not necessary for every action although all development actions which may have significant impact on the environment are potentially subject to EIA. See, Norman Lee and Clive George (eds.) *Environmental Assessment in Developing and Transitional Countries* (New York et.al.: John Wiley and Sons Ltd, 2000), p. 1.

Nevertheless, there is still one question that is worth raising and examining. That is, although the better stance of the new Investment Proclamation No. 769/2012 on environmental protection in general and the use EIA in particular is now beyond doubt, it is still important to see if it has gone far enough. Here, two possible positions could be reflected.

First of all, as we have seen before, the relevant provisions of the New Investment Proclamation could be interpreted and used to ensure the implementation of the system of EIA. As a result, it could be argued that the Proclamation has gone far enough to contribute to the effectiveness of the system of EIA in the country. After all, the new Investment Proclamation is an economic law, not an environmental law. As such, it is not expected to provide for more stipulations than it already has provided.

On the other hand, one can argue that, without prejudice to the possibility of interpreting its provisions to ensure the use of EIA, the new Investment Proclamation does not go far enough to contribute to the effectiveness of the system of EIA in Ethiopia. Many examples could be given to support this assertion. One, if we look at the Mining Operations Proclamation No. 678/2010, as discussed before, it expressly requires applicants to submit an EIA and obtain all the necessary approvals from the competent authority in accordance with the relevant environmental laws of the country. However, the new Investment Proclamation lacks such clear statement on EIA which could be regarded as a manifestation of lack of serious commitment to strengthen the system of EIA, and, hence, environmental protection. Two, investment organs

are not expressly authorized to refuse the issuance of permits if EIAs are not done for projects subject thereto. As previous discussions have shown, interpretation can help us obtain the same result. All the same, the law-maker could have dispensed with the need to interpret the provisions of the new Investment Proclamation by simply inserting a clear statement on EIA in one of the articles dealing with the requirements to obtain investment permits.⁴¹ Three, article 17 of the new Investment Proclamation requires the renewal of investment permits every year until the investor begins marketing his products or services. Then, it provides for the guidance that investment organs have to use to renew or refuse to renew permits. However, the Proclamation does not seem to recognize the implementation of an EIA as one of the conditions to renew permits. Article 17(3) states that the appropriate investment organ shall renew an investment permit if it is satisfied that the holder has sufficient reason for not commencing or completing the implementation of his project. If the appropriate investment organ is not satisfied that the holder has sufficient reason for not commencing or completing the implementation of his project, it will not renew the permit. So, as one can understand from this provision, the failure of the permit holder to use EIA while implementing his project is not recognized as a ground for refusing to renew investment permit.

Therefore, although the new Investment Proclamation could have contained stipulations which expressly require and force the use and implementation of EIA with a view to improving or strengthening the system of EIA in the country, it does not do so *albeit* some of its provisions could be construed to obtain the same result.

⁴¹ See Investment Proclamation No. 769/2012, articles 12-16.

5. CONCLUSION

As we have seen in this article, Ethiopia has recognized the system of EIA to ensure effective environmental protection. Nonetheless, the legal framework on EIA has thus far remained inadequate. Moreover, some sectoral laws have also missed the chance of contributing to the effectiveness of the system of EIA by requiring the use of EIA. Fortunately, however, some new sectoral laws are emerging with stipulations pertinent to the system of EIA. In this regard, the Mining Operations Proclamation No. 678/2010 and the new Investment Proclamation No. 769/2012 could be mentioned. The new Investment Proclamation does not contain any express requirement on EIA. Instead, it contains some articles which impliedly recognize the relevance of the use of the procedure of EIA. Hence, it is now possible to require those who apply for investment permits to do EIA to obtain the licenses they seek provided, of course, that the activities they intend to engage in are subject to EIA. That being the case, it can be safely concluded that the new Investment Proclamation has revived the chance to improve the system of EIA in Ethiopia. Nonetheless, the issue of how far the Proclamation has gone, and how far it could have gone, remains a matter of opinion. Putting that aside, at least for the moment, all concerned organs, in particular, environmental protection organs, should take the opportunity presented by this new Investment Proclamation and seek to improve the system of EIA in the country.