



EaP GREEN PROGRAMME

Review of legislation on environmental impact assessment of Georgia with regard to implementation of the Espoo Convention

FINAL REPORT
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The findings, interpretations and conclusions expressed in this report are those of the consultants and United Nations staff members who were involved in the preparation of this report and do not necessarily represent the views of the United Nations or its Member States.

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1. Introduction and Background

The project's objective is to assist Georgia to build its administrative capacity and to enhance its legal and institutional frameworks for applying environmental impact assessment (EIA) in a transboundary context for all major projects under consideration that might have adverse environmental impact across borders. The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention, hereinafter Convention) under the United Nations Economic Commission for Europe (UNECE) is used as the main instrument to achieve this. As Georgia is not yet a Party to the Convention, the project aims to promote the accession of Georgia to the Convention through assisting it to reach full compliance with the Convention's obligations and to implement them effectively. A ratification of the Convention is based on a transposition of the requirements of the Convention into national legislation. This can be achieved by including the necessary transboundary considerations into the national EIA legislation, wherever such legislation exists. The requirements of the Convention may also be included in different pieces of legislation, e.g. those covering environmental protection or physical planning.

In April 2013, the Ministry of Environment and Natural Resources Protection of Georgia informed the secretariat to the Convention that Georgia was planning to carry out fundamental reforms in the existing EIA and SEA systems and was committed to improving its EIA legislation in compliance with the Convention and the relevant EU legislation. It requested assistance from the Convention secretariat in reviewing and evaluating its national legislation currently in force (Georgian Law on Environmental Impact Permits) and in recommending requested changes for reaching compliance with the Convention. The activity is funded by the European Union, as part of activities implemented by UNECE under the "Greening Economies in the Eastern Neighbourhood (EaP-GREEN)" project¹.

Legislative advice under the project consists of (a) a review of the national legislation for the application of the Convention in Georgia; and (b) development of recommendations for required changes or amendments in the legislation as well as institutional and process improvements to effectively implement environmental impact assessment procedures in full compliance with the Convention.

The legislative advice has been carried out by Stephen Stec, an international consultant to the UNECE Espoo Convention secretariat, supported by Merab Barbakadze, a national expert on EIA legislation. The international expert coordinated and consulted with the Netherlands Commission on EIA, which has a longstanding cooperation project with authorities and civil society in Georgia on EIA and strategic environmental assessment, and took into account and incorporated the results from its work. The national expert produced a short background report on the current and draft legislative and institutional framework, listing relevant publications, results of any related projects, other studies, reports or reviews. The Ministry of Environment and Natural Resources Protection of Georgia played a central role in conducting the review, being responsible for providing required materials and information and

¹ Jointly implemented by OECD, UNECE, UNEP, and UNIDO to assist the European Union's Eastern Partnership countries in their transition to green economies.

participating in the analysis. Environmental Information and Education Centre supported the Convention secretariat in practical arrangements for the project activities.

The international expert conducted a field mission to Georgia to gather information, conduct research and interview key authorities and stakeholders. Interviews were conducted to gather information about EIA-related legislation, institutions and implementation mechanisms, including obstacles to effective implementation; plans, processes and prospects for further development; and to aid in identifying gaps and weaknesses that can be addressed through follow-up activities.

The organizations and stakeholders interviewed includes the following: Ministry of Environment and Natural Resources Protection, REC Caucasus, Gamma, Association Green Alternative, Millennium Challenge Corporation, MCA Georgia, Georgian Green Movement, Association of Civil Society Development, CENN, World Bank and Tamar Gugushvili (independent expert).

On 4 November 2013, a round table consultation meeting took place in Tbilisi hosted by the Ministry for consideration of and commenting on the draft executive summary. The international consultant with support of the national expert presented the draft results at the consultation meeting, and collected comments from the authorities and other stakeholders during and after the meeting.

2. Current status of EIA law and practice in Georgia

The system in Georgia is similar to the OVOS/Expertiza system found in several countries in Eastern Europe, the Caucasus and Central Asia. For further analysis of this system generally, see “General guidance on enhancing consistency between the Convention and the environmental assessment within the framework of State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia”² (pending adoption by the Meeting of the Parties to Convention, at its sixth session, to be held in Kyiv, from 2 to 5 June 2014). Typically, in EIA worldwide, the final decision on a proposal to undertake certain activities requiring EIA is a “consent-type” decision, taking into account and balancing various interests, including those determined via the EIA procedure. The OVOS/Expertiza system is not typical for EIA worldwide and ecological expertise is not a requirement for EIA meeting the standards of the Convention. In line with the recommendations under the draft General guidance and to ensure full compliance with the Convention, Georgia may wish to introduce necessary changes to its OVOS/Expertiza type system, or establish a brand new legal framework based on EIA legislation found within the UNECE region.

The Georgian Constitution (1995), Article 37, guarantees the right to a healthy environment and the transparency of environmental information. Article 6, paragraph 2 of the Georgian Constitution provides that international treaties, subject to Constitutional norms, take

² The Working Group on EIA and SEA decided during its third meeting in 11-15 November 2013 to forward the draft guidance, as presented in the informal document ECE/MP.EIA/WG.2/2013/INF.5, for adoption by the MOP.

precedence over domestic normative acts. A provision in a country's Constitution to directly apply international agreements is considered by the Convention Implementation Committee as being insufficient for proper implementation of the Convention without more detailed provisions in the legislation (ECE/MP.EIA/10, decision IV/2, annex I, para. 64).

The Convention provides for extensive public participation in EIA. While Georgia is not yet a Party to the Convention, it is a Party to the Convention on Access to Information, Public Participation in Decisionmaking, and Access to Justice in Environmental Matters (Aarhus Convention)³ and must comply with its obligations including with respect to EIA. Furthermore, Georgia has a political goal of future membership in the European Union. The European Union is Party to the Espoo Convention, and therefore its obligations are aligned with and integrated into the EU's environmental policy. Georgia committed to implement the Convention in the Partnership and Cooperation Agreement with the European Community (now European Union), which entered into force on 1 July 1999. Article 57, paragraph 2, of the Agreement states that cooperation between the EU and Georgia shall aim at, inter alia, "implementation of the Espoo Convention on Environmental Impact Assessment in a transboundary context." In paragraph 3, the Agreement further specifies that cooperation shall take place particularly through "... improvement of laws towards Community standards." Current EU law on EIA is governed by the EIA Directive, originally adopted in 1985 and amended three times, in 1997, 2003 and 2009. The initial Directive of 1985 and its three amendments have been codified by Directive 2011/92/EU of 13 December 2011. The Directive is under a further process of review and amendment, with the changes expected to come into force in 2016. The Directive is fully compatible with the Convention. It is expected that Georgia's commitments to harmonize its legislation with the EU *acquis communautaire*, including the EIA Directive, will increase before the end of 2013 with the initialing of an Association Agreement with the EU. The Association Agreement replaces the Partnership and Cooperation Agreement.

Legal acts on EIA in Georgia are found in parliamentary acts and other normative acts such as presidential orders, governmental decrees, ministerial orders etc.

The Law on Environmental Protection (adopted on December 10, 1996) establishes the general legal framework for comprehensive environmental protection and management of natural resources. Article 5 of the Law sets forth basic principles of environmental protection (based on the Rio Declaration principles) and states that they shall be applied in the course of planning and implementing any activity. Under Article 35 of the Law certain activities can only be permitted to take place in accordance with an environmental impact permit, in order to take into consideration ecological, social and economic interests of the public and the state and to protect human health, natural surroundings, material assets and cultural heritage. Article 37 of the Law establishes the general requirements with regard to EIA in Georgia.

³ Article 6, paragraph 8 of the Aarhus Convention requires authorities to take into account the outcome of public participation in relation to environmental decisionmaking, which can only be done on the basis of an administrative procedure. This provision implies the establishment of administrative procedures for environmental decisionmaking meeting certain international standards. See *The Aarhus Convention: An Implementation Guide* (1st ed., 2000), at 91.

The first Georgian EIA legislation adopted after 1996 was drafted with the assistance of the European Union and Germany and met international standards, even being called “rather ambitious.”⁴ However, in the mid-2000s Georgian law and policy underwent a substantial restructuring aimed at increasing investment and eliminating corruption. The current Law on Environmental Impact Permits came into force during this period, in 2005. As EIA was considered to be an obstacle to investment, the 2005 amendments substantially weakened the country’s first EIA legislation. Georgia introduced a system of investment permitting called the “one window” approach, streamlining the permitting process and cutting down the number of authorities that permit applicants need to deal with. It also reduced the list of activities subject to EIA, shortened the timeframes for permitting, and constrained public participation rights and procedures.

As a result of the reforms, for new activities, the main permitting procedure is the construction permit, with the environmental impact assessment procedure subject to the construction permitting process.

The Law on Licenses and Permits (adopted on June 24, 2005) defines the comprehensive list of categories of licenses and permits, and sets up the rules for the issuance, amendment and termination of licenses and permits. Among the types of permits relevant to Convention implementation are environmental impact permits and various types of construction permits. This law determines the general procedure for construction permit issuance that consists of three stages, each representing an independent administrative proceeding with specified time frames.⁵ The environmental impact permit procedure (including EIA) with the involvement of the Ministry of Environment and Natural Resources Protection is required only in stage II, and only for those activities that require ecological examination as per article 4 of the Law on Environmental Impact Permits (see below). Where a construction permit is required, the public authority responsible for issuing the construction permit must determine whether the proposed activity requires an Environmental Impact Assessment under the Law on Environmental Impact Permits (see below) and if so involves the Ministry in the second stage of permitting.

The Law on Licenses and Permits includes a general exemption from its application for projects undertaken by government ministries, the local self-government of Tbilisi, and certain agencies subordinated to the ministries or Tbilisi local self-government. Such projects are alternatively covered by sub-legislative normative acts such as Government Resolution #57 of March 24, 2009 on Construction Permit Issuance Procedure and Permit Terms, and Order #1-1/842 of 25.05.2010 of the Minister of Economy and Sustainable Development of Georgia, which establish special consent procedures for these projects that may include EIA. However, the mandatory application of EIA in such situations has been questioned⁶ and apparently there is a lack of clarity and legal certainty for this significant category of projects.

⁴ Kolhoff and Gugushvili, “EIA in Georgia – state of affairs”.

⁵ Construction permitting is also governed by the Code on Safety and Free Turnover of Products (May 8, 2012) and Government Resolution No. 57 on Construction Permit Issuance Procedure and Terms (March 24, 2009).

⁶ See, e.g., report on the National Round-table Meeting on Legal Implementation of the Espoo Convention in Georgia, Tbilisi, 4 November 2013 available at <http://www.unece.org/index.php?id=33483> .

The Law on Environmental Impact Permits (adopted on December 14, 2007) establishes those activities subject to mandatory ecological expertise through an exhaustive list of activities, included in Article 4 of the law,⁷ and sets forth the requirements for issuing environmental impact permits and for conducting ecological expertise, including requirements for public participation. This law defines the environmental impact permit as a permanent authorization to commence a particular activity, issued to a developer pursuant to the applicable legal requirements. Article 4 of the Ministry Regulation on Environmental Impact Assessment (approved May 15, 2013)⁸ further defines the list of activities. The construction permitting procedure is interrupted while the environmental impact permit procedure proceeds.

The Order of the Ministry of Economic Development of Georgia N 1-1/823 of 24 August 2006 on approval of the temporary rules for conducting a mandatory expertise of construction projects of special importance governs procedures of conducting expertise of activities subject to construction permitting. This includes expertise of the components of the project related to engineering geology and/or engineering hydrology, foundations and load-bearing construction.

According to article 11 of the Law of Georgia on Environmental Impact Permits and a Ministry regulation (Order #38 of Jun 3, 2013 of the Minister of Environment and Natural Resources Protection of Georgia on Approval of Modus Operandi of the Special Council of Environmental Impact), an activity may be exempted from EIA in the case that “common state interests require that the activity be undertaken and the decision has been made in a timely manner.” The regulation does not specify what activities may fall under this category, and in fact any activity can potentially be exempted. The Minister of Environment and Natural Resources Protection takes the decision on the basis of a recommendation from a special council on environmental impact. According to the interviews conducted, this provision has been rarely used, in connection with small hydropower projects, in the case of road construction, and the Tbilisi landfill project.

The Law on Ecological Expertise (adopted on December 14, 2007) establishes an obligatory step in the process of environmental impact permitting, consisting of a scientific review by an expert commission set up by the Ministry of Environment and Natural Resources Protection for each project, to ensure ecological balance with consideration for principles of conservation and sustainable development. All activities subject to ecological expertise are also subject to EIA under Article 4 of Ministry Order #31 of May 15, 2013 on Approval of the Environmental Impact Assessment Regulation, which makes reference to Article 4 of the Law on Environmental Impact Permits. A positive ecological expertise is a condition for obtaining an environmental impact permit. Thus, a positive ecological expertise is also a prerequisite for construction permits for construction related to Article 4 activities.

⁷ Activities not listed in Article 4 may still need to be in compliance with environmental technical regulations issued by the Ministry. For example, wastewater discharges from activities that do not require an environmental impact permit are regulated by the 2008 Ministry Order No. 745 on Environmental Technical Regulations.

⁸ Environmental impact permitting is also required for old facilities continuing operations under the new permitting regime, even if no new construction is pending, through a type of environmental audit procedure. Where no construction permit is required, the Ministry is entitled to issue the environmental impact permit for those activities falling under Article 4.

The provision of the above laws dealing with permitting are covered by the General Administrative Code (adopted on June 25, 1999), which defines the procedures for issuing and enforcing administrative acts, reviewing administrative complaints, and preparing, concluding, and implementing administrative contracts by an administrative agency. Chapter VI of the Administrative Code deals with administrative procedure applicable to environmental impact permitting. Chapter III of the Code deals with transparency of information.

The Georgian legislation on public participation and EIA came under the scrutiny of the Aarhus Convention Compliance Committee (see Communication ACCC/C/2008/35), which recommended that Georgia take the necessary steps to ensure that its national legislation with regard to public participation in respect of decisions related to forestry is clear. The Committee stated: “the Committee is not convinced that the de facto EIA process for the issuance of forest use licenses amounts to an EIA in the meaning of annex I, paragraph 20,” without however finding that the country was in non-compliance with its obligations under the Convention.

Partly due to the increase in investment in the country, a substantial EIA practice has developed. A handful of private consulting companies have developed expertise in conducting EIA procedures and in developing documentation. Significantly, these consultants have developed parallel systems depending on whether an EIA is subject only to Georgian legislation, or whether international standards should apply. The latter is the case where a project involves international financing, because the international financing institutions (e.g., the World Bank, Asian Development Bank, European Investment Bank) have their own EIA requirements that are generally stricter than the Georgian law.⁹

3. Draft legislation on EIA

Following elections in late 2012, a new government was formed in Georgia, which subsequently has increased resources available to the Ministry of Environment and Natural Resources Protection, and has established certain priorities related both to international standards and to potential EU membership. As a result of the new government programs, the Ministry has established a schedule of legislative drafting. A law amending the Law on Environmental Impact Permits has been included in the schedule of legislative drafting submitted in the second half of 2013. However, no drafting of the relevant amendments had begun as of November 2013. The present review therefore aims to support Georgia’s efforts to assess gaps in the current legislation and to establish the need for legislative changes.

The Ministry is reviewing examples of EIA legal provisions that have been produced pursuant to earlier assistance projects.¹⁰ A draft “Environmental Code” was prepared in 2009 in cooperation between the Ministry and the United Nations Development Programme (UNDP). It was subject to public discussion at that time. Part 8 of the draft (articles 362-408) is dedicated to permitting procedures and EIA. An earlier project from 2004 resulted in a draft law on the

⁹ The World Bank has conducted an assessment of the differences between Georgian and Bank requirements. See EIA report, Kakheta Regional Roads Improvement Project (supplemental EIA for Sasadilo-Sioni Road), prepared by Roads Department of the Ministry of Regional Development and Infrastructure.

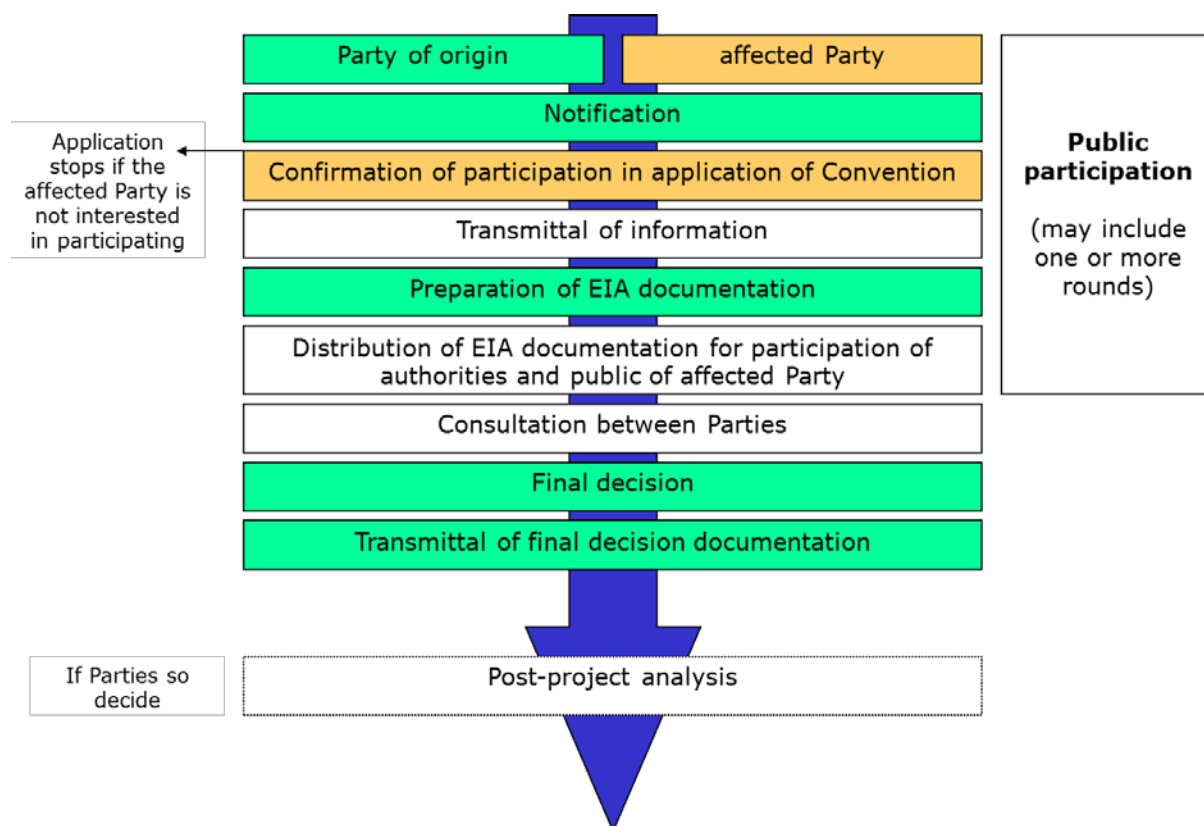
¹⁰ These draft laws have not been reviewed in connection with this report.

“environmental assessment system” produced with technical assistance of the Netherlands EIA Commission. The project was implemented by Caucasus Environmental NGO Network (CENN).

4. Obligations under the Convention

EIA is included in the Rio Declaration (Principle 17) and has been described as a customary norm of international law.¹¹ The Convention deals with environmental impact assessment in a transboundary context. The Implementation Committee of the Convention has determined that establishment of an environmental assessment procedure is one of the core obligations under the Convention (ECE/MP.EIA/WG.1/2003/3, para. 9). In order to implement the Convention a state should establish a national EIA system that meets the Convention’s requirements, especially with respect to public participation (ECE/MP.EIA/IC/2010/4, para. 19(a)).

Figure 1 below presents a flow chart demonstrating stages of transboundary EIA under the Convention, adapted from the ECE Guidance on the Practical Application of the Espoo Convention¹².



¹¹ See Gabčíkovo-Nagymaros Project (Hungary/Slovakia), concurring opinion of Judge Weeramantry, I.C.J. Reports 1997, p.7.

¹² UNECE Environmental Series, No. 8: Guidance on the Practical Application of the Espoo Convention (2006). Available at http://www.unece.org/env/eia/pubs/practical_espoo.html.

Article 2, paragraph 2 of the Convention requires the establishment of an EIA procedure that includes all the recognized elements of a well-functioning system. The Convention includes an Appendix containing a list of activities that trigger the obligation to perform an EIA when such activity is likely to cause a significant adverse transboundary impact.¹³ The first task is thus to determine whether an activity is listed in Appendix I and may have significant impacts across borders. This exercise is often called screening. Parties may also decide to extend that list with further activities that always require a transboundary EIA (Appendix III contains general criteria to assist in the determination of the environmental significance of activities not listed in Appendix I).

Notification is the formal and mandatory start of the application procedure. Article 2, paragraph 4 of the Convention requires that the Party of origin ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. Article 3 of the Convention sets forth the requirements for the contents of notification, including the principle that an affected Party be notified early in the decisionmaking process, and no later than when informing the public in the country of origin. It is recommended to send the notification as early as possible, preferably before the scoping, if such a phase is being carried out. Article 3 includes minimum required contents, as well as additional required contents where an affected Party responds to the original notification stating its desire to participate in an EIA procedure. The article includes provisions allowing for an affected Party to trigger EIA procedures, and requires that the public be involved.

Article 4 of the Convention introduces minimum requirements for the contents of **EIA documentation**. Details are set forth in Appendix II to the Convention. This article also includes the requirement to disseminate documentation to authorities and the affected public. Other important aspects for **public participation**, for example translation, timing and financial aspects, are left to the discretion of the Parties to define.¹⁴

The **consultation** procedures required under Article 5 prescribe certain elements concerning e.g. the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact, such as consultations on alternatives, including the no-action alternative, implying that an alternatives analysis be undertaken at an early stage.

The second amendment to the Convention (not yet in force) requires that affected Parties have an opportunity to participate in the scoping phase, which implies the involvement of the public authorities of the Party of origin in this process.¹⁵

Article 6 states that the **final decision** shall take into account the results of the EIA including the outcomes of the public participation and consultation processes. It also requires the Party of

¹³ The Appendix I was revised in the second amendment to the Convention, which was adopted in 2004 but has not yet entered in force. The revised list of activities is used for the purposes of this review.

¹⁴ UNECE Environmental Series, No. 7: Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (2006).

¹⁵ The EU Directive is also being amended to establish that the scoping phase is to be undertaken under the auspices of the competent authority.

origin to motivate its decision with reasons and considerations. Finally, this article provides that new information coming to light prior to commencement of the activity must be notified and consultations should take place on whether to revise the decision.

Article 7 deals with “**post-project analysis**”, and appendix V outlines its objectives. Post-project analysis is not a mandatory activity that is automatically carried out for all transboundary EIAs. However, the Convention provides that the Parties shall determine at the request of one of the Parties whether a post-project analysis shall be carried out.

Good practices in implementation are established through the information gained from national reporting, and from the work of the Convention’s Implementation Committee, which reports to the Meeting of Parties on its activities and makes recommendations about compliance with the Convention. These include, for example, negotiation by Parties of bilateral or multilateral agreements for the effective implementation of the Convention. UNECE has issued several guidance documents on specific aspects of implementation of the Convention following decisions of the Meetings of the Parties.¹⁶ The Convention envisages in Article 8 that Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under the Convention. The Convention provides in Appendix VI a list of elements that can be included in any such agreement, whether with a Party to the Convention or with any other country. The list is neither mandatory (i.e. not all elements listed in Appendix VI have to be included in such agreements) nor is it exhaustive. There are a number of other specific elements that should be considered for inclusion into such an agreement.

5. Analysis of existing procedures, government structures and responsibilities with regard to the obligations of the Convention

As a preliminary matter, it should be noted that there are currently no provisions in Georgian law concerning EIA in a transboundary context, nor is there an official platform or mechanism for transboundary cooperation on such matters. Georgia has not entered into bilateral arrangements with its neighbors for transboundary EIA. As noted below (see section 5.2), the situation whereby the proponent undertakes screening and/or scoping without the involvement of the environmental authorities means that in practice transboundary issues tend to be omitted. In cases where there is international financing, transboundary aspects may be taken into account, but only on an ad hoc basis.

It is often the case that the obligation to take measures to implement a treaty requires the designation of responsible authorities with appropriate powers.¹⁷ Under the Convention, the

¹⁶ See, e.g., UNECE Environmental Series, No. 7: Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context (2006); UNECE Environmental Series, No. 8: Guidance on the Practical Application of the Espoo Convention (2006); UNECE Environmental Series, No. 10: Guidance on notification according to the Espoo Convention (2009).

¹⁷ E.g., the Convention on International Trade in Endangered Species requires the designation of scientific and management authorities as one of the essential elements of implementation.

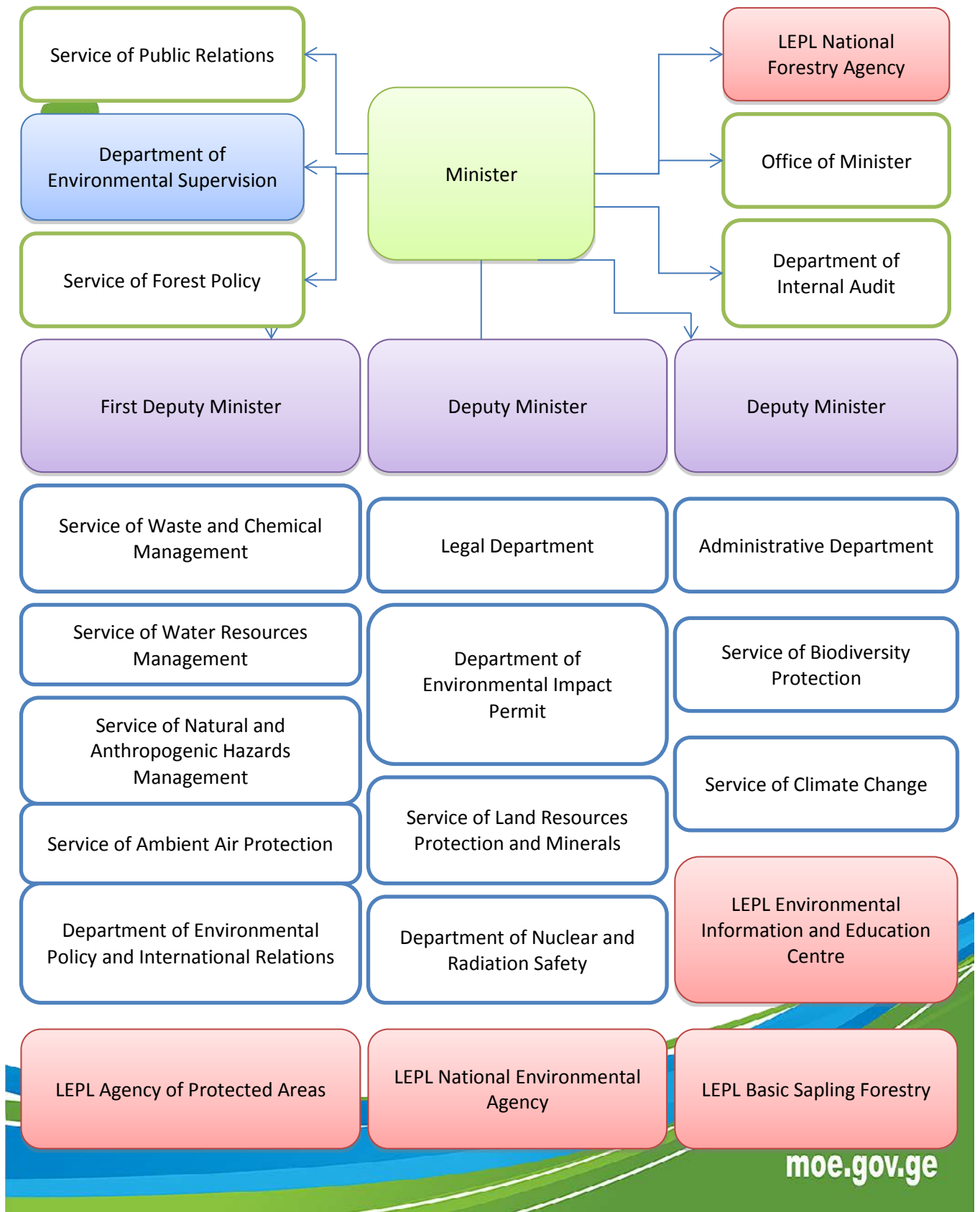
competent authority is the authority that is designated by the Party to carry out the practical application of the Convention nationally and may also have the decision-making powers regarding a proposed activity. A Party to the Convention also must designate a Point of Contact as an official contact towards other Parties and the Convention bodies.¹⁸ Georgia has nominated the Ministry of Foreign Affairs as the Point of Contact regarding Notification. The Focal Point for Administrative Matters is an officer from the Ministry of Environment and Natural Resources Protection. As shown below, Georgia has well-established administrative structures and the assignment of responsibilities relevant to EIA, and could adapt these for the implementation of the Convention.

5.1 Institutional framework

The Ministry of Environment and Natural Resources Protection has issued several sets of regulations aimed at EIA implementation subject to the Law on Environmental Impact Permits and other laws.

The current Ministry of Environment and Natural Resources Protection's responsibilities and authority are determined under a charter adopted by governmental decree on April 26, 2013. The Ministry is the executive authority body that regulates activities related to the protection of the environment and natural resources of Georgia. It is also the main authority responsible for oversight and for implementing decisions on environmental policy and management. An organigram of the Ministry is set forth in Figure 2, below.

¹⁸ See UNECE Environmental Series No. 8: Guidance on the Practical Application of the Espoo Convention (2006), at para. 13.



The Department of Environmental Policy and International Relations is responsible for representing Georgia in various international processes related to the environment and plays an important role in the potential membership of the country in the Convention.

Several of the bodies in the Figure are concerned with EIA implementation. The most important is the Department of Environmental Impact Permit. This unit is responsible for decisions on the basis of the EIA procedure including the issuance of permits, as well as conducting ecological expertise.

Following permitting, the Department of Environmental Supervision is the primary body for monitoring the implementation of permit conditions, and works in cooperation with the National Environmental Agency, the National Forestry Agency, and the Agency of Protected Areas, each of which has its own sphere of authority. In 2013 these functions were returned to the Ministry of Environment and Natural Resources Protection.

Other bodies outside the Ministry of Environment and Natural Resources Protection would potentially play an important role in EIA or the lack thereof. The Technical and Construction Inspection unit of the Ministry of Economy and Sustainable Development is responsible for the issuance of special construction permits, such as the Permit for Construction of Facilities of Special Importance and the Permit for Construction of Radiation Or Nuclear Facilities. EIA is not required for such projects.

Local Self-Government Units are responsible for the issuance of construction permits for other facilities pursuant to the Law on Local Self-Government (adopted on December 16, 2005).

The Ministry establishes ad hoc Councils of Experts with respect to each ecological expertise procedure.

5.2 Screening/scoping and notification procedures

In Georgia, the construction permitting authority (the Ministry of Economy and Sustainable Development or the Local Self-Government Unit, as appropriate) initially determines whether a proposed activity may fall under the EIA requirements in accordance with Article 4 of the Law on Environmental Impact Permits. If so, the construction authority invites the environmental authorities to participate in the decision-making and the environmental authorities advise the construction authority whether the proposed activity requires ecological expertise. In accordance with the “one-window” approach (see above), the proponent does not deal directly with the environmental authority. Rather, the proponent submits its application to the construction authority, which communicates with the environmental authority. Scoping is within the responsibility of the project proponent. There is no formal requirement for dialogue between the proponent and the public authorities during the scoping stage. The environmental permitting authority is only formally acquainted with the documentation, in the form of a preliminary EIA report, after the publication of the announcement of the public hearing.

The proponent is required to provide the affected public with a notice containing: (a) objectives, title and location of the planned activity; (b) address where the public can obtain information; (c) deadline for submission of comments; (d) time and venue for public hearing.

5.3 Preparation of EIA documentation and public consultation

The proponent is obliged to produce the EIA Report according to the requirements of the Regulations on EIA promulgated by the Ministry of Environment and Natural Resources Protection. EIA is performed on the basis of design documents, while the acceptability of the proposed site for the planned development and a serious alternatives analysis, including the no action alternative, are not evaluated. Consequently the EIA process in Georgia is missing an important stage, that is, evaluating the feasibility of the project from environmental and other perspectives. While formerly a non-technical summary was required in the law, this requirement was dropped in favor of a technical summary. The subordinate regulations do require a non-technical summary. Reportedly, however, the non-technical summary is not often given to the public in EIA procedures.

The proponent produces a preliminary EIA report that is subject to public consultation. The obligations of the proponent include the conduct of public consultations in accordance with the law. The proponent is obliged to advertise the public hearing(s) via media, including a description of the activity, information about obtaining the preliminary EIA report, and the time frames for the process, including the submission of written comments and the public hearing. The proponent submits the preliminary EIA report¹⁹ to the Ministry of Environment and Natural Resources Protection within one week after the announcement. This is the first point at which the Ministry of Environment and Natural Resources Protection is formally involved in the EIA process. The period for receiving written comments from the public (and from the Ministry) is 45 days. The public hearing must be held between 50 and 60 days after the publication of the announcement. The Ministry has the possibility to attend the public hearings²⁰ as a participant and to make comments on the EIA documentation at that stage.

The proponent must prepare a report of the public participation procedure (called a “protocol”) within 5 days after its conclusion, which reflects all comments made at the hearing and submitted in writing. The protocol also describes how the comments were taken into account. Where a comment is rejected, reasons have to be given and communicated to the commenter. The protocol should be signed by the public authorities, but only if they are present (which appears to be not mandatory). This protocol, which is included in the final EIA report, forms the basis for determining whether the proponent has taken all comments received into account in the final EIA report.

¹⁹ In fact, the preliminary EIA report, while often implemented in practice, is not required under Georgian law. See <http://www.eia.nl/en/countries/eu/georgia/eia>.

²⁰ All interested public authorities should be invited to participate in the EIA by written notice.

The proponent seeking an environmental impact permit has one year to submit its full application. The application must include all documentation including expert statements, the public participation protocol and the conclusions of the EIA.

5.4 EIA Review

The decision of the environmental authority in the process of environmental impact permitting comes as a result of the separate, but linked, ecological expertise procedure. The ecological expertise is a technical review of the EIA process conducted by the proponent. Where required, a positive ecological expertise is a condition for granting a permit to commence activities. It is therefore an essential component of the permitting process. The outcome of the ecological expertise may include the imposition of conditions for operation.

The Ministry's Department of Environmental Impact Permit establishes a council of experts for each ecological expertise procedure. The council of experts includes staff members of the Ministry and its subordinate agencies, and may also include independent experts. The council of experts reviews the EIA documentation for compliance with legal requirements, including the contents of the EIA Report, a site map, the volume and types of emissions, and the outcome of the public participation procedure.

The specific contents of the Ecological Expertise are prescribed under the law, as follows:

- a) ecological conclusion issuance date and registration number; and
- b) general information:
 - title of the activity
 - name of the proponent and address
 - location (place) of the activity
 - date of the application
 - information about the author of the project (who prepared)
 - the general information of the project (as described in the EIA report)
 - the conditions of ecological expertise conclusion
 - conclusion

The law requires the ecological expertise, as a part of the EIA review, to be completed within 10-15 days following commencement of the EIA review procedure so that an environmental impact permit may be issued within 20 days.

5.5 Final decision

The Minister formally confirms or approves the ecological expertise (which is then transmitted to the construction permitting authorities). The order of the Minister is a formality and includes as an integral part the main text of the Conclusions of Ecological Expertise prepared by

the Expert Commission. These Conclusions include the reasoning and rationale. The Conclusions of Ecological Expertise prepared by the Expert Commission can be positive or negative. The EIP and Construction Permit can be issued only on the basis of positive conclusions of the Ecological Expertise. The Minister cannot change or reject the Conclusions of Ecological Expertise prepared by the Expert Commission. This decision sets the authorized basic parameters of the proposed activity and the respective environmental conditions for implementing the activity (ECE/MP.EIA/10, decision IV/2, annex I, para. 61). However, it has been noted in the case of OVOS/Expertiza that most legal systems employing this mechanism do not clearly specify which of the various related decisions finally permits the activity to take place.²¹ The decision of the Minister on the ecological expertise is subject to appeal and includes a statement to that effect.

The issuance of the Minister's order on the basis of the Ecological Expertise must be made within 5 days following the submission of the Conclusions. The decision is published within ten days following its issuance.

The construction permit once issued may impose conditions on the project proponent (through confirmation of the conditions in the Ecological Expertise). These conditions may be based upon the portions of the EIA Report concerning: (i) methods of environmental control and monitoring; (ii) prevention and mitigation plans for identified or expected negative impacts on the environment; and (iii) environmental strategy and management plan for each stage of the activity.

5.6 Post-project analysis

The final EIA Report must include monitoring plans according to the Regulation on Environmental Impact Assessment. The EIA Report should include the methods for environmental control and monitoring, a prevention and mitigation plan for identified or expected negative impacts on the environment, and an environmental strategy for each stage of the activity. The project proponent implements the monitoring plan (self-monitoring) at all stages of the project lifetime.

The responsibility for enforcing conditions in permits and inspecting the facilities falls under the Ministry's Department of Environmental Supervision. Within the Department, a unit is responsible for enforcement of requirements of EIA and environmental impact permit conditions. Altogether, including staff responsible for other areas such as natural resources extraction, fishing, hunting and logging, the Department has 95 environmental inspectors working in the field.

²¹ See "Draft guidance on enhancing consistency between the Convention and the environmental assessment within the framework of State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia," ECE/MP.EIA/WG.2/2013/INF.5.

The last period for which figures are available is 2012, during which the environmental inspection authorities conducted approximately 23 inspections of environmental impact permit holders. Since the reorganization of the government in early 2013, the new Department has inspected three environmental impact permit holders and issued 79,000 GEL (approximately 50,000 USD) in fines. At the present time the vast majority of inspections are unplanned (non-routine) inspections undertaken on the basis of complaints. The Department is working on an annual inspection plan for 2014 that will include inspections of more than 70 environmental impact permit holders.

5.7 Practice

Since 2007, approximately 450 environmental impact permits have been issued by the Ministry. It is unclear what proportion of these pertain to new construction, and what proportion pertain to ongoing activities. There have been several studies on EIA practice in Georgia. In 2004, CENN conducted an assessment of EIA practice,²² while the former Aarhus Centre Georgia conducted periodic “Observer Reports” on EIA with particular attention to the public participation elements. The Netherlands EIA Commission has studied practice and made several sets of recommendations in its long-term assistance project. Most recently, Tamar Gugushvili (2013)²³ has made observations concerning EIA practice following an analysis of eight case examples of EIA procedures. The current Report is not based on independent review of such case studies, but sets forth the observations made in the Gugushvili study,²⁴ including:

- a) The quality of EIA reports tends to be poor. Some EIA reports are missing essential elements.
- b) Because there is no agency involvement in screening and scoping stages, or public participation in scoping, the proponent is highly invested in a particular project design (even having already purchased the site etc.), and consequently the reports almost completely lack an alternatives analysis.
- c) Comments made by public authorities are overly general and do not result in substantial improvements to EIA reports. Comments by private actors tend to be of higher quality. Overall there are very few instances where a preliminary EIA report was changed following commenting.
- d) Public participation is not effective. The level of public participation is low.
- e) There is virtually no routine inspection of facilities following permitting. Generally authorities do not perform inspections except in response to complaints.
- f) Ministry authorities have low capacities, few resources and relatively low power.

²² CENN, “Assessment of the effectiveness of the EIA system in Georgia” (2004), available at http://www.unece.org/fileadmin/DAM/env/eia/documents/CENN_EIA_reviews/Georgia_English_FINAL_20.09.pdf

²³ Tamar Gugushvili, “Performance of the EIA and ECE system in Georgia” (unpublished, August 2013), available from the author.

²⁴ The author of this report notes, however, that Ms. Gugushvili’s conclusions are generally consistent with the statements made in interviews and during the Round Table.

- g) The two inspection bodies in the two ministries do not coordinate effectively. There is a low level of interagency cooperation.
- h) The public has low capacities.

6. Gap analysis of national and transboundary EIA systems

This section identifies gaps and inconsistencies in the existing legislation and in the institutional procedures and practices, as compared to Convention obligations and the requirements of future implementation of the Convention. Its focus is on the specific obligations of the Convention in the context of transboundary EIA. Article 2, paragraph 2 of the Convention relates to the establishment of a functioning EIA system, and therefore based on the expert findings, some identification of gaps and consequently some recommendations are included herein on matters that appeared to be especially problematic in relation to the general functioning of Georgia's EIA system. However, this report does not and cannot provide a complete and coherent set of recommendations to develop a comprehensive new EIA system for Georgia.

Without specific provisions in Georgian law concerning EIA in a transboundary context, the Georgian EIA system is completely lacking with respect to, inter alia, designation of responsible authorities, screening for transboundary aspects, definitions in the law with respect to specific requirements of the Convention, procedures for notification and communication under the Convention, transboundary consultations, taking into account these in the final decision, and all issues that would be relevant to Georgia as an affected Party.

It would be inconsistent with the Convention for a Party to exempt proposed activities from EIA on the basis that it is carried out by public agencies. While an alternative consent procedure is in place for the public projects that are exempted under the Law on Licenses and Permits, this exemption nevertheless creates problems due to its lack of clarity and legal certainty. It should also be noted that among active civil society organizations there is a distinct impression that this alternative procedure does not meet the standards of Georgian legislation.

The list of activities subject to EIA under Georgian legislation does not conform with the list of activities in Appendix I to the Convention. Many activities with significant potential adverse impacts on the environment (construction of radiation or nuclear facilities for instance) do not require EIA and ecological expertise under the present legislation. Several interviewed persons brought attention to the need for Georgia to include mining activities under its EIA regime. Reforms in this area would need to take into account the auction system for mining rights that is currently in place.

Following are the specific activities under Appendix I to the Convention, as amended through decision III/7 (see note [11] above) that are not covered by Article 4 of the Law on Environmental Impact Permits in Georgia:

- Nuclear power stations and other nuclear reactors, including the dismantling or decommissioning of such power stations or reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
- (a) Installations for the reprocessing of irradiated nuclear fuel;
(b) Installations designed:
 - For the production or enrichment of nuclear fuel;
 - For the processing of irradiated nuclear fuel or high-level radioactive waste;
 - For the final disposal of irradiated nuclear fuel;
 - Solely for the final disposal of radioactive waste; or
 - Solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.
- Groundwater abstraction activities or artificial groundwater recharge schemes where the annual volume of water to be abstracted or recharged amounts to 10 million cubic metres or more.
- Pulp, paper and board manufacturing of 200 air-dried metric tons or more per day.
- Major quarries, mining, on-site extraction and processing of metal ores or coal.²⁵
- Offshore hydrocarbon production. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 metric tons/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.
- Deforestation of large areas.
- (a) Works for the transfer of water resources between river basins where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year; and
(b) In all other cases, works for the transfer of water resources between river basins where the multi-annual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5 per cent of this flow. In both cases transfers of piped drinking water are excluded.
- Installations for the intensive rearing of poultry or pigs with more than:
 - 85 000 places for broilers;
 - 60 000 places for hens;
 - 3 000 places for production pigs (over 30 kg); or
 - 900 places for sows.
- Major installations for the harnessing of wind power for energy production (wind farms).

²⁵ Only processing is covered under Georgian law.

In other respects, the list of activities subject to EIA under Georgian legislation does not correspond to Appendix I to the Convention even where the subject matter is similar. Activities under the Appendix that are covered in some degree by the Georgian law, but differ in respect of thresholds or other attributes, include:

- Major installations for the initial smelting of cast iron and steel and for the production of non-ferrous metals.
- Construction of motorways, express roads
- Waste-water treatment plants with a capacity exceeding 150 000 population equivalent.
- Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

The current legislation of Georgia does not guarantee that the official EIA procedure begins at an early stage in decisionmaking when options are open. The screening stage in practice often is dependent on the proponent, while the scoping stage takes place under the sole responsibility of the proponent, without official involvement of public authorities or opportunities for public participation prior to the development of a full preliminary EIA. Consequently, late involvement of the authorities, combined with the lack of an effective screening mechanism for projects likely to have a transboundary effect, make it impossible in practice to fulfill the obligation under Article 3, para. 1 of the Convention to notify potentially affected Parties “as early as possible and no later than when informing its own public about the proposed activity.” It should be noted that the scoping requirements under the EU Directive are among the main issues for reform. The future Directive is expected to establish a mandatory scoping phase with the competent authority in the lead and an enlarged content of the scoping decision.²⁶

Because public authorities are not involved during the scoping stage there is no means of enforcing the requirement that a full alternatives analysis, including the no-action alternative, be undertaken. Authorities could potentially invalidate EIAs for shortcomings at a later stage, but at great cost to the proponent. Consequently, the alternatives analysis requirement tends to be undermined and ineffective, generally not described in practice even though required by law.

The requirements for the contents of the EIA Report under Georgian law do not correspond to the requirements of the Convention in several important aspects. The elements from Appendix II of the Convention that are not included under Georgian law include:

“(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

²⁶ European Commission, “Main EU Developments in the Field of Environment,” EaP Green presentation, Tbilisi, 17 September 2013.

“(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information.”

In the case of (h), monitoring programs are required, but not management plans. Also the non-technical summary in the former law has been replaced by the requirement to include a technical summary. While the non-technical summary is still required under the regulations issued by the Ministry, it appears that it is not often used in practice.

While an alternatives analysis is included in Georgian law, the no-action alternative is not specifically mentioned.

The time periods under current legislation would not allow for transboundary consultation. For example, the ecological expertise must be conducted during a period of between 10 and 15 days following the commencement of the administrative process (i.e., when the EIA application is submitted to the Ministry).

It is even questionable whether the 20 day time period for issuance of an environmental impact permit provides sufficient time for the environmental authorities to study and approve a project with potential adverse transboundary effects.²⁷ An insufficient time frame for decisionmaking could violate the Convention obligation to “take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities” under Article 2.1.

The ecological expertise procedure cannot meet the requirements of consultation and public participation under the Convention. The Georgian legislation relies on a private project proponent to undertake consultation/public participation outside of the control or immediate oversight of the public authorities. This is a delegation of powers contrary to the functioning of the regime.²⁸ The Convention Implementation Committee has stated: “entrusting the proponent of an activity with the carrying out of the procedure for transboundary environmental impact assessment would not be adequate, unless the proponent was the State” (ECE/MP.EIA/IC/2010/2, para. 36). Also, as stated in the Draft guidance on enhancing consistency between the Espoo Convention and the environmental assessment within the framework of State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia: “Such a reliance on the proponent/developer in providing for public participation during the OVOS stage ... is not in line with the Convention in which it is implicit in provisions of article 3.8 and art.4.2 of the Convention that comments should be submitted to the competent public authority.” This has been also noted by the Implementation Committee, which stated that: “The organization of public participation under the Convention was the responsibility of

²⁷ The law includes the possibility for the Ministry of Environment and Natural Resources Protection to extend the period up to three months, but this has only happened once, for a small hydropower plant, according to one of the interviewees.

²⁸ An overview of the tasks that may or may not be delegated to the proponent or developer, extracted from the Draft guidance on enhancing consistency between the Espoo Convention and the environmental assessment within the framework of State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia, is found at Annex I to this report.

the competent authority²⁹ and not of the proponent. Nevertheless, it might be possible under national systems that the competent authority and the proponent would organize the public participation together. However, the proponent should not be responsible for public participation without the competent authority.” (ECE/MP.EIA/IC/2010/4, para. 19(b)).

The application of the “one window principle” has the effect of placing the EIA permitting process in an inferior position to the construction permit. It is unclear whether the authorities issuing construction permits respect and maintain inter-agency coordination principles. Even if this functions well in most cases, the procedure may be misleading or confusing to project proponents.

Post-project analysis is almost wholly dependent on the proponent. Inspection almost never occurs except in response to public complaints.

7. Conclusions and recommendations

This section includes recommendations for possible amendments to the national legislation and/or a new draft law as well as for improving the institutional framework and procedures for complying with and implementing the obligations of the Convention, and further steps to be taken to strengthen Georgia’s capacity to accede to the Convention, and to implement and comply fully with it.

As stated in the UNECE Guidance on the Practical Application of the Espoo Convention, to ratify and implement the Convention, a country must transpose the Convention’s requirements into its national legislation³⁰. This can be achieved in different forms/ways depending on a particular country’s legal framework. However, the details of the EIA procedure, for example regarding public participation, should rather be included in the legislation than left for implementing regulations (decision V/2, annex II, para. 32). The practical application of the Convention can be strengthened and clarified through specifying in primary or secondary legislation issues such as the responsibilities of different authorities and rules of procedures of joint bodies.³¹

Specific drafting recommendations are included where appropriate. In the case of many recommendations, however, the drafting of specific provisions within new legislation on EIA will depend on certain preliminary factors and decisions, such as whether Georgia will continue with the OVOS/Expertiza type of system. The specific recommendations also are dependent upon the broader process of environmental law reform in the country, such as the progress that will be made in drafting related legislation such as that concerning integrated environmental permitting.

²⁹ According to art 1 of the Espoo Convention "competent authority" means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity.

³⁰ See paras. 94-95. Available at http://www.unece.org/env/eia/pubs/practical_espoo.html.

³¹ See paras. 94-95.

Therefore, it may be the case that the recommendations contained herein will be implemented in phases, following a step-by-step process. An early step in the process would be the decision whether a form of ecological expertise will be retained, and/or whether the OVOS and EE processes should be further integrated, perhaps through a single law on EIA. Ecological expertise is not per se inconsistent with implementation of the Convention, provided that the OVOS stage has stronger involvement of public authorities than currently, such that they can carry out their responsibilities under the Convention.

It should also be acknowledged that reform to the EIA system may entail amendments to laws on other topics, such as the laws on forestry, water and mining.

Georgia's reformed EIA law(s) should ensure full compliance with the Convention's obligations both as a matter of law and in practice. It should be integrated within Georgia's overall system of development consent and permitting. It should also ensure compliance with the respective requirements of the Aarhus Convention.

7.1 National EIA system

Article 2.2 of the Convention states that each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, **the establishment of an environmental impact assessment procedure that permits public participation** and preparation of the environmental impact assessment documentation described in Appendix II. It is the view of the Implementation Committee that "a domestic regulatory framework was necessary for the Implementation of the Convention especially with respect to public participation." (ECE/MP.EIA/IC2010/4, para. 19 (a)).

Georgia's anticipated EU accession process will require harmonization of its legislation with the Directive, and the Directive itself is compliant with the Convention requirements. Consequently, in general, Georgia could refer to the provisions of the European Union's EIA Directive as a basis for drafting a new law or amending existing law on environmental impact assessment with respect to its domestic EIA procedures, and ensure that the law incorporates or is fully linked with the legal and procedural requirements for transboundary EIA in accordance with the Convention.

Neither the Convention nor the EU Directive admits of any exemption from EIA requirements on the basis of a project being carried out by public agencies³². Georgia should eliminate the exemption for certain public agencies from the Law on Licenses and Permits and should fully integrate and harmonize its permitting and EIA system applying the same standards regardless of the proponent.

³² It should be noted however, that the provisions of the Convention shall not affect the right of Parties to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security (article 2, paragraph 8 of the Convention).

It is recommended that public authorities be granted a greater role in screening and scoping stages in the national EIA procedure to guarantee public participation and interministerial/stakeholder consultations, including where appropriate transboundary consultations, at these stages.

Public participation

As mentioned above, the Convention requires Parties to establish a national EIA procedure that permits public participation (art. 2, para. 2; art. 3, para. 8; art. 4, para. 2). The Convention does not specify the detail of such a procedure recognizing that it is a matter for the national authorities to determine. Georgia is a Party to the Aarhus Convention and consequently has to ensure that the public participation requirements prescribed under article 6 of the Aarhus Convention are met. Meeting the detailed requirements for public participation under the Aarhus Convention supports the conduct of EIA under the Espoo Convention. Meeting the requirements of Article 6, e.g., supports the involvement of public authorities in the public participation (i.e., EIA conduct) stage. In this regard, because ecological expertise is the discrete environmental decision-making procedure with the involvement of public authorities, it must include full public participation in compliance with the Aarhus Convention's requirements.³³

While the provisions on public participation under the Espoo Convention relate specifically to the transboundary EIA procedure, the scope of application of public participation under the Aarhus Convention is broader: Article 6, paragraphs 2 to 9, of the Aarhus Convention, provide for minimum standards for public participation procedures to be followed in a wide range of activities (as defined in article 6, paragraph 1, in conjunction with annex I to the Aarhus Convention) with a potentially significant environmental impact irrespective of whether an EIA is to be carried out.

Being a Party to the Aarhus Convention supports the fulfillment of the requirements for EIA under the Espoo Convention. Notably, article 3, paragraph 9, of the Aarhus Convention applies the principle of non-discrimination as to citizenship, nationality or domicile (and in the case of legal persons, as to the registered offices or effective center of activity) in public participation procedures in decision-making. This principle is aligned with the principle of equivalent public participation opportunities for the public of the affected Party vis-à-vis the public of the Party of origin in transboundary EIA procedures, as enshrined in article 2, paragraph 6, of the Espoo Convention. Public participation in a transboundary context is addressed in more detail later in this report.

Article 6, paragraphs 2 to 9, of the Aarhus Convention lay out the mandatory elements of the public participation procedure. The Aarhus Convention Compliance Committee has further interpreted these provisions in order to provide guidance and assistance to Parties in their

³³ Note that the Convention's Implementation Committee has presented advice on integrating the public participation requirements of the two conventions. See ECE/MP.EIA/IC/2010/4.

efforts to implement the Aarhus Convention.³⁴ The jurisprudence of the Aarhus Convention Compliance Committee with respect to public participation is extensive and would provide useful guidance for the design of new legislation. Annex II to this report discusses the relationship between the Aarhus Convention's provisions and the obligations under the Espoo Convention.

7.2 Transboundary EIA

It is important to ensure that the transboundary EIA procedure contains clear mechanisms for notification, provision of information, consultation and public participation.

Georgia should address and incorporate into national legislation the following issues:

- sending a notification as a Party of origin (art 3.1);
- the content of the notification (art 3.2);
- the content of the EIA documentation (art 4.1, Appendix II);
- sending the EIA documentation (art 4.2);
- obligations and procedure for public participation (art. 2.2; 2.6; 3.8; 4.2);
- timeframes for public participation, and modalities of participation at different stages;
- consultations between the Parties on the basis of the EIA documentation (art. 5);
- the final decision and the transmission of final decision documentation to the affected Party along with the reasons and considerations on which it was based (art. 6);
- post-project analysis (monitoring) (art. 7).

In each of the above areas, Georgian legislation must take into account the rights and responsibilities of both the Party of origin and the affected Party.

Competent authority

According to Paragraph ix of Article 1 of the Convention the “competent authority” is the national authority or authorities designated by a Party as responsible for performing the tasks covered by the Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity.

Thus, implementation of a number of functions, including the functions of the Point of Contact of the Convention to receive notifications, shall be clearly stipulated.

³⁴ See <http://www.unece.org/env/pp/cc.html> and also the jurisprudence database at: <http://aarhusclearinghouse.unece.org/resources/?c=1000094>. Useful guidance on the implementation of the Convention provisions, including the interpretations by the Aarhus Convention Compliance Committee, may be found in the revised Implementation Guide, English copy available from: <http://www.unece.org/environmental-policy/treaties/public-participation/publications/public-participation/2013/aarhus-convention-implementation-guide-second-edition-text-only-version/doc.html>.

Entrusting the proponent of an activity with the carrying out of the procedure for transboundary EIA would not be adequate, unless the proponent was the State (ECE/MP.EIA/IC/2010/2, para. 36).

Identification of proposed activities requiring EIA under the Convention/ Screening

Amendments to the Law on Environmental Impact Permits or a new EIA law should ensure that – at a minimum – the list of activities requiring EIA be fully consistent with Appendix I to the Convention (as amended through decision III/7), both in terms of the activities covered and the descriptions of such activities, and thresholds where applicable. Specifically, the activities indicated in paragraphs 6.2 and 6.3, above, should be added.

Georgia could also consider the need to supplement the list of activities in the Convention with other relevant activities that would always require transboundary EIA. Appendix III contains general criteria to assist in the determination of the significance of activities not covered under Appendix I.

Furthermore, Article 11 of the Law on Environmental Impact Permit should be amended to establish that the Minister may not exempt from EIA projects that fall under the Convention. Under the Convention, there are no grounds for unilateral exclusion of projects falling under the Convention from the Convention's requirements.

It is important to ensure that all planned activities with potentially significant transboundary effects shall appear “on the radar” of the competent authority early in the planning process. Public authorities shall be informed at an early stage about all such planned activities and have practical means of identifying those with potential transboundary impact (art. 3.1 of the Convention).

In the current system the construction permitting authorities are in the front line of determining whether a proposed activity falls under the EIA requirements, and the involvement of the environmental authorities is entirely dependent on these other authorities. It is recommended to extend the role of the competent environmental authority and include an obligation for the proponent to notify the authorized governmental body (competent authority under the Convention), and to submit the Application (containing basic information on the proposal), a “Declaration of Intent,” or other type of notification to the competent authority at the beginning of the process. In such case the competent authority can decide whether such activity may have significant transboundary impact or not, and in case it may have such impact apply the transboundary procedure that shall be also clearly defined.

Notification

Georgia must ensure that the legislation includes appropriate provisions for notification, including timeframes, contents of the notice, and response.

In practice, the timeframes can be based upon national legislation, bilateral agreements, or case-by-case. From the national reports by the Parties on implementation of the Convention in the period of 2010-2012, it can be seen that the time specified for responding to notification ranged from two weeks to three months, with an average of one month³⁵. Similarly, the typical timeframe for examining EIA documentation and giving comments is one month, with some states providing up to three months.

In conformity with the decision of the Meeting of the Parties on the format for notification (ECE/MP.EIA/2, annex IV, appendix), Georgian legislation should enable the following three stages of notification: a) notification of the proposed activity to the affected Party; b) request for and transfer of information to the affected Party; and c) public notification of the proposed activity, EIA process and opportunities for public participation and consultation. Suggested formats for notification as well as the response by an affected Party are set forth in the MOP decision referred to.

As an affected Party, Georgia should establish procedures for receiving the notification as well as for deciding whether it intends to participate in the EIA procedure in the case of being notified on a proposed activity by another Party. Among the Parties of the Convention, this decision is often taken case by case, based on the examination of criteria such as the nature of the activity, the likely extent of the transboundary impacts and the territory likely to be affected. Most Parties consult relevant authorities at the national, regional and local levels and other relevant experts.³⁶

Georgian legislation must also address the situation as an affected Party where authorities receive information concerning an activity that might have significant transboundary environmental impact, but no notification from the Party of origin has been received (art 3.7). See also below, under “consultations with public authorities.”

Public participation

In addition to the general requirements under the Aarhus Convention (see above, and in Annex II), the Convention includes extensive obligations on public participation that are specific to the transboundary EIA procedure. Specifically, the public authority should be responsible for the organization of the public participation procedure, not the proponent. However, it is permissible for the public authority and proponent to have joint responsibility under the supervision of the public authority (ECE/MP.EIA/IC/2010/4, para. 19(b)).

The concerned Parties share the responsibility for ensuring that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of

³⁵ See Draft fourth review of implementation of the Convention on Environmental Impact Assessment in a Transboundary Context (ECE/MP.EIA/WG.2/2013/8)

³⁶ Draft fourth review of implementation of the Convention on Environmental Impact Assessment in a Transboundary Context (ECE/MP.EIA/WG.2/2013/8)

origin, including access to at least relevant parts of the documentation in a language the public could understand, as set out in article 2, paragraph 6; article 3, paragraph 8; and article 4, paragraph 2 of the Convention (ECE/MP.EIA/IC/2010/2, para. 35). The Party of origin's competent authority should support the affected Party's competent authority in providing effective participation for the public of the affected Party in the procedure for transboundary EIA (ECE/MP.EIA/IC/2010/4, para. 19 (c)).

While recognizing the lack of administrative powers of the Party of origin's competent authority on the territory of the affected Party, at a minimum it has to provide the possibility for the public of the affected Party to participate in the procedure of the Party of origin (ECE/MP.EIA/IC/2010/2, para. 37).

As an affected Party, Georgia has to put in place procedures to undertake joint responsibility with the Party of origin to involve the Georgian public in the transboundary EIA process, in order to ensure that the public in the areas likely to be affected is informed of, and provided with, possibilities for making comments on or objections to the proposed activity (art. 3.8).³⁷

Issues of translation of materials are important considerations in developing modalities for transboundary public participation. These are often addressed through bilateral agreements.

Consultations with public authorities

Consultations under article 5 are bilateral or multilateral discussions between authorities that have been authorized by the concerned Parties, and should not be confused with public participation under article 3, paragraph 8, and article 4, paragraph 2, or with consultation of the authorities under article 4, paragraph 2, in the areas likely to be affected (ECE/MP.EIA/IC/2010/2, para. 39).

Once Georgia as an affected Party has notified its intent to participate, procedures must be in place for responding to requests for information from the Party of origin necessary to complete the EIA documentation (art. 3.6).

It also needs to establish procedures for examination of the EIA documentation domestically and for the transmittal of the comments from the public to the competent authority of the Party of origin (art 4.2). Among the Parties to the Convention, most commonly the competent authority in the affected Party disseminates the EIA documentation, once received from the Party of origin, to all relevant authorities at the central and local levels and to the public (generally publishing it also on its website). The competent authority is usually also responsible for collating all responses received and delivering them to the Party of origin.

³⁷ The exact modalities for cooperation in such matters are up to the Parties and can be defined in a bilateral agreement.

Georgia should also establish mechanisms for initiating discussions on possible transboundary impacts in cases where a potential Party of origin has not notified it under the Convention (art. 3.7). This is another matter that is often covered through bilateral agreements.

EIA documentation

When establishing the requirements for the mandatory elements of the content of the EIA documentation it should be borne in mind that:

- a) The Convention's provision requiring that the EIA documentation includes a description, where appropriate, of reasonable alternatives (appendix II, item (b)) is mandatory for the legal implementation of the Convention by a Party (ECE/MP.EIA/IC/2009/2, para. 39);
- b) It is important that the no-action alternative is addressed so that the evolution of the environment in the absence of the project could be considered (ECE/MP.EIA/IC/2010/2, para. 33);
- c) The non-technical summary is a mandatory element of the EIA documentation and it should outline in nontechnical language the findings included in each of the earlier chapters corresponding to items (a)–(h) of appendix II, including visual presentations as appropriate (maps, graphs etc) (ECE/MP.EIA/IC/2009/2, para.16);
- d) Identification of gaps in knowledge and uncertainties encountered in compiling the required information is also a mandatory element of the EIA documentation;
- e) EIA documentation should include a separate chapter on transboundary impact to facilitate translation (ECE/MP.EIA/IC/2010/2, para. 35).

Specifically, Georgian legislation should be amended to include the following requirements for the contents of the EIA Report from Appendix II of the Convention:

“(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;

“(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information.”

In the case of (h), monitoring programs are required, but not management plans. Also the non-technical summary required only by secondary legislation should be included within the EIA documentation to be provided to the public.

Finally, the no-action alternative should be specifically mentioned in the alternatives analysis requirement.

Final decision

The issue of the “final decision” is very important in the Convention. According to the Convention (article 4) a Party of origin is obliged to “disclose the EIA materials at a reasonable time before the final decision” and inform the affected Party of such decision together with the reasons and considerations on which it is based (article 6). However, the term “final decision” in the Convention is not defined.

There should be a clear requirement that:

- a) Comments under article 3.8 and 4.2 of the Convention of foreign authorities and the public regarding information in the EIA documentation are taken into account so that transboundary impacts are properly addressed (art. 6.1 of the Convention);
- b) Authorities issuing the final decision take due account of the outcome of the consultations as referred to in Article 5 (art. 6.1 of the Convention);
- c) The final decision is accompanied by a statement of reasons and considerations on which it is based (art. 6 of the Convention and art. 6.9 of the Aarhus Convention).

In addition, it is recommended that the final decisions when applying the Convention include:

- a) Monitoring conditions (ECE/MP.EIA/IC/2010/2, para. 18);
- b) Information about possibilities to appeal (ECE/MP.EIA/IC/2009/2, para. 26).

According to the Aarhus Convention article 6, paragraph 9, each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.

The national framework should clearly indicate which of the decisions for approving the activities should be considered the final decision for the purpose of satisfying the requirements of the Convention (ECE/MP.EIA/10, decision IV/2, annex I).

While the Parties are free to decide which of the multitude of decisions required within their regulatory framework should be considered final for the purpose of the Convention, their discretion in this respect is limited to those decisions that in real terms set the environmental conditions for implementing the activity (ECE/MP.EIA/10, decision IV/2, annex I, para. 61).

The national framework should be designed in such a way that in each of the decisions considered to be final in relation to a given activity there is clarity as to the authorised basic parameters of the proposed activity and the respective environmental conditions for implementing the activity. If the conditions attached to a decision can be altered subsequently by other decisions, the former cannot be considered the ‘final decision’ in the meaning of the Convention (ECE/MP.EIA/IC/2009/2, para. 21).

Post-project analysis

Post-project analysis is not a requirement of the Convention but where it is undertaken, it includes the surveillance of the activity and the determination of any adverse transboundary impact (Art. 7.1). The implementation of monitoring plans and programs is an important element of post-project analysis. Environmental inspection and enforcement authorities play a critical role in post-project analysis. Georgia should introduce routine inspection and increase the capacities of its inspectorate. In addition, Georgia should monitor the development under the Convention of recommendations on post-project analysis, currently being drafted under a pilot project involving Ukraine and Belarus.

Bilateral agreements

Georgia should consider entering into bilateral agreements with its neighbors for implementation of transboundary EIA. Elements for bilateral or multilateral agreements are included in Appendix VI to the Convention. Examples of specific agreements can be found on the Convention website³⁸. Parties should bear in mind that bilateral agreements could:

- a) Be an effective mechanism to address communication between concerned Parties and the sending of information (ECE/MP.EIA/IC/2010/4, para.29);
- b) Resolve many issues relating to public participation, as foreseen by the Convention (ECE/MP.EIA/IC/2010/4, para. 19 (f)).

Bilateral agreements are particularly indicated in order for Parties to agree on issues such as translation of documents, including which parts to translate, to which languages, and who covers the costs.

Other

Amendments to the Law on Environmental Impact Permit or a new EIA law should clarify the distinctions between permitting processes for new construction and permitting for continued or amended activities. Note that this recommendation depends upon Georgia's progress in developing integrated environmental permitting.

Improved standards, rulebooks, etc could be adopted with respect to the handling of comments and the outcome of public participation procedures. This has been identified as a weakness in the interviews.

Georgia could consider the introduction of a certification system in order to improve the quality of EIA and the standards for companies performing EIA services, taking into account current

³⁸ <http://www.unece.org/env/eia/resources/agreements.html>

discussions on this topic in the context of the EU.³⁹ Currently there are no formal requirements that a private company must meet to provide EIA services. In practice, sometimes EIA reports do not even include the contact information or identity of the experts carrying it out. This should be a minimum requirement.

³⁹ There are pros and cons to certification. Georgia should make its determination on the basis of its particular circumstances.

Annex I

Delegating tasks in the transboundary procedure

(Source: “Draft guidance on enhancing consistency between the Convention and the environmental assessment within the framework of State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia”)

While overall responsibility for each stage of a transboundary procedure rests with the public authority, the public authority may delegate certain of the administrative tasks regarding the procedure to the project proponent/developer. This box clarifies which tasks may, and which may not, be delegated.

Task	May it be delegated to project proponent/developer?	
Decide whether activity may have significant transboundary environmental impact and require notifying potentially affected Parties	NO	Proponent/developer assists public authority in identifying potential significant transboundary environmental impact by providing certain information about the project and its impact
Identify the potentially affected Parties	NO	Proponent/developer assists public authority in identifying potentially affected Parties by providing certain information about the project and its impact
Prepare and carry out the notification	NO	Public authority responsible for the tasks related to the transboundary procedure is responsible for notifying potentially affected Parties. Proponent/developer may be requested to assist in preparing the notification and to translate it.
Provide the affected Party with relevant information regarding the procedure	NO	Public authority responsible for the tasks related to the transboundary procedure must provide the affected Party with the information regarding the procedure
Provide the affected Party with relevant information on the proposed activity and its possible significant adverse transboundary impact	YES	Under the direction and oversight of the public authority responsible for the tasks related to the transboundary procedure

Informing the public of the affected Party on the proposed activity and possibilities for making comments or objections	YES	Under the direction and oversight of the public authorities responsible for the tasks related to the transboundary procedure in the Party of origin and the affected Party
Distribution of the environmental impact assessment documentation to the authorities and the public of the affected Party in the areas likely to be affected	YES	Under the direction and oversight of the public authorities responsible for the tasks related to the transboundary procedure in Party of origin and the affected Party
Receive the public's written comments or objections	NO	
Organize any public hearings, including notifying the public concerned of the date and place of the hearing(s) and organizing the venue	YES	Under the direction and oversight of the public authorities responsible for the tasks related to the transboundary procedure in the Party of origin and the affected Party
Chair any public hearings	NO	
Collate all written and oral comments received from the public	NO	
Entering into consultations with the affected Party	NO	Proponent/developer may be allowed to participate in the consultations
Take into due account in the final decision the outcome of the transboundary procedure (including the comments received and results of the consultations)	NO	Competent public authority entrusted by the Party of origin with decision-making powers regarding a proposed activity is responsible for taking due account of the outcome of transboundary procedure
Provide the affected Party with the final decision, along with the reasons and considerations on which it was based and possibilities to appeal it	NO	Public authority responsible for the tasks related to the transboundary procedure is responsible for providing the affected parties with the final decision along with the reasons and considerations on which it was based and possibilities to appeal it. Proponent/developer may be requested to translate it.

Requirements for public participation at the national level under the Aarhus Convention

Article 6, paragraph 2, of the Aarhus Convention stipulates detailed requirements for notifying the public concerned about a specific decision-making procedure. The notification could be either by public notice or individually, as appropriate. Following the Aarhus Convention, the national framework should clearly:

- a) Provide that the public is informed early in the decision making process, in an adequate, timely and effective manner;
- b) Specify at a minimum the mandatory contents of the public notice (as compared with the requirements specified in para. 2 (a)-(e) of art. 6 of the Aarhus Convention), such as the description of the proposed activity, the responsible authority, and the decision-making process (its nature, commencement and expected duration, the opportunities for public participation during the process, the information available – in particular the relevant environmental information – and the ways the public concerned may obtain further information, etc.). Notably, one of the mandatory elements of the notification under the Aarhus Convention is the inclusion of information about the fact that the activity is subject to a national or transboundary EIA procedure (art. 6, para. 2 (e)).

When designing a national framework it should be borne in mind that, according to the Aarhus Compliance Committee, the organization of discussions on the proposed project in the newspapers and through TV programmes is not a sufficient way to assure public participation in compliance with article 6, paragraph 7, of the Aarhus Convention (ECE/MP.PP/C.1/2010/6/Add.4 para 95).

Article 6, paragraph 3, requires Parties to establish a national framework with specific time frames for public participation procedures for the different phases within the decision-making process. Such timeframes should be reasonable, according to the Convention, allowing for enough time for informing the public and for the public to prepare and participate effectively.

In addition, article 6, paragraph 4, requires that public participation take place early in decision-making. This means that national legislation should provide for public participation when all options are still open so as to guarantee that any public participation procedure is not a mere formality during the process. The requirement for early public participation when all options are open goes hand in hand with the requirement for early notification of the public (see above, art. 6, para.2); and also with the requirement in article 6, paragraph 5, that Parties, where appropriate, encourage dialogue and exchange of information between project developers and the public concerned, even before the permit application is submitted.

Effective public participation depends on the information available to the public concerned to enable it to make informed comments. Following the requirement in article 6, paragraph 6, of the Aarhus Convention, national legislation should require that competent authorities provide the public concerned with access to *all* information (including at least the information listed in art. 6, para. 6 (a) to (f)) relevant to the decision-making, free of charge, and as soon as

available. This implies that the provision of information should not be limited only to selected parts of EIA documentation, should not depend on the volume, and information held by the project developers cannot be excluded. Public authorities may refuse access to some information in specified cases, based on the exemptions under art. 4, paras. 3 and 4 of the Convention. Examples include where the request for information is unreasonable, the information is protected by intellectual property rights, or where the disclosure of the information may have an adverse effect on national defence or public security. It should be borne in mind, however, that any grounds of refusal further to these exemptions are to be interpreted in a restrictive way, taking into account the public interest served by disclosure (art. 4 last paragraph, of the Aarhus Convention).

The application of these provisions of the Aarhus Convention complements the application of article 2, paragraph 8, of the Espoo Convention, in the carrying out of public participation within the EIA procedure. By way of illustration, in relevant states, the so-called OVOS report prepared by the developer may not be exempted from disclosure on the grounds of copyright; nor may access to it be made subject to the payment of a fee. In line with the requirement of the Aarhus Convention that any exemptions are to be interpreted in a restrictive way, taking into account the public interest served by disclosure, the OVOS report, containing information necessary for effective public participation within the EIA procedure, would ordinarily not be restricted from disclosure.

Under article 6, paragraph 7 of the Aarhus Convention, procedures for submitting comments must allow for the public to submit any comments (information, views, etc) that the public considers relevant to the proposed activity. Moreover, article 6, paragraph 8, requires Parties to ensure that the final decision takes due account of the outcomes of public participation. This means that the final decision should include a reasoning upon which the decision was based and should provide explanation and evidence on how the outcomes of the public participation procedure were taken into account. This is consistent with article 6, paragraph 1, of the Espoo Convention.

Finally, according to article 6, paragraph 9 of the Aarhus Convention, Parties must ensure through their national legislation that the public is informed of the final decision, promptly after the decision is taken, and must make the decision and the reasons and considerations on which it is based publicly accessible (see also art. 6, paras. 1 and 2, of the Espoo Convention). Implicit in article 5, paragraph 2 of the Aarhus Convention, is the requirement that public authorities must maintain all the relevant documents including the application, EIA documentation and final decision, in publicly accessible lists, registers or files.