

**A study of South African environmental law and the environmental
standards prescribed by lending institutions**

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ABSTRACT

The research investigates whether the environmental performance standards prescribed by international financial lending institutions have the potential to regulate within the South African legislative framework. In assessing this, the environmental performance standards of three specific financial lending institutions, namely, the International Finance Corporation, the African Development Bank and the Development Bank of Southern Africa are analysed. In addition, the extent to which South African framework legislation accommodates the use of the environmental performance standards is looked at with specific focus on the *National Environmental Management Act 107 of 1998* (NEMA) and the *Constitution of the Republic of South Africa, 1996* (Constitution). The principles and provisions underscored in NEMA are shown in this study to accommodate the application of the environmental performance standards. This is so because the environmental performance standards support the framework legislation to the extent that it gives effect to its principles by providing substantive content to the framework.

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LIST OF ABBREVIATIONS

ADB	: African Development Bank
DBSA	: Development Bank of Southern Africa
ECA	: Environment Conservation Act
IFC	: International Finance Corporation
NEMA	: National Environmental Management Act
NEMAQA	: National Environmental Management Air Quality Act
NEMWA	: National Environmental Management Waste Act
PELJ	: Potchefstroom Electronic Law Journal
SAJELP	: South African Journal of Environmental Law and Policy
SAJHR	: South African Journal of Human Rights

1 Introduction

There are a number of financial lending institutions in South Africa that are blazing the trail in formulating environmental performance standards that go beyond the requirements of national legislation.¹ These financial lending institutions, in essence, demand compliance with their own formulated environmental standards before borrowers can receive funding.² The environmental performance standards may in simple terms be described as the environmental safeguards that are required by financial lending institutions prior to approving funding.³ The research will focus on the three lending institutions featuring most prominently in the South African project and development sectors. These lending institutions are the World Bank, the African Development Bank and the Development Bank of Southern Africa. The objective of the research is to determine the extent to which South African law accommodates the environmental standards of these financial lending institutions.

The research will, by way of comparison, focus on the relationship between the environmental performance standards and South African national legislation and may possibly show that the two may indeed be not too far from each other. Consequently, the research will attempt to ascertain whether the environmental performance standards can complement South African environmental legislation.

These financial lending institutions have their own unique standards for environmental performance. They prescribe that these environmental performance standards are to be applied when they fund projects which may have an environmental impact.⁴ The application of these environmental performance standards is compulsory with the granting of finance resting on

1 Examples of the financial lending institutions are the World Bank, African Development Bank and the Development Bank of Southern Africa.

2 Paterson and Kotze (eds) *Voluntary Compliance Measures* 293.

3 Paterson and Kotze (eds) *Voluntary Compliance Measures* 293.

4 As in the gas pipeline example further on in this research paper, an environmental impact may include mine residue deposits that are likely to have adverse environmental impacts.

compliance with these environmental performance standards. This is notwithstanding that country legislation must in any event also be applied and complied with. It is also debatable that the partnership that is created between the financial lending institution and the borrower receiving funding cannot strictly be regarded as voluntary compliance with the environmental performance standards as funding is conditional upon compliance with these standards.⁵

These environmental performance standards do not quite fall within the ambit of hard law or soft law. Whilst hard law refers to those traditional sources of legislation such as statutes and customary law, soft law refers to less binding and authoritative commitments.⁶ Although the environmental standards prescribed by the lending institutions fall within the domestic context, they would typically be regarded as non legal regulatory instruments as they are law-like instruments that are not binding.

The World Bank prescribes the application of the International Finance Corporation's Environmental and Social Performance Standards as a condition before granting funding on specific projects.⁷ The International Finance Corporation is a global development institution and a member of the World Bank Group. The International Finance Corporation's Environmental and Social Performance Standards are entrenched in the International Finance Corporation's Policy on Social and Environmental Sustainability.⁸ The International Finance Corporation's Environmental and Social Performance Standards are a measure developed to achieve sustainable development in the private sector.⁹ The International Finance Corporation's Environmental and Social Performance Standards detail that in order to understand the total impact

5 Paterson and Kotze (eds) *Administrative Measures* 293.

6 Birne, Boyle and Redgwell *International Law and the Environment* 34.

7 World Bank 2012 <http://www.worldbank.org>.

8 IFC 2012 <http://www1.ifc.org>.

9 International Finance Corporation's Policy on Environmental and Social Sustainability (hereinafter referred to as Policy on Environmental and Social Sustainability).

of a project to be financed by the World Bank, a regional and social environmental impact study, amongst others, is imperative.¹⁰

The African Development Bank plays a major role in contributing to the economic and social progress of its regional member countries of which South Africa is one.¹¹ The African Development Bank has established a Policy on the Environment. One of the main goals of the Policy on the Environment is to promote sustainable development in its member countries.¹² It does this by the application of its Strategic Impact Assessment Guidelines and the Integrated Environmental and Social Assessment Guidelines both of which were established in 2004.¹³ These guidelines evaluate the environmental consequences of proposed projects and further ensure that environmental issues are mainstreamed throughout the project cycle.

The Development Bank of Southern Africa finances the creation of infrastructure in the Southern African region and services the Southern African Development Communities member countries.¹⁴ The main purpose of the Development Bank of Southern African is to promote economic development and growth for sustainable development programmes and projects.¹⁵ It provides funding in order to minimise or mitigate the environmental impact of projects. Due to its commitment to promoting sustainable development, the Development Bank of Southern African has developed a policy framework for environmental appraisal, which comprises of its environmental policy and its procedural framework.¹⁶

The focal point of the research will be on describing the standards of these financial lending institutions and highlighting their potential to regulate in collaboration with South African environmental laws. Due to length restrictions,

10 International Finance Corporation's Guidance Note 1 <http://www1.ifc.org>.

11 African Development Bank <http://www.afdb.org>.

12 African Development Bank Group's Policy on the Environment iii.

13 African Development Bank and the Environment: A Priority 2012 <http://www.afdb.org>.

14 Development Bank of Southern Africa <http://www.dbsa.org>.

15 Guidelines for Environmental Appraisal at the Development Bank of Southern Africa 5.

16 Development Bank of Southern Africa <http://www.dbsa.org>.

this dissertation will only focus on how section 24 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution) as well as the *National Environmental Management Act*¹⁷ (NEMA) could accommodate the application of the environmental standards in South Africa. These laws are most relevant to the research topic and the environmental performance standards prescribed by the lending institutions as these are regarded as framework legislation. Framework legislation has been described by some scholars as that which aims to define overarching and general principles in terms of which sector specific legislation is ingrained.¹⁸ The focus of specifically NEMA is on matters of the environment and the impact of human activities on the environment, hence the consideration of NEMA in the research. Section 24 of the Constitution establishes the high-level framework in terms of which legislation has to be interpreted and written.¹⁹ The resulting legislation is NEMA which gives effect to section 24 of the Constitution and which has a strong flavour of section 24 incorporated into it.²⁰ There are other sector specific laws that also deal with human impacts on the environment but those are not included in this research due to length restrictions of the research.²¹

The research is thus important and necessary as it will describe the extent to which South African law accommodates the environmental performance standards of financial lending institutions by explaining these standards, evaluating their benefits and drawbacks, assessing how section 24 of the Constitution and NEMA accommodate the standards and by discussing the specific standards that would typically apply in South Africa. In addition, an industry example will be used to illustrate the role and function of the environmental standards in order to gain an understanding of the practical implementation of the environmental standards.

17 *National Environmental Management Act* 107 of 1998 (hereinafter referred to as NEMA).

18 Nel and Du Plessis 2001 *SAJELP* 1-2.

19 Nel and Du Plessis 2001 *SAJELP* 2.

20 NEMA section 2(1)(a).

21 Examples of these would be the *National Water Act* 36 of 1998, the *National Environmental Management: Air Quality Act* 39 of 2004 and the *National Environmental Management: Waste Act* 59 of 2008.

2 Understanding the environmental performance standards

In order to get an understanding of the regulatory potential of the environmental performance standards, it is imperative to first appreciate the background and the manner in which the financial lending institutions apply the standards.

2.1 The theory behind environmental performance standards

Gunther Teubner first introduced the term “reflexive law” in 1982 of which the core concept is that of regulated self-regulation.²² It is asserted by scholars that modern society is so complex and fractured that the utilisation of only command and control regulation is sure to fail hence the focus on the reflexive law theory, which is based on self-regulation.²³ The assertion of reflexive law is that rather than law being prescriptive, it should permit the necessary stakeholders to detail the content of policies and procedures in terms of how governance will be enabled.²⁴

In further understanding the notion of reflexive law, it is worthwhile to note what reflexive law is not. Democracies choose their rights and must therefore be reflective about what rights are to be followed and what legal forms should be taken to initiate those rights.²⁵ In this sense, reflective, that is, thinking about thought, is not meant to be a synonym for reflexive.²⁶ Reflexivity is a general term for a particular situation where the subject reflects upon a point.²⁷ Reflexive thought does not centre as much on the achievement of the substantive content of law as much as it does on proceduralisation in that it tries to set the boundaries for future action.²⁸ It is based on reflexive rationality and is thus not

22 Calliess “Lex Mercatoria: A Reflexive Law Guide to An Autonomous Legal System”.

23 Dorf 2003 *Cornell Law Faculty Publications* 393.

24 Teubner 1984 *Law and Society Review* 83-93.

25 Dorf 2003 *Cornell Law Faculty Publications* 391.

26 Dorf 2003 *Cornell Law Faculty Publications* 393.

27 Dorf 2003 *Cornell Law Faculty Publications* 393.

28 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

as coercive, prescriptive and regulatory than repressive and regulatory law.²⁹ Regulatory and repressive law are those traditional processes of law that focus on rule inclined resolution of disputes.³⁰ This is juxtaposed by the extremely involved nature of reflexive law which provides the basis for self-organisation without pre-empting the outcome of regulatory interventions.³¹ What reflexive law means for governance is therefore that the law should not be so prescriptive in that it provides every detail of content but rather it should provide a broad spectrum of procedures required and allow stakeholders to colour in the detail.³² This results in law remaining in the background rather than in the foreground in governance.

In applying the rules of reflexive law to real life, a good example of reflexive law would be the environmental management system as advocated by ISO 14001.³³ This is an adopted non-legal³⁴ requirement that is implemented to result in improved environmental legal compliance.³⁵ It is based on the premise that the organisation that is adopting ISO 14001 will periodically review and evaluate its environmental management system to identify opportunities for improvement.³⁶ The frequency, scale and timeframe of this continual improvement process are to be established by the organisation taking into account economic and other relevant circumstances.³⁷ Improvements in an organisation's environmental

29 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

30 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

31 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

32 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

33 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

34 Adopted in the sense that it is not a standard required to be applied by a law, rather it is a voluntarily adopted standard.

35 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

36 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

37 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

management systems are intended to result in further improvements in environmental performance.³⁸ This is in keeping with the theory of the reflexive law movement as the ISO 14001 standard does not include every detail of what an organisation should do to comply with the standard, rather, it gives broad outlines of the requirements to achieve improved environmental performance.

Another example of reflexive law is the environmental performance standards that make up the core focus of this research. As will be illustrated in detail in the subsequent chapters, the environmental performance standards provide the outline of how organisations should manage environmental and social performance throughout the lifecycle of their projects. Unlike traditional command and control tools which are not well suited to dealing with increasingly unexpected changes in environmental problems, the environmental performance standards take into account the uniqueness of projects in specific environmental sectors. Due to the vast array of laws across the different environmental sectors,³⁹ fragmentation of government structures and the multitude of processes and governance mechanisms occur. This is not an impediment associated with the implementation of the environmental performance standards as the evaluation by the financial lending institutions is done on a project-by-project basis in relation to the specific environmental circumstances.

2.2 International Finance Corporation

The International Finance Corporation is one of the largest global development institutions focused exclusively on the private sector in developing countries.⁴⁰ Its vision is that people should have the opportunity to escape poverty and improve their lives.⁴¹ As a development institution, the International Finance Corporation

38 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

39 Such as water, waste, land management and air quality.

40 World Bank 2012 <http://www.worldbank.org>.

41 World Bank 2012 <http://www.worldbank.org>.

is concerned with the impact of projects on its 184 member countries.⁴² It is further concerned with the broader impact of projects on society and finds it important that these development impacts are well understood and clearly presented in the project documents.⁴³ The Environmental and Social Performance Standards provide guidance on how to identify risks and impacts and are meant to avoid, minimise and manage risks in support of sustainable development.⁴⁴

The International Finance Corporation requires its clients, meaning the entity to which it is granting financing, to apply the Environmental and Social Performance Standards in order to manage environmental and social risks and impacts to enhance development opportunities.⁴⁵ It prescribes that the anticipated development impact includes consideration of social and environmental performance. Hence, the International Finance Corporation applies the Performance Standards to manage social and environmental risks and impacts. There are eight Performance Standards which establish standards that a borrower must meet throughout the life of an investment funded by the International Finance Corporation.⁴⁶ As mentioned earlier, the research will focus on the most relevant standard being the Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts.⁴⁷

Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts establishes the importance of integrated assessments in order to identify the environmental and social impacts, risks and opportunities of projects. It further establishes the importance of effective community engagement through disclosure of project-related information and consultation

42 IFC 2012 <http://www1.ifc.org>.

43 IFC 2012 <http://www1.ifc.org>.

44 Policy on Environmental and Social Sustainability 3.

45 Policy on Environmental and Social Sustainability 4.

46 Policy on Environmental and Social Sustainability 14.

47 International Finance Corporation's Performance Standards on Environmental and Social Sustainability 1 (hereinafter referred to as Performance Standards on Environmental and Social Sustainability).

with local communities on matters that directly affect them. Performance Standard 1 emphasises the client's management of environmental and social performance throughout the lifecycle of the project. The lifecycle of a project refers to the entire life of the project that is being funded from inception to the point that the project is finalised.⁴⁸ Environmental and social risks and impacts are required to be managed through an Environmental and Social Management System.⁴⁹ The Environmental and Social Management System refers to the process initiated and supported by management of the borrower and involves multiple engagements with clients, employees, communities affected by the project and other stakeholders.⁵⁰ The Environmental and Social Management System must identify the roles and responsibilities of involved parties, identify risks and mitigate those risks to ultimately identify and address potential limitations in achieving desired outcomes.⁵¹

Besides identifying and evaluating environmental and social risks and impacts of the project, Performance Standard 1 sets out to adopt a hierarchy to anticipate and avoid risks and impacts on the environment. Where it is not possible to avoid, then minimising risks is acceptable. Where residual impacts are left, compensation or offsetting of risks and impacts on the environment must occur.⁵² An important objective of Performance Standard 1 is to promote improved environmental and social performance through the effective use of management systems and to ensure that grievances from affected communities and other stakeholders is effectively managed and responded to. A further noteworthy objective is that Performance Standard 1 promotes and provides means for adequate engagement throughout the project lifecycle.⁵³ These engagements

48 International Finance Corporation's Guidance Note 2.

49 Policy on Environmental and Social Sustainability 3.

50 International Finance Corporation's Guidance Note 2.

51 International Finance Corporation's Guidance Note 2.

52 Policy on Environmental and Social Sustainability 17.

53 Policy on Environmental and Social Sustainability 17.

include issues that could potentially affect stakeholders and ensure that relevant environmental information is disclosed and disseminated.⁵⁴

2.3 African Development Bank

The African Development Bank has found it necessary to adopt a policy that promotes a long-term view of development.⁵⁵ Economic growth results in increased economic activity which in turn sees an increase in developed areas which means an increase in energy and fossil fuel use.⁵⁶ These activities generate environmental costs and benefits, which require an integration of social and environmental concerns. The African Development Bank states that there should therefore be an effective policy so that integration is achieved early in the project development stage in order to minimise the negative effects and enhance the positive effects.⁵⁷

The Bank's policy sets out a few overall goals. These are the improvement in the overall quality of life of the people of Africa by supporting sustainable environmental development and the preservation and enhancement of the ecological capital and life-support systems across Africa.⁵⁸ The objectives of the policy are to enhance the carrying capacity of Regional Member Countries by introducing innovative technologies, sound natural resource management techniques and reducing threats to ecosystems. The policy further sets out to improve access to environmental resources by the poor, to assist Regional Member States to build their capacity in order to bring about institutional changes to achieve sustainable development and to strengthen partnerships with international agencies to coordinate interventions in environmental sustainable development and to promote information sharing and sharing of best practices.

54 Policy on Environmental and Social Sustainability 17.

55 <http://www.afdb.org>.

56 African Development Bank Group's Policy on the Environment iii.

57 African Development Bank Group's Policy on the Environment 13.

58 African Development Bank Group's Policy on the Environment 13.

The approach that the African Development Bank adopts in implementing its policy is to mainstream environmental sustainability considerations in all its operations by strengthening existing environmental assessment procedures and developing new environmental management tools.⁵⁹ It aims to assist its Regional Member Countries to build sufficient human and institutional capacity to deal with environmental management and improving public consultation and information disclosure mechanisms.⁶⁰

If one undertakes a comparison of the environmental performance requirements of the African Development Bank to the other two financial lending institutions in the research, it is evident that the requirements are not as detailed as those of the Development Bank of Southern Africa and the International Finance Corporation.⁶¹

2.4 Development Bank of Southern Africa

The Development Bank of Southern Africa expects its members to follow its policy and guidelines, which allow for the early and systematic consideration of environmental issues in its projects. This thus ensures that projects continue within the framework of its mandate and policies.⁶² It follows a lifecycle approach and assists its borrowers to establish a suitable environmental management system and further assists them to reach their capacity to fulfil their environmental obligations.⁶³

The Development Bank of Southern Africa employs an appraisal process that aims to identify opportunities that allow for maximising the developmental and

59 African Development Bank Group's Policy on the Environment 14.

60 African Development Bank Group's Policy on the Environment 14.

61 A detail of each financial institution is set out in chapter 4 of the research which further supports this statement.

62 Guidelines for environmental appraisal at the Development Bank of Southern Africa (hereinafter referred to as DBSA) 5.

63 Guidelines for environmental appraisal at the DBSA 6.

environmental benefits of projects and promote sustainable development.⁶⁴ This appraisal process is an effective decision making tool that helps manage environmental risks and thus business risks.⁶⁵ It assists management to determine whether to support a project based on the environmental risks of the project.⁶⁶ It further assists the borrower to acquire any mandatory environmental authorisations that may be necessary thus minimising the project liability of both the borrower and the Development Bank of Southern Africa.⁶⁷ The Development Bank of Southern Africa also assists borrowers in increasing their environmental capacity and lastly finds ways to prevent, minimise, mitigate or compensate for any environmental risks and impacts during a project.⁶⁸

The Development Bank of Southern Africa supports projects only if they comply with the Bank's environmental policy and adhere fully to its procedural framework. The environmental policy delineates three essential principles of the appraisal process. These are compliance with national and regional policies, legislative and regulatory requirements related to the environment including international mandatory obligations, stewardship of environmental products and services in and out of the Development Bank of Southern Africa and to have in place an environmental management system that assists in improving environmental performance.⁶⁹

An important point to note in understanding the Development Bank of Southern Africa is that it has certain pre-requisites that govern projects. One of these is the categorisation of projects into high risk, medium risk, low risk and financial intermediaries.⁷⁰ A high-risk project is defined as a project likely to have a significant and adverse impact on the environment, and could lead to significant

64 Guidelines for environmental appraisal at the DBSA 6.

65 Guidelines for environmental appraisal at the DBSA 8.

66 Guidelines for environmental appraisal at the DBSA 8.

67 Guidelines for environmental appraisal at the DBSA 8.

68 Guidelines for environmental appraisal at the DBSA 7.

69 Guidelines for environmental appraisal at the DBSA 9.

70 Guidelines for environmental appraisal at the DBSA 12.

changes in land use and in the social and biophysical environment.⁷¹ In these types of projects, an environmental impact assessment must be done, whether or not it falls within the ambit of section 24 of the *National Environmental Management Act*.⁷² Additional to this, the Development Bank of Southern Africa requires an environmental management plan in line with the environmental impact assessment thus ensuring that the project has sufficiently planned for the mitigation of its environmental impacts.⁷³

2.5 Benefits and drawbacks

What is clear from the application of the environmental standards of these financial lending institutions is that the end objective is to achieve environmental sustainability in one way or another. Although there are various definitions of sustainable development, the concept is generally considered to have been formulated by the World Commission on Environment and Development and defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁷⁴ Sustainability is a mix of economic, social, and ecological principles intended to shape human activity so that we can meet our basic needs while still preserving biodiversity and natural ecosystems, and planning and acting to maintain these for the future.⁷⁵ Sustainability affects every level of human activity that stretches across the globe to all nations, developed and in the state of development.⁷⁶

Having said that, the question then arises as to how one could specifically define what is sustainable. The economic needs of a society are straightforward and would hinge on whether you make a profit or not.⁷⁷ Social needs depend on the specific society, as every society is different and has its own set of rules. One

71 Guidelines for environmental appraisal at the DBSA 13.

72 Guidelines for environmental appraisal at the DBSA 13.

73 Guidelines for environmental appraisal at the DBSA 13.

74 Nanda and Pring *International Environmental Law & Policy for the 21st Century* 23.

75 Environmental News Network 2012 <http://www.enn.com>.

76 Kidd *Environmental Law* 16.

77 Kidd *Environmental Law* 19.

cannot paint with a same brush the societal values of, for example, the United States and India. Ecological standards are also a variable as it is unclear how much resilience ecosystems have.⁷⁸ As a result, there will be a constant and changing debate on ecological standards as well.

The emergence of environmental standards prescribed by the financial lending institutions to their borrowers lends itself positively to attaining sustainable development in activities funded by the institutions.⁷⁹ Were this not so then the financial lending institutions would not compel enforcement before funding is given. This presents a colossal opportunity to the stakeholders to participate in preserving natural resources for the benefit of future generations, applying the principles of sustainable use, equitable use and the principle of integration.⁸⁰

On the other hand, the numerous environmental standards make it progressively more challenging for stakeholders to keep abreast of the latest developments and best practices.⁸¹ Not all borrowers are multinationals with a global footprint and with the resources to stay ahead of the developments in the environmental standards.⁸² Furthermore, it is especially difficult to assess their utility and performance, let alone the steps required to mainstream best practice.⁸³

In many industries, including the mining and chemical industries, large organisations go beyond compliance by striving to combine their economic growth and the objectives of environmental protection by risk management or by entering the “green markets”.⁸⁴ An organisation successfully implementing the environmental performance standards would be regarded as going above the minimum legal requirements that are required of an organisation. This brings many benefits to the organisation including positive industry reputation thus

78 Kidd *Environmental Law* 19.

79 Kidd *Environmental Law* 16.

80 Kidd *Environmental Law* quoting Sands 16.

81 Environmental News Network 2012 <http://www.enn.com>.

82 Environmental News Network 2012 <http://www.enn.com>.

83 Environmental News Network 2012 <http://www.enn.com>.

84 Gunningham 2009 *Journal of Environmental Law* 194.

increasing its marketability and attracting investments. A further benefit is to maintain the trust of local and surrounding communities where an organisation conducts its business.⁸⁵

Although responsible organisations strive to achieve at least the minimum legal requirements to achieve certain levels of environmental performance, they do resist certain forms of regulation that impose unnecessary costs on them and that hinder their environmental initiatives.⁸⁶ The command and control instrument widely used by government authorities is often seen by industry as being too costly, inflexible, ineffective and constraining.⁸⁷ A good example in industry occurred at a refinery where they found that they were able to achieve the same emission reductions required by legislation at a fraction of the cost if they were exempted from the legislative requirements.⁸⁸

Organisations seeking financial aid from the financial lending institutions will not receive such aid unless they meet the requirements of the environmental performance standards. This will result in the organisation having to source other financial support or simply not be able to carry out its intended growth and development. This ultimately results in economic loss to the company.

A good understanding of the environmental performance standards enables policy-makers to understand how these standards may be utilised to better shape and design environmental regulation.⁸⁹ Until such time that organisations have the need to be seen as being interested in corporate environmental responsibility, it may be appropriate for public policy itself to shift from a corporate accountability model to a corporate responsibility model.⁹⁰ This involves a less significant role for legal compliance and a broader scope for

85 Gunningham 2009 *Journal of Environmental Law* 194.

86 Gunningham 2009 *Journal of Environmental Law* 194.

87 Gunningham 2009 *Journal of Environmental Law* 194.

88 Gunningham 2009 *Journal of Environmental Law* 194.

89 Gunningham 2009 *Journal of Environmental Law* 195.

90 Gunningham 2009 *Journal of Environmental Law* 195.

voluntary or self-regulation.⁹¹ This argument however is dependent on the particular industry and an organisation's financial situation.

Whilst it is evident from the above that there exist more benefits than drawbacks to the environmental performance standards, an important point to note, indeed an obvious one, is that the environmental performance standards are not enforceable, at least by the regulators who cannot insist on compliance.⁹² It is noteworthy that compliance is defined as relating to the ideal situation in which a legal community conforms to the legal standards and requirements applicable to that community's activities.⁹³ Compliance to the environmental performance standards is therefore not a requisite stemming from South African legislation, nor are the environmental performance standards specifically referred to by any existing South African legislation, thus making them unenforceable.

91 The argument is based on and adapted from Gunningham's submissions on the roles of business in environmental regulation and governance.

92 Regulators in this context refers to South African government authorities such as the Department of Environmental Affairs. Although not strictly speaking enforceable by the financial lending institutions, the institutions may refuse funding on the basis of non compliance to the environmental performance standards.

93 Paterson and Kotze (eds) *Dissecting Environmental Compliance and Enforcement* 41.

3 Constitutional and framework legislation provisions

The following is a depiction of how section 24 of the Constitution and NEMA as framework legislation accommodate the environmental performance standards in South Africa.

3.1 Constitutional Provisions

Section 24 of the Constitution contains South Africa's environmental right.⁹⁴ This right is divided into two parts, one of which is a fundamental human right and the other is more of a directive type which requires the state to take certain positive steps to realize the right.⁹⁵ It is the latter part of the section 24 right that is of importance to the application of the environmental performance standards on which this research is based.⁹⁶

The courts have commented on how this right can be met, expressly in the historic *Government of the Republic of South Africa and Others v Grootboom and Others* (hereinafter referred to as *Grootboom*) case that incidentally was not a case on environmental law specifically.⁹⁷ The court here said that the constitutional right conferred certain obligations on the state, namely to take reasonable legislative and other measures. These "other measures" are particularly important as legislative measures by themselves will not ensure complete compliance and thus just legislation in itself is not enough. The court in the *Grootboom* case went on to discuss how "other measures" may refer to policies and programmes saying that the state must implement these to give effect to the constitutional right as espoused in section 24.

94 See generally Du Plessis 2009 *SAJELP* 58-84.

95 Kidd *Environmental Law* 20.

96 See generally Feris 2008 *South African Journal of Human Rights* (hereinafter referred to as *SAJHR*) 29-49 and Feris 2012 *Potchefstroom Electronic Law Journal* (hereinafter referred to as *PELJ*) 73-99.

97 2001 (1) SA 46 (CC).

Although the *Grootboom* judgment relates the “other measures” provision in section 24 to the state, primarily because this is in the context of the particular facts of the *Grootboom* case, Kidd validly questions whether the “other measures” is only confined to the state.⁹⁸ He states that non-state entities also often engage in activities that have a detrimental effect on the environment. Basing his argument on section 8 of the Constitution, he states that section 24 will also be applicable to non-state entities, which include natural and juristic persons.

Taking the arguments above further, that the “other measures” may include programmes and policies and these may be applicable to natural and juristic persons, the environmental performance standards may then also be regarded as being “other measures” that are in place additional to legislative measures.⁹⁹ The matter does not however end here as the provisions of the environmental framework legislation must also be considered. Suffice to state at this juncture that it has been illustrated above that the environmental performance standards are indeed constitutionally mandated.

3.2 Provisions of the National Environmental Management Act

The intention of introducing environmental framework legislation was to ensure an integrated ecosystem-orientated legal regime that permits a holistic view of the ecosystem, of the inter-relationships and inter-actions within it, and of the linkages in environmental stresses.¹⁰⁰

98 Kidd *Environmental Law* 22. See also Feris 2008 *SAJHR* 29-49 and Feris 2012 *PELJ* 73-99.

99 See generally Strydom and King (eds) *Environmental Management in South Africa* (Juta Johannesburg and Copenhagen 2009) Chapter 3, Currie and De Waal *The Bill of Rights* and Glazewski *Environmental Law in South Africa*.

100 Nel and Du Plessis 2001 *SAJELP* 1.

NEMA is the overarching legislation governing environmental matters in South Africa.¹⁰¹ NEMA sets out that an entity's environmental responsibility shall exist throughout the life cycle of a project.¹⁰² The environmental responsibility further includes the safety, health and environmental consequences of a policy, programme, project, product, process, service or activity. Of course, the life cycle of a project includes the entire spectrum of all stages of the project, otherwise known as the cradle to grave approach as espoused further in NEMA.

There are, besides the principle of life cycle responsibility, other environmental principles that are specifically incorporated into law.¹⁰³ NEMA sets out some important principles such as the polluter pays principle, precautionary principle, sustainable development, duty of care to avoid harm to the environment and environmental justice.

The principles set out in NEMA are the central focus of environmental governance in South Africa and must be taken into account in decision-making.¹⁰⁴ These are binding on all organs of state and apply throughout the country. According to Kidd, not all the principles mentioned above are generally accepted principles.¹⁰⁵ The polluter pays principle and the precautionary principle are the more universally agreed upon principles.

The polluter pays principle means exactly what it says, that the entity that causes pollution must undertake the cleaning up of the pollution. NEMA sets out that this principle entails the costs of remediation of the actual pollution caused as well as the costs of prevention of future pollution.¹⁰⁶ This principle therefore has a preventive and a compensatory aspect. This principle shall apply at any stage

101 Strydom and King (eds) *Environmental Management in South Africa* (Juta Johannesburg and Copenhagen 2009) 193-195.

102 NEMA section 2(4)(e).

103 NEMA section 2.

104 NEMA section 2.

105 Kidd *Environmental Law* 7.

106 NEMA section 2(4)(p).

of a project and will be just as applicable no matter what stage the project has reached.¹⁰⁷

The other of the universally accepted principles is the precautionary principle which entails where it is unknown or uncertain that a certain situation or thing may cause harm to the environment, then preventive measures should rather be taken.¹⁰⁸ The situation or thing should be treated as potentially harmful to the environment until proven otherwise rather than risk permanent harm to the environment.¹⁰⁹ This would be very responsibly electing to rather err on the side of caution. Of course, development must continue and a balance must be reached in terms of the likely risk with the cost of avoidance and the likelihood of any damage or harm taking place.¹¹⁰ This principle is entrenched in NEMA where it is also believed by prominent authors that environmental impact assessment legislation is really based on the precautionary principle.¹¹¹

Having said the above, it is then only to be expected that government authorities would have to regulate development by individuals and industries. There will be and indeed have been unscrupulous entities that have gone through the development stages and in the course of doing so caused irreversible damage to the environment. It is therefore trite that authorisations are required before certain activities are undertaken. The process of obtaining environmental authorisations however, comes with its own share of problems both for the government spheres dealing with authorisations and the parties on the other end that make application for authorisations.

NEMA sets out what authorisations are required before proceeding with certain activities. It directs that the potential consequences for the environment and

107 Paterson and Kotze (eds) *Administrative Measures* 226-237.

108 NEMA section 2.

109 Paterson and Kotze (eds) *Administrative Measures* 226-237.

110 Kidd *Environmental Law* 9.

111 Paterson and Kotze (eds) *Administrative Measures* 226-237.

impacts on the environment for specified activities must be considered.¹¹² There are certain environmental activities that may continue without having to obtain an environmental authorisation.¹¹³

Having looked at the scope of NEMA, it is clear that NEMA is the national environmental framework legislation in South Africa. According to Nel and Du Plessis, an important characteristic of NEMA is the attempt to achieve cooperative governance between different line functions in the international context as well as between same and different spheres of government. NEMA makes extensive arrangements for the management of outsiders by way of empowering civil society and providing for cooperation agreements.¹¹⁴ It is a definite departure from the previous command and control practices. It also allows for the integration of multiple environmental management tools and governance instruments of which the environmental performance standards are but one.¹¹⁵ This is very similar to the objectives of the environmental performance standards as discussed in detail in chapter 4 of this research paper. It illustrates that the manner in which the objectives of NEMA are set out are compatible with the intention of the environmental performance standards.

The determination to make is then to what extent does NEMA mandate the use of the environmental performance standards. One can argue perhaps that since the environmental performance standards are mandated by the Constitution as detailed in the preceding chapter, and if the hypothesis is used that NEMA is based on the constitutionally entrenched section 24 right, then it must follow that the standards are therefore mandated by NEMA.

A more thorough analysis to reach the conclusion that the environmental performance standards are mandated by NEMA, is to draw from the principles

112 Strydom and King (eds) *Environmental Management in South Africa* (Juta Johannesburg and Copenhagen 2009) 193-195.

113 NEMA section 24.

114 Nel and Du Plessis 2001 *SAJELP* 11.

115 Nel and Du Plessis 2001 *SAJELP* 1.

entrenched in NEMA.¹¹⁶ The principles set out in NEMA do not prescribe in detailed terms how they may be achieved and what criteria will be used by the regulators¹¹⁷ to measure compliance to the principles.¹¹⁸ The principles, although a noble concept, are not detailed by NEMA in terms of containing specific normative substance on how to measure or evaluate them.¹¹⁹

The courts have taken a similar view of the NEMA principles in the case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another*.¹²⁰ In coming to its judgment, the Court referred to section 2 of NEMA and stated that “it did not make provision for rights and obligations, instead it set out principles expressed at times in abstract rather than concrete terms”. The Court went on to state that the NEMA section 2 principles were more aimed at directing the appropriate organs of state to establishing policies which set out their environmental implementation and management plans that give effect to the principles rather than to attempt to prescribe the manner in which the organs of state control their allocated property.¹²¹

NEMA section 24 gives effect to the aspect of integrated environmental management by setting out that certain activities may not be undertaken prior to obtaining an environmental authorisation from the competent authority.¹²² The environmental authorisations however only focus on considering the impacts on certain activities on the environment, they do not delve into the detail of how to give effect to the principles of NEMA section 2.¹²³ NEMA further does not

116 See references to NEMA principles in Footnotes 101-114 above.

117 Regulators in this context refers to South African government authorities such as the Department of Environmental Affairs.

118 Summers “Defining Sustainability” 6.

119 Summers “Defining Sustainability” 6.

120 *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001(3) SA 1151 (CC).

121 Kotze *et al South African Environmental Law through the Cases* 62.

122 NEMA section 24(2)(a).

123 Summers “Defining Sustainability” 6.

provide a thorough definition of integrated environmental management in section 24, although this is the core focus of Chapter 5 of NEMA.¹²⁴

NEMA section 28 codifies the common law doctrine of duty of care.¹²⁵ The duty rests with any person who has caused or may cause significant pollution to take reasonable measures to prevent harm to the environment.¹²⁶ Although reasonable measures is not defined specifically in NEMA section 28, section 28(5) does make provision for an authority to consider “any adopted environmental management plan or environmental implementation plan”.¹²⁷ An analyses of the environmental performance standards illustrates how these are scoped in order to formulate environmental management plans and systems.¹²⁸ Applying the environmental performance standards would thus contribute to meeting an organisation’s duty of care, the obligation advocated by NEMA section 28.

NEMA Chapter 6 focuses on the incorporation of international environmental instruments into South African law and subsequent compliance thereto.¹²⁹ This is particularly important to this study as although the environmental performance standards are not international law, they may be regarded as best practice. The environmental performance standards, although in the strict sense cannot be regarded as international environmental law, it may display some characteristics of international soft law.¹³⁰ It then follows that NEMA allows for and certainly incorporates international environmental instruments into South African law.

124 Strydom and King (eds) *Environmental Management in South Africa* (Juta Johannesburg and Copenhagen 2009) 203.

125 Strydom and King (eds) *Environmental Management in South Africa* (Juta Johannesburg and Copenhagen 2009) 211.

126 NEMA section 28(1).

127 Glazewski *Environmental Law in South Africa* 178.

128 See Chapter 4 of the research for an analysis of the environmental performance standards of the financial lending institutions.

129 NEMA section 25(1).

130 Birnie, Boyle and Redgwell *International Law and the Environment* 34-37.

It may therefore very well be argued, based on the theory of the reflexive law movement, that the principles and other concepts entrenched in NEMA are other examples of reflexive law. More importantly, one may then conclude that NEMA supports the environmental performance standards in that the standards would make it possible to give effect to the NEMA section 2 principles, NEMA section 28 duty of care obligations as well as lending more substance to NEMA section 24 environmental authorisations. NEMA section 25 further accommodates the use of the environmental performance standards as best practice.¹³¹

131 See detailed discussion of the environmental performance standards in Chapter 4 below.

4 An analysis of specific standards applicable in South Africa

The environmental performance standards described in the following sub-chapters are the standards that are typically applicable in South Africa and more specifically are those that incorporate applicable environmental provisions.

4.1 International Finance Corporation's Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

As set out earlier in the research paper, this Performance Standard applies to projects with environmental and social risks and impacts that are being financed by the International Finance Corporation. Projects are business activities including those where physical aspects and facilities are likely to generate their own specific risks and impacts from early development stages and then throughout the lifecycle of the project.¹³² The lifecycle will include the stages of design, construction, commissioning, operation, decommissioning, closure or perhaps even post-closure of an asset.¹³³

4.1.1 Environmental and Social Management System

Performance Standard 1 prescribes that the client, meaning the entity receiving financing, will conduct a process of environmental and social assessment to establish and maintain an Environmental and Social Management System.¹³⁴ This system must be appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risks and impacts.¹³⁵ The elements that are required to constitute the Environmental and Social

132 Performance Standards on Environmental and Social Sustainability 17.

133 International Finance Corporation's Guidance Note 3.

134 Performance Standards on Environmental and Social Sustainability 17.

135 International Finance Corporation's Guidance Note 3-4.

Management System are the policy¹³⁶, identification of risks and impacts, management programmes, organisation capacity and competency, emergency preparedness and response, stakeholder engagement and finally monitoring and review.¹³⁷

4.1.2 Policy

The policy must define the environmental and social objectives and principles that guide the project to achieve sound environmental and social performance.¹³⁸ This project specific policy does not require the alteration of any existing policies. The policy provides a framework for the environmental and social assessment and management process. It must specify that the project will comply with the applicable laws and regulations of the jurisdictions in which it is being undertaken. Further, the policy must be consistent with the principles that underpin the Performance Standards.¹³⁹ In the scenarios where there exist subscriptions to other internationally recognised standards, codes of practice or certification bodies, these must be included in the policy. The policy must detail who within the organisation will ensure conformance and be responsible for the execution of the policy. The policy must be communicated to all levels of the organisation.¹⁴⁰

4.1.3 Identification of Risks and Impacts

Performance Standard 1 indicates that the client will establish and maintain a process for identifying the environmental and social risks and impacts of a

136 Policy here refers to the project-specific policy that the Performance Standard 1 expects the borrower to establish and that may exist alongside existing policies that the borrower may already have in place.

137 Performance Standards on Environmental and Social Sustainability 17.

138 International Finance Corporation's Guidance Note 5.

139 The principles referred to here are the principles that guide a specific project to achieve its environmental and social performance.

140 International Finance Corporation's Guidance Note 5.

project.¹⁴¹ The scope and level of effort in determining the risks and impacts depends on the size, nature and locality of the project. The scope must be consistent with good international industry practice and will determine the appropriate and relevant manner together with assessment tools.¹⁴² The process may either comprise of a full-scale environmental and social impact assessment or it may comprise of a limited environmental and social assessment or a basic application of the standards.¹⁴³

For a project that involves existing material property,¹⁴⁴ environmental and social audits or hazard or risk assessments are sufficient for the identification of risks and impacts.¹⁴⁵ For a project that has to still define the material property, an environmental due diligence process will be carried out to identify the hazards or risks at the stage when the assets are more fully understood. The information used in the identification of hazards or risks will be recent environmental baseline data. This process of identifying hazards or risks will consider greenhouse gas emissions, climate change risks, and transboundary effects like air pollution and the use or pollution of international waterways.¹⁴⁶

In the instance where the project is centred on a specific physical aspect and service that may generate impacts, environmental risks and impacts will be identified.¹⁴⁷ This identification of risks and impacts will be in the context of the area of influence of the project.¹⁴⁸ This area of influence referred to includes all components of the project such as project and client activities, as well as facilities owned, operated managed by the client or even his contractors. The area of influence may also include impacts from *ad hoc* but foreseen developments

141 Performance Standards on Environmental and Social Sustainability 18.

142 Policy on Environmental and Social Sustainability 18.

143 Policy on Environmental and Social Sustainability 18.

144 Existing material property refers to, for example, physical premises that have already been identified for a project thus making it possible to identify adverse impacts and risks.

145 International Finance Corporation's Guidance Note 8.

146 International Finance Corporation's Guidance Note 8.

147 Performance Standards on Environmental and Social Sustainability 19.

148 International Finance Corporation's Guidance Note 9.

caused by projects that may occur in the future or at a possibly different geographic position. The area of influence of a project may entail indirect project activities that impact on biodiversity on which affected communities depend on for a livelihood. Further areas of influence may be associated facilities that would not have been in existence but for the project and that are not funded as part of the project but would make the project impossible if it did not exist. Cumulative impacts such as incremental contribution of gaseous emissions to an air shed, reduction in sediment loads to a watershed, interference with migratory routes or wildlife movement may be areas within the influence of a project.¹⁴⁹

Should risks and impacts within the area of influence of a project come about due to the actions of a third party, the client will deal with the impacts and risks in a manner appropriate to the client's influence and control of the third party, keeping in mind the conflict of interest that may exist.¹⁵⁰

The process of identifying risks and impacts must take into account the findings and recommendations of associated and relevant plans, studies or assessments prepared by the relevant government departments or other relevant entities that are related to the area of influence of the project. This is inclusive of master economic development plans, country or regional plans, feasibility studies, alternatives analyses, and cumulative, regional, sectoral or strategic environmental assessments where relevant. This must be done where the project involves specific physical elements, aspects and facilities.¹⁵¹

In instances where the project encompasses specific physical elements, aspects and facilities that have the likelihood of generating impacts and as part of the process of identifying risks and impacts, individuals and groups that may be directly or disproportionately affected by the project because of their

149 International Finance Corporation's Guidance Note 9.

150 International Finance Corporation's Guidance Note 9.

151 Performance Standards on Environmental and Social Sustainability 19.

disadvantaged or vulnerable position must be identified.¹⁵² When disadvantaged or vulnerable persons or groups are identified, measures must be proposed and in turn implemented so that these persons or groups are not impacted negatively and they are not disadvantaged with respect to the benefits of development and the associated opportunities.¹⁵³

4.1.4 Management Programmes

The entity receiving finance from the International Finance Corporation must establish management programmes that, in accordance with its policy, principles and objectives, will set out mitigation and performance measures and actions that deal with the environmental and social risks and impacts that have been identified in the project.¹⁵⁴

The management programmes will typically consist of operational manuals, practices, plans, legal agreements and related supporting documents that are managed in a methodical way.¹⁵⁵ These management programmes will apply across the organisation and will be equally applicable to contractors and suppliers over which the organisation has control over. It will also apply to specific sites, activities or even facilities. The hierarchy to mitigate risks will have avoidance at the topmost tier followed by minimising and lastly compensation if technically and financially feasible.¹⁵⁶

In instances where an identified risk or impact cannot possibly be avoided, the organisation will identify mitigation measures and thereafter establish actions for compliance to the applicable legislative landscape, regulations and all the Environmental and Social Performance Standards. The complexity and detail of

152 Performance Standards on Environmental and Social Sustainability 19.

153 International Finance Corporation's Guidance Note 16.

154 Performance Standards on Environmental and Social Sustainability 19.

155 International Finance Corporation's Guidance Note 20.

156 International Finance Corporation's Guidance Note 21.

the management programme will be proportionate to the project's risks and impacts.¹⁵⁷

The management programmes must establish environmental action plans. Action plans will include the details necessary to carry out mitigation measures, for example a Waste Reduction Action Plan.¹⁵⁸ These action plans must set out the intended outcomes and actions to address matters arising from the risk and impact identification process. This must be measurable and must be able to be tracked by using performance targets and key indicators over specific timelines. The resource estimates and responsibilities for implementation must also be included in the action plan. The management programme will also include the actions controlled by third parties to address risks and impacts. The management programme must be prepared to deal with unforeseen events, changing circumstances and the results of monitoring and review.¹⁵⁹

4.1.5 Organisational Capacity and Competency

Performance Standard 1 details that the organisation, together with the relevant third parties, will establish, maintain and strengthen the organisational design such that roles, responsibilities and the authority to implement an Environmental and Social Management System are clearly defined.¹⁶⁰ Clear responsibilities and authorities of role players in the Environmental and Social Management System must be defined; this includes the designation of management representatives.¹⁶¹

The essential environmental responsibilities must be well explained and communicated to the relevant persons and to the rest of the organisation.

157 Performance Standards on Environmental and Social Sustainability 19.

158 Performance Standards on Environmental and Social Sustainability 19.

159 Performance Standards on Environmental and Social Sustainability 19.

160 Performance Standards on Environmental and Social Sustainability 20.

161 Performance Standards on Environmental and Social Sustainability 20.

Adequate resources, including human, financial and management sponsorship must be provided continuously to ensure effective environmental performance.¹⁶²

The organisation must ensure that the persons responsible for the environmental performance of the project must have sufficient knowledge, skills, and experience necessary to perform their work. This includes up to date knowledge of the host country's regulatory framework as well as the Performance Standards. Persons must be have the knowledge, skills and experience to implement the specific measures required by the Environmental and Social Management System and the methods required to perform the actions in an efficient and competent manner.¹⁶³

The identification of risks and impacts will comprise of an adequate and objective evaluation. The preparation and presentation must be done by competent personnel. External expert consultants may be required to assist in the risks and identification process where the issues are technically complex.¹⁶⁴

4.1.6 Emergency Preparedness and Response

Where the project involves specifically identified physical elements, aspects and facilities that are likely to generate impacts, the Environmental and Social Management System must establish and maintain an emergency preparedness and response system.¹⁶⁵ This will enable the organisation to effectively respond to accidents and emergencies resulting out of project activities in a manner that prevents and mitigates further harm to people and the environment.¹⁶⁶ This implies that areas where accidents and emergency scenarios may occur must be identified. Response procedures, availability of emergency equipment, resources, responsibility areas, communication and training to ensure effective

162 International Finance Corporation's Guidance Note 23.

163 International Finance Corporation's Guidance Note 24.

164 International Finance Corporation's Guidance Note 24.

165 Performance Standards on Environmental and Social Sustainability 20.

166 International Finance Corporation's Guidance Note 26-27.

response must also be in place. The emergency preparedness and response process must be regularly reviewed to ensure that the changing environment is taken into account. In certain instances, the organisation must collaborate with local government agencies and the affected community to facilitate adequate emergency preparedness by *inter alia* providing the appropriate information.¹⁶⁷

4.1.7 Monitoring and Review

The effectiveness of the management programme must be measured. This is done by way of an established monitoring and measurement process.¹⁶⁸ The monitoring and measurement of related legal, contractual and regulatory requirements must be included in the monitoring and measurement process.¹⁶⁹ The process includes cases where third parties and the government have the responsibility to manage specific risks and impacts. In certain instances, the organisation will involve members from affected communities to participate in the monitoring, such as participating in water monitoring programmes. Should a project have significant impacts, the organisation must utilise external expert consultants to authenticate its monitoring data. The extent of monitoring must be proportionate to the risks and impacts of the project.¹⁷⁰

The organisation must use mechanisms such as internal audits and inspections to supplement the verification of compliance process.¹⁷¹ Results of monitoring must be recorded and compared with previous results for improvement purposes. Monitoring results as well as the resulting corrective and preventive actions must be documented in the management programme and adequate tracking done to ensure close out of these actions. The next monitoring cycle must test effectiveness of the corrective and preventive actions that were implemented.¹⁷²

167 International Finance Corporation's Guidance Note 27.

168 Performance Standards on Environmental and Social Sustainability 20.

169 International Finance Corporation's Guidance Note 28.

170 International Finance Corporation's Guidance Note 28.

171 International Finance Corporation's Guidance Note 28.

172 International Finance Corporation's Guidance Note 28.

Senior management in the organisation must receive periodic performance reviews that detail the effectiveness of the Environmental and Social Management System.¹⁷³ The scope and frequency of such reporting will depend on the nature and scope of the activities of the project. Senior management must in turn review the information received to ensure that the policy is upheld, and that the procedures, plans and practices are being implemented and are effective.¹⁷⁴

4.1.8 Stakeholder Engagement

The basis to ensuring successful management of a project's environmental impacts is in building strong, constructive and engaging relationships with stakeholders.¹⁷⁵ Stakeholder engagement is a continuous process that involves stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanisms and ongoing reporting to affected communities.¹⁷⁶ The nature of such stakeholder engagement will depend on the project's risks, adverse impacts, and the project's specific phase of development.¹⁷⁷

The first step would be to identify the stakeholders and then to consider how to facilitate dialogue with the identified stakeholders.¹⁷⁸ Where projects involve specific physical elements, aspects or facilities that may adversely affect a community then that affected community must be identified.¹⁷⁹ A stakeholder engagement plan must be put in place to allow effective participation by the affected community with particular focus on the disadvantaged and vulnerable.¹⁸⁰

173 Performance Standards on Environmental and Social Sustainability 21.

174 International Finance Corporation's Guidance Note 29.

175 Performance Standards on Environmental and Social Sustainability 21.

176 International Finance Corporation's Guidance Note 30.

177 International Finance Corporation's Guidance Note 28.

178 Performance Standards on Environmental and Social Sustainability 21.

179 Performance Standards on Environmental and Social Sustainability 21.

180 International Finance Corporation's Guidance Note 31.

Where engagement is done with community representatives such as religious leaders, politicians or school teachers, then the organisation must verify that the representatives do in fact represent the views of the affected community and that they can be relied upon to communicate the engagements to the community they represent.¹⁸¹

Where the exact physical location of a project is not yet known but the project is expected to have significant impacts on the local communities, a Stakeholder Engagement Framework must be established.¹⁸² This must form part of the management programme and must sketch the general principles and the strategy to identify the affected communities and other relevant stakeholders.¹⁸³ The implementation will be done once the physical location of the project is known.¹⁸⁴

Disclosure of project information helps the affected community and other stakeholders to understand the risks, impacts and opportunities of the project.¹⁸⁵ The organisation must provide affected communities with access to relevant information regarding the purpose, nature and scale of the project; duration of the project; risks, impacts and mitigation measures; the stakeholder engagement process and grievance mechanisms.¹⁸⁶

4.1.9 External Communications and Grievance Mechanisms

In instances where affected communities are subject to risks and impacts from a project, the organisation must establish a process for the affected community to consult in a manner that allows them to express their views on the risks, impacts

181 International Finance Corporation's Guidance Note 32.

182 Performance Standards on Environmental and Social Sustainability 21.

183 Performance Standards on Environmental and Social Sustainability 21.

184 Performance Standards on Environmental and Social Sustainability 21.

185 Performance Standards on Environmental and Social Sustainability 21.

186 International Finance Corporation's Guidance Note 32-33.

and mitigation measures and in turn allows the organisation to respond.¹⁸⁷ The degree and extent of engagement required by the consultation process should be proportionate to the nature and scale of the project. For projects with significant adverse impacts, the organisation will have to go through an additional Informed Consultation and Participation Process. This involves a more in-depth consultation process that leads to the organisation incorporating the views of the affected community into its decision-making.¹⁸⁸

It is imperative for the organisation to establish a procedure for external communications that includes the process to receive and register complaints and concerns from the public.¹⁸⁹ The process must provide for assessing the issues raised and the determination of how to address these including providing and tracking responses, and adjusting the management programme as required. Clients should make periodic environmental and social sustainability reports available to the public.¹⁹⁰

The organisation must establish grievance mechanisms in cases where there exist affected communities.¹⁹¹ The grievance mechanism must be able to receive and facilitate effective resolution of concerns and grievances regarding the organisation's social and environmental performance. The concerns should be resolved speedily through a transparent consultative process that is sensitive to cultural needs and accessible. There should be no cost or retribution attributed to the party that raised the concern. The grievance mechanism cannot impede the normal judicial or administrative remedies.¹⁹²

187 Performance Standards on Environmental and Social Sustainability 22.

188 International Finance Corporation's Guidance Note 34.

189 Performance Standards on Environmental and Social Sustainability 23.

190 International Finance Corporation's Guidance Note 36.

191 International Finance Corporation's Guidance Note 37.

192 International Finance Corporation's Guidance Note 37.

4.1.10 Ongoing Report to Communities

The organisation must provide periodic reports to the affected communities that describe progress on issues that have been identified as a concern to the affected communities.¹⁹³ These reports must be provided at least annually.¹⁹⁴

4.2 African Development Bank's Policy on the Environment

In order to improve the environmental sustainability of its projects, the African Development Bank is improving existing and developing new environmental management tools. In doing so, the African Development Bank screens projects to categorise them by way of information provided by the borrower.¹⁹⁵

Category 1 projects require full environmental and social impact assessments and the consolidation of an environmental and social management plan.¹⁹⁶ Projects in this category are likely to bring about severe adverse and irreversible effects on elements of the environment considered sensitive by the borrowing country or the African Development Bank.¹⁹⁷ The environmental and impact assessment scrutinizes the project's potential beneficial and adverse impacts and then compares those with reasonable alternatives. The assessment also proposes measures that are required to prevent, minimise, mitigate or compensate for adverse impacts and to improve environmental benefits.¹⁹⁸ A typical example of a category 1 project is in extractive industries such as mining. Mining projects have inherently significant environmental impacts and are deemed category 1 by virtue of its nature.¹⁹⁹

193 Performance Standards on Environmental and Social Sustainability 23.

194 International Finance Corporation's Guidance Note 37-38.

195 African Development Bank Group's Policy on the Environment 20.

196 African Development Bank Group's Policy on the Environment 20.

197 African Development Bank Group's Policy on the Environment 20.

198 African Development Bank Group's Policy on the Environment 20.

199 Comments on the Integrated Safeguard System of the African Development Bank
<http://www.jamaaresourceinitiatives.org>.

Category 2 projects require environmental and social management plans to be developed. These projects are expected to have detrimental and site-specific environmental and social impacts that are less damaging than the projects in category 1. These detrimental impacts can be minimised by applying mitigating measures or even incorporating internationally recognised design criteria and standards.²⁰⁰ An example of a category 2 project is the Alternative Learning and Skills Development Project undertaken by Tanzania.²⁰¹ The project involved the construction of training centres on two islands which had specific environmental and social impacts. These included possible oil spills and waste battery (containing acids and lead) disposal, solid waste and waste water disposal especially in light of the island having porous land with high percolation rates. Other environmental impacts included loss of vegetation from construction activities causing erosion and the movement of people settling closer to the development sites.

Category 3 projects do not require impact assessments. There are no adverse effects on the environment. The only requirement for these projects is categorisation.²⁰² An example of a typical category 3 project would be the Economic Reform Support Programme in Burundi. This project involved improving governance and security and promoting equitable growth in Burundi and thus had no environmental impacts, as a result being classified as a category 3 project.²⁰³

Category 4 projects entail the investment of the African Development Bank's funds through Financial Intermediaries in projects that result in adverse environmental and social impacts. Financial Intermediaries include other banks, insurance companies and leasing companies that lend the African Development Bank's funds to small and medium sized enterprises. These small and medium

200 African Development Bank Group's Policy on the Environment 20.

201 Alternative Learning and Skills Development Project Appraisal Report June 2001
<http://www.afdb.org>.

202 African Development Bank Group's Policy on the Environment 20.

203 Economic Reform Support Programme Completion Report March 2011 <http://www.afdb.org>.

sized enterprises embark on projects with minimal adverse environmental impacts such as small building projects in ordinary areas not zoned as being environmentally sensitive.²⁰⁴

The African Development Bank prioritises environmental policy based lending and initiatives to achieve coherence among sectoral policies that encroach on the environment.²⁰⁵ This is done by assessing the impacts of policies, plans and programmes rather than just the impact assessment in the project phase.²⁰⁶

The detailed environmental requirements for any specific project are set out in the African Development Bank's Integrated Environmental and Social Impact Assessment Guidelines.²⁰⁷ Although the title indicates that it is a guideline, the details contained therein are actually requirements.²⁰⁸ The Environmental and Social Assessment Procedures prescribe a formal process for the environmental and social review of projects, plans and programmes in order to improve decision-making and to optimise projects.²⁰⁹ The Environmental and Social Assessment Procedures detail the steps to follow when assessing the environmental risks during the project cycle and to ensure that environmental and social elements are taken into account during the project cycle. The Environmental and Social Assessment Procedures also aim to make the member countries aware of the African Development Bank's requirements so that they can evaluate the project activities in accordance with these requirements and thereby assist them to achieve environmental sustainability.²¹⁰

204 African Development Bank Group's Policy on the Environment 20.

205 African Development Bank Group's Policy on the Environment 21.

206 African Development Bank Group's Policy on the Environment 21.

207 African Development Bank and the Environment: A Priority 2012 <http://www.afdb.org>.

208 African Development Bank Group's Policy on the Environment 19.

209 African Development Bank's Environmental and Social Assessment Procedures for Public Sector Operations 1 (hereafter known as Environmental and Social Assessment Procedures for Public Sector Operations).

210 Environmental and Social Assessment Procedures for Public Sector Operations 1.

The assessment of environmental and social impacts is the responsibility of the borrower. Specific divisions of the African Development Bank will however ensure that the Bank's policies and requirements are sufficiently applied.²¹¹

An integral process of the environmental assessment involves country programming. This outlines government's environmental and social constraints, strategies and programmes which enables the Bank to incorporate environmental and social elements into lending priorities.²¹²

4.3 Development Bank of Southern Africa's Environmental Appraisal Guidelines

As detailed in the opening chapters, the primary purpose of the Development Bank of Southern Africa is to promote economic development and growth, human resource development and institutional capacity building by mobilising financial and other resources from the national and international private and public sectors for sustainable developmental programmes and projects.²¹³ It therefore commits itself to promoting sustainable development and has as a result developed a procedural framework for environmental appraisal.²¹⁴ All projects requiring support from the Development Bank of Southern Africa must undergo environmental appraisals based on the guidelines set out by the Bank.²¹⁵ The guidelines aim to guide and assist environmental analysts to produce high quality environmental appraisals to inform proper decision-making and ultimately to promote sustainable development.²¹⁶

The environmental appraisal is primarily qualitative and involves planning, gathering and validating information, evaluating the information and reporting on

211 Environmental and Social Assessment Procedures for Public Sector Operations 1-2.

212 African Development Bank Group's Policy on the Environment 17.

213 *Development Bank of Southern Africa Act* 13 of 1997.

214 Development Bank of Southern Africa <http://www.dbsa.org>.

215 Guidelines for Environmental Appraisal at the DBSA 6.

216 Guidelines for Environmental Appraisal at the DBSA 8.

the appraisal.²¹⁷ This process is made up of three important steps, namely, project screening, site visit and the actual environmental appraisal.²¹⁸

Initial screening is done in order to determine the risk category of a project. Screening will only commence when a project is in the pipeline after passing the initial acceptance in accordance the policies and priorities of the Bank.²¹⁹ During the initial screening stage, the environmental analyst will categorise the project into one of the four risk categories.²²⁰ Once the categorisation is done, an outline of all information required, including legislative and regulatory requirements, is communicated to the borrower.²²¹

At least one site visit is done before the environmental appraisal to assess the types of risk that may be encountered.²²² The site is assessed to determine the sensitivity of the site, potential environmental risks from project activities and the potential for intervention to promote alternative engineering designs.²²³ The institutional capacity of the borrower for environmental management is also assessed and relationships with the work team and stakeholders are established.²²⁴

The site visit is imperative especially in instances where no environmental impact assessment report is submitted and it enables identification of potential environmental impact of the project. Where there is an ongoing programme of financing, the site visit allows assessment of the environmental performance of the project and borrower.²²⁵

217 Guidelines for Environmental Appraisal at the DBSA 15.

218 Guidelines for Environmental Appraisal at the DBSA 16.

219 Guidelines for Environmental Appraisal at the DBSA 16.

220 High risk, medium risk, low risk and financial intermediary.

221 Guidelines for Environmental Appraisal at the DBSA 16.

222 Guidelines for Environmental Appraisal at the DBSA 16.

223 Guidelines for Environmental Appraisal at the DBSA 17.

224 Guidelines for Environmental Appraisal at the DBSA 17.

225 Guidelines for Environmental Appraisal at the DBSA 17

The information gathered is analysed and if need be further information requested. The adequacy and source of the information is also reported on in order to ensure a sound information base.²²⁶

Part of the environmental risk appraisal encompasses having an environmental risk table for all projects. For each risk identified, the impact is assessed and given a rating of low, medium or high. Criteria that are appropriate to the project are used for the rating and documented.²²⁷

Suspensive conditions and further terms and conditions may be imposed by the Bank on borrowers in legal agreements to ensure compliance with the Bank's mandate, policies and guidelines in environmental management.²²⁸

During the project implementation phase, environmental aspects of monitoring are carried out by the Bank to ensure that borrowers comply with conditions, that mitigation measures are effective, and that the borrower has capacity to monitor and measure the environmental performance of the project.²²⁹ Following this, a review process of the environmental appraisal guidelines of the Bank is done periodically to ensure continual improvement of its management systems.²³⁰

226 Guidelines for Environmental Appraisal at the DBSA 17.

227 Guidelines for Environmental Appraisal at the DBSA 18.

228 Guidelines for Environmental Appraisal at the DBSA 23.

229 Guidelines for Environmental Appraisal at the DBSA 24.

230 Guidelines for Environmental Appraisal at the DBSA 25-26.

5 Illustration of the implementation of the environmental performance standards in the gas industry sector

This basic illustration is used in order to grasp a firm understanding of how the environmental performance standards are applied in practice. The example is based on the environmental and social impact assessments and other safeguard documentation submitted to the World Bank by a particular gas industry pursuant to a request for project funding from the World Bank.²³¹ It illustrates the extent to which the environmental performance standards and environmental legislation complemented each other to deliver sustained legal compliance in the project.

Although the adoption and use of these environmental performance standards are actually mandatory in the project scenario, meaning funding rests on compliance with these standards, this is immaterial as they retain an agreement and civil based character.²³²

A gas company²³³ embarked on a multi-million dollar natural gas project that spanned across regional boundaries and involved gas pipelines stretching across close to one thousand kilometres (1000 km). The objective of constructing the pipeline was for the transportation of natural gas. The project concerned the extraction and processing of natural gas and then transporting it to various operational plants across South Africa as feedstock into its various processes.

During the course of the preparatory work, a number of independent studies were commissioned by the gas company to evaluate the social and environmental effects of the gas pipeline project. The studies were done in accordance with South African environmental legislation as well as the guidelines and policies as set out by the World Bank, specifically the International Finance

231 Case example based on a confidential industry report.

232 Nel and Wessels 2010 *PELJ* 17.

233 Name of gas company withheld due to confidentiality restrictions.

Corporation's environmental performance standards discussed extensively in Chapter 4.1 of this research.

The environmental assessment requirement from the International Finance Corporation's environmental performance standards states that all projects proposed for World Bank funding require environmental impact assessment reviews in order to ensure that they are environmentally and socially sound.²³⁴ An environmental assessment evaluates a project's potential environmental risks and impacts, examines project alternatives and identifies ways of preventing, minimising, mitigating or compensating for adverse environmental impacts and for enhancing positive impacts.²³⁵ An environmental assessment does exactly this for the elements of the environment namely, air, water and land aspects. Due to the complexity of the gas pipeline project, an assortment of instruments were used in fulfilment of the environmental performance standards. These included environmental impact assessments, environmental audits, risk assessment and environmental action plans which incidentally were also in fulfilment of South African environmental legislation.

The mitigation, control and management of environmental impacts was of great importance to the gas company, its stakeholders and the relevant authorities. Although not expressly required by South African environmental legislation to do so, it developed a safety, health and environmental policy in order to fortify its environmental performance and improvement. The policy committed itself to acting responsibly, carrying out its duty of care and ensuring good corporate governance practice. Internal and external environmental monitoring and auditing was also factored into the gas pipeline project that was in accordance with internationally accredited environmental management systems such as ISO 14001.²³⁶

234 Performance Standards on Environmental and Social Sustainability 15.

235 Performance Standards on Environmental and Social Sustainability 3.

236 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

The gas company, being funded by the World Bank, showed good environmental and social performance based on previous sustainable development reporting and was committed to meeting good international industry practice through compliance with the International Finance Corporation's Performance Standards as well as adherence to the strong, well enforced South African environmental laws, regulations and requirements. NEMA, in particular its principles, was used to guide practice, as well as various international best practice standards.²³⁷

The gas company had an Environmental Management System based on ISO 14001 in place incorporating regulatory requirements and the site-specific conditions at the project location. The gas company operations were found to be already broadly in compliance with the International Finance Corporation's Environmental Performance Standards from observations during the site visit and data provided by the company.

The gas company was a greenfield project²³⁸ and thus, the investment was resulting in significant new impacts. Projected safety, health and environmental management issues associated with the project included dust control, waste management, including management of mine residue deposits, water management, public safety, hazardous materials management and mitigation of transportation risks on roads leading to the site. The existing and approved environmental management plan was compiled with updated legal requirements and identified for management of any environmental aspects that may have arisen as part of the gas pipeline project. Key aspects of the regulatory environment relevant to the gas pipeline project concerned the environment, best practice guidelines and standards in environmental management and the management of social impacts in terms of resettlement.

237 NEMA section 2.

238 A greenfield project in this context refers to a previously undeveloped site.

The World Bank had issued operational directives to the gas company, one of which was to utilise internationally accepted best practice standards and guidelines in environmental management.²³⁹ The gas pipeline project, acting on these operational directives, established an environmental management system based on ISO 14001. The main objective of ISO 14001 is to bring about continuous improvement in environmental management and the prevention of pollution.²⁴⁰ The gas pipeline project established the ISO 14001 environmental management system and consequently defined its own targets and standards for auditing, including the incentive for the company to strive for excellence beyond simply adhering to legislative and other requirements. In order to have a proper environmental management system in place, the gas pipeline project implemented a comprehensive management system that included the following principles:

1. Commitment to a number of key principles that have been developed in a company-specific environmental policy.
2. Clear environmental policies and targets.
3. Thorough record of all policies, procedures and activities.
4. Due cognisance of legal requirements.
5. Designation of responsibilities within specified time frames using specified resources.
6. Training and personnel aspects of environmental management necessary for meeting environmental management objectives.
7. Development and maintenance of internal and external communication to assist in attaining environmental management objectives.
8. On-going monitoring of operations against standards specified by the organisation and prompt corrective actions in cases of deviation from environmental management policy and targets.

239 Policy on Environmental and Social Sustainability 3.

240 Standards South Africa <http://www.stansa.co.za> ISO 14001/SANS 14001:2005 Environmental Management Systems.

The most significant direct social impact associated with this project was mostly positive and involved the creation of job opportunities for local communities including their dependents and people employed by businesses supporting the mine.

Thus, the gas project, according to the International Finance Corporation's Environmental Performance Standards had good safety, health and environmental performance. Although having some adverse impacts and risks, these proved to be manageable under the various initiatives run by the International Finance Corporation and the gas company, such as the IFC-for-Aids campaign.

6 Conclusion and Recommendations

With the rate of industry development and the steady increase of populations in developing countries, the negative impact of human activity on the environment has grown exponentially. This is notwithstanding state interventions to control certain activities due most significantly to the limitations of the command and control instruments.²⁴¹ There has been much attempt therefore to introduce alternate tools of which voluntary approaches are but one. Some typical features of these voluntary tools include the state not prescribing that these be adopted by organizations.²⁴² Their use is prescribed rather by institutions such as the financial lending institutions alongside existing legislation in order that they complement each other to achieve what scholars have referred to as “beyond compliance” measures.²⁴³ The downfall of the lack of prescription by the state is that enforcement is not carried out leaving the field wide open for free-riders.²⁴⁴ Such is the nature of a voluntary tool for compliance.

The objective of this study was to describe the extent to which South African law accommodates the environmental performance standards of financial lending institutions by explaining these standards, evaluating their benefits and drawbacks, assessing how section 24 of the Constitution and NEMA accommodate the standards and by discussing the specific standards that would typically apply in South Africa. In addition, an industry example was used to illustrate the role and function of the environmental standards in order to gain an understanding of the practical implementation of the environmental standards.

The environmental performance standards of each of the financial lending institutions were shown to each have their own identity when it comes to applying the standards to specific projects. The International Finance Corporation has the

241 Paterson and Kotze (eds) *Administrative Measures* 294.

242 Paterson and Kotze (eds) *Administrative Measures* 294.

243 Paterson and Kotze (eds) *Administrative Measures* 294.

244 Free-riders in this context refers to entities that benefit from natural resources with no regard for sustainability.

most detailed environmental performance standards across each element applied to a project. These elements include establishing a policy, management programmes and an environmental and social management system.²⁴⁵ The African Development Bank applies the categorisation method to its projects in order to determine the effects of a project on elements of the environment.²⁴⁶ The Development Bank of Southern Africa has what it calls Appraisal Guidelines which is a procedural framework for environmental appraisal.²⁴⁷ These constitute the environmental performance standards of the financial lending institutions with all having the same objective, that is, to apply funding towards projects that take into consideration the protection of the environment.²⁴⁸ In analysing the environmental performance standards, the research highlighted the relationship between the environmental performance standards and reflexive law.

The theory of reflexive law is based on setting the boundaries for future action by proceduralisation rather than by achieving the substantive content of law.²⁴⁹ Examples of reflexive law are typically the ISO 14001 Environmental Management System and the provisions of NEMA in the context of it being framework legislation. The research showed that, in applying the environmental performance standards in industry, the standards have the potential to give effect to South African framework legislation and indeed are mandated by the Constitution.²⁵⁰ NEMA, by way of its section 2 principles, the section 24 environmental authorisations, the section 25 international environmental law obligations and the NEMA section 28 duty of care rule accommodate the environmental performance standards to a large degree mainly because the framework is set out without the substantive content. The environmental performance standards, if adopted, either because of the need for funding from

245 Performance Standards on Environmental and Social Sustainability 17.

246 African Development Bank Group's Policy on the Environment 20.

247 Guidelines for Environmental Appraisal at the DBSA 6.

248 Adapted from the environmental performance standards specific to each of the three financial lending institutions.

249 Kotze *Global Environmental Law and Governance: Law and Regulation for the 21st Century* Chapter 5.

250 See discussion in Chapter 3 above.

any of the three financial lending institutions²⁵¹ or for simply ecocentric²⁵² reasons, will provide the substantive content missing from South African framework legislation. The main concern however remains the lack of enforcement by the regulators of the environmental performance standards due to it not being classified as a mandatory legislative requirement.

If the use of these adopted compliance measures yields positive results, then their use should be encouraged as the potential of these financial lending institutions to regulate is positive. In certain instances, the use of other types of voluntary measures²⁵³ may not yield positive results because of the lack of sanctions on those who choose not to comply. Although the state does not regulate or insist on compliance to the environmental performance standards, the case remains unique with respect to the standards. This is so because compliance to the measures impacts positively on the organization electing to comply with the environmental performance standards, the main benefit being that the organization is on the receiving end of financial lending in addition to elevating an organisation's market reputation.²⁵⁴

Ultimately, an analysis of the legislative framework as well as the environmental performance standards has shown that not only does the legislative framework accommodate the standards, but that they do indeed contain the regulatory potential to enhance environmental performance in South Africa.

251 Namely the International Finance Corporation, the African Development Bank and the Development Bank of Southern Africa.

252 Scholtz 2005 *Macquarie Journal of International and Comparative Environmental Law* 18-30.

253 Other types of voluntary measures may include the adoption of ISO 14001 or even the Responsible Care Programme, see <http://www.responsiblecare.org>.

254 See Chapter 2.5 above.

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Addendum: Solemn Declaration

I, the undersigned Rakshita Mohabir, with University Number: 22620923 hereby solemnly declare that:

1. I know that it is wrong to copy (that is to 'copy and paste' or simply write over) any text (that is any sentence, paragraph or longer texts) from a text book, journal, study guide, prescribed study material, from the internet or from text that was written by another student or by any other person and then to present it as my own work, even if I do refer to the source in the bibliography.
2. I also know that it is unacceptable to copy parts of text here and there in my assignment or paper and that I am not allowed to make use of the exact wording of another text, even if I add my own words here and there or rearrange the sequence of the copied text.
3. I understand that I must use texts as sources in the sense that I have to interpret the principles discussed in the text, describe it in my own words and then answer the question asked.
4. I know that an instruction to use additional sources does not mean that I may copy any other source or text word for word.
5. I understand that I may use short quotations but that I am then required to clearly indicate the text as a quotation, in accordance with the house style of the faculty. This is the only legitimate way in which I may use the exact wording of another text in an assignment and paper.
6. I know that I have to substantiate any factual allegation by referring to an applicable source. I must also acknowledge the origin of any idea or opinion I refer to in my paper or assignment, if it was originally formulated by anyone else. .
7. I know that I have to make use of footnotes throughout my assignment and paper to refer to my sources and that I have to list all sources in the bibliography.
8. I know that I may only include sources in the bibliography if I have read them myself. If author X refers to another book or article by author Y and I have only read the article by X, not the article or book by Y, I may not include the article or book by Y in my bibliography. The same applies to any legislation or cases the authors refer to.
9. I know that I am guilty of academic dishonesty and a contravention of the rules of the NWU whenever I:
 - a. Do not act in accordance with the principles set out above.
 - b. Make my own work available to another person, thereby enabling that person to copy my work or to use it to complete his or her assignment or paper.
 - c. Submit a memorandum that I have in my possession, as my assignment, thus presenting it as my own intellectual effort.
 - d. Present anybody else's work as my own, regardless whether the real author of the work is a previous or current student, a student at another university or anybody else. It also does not matter whether this person completed the assignment on my behalf on my request or instructions or not.
 - e. Present my own work as the work of somebody else or allow that my work be presented as the work of anybody else.
10. I know that a lack of time, a busy schedule, peer pressure, committee commitments, sport commitments, tradition or personal circumstances will not be a defence on a charge of academic dishonesty.
11. I know that disciplinary steps will be instituted against me if there is a suspicion that I may have acted dishonestly as described in this declaration.
12. I further realise that I may jeopardise my own future career as a jurist if I am found guilty of academic dishonesty. Any such finding will appear on my university record.

R Mohabir

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12 November 2012

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