UN environment

# Assessing Environmental Impacts-
# A Global Review of Legislation

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# Executive Summary

**Environmental Impact Assessments (EIAs)** are the most commonly known, used, and globally widespread, environmental planning and management tools, with **Strategic Environmental Assessments (SEAs)** also gaining increasing momentum over the last decade. The objective of these tools is to make sure that all **critical information to predict future impact** on the environment is supplied and considered in the decision-making process. While EIAs assess planned physical developments, SEAs target the strategic planning level, such as government plans, programmes or policies. Both aim to avoid the implementation of any activity or strategic planning document with significant negative impacts on the environment, as well as an enhancement of positive impacts.

The future development and implementation of EIAs/SEAs will be crucial in advancing environmentally friendly development. Thus, both EIAs and SEAs are of high relevance for delivering the **2030 Agenda for Sustainable Development** and related policy frameworks such as the Strategic Plan for Biodiversity. The ability of countries and communities to achieve sustainable development depends in no small measure on robust and effective EIA/SEA legislation and implementation as a major catalyst for overcoming current implementation gaps and achieving better environmental outcomes.

This report provides an **overview of the current status** of national legislation and institutional arrangements of relevance to EIAs and SEAs across the globe, as well as emerging issues and trends. It does this primarily through providing examples from a wide selection of countries of their EIA/SEA arrangements and in relation to the different steps of the EIA/SEA processes. These steps include: (1) *Screening*; (2) *Scoping and Impact Analysis*; (3) *Review of the EIA/SEA report*; (4) *Decision-making*; (5) *Follow-up and Adaptive Management* and (6) *Public Participation* as a cross-cutting issue.

It is hoped that this report and the many examples, experiences and practices contained in it will support **legal practitioners and policy makers** in making well-informed decisions when drafting, implementing or aiming to improve their laws and policies related to EIAs and SEAs.

The report, and in particular the section on **public participation** in EIAs/SEAs, is also of relevance to civil society, including the general public. It can for example be used as a resource for NGOs to better understand the concept of EIAs and SEAs and the benefits that can be derived in terms of preserving the environment and the broader sustainable development agenda. Further, it is hoped that readers will generally feel empowered to have their voices heard in EIA or SEA processes in their countries and thus make use of the available mechanism for public participation at different stages of the EIA and SEA process.

## Key findings and trends

1. There is generally a broad spread of **EIA legal requirements** globally, with a number of countries recently strengthening their regulatory frameworks. However, in some other countries there has been a worrying trend towards weakening the EIA process.
2. Despite some promising developments in different parts of the world, uptake and in particular implementation of **SEA legal requirements** has been slow in many countries. Prevailing shortcomings are mostly linked to the fact that legal approaches are often rooted in the logic of EIA systems, not taking into account the particularities of strategic planning processes, or that provisions are lacking legal force.
3. **Public participation** requirements for **EIAs** are being expanded in some countries, although mostly limited to the scoping and review stage. Further, the required level of participation varies considerably, as well as interpretations of who "the public" is. Only a limited number of countries' national EIA legislation includes specific provisions related to the participation of **indigenous peoples**.
4. Despite growing recognition of **SEAs** as a tool to strengthen democratic control, little guidance is provided in many countries' SEA legislation regarding **public participation**, including access to information.
5. Many national EIA laws leave **high levels of discretion** to implementing agencies. While in some cases this can provide important flexibility to apply the regulations to different circumstances, it can also lead to uncertainty about the process, and inconsistent application.
6. The consideration of **cumulative impacts** in EIAs is a legal requirement in many countries, and the concept of **ecosystem services** can help in assessing these; however, existing provisions are often criticized as not effective and there is also a need to better measure ecosystem services. To overcome some of the limitations of EIAs regarding the considerations of cumulative effects (and alternatives), the **importance of SEAs** is increasingly recognized.
7. Linked to developments in international and regional policy agendas, more recently adopted EIA and SEA legislation shows an increased focus on issues such as **climate change** and **human health**, often complemented by **non-binding guidelines**, e.g. on integrating climate change in SEA or biodiversity-inclusive EIA.
8. A key challenge in EIA and SEA implementation is **lack of available, accessible and fit-for purpose data**, including with regard to ecosystem services and climate change adaptation and mitigation.
9. An explicit reference to the **mitigation hierarchy**[1] is not generally included in national EIA (or SEA) legislation, which is widely regarded as a severe shortcoming. Nevertheless, application of the mitigation hierarchy, including through **biodiversity offsets**, is increasingly seen as good practice.
10. There are some developments towards integrating substantive guidance in EIA and SEA legislation, for example with regard to mitigation, such as on compensation and offsetting, and often through reference to broader government policies and targets (e.g. no net loss or a net gain in biodiversity). By moving beyond a focus on

1 The mitigation hierarchy is the sequence of actions to anticipate and avoid impacts on biodiversity and ecosystem services; and where avoidance is not possible, minimize; and, when impacts occur, rehabilitate or restore; and where significant residual impacts remain, offset. (CSBI 2013)

procedural requirements, this can help in achieving better environmental outcomes of EIAs and SEAs.

11 An important **review criterion** of the EIA/SEA reports or statements, including Environmental Management Plans, is the **capacity** of the project proponent or plan, programme or policy executing agency to implement required mitigation measures and to avoid adverse environmental impacts.

12 There is an increased focus on **follow-up and adaptive management** in more recent **EIA** legislation. Nevertheless, the pre-decision stage is still generally the focus, including overemphasis of the EIA report itself, with the perception that it is an end product, instead of a legally binding commitment.

**13** **Follow-up and adaptive management** of **SEAs** face many of the same challenges observed with regard to EIAs. Specific challenges for SEA follow-up include the regularly long time period for a strategic planning document to materialize as well as the difficulty to attribute environmental changes to a single strategic planning instrument.

14 Making EIA and SEA **decisions/ recommendations** and **permitting conditions/ implementation guidelines** available to the public and relevant agencies supports follow-up measures, including enforcement in case of non-compliance and adaptive management.

# 执行摘要

**“环境影响评估”（EIA）** 是人们最为熟知和常用的、且在全球应用最为广泛的环境规划与管理工具。在过去十年里，**“战略环境评估”（SEA）** 工具的使用也呈增长势头。这些工具的目标是确保在决策过程中提供并考虑**预测未来对环境影响所需的全部关键信息**。“环境影响评估”所评估的是规划的实际开发，而“战略环境评估”则针对战略规划层面，如政府计划、方案或政策。两者都旨在避免执行任何对环境产生重大不利影响的活动或战略规划文件，同时致力于扩大积极影响。

“环境影响评估”/“战略环境评估”的未来发展和实施对促进环境保护发展至关重要。因此，“环境影响评估”和“战略环境评估”对于实施《**2030年可持续发展议程**》和相关政策框架（如《生物多样性战略计划》）具有高度相关性。国家和社区实现可持续发展的能力在很大程度上取决于有效、可靠的“环境影响评估”/“战略环境评估”立法以及将其作为克服当前实施差距和取得更好环境成果的主要催化因素来加以实施。

本报告**概述**了当前全球范围内有关“环境影响评估”和“战略环境评估”的国家立法情况和制度安排的**现状**，以及新出现的问题和趋势。主要通过提供多个国家的“环境影响评估”/“战略环境评估”安排范例以及有关环境影响评估”/“战略环境评估”流程的不同步骤来实现上述目标。这些步骤包括：*(1) 筛选；(2) 范围界定及影响分析；(3) 审查“环境影响评估”/“战略环境评估”报告；(4) 决策；(5) 后续行动和适应性管理；(6)作为跨领域问题的公众参与。*

希望本报告及所含的多种范例、经验和实践能够帮助**法律执业者和政策制定者**在起草、实施或旨在改进与“环境影响评估”和“战略环境评估”有关的法律和政策时做出明智的决定。

本报告，尤其是有关公民参与“环境影响评估”/“战略环境评估”的部分，也对民间团体（包括公众）相关。例如，它可用作非政府组织的一个参考资料，以便更好地了解“环境影响评估”和“战略环境评估”的概念及其在保护环境和实现更广泛的可持续发展议程方面可能带来的益处。此外，我们希望读者感觉自己有权在所在国“环境影响评估”或“战略环境评估”的流程中发声，进而利用现有机制在“环境影响评估”和“战略环境评估”流程的不同阶段实现公众参与。

### 主要发现和趋势

1. **环境影响评估”法律要求**在全球范围内得到了普遍推广，一些国家最近加强了其监管框架。然而，其他一些国家的“环境影响评估”进程有遭到削弱的趋势，这令人担忧。
2. 尽管在世界一些地区的发展较为乐观，但很多国家对“**战略环境评估”法律要求**的接受过程仍显缓慢，尤其是在实施方面。其主要问题大多与以下事实有关，即：法律手段常植根于“环境影响评估”系统的逻辑，而未顾及战略规划过程的特殊性，亦或规定缺乏法律效力。

3. 一些国家正加大对公众参与“环境影响评估”的要求，虽然主要限于范围界定和审查阶段。此外，要求公众参与的程度也有很大差异，而且对“公众”指哪些人也有不同的诠释。只有少数国家的全国性“环境影响评估”法律包含有关土著居民参与的具体规定。
4. 尽管越来越多的人认识到**“战略环境评估”**是加强民主控制的一种工具，但很多国家的“战略环境评估”法律并没有针对**“公众参与”**（包括获取信息）提供指导。
5. 很多国家的“环境影响评估”法律都让执行机构拥有**相当大的酌情处理权**。虽然这在某些情况下对不同场合实施规定提供灵活性，但也可能导致过程的不确定性以及前后应用不一。
6. 考虑“环境影响评估”的**累积影响**是很多国家的法律要求，同时**生态系统服务**的概念有助于评估这些影响；然而，现行规定经常因不奏效而受到批评，而人们还需更好地衡量生态系统服务。为克服“环境影响评估”在考虑累积效应（及替代方案）方面的一些局限性，人们日益认识到**“战略环境评估”的重要性**。
7. 最近通过的“环境影响评估”和“战略环境评估”立法显示出人们日益关注**气候变化和人类健康**等问题，这与国际和地区性政策议程的发展息息相关。这些立法通常还辅以**不具约束力的指导原则**，例如将气候变化纳入“战略环境评估”或包含生物多样性的“环境影响评估”当中。
8. “环境影响评估”和“战略环境评估”在实施过程中面临的一个关键挑战是**缺乏可用、易用和适用的数据**，包括与生态系统服务、适应与减缓气候变化有关的数据。
9. 全国性“环境影响评估”（或“战略环境评估”）立法通常均未明确提及**减缓层次结构**[1]，而这受到人们的广泛诟病，认为是其严重缺点。然而，采用减缓层次结构的做法，包括利用**生物多样性补偿抵消**，正日益被人们接受为良好做法。
10. 在“环境影响评估”和“战略环境评估”立法中纳入实质性指导方面已取得一些进展，例如就减缓措施而言，可以采用补偿和抵消措施，并且通常还会参照范围更为广泛的政府政策和目标（例如，生物多样性方面实现无净损失或净收益的目标）。通过对比程序性要求更高层次的关注，这有助于实现更好的“环境影响评估”和“战略环境评估”的环保成果。
11. “环境影响评估”/“战略环境评估”报告或陈述（包括环境管理计划）的一个**重要审查标准**是项目倡议者或者规划、计划或政策执行机构执行所需的减缓措施并避免产生不利环境影响的能力。
12 最近的“环境影响评估”立法对**后续行动和适应性管理**的关注越来越多；但通常决策前阶段仍是“环境影响评估”报告本身的重点，甚至是过分重视。人们将其视作最终产品，而不是具有法律约束力的承诺。
13. **“战略环境评估”的后续行动和适应性管理**面临着很多与“环境影响评估”相同的挑战。“战略环境评估”后续行动所面临的具体挑战包括：形成战略规划文件通常需要很长时间；将环境变化诉诸单一战略规划工具比较困难。
14. 向公众和相关机构提供“环境影响评估”和“战略环境评估”**决策／建议**以及**允许条件／实施指南**，这可为后续措施提供支持，包括不合规情况下的执法和适应性管理。

[1] 减缓层次结构指预测和避免对生物多样性和生态系统服务造成影响的行动序列；在无法避免的情况下，将其影响降至最低；在造成影响的情况下，重建或恢复；在残余影响较大的情况下，予以补偿并抵消。(CSBI 2013)

# Résumé

Les **Études d'impact environnemental (EIE)** sont les outils de planification et de gestion de l'environnement les plus connus, utilisés et répandus à l'échelle mondiale. Les **Évaluations environnementales stratégiques (EES)** ont quant à elles pris de plus en plus d'importance ces dix dernières années. L'objectif de ces outils est de veiller à ce que toutes les **informations essentielles pour prédire l'impact futur** sur l'environnement soient transmises et prises en compte lors du processus décisionnel. Les EIE évaluent les projets d'aménagement tandis que les EES ciblent le niveau de la planification stratégique, comme les plans, programmes et politiques du gouvernement. Ces outils ont tous les deux pour but d'éviter la mise en œuvre de toute activité ou tout document de planification stratégique ayant des impacts négatifs considérables sur l'environnement, ainsi que de renforcer les impacts positifs.

À l'avenir, l'élaboration et la mise en œuvre des EIE/EES seront cruciales pour promouvoir un développement respectueux de l'environnement. Ainsi, ces deux outils ont un rôle important à jouer dans la réalisation du **Programme de développement durable à l'horizon 2030** et des cadres politiques connexes comme le Plan stratégique pour la biodiversité. La capacité des pays et des communautés à réaliser un développement durable repose en grande partie sur l'adoption d'une législation solide et efficace en matière d'EIE/EES, qui permettra de remédier aux lacunes actuelles dans la mise en œuvre et d'obtenir de meilleurs résultats environnementaux.

Le présent rapport fournit un **aperçu de l'état actuel** de la législation nationale et des dispositifs institutionnels relatifs aux EIE et EES dans le monde entier, ainsi que des tendances et problèmes émergents. Pour ce faire, il utilise principalement des exemples de dispositifs relatifs aux EIE et EES tirés d'un vaste échantillon de pays, en relation avec les différentes étapes des processus de l'EIE et de l'EES. Ces étapes comprennent : 1) *un tri préliminaire* ; 2) *le cadrage et l'analyse de l'impact* ; 3) *l'examen du rapport d'EIE/EES* ; 4) *la prise de décision* ; 5) *le suivi et la gestion adaptative* et 6) *la participation du public* en tant que question transversale.

Dans l'idée, le présent rapport et les nombreux exemples, expériences et pratiques qu'il contient aideront les **législateurs et les décideurs politiques** à prendre des décisions éclairées lors de l'élaboration, de la mise en œuvre ou de l'amélioration de leurs lois et politiques relatives aux EIE et EES.

Son contenu, et en particulier la section sur la **participation du public** aux EIE/EES, revêt aussi un intérêt pour la société civile, notamment le grand public. Par exemple, il peut servir de ressource pour les ONG afin de mieux expliquer le concept d'EIE et d'EES et les avantages qui peuvent en découler en matière de préservation de l'environnement et en ce qui concerne le programme de développement durable dans son ensemble. En outre, les lecteurs pourraient en tirer le sentiment qu'ils sont en droit de faire valoir leur opinion

pendant les processus d'EIE ou d'EES dans leur pays et ainsi utiliser les mécanismes de participation du public existants lors des différentes étapes desdits processus.

### Conclusions et tendances principales

1. De manière générale, les **obligations légales en matière d'EIE** gagnent du terrain dans le monde entier, un certain nombre de pays ayant récemment renforcé leurs cadres réglementaires. Néanmoins, dans d'autres pays, une tendance préoccupante à l'affaiblissement du processus d'EIE a été observée.
2. Malgré des avancées prometteuses dans diverses parties du monde, l'adoption et en particulier l'application des **obligations légales en matière d'EES** est lente dans la plupart des pays. Les lacunes actuelles sont principalement liées au fait que les approches juridiques sont souvent fondées sur la logique des systèmes d'EIE et ne prennent pas en compte les spécificités des processus de planification stratégique, ou que les dispositions sont dénuées de valeur juridique.
3. Les obligations de **participation du public** pour les **EIE** sont en cours d'élargissement dans certains pays, bien que limitées pour la plupart aux étapes de cadrage et d'examen. En outre, le niveau requis de participation varie considérablement, de même que les interprétations quant au « public » éligible. Seul un nombre restreint de pays ont inclus des dispositions spécifiques liées à la participation des **peuples autochtones** dans leur législation nationale relative aux EIE.
4. Malgré la reconnaissance grandissante des **EES** en tant qu'outil de renforcement du contrôle démocratique, la législation relative aux EES ne fournit que peu d'orientations en ce qui concerne la **participation du public**, y compris l'accès aux informations, dans de multiples pays.
5. De nombreuses lois nationales relatives aux EIE laissent un **grand pouvoir discrétionnaire** aux organismes de mise en œuvre. Dans certains cas, il peut certes en résulter une application souple des réglementations en fonction des circonstances, mais aussi un processus incertain et une mise en œuvre incohérente.
6. La prise en compte des **impacts cumulatifs** dans les EIE est une obligation légale dans de nombreux pays, et le concept de **services écosystémiques** peut aider à les évaluer ; cependant, les dispositions existantes sont souvent qualifiées d'inefficaces et il conviendrait également de mieux mesurer les services écosystémiques. Pour pallier certaines des limites des EIE concernant la prise en compte des effets cumulatifs (et des alternatives), **l'importance des EES** est de plus en plus reconnue.
7. En lien avec l'évolution des programmes politiques internationaux et régionaux, les législations relatives aux EIE et EES adoptées plus récemment se concentrent davantage sur des questions comme le **changement climatique** et la **santé humaine**, et sont souvent complétées par des **directives non contraignantes**, p. ex. l'intégration du changement climatique dans les EES ou les EIE prenant en compte la biodiversité.
8. L'une des difficultés principales de la mise en œuvre des EIE et des EES est **le manque de données disponibles, accessibles et adaptées à l'usage prévu**, notamment en ce qui concerne les services écosystémiques et l'adaptation au changement climatique ainsi que l'atténuation de ses effets.

9. Les législations nationales relatives aux EIE (ou aux EES) ne font généralement pas explicitement référence à la **séquence ERC**[1], une lacune globalement qualifiée de grave. Néanmoins, l'application de cette séquence, notamment par le biais de la **compensation des atteintes à la biodiversité,** est de plus en plus considérée comme une bonne pratique.
10. On observe quelques évolutions concernant l'intégration d'orientations concrètes dans la législation relative aux EIE et aux EES, par exemple en ce qui concerne l'atténuation, notamment la compensation, et qui font souvent référence à des politiques et cibles gouvernementales plus larges (p. ex. absence de perte nette voire gain net de biodiversité). Cette évolution, qui va plus loin que les seules obligations procédurales, pourrait contribuer à l'amélioration des résultats environnementaux des EIE et des EES.
11. L'un des **critères d'examen** importants des rapports ou déclarations d'EIE/EES, y compris les Plans de gestion de l'environnement, est la **capacité** du promoteur du projet ou de l'organisme d'exécution du plan, programme ou de la politique à mettre en œuvre des mesures d'atténuation et à éviter les atteintes à l'environnement.
12. Les législations plus récentes relatives aux **EIE** sont de plus en plus axées sur le **suivi et la gestion adaptative.** Néanmoins, l'étape précédant la décision reste généralement l'élément central, l'accent étant notamment mis de manière excessive sur le rapport d'EES même, qui est perçu comme un produit final plutôt que comme un engagement juridiquement contraignant.
13. **Le suivi et la gestion adaptative** des **EES** rencontrent un grand nombre de difficultés identiques à celles des EIE. Les défis spécifiques au suivi des EES comprennent le délai généralement long nécessaire à la matérialisation du document de planification stratégique et la difficulté à imputer des modifications de l'environnement à un instrument de planification stratégique précis.
14. Mettre les **recommandations/décisions** relatives aux EIE et EES et les **conditions d'autorisation/directives de mise en œuvre** à la disposition du public et des organismes compétents est un moyen de soutenir les mesures de suivi, notamment l'application en cas de non-respect et la gestion adaptative.

1 La séquence ERC (éviter, réduire et compenser) est une série de mesures permettant : d'anticiper et d'éviter les impacts sur la biodiversité et les systèmes écosystémiques ; lorsque l'évitement n'est pas possible, de minimiser l'impact ; lorsque les impacts se concrétisent, de réhabiliter ou de restaurer ; et lorsque des effets résiduels notables persistent, de les compenser. (CBSI 2013)

# Резюме

**Оценки воздействия на окружающую среду (ОВОС)** являются наиболее общеизвестными, часто используемыми и широко распространенными во всем мире инструментами экологического планирования и управления, при этом в последнее десятилетие все чаще проводятся **стратегические экологические оценки (СЭО)**. Эти инструменты призваны обеспечить предоставление и учет в процессе принятия решений всей **особо важной информации для прогнозирования будущего воздействия** на окружающую среду. В то время как ОВОС проводятся с целью оценки планируемых физических вмешательств, например строительства объектов, СЭО направлены на уровень стратегического планирования, например на планы, программы или политические установки правительства. Оба вида оценок призваны помочь избежать осуществления какой-либо деятельности или реализации какого-либо документа стратегического планирования, оказывающих значительное неблагоприятное воздействие на окружающую среду, а также обеспечить усиление положительного воздействия.

Будущая разработка и реализация ОВОС/СЭО будет играть решающую роль в обеспечении экологически безопасного развития. Таким образом, как ОВОС, так и СЭО имеют большое значение для осуществления **Повестки дня в области устойчивого развития на период до 2030 года** и связанных с ней политических рамочных документов, таких как Стратегический план по биоразнообразию. Способность стран и общин добиться устойчивого развития в немалой степени зависит от обоснованности и эффективности законодательства об ОВОС/СЭО и их реализации в качестве одного из основных факторов, способствующих более быстрому устранению существующих пробелов в осуществлении и достижению более благоприятных конечных природоохранных результатов.

В настоящем докладе приводится **общий обзор текущего статуса** национальных законодательных актов и институциональных механизмов, имеющих значение для проведения ОВОС и СЭО во всем мире, а также вновь возникающих вопросов и тенденций. Это достигается преимущественно путем приведения примеров механизмов проведения ОВОС/СЭО из опыта широкого круга стран, а также описания различных шагов, используемых ими в процессе проведения ОВОС/СЭО. В число этих шагов входят: *(1) предварительная проверка; (2) определение масштабов и анализ воздействия; (3) рассмотрение доклада об ОВОС/СЭО; (4) принятие решений; (5) последующий контроль и адаптивное управление и (6) участие общественности как вопрос,* охватывающий все этапы.

Хочется надеяться, что настоящий доклад и приведенные в нем многочисленные примеры, опыт и практические методы будут способствовать принятию **практикующими юристами и лицами, отвечающими за выработку политики,**

обоснованных решений в процессе составления проектов и реализации законов и политических установок, касающихся ОВОС и СЭО, или принятия мер по их совершенствованию.

Настоящий доклад и, в частности, раздел, посвященный участию общественности в ОВОС/СЭО, также имеет значение для гражданского общества, включая широкую общественность. К примеру, его можно использовать в качестве справочного материала для НПО, обеспечивающего более ясное понимание концепции ОВОС и СЭО, а также тех преимуществ, которые могут быть получены в плане сохранения окружающей среды, как и более широкой повестки дня в области устойчивого развития. Кроме того, хочется надеяться, что читатели в целом почувствуют в себе силы открыто высказывать свое мнение в процессе проведения ОВОС или СЭО в их странах и таким образом использовать имеющийся механизм для обеспечения участия общественности на различных этапах процесса проведения ОВОС и СЭО.

### Основные выводы и тенденции

1. В мировом масштабе существует в целом широкий спектр **правовых требований к ОВОС**, при этом в ряде стран недавно были приняты меры по укреплению их нормативно-правовой базы. Вместе с тем, в некоторых других странах наблюдается тревожная тенденция к ослаблению процесса проведения ОВОС.
2. Несмотря на некоторые обнадеживающие события в различных регионах мира, принятие и, в частности, реализация **правовых требований к СЭО** во многих странах шли медленными темпами. Преобладающие недостатки, главным образом, обусловлены тем, что правовые подходы зачастую основываются на логике систем ОВОС, без учета особенностей процессов стратегического планирования, или тем, что положения не имеют юридической силы.
3. В некоторых странах расширяются требования в отношении **участия общественности в ОВОС**, хотя по большей части они ограничиваются этапом определения масштабов и рассмотрения. Кроме того, требуемый уровень участия в значительной степени варьируется, равно как интерпретации понятия «общественность». Лишь в ограниченном числе стран национальное законодательство о проведении ОВОС включает конкретные положения, касающиеся участия **коренных народов**.
4. Несмотря на растущее признание **СЭО** в качестве инструмента для укрепления демократического контроля, в законодательстве многих стран о проведении СЭО включен незначительный объем руководящих указаний в отношении **участия общественности**, включая доступ к информации.
5. Во многих странах национальное законодательство о проведении ОВОС предоставляет **высокую степень свободы действий** учреждениям-исполнителям. В некоторых случаях это может обеспечивать важную гибкость в применении нормативных актов в разных обстоятельствах, но также может вызывать неопределенность в отношении процесса, а также непоследовательное применение.

6. Учет **совокупных воздействий** в ОВОС является юридическим требованием во многих странах, и для их оценки может оказаться полезным понятие «**экосистемные услуги**»; вместе с тем, существующие положения зачастую подвергаются критике как неэффективные, а кроме того существует потребность в более точном количественном измерении экосистемных услуг. В целях преодоления определенной ограниченности ОВОС в том, что касается рассмотрения совокупных последствий (и альтернатив), во все большей степени признается **важность СЭО**.
7. В связи с изменениями в международных и региональных политических повестках дня в принимаемых в последнее время законодательных актах о порядке проведения ОВОС и СЭО повышенное внимание уделяется таким вопросам, как **изменение климата и здоровье человека**. Эти законодательные акты зачастую дополняются **не имеющими обязательной силы руководящими принципами**, например, в отношении включения вопросов изменения климата в СЭО или учета вопросов биоразнообразия при проведении ОВОС.
8. Ключевой проблемой в ходе проведения ОВОС и СЭО является **отсутствие существующих, доступных и пригодных для использования данных**, в том числе касающихся экосистемных услуг и адаптации к изменению климата, а также смягчения климатических изменений.
9. Прямое указание на **иерархию смягчения воздействия**[1] обычно не включается в национальное законодательство о проведении ОВОС (или СЭО), что широко признается серьезным недостатком. Тем не менее, применение иерархии смягчения воздействия, в том числе посредством **компенсации неблагоприятного воздействия на биоразнообразие**, все чаще рассматривается как надлежащая практика.
10. Имеют место определенные подвижки в направлении включения предметных руководящих указаний в законодательство о проведении ОВОС и СЭО, например в отношении смягчения воздействия, например по вопросам компенсации и возмещения, и зачастую посредством ссылок на более широкие правительственные политические установки и целевые задачи (например, отсутствие чистой утраты или чистое увеличение биоразнообразия). Подобный выход за рамки процедурных требований может способствовать достижению более благоприятных конечных природоохранных результатов ОВОС и СЭО.

1 Иерархия смягчения воздействия — это последовательность действий по предвосхищению и предотвращению воздействий на биоразнообразие и экосистемные услуги; либо их сведению к минимуму в случае невозможности предотвращения; либо по реабилитации или восстановлению в тех случаях, когда воздействие происходит; либо по компенсации существенных остаточных последствий таких воздействий. (CSBI 2013)

11. Важным **критерием рассмотрения** докладов или заявлений о результатах ОВОС/СЭО, включая планы природоохранных мероприятий, является **потенциал** инициатора проекта или учреждения-исполнителя плана, программы или политики в отношении осуществления требуемых мер по смягчению воздействия и предотвращению неблагоприятных экологических последствий.
12. В более недавнем законодательстве о проведении **ОВОС** повышенное внимание уделяется **последующему контролю и адаптивному управлению**. Тем не менее, в центре внимания по-прежнему обычно находится этап, предшествующий принятию решений, включая придание чрезмерного значения докладу о результатах ОВОС как таковому, когда он воспринимается как конечный продукт, а не юридически обязывающее заявление.
13. В процессе **последующего контроля и адаптивного управления СЭО** приходится сталкиваться со многими из тех же проблем, которые возникают при проведении ОВОС. К числу конкретных проблем, связанных с последующим контролем СЭО, относятся обычно длительный период, необходимый для выработки документа стратегического планирования, а также затруднения, связанные с отнесением экологических изменений к одному документу стратегического планирования.
14. Доведение **решений / рекомендаций** по ОВОС и СЭО и **условий выдачи разрешений / руководящих принципов осуществления** до сведения общественности и соответствующих ведомств обеспечивает поддержку мер последующего контроля, включая принудительное исполнение в случае несоблюдения требований и адаптивное управление.

# Resumen Ejecutivo

**Las evaluaciones del impacto ambiental (EIA)** son las herramientas de planificación y gestión ambiental más conocidas, utilizadas y generalizadas a escala mundial. Por su parte, las **evaluaciones ambientales estratégicas (EAE)** han cobrado fuerza en el último decenio. El objetivo de estas herramientas es garantizar que los procesos de adopción de decisiones cuenten con y utilicen toda la información necesaria para predecir futuros impactos sobre el ambiente. Mientras que las EIA evalúan los impactos ambientales que pudieran resultar de proyectos específicos, las EAE se centran en la esfera de la planificación estratégica, como los planes, los programas o las políticas gubernamentales. El objetivo de ambos tipos de evaluación consiste en evitar la aplicación de documentos de planificación estratégica o ejecución de actividades que pudieran generar efectos negativos significativos para el ambiente, así como potenciar los efectos positivos.

El futuro desarrollo y aplicación de las EIA y las EAE serán cruciales para impulsar un desarrollo en armonía con al ambiente. Por consiguiente, ambas herramientas resultan fundamentales para la aplicación de la **Agenda 2030 para el Desarrollo Sostenible** y de otros marcos de políticas conexos como el Plan Estratégico para la Diversidad Biológica. La capacidad de los países y las comunidades para alcanzar un desarrollo sostenible depende en buena medida de la vigencia y aplicación de legislación sólida y eficaz en materia de EIA y EAE lo que constituye un elemento catalizador clave para corregir las deficiencias en la implementación y obtener mejores resultados ambientales.

En el presente informe se ofrece una **visión general de la situación actual** de la legislación nacional y los acuerdos institucionales relativos a las EIA y las EAE en todo el mundo, de las tendencias y los nuevos retos. En tal sentido, se presentan ejemplos de los arreglos institucionales de EIA y EAE de una gran variedad de países, en relación con las diferentes etapas de ambos procesos de evaluación. Estas etapas comprenden: *1) examen previo; 2) identificación y análisis de los impactos del proyecto; 3) revisión del estudio de EIA o EAE; 4) adopción de decisiones; 5) seguimiento y gestión adaptable; y 6) participación pública, que constituye una cuestión transversal.*

Se espera que este informe y los múltiples ejemplos, experiencias y prácticas que contiene, ayuden a los **profesionales del derecho y a los encargados de la formulación de políticas** a tomar decisiones informadas durante los procesos de redacción, aplicación o mejora de sus leyes y políticas en materia de EIA y EAE.

El informe, y en especial la sección sobre **participación pública** en las EIA y EAE, también reviste interés para la sociedad civil, incluido el público general. Se puede utilizar, por ejemplo, como recurso para que las organizaciones no gubernamentales (ONG) ganen un mayor entendimiento sobre el concepto de las EIA y las EAE y las ventajas que estos procesos pueden ofrecer para la conservación del ambiente en particular y, de modo más

amplio, en pos de la agenda de desarrollo sostenible. Además, se espera que los lectores se sientan empoderados para hacerse oír en los procesos de EIA o EAE de sus países, haciendo como consecuencia uso del mecanismo de participación pública disponible en las diferentes etapas de estos procesos de evaluación.

### Principales conclusiones y tendencias

1. En general existe en todo el mundo una amplia variedad de **requisitos legales para las EIA.** Recientemente, algunos países han reforzado sus marcos regulatorios. No obstante, en otros países se ha observado una preocupante tendencia hacia el debilitamiento del proceso de EIA.
2. Pese a algunos avances prometedores en diferentes partes del mundo, el proceso de adopción y en especial de aplicación de los **requisitos legales de las EAE** se ha desarrollado de modo más lento en numerosos países. Los puntos débiles más importantes están vinculados en su mayoría con el hecho de que los enfoques jurídicos utilizados para la EAE suelen fundamentarse en la lógica de los sistemas de EIA, sin tomar en consideración las especificidades de los procesos de planificación estratégica, o sin que las disposiciones existentes cuentan con la fuerza legal necesaria para su aplicación.
3. Algunos países están ampliando los requisitos de **participación pública** de las **EIA**, aunque se limitan sobre todo a la etapa de identificación y análisis de los impactos del proyecto y revisión. Además, existen diferencias importantes en cuanto al nivel de participación requerido así como con respecto a las interpretaciones de quién compone "el público". Sólo un número reducido de países incluye en legislación nacional en materia de EIA disposiciones específicas relativas a la participación de los **pueblos indígenas**.
4. Pese al reconocimiento creciente sobre la utilidad de las **EAE** como herramienta para fortalecer el control democrático, la legislación en materia de EAE de varios países ofrece poca orientación sobre la **participación pública**, incluido el acceso a la información.
5. Gran parte de las leyes nacionales sobre las EIA conceden una **elevada facultad discrecional** a los organismos de ejecución. Si bien en algunos casos esta característica puede proporcionar una gran flexibilidad al aplicar la normativa frente a distintas circunstancias, también puede generar incertidumbre sobre el proceso e incoherencia en su aplicación.
6. La consideración de los **impactos acumulativos** en las EIA es un requisito legal en muchos países, y el concepto de **servicios de los ecosistemas** puede ayudar para evaluar dichos impactos. Sin embargo, con frecuencia surgen voces críticas en contra de las disposiciones vigentes por su falta de eficacia, identificándose además la necesidad de mejorar la medición de los servicios de los ecosistemas. De modo creciente, se reconoce la **importancia de las EAE** para superar algunas de las limitaciones de las EIA en torno a la consideración de los impactos acumulativos (y las alternativas).
7. En relación con la evolución de las agendas de política internacionales y regionales, la legislación en materia de EIA y EAE aprobada más recientemente presta una mayor atención a cuestiones como el **cambio climático** y la **salud humana**, a menudo acompañada de **directrices no vinculantes**, por ejemplo, sobre la integración del

cambio climático en las EAE o sobre la consideración de la biodiversidad en los procesos de EIA.

8. La **falta de datos disponibles, accesibles y adecuados para el propósito previsto** es un reto importante para la puesta en práctica de las EIA y las EAE**,** incluido en lo relativo a los servicios de los ecosistemas y la mitigación del cambio climático y la adaptación al mismo.
9. La legislación nacional en materia de EIA (o EAE) no suele incluir ninguna referencia explícita a la **jerarquía de mitigación**[1], lo que se considera en general como una gran limitación. Pese a todo, la aplicación de la jerarquía de mitigación, entre otras cosas mediante la **compensación por pérdida de biodiversidad**, se considera cada vez con más frecuencia como una buena práctica.
10. Hay algunos casos que muestran el avance hacia la integración de orientación substantiva sobre diferentes temas en la legislación en materia de EIA y EAE, como por ejemplo la compensación en lo que respecta a la mitigación. A menudo esto se realiza a través de referencias a políticas y objetivos gubernamentales más amplios (como la ausencia de pérdida neta o la ganancia neta de biodiversidad). Al ir más allá del enfoque centrado en los requisitos procedimentales, es posible obtener mejores resultados ambientales derivados de las EIA y las EAE.
11. La **capacidad** del promotor del proyecto o del organismo de ejecución del plan, el programa o la política de que se trate para poner en marcha las medidas de mitigación requeridas y evitar los efectos perjudiciales sobre el ambiente es un **criterio importante para la revisión** de los estudios o las declaraciones de EIA y EAE, incluidos para los planes de gestión ambiental.
12. La legislación más reciente en materia de **EIA** se centra en mayor medida en **el seguimiento y la gestión adaptable**. Sin embargo, la etapa anterior a la adopción de decisiones continúa acaparando más atención, lo que se hace evidente, entre otras cosas, el hincapié excesivo que se hace en el propio estudio de EIA, al considerarse que se trata de un producto en sí mismo, en lugar de entenderlo como un compromiso jurídicamente vinculante.
13. **El seguimiento y la gestión adaptable** de las EAE enfrentan muchos de los desafíos ya observados en las EIA. Algunos problemas específicos del seguimiento de las EAE son el largo período que suele requerir la elaboración de un documento de planificación estratégica y la dificultad para atribuir los cambios ambientales a un único instrumento de planificación estratégica.
14. Poner a disposición del público y de los organismos competentes **las decisiones y las recomendaciones** de las EIA y las EAE, así como las **directrices para su aplicación y las condiciones para la obtención de permisos**, respalda las medidas de seguimiento, incluidas la aplicación de la ley en caso de incumplimiento y la gestión adaptable.

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1 La jerarquía de mitigación es la secuencia de medidas orientadas a anticipar y evitar los impactos sobre la biodiversidad y los servicios de los ecosistemas; a minimizarlos, si no se pueden impedir dichos impactos; a rehabilitar o restaurar, si se producen los impactos; y a compensar, si persisten impactos residuales importantes. (CSBI 2013)

# ملخص تنفيذي

تُعدّ عمليات تقييم الأثر البيئي (sAIE) أكثر أدوات التخطيط والإدارة البيئية المعروفة شيوعاً واستخداماً وانتشاراً على الصعيد العالمي، إلى جانب عمليات التقييم البيئي الإستراتيجي (sAES) التي تكتسب زخماً متزايداً خلال العقد الأخير. والغرض من هذه الأدوات هو ضمان توفير جميع المعلومات الأساسية اللازمة للتنبؤ بالأثر المستقبليّ على البيئة ووضعها في الاعتبار في عملية اتّخاذ القرار. وفي حين تُقيِّم عمليات تقييم الأثر البيئي المستجدات المادية المخططة، تستهدِف عمليات التقييم البيئي الإستراتيجي مستوى التخطيط الإستراتيجي مثل خطط الحكومة والبرامج أو السياسات. وتهدِف كِلتاهُما إلى تجنّب تنفيذ أي نشاط أو وثيقة تخطيط إستراتيجي يكون لها أثر سلبيّ ملحوظ على البيئة كما تهدفان إلى النهوض بالآثار الإيجابية.

سوف يكون تنفيذ عمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي في المستقبل بالغ الأهمية في تعزيز عملية تنميةٍ صديقةٍ للبيئة. وبالتالي فإنَّ لكلّ من عمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي أهمية فائقة في إنجاز خطة التنمية المستدامة لعام ٢٠٣٠ وأُطُرِ السياسات المتصلة بها مثل الخطة الإستراتيجية للتنوع البيولوجي. تعتمد قدرة البلدان والمجتمعات في تحقيق التنمية المستدامة بقدرٍ لا يستهان به على وجود تشريعٍ فعّال وقوي لعمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي وتنفيذها كحافزٍ رئيسي للتغلّب على الفجوات الحاليةِ في التنفيذ وتحقيق نتائج بيئية أفضل.

يوفّر هذا التقرير نظرة عامة على الوضع الحالي للتشريع الوطني والتدابير المؤسسية ذات الأهمية لعمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي في أنحاء العالم، بالإضافة إلى القضايا والاتجاهات المستجدة. ويتمّ ذلك بشكل رئيسيّ من خلال تقديم أمثلة من مجموعة واسعة ومختارة من البلدان حول ترتيباتها المتخذة في تقييم الأثر البيئي/ التقييم البيئي الإستراتيجي وفيما يتصل بمختلف الخطوات المتعلقة بعمليات تقييم الأثر البيئي/التقييم البيئي الإستراتيجي. وتشمل هذه الخطوات: (١) الفرز؛ (٢) تحديد النطاق وتحليل الأثر؛ (٣) مراجعة تقرير تقييم الأثر البيئي/التقييم البيئي الإستراتيجي؛ (٤) اتّخاذ القرار؛ (٥) المتابعة والإدارة التكيّفية و(٦) المشاركة العامة كمسألة شاملة.

ومن المأمول أن يقدّم هذا التقرير والأمثلة الكثيرة، والتجارب والممارسات التي تضمّنها، الدعمَ للممارسين القانونيين وصانعي السياسات في اتخاذ قرارات مستنيرة بنحوٍ جيّد لدى صياغة وتنفيذ قوانينهم وسياساتهم المتعلقة بعمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي أو السعي إلى تحسينها.

كما أنّ للتقرير، وبالأخص الجزء المتعلّق منه بالمشاركة العامة في عمليات تقييم الأثر البيئي/عمليات التقييم البيئي الإستراتيجي، أهميته بالنسبة إلى المجتمع المدني، بما في ذلك الجمهور العام. وقد يُستخدم على سبيل المثال كمصدر للمنظمات غير الحكومية لتحقيق فهمٍ أفضل لمفهوم عمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي والفوائد التي يمكن الحصول عليها من ناحية الحفاظ على البيئة وخطة التنمية المستدامة الأوسع. بالإضافة إلى ذلك، يُؤمَل أن يشعر القرّاء عموماً بالتمكين لإسماع أصواتهم في عمليات تقييم الأثر البيئي وعمليات التقييم البيئي الإستراتيجي في بلدانهم وبالتالي استثمار الآلية المتاحة لمشاركة الجمهور في مراحل مختلفة من عملية تقييم الأثر البيئي وعملية التقييم البيئي الإستراتيجي.

## النتائج والاتجاهات الأساسية

١. بصورة عامّة، يوجد نطاق واسع من **المتطلّبات القانونية لتقييم الأثر البيئي** على الصعيد العالمي، إلى جانب عدد من البلدان التي تعزّز أُطُرَها التنظيمية في الآونة الأخيرة. ولكن في بعض البلدان الأخرى سُجِّلَ اتّجاهٌ ينحو نحو إضعاف عملية تقييم الأثر البيئي.

٢. وبالرغم من حصول تطورات واعدة في مناطق مختلفة من العالم، إلاّ أنّ الإقبال، وبالأخص تنفيذ المتطلّبات الإستراتيجية لتقييم الأثر البيئي الإستراتيجي يسير ببطء في كثير من البلدان. وترتبط معظم أوجه القصور السائدة بحقيقة أنَّ المقاربات القانونية عادةً ما تكون متجذّرة في منطِق أنظمة تقييم الأثر البيئي، دون أن تضع السّمات الخاصة لعمليات التخطيط الإستراتيجي في الاعتبار، أو أنَّ الأحكام تفتقر إلى الأثر القانوني.

٣. في بعض البلدان يجري التوسّع في متطلّبات المشاركة العامة في عمليات تقييم الأثر البيئي، مع أنَّ ذلك يقتصر في معظمِ الأحيان على مرحلة تحديد النطاق والمراجعة. وفضلاً عن ذلك فإنّ المستوى المطلوب من المشاركة يتفاوت بدرجة كبيرة، وكذلك التفسيرات المتعلّقة بمن هو "الجمهور". وتقتصر التشريعات الوطنية الخاصة بتقييم الأثر البيئي التي تضمّ أحكاماً محدّدةً تتعلّق بمشاركة الشعوب الأصلية على عددٍ محدودٍ من البلدان فقط.

٤. ورُغمَ الإقرار المتنامي بعمليات تقييم الأثر البيئي الإستراتيجي كأداة لتعزيز الرقابة الديمقراطية، إلاّ أنّ التشريعات الخاصة بتقييم الأثر البيئي الإستراتيجي فيما يتعلق بالمشاركة العامة في كثيرٍ من البلدان لا توفّر سوى القليل من الإرشاد، بما في ذلك إتاحة المعلومات.

٥. وتترك القوانين الوطنية الخاصة بتقييم الأثر البيئي مستوى مرتفعاً من السلطة التقديرية للوكالات القائمة بالتنفيذ. وفي حين أنّ

هـذا قـد يوفّـر مرونـةً هامـة لتطبيـق اللوائـح في ظـروف مختلفـة، إلاّ أنـه قـد يُفضي كذلـك إلى حالـة مـن عـدم اليقـين حـول العمليـة، وإلى تطبيـقٍ غـير متّسـق لهـا.

٦. يُعـدّ وضـع الآثـار التراكميـة لعمليـات تقييـم الأثـر البيـئي في الاعتبـار متطلّبـاً قانونيـاً في كثـير مـن البلـدان، ويمكـن لمفهـوم خدمـات النظـام الإيكولوجـي المسـاعدة في تقييمهـا؛ إلاّ أنّ الأحـكام الموجـودة عـادةً مـا تُنتَقَـدُ لعـدم فعاليتهـا كمـا أنّ هنـاك حاجـة أيضـاً إلى قيـاس خدمـات النظـام الإيكولوجـي بنحـوٍ أفضـل. وبغيـة التغلـب عـلى بعـض القيـود المفروضـة عـلى عمليـات تقييـم الأثـر البيـئي فيمـا يتعلـق باعتبـارات الآثـار التراكميـة (والبدائـل)، فـإنّ أهميـة عمليـات تقييـم الأثـر البيـئي الإسـتراتيجي تحظـى بالاعـتراف بصـورة متزايـدة.

٧. فيمـا يتصـل بالمسـتجدات الحاصلـة في الخطـط الدوليـة والإقليميـة، فـإنّ التشريـع الخـاص بتقييـم الأثـر البيـئي وتقييـم الأثـر البيـئي الإسـتراتيجي يُظهِـرُ تركـيزاً متزايـداً عـلى مسـائل مـن قبيـلِ تغـيّر المنـاخ والصحـة البشريـة، وعـادةً مـا يُسـتَكمَل بمبـادئ توجيهيـة غـير ملزِمـة، وعـلى سـبيل المثـال بشـأن إدمـاج تغـيّر المنـاخ في عمليـة تقييـم الأثـر البيـئي الإسـتراتيجي أو تقييـم أثـر بيـئي شـامل-للتنوع البيولوجـي.

٨. يتمثّـل أحـد التحديـات الرئيسـية لتنفيـذ تقييـم الأثـر البيـئي وتقييـم الأثـر البيـئي الإسـتراتيجي في انعـدام توفّـر وإتاحـة بيانـات تُلبّي الغـرض، بمـا في ذلـك مـا يتعلّـق بخدمـات النظـام الإيكولوجـي والتكيّـف مـع تغـير المنـاخ وتخفيفـه.

٩. وبشـكل عـام، لا يتضمّـن التشريـع الوطـني الخـاص بتقييـم الأثـر البيـئي (أو تقييـم الأثـر البيـئي الإسـتراتيجي)، إشـارةً صريحـة إلى هرميـة تخفيـف الأثـر ١ الـتي يُنظَـرُ إليهـا عـلى نطـاق واسـع كوجـه قصـورٍ حـاد. وعـلى الرغـم مـن ذلـك، يُنظَـرُ إلى تطبيـق هرميّـة تخفيـف الأثـر بصـورة متزايـدة عـلى أنـه ممارسـة سـليمة، بمـا في ذلـك مـن خـلال معاوضـات التنـوع البيولوجـي.

١٠. هنـاك بعـض التطـورات الحاصلـة تجـاهَ إدمـاج توجيـه موضوعـي في التشريـع الخـاص بتقييـم الأثـر البيـئي وتقييـم الأثـر البيـئي الإسـتراتيجي، وعـلى سـبيل المثـال فيمـا يتعلّـق بتخفيـف الأثـر، مـن قبيـل مـا يتصـل بالتعويـض والمعاوضـة، وغالبـاً مـن خـلال الإشـارة إلى سياسـات الحكومـة وأهدافهـا الأوسـع (عـلى سـبيل المثـال عـدم وجـود خسـارة صافيـة أو ربـح صـافٍ في التنـوع البيولوجـي). وبالانتقـال إلى مـا هـو أبعـد مـن التركـيز عـلى المتطلّبـات الإجرائيـة، فـإنَّ مـن شـأن هـذا أن يسـاعد في تحقيـق نتائـج بيئيـة أفضـل لعمليـات تقييـم الأثـر البيـئي وعمليـات تقييـم الأثـر البيـئي الإسـتراتيجي.

١١. إنّ أحـد معايـير المراجعـة الهامـة لتقاريـر تقييـم الأثـر البيـئي أو كشـوفاتها، بمـا في ذلـك خطـط الإدارة البيئيـة، هـو قـدرةُ مقـتَرَح المشروع أو خطّتـه وقـدرةُ الوكالـة القائمـة بتنفيـذ البرنامـج أو السياسـة عـلى تنفيـذ تدابـير التخفيـف المطلوبـة وتجنّـب الآثـار البيئيـة الضـارّة.

١٢. هنالـك تركـيز متزايـد عـلى المتابعـة والإدارة التكيّفيـة في تشريـع قيـاس الأثـر البيـئي في الآونـة الأخـيرة. ومـع ذلـك فـإن التركـيز مـا يـزال مُنصبّـاً بشـكلٍ عـام عـلى مرحلـة مـا قبـل اتّخـاذ القـرار، بمـا في ذلـك التركـيز المفـرِط لتقريـر تقييـم الأثـر البيـئي نفسـه، انطلاقـاً مـن التصـور الـذي يـرى فيـه منتجـاً نهائيـاً، بـدلاً مـن أن يكـون التزامـاً قانونيـاً مُلزِمـاً.

١٣. تواجِـهُ المتابعـة والإدارة التكيّفيـة لعمليـات تقييـم الأثـر البيـئي الإسـتراتيجي الكثـير مـن التحديـات نفسـها الـتي لوحِظَـت فيمـا يتّصـل بعمليـات تقييـم الأثـر البيـئي. وتشـمل التحديـات المحـدّدة لمتابعـة تقييـم الأثـر البيـئي الفـترةَ الزمنيـة الطويلـة الـتي عـادةً مـا تسـتغرقها بلـوَرة وثيقـة تخطيـط إسـتراتيجي.

١٤. ومـن شـأن وضـع قرارات/توصيـات تقييـم الأثـر البيـئي وتقييـم الأثـر البيـئي الإسـتراتيجي واشـتراطات السـماح/المبادئ التوجيهيـة للتنفيـذ في متنـاول الجمهـور والـوكالات المعنيـة القائمـة بالتنفيـذ دعـمُ تدابـير المتابعـة بمـا في ذلـك الإنفـاذُ في حالـة عـدم الامتثـال والإدارة التكيّفيـة.

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١. ١ هرميّـة التخفيـف هـي سلسـلة الإجـراءات المتّخـذة للتنبـؤ بالآثـار المحتملـة عـلى التنـوع البيولوجـي والنظـام الإيكولوجـي وتجنّبهـا؛ وحيثمـا يتعـذّر تجنّبهـا، الحـدُّ منهـا؛ و حينمـا تحـدث الآثـار، إعـادة التأهيـل أو الاسـتعادة؛ والمعاوضـة حيثمـا تظـلُّ التأثـيرات المتبقّيـة. (IBSC ٢٠١٣)

# Chapter 1

# Introduction and Objectives

## 1.1 Aim and target audience

This report provides an overview of the current status of national legislation and institutional arrangements of relevance to Environmental Impact Assessments (EIAs) and Strategic Environmental Assessments (SEAs) across the globe. It does this primarily through providing examples from a wide selection of countries of their EIA/SEA arrangements and in relation to the different steps of the EIA/SEA processes.

It is intended to support **legal practitioners and policy makers** in making well-informed decisions when drafting and implementing laws and policies related to EIAs and SEAs. This will be achieved through expanding their knowledge base with respect to recent developments and trends in the field of EIA and SEA law and policy.

The report, and in particular the section on public participation in EIAs/SEAs, is also of relevance to civil society, including the general public. It can for example be used as a resources for NGOs to better understand the concept of EIAs and SEAs and the benefits that can be derived in terms of preserving the environment and the broader sustainable development agenda. Further, it is hoped that readers will generally feel empowered to have their voices heard in EIA or SEA processes in their countries and thus make use of the available mechanism for public participation at different stages of the EIA and SEA process.

Based on current trends and recent or ongoing reform processes, the report also identifies a number of emerging issues that are likely to shape future developments in EIA and SEA legal systems.

## 1.2 Approach taken

The report is based on a comprehensive literature review as well as exchanges with a number of EIA and SEA legal experts and practitioners. The government representatives, researchers and academics, representatives of regional organizations, as well as legal practitioners from across the world were involved from the very beginning in order to agree upon the structure of the report. Further, input was provided during the drafting process, in particular regarding individual countries and regions, and comprehensively on the draft report.

The selection of the different national legal approaches and measures presented in the report were guided by the following criteria:

- Regional balance of countries;
- Balance of countries within the region, e.g. in terms of the size and level of development;

- Mix between an illustration of rather common legal approaches as well as rather unique approaches due to either the individual circumstances in the country, or the intention to address a specific challenge;
- Recent reform of the EIA or SEA legal framework; and
- Availability of in-country reviewers.

### 1.3 Structure of the stocktaking

**Chapter 1** presents a general overview of the EIA and SEA legal and institutional framework including defining EIAs and SEAs, and the role of national legislation.

**Chapter 2** provides the global and regional policy context for national EIA and SEA systems. This includes an overview of the development of global and regional Multilateral Environmental Agreements (MEAs) related to EIAs/SEAs and other relevant global and regional policy developments. The chapter also includes information on the role of financial institutions and standard-setting bodies relating to EIAs/SEAs, including the interaction of regulations with national policies and legislation.

**Chapters 3 and 4** present an overview of national legal and institutional frameworks for EIAs and SEAs respectively. This includes an overview of a number of different countries in relation to their institutional arrangements for EIA and SEA systems, and in relation to each of the different steps of the EIA process (*see Figure 1. General EIA process flowchart, adapted from (United Nations Environment Programme 2002)*.

**Chapter 5**, the conclusion and outlook, provides a summary of the recent developments and emerging trends.

### 1.4 What are EIAs and SEAs?

**Environmental Impact Assessments (EIAs)** are the most commonly known, used, and globally widespread, environmental planning and management tools. They are the only environmental policy tools that are required by most countries around the world and whose results are regularly publicly acknowledged and available [1]. Common definitions of EIA include:

*The formal structure for carrying out the assessment of the environmental implications of projects and its integration with the project cycle [2].*

*The process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made [3].*

*Formally, EIAs/SEAs are structured approaches for obtaining and evaluating environmental information prior to its use in decision-making in development processes [1].*

**Key characteristics** of this regulatory technique, which defined the tool when first introduced in the 1970s, are that EIAs:

- Are aimed at preventing harm to the environment, but often also take into account related social considerations
- Are administrative processes consisting of several steps
- Start in the planning phase and thus prior to an activity taking place
- Predict impacts of an activity on the environment and provide evidence to determine trade-offs between policy goals

- Are aimed at comprehensively informing decision-making on whether a specific activity should go ahead, or not, and if so, how it should be undertaken

The essential idea is that a **formal process** will ensure that a comprehensive environmental assessment is undertaken in a systematic manner, leading to a well-informed decision regarding the proposed activity. However, importantly this does not necessarily mean a decision that prioritizes environmental considerations over others, such as economic considerations. In other words, the tool does not primarily aim at compliance with a specific environmental standard, but at making sure that all critical information to predict the future impact on the environment is supplied and considered in the decision-making process. As a result, the quality of information sourced and the related decision-making process are of key importance for the effectiveness of the tool [4,5].

In order to ensure that key issues are taken into account in the assessment and subsequent decision-making, a key element of an EIA process is the **involvement of different stakeholders** – within government, as well as independent technical experts, non-governmental organizations, affected communities and the general public. Through this feature, EIAs broaden the information base for decision-making and can also fulfil other objectives, such as leveraging the support of the community and even providing a sense of ownership and thus responsibility in relation to a specific development. As a result, EIAs are sometimes referred to as democratic environmental policy tools. Furthermore, the goal of environmental assessments, like other policy processes, is to make determinations as to whether a particular project is in the "public interest" and public participation has a crucial role to play in making such determinations [6]. Nevertheless, few EIA statutes actually require a "public interest" justification.

Environmental impacts do not only include negative impacts. Not only should **positive impacts** of a project be taken into account in the assessment, but ideally the assessment should also be aimed at enhancing positive benefits through project design and implementation. Consequently, EIAs have also been termed a "proactive management tool with technical input" [1,7].

The common distinction between EIAs and **Strategic Environmental Assessments** (SEA) is the level of decision-making and thus the kind of activities that are being assessed. In the case of EIAs, physical developments, and in the case of SEAs, the adoption of a plan, programme or policy by the government. However, this terminology is not used consistently across countries. An EIA process might for example also be applicable to plans and policies, and a separate term may be introduced for a specific group of SEAs, for example Plan Environmental Impact Assessment (PEIA)[2].

Since physical developments regularly happen after broader policy or planning decisions have taken place, there is often a direct **link between application of SEAs and individual EIAs for projects** that arise from implementation of the policy or plan.

2 The Law of the People's Republic of China on Environmental Impact Assessments, adopted at the 30th Meeting of the Standing Committee of the 9th National People's Congress on October 28, 2002, chapter II: Environmental Impacts Assessment on Plans).

However, SEAs were only introduced much later in environmental policy-making processes. Whereas EIAs emerged in the late 1960s/ early 1970s, SEAs only received significant attention in the 1980s and early 1990s. This was due to the realization that EIAs were mostly realized at the project-level for physical developments, and did not prove adequate for influencing public policy decisions, in particular at the higher level of decision-making. For substantively influencing planning decisions, EIAs were undertaken too late [4]. Key identified **limitations inherent of project-level EIAs** are that they:

- React to development proposals rather than anticipate them, so they cannot steer development away from environmentally sensitive sites;
- Are financed by the project proponent, and thus are often steered in favour of the project and not the environment;
- Often happen after a decision has already been made, and thus are unlikely to change the course of the investment planned (no real assessment of alternatives);
- Do not adequately consider the cumulative impacts caused by several projects or even by one project's subcomponents or ancillary developments.

These limitations of EIAs lead to the introduction of **SEAs**, "*the proactive assessment of alternatives to proposed or existing [Policies, Plans and Programmes, PPPs] in the context of a broader vision, set of goals or objectives..*" [8].

For both tools, the existence of a common global approach can be seen, particularly with regard to **the different stages of the EIA and SEA process,** with many countries following the same key steps. A general overview of these common stages of EIA and SEA processes is presented in *Figure 1* and Figure 2 respectively, and section 3 (*EIA systems – Legal and institutional frameworks for EIAs*) and 4 (SEA systems – Legal and institutional frameworks for SEAs) of this report are structured accordingly. EIAs and SEAs focus on "the environment" and thus limit the scope of the impacts to be assessed and addressed. However, it should be recalled that the tools focus on the (natural) environment because the environment is regularly marginalized by decision-makers [4]. Thus, often voiced criticism that they are tools that stand in the way of development, simply reflects the viewpoint that development means economic development, and the prevailing paradigm of measuring only economic development or growth in GDP. As well as the economic pillar, the principle of *sustainable development* however also includes the environmental and social pillars. While the economic pillar of sustainable development is already an inherent part of any project proposal, EIAs and SEAs make sure that the environmental pillar is adequately considered. With regard to the social pillar, many systems explicitly do include social considerations in the assessments, mainly through the definition of "the environment" in national laws. These are often called Environmental and Social Impact Assessments (**ESIAs**). This takes account of the strong linkages between these two pillars of sustainable development which often risk being overridden by the third economic pillar. In the context of developing countries, EIAs and/or SEAs are therefore also considered tools for poverty alleviation [7,9].

Linked to the discussion in how far EIAs and SEAs should be considered a tool for sustainable development, it should generally

be noted that advances in the design and implementation of environmentally friendly development will in large parts be based on the future development and adaptation of EIA/SEA legislation and implementation [1]. Thus both EIAs and SEAs are of high relevance for achieving the Sustainable Development Goals. In this context, it is also worth noting that while this study focuses on EIAs and SEAs, there are a broader range of impact assessments, and examples of these are given in *Box 1*.

An issue to keep in mind is that both EIAs and SEAs may be less effective than they might otherwise be, as a result of **lack of available, accessible and suitable/fit-for purpose data**. This is particularly so with regard to biodiversity data, leading in many cases to the practice of only assessing the bio-physical environment,

## Box 1. Other types of impact assessments

A variety of impact assessments can be used to assess and predict potential impacts of specific interventions. These can be undertaken either at the project or policy levels. Examples of impact assessments include:

**Social impact assessments** are generally aimed at analysing, monitoring and managing the social consequences of development activities [10]. Integrated within environmental assessments these are often called ESIAs and Strategic Environmental and Social Assessments (SESAs).

**Health impact assessments** (HIAs) aim at influencing decision making to minimise the harm and maximise the health benefit of proposals [11].

**Gender impact assessments** aim to ensure gender equality and can be a crucial element of other types of assessments such as HIAs.

**Climate change risk or vulnerability assessments** do not only focus on analysing the expected impacts and risks that may affect a specific area or sector but also analyse the capacity to adapt to the effects of climate change.[1]

**Technology assessments** are usually undertaken to identify possible concerns and benefits related to technological development. They therefore allow for the consideration of mitigation measures that would reduce any potential negative impacts resulting from the release of such technology.[2]

**Sustainability assessments** are conducted to support decision-making and policy in a broad environmental, economic and social context and on the long-term, transcending a purely technical/scientific evaluation.

With regard to **SEAs** there is also a variety of assessments that can help to inform the development of policies, plans or programmes. **Impact assessments of trade agreements** are one of these examples. These types of assessments are carried out prior to starting specific trade negotiations for the development of trade agreements with other countries. The aim is to understand if a trade agreement is the most appropriate instrument to tackle a specific trade policy issue.

1 http://climate-adapt.eea.europa.eu/knowledge/adaptation-information/vulnerabilities-and-risks.
2 IAIA, available from http://www.iaia.org/wiki-details.php?ID=26 .

**Key points on EIAs and SEAs**

- EIAs are environmental policy tools that are required globally by most countries and whose results are regularly publicly acknowledged and available;
- In the case of EIAs, the impact of a physical development, and in the case of SEAs, the impacts of adopting a plan, programme or policy by the government, is assessed;
- EIAs and SEAs do not primarily aim at compliance with a specific environmental standard, but at making sure that all critical information to predict the future impact on the environment is supplied and considered in the decision-making process;
- A key element of the EIA and SEA process is public participation;
- There is often a direct link between application of SEAs upstream, and EIAs for projects that arise from the implementation of the policy document that had been subject to an SEA;
- Environmental impacts include negative and positive impacts, thus next to mitigating negative impact the assessment should also be aimed at enhancing positive benefits through project design and implementation;
- A major challenge for EIAs and SEAs is the lack of available, accessible and suitable/fit-for purpose data.

by for example, locating or counting certain species in the project area, instead of undertaking an assessment that enables the prediction of impact. The challenge is multi-faceted, and any response measures need to, for example, take into account the difference between existing data and available data (e.g. restriction of data for non-commercial use) as well as that some data might be available but not in a format that is suitable for use by decision-makers.

### 1.5 What is the role of national legislation?

While a number of countries initially introduced EIAs through executive or administrative orders, the EIA systems of almost all countries are today based on legislation [1]. SEA systems have spread more recently than project-level EIAs, in particular over the last two decades, leading to at least 40 countries having SEA systems in place, including all member countries of the European Union [12]. However, among the countries having SEA systems in place, only some include formal legal requirements to conduct SEAs.

In most countries, basic legal requirements related to the EIA or SEA processes are included in environmental framework laws, while more detailed EIA and/or SEA requirements are either stipulated in specific EIA and/or SEA laws or one or several executive or administrative (implementing) regulations. In addition, and mostly with respect to EIAs, sectoral laws regularly include references to the EIA process in the context of sector-specific permitting/licencing provisions and might also include sector-specific technical guidance for EIAs. In some cases sectoral EIA rules even predate cross-sectoral EIA regulations such as in the case of Nigeria with respect to the oil sector.

While depth and coverage of legislation on EIAs/SEAs varies from country to country, the overall aim of introducing requirements through law is to make EIAs and SEAs legally binding requirements, thus, resulting in the potential to enforce regulations and apply administrative and/or criminal sanctions in case of violation. Other benefits include reducing the risk of decisions being influenced by inappropriate considerations, enhancing procedural certainty, clarifying authority and creating clear rights and responsibilities [13].

However, major **challenges** often remain. One is linked to the fact that many national laws leave **high levels of discretion** to implementing agencies. While in some cases this can provide important flexibility to apply the regulations to different circumstances, it can also lead to uncertainty about the process, and inconsistent application, in particular in cases where it is not required to make the reasons for EIA/SEA decisions publicly-available.

Another challenge addresses the questions of what constitutes a legally and institutionally adequate and effective EIA/SEA system. The challenge is how to overcome the **"implementation gap"**, thus the fact that in some cases legislative requirements have been stipulated but are regularly not (fully) complied with. Or that crucial elements of the common global approach on EIAs and SEAs are not included or only generally referenced (for example public participation or follow-up measures), leading to substantive shortcomings in implementation. As a consequence, and while the range of benefits to be gained from conducting EIAs and SEAs are widely acknowledged, the **effectiveness of the tool** is a constant subject in literature and EIA and SEA practice globally. Regarding EIAs, common concerns are summed up as follows: "*from the lofty goals of project EA becoming a planning tool and an effective tool for sustainable development, EA has become little more than an additional regulatory hurdle for proponents. This has resulted in legitimate concern on the part of proponents that project EAs are a drain on resources and time without any substantial benefit to either the proponents or the general public*" [13]. In other words, while on the one hand EIAs are regarded by some as anti-development, others are concerned that EIAs only do white- (or better green-) washing of a project. Further criticisms of EIAs can be summarized as follows:

- being regularly of low quality,
- the public not being adequately consulted,
- the final decision not adequately taking into account the results and recommendations of EIAs,
- reliance on permitting conditions to mitigate impact, and,
- monitoring and enforcement of the decision being absent or flawed.

The root causes of many challenges are often found in the absence of national **capacity** at all levels of government and society, leading some to conclude that "*where the national capacity to implement the EIA requirement is lacking, legislation is just a useless tool*" [14]. In addition, particularly in developing countries, it is questionable whether sufficient attention is allocated to the socio-economic and political situation in order to overcome implementation gaps [15]. However, it should be stressed that capacity develops over time and that legislation for EIAs and SEAs may serve as a **catalyst**, including by empowering the government or other actors to acquire capacity from different

sources. Further, building capacity is also dependent on **political will** to do so.

In this context it is also pointed out that comparing EIA (and SEA) systems among countries is only useful to a limited extent, given that EIA systems have progressed along different paths. For example, in developing countries EIAs were often introduced because of demands by development assistance agencies and global policy developments, including the banking sector, as opposed to pressure by civil society as in the case of most developed countries. Thus, it has been observed that EIAs have been introduced later and are less firmly embedded in development processes in low and middle income countries than in developed countries [16,17].

Moreover, the influence of informal rules and norms on how formal rules are implemented and ultimately on how organisations (and systems) function, has often been underestimated, although less so with regard to SEAs than EIAs [18].

Therefore, and while the benefits of incorporating legal requirements related to EIAs (and SEAs) are widely acknowledged, it needs to be kept in mind that the legal and institutional adequacy of EIA systems cannot be divorced from wider issues of governance and the influence of cultural traditions (1)

### Key points on the role of national legislation

- EIA systems of almost all countries are today based on legislation;
- At least 40 countries have SEA systems in place, including all member states of the European Union;
- The overall aim of introducing requirements through law is to make EIAs and SEAs legally binding requirements, thus, resulting in the potential to enforce regulations and apply administrative and/or criminal sanctions in case of violation;
- Depth and coverage of legislation on EIAs/SEAs varies from country to country;
- The challenge is how to overcome the "implementation gap", thus the fact that in some cases legislative requirements have been stipulated but are regularly not (fully) complied with; or crucial elements of the common global approach on EIAs and SEAs are not included or only generally referenced, leading to substantive shortcomings in implementation;
- While EIAs are regarded by some as anti-development, others are concerned that EIAs only do white- (or better green-) washing of a project;
- Lack of capacity in implementation; it should be stressed that capacity develops over time and that legislation for EIAs and SEAs may serve as a catalyst;
- The legal and institutional adequacy of EIA and SEA systems cannot be divorced from wider issues of governance and the influence of cultural traditions in each individual country and region.

# CHAPTER 2

## The global and regional policy context

The international community has recognised the importance of assessing impacts that a range of activities can have on the environment, in order to mitigate these impacts as far as possible. This recognition has increased over time both in scope and depth through the number of references to EIAs and SEAs in different international instruments such as treaties, and decisions by governing bodies of international agreements. In this chapter, key developments at the global and regional level are presented, including the role that financial institutions have played in the development of national EIA and SEA legislation.

### 2.1 Global developments

The main fora at the global level to discuss EIAs as a key element of an evolving body of environmental law, were the **international UN Conferences**. These focused first on the Human Environment (Stockholm 1972), then Environment and Development (1992, Rio de Janeiro), and subsequently on Sustainable Development (2002, Johannesburg and 2012, Rio de Janeiro, often referred to as Rio+20). This was triggered through developments at the national level, including the first adoption of a legal requirement to conduct EIAs prior to the approval of a development in the United States in 1969.[3]

The **Stockholm Declaration (1972)** does not explicitly refer to EIAs. Nevertheless, principles 14 and 15 acknowledge the importance of planning as a tool to reconcile any conflict between environment and development, and avoid adverse effects of human settlements and urbanization on the environment. EIAs were considered in draft principle 20, which aimed at establishing the duty for states to supply information when their actions threaten the environment of others, and was part of the discussions in the preparation of the United Nations Conference on the Human Environment (1972). However, due to concerns of a potential conflict between EIAs and the right to development, no agreement could be reached and the principle was not included in the Declaration [4,19].

A series of other non-binding instruments referring to EIAs were adopted between the 1970s and 1980s. For example, the **1978 UN Environment draft Principles of Conduct in the field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by two or more States,**

3 National Environmental Policy Act, 42 USC §§ 4321-4370(f) (NEPA).

refer to the importance of EIAs to be conducted for activities related to natural resources shared among States and thus fostered the wider recognition of EIAs as a principal environmental management tool. At the same time, the references to EIAs in international instruments were rather general and did not provide guidance on how EIAs should be conducted [4,19]. This aspect was addressed through the adoption of guidelines and principles. For example, the **UN Environment Goals and Principles of EIA** (1987) which constitute a set of principles to guide EIA processes at the national, regional and international levels [20] or the **good practice guidance for applying SEA in development cooperation** (2006), developed by the Organization for Economic Cooperation and Development (OECD).

Broadening the use of environmental assessments was one of the sustainable industrial development strategies identified in the report **Our Common Future**, often referred to as the Brundtland report [19,21]. Informed by this message and developments that were taking place around the world, EIAs became a globally recognised principle of international environmental law in 1992 at the Rio Conference. In 1992 **Principle 17 of the Rio Declaration** included the obligation to conduct an EIA for proposed activities that are likely to have a significant adverse impact on the environment [22]. Furthermore, **Principle 10**, provides that each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on activities in their communities, and the opportunity to participate in decision-making processes. In addition, effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

EIA requirements were also integrated in binding international agreements. For example, the **United Nations Convention on the Law of the Sea** (UNCLOS, 1982), concluded in 1982 and in effect since November 1994, requires that countries assess potential effects that planned activities under their jurisdiction or control can have on the marine environment (UNCLOS, article 206). Moreover, the **International Seabed Authority**, the regulatory authority for seabed mining established under UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of UNCLOS, is responsible for establishing international rules, regulations and procedures to prevent, reduce and control pollution of the marine environment from mining activities in the Area (i.e. the seabed in areas beyond national jurisdiction). To date, the Authority has issued three separate legally binding Regulations on Prospecting and Exploration. Each set of regulations contains provisions dedicated to the protection and preservation of the marine environment. In 2014, the Authority began developing a regulatory framework for mineral exploitation in the Area (the so-called 'exploitation code'), which includes an EIA process and a strategy for the development of regional Environmental Management Plans [23]. In addition, a preparatory committee established by the United Nations General Assembly through resolution 69/292 was tasked to develop an **international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction** (ABNJ). One of the four topics the committee was mandated to

address is EIAs. The deliberations of the committee are ongoing.

Opened for signature during the **Rio Conference**, both the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC) include provisions on impact assessments.

The **CBD** requests Parties to require EIAs of proposed projects that are likely to have significant adverse effects on biological diversity, with a view to avoiding or minimizing such effects. Importantly, public participation is highlighted as a component of those EIA processes (CBD, article 14.1.a). Furthermore, SEAs are also considered as countries are required to introduce arrangements to ensure that the environmental consequences of "programmes and policies" that are likely to have significant adverse impacts on biological diversity, are duly taken into account (CBD, article 14.1.b). The current Strategic Plan for Biodiversity 2011-2020, which is supported by the UN General Assembly and several multilateral environmental agreements and international organizations, makes no explicit reference to EIAs or SEAs (CBD COP decision X/2). Although non-binding, a number of decisions of the CBD governing body provide specific guidance on the consideration of biodiversity when conducting impact assessments. Some relevant outcomes include the adoption of the **Akwé: Kon Voluntary Guidelines on Environmental and Socio-cultural Assessment** aimed at guiding the development and implementation of impact assessment regimes in a way that supports the full and effective participation of indigenous and local communities during EIA processes (CBD COP decision VII/16); the endorsement of the voluntary guidelines on biodiversity-inclusive impact assessment and the draft guidance on biodiversity-inclusive SEAs (CBD COP decision VIII/28) and, for the marine environment, the voluntary guidelines for the consideration of biodiversity in EIAs and SEAs in marine and coastal areas (CBD COP decision XI/18). At the 13th meeting of the Conference of the Parties to the CBD, countries were invited to take measures to improve the effectiveness of EIAs and SEAs, including by strengthening the application of SEA methodologies, by using tools to evaluate potential impacts on biodiversity and ecosystem functions and services (CBD COP decision XIII/3). Countries were also invited to consider health-biodiversity linkages in EIAs and SEAs (CBD COP decision XIII/6) and to take measures to ensure conservation and sustainable use of marine and coastal biodiversity by implementing relevant tools, including EIAs and SEAs (CBD COP decision XIII/12).

In the field of climate change, UNFCCC recognises impact assessments as one of the methods to take into account climate change considerations in social, economic and environmental policies and actions, so as to minimise adverse effects that projects or measures undertaken to mitigate or adapt to climate change can have on the quality of the environment (UNFCCC, article 4.1.f). Furthermore, while not explicitly referring to EIAs or SEAs, the Kyoto Protocol (1997) requests developed country Parties to implement their emission reduction commitments minimising adverse social, environmental and economic impacts on developing country Parties. To that effect, countries discuss the necessary actions to minimize the adverse effects of climate change and/

or the impacts of response measures on developing countries (Kyoto Protocol, article 3.14). In this context, a number of developed countries conducted impact assessments and consultation processes when developing new, or modifying existing, policies.4 Response measures are also included in the **Paris Agreement** (2015) though only relating to the impacts that those measures may have on the countries' economies (Paris Agreement, article 4.15).

Another treaty that includes provisions on EIAs is the **Protocol on Environmental Protection to the Antarctic Treaty** (1991). It provides detailed information on EIAs, with an annex specifically dealing with the procedural requirements to be followed for carrying out assessments in the Antarctic.

There are also important agreements outside of the environment sector that are of key relevance for the development of EIAs and SEAs. For example, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, known as the **169 Convention**, was adopted in 1989 with a view to ensuring that indigenous peoples can freely participate at all levels of decision-making in policies and programmes which concern them (169 Convention, article 6). Regarding EIAs, the Convention stipulates that governments shall ensure that studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impacts of planned development activities on them (169 Convention, article 7).

Regardless of specific treaty obligations, it should be highlighted that customary international law obliges States to conduct transboundary EIAs for activities which may have significant adverse impact in a transboundary context. This has been recognized by the International Court of Justice in its judgement of the Pulp Mills Case in 2010.[5] However, the specific procedure and content of an assessment procedure, including with respect to public participation, is not yet stipulated by customary international law.

With respect to recent developments in global environmental policy, the outcome document of the 2012 **Rio+20** Conference only refers to impact assessments under the section dealing with oceans and seas, indicating the effective use of impact assessments as a means of protecting vulnerable marine ecosystems from significant adverse impacts [24,25]. Furthermore, EIAs are not explicitly mentioned in the United Nations **2030 Agenda for Sustainable Development** and its Sustainable Development Goals.[6] Nonetheless, EIA and SEA processes can be useful tools to better understand, and therefore mitigate, the potential negative impacts that a range of activities, programmes, or policies could have on the environment.

4 The secretariat compiles annually the information submitted by Parties in relation to the implementation of article 3.14. Information from 2016 is available from http://unfccc.int/resource/docs/publications/art_314_compilation_2016.pdf.

5 International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay). http://www.icj-cij.org/en/case/135.

6 Resolution adopted by the General Assembly on 25 September 2015 (A/RES/70/1) - Transforming our world: the 2030 Agenda for Sustainable Development. http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

**Key points the global context**

- The main fora at the global level to discuss EIAs as a key element of an evolving body of environmental law, were the international UN Conferences, including the Conference on the Environment and Development in 1992;
- Next to a series of non-binding, but nevertheless important instruments referring to EIAs, EIA requirements were also integrated in binding international agreements such as UNCLOS, UNFCCC and CBD;
- A number of decisions of the CBD governing body provide specific guidance on the consideration of biodiversity when conducting impact assessments;
- Outside of the environment sector important agreements for EIAs include the Indigenous and Tribal Peoples Convention;
- Customary international law obliges States to conduct transboundary EIAs for activities which may have significant adverse impact in a transboundary context;
- Current developments include the drafting of the regulatory framework for mineral exploitation in the international seabed Area and the development of a legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity in international waters;
- With respect to international policy, EIAs and SEAs should play a crucial role in the implementation of the 2030 Agenda and its Sustainable Development Goals.

## 2.2 The role of international and regional financial institutions

In addition to the global instruments that fostered the development of EIA and SEA regulations at the national level, the adoption of **environmental standards** in multilateral development banks and financial institutions has also been of significance for the progress of these systems around the globe.

The core mission of development banks and financial institutions is to contribute to poverty alleviation by fostering development. As such, the main critique that has led to the elaboration of environmental standards in these institutions was the lack of sufficient consideration of environmental aspects when pursuing specific projects [26]. In this context, the **World Bank** adopted a policy in 1984 introducing a requirement that all potential projects undergo an analysis of their potential impacts on the environment [27]. This requirement evolved, until the environmental assessment was included in the bank's operative framework in 1989, and then revised through the Operational Policy 4.01 and Bank Procedure 4.01.

The adoption of environmental and social policies was thus aimed at improving project selection, design and implementation with a view to minimising potential negative effects on the environment and people [26]. It is considered that the safeguard policies helped fill the gaps left by the local regulatory frameworks, and safeguard the sustainability of projects in developing countries where EIA requirements are relatively loose [28].

Despite the general recognition of such safeguard policies as important stepping stones, their implementation and

effectiveness have been questioned [29]. A step towards addressing some of these concerns was the establishment of an inspection panel in 1993, by the World Bank, responsible for investigating claims from individuals affected by the bank's procedures and policies [4,27]. In addition, a reform process led to the development of the Environmental and Social Framework in 2016, to replace the earlier environmental policies and procedures and adapt the bank's safeguards to a changing context.7 Some of the key messages that resulted from the consultations held during the revision process were:

- While the importance of considering cumulative and indirect impacts was acknowledged, there were concerns of this requirement being burdensome, with no clear idea on how this will be done by the Bank (due to lack of monitoring of these impacts) [30]
- Need for the new safeguards to reinforce public participation, including with vulnerable groups [31]
- Need to strengthen impact assessments and include climate change impacts, whilst recognizing concerns on measuring and monitoring greenhouse gas (GHG) emissions [30]
- Need to include the application of environmental and social safeguards in the project budgets [31]
- Limited knowledge base on biodiversity offsets – thus, how to implement such a requirement is challenging [30,31]

In the context of development banks, SEAs have been mainly conducted for projects with potential significant impacts at the regional and/or sectoral level. For example, the energy sector has been the one with the highest number of SEAs [32].

The International Finance Corporation (IFC), responsible for strengthening the private sector in developing countries and one of the members of the World Bank Group, also has its own Performance Standards and Environmental, Health and Safety Guidelines. The Environmental and Social Performance Standards aim to provide guidance to IFC's clients on how to identify risks and impacts, while helping to avoid, mitigate, and manage risks and impacts.8 The performance standards cover different areas such as Performance Standard 6 on biodiversity conservation and sustainable management of living natural resources (which not only considers biodiversity conservation but also maintaining the benefits of ecosystem services); or Performance Standard 7 on indigenous peoples (not only to avoid or minimise adverse impacts of projects on indigenous peoples but also to ensure free, prior and informed consent of the affected communities). The 2012 revision of these standards was based on extensive expert and stakeholder consultation and as such, many of these standards have become highly regarded as international good practice among some industry sectors. Building on the IFC standards, the Equator Principles, initially launched in 2003 and last updated in 2013 following the release of the revised IFC performance standards, created an industry-wide framework to manage environmental and social risks in financed projects [33]. The Principles

7 It is expected that the new safeguards will become operational in 2018. For more information see http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html.

8 IFC, Performance Standards on Environmental and Social Sustainability, 2012.

are drafted, enacted and applied mainly by private actors of the financial sector, on a voluntary contractual basis [34]. The 91 financial institutions[9] that have adopted the Principles to date have to contractually oblige their clients to comply with the Equator Principles' standards, which refer specifically to the IFC performance standards, in their businesses [34].

The Equator Principles Financial Institutions cover over 70 percent of international Project Finance debt in emerging markets. It is therefore argued that through these Principles, private banks with a global reach play a quasi-regulatory role with respect to development activities. Thus, the Equator Principles work as soft law for the banks who join on a voluntary basis and could potentially influence the development of laws and standards at the domestic level. Notwithstanding its legal implications, there is no consensus on whether the Principles are making a substantial tangible difference on the ground [35]. Furthermore, others regard such a **quasi-regulatory role** as an attempt to universalise specific standards regardless of the specific national or regional circumstances in different contexts [36].

With the launch of the Equator Principles III in 2013, some areas of concern such as the lack of detailed consideration of **climate change** issues, were addressed. For example, the Principles now include a requirement to conduct alternative analyses on projects that are intensive in terms of

**Key points on the role of financial institutions**

- The adoption of environmental standards in multilateral development banks and financial institutions has been important for the progress of EIA and SEA systems around the globe;
- In some cases, the safeguard policies helped fill the gaps left by the local regulatory frameworks, and safeguard the sustainability of projects in developing countries where EIA requirements are relatively loose;
- At the same time, some regard such a quasi-regulatory role as an attempt to universalise specific standards regardless of the specific national or regional circumstances in different contexts;
- Next to the 2016 Environmental and Social Framework of the World Bank, the International Finance Corporation (IFC) has its own Performance Standards and Environmental, Health and Safety Guidelines, aiming to provide guidance to IFC's clients on how to identify risks and impacts, while helping to avoid, mitigate, and manage risks and impacts;
- Building on the IFC standards, the Equator Principles created an industry-wide framework to manage environmental and social risks in financed projects and are being applied mainly by private actors of the financial sector, on a voluntary contractual basis

9 Information as of 24 March 2017, available from http://www.equator-principles.com/.

greenhouse gas emissions, to evaluate less carbon-intensive options [33].

### 2.3 Regional developments

Progress made on EIAs and SEAs at the global level has had a significant impact on the development of these systems at regional and national scales, either motivated by requirements from development banks, or by key events that shaped the international environmental agenda such as the Earth Summit in 1992. While a comprehensive overview is beyond the scope of this report, key developments with regard to selected regions will be presented.

While EIA regimes in countries such as the United States, Australia and New Zealand were developed in response to strong **environmental movements** in these countries [37], EIA regimes in a number of regions such as the Pacific, Latin America and Africa were mainly established under the influence of, or in association with **multilateral developments banks**. In particular, projects with the World Bank, the Asian Development Bank and the Inter-American Development Bank were an important booster to incorporate EIAs into environmental policies and legislation [15,38]. While in Latin America this mainly happened during the 1970s and 1980s, in the Pacific it was mostly during the 1990s and 2000s, supported by organisations such as the Secretariat of the Pacific Regional Environment Programme (SPREP).

Some specific environmental assessment elements were also already introduced in most **socialist countries** during the 1970s. Over the decades, these EIA systems, which were state-led and focused on ensuring compliance with environmental standards, were subject to a series of reforms. In most of the countries reforms started at the end of the 1980s with the onset of political and economic changes. The second stage occurred in the early- to mid-1990s, at the time of the dismantling of socialist political and economic regimes. Most recently, the gradual accession of more Central and Eastern European Countries to the **European Union** has given another impetus for reform, both with regard to EIAs and SEAs [39].

Given the circumstances that countries within a region sometimes share, a number of binding agreements or non-binding instruments have been elaborated at the regional level to guide and/or support countries in the implementation of a range of aspects related to EIAs. In the context of the United Nations Economic Commission for Europe (UNECE), the Convention on Environmental Impact Assessment in a Transboundary Context (**Espoo Convention**, 1991) incorporates the obligation for Parties to establish the necessary EIA process in place for those activities that are likely to cause significant adverse impact across borders. The Espoo Convention provides detailed rules for the EIA process and in 2001 the Convention Parties agreed to amend the Convention so to allow that, with the approval of the membership, non-UNECE members can also become Parties [4]. Later on, the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (**Kiev Protocol**, 2003) was adopted with the main objective of ensuring that environmental considerations are taken into account in the development of plans and programmes, and establishing SEA procedures to that effect. The Protocol, which requires SEAs to be undertaken for

certain plans, programmes and policies, is also open for all United Nations member states.

The development of the Kiev Protocol was influenced by developments in the **European Union**. Following the development of the EIA directive in 1985 and the SEA directive in 2001, as well as a number of revisions over the years, all Member States of the European Union have transposed the directives into national legislation. Moreover, countries aspiring to join the European Union are making efforts to align their legislation with the EU directives as well as the Espoo Convention and its Kiev Protocol. Furthermore, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (**Aarhus Convention**) is also of relevance to EIA processes as it aims to guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters. Public participation is a crucial element in any EIA process and therefore it is worth highlighting some of the key points emphasised in the Convention such as informing the public of the environmental impact of the activities and products; including reasonable time-frames for the different phases; allowing sufficient time for informing the public; and informing on whether the relevant activity is subject to either national or transboundary EIAs (Aarhus Convention, 1998).

With regard to the marine environment, the adoption of the **regional seas conventions** can also be regarded as an important booster for EIA legislation. The Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (Kuwait Convention, 1978) was the first agreement incorporating the obligation for countries to undertake an environmental assessment. Afterwards, other regional seas conventions such as the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (Cartagena Convention), the Convention for Western Indian Ocean (Nairobi Convention, 1985) and the Convention for the Atlantic Coast of the West, Central and Southern Africa Region (Abidjan Convention, 1981) also include EIA provisions. In addition and over time, the regional seas conventions have advanced in the consideration of more specific provisions, as can be illustrated with the example of the amended Barcelona Convention for the Coastal Region of the Mediterranean Sea, which entered into force in 2004.

With regard to non-binding guidelines, in the context of the **Caribbean Community and Common Market**, a number of guides were elaborated in collaboration with the Caribbean Development Bank, with the ultimate goal of integrating **climate change** adaptation into the EIA process [40]. Furthermore, the Central American Commission for Environment and Development (CCAD) of the **Central American Integration System** (SICA) developed an EIA Regional Action Plan in 2002, with the main objective of promoting coordination and cooperation among all authorities implementing EIAs in the region. The action plan includes an EIA Regional Strategy for Central America, consisting of nine strategic actions. Among others, the following strategic actions can be highlighted: (i) develop an agenda for improvement of EIA systems in the region; (ii) harmonization of lists and thresholds; and (iii) regional agenda for the harmonization of environmental legislation.

## Key points on regional developments

- Progress made on EIAs and SEAs at the global level has had a significant impact on the development of these systems at regional and national scales, either motivated by requirements from development banks, or by key events that shaped the international environmental agenda;
- While EIA regimes in countries such as the United States, Australia and New Zealand, developed in response to strong environmental movements in these countries [37], EIA regimes in a number of regions such as the Pacific, Latin America and Africa were mainly established under the influence of, or in association with multilateral developments banks;
- Some specific environmental assessment elements were also already introduced in most socialist countries during the 1970s;
- Given the circumstances that countries within a region sometimes share, a number of binding agreements or non-binding instruments have been elaborated at the regional level to guide and/or support countries in the implementation of a range of aspects related to EIAs;
- With regard to the marine environment, the adoption of the regional seas conventions can be regarded as an important booster for EIA legislation.

# Chapter 3

# Legal and institutional frameworks for EIAs

## 3.1 EIA arrangements

### 3.1.1 Triggering EIAs

The triggering factor for the EIA process is generally a government permitting or licencing process for different activities (often also termed development projects) that shape the environment. The permitting process seeks to regulate competing interests as well as alignment with government policies.

As a tool designed to assess a planned activity prior to its commencement, EIA approval is regularly a legal pre-condition for the final decision on whether to issue a permit or not, and if so, under which conditions. This way it not only assesses whether the planned project will have a significant impact on the environment, but it can also influence the design of the project and thus its impact. In other words, the EIA process can influence how the project should be implemented in order to avoid, minimise, restore, and offset negative environmental impacts and ideally trigger positive impacts for the environment.

This approach takes into account the fact that the environment should not be treated as an isolated or stand-alone issue when reviewing project applications, but as an integral part of the decision-making process in order to foster sustainable development for the benefit of all people.

Another benefit of **linking the EIA process to permitting processes** is to facilitate compliance with EIA approval conditions as well as the implementation of enforcement measures, such as the withdrawal of the project approval. This is regularly achieved by making the EIA approval an integral part of the permit or licence. A legal arrangement where the EIA process is intrinsically linked to government permitting processes is stipulated in most national environmental framework laws or EIA laws[10].

Most recently there is some movement towards making the EIA process only a legal requirement for the execution or implementation of a project, but not for the general approval of a project under the applicable sectoral law. For example, following a revision of its EIA law in 2016 in **China**, the general permitting process and the EIA process are now separate and can happen in parallel[11]. While this is generally being justified for the sake of not holding

10 E.g. Environmental (Impact Assessment and Audit) Regulations of Kenya [2003], revised in 2012, Section 4 (2); Environmental Protection and Conservation Act of the Republic of Vanuatu, last updated through Act no. 28 of 2010, Paragraph 11; Environmental Code of the Republic of Kazakhstan (2007), Article 51 (1); Environmental Impact Assessment System Act of Peru [2001], revised in 2008, Article 3.

11 The Law of the People's Republic of China on Environmental Impact Assessments [2002], last revised in 2016.

up important developments for too long, the major criticism is that once the general permitting decision has been issued in favour of the project, or even construction has started, the EIA process is less likely to influence the design and implementation of the activity, and thus the impact of the activity on the environment. Moreover, it will certainly make it even more difficult to deny EIA approval, at least for political reasons [41].

However, where EIA approval has been made a legal condition for project approval, some government authorities tolerate or approve project implementation activities in the absence of EIA approval (e.g. Nigeria [42,43] and Indonesia [44]). A major challenge for EIA systems is to not simply be perceived as an additional and resource-intensive hurdle for project implementation and development, but as an integral part of decision-making that considerably shapes environmental outcomes [45].

Another challenge in case of a link to government permitting, is that purely private activities (where no permit is required) or, in the case of a federal EIA system, those activities subject only to sub-state government oversight, might be excluded from an EIA requirement, regardless of their environmental impact. In a number of countries, such as **Canada**, the gaps in federal coverage are supplemented by EIA requirements at the sub-state level. However, in the **United States of America**, for example, there are notable gaps in the EIA system coverage due to the absence of comprehensive EIA requirements in many states. In many countries, to counter this, the approach has been to identify **areas of prima facie application without a requirement for a governmental trigger**. Instead, or often in addition to the link to a permitting or licencing process, the legislation thus identifies industrial sectors or categories of activities that are subject to EIAs, regardless of a requirement for

**Table 1: Overview of section content related to EIA trigger and EIA system coverage**

| | EIA trigger and EIA system coverage | | | | |
|---|---|---|---|---|---|
| Specific issue | Intrinsic link of the EIA process to government permitting | Cases of toleration of project implementation despite absence of EIA approval | Prima facie application of EIA | Parallel EIA approval and sectoral permitting | Interplay of federal and sub-national level (decentralized system) |
| Case study countries and illustrative examples* | Kenya; Vanuatu; Kazakhstan; Peru; Fiji; Oman; Egypt; Lebanon; Georgia | Nigeria; Indonesia | Canada; Kenya | China | Canada; USA; Peru |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

**Key points on linking the EIA process to government permitting processes**

**Benefits:**

- Most likely influences the design of an activity in order to mitigate negative impact and ideally enhance positive impact
- Fosters the inclusion of environmental considerations as an integral part of the decision-making process
- Facilitates compliance with EIA approval conditions and implementation of enforcement measures, e.g. withdrawal of project approval

**Challenges:**

- Perception of EIAs as an additional and resource-intensive hurdle for project development and implementation

*Solution: Awareness raising and capacity building about the benefits of EIAs*

- No coverage of purely private activities, thus where no government permit is required
- In a federal state, activities subject only to sub-state government oversight are not covered, unless federal coverage are supplemented by EIA requirements at the sub-state level

*Solution: Identification of prima facie application for specific activities without a requirement for a government trigger*

government action, such as the issuance of a permit12 [4]

### 3.1.2 Institutional set-up

Linked to the different legal approaches in triggering EIAs, the institutional arrangements for the implementation of EIAs are important to understand EIA systems. This includes the **division of competencies in the EIA process**, in particular whether the same agency responsible for the issuance of a permit and implementation oversight is in charge of the EIA process (regularly a sectoral body), potentially consulting environmental agencies for the review of the EIA report, or whether an environmental agency is in charge of conducting or overseeing the whole EIA process. More recently, some countries also established specialized agencies charged primarily with the oversight of the EIA system in the country, such as in **Peru**.

A range of different approaches that determine the relationship of the EIA approval process, to sectoral permitting processes, have been adopted by countries. In the following sections, a number of these arrangements will be presented with a special focus on the distribution of decision-making power in the approval phase and the follow-up phase, and thus institutional competencies. Thereby it should be noted, that because EIAs often regulate government decision-making, the system must to some degree adhere to existing structures – such as federal arrangements or broader permitting/approval regimes.

12 E.g. Environmental Management and Co-ordination Act of Kenya [1999], last revised in 2015, Section 58 (1).

**Table 2: Overview of section content related to division of competencies**

| | Division of competencies | | | | |
|---|---|---|---|---|---|
| Specific issue | Central role of general environmental agencies and departments | Specialized agency for EIA oversight | EIA approval has been made an integral part of sectoral permitting processes | Unclear or overlapping division of competences | Delegation of EIA-relevant powers to the sub-national level under national oversight |
| Case study countries and illustrative examples* | Kenya; China; Fiji | Peru | Egypt; Lebanon; Georgia | Nigeria | China, Egypt |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

### *Central role of environmental agencies*

In many countries the EIA approval, whether an integral part of an environmental permitting process or the result of an independent EIA process, is governed by environmental agencies and departments. In **Kenya** and **China**, for example, these are independent processes that are separate from sectoral permitting procedures. In **Peru**, the EIA system is moving towards a one-window approach, with an agreed schedule for national sectoral authorities to transfer their responsibilities related to the evaluation and approval of detailed-EIAs to the environmental authority.[13] And whereas in **Kenya** and **Peru** the respective laws make the EIA approval a pre-condition for sectoral permitting processes, this is not the case in **China**, where both can run in parallel following a recent legislative reform.

In **Kenya**, EIA decision-making is centralized. The National Environment Management Authority (NEMA) decides on all EIAs, but has to consult with County level Environmental Committees for decision-making on EIAs[14]. The approval of the EIA report leads to a decision on the issuing of an EIA licence. Such a licence is required before other licences (trading, commercial or development) can be issued. EIA approval and project approval are thus two separate decisions taken by different competent authorities. The Water Act of Kenya (2016), for example, stipulates in Article 40 (IV) that an application for a permit under the Act shall, where applicable, be the subject of [..] an EIA in accordance with the requirements of Kenya's Environmental Management and Co-ordination Act. At the same time, sectoral permitting bodies, such as the Water Resources Authority in the case of the Water Act, will generally be consulted at the review stage of the EIA report[15].

While the implementation of the Act governing the EIA process in Kenya

13 Currently, the EIA processes for the mining, energy, hydrocarbons and transport sectors are already managed by the National Environmental Certification Service for Sustainable Investments, under the umbrella of the environmental agency.

14 E.g. Environmental (Impact Assessment and Audit) Regulations, 2003, Article 9 (1). Environmental Management and Co-ordination Act of Kenya [1999], (amended 2015, with a new s.29 replacing District Environmental Committees, with County Environmental Committees).

15 EMCA, 1999, Section 60 and Environmental (Impact Assessment and Audit) Regulations, 2003, Article 20.

by both the National Environment Management Authority and relevant lead agencies has been effective in certain areas, observed **limitations** include the fact that government agencies do not have adequate capacity to effectively guide and review EIAs. This includes financial resources, in particular following the removal of the EIA fee in January 2017. It is also argued that whilst it is important to improve policies and laws, and to capacitate national and local institutions, addressing critical conditions in the country, like most importantly poverty, is crucial in order to achieve better use of EIAs [46,47].

In **Peru,** with respect to institutional arrangements, the Ministry of Environment is the governing body of the EIA system. Importantly, in 2012 the National Environmental Certification Service for Sustainable Investments (SENACE) was established to enhance the credibility of the EIA system. Historically, EIA processes in Peru had been managed under a sectoral approach. This raised concerns over its credibility and, as a result, a reform process was undertaken [48]. The SENACE was thus **established under the umbrella of the Ministry of Environment but with technical independence**, therefore playing a key role in the implementation of the EIA system.

SENACE is in charge of reviewing and approving detailed EIAs for those sectors that transferred their competences for that purpose (i.e. to date- mining, electricity, hydrocarbons and transport). Furthermore, the national sectoral authorities as well as local and regional authorities are in charge of reviewing and approving the terms of reference for the semi-detailed-EIAs and detailed-EIAs as well as of issuing the permits under the three categories, based on their competences. For this purpose, the specific subject matter and context need to be considered as, for example, there are certain issues that have been decentralised (e.g. artisanal, small-scale mining), or others that have not yet been transferred on to the SENACE.

In **China,** the responsibility for the EIA process is divided between the central and the sub-national level. At the central level, the main management agency of EIAs is the Ministry of Environmental Protection (MEP) and at the sub-national level the Environmental Protection Bureaus (EPBs) are in charge of the process. China has a total of 34 administrative units at provincial level directly under the central government in Beijing. Enterprises directly submit their reports to the environmental protection authorities.

The Ministry of Environmental Protection approves the EIA reports for four types of construction projects, including projects involving nuclear facilities or cross-boundary projects (across national administrative units). In all other cases Environmental Protection Bureaus at provincial, autonomous region and municipal levels coordinate and share approval authority with county Environmental Protection Bureaus. The approval of the EIA report and the project approval (sectoral permitting or licencing requirement) are two separate decisions. Furthermore, and with the adoption of the 2016 revision of the EIA law, EIAs are no longer a prerequisite for other approvals, thus, different permissions can be applied for in parallel.

Whereas policy-makers argued that the 2016 revision of the EIA law will reduce the amount of time applicants spend stuck in process, others raise concerns that once time-consuming financial and

project approvals have been granted, the "lost" administrative costs will make it difficult to exercise an EIA veto regardless of the assessment outcome.[16] And similar to the situation in **Kenya** and many other countries, another perceived challenge for the effective implementation of the EIA system in China are insufficient resources of environmental authorities and structural challenges with regard to the environmental governance system in general [49].

In **Oman,** it is a legal requirement to have obtained an environmental permit, including if required EIAs, prior to commencing construction for planned project17. The interpretation of this in the non-binding MECA Guidelines for Obtaining Environmental Permits, Appendix B is that the environmental permit forms a basis for issuance of other relevant environmental sub-permits and licences. And also in practice sectoral permits are only issued once the environmental permit has been granted by the Ministry of Environmental and Climate Affairs.

In the **Pacific,** the Department or Ministry of Environment of most governments has the authority to enforce EIA legislative requirements. The EIA approval contributes to the overall approval permit for developments that undergo assessment through the EIA process. In Fiji, for example, an EIA approval is required from the Department of Environment before developments permits are issued by the Department of Town and Country Planning.

16 https://www.chinadialogue.net/blog/9122-Has-China-s-impact-assessment-law-lost-its-teeth-/en.

17 RD 114/2001 Law on Conservation of the Environment & Prevention of Pollution, Article 9.

### *Central role of sectoral agencies*

In a number of countries where EIA approval has been made an integral part of sectoral permitting processes, the EIA is considered a procedural step in obtaining sectoral permits, and thus the competent sectoral agency is in charge of the complete process. This is for example the legal approach implemented in **Egypt, Lebanon** and **Georgia.**

In **Egypt,** the Environmental Protection Law of 1994, revised in 2009, complemented by a number of decrees signed by the President, Prime Minister, Minister or CEO/ Egyptian Environmental Affairs Agency (EEAA), provide the legal framework for EIAs. According to the Law, the Egyptian Environmental Affairs Agency (EEAA) as the executive arm of the Ministry of State for Environmental Affairs at the central level, oversees the EIA system, but sectoral ministries and governing bodies are the competent administrative authorities for EIAs. This is due to the links between the EIA system and sectoral licencing processes: EIAs are considered to be one of the requirements for receiving licenses and the Competent Administrative Authorities (CAA) are the main interface between the project proponent and the EIA system (one-window approach). The Competent Administrative Authorities therefore have executive powers in the EIA process. They receive the applications and take the decision on approval or rejection of the activity. The main responsibilities of the Egyptian Environmental Affairs Agency is to set the requirements and criteria to undertake EIAs and to issue EIA guidelines. It is further generally responsible for the review of the EIA reports (Article 20 EPL). However, for specified projects (classified as category A and B) review responsibilities are assigned to its Regional Branch Offices for the purpose

of incremental decentralization [50]. The EEAA is responsible for review of projects under category C. It should be noted that the Competent Administrative Authorities are not bound by the suggestions of the Egyptian Environmental Affairs Agency [50].

In case a decision on an EIA is required as a prerequisite for the issuance of a development permit in **Lebanon,** the concerned government agency for the issuance of the development permit transfers the application to the MOE. This does not apply for industrial permits applied for at the Ministry of Industry and Health or at the district level18. Generally also in Lebanon, weak institutional capacity of the Ministry of Environment (in particular human capacity in terms of staff numbers) in relation to environmental monitoring and management is observed [51].

In **Georgia**, the 2005 Law on Licenses and Permits[19] defines the list of categories of licenses and permits, and sets up the rules for the issuance, amendment and termination of licenses and permits. This includes environmental impact permits and various types of construction permits. The Law on Environmental Impact Permits links the main permitting procedure (the construction permit) to the Environmental permitting procedure and thus EIAs. The environmental impact permit procedure (including EIAs) is required only in stage II of the construction permit, and only for those activities that require ecological examination. Where a construction permit is required, the public authority responsible for issuing the construction permit (the Ministry of Economy and Sustainable Development or the Local Self-Government Unit, as appropriate) must determine whether the proposed activity requires an EIA and if so, involves the Ministry of Environment and Natural Resources Protection in the second stage of permitting. In accordance with the "one-window" approach, the proponent thus does not deal directly with the environmental authority. Rather, the proponent submits its application to the construction authority, which communicates with the environmental authority. The responsibility for all EIA processes lies with the national authority that is the Ministry of Environmental Protection and Natural Resources (MoE) [52].

The current legislation of Georgia has been criticized as it does not guarantee that the official EIA procedure begins at an early stage in decision-making when options are open. The screening stage is in practice often dependent on the proponent, while the scoping stage takes place under the sole responsibility of the proponent, without official involvement of public authorities. Further, it is considered unclear whether the authorities issuing construction permits respect and maintain inter-agency coordination principles. And even if this functions well in most cases, the procedure may be misleading or confusing to project proponents [52].

With respect to the Law on Licenses and Permits it should also be noted that there is a general exemption from its application for **projects undertaken by government ministries**, the local self-government of Tbilisi, and certain agencies subordinated

18 Environmental Impact Assessment Procedures Decree 8633 of the Government of Lebanon, 2012, Art. 4, Annex 4.

19 Please note that the Law has most recently been amended. The new law on Environmental Impact Permits and Ecological Expertise will enter into force on January 1st, 2018.

to the ministries or Tbilisi local self-government. Such projects are instead covered by sub-legislative normative acts, which establish special consent procedures for these projects that may include EIAs. However, the mandatory application of EIAs in such situations has been questioned and a lack of clarity and legal certainty for this significant category of projects has been observed. In addition, it has been noted among civil society organizations that this alternative procedure does not meet the standards of Georgian EIA legislation [52].

The identified potential shortcoming of the legal and institutional framework on EIAs in Georgia are being considered in a current **legal reform process of the EIA (and SEA) system**, which started in 2013 [52].

### *Unclear or overlapping division of competences at the national level*

As in other areas of regulation, there are also a few examples where the division of competencies among different government institutions are not clear, which regularly hampers implementation. This is the case, for example, in **Nigeria**, where the historic development of the legal and institutional framework lead to the development of different EIA systems.

In **Nigeria**, the principal legislation is the federal EIA law (previously Decree 86 of 1992)[20] which made EIAs mandatory in both the public and private sectors for all development projects. The National Environmental Standards and Regulations Enforcement Agency (NESREA), as an agency under the Federal Ministry of the Environment, is the authority governing the EIA process. It replaced the Federal Environmental Protection Agency (FEPA) in 2007.[21]

State Environmental Protection Agencies are often only involved at the review stage of the EIA process, which is considered a challenge as they want to have an active role in the management of the environment within their areas, and thus often demand a repeat of EIAs [43,53].

For historic reasons there is also an EIA system in place for activities in the oil and gas sector. Under the 1969 Petroleum Act, supplemented by procedural guidelines updated in 1999, the Directorate of Petroleum Resources, DPR, carries out in-house EIA studies. Lastly, a third EIA system exists under the Urban and Regional Planning Act 56 (1992)[22], which is governed by local government councils and the town planning divisions of the State Ministries of Lands [16,17,43].

The federal EIA law is modelled on the US NEPA Act, covering all sectors of the economy, while the Urban and Regional Planning Act (1992) is modelled on the UK Town and Country Planning Regulations 1988, which covers planning development activities and specifies Town Planners as the principal environment assessors. The third EIA system, operated under the Petroleum Act, is an evolution from 1969 petroleum regulations in Nigeria [16].

The current practices of the three EIA systems in Nigeria are at different stages of evolution, with the EIA system under the Urban and Regional Planning Act not having evolved satisfactorily, while the other two EIA systems (Petroleum Act and

20 Cap.E.12, Vol.6, Laws of the Federation of Nigeria (LFN) 2004.

21 NESREA (establishment) Act, no.25, 2007.

22 New Cap. N 138, vol.12, LFN 2004.

EIA Act) produced intricate legislations and guidelines, but fell short of first-rate practice [16,43]. Moreover the necessity of operating three dissimilar EIA systems in **Nigeria** is questionable, in particular because the three systems are not mutually complementary, and sometimes permit seekers simply ignore one or other of the agencies [16].

While the legislative provisions and guidelines for EIAs in **Nigeria** are quite comprehensive, it has been observed that there is a lack of implementing mandatory requirements for EIAs, including no use of powers to impose fines, resulting in the development and operation of many projects. Furthermore, a lack of coordination in the enforcement machinery is being observed, which also obstructs implementation of the provisions. This in particular applies to the assessment of public sector projects that appear to have no, or only late, initiations of EIA studies. Being an in-house department for government projects, the requirement of EIAs is at times ignored due to political pressure [43].

The EIA procedure in **Nigeria** has thus been described as characterized by a conflict of roles, mandates and responsibilities among the different levels of governments; federal, state and local government authority: "*The conflicts revolve around overlaps, duplications, inconsistencies in the constitutional and legislative mandates and foundation that govern the relationship of the three tier of government. Apart from this conflict, accountability is a major setback in ensuring adherence to laws, norms, rules and procedures of EIAs*" [54]. The federal EIA law is currently under revision.

### *The division of competences between the national and sub-national level*

As demonstrated with the examples of the legal and institutional framework for EIAs in **Kenya**, **Oman**, **Lebanon** and **Georgia**, the EIA system is centralized in many countries, thus national environmental agencies are in charge of the EIA process or at least the EIA review, depending on the division of competencies between environmental and sectoral agencies as outlined above. Nevertheless, sub-national environmental government entities might be involved at different stages of the EIA process, as will be highlighted in section *3.2 The different steps of the EIA process* with regard to each stage. In some cases, responsibilities in the EIA process are assigned to sub-national environmental entities due to the structure of the central environmental agency in charge of the EIA process. Thus sub-national environmental agencies perform EIA relevant tasks, but under the oversight of the central authority. This is, as outlined above, the case in **China** and **Egypt**.

Depending on the level of decentralization of a country and thus the distribution of powers within a country, competences related to EIAs are in many countries shared between the different levels of government. This is for example the case in **Peru** and in **Canada**.

As a federation or federal state, responsibility for law-making in **Canada** is shared among one federal, ten provincial and three territorial governments. Whereas the provinces receive their power and authority from the Canadian Constitution, the territorial governments have their powers delegated to them by the Canadian Parliament.

**Key points from the section on the division of competencies in the EIA process**

Three different approaches can be broadly distinguished:

- **Centralized EIA decision-making**: Central role of environmental agency or department in EIAs. Sectoral agencies are consulted for review of the EIA report. (*E.g. Kenya; key challenges in implementation include a lack of capacity of government agencies as well as poverty in the country*)
- **Specialized agency for EIA oversight:** a specialized agency is charged with the oversight of the EIA system in the country. (*E.g. Peru, which until a recent reform followed a sectoral approach*)
- **Sectoral approach:** Central role of the sectoral agency responsible for the issuance of a permit, in the EIA process, regularly consulting environmental agencies for the review of the EIA report. (E*.g. Egypt; limitation: the Competent Administrative Authorities are not bound by the suggestions of the Egyptian Environmental Affairs Agency*)

Depending on the level of **decentralization** of a country and thus the distribution of powers, competences related to EIAs are in many countries shared between the different levels of government. (*E.g. Canada*)

In some cases, the division of competencies among different government institutions are not clear **or overlapping**, which regularly hampers implementation. (*E.g. Nigeria*)

The 2012 Canadian Environmental Assessment Act, last amended in December 2014, and its regulations, establish the legislative basis for the federal practice of environmental assessment in Canada. The law applies to projects described in the Regulations Designating Physical Activities and to projects designated by the Minister of the Environment. A federal environmental assessment may be required because of the adverse environmental effects on areas of federal jurisdiction or that may result from a federal decision about the project (*Article 13 and 14*). Federal review is thus limited to areas of federal jurisdiction; a federal trigger, such as a federal permit or use of federal funds is not required (legal approach prior to the 2012 revision). Some projects may in addition also require a provincial/territorial environmental assessment according to respective legislation. In such a case, environmental assessments may be coordinated so that a single environmental assessment meets the legal requirements of both jurisdictions. A responsible authority can also delegate any part of an environmental assessment that it is required to conduct to another jurisdiction.

There are two types of environmental assessment conducted under the Act: environmental assessment by a responsible authority[23], and environmental assessment by a review panel[24]. Responsible authorities can be the Canadian Nuclear Safety Commission, the National Energy Board or the Canadian Environmental Assessment Agency. An environmental assessment by a review panel is conducted

23 Article 22-27.
24 Article 38-51.

by a panel of individuals appointed by the Minister of the Environment and supported by the Canadian Environmental Assessment Agency. The Minister of Environment may refer the environmental assessment to a review panel in case he or she is of the opinion that it is in the public interest. Criteria for determining public interest include public concerns related to the significant adverse effects that the designated project may cause; and opportunities for cooperation with any jurisdiction that has powers in relation to the environmental assessments[25]. Both types of assessments can be conducted by the federal government alone or in cooperation with another jurisdiction, such as a province.[26]

## 3.2 The different steps of the EIA process

In the following sections, the different steps of the EIA process, as outlined in *figure 1* (highlighted in blue), will be presented, including case studies and illustrative examples from legal approaches implemented in countries around the world.

### 3.2.1 Screening

The goal of screening is: "*to determine whether or not a proposal should be subject to [an] Environmental Impact Assessment (EIA), and if so, at what level of detail*" [3]. Thus, screening is the preliminary assessment of a development proposal to determine:

(1) If an EIA is required or not, and;

(2) Which particular set of EIA requirements should be applied to the specific proposal.

In the context of the **European Union** – and elsewhere, for example in **Canada** and the **United States** - this has meant that screening is the most heavily litigated aspect of the EIA regime, giving rise to a significant body of case law of the Court of Justice of the European Union [5].

#### *Procedural steps in screening*

Screening is regularly done based on information provided by the project proponent when applying for an environmental permit or certificate required for project approval. In most countries, detailed information on the required information is stipulated in legislation and in many cases, forms have been developed that facilitate the capturing of the information in an appropriate format, often termed a **project report** or **environmental impact statement**. This sometimes includes an Environmental Management Plan outlining potential mitigation measures, as this enables the authorities to assess whether, throughout the project cycle, significant impacts on the environment will be avoided, and thus the project can be approved without a full EIA being conducted. Many laws also stipulate that where the information provided is not sufficient to make the screening decision, the authorities can (and should) request **additional information**.

All of the above requirements are regulated in **Kenya** by the *Environmental (Impact Assessment and Audit) Regulations 2003*, last amended in 2016, and complemented by the EIA guidelines and administrative procedures adopted by the National Environment Management Authority in 2002. Whereas many laws require

25 Article 38 (2).

26 Government of Canada, Basics of Environmental Assessment. https://www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html [accessed on 16 June 2017].

**Figure 1: EIA process flowchart, adapted from [55]**

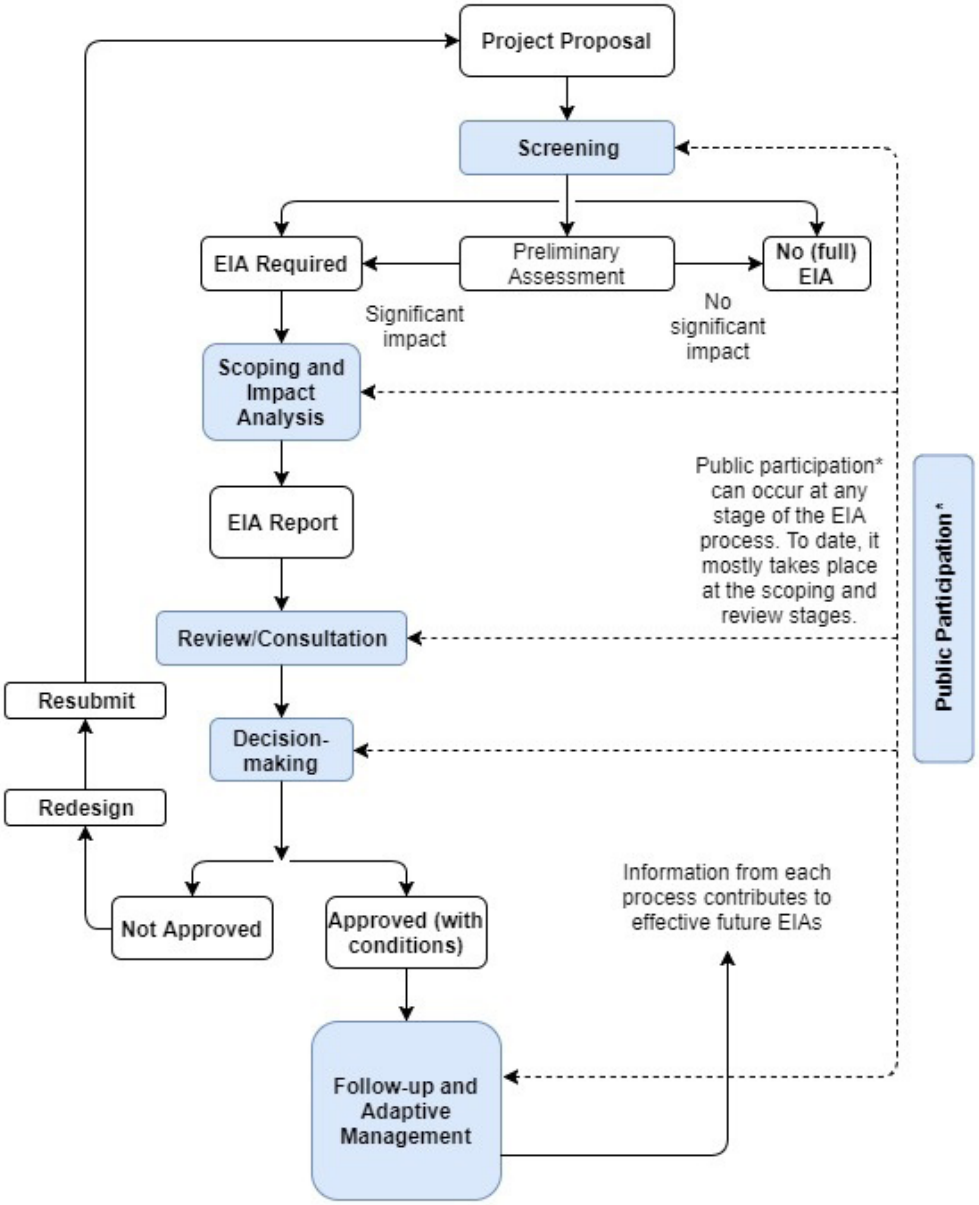

**Table 3: Overview of section content related to EIA Screening**

| | Screening | | | | | | |
|---|---|---|---|---|---|---|---|
| Specific issue | Requirement of project report/ EIS | Consultation | Right to appeal | Trans-boundary impact | Determining the level of impact | Cumulative impacts | General exemptions from EIA requirements |
| Case study countries and illustrative examples* | Kenya | Kenya; Lebanon; Nigeria; Canada; Vanuatu | EU; Kenya, Denmark | Georgia; Canada | Kenya, Nigeria; Tanzania; Peru; Panama; EU; Egypt; Georgia | Panama; EU; Austria; Germany; Japan | EU; Georgia; Nigeria; Indonesia; India |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

the involvement of certified experts to undertake an EIA, the Kenyan EIA legislation is one of the few (along with for example **Tanzania's** EIA law) that requires the involvement of an environmental practitioner with a specified minimum education plus related experience at the screening stage.[27] Further, knowingly providing false or misleading information is considered an offence and leads to the revocation of the environmental licence.[28]

In order to ensure that the necessary information is available at the screening stage, several EIA laws include measures to obtain information from sources other than the proponent. In most laws that include measures for **consultation at the screening stage**, stakeholders are consulted at the "review stage" of the project report (to be clearly distinguished from the review of the full EIA report (to be discussed in section *3.2.4 Review and final decision*), thus after the determination of the competent authority that the information provided fulfils the legal requirements. In **Kenya**, for example, copies of the project report need to be shared with other relevant lead agencies (e.g. the Kenya Forest Service or Kenya Wildlife Service) and County Environmental Committees for their written comments.[29] However, since the National Environment Management Authority does not always receive responses from other agencies in time, it sometimes has to make a decision in the absence of full information [47].

In **Lebanon**, the Ministry of Environment studies project reports through an ad-hoc committee established for that purpose which, depending on the project nature, gathers representatives from different departments of the Ministry, the executing agency (in terms of donor institutions) and other concerned government agencies.[30] Whereas consultation of other government stakeholders at the screening stage is legally required in several EIA laws, in only a few countries do non-governmental stakeholders, or the public in general, have to be consulted at this stage. For example, a requirement for

27 Environmental (Impact Assessment and Audit) Regulations 2003 of Kenya, Section 7 (3).

28 Environmental Management and Co-ordination Act [1999] of Kenya, amended in 2015, Section 58 (10).

29 Environmental (Impact Assessment and Audit) Regulations of Kenya [2003], Section 9.

30 2275/2009.

public consultation at the screening stage is included in the **Nigerian** and **Canadian federal** law.[31] The **EU** legislation does not require public consultation this early on in the process, but does encourage it as good environmental practice.[32] Similarly, the EIA law of **Vanuatu** provides the option to seek comments from NGOs, any person who may have a direct interest in the subject-matter, or other government entities, at the screening stage.[33]

In most other countries such **consultation at the screening stage** is not provided for, and regularly only takes place at the review stage of the full EIA report (where the screening decision requires the undertaking of a full EIA). Further, in a few cases, screening is not even considered a formal step or stand-alone decision in the EIA process. This is for example, the case in **Georgia** [52]. However, as in most cases, where screening is a stand-alone decision according to the law, an increasing trend is to make the **screening decision public**, **state the reasons for requiring or not requiring an EIA**, and provide the **opportunity to appeal** against the decision – to the project proponent and/or other stakeholders. The recent **EU** EIA Directive amendment for example includes the first two measures[34] and there is a right of appeal against the screening decision in **Kenya** and **Denmark.**[35] For more information regarding public participation please view section *3.2.3 Public participation*.

Since an EIA takes time, costs resources, and to a certain degree also brings uncertainty regarding the execution of the project, the screening stage provides an incentive for the proponent to redesign the project plans to ensure the least impact on the environment (including through the consideration of alternatives), thus averting the requirement for a full EIA. And even if screening authorities are usually not allowed to formulate demands, screening can be seen to have a second function as a regulatory instrument in its own right, in particular when project proposals are adjusted following an agreement with the authorities [47].

While minimizing the environmental impact of a project is a desired outcome of the establishment of an EIA system, it may however also incentivize people to circumvent the EIA requirement. A major challenge in this regard is the issue of **project-splitting,** commonly referred to as **salami slicing**, and defined as "*the practice of splitting a project into a number of separate ones that individually do not exceed the EIA screening threshold or do not have significant effects on a case-by-case examination, and therefore may not require [an] EIA, but might have significant impacts when taken into consideration as a whole*" [56]. Legal approaches to address this issue will be explored in the section on

31 cap.E.12, Vol.6, Laws of the Federation of Nigeria (LFN) 2004, Article 16 (1) (c) and 21 (3) and Canadian Environmental Assessment Act [2012], last revised in December 2014, Article 9 and 10.

32 Directive 2011/92/EU* of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, amended in 2014, Preamble no. 29.

33 Order 175, Article 3 (2).

34 EU Directive 2014/52/EU, Article 6 (2) b and Article 4 (5).

35 Kenya: Environmental (Impact Assessment and Audit) Regulations of Kenya [2003], Section 10 (4) (appeal may be lodged by proponent to the National Environmental Tribunal in case of dissatisfaction with decision that an EIA study is required); Denmark: Act on environmental assessment of plans and programs and specific projects (EIA) of Denmark, § 49 (regarding legal issues).

*Addressing the issue of project-splitting or downsizing.*

Regarding the **timeline** for the issuance of the screening decision, domestic legal provisions vary and are not included in all laws. The **EU** Directive for example stipulates that the timeline may not exceed 90 days from the date of submission of all information by the developer;[36] this is well above the average duration of the screening process across the EU (1.2 months) [5]. Similar to the EU average, the timeline for issuance of the screening decision in **Canada** (federal level) is 45 days[37], whereas for example in **Mongolia** it is considerably shorter at 14 days, with the possibility of extension by another 14 days.[38]

### *The preliminary assessment, or, determining the level of impact in project screening*

Project screening narrows the application of EIAs to those projects that may have **significant environmental impacts**, as stipulated in Principle 17 of the Rio Declaration. 'Significant' can be defined as "*determining the relative importance and acceptability of residual impacts (i.e., impacts that cannot be mitigated)*" [3].

A key exception to this rule is enshrined in the **Antarctic Treaty regime**, where a lower threshold is employed to trigger EIAs due to the sensitivity of Antarctic areas. According to the Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol), EIAs are required where an activity has at least a "*minor or transitory impact*" [57] his lower threshold is often cited as a good example of the **precautionary principle**, as an important principle of international environmental law, being effectively applied.

In a national context, a different threshold or set of EIA requirements might also be applied for areas identified as sensitive, such as protected areas or vulnerable marine ecosystems. In most cases, the (ecological) sensitivity of the project area is simply listed as an important factor to be considered when determining impact.[39] In addition, projects within ecologically sensitive areas, such as nature reserves, or in proximity of the same, might generally be subject to full EIAs.[40]

With regard to the geographical focus of determining impact, and as enshrined in the international Espoo Convention, many national laws include the obligation to conduct an EIA before authorising certain activities that may have a "significant adverse transboundary impact". This includes the 45 Parties to the Espoo Convention[41] and Georgia is for example currently revising its EIA legal framework in preparation for accession to the Espoo Convention, thus including the transboundary dimension for impact assessment.[42] Taking the

36 Article 4 (6).
37 Article 10.
38 Environmental Impact Assessment Law of Mongolia, 2012, Article 7 (4) and (5).

39 E.g. **EU** Directive 2014/52/EU, Annex III 2, which includes a list of criteria to determine the environmental sensitivity of geographical areas likely to be affected by a project; the Environmental Impact Assessment and Audit Regulations, 2005, of **Tanzania**, 2nd Schedule: Screening Criteria.
40 E.g. Prime Minister Decree no. 338 of the year 1995 promulgating the Executive Regulations of the Law for the Environment of **Egypt**, Law no. 4 of the year 1994, Annex 2, 2nd standard; and in **India**.
41 Convention on Environmental Impact Assessment in a Transboundary Context. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en [accessed on 18 June 2017].
42 A new Law on Environmental Impact Permits and Ecological expertise was adopted at the time of writing (in June 2017) and will enter into force on 1st January 2018.

consideration of environmental impacts in other countries (or even in areas beyond national jurisdiction/the high seas) a step further, the Canadian federal EIA law (2012) also makes projects that are implemented outside of Canada and that are to be carried out or financially supported by a federal authority, subject to an EIA.[43]

The rationale behind focusing on 'significant impact' is to **balance**

- the interest of the developer in executing the project plans in a timely manner and the often limited resources of environmental authorities overseeing or managing EIAs; and
- the public interest of protecting the environment and efficient use of resources.

The striking of this balance is the key for an effective screening process. Thereby, part of the difficulty in making the determination of the impact level at the screening stage is "an inevitably circularity in making this determination, because it requires the decision-maker to arrive at a conclusion about the nature of the environmental effects as a precondition to preparing a study that is aimed at that *precise determination*" [4].

To mitigate this problem, by way of conducting a preliminary assessment as to whether a full EIA is required, the **principle approaches** applied in different countries include:

1. The listing of factors/criteria for assessing the likely impact on a case-by-case basis (positive and negative);
2. The use of activity lists (for inclusion or exclusion and with or without thresholds); or
3. A hybrid of (1) and (2).

These two different approaches ((1) and (2)) can be described as an **environment-centred** approach, based on a judgement of the likely significant impact on the environment, and a **development-centred approach**, based on the size and/or type of development [58].

It is commonly agreed that lists remove the burden of case-by-case analysis on the screening authority and minimize the chance of ambiguity and corruption in decision making [58]. At the same time, it is acknowledged that discretion in policy-making is an important tool, in particular in a democratic system where different parties need to find compromises [59]. In addition, the inherent challenge of lists is that they do not take into account the individual circumstances of the case (e.g. whether the project is close to a sensitive ecological area), and that they incentivize project downsizing just beneath the capacity threshold level and project splitting. As a result, many domestic EIA legislation, adopts a hybrid approach to determine the likely impact of a project. A common approach is for example to make a full EIA mandatory for a certain type of activity and/or for activities above a certain capacity threshold (e.g. area size, emissions, etc.), and to subject projects below the capacity threshold to a preliminary impact assessment on a case-by-case basis, taking into account a list of factors/criteria. This is for example the approach taken in Kenya and in the Nigerian federal EIA law,

43 Canadian Environmental Assessment Act, 2012, amended in 2014, section 68.

although in the case of the latter the law does not provide guidance for determining the level of impact.[44] Therefore, in some cases the list of criteria applied is the same as at the scoping stage/full EIA assessment (e.g. Kenya), whereas in other countries specific screening criteria have been developed (e.g. in **Tanzania**[45], **Peru**[46] and **Panama**[47]). In Kenya, amendments to EMCA in 2015 have created a comprehensive list of activities that, mandatorily, have to undergo a full EIA study. However, this amendment provides the National Environment Management Authority with discretion to direct a proponent to forego submission of an EIA study report in certain cases.

In the **European Union,** Member States are required to make projects belonging to a certain type – as listed in the EU Directive - subject to an EIA (Article 4 (1), Annex I). For projects of other types included in Annex II the Member States shall determine whether the project shall be made subject to an EIA (Article 4 (2)). Member States can make the determination based on a case-by-case examination or the setting of thresholds criteria or a hybrid of both. Regardless of the specific approach taken, the selection criteria set out in the Directive shall be taken into account (Annex III). The detailed project lists and set of criteria developed by the EU are often used as a point of reference in the literature.

In **Egypt,** establishments that are subject to EIAs are set out in Annex 2 of the 1995 EIA Regulations based on 4 standards: type of establishment activity; location of the activity; extent of an establishment's use of natural resources and type of energy used for operating an establishment. [48]

In **Georgia,** the 2005 Law on Environmental Impact Permits establishes those activities subject to mandatory ecological expertise through the provision of a limited list of activities, included in Article 4 of the law. However, many activities with significant potential adverse impacts on the environment (e.g. construction of radiation or nuclear facilities or mining activities) do not require EIAs and ecological expertise under the present legislation [52]. Under the new legislation EIAs will be required for all the activities listed in the EU directive.

### *Addressing the issue of project-splitting or downsizing*

Approaches to avoid circumventing the EIA requirement of activities above a specified threshold, through in particular **project-splitting**, include the consideration of **cumulative impacts** when determining impact on a case-by-case basis at the screening stage. This is the most common approach to address the issue, and the cumulative impact-consideration is for example included in the EIA law of **Panama** and the **EU** EIA Directive.[49] However, despite the fact that the European Commission has also issued a guidance document on how to assess cumulative impacts of projects and the existence of relevant court rulings, 'salami-slicing' is still frequent in new Member States that recently joined the EU [60].

Two examples of EU Member States that address the issue in a detailed manner

44 Article 18.
45 2nd Schedule.
46 Supreme Decree No. 019-2009-MINAM of Peru, annex V.
47 Executive Decree 123 of Panama, Title III, Chapter I.
48 Prime Minister Decree no. 338 of the year 1995 promulgating the Executive Regulations of the Law for the Environment of Egypt, Law no. 4 of the year 1994, Annex 2.
49 EU Directive 2014/52/EU, Annex III, 1 (b).

in their national EIA legislation, include **Austria** and **Germany.** With regard to *Annex 1 of EU Directive 2014/52/EU*, which includes a list of activities for which EIAs are mandatory, Austria's EIA Act stipulates that if projects fall below the threshold values, or do not fulfil the criteria defined therein, but are spatially related to other projects and, which do reach the relevant threshold value or fulfil the criterion, these projects will be subject to a case-by-case analysis due to a potential accumulation of effects. Similarly, Germany's EIA Act also stipulates the obligation to perform an EIA if several projects are closely related and together reach or exceed the relevant size or capacity figures [61].

In order to address the issue of project-splitting, an effective approach is to explicitly include a prohibition on project-splitting in the EIA law. In this regard it has been noted that the recent **Spanish EIA Law** is a step back from the previous law. The repealed Law 6/2010 had an explicit reference to project splitting, indicating that EIAs shall include the entire project and not only partial EIAs of each phase or part, but this requirement has not been incorporated into the more recent Law 21/2013 [56].

Another approach to address the problem of down-sizing or project splitting has been implemented in **Japan,** where the Ministry of Environment Japan created a 'grey zone' category for any projects that are slightly smaller than the size that requires an EIA. In this case, the project developer/proponent must consult the Ministry as to whether the proposed project needs an EIA or not, even though it is below the stipulated capacity threshold of the EIA requirement [44].

Another suggestion made to avoid the practice of project-splitting is the **strengthening of SEA** [56].[50] This issue will be further dealt with in section *4 SEA systems – Legal and institutional frameworks for SEAs.* Finally, another legal measure that at least partially addresses down-sizing and which is included in most EIA legislation, is to explicitly make **amendments or modifications of EIA-approved projects,** subject to EIAs. In **India,** expansion and modernization of existing projects that are subject to EIAs, or listed activities with addition of capacity beyond the limits specified for the concerned sector, are subject to the EIA requirement.[51] And in **Denmark**, the developer must apply for an EIA before the establishment, extension or amendment of listed activities.[52]

A comparison of **criteria to determine the level of impact** or **listed activities**, including project categories and capacity thresholds adopted in different countries, is beyond the scope of this report. Such comparisons have, for example, been undertaken by FAO regarding aquaculture. [62] And an emerging issue where there is much differentiation, is in relation to GHG emissions, with different EIA regimes requiring assessments on very different levels. More broadly, it is widely recognized that **climate change**, as a global cumulative environmental effect, needs to be tackled by impact assessments. With regard to screening, suggestions include inclusion/exclusion lists of project types, checklists of environmental triggers for EIA, specific criteria for climatically sensitive areas and/or specified climate thresholds for projects/activities [63].

50 Compare e.g. Environmental (Impact Assessment and Audit) Regulations of Kenya [2003], Article 4 (3).
51 Notification 2006.
52 Paragraph 18.

It should also be noted that criteria and project lists that guide the determination of the likely impact of a project, and which are often included in annexes to domestic EIA legislation, are in many countries subject to regular revision, reflecting advancements in technology, science as well as changing political priorities.

**Kenya,** for example, includes a new category in its list of projects to undergo EIAs under the heading of "marine resource exploitation and reclamation" (high risk project).[53]

In **India**, the main change in the screening criteria of 2006 was the adoption of capacity based exclusions (spatial extent of the proposed activity as well as its impacts on human health and natural and man-made resources) rather than the investment size of a project. Based on capacity, projects are divided into A and B categories and different set of rules are applied. The Ministry of Environment & Forests deals only with category-A projects and the State Environmental Impact Assessment Agency (SEIAA) under the State Pollution Control Boards (SPCB) screens the category-B projects [58]. While the adoption of capacity based exclusions was generally welcomed, criticism voiced regarding the new regulation is that the thresholds are too high and that the danger of downsizing or project-splitting is not sufficiently addressed in the regulation [64].

### *General exemptions from EIA requirements*

Most, if not all countries, also include **general exemptions from the EIA requirement** in their legislation. Thus, as opposed to mandatory project exclusions due to assumed non-significant impact, projects that are or can be exempted from an EIA requirement for other reasons. The most common exemption is for projects conducted within the framework of a disaster emergency response. Other examples of legal exemptions are as follows:

In the **Member States of the European Union,** projects adopted by a specific act of national legislation, serving defence purposes, and projects having as their sole purpose the need to respond to civil emergency, may generally not be subject to the EIA requirement, potentially under specified provisions to be adopted by the Members States. Furthermore, Members States may in exceptional cases exempt a specific project from the assessment procedures laid down by this Directive, subject to appropriate information being supplied to the European Commission and to the public concerned.

With respect to projects to respond to emergency situations it is important to highlight the possibility to conduct **rapid EIA (REA)**. A tool to identify, define, and prioritize environmental impacts in disaster situations [65].

In **Georgia,** under the 2005 legislation, exempted activities from the detailed process are not specified but an activity may generally be exempted from EIAs if common state interests require that the activity be undertaken and the decision has been made in a timely manner.

53 The Environmental Management and Coordination Act of Kenya no 8 of 1999, Legal Notice no 150 Replacement of the Second Schedule.

**Key points from the section on screening**

- Narrows the application of EIAs to those projects that may have significant environmental impact;
- Regularly done based on information provided by the project proponent and in the form of a project report or environmental impact statement;
- The principle approaches for conducting a preliminary assessment include an environment-centred approach (listing of factors/criteria for assessing the likely impact), a development-centred approach (listing development activities) and a hybrid between the two;
- Whereas consultation of other government stakeholders is legally required in several EIA laws, in only a few countries do non-governmental stakeholders or the public in general have to be consulted at this stage;
- There is an increasing trend to make the screening decision public, to state the reasons for requiring or not requiring an EIA, and to provide the opportunity to appeal against the decision;
- Provides an incentive to redesign the project plan to ensure the least impact on the environment in order to avoid the requirement for a full EIA; however, it may also incentivize people to circumvent the EIA requirement e.g. through project-splitting/ salami-slicing (linked to the issue of cumulative impacts).

The Minister of Environmental Protection takes the decision on exemptions from EIAs. Recommendations are provided by a special council on Environmental Impact that is formed by the Ministry of Environment, but without the elaboration of further guidance. Thus, in principle any activity can be exempted but in practice this provision has been used only in some cases and usually in connection with small hydropower projects, in the case of road construction, and a landfill project in the capital [52].

In **Nigeria**, projects are exempted if the project is in the interest of public health or safety (Article 14 EIA law).

In **Indonesia** an activity can be exempted from the obligation to conduct an EIA if the location of the activity is within an area that has had an EIA already; or the location of the activity is within a district/ city that has already adopted a detailed spatial plan and/or a district/city strategic area spatial plan. The law also stipulates that for activities which are exempted from EIAs, an EMaE-EMoE (environmental monitoring and management study) shall be prepared.[54]

In **India**, Small Scale Industry (SSI) was an outright exemption from EIAs under the 1994 EIA law. Following the revision of the law in 2006 SSI are still given this concession if they are located inside industrial estates [58]. Moreover, a recent notification by the Ministry of Environment and Forests and the Ministry of Urban Development exempts real estate projects of all sizes from the process of EIA and prior environmental clearance. The policy was motivated by a push for greater decentralization, delegation of powers and enhancing the 'Ease of Doing Responsible

54 Article 13 of the 2012 Regulation on Environmental Permits.

Business' a pet scheme of the current government, as well as providing affordable houses under the scheme of Housing for all by 2022. However, the notification has been challenged in front of the National Green Tribunal.[55]

### 3.2.2 Scoping and impact analysis

Once a decision has been made that a (full) EIA needs to be undertaken, determining the scope of the EIA including which specific impacts need to be considered, is generally referred to as scoping. The legal process which needs to be followed is generally already determined by the screening decision, in particular if different assessment processes are foreseen by law.

In **Peru**, for example, the law distinguishes between three project categories. Category-I projects, where only an Environmental Impact Statement (EIS) needs to be prepared, because of the expected **low** environmental impact generated by the project; category-II projects which need to undergo a semi-detailed Environmental Impact Study (EIA-sd) because of their expected **moderate** impact; and category-III projects which need to undergo a Detailed Environmental Impact Study (EIA-d) because of their expected **significant** environmental impact. Since an EIA is only undertaken for category-II and III projects, scoping is only required for these, with a different set of rules applying for each type of project.

This report generally focuses on the process for projects with an **expected significant impact**, thus the most comprehensive EIA process.

The **objective** of introducing scoping as a formal step in the EIA process is to ensure that the final EIA report, which contains the result of the assessment and thus forms the basis for decision-making, fulfils its purpose. The determination of what to focus on when predicting impact is key, as it is neither useful nor possible to try to address all aspects. There is a need to maintain a good balance between comprehensiveness and efficiency in order to effectively predict the impact on the environment. Thereby, the ideal is to focus "*as much as possible on the environmental issues that are truly likely to have a significant impact on the environment*" [4], while it is also recognized that this will not always be a straightforward exercise, particularly given **data gaps and general scientific uncertainty** regarding environmental outcomes. A lack of reference to environmental services may for example lead to a lack of assessment and thus a potential barrier to the consideration of ecosystem-based adaptation options (/nature-based solutions) for climate resilience on a 'level playing field' with other options.

Effective scoping can also address challenges such as the tendency of consultants to produce excessively long, expensive and time-consuming studies as well as lack of guidance at the review stage of the EIA process. The latter is regularly achieved through the development of terms of references (see below) for the EIA report against which the final report can be assessed [4,66].

Most national EIA frameworks include specific regulations relevant to scoping. However, this is not the case in all

55 The Times of India. NGT notice to environment ministry over realty projects (1 January 2017). http://timesofindia.indiatimes.com/home/environment/developmental-issues/ngt-notice-to-environment-ministry-over-realty-projects/articleshow/56311120.cms, accessed on 6 May 2017.

countries (e.g. in **Georgia**, where scoping is not considered a formal step in the EIA process under the 2005 legislation [52]) and the details of the guidance provided also vary. A scoping decision is also not mandatory for the Member States of the **European Union** according to EU legislation[56], even though most Member States made it a legal requirement in their national EIA laws. Moreover, in some cases, and regularly where a detailed screening decision is required, the screening decision is considered to fulfil the function of scoping.[57]

In most national legislation with a scoping requirement, the determination about process and content for each individual EIA is undertaken through the development of **Terms of Reference (ToR).**[58] These also serve the purpose of guiding the review of the EIA, as well as the transparency of the process.

In recognition of the importance of scoping, some countries provide for **public consultation** at the scoping stage (e.g. in **Canada** or **Indonesia**)[59], or leave it at the discretion of the competent authority to do so (e.g. in **Vanuatu**, and in cooperation with relevant authorities)[60]. In several other countries where public participation is required at the assessment stage, the terms for public participation to be undertaken by the project proponent are agreed upon at the scoping stage.[61] The preparation of a plan for public participation before the comprehensive assessment begins is considered important in order to avoid a pure focus on the technical aspects of the EIA as well as to facilitate the review of the EIA process regarding public participation [1]. Public participation at the scoping stage allows for the public to have influence on the development of the plan for public participation and, regarding the technical parameters, to bring forward issues to be considered in the assessment that otherwise might be neglected. A crucial role can also be played by stakeholders in highlighting alternatives in relation to project design and implementation. More information on public participation in the EIA process will be provided in section *3.2.3 Public participation*.

Many laws also include requirements for consultation with other government entities. For example the EIA Directive of the **European Union** makes it mandatory for Members States to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are consulted.[62]

56 Article 5 (2).
57 E.g. Environmental Impact Assessment Law of Mongolia, 2012, Article 8.1.
58 E.g. Act on environmental assessment of plans and programs and specific projects (EIA) of Denmark [2016], Paragraph 23; Canadian Environmental Assessment Act [2002], last revised in 2014, Article 19 (2); Act 12 of 2002 on Environmental Management and Conservation of Vanuatu, last revised in 2010; Article 19; Decree 2013/0171/PM of Cameroon, Article 8; The Law of the People's Republic of China on Environmental Impact Assessments [2002], Article 17; Environmental Impact Assessment Law of Mongolia, 2012, Article 8.1; Environmental Impact Assessment System Act of Peru [2001], revised in 2008, Article 7.1.c. and in the Regulation of the Environmental Impact Assessment System Act of Peru [2009], Article 40.
59 Regulation on Environmental Permits of Indonesia, Article 9 (1)
60 Environmental Impact Assessment Regulation of Vanuatu, Order 175 of 2011, Article 5.
61 E.g. The Environmental Management Act of Tanzania, 2014, Article 85 (1) b).
62 EIA Directive, Article 6 (1).

**Table 4: Overview of section content related to EIA Scoping**

| | Scoping | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Specific issue | ToR | Consultation | Responsibilities for preparing EIAs | Content requirements for assessment | Alternatives | Cumulative impacts | EMPs | Mitigation hierarchy | Offsetting |
| Case study countries and illustrative examples* | Denmark; Canada; Vanuatu; China; Mongolia; Peru | Canada; Indonesia; Vanuatu; EU | USA; Cameroon; Peru; Oman; Lebanon; Fiji | China; Oman; Tanzania; Mongolia; EU; Kenya; Bhutan; India | Bhutan; Denmark; EU; Mongolia; Kenya; Brazil | Vanuatu; Bhutan; Kenya; Brazil, Canada; Mongolia | Vanuatu; Mongolia; Panama; South Africa; Oman | South Africa; Indonesia; Oman; State of Kosrae, Micronesia | Brazil, Mexico; Columbia; Australia; Canada; South Africa; Austria; France; Germany |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

## Key points on scoping

- Aims at ensuring that the final EIA report can fulfil its purpose as an adequate basis for decision-making;
- Most national EIA frameworks include provisions on scoping, but the details of the guidance provides varies considerably;
- It is neither useful nor possible to address all aspects, thus maintaining a good balance between comprehensiveness and efficiency is key;
- Effective scoping can address challenges such as the tendency of consultants to produce excessively long reports;
- The scoping decision provides guidance at the review stage of the EIA process, in particular if terms of references have been drafted;
- Only some countries provide for public consultation at the scoping stage, but where public consultation is required at the assessment stage, the terms of public participation are agreed upon at the scoping stage.

### *Responsibilities for preparing EIAs*

Whereas in some jurisdictions a government agency is responsible for conducting EIAs (for example in the **USA**), the responsibility to conduct EIAs in the majority of countries lies with the project proponent. However, many national laws require the use of **government licenced or registered** consultants or agencies. This is for example the case in **Vanuatu, Cameroon, Peru, China, Mongolia, Oman, Lebanon** and **Indonesia**. In **Fiji**, registered consultants pay an annual fee to operate as an EIA consultant.

In **Indonesia**, the preparation of Amdal (EIA) documents must be done by individuals who have a certification of competence. This is obtained after a specified training program established under the oversight of a certification body

composed of members appointed by the Minister of Environment.[63]

A number of laws also include provisions on the (administrative or criminal) **liability** of consultants. In **Mongolia**, the EIA law for example provides that should a completed EIA be found inadequate at the review stage, the licence of the respective entity shall be cancelled and made subject to the imposition of a fine.[64]

The objective of all these requirements is to ensure that all individuals involved in the assessment are adequately trained and thus capable to prepare a high quality EIA. At the same time, the commissioning of external assessors seeks to ensure the independence of the experts hired. This requirement may however cause challenges in some countries, since it relies upon the existence of a well-qualified, independent private consulting sector. For example the **Republic of Maldives** is particularly challenged in this regard, because it has a small population and most of its qualified environmental professionals work within the government [67].

### *Content requirements Environmental analysis*

Content requirements for the assessment itself are regularly defined in national legislation, but with varying levels of detail. Whereas in some countries the EIA laws contain rather brief EIA content requirements, and thus require these to be defined in each individual case (for example in **China**)[65], some have more detailed requirements contained in non-binding guidelines (for example **Oman**)[66], and EIA laws of many other countries provide more detailed provisions (for example in **Tanzania**)[67]. In some cases specific requirements are stipulated for specific sectors (for example the EIA law of **Mongolia** includes detailed content requirements for "*oil, mining and radioactive minerals projects*")[68]. Defining standards on content can overcome challenges such as a practice of 'cut and paste' in EIA reports from existing reports, regardless of the relevance to the assessment in question [47].

Regarding the determination of the environmental impact in general, and as already pointed out in section *3.2.1 Screening*, a common legislative approach is to include a **list of factors** to be considered in order to guide the identification of likely effects of a project based on a number of issues.[69] Therefore, some laws explicitly require the taking into account of direct and indirect significant effects (e.g. in the **European Union, Kenya** and **Bhutan**), as well as negative and positive impacts (e.g. in **Bhutan** and **India**). This fosters the enhancement of positive impacts of environmental projects such as those related to **ecosystem-based adaptation** or **nature-based solutions for climate mitigation**, in particular when considering alternatives [68–72].

With regard to **specific factors or environmental issues** that can be considered in an EIA, the following criteria are highlighted the most in the (recent) literature, in part due to their relevance in

63 Government Regulation no. 27 of the Republic of Indonesia of 2012 about Environmental Permissions, Article 11.
64 Environmental Impact Assessment Law of Mongolia, 2012, Art. 19.1.4.
65 The Law of the People's Republic of China on Environmental Impact Assessments [2002], Article 17.
66 MECA Guidelines for obtaining environmental permits.
67 The Environmental Impact Assessment and Audit Regulations of Tanzania, 2005, Article 16 and 18.
68 Environmental Impact Assessment Law of Mongolia, 2012, Article 8.4.6.
69 E.g. Canada, Article 5 (1) and EU and xxx.

the international policy arena (see section *2.1 Global developments*):

- Biodiversity and ecosystem services;
- Climate change (mitigation and adaptation);
- Risks of accidents and disasters;[70]
- Social impacts, including indigenous and local communities;
- Community and traditional knowledge;
- Population and human health;
- Transboundary effects; and
- The marine environment.

It is common practice to briefly describe or list the different factors in legislation, and then to issue **complementary non-binding guidelines** on how to carry out the assessments with respect to some of them. The **European Union**, for example, issued guidance on integrating **climate change and biodiversity** into EIAs.[71] This approach recognizes the complexity of assessing many of these aspects; the need to tally the individual assessment approach and methodology to the specific project and its environmental circumstances; and rapid and continuing advances in assessment methodologies and approaches which can be addressed in a timelier manner through revision of guidelines than legal reform. The adoption of non-binding guidelines complementary to legislative (minimum) requirements thus gives the option of providing detailed guidance in order to facilitate assessments with regard to specific issues, without sacrificing the flexibility needed in order to undertake each individual EIA.

Guidelines on specific issues related to their mandate have also been developed by international or regional environmental agreements, such as the **CBD Voluntary Guidelines on Biodiversity-Inclusive Impact Assessments**. Guidelines on EIAs in a **transboundary** context have been developed for the Caspian Sea Region (2003) as well as for Central Asian Countries (2007 draft) under the umbrella of the Espoo Convention. Related to **emergency situations**, guidelines for natural hazard impact assessment (NHIA) and their integration into EIA procedures have for example been developed by the Caribbean Development Bank in 2004; and a framework for **rapid EIA** has been developed by the United Nations High Commissioner for Refugees (UNHCR) and CARE International.

A comprehensive review of legal assessment criteria or environmental aspects in national legislation is beyond the scope of this paper. Thus in the following only a few examples will be presented.

The adoption of the Climate Change Act in **Kenya** in 2016, illustrates an example where requirements for impact assessments are included in national legislation other than the EIA law. The Climate Change Act makes it mandatory for the National Environmental Management Authority, the national authority that is also in charge of the EIA process, to integrate **climate risk and vulnerability assessments** into all forms of assessment, and for that purpose to liaise with relevant lead agencies for their technical advice.[72]

70 See the Sendai Framework of Disaster Risk Reduction endorsed by UNGA resolution 69 in 2015 (A/RES/69/238).

71 European Commission. Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment, 2013. http://ec.europa.eu/environment/eia/pdf/EIA%20Guidance.pdf.

72 Climate Change Act, No. 11 of 2016, Section 20.

In the **EU,** the EIA Directive lists **biodiversity**, **human health** and **climate change** (adaptation and mitigation), amongst others, as factors to be considered in the assessment.

In **Canada,** with respect to **aboriginal peoples,** environmental effects that are to be taken into account in EIAs are : health and socio-economic conditions; physical and cultural heritage; the current use of lands and resources for traditional purposes; or any structure, site or objective that is of historical, archaeological, paleontological or architectural significance. In addition, the environmental assessment of a designated project may take into account **community knowledge** and **aboriginal traditional knowledge**. To facilitate the implementation of the provision, a reference guide has been developed by the Government of Canada.[73]

As a final remark regarding the different factors to be considered according to national legislation, the link to the **national, regional and international policy agenda** should be highlighted. As already pointed out, an EIA can, in particular in the case of a larger and complex project, never be fully comprehensive, thus a focus on the key issues identified is required. These are determined by a country's policy agenda. A number of national EIA legislation therefore include specific provisions to take into account environmental effects focused on in policy documents. The EIA Directive of the **European Union,** for example, makes explicit reference in its preamble to the requirements of the Convention on Biological Diversity, the Birds and Habitat Directive of the European Union as well as the Union's Biodiversity Strategy up to 2020.

Many of the individual factors, in particular biodiversity and human health, as well as climate risk and/or climate change, are often discussed in the context of considering alternatives as well as the need to consider cumulative impacts of multiple developments.

The consideration of **alternatives in EIAs**, i.e. the many ways in which a project could be implemented (in terms of alternatives to a specific project as well as alternative project design), is widely considered as key to identify project designs with the lowest impact on the environment and is consequently a mandatory consideration in many national laws[74]. However, some countries, including **Georgia** and **China,** have no legal requirement to consider alternatives. In a few countries, such as **Brazil,** a further requirement is to explicitly evaluate the "no-project" option [73]. However, most recently a reform proposal has been brought forward that would not only erase the requirement, but would also ban the option to suspend or cancel a project once an EIA has been submitted [74]. It is however observed that a general statutory requirement to consider alternatives as included in most legal frameworks appears to only lead to a superfluous assessment and that non-compliance is widely tolerated [75].

73 Reference guide for Considering Aboriginal traditional knowledge in environmental assessments conducted under the Canadian Environmental Assessment Act, 2012. (https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/considering-aboriginal-traditional-knowledge-environmental-assessments-conducted-under-canadian-environmental-assessment-act-2012.html .

74 Bhutan, India: in technical guidelines, Denmark, Mongolia, Kenya, Article 18.

The 2014 revision of the EIA Directive of the **European Union** aimed amongst other things to facilitate the review of EIA reports and compel compliance. Therefore, an important revision targeted the provision to consider alternatives in the assessment. Instead of an 'outline of the main alternatives' (as required under the pre-existing Directive), the Directive now makes it mandatory to include 'a description of the reasonable alternatives studied by the developer' and main reasons for their choice [5].

As already outlined in section *3.2.1 Screening*, the consideration of **cumulative impacts** in the EIA is a legal requirement in many countries (e.g. **Vanuatu**, **Bhutan**, **Kenya** and **Brazil**). According to Craik, "*cumulative effects assessment requires the project proponent to consider not only the impacts from their project by itself, but also how the effects of the project, when combined with the effects from other projects, will impact the environment*" [4]. The concept of **ecosystem services** can also help in addressing cumulative impacts; thus there is a general need to better measure ecosystem services in impact assessments. However, in several countries there is no mention of the issue of cumulative impacts (e.g. **China**) and even where it is included, as highlighted in section *3.2.1 Screening*, provisions are often criticized as not effective. Thus, in some countries additional measures have been implemented. For example:

In **Canada**, encouraging the study of cumulative effects of physical activities in a region and their consideration in environmental assessment, has not only been made an explicit **purpose** of the federal EIA law, but the Government of Canada also adopted an Operational policy statement on Assessing Cumulative Environmental Effects under the Act as well as **Technical Guidance** for Assessing Cumulative Environmental Effects.[75]

In **Mongolia**, the "cumulative impact assessment" was even made a **separate process of impact assessment** in parallel to EIA in 2012. According to the law, cumulative impact assessment shall mean "*determination of the joint and repeated adverse impacts on the public health caused by the projects implemented by the citizen, entity and organization throughout the certain area and define the methods and actions that assist elimination and mitigations of such impacts*".[76] The public authorities are required to conduct the assessment according to specified procedural requirements, which were adopted in 2013, and at the cost of the project proponents.[77] The need to conduct the assessment is determined by the Ministry of Environment and Tourism. To date there is very little experience of undertaking cumulative impact assessments and capacity building is needed. In total, 4 cumulative impact assessments have been conducted for 4 different mining regions (1 per year starting in 2013). In addition, currently the assessment only covers public health. However, a legal amendment has been proposed to include environmental considerations more broadly and it is

75 Federal EIA law of Canada, xxx, Article 4 (1); https://www.canada.ca/en/environmental-assessment-agency/news/media-room/media-room-2015/assessing-cumulative-environmental-effects-under-canadian-environmental-assessment-act-2012.html; https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/technical-guidance-assessing-cumulative-environmental-effects-under-canadian-environmental-assessment-act-2012.html.

76 Environmental Impact Assessment Law of Mongolia, 2012, Article 3.1.5.

77 Environmental Impact Assessment Law of Mongolia, 2012, Article 6.

anticipated that Parliament will adopt the amendment before the end of 2017.

### EIA Recommendations

Content requirements not only cover environmental factors to be considered in the assessment, but also include requirements related to project design and implementation, including mitigation, monitoring and reporting measures.

In **China**, for example, it is a legal requirement that mitigation measures for each likely adverse environmental impact should not only be considered during scoping, but that installations for the prevention and control of pollution at a construction project must be designed, built and commissioned together with the principal part of the project and that they must comply with the requirements of the approved EIA report.[78]

In many countries it is a legal requirement to develop an **Environmental Management Plan** (EMP). This is for example the case in **Vanuatu**, **Mongolia**, **Panama**, **South Africa** and **Oman** (*in case of the latter only in non-binding guidelines*). Where an Environmental Management Plan is required, it is further regularly stipulated that it forms an integral part of EIA approval and thus its content is binding for the project owner/implementer, regularly through the establishment of **conditions** in case of EIA approval.

The 2012 EIA law of **Mongolia** contains detailed requirements regarding the development of an Environmental Management Plan when conducting a detailed environmental impact assessment. The Environmental Management Plan shall consist of the environmental protection plan and environmental monitoring plan and importantly the latter shall include the methods of implementation, required funding, cost and timeframe.[79]

An explicit reference to the **mitigation hierarchy**[80] is not generally included in national EIA laws, which is widely regarded as a severe shortcoming given the objective of the EIA process. [44] The mitigation hierarchy places preference on avoidance of adverse effects, followed by minimisation, followed by restoration and, if required, the compensation or offsetting of residual effects [76,77]. Only a number of non-binding national EIA guidelines include a specific reference (for example in **South Africa**, **Indonesia**, **Oman** and **the State of Kosrae, Federated States of Micronesia**). EIA guidelines issued by some international or regional organizations do however include reference to the mitigation hierarchy, such as the **CBD Guidelines** and the **IFC performance standards**. Despite a general absence of an explicit reference to the mitigation hierarchy in EIA legislation or EIA guidelines, application of the mitigation hierarchy, including through **biodiversity offsets**, is increasingly seen as good practice for balancing development and conservation goals and Government offset policies now exist across the world, in both developed and developing countries. The mitigation hierarchy is regularly adopted together with targets of **no net loss or a net gain in biodiversity** and requires the quantification of impacts and associated mitigation measures in order

78 Article 41 EPL.

79 Law of Mongolia on Environmental Impact Assessments, Article 9.

80 The mitigation hierarchy is the sequence of actions to anticipate and avoid impacts on biodiversity and ecosystem services; and where avoidance is not possible, minimize; and, when impacts occur, rehabilitate or restore; and where significant residual impacts remain, offset. (CSBI 2013)

to provide assurance that these targets are met.

Government offset policies in developing countries are being driven by their inclusion in international standards, such as the IFC performance standard 6 and may be further supported by the newly adopted World Bank's Environmental and Social Safeguards Framework [76]. The expanding adoption of **natural capital accounting frameworks** may also support further uptake of these policies as well as their implementation, as this would improve data and metrics for quantifying impacts.

**Key points related to scoping and impact analysis on:**

**1. Report preparation**

- Many national laws require the use of government licenced or registered consultants or agencies
- A number of laws also include provisions on the (administrative or criminal) **liability** of consultants

**2. Content requirements**

- Are regularly defined in national legislation, but with varying levels of detail;
- A common legislative approach is to include a **list of factors** to be considered in order to guide the identification of likely effects of a project, e.g. biodiversity;
- In order to provide more detailed guidance, but without sacrificing the flexibility in undertaking each individual EIA, complementary **non-binding guidelines** on specific issues are being adopted, e.g. on integrating climate change in EIA or biodiversity-inclusive EIA;
- Many of the individual factors, in particular **biodiversity** and **human health**, as well as **climate risk and/or climate change**, are often discussed in the context of considering alternatives as well as the need to consider cumulative impacts of multiple developments;
- The consideration of **cumulative impacts** in the EIA is a legal requirement in many countries and the concept of **ecosystem services** can help in assessing cumulative impacts; however, existing provisions are often criticized as not effective.

**3. EIA recommendations**

- In many countries it is a legal requirement to develop an **Environmental Management Plan** (EMP).
- Where an Environmental Management Plan is required, it is further regularly stipulated that it forms an integral part of EIA approval and thus its content is binding for the project owner/ implementer, regularly through the establishment of **conditions**.
- An explicit reference to the **mitigation hierarchy**, is not generally included in national EIA laws, which is widely regarded as a severe shortcoming given the objective of the EIA process. Nevertheless, application of the mitigation hierarchy, including through **biodiversity offsets**, is increasingly seen as good practice.

In **Brazil**, for example, projects subject to environmental licensing must offset their impacts on protected areas[81]. In **Mexico** the Sustainable Forest Development Act of 2003 requires offsets for impacts that result in land-use change to forested areas. The recently enacted Environmental Liability Act (2013) also requires offsets, but only when impacts are not predicted or approved in the EIA and are deemed an environmental offence. And in **Colombia** projects subject to EIA must in particular offset their impacts on terrestrial ecosystems and freshwater [78].

Further, progressive national offset policies have been adopted in Australia, Canada, South Africa, Austria, France and Germany and a database on offset policies globally has been developed and is currently being updated by the Biodiversity Consultancy [76,79].

Observed **legislative shortcomings with regard to biodiversity offsets** include (1) the emphasis on area- and habitat-based assessment methods for biodiversity and ecosystem services instead of functional assessments at landscape or seascape scales; (2) the absence of a clear recognition of and strong requirements for the establishment of avoidance areas before specific projects are considered (in implementation of the mitigation hierarchy); and (3) the fact that many countries focus on the impact assessment stage in their legal requirements, failing to require compensatory mitigation for allowed impacts [80].

81 Law 9.985/2000.

### 3.2.3 Public participation

*"How we decide and who gets to decide often determines what we decide." **[81]***

There is a wide consensus that public participation constitutes a fundamental element of EIAs – or in fact even that EIA is not an EIA without public participation [1,6,82,83]. It is also widely recognized that public participation is not only a goal in itself, but that it is a key to accurate and effective environmental assessments [6,83,84].

Nevertheless, there is no general agreement in the literature on **what constitutes good practice** in relation to public participation in EIAs and there is also no coherent use of terminology such as public participation, involvement and consultation [83,85]. Is it for example sufficient to publish a project proposal subject to an EIA and provide the option to submit comments, or is it necessary to organize a face-to-face meeting where the planned project, predicted impacts and mitigation measures are presented and discussed? But who needs to be invited to the meeting? How far does the provided feedback and input need to be considered in the decision on the project? And does the opportunity to participate end with a decision on EIA approval? Thus, while there is a consensus on the need for public participation, different opinions prevail on what mechanisms fulfil the requirements for public participation as well as who "the public" is. Consequently, it has been observed that there is no common understanding of public participation in EIA practice [83]. Moreover, it is probably safe to assume that it won't be possible to achieve a consensus across the globe and among the different stakeholder groups. At the same time, a continuous discourse and exchange in the literature and in EIA practice will be essential to critically review

the measures in place in different countries and to further enhance public participation and thus EIA processes. After all, the reasons for the diverging opinions are mostly rooted in different understandings about fundamental concepts of what constitutes good governance and thus build upon different cultural and political norms in different regions, countries and cultures – and thus importantly, evolve over time. Much of the criticism voiced with respect to public participation in EIA processes is therefore linked to wider criticism about the political environment and distribution of powers in a country or region, as well as the fact that generally the issue of public participation in policy making is often highly contested and political [18,85].

Since the purpose of this report is to present the wide range of legal approaches to EIA and thus in this section to public participation in EIAs, a broad **definition** is used according to which 'public participation' is "*any form of interaction between government and corporate actors and the public that occurs as part of EIA processes*" [85]. And while this section focuses on formal public participation due to the focus of the report on the legislative framework, the impact that informal public participation can have on EIA outcomes should also be highlighted. An example is the social protest that contributed to the shutdown of a gold mine in Costa Rica after already having been issued an environmental permit, followed by the ban of mineral open-pit mining in the country in 2010 [83].

Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs [1,83]. Obligations related to public participation in environmental decisions-making are either included in environmental framework laws (for example in **China**)[82] and/or specific EIA laws (for example in **Canada**)[83] and/or sectoral laws. Many laws also specifically highlight the importance of public participation in the EIA process or include it specifically as one of the objectives of the law. Only in a very limited number of cases is public participation not a mandatory requirement such as in **Oman**, where the requirement for public participation is only included in non-binding Ministerial guidelines, but nevertheless considered to be an important component of an open and balanced EIA process, and in **Nigeria**, where there is no mentioning of public participation in the Urban and Regional Planning Act [16]. In **Egypt**, public participation is only mandatory for mega projects, otherwise public participation is only dealt with in in technical guidelines.

However, many countries include **exceptions** from the requirement to conduct public participation, or at least the level of participation required varies. Whether public participation is required or not, and if so, at which stage of the EIA process and through which mechanisms, is regularly linked to the categorization of projects at the screening stage, which generally determines the need for and scope of an environmental assessment, including public participation. In many cases public participation is only required when a full EIA needs to be conducted. At the same time, some legislation also stipulates that public interest, and thus a

82 Environmental Protection Law of China, 2016, chapter V Information Disclosure and Public Participation.

83 Environmental Assessment Act of Canada, 2012, according to which the provision for meaningful public participation during an environmental assessment is also an explicit purpose of the Act.

## Key points on public participation

- Public participation constitutes a fundamental element of EIAs;
- It is not only a goal in itself, but it is a key to accurate and effective environmental assessments;
- While there is a consensus on the need for public participation, different opinions prevail on what mechanisms fulfil the requirements for public participation as well as who "the public" is;
- Much of the criticism voiced with respect to public participation in EIA processes is linked to wider criticism about the political environment and distribution of powers in a country or region;
- Due to the fact that public participation is considered an integral part of the EIA process, all countries have enacted some kind of legal measure for public participation in EIAs. Only in a very limited number of cases is public participation not a mandatory requirement. However, many countries include exceptions from the requirement to conduct public participation, or at least the level of participation required varies.

### *Public participation at the different stages of the EIA process*

**Table 5: Overview of section content related to Public Participation in EIA**

| | Public participation | | | | | |
|---|---|---|---|---|---|---|
| Specific issue | Participation at different EIA stages | | | | Definition of the public | Implementation challenges and response measures |
| | Screening | Scoping and impact analysis | Review and decision-making | Follow-up | | |
| Case study countries and illustrative examples* | Canada; Nigeria | Peru; Indonesia; Denmark; Kenya; Oman | Indonesia; Kenya; China; Georgia; Peru; India; Nigeria; Canada | India; Kenya; China; South Africa | China; Kenya; Fiji; Denmark; Costa Rica; Nicaragua; Canada; Peru | Indonesia; Canada; EU; Nigeria; China; Egypt; Pacific |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

need for public participation, can trigger the need to conduct a full EIA.

Many EIA laws require public participation "only" at the assessment and/or review stage, thus when an EIA report has been developed and prior to final decision-making of the competent authority. However, it is argued that public participation is most effective if it takes place at the earliest stage possible, thus ideally at the **screening stage** [13,82]. After all, it is here where it is determined whether an EIA needs to be undertaken

and according to which set of rules – including as pointed out above whether public consultation needs to take place at subsequent stages and by which means, or whether it is not required to do so. Whereas most legislation makes it mandatory to publish information on the project when an application is submitted, only a few explicitly require the public to be involved at this screening stage, and mostly through the opportunity to submit comments.

In **Canada**, for example, the public is invited to submit comments for a period of 20 days after the posting of a notice on a dedicated internet site that the designated project is subject to a screening. Any comments received must be taken into account by the Canadian Environmental Assessment Agency.[84]

In **Nigeria**, it is a legal requirement according to the federal EIA law to provide interested members of the public the opportunity to provide input through comments on the project report, which are then put on display relating to the conclusions and recommendations made. The National Environmental standards and Regulations Enforcement Agency shall take the comments into consideration before issuing the screening decisions.[85] However, despite this provision, it has been observed that by the time the opportunities for public participation occur in practice, agencies and decision makers have often become attached to a particular course of action, thus actual influence on the EIA decision is very limited [54]. Other challenges include the fact that the public is often not able to interpret the EIA reports, a short time period for the submission of comments, as well as in some cases politicization of the environmental assessment process [43].

A number of countries also require public participation at the **scoping stage**[86], or generally state that public participation should take place at all stages of the EIA, as in the case of **Peru**[87]**.** Whereas the legally binding requirements for the EIA process are determined through the categorization of the project at the screening stage, it is at the scoping stage where the specific parameters for the assessment are agreed upon. As outlined in section *3.2.2 Scoping and impact analysis*, this regularly takes place through the establishment of Terms of References (ToR) as well as the technical parameters, this often also includes the specific requirements for public participation. This applies in particular, in cases where the law leaves room for discretion and thus there is a need to determine the specific requirements regarding public participation on a case-by-case basis.

In **Indonesia**, the first opportunity for the public to engage is at the scoping stage, when the proponent is required to announce his business and/or activity plan and thus prior to the preparation of the Terms of References for the assessment. Within a period of 10 working days from the announcement, the public is able to provide comments.[88] Furthermore, public consultation is legally required. For both types of public participation in the Amdal (the Indonesian EIA) process,

84 Article 10.
85 Article 21 (3).

86 E.g. Act on environmental assessment of plans and programs and specific projects (EIA) of Denmark [2016], Paragraph 35 (2); Regulation of Environmental Permits of Indonesia, Article 9 (IV).
87 Regulation of the Environmental Impact Assessment System Act of Peru [2009], Article 68.
88 Regulation of Environmental Permits of Indonesia, Article 9 (IV).

Regulation no. 17 of 2012 on Guidelines for Community Engagement contains detailed provisions. Regarding the public announcement, the Guidelines include requirements for the content of the announcement, the type of media to be used to disseminate the information and guidance on how e.g. to accommodate for local languages. Regarding public consultations, the Regulation stipulates that this may include the organization of different type of events by the proponents, including workshops, seminars, focus groups discussion, public meetings (formal and informal), public hearings, interactive dialogues, and any other methods that can facilitate two- way communication. In addition it is stipulated that during public consultation a key task is the selection of representatives of affected communities who will become members of the Amdal Appraisal (Review) Committee. The chosen community representatives shall conduct regular communication and consultation with the community and convey the aspirations of the people affected by the impact it represents in the Committee meetings.

Regarding the **duration for the public to make comments** after the first announcement of the project in Indonesia it should be highlighted that the 2012 Government Regulations shortened the timeline from 30 days to 10 days and that it is questioned whether a 10-day time duration is enough for the public to learn the project and give useful opinions and suggestions. Also there is no provision concerning the time duration for public consultation, the regulations only stipulate that public consultation must be done before formulating Terms of References [86].

During the scoping stage in **Kenya**, the proponent, in consultation with the National Environmental Management Authority, has to inform affected parties and communities about the project and its anticipated effects and benefits via public notices, radio – in both official and local languages - and to hold **at least three public meetings** with the affected parties and local communities.[89] With respect to the meetings it is specifically required to ensure that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

In **Oman**, where the requirement for public participation is only included in non-binding MECA Guidelines for Obtaining Environmental Permits[90], the Guidelines provide that during the scoping process, the proponent in consultation with the Ministry should determine who is interested in the project, what their concerns are, and how the concerned parties should be involved in the EIA. It is further stipulated that interested parties may include government authorities, municipal organizations, local planning committees, nongovernmental organizations, private sector and the public and that concerns of these parties may result in expanding the scope of the EIA. Lastly, it is also suggested that the proponent should develop and implement an efficient public information program that would continue throughout the duration of the project.

Similar to the approach in Oman, there are a number of countries that include

89 Article 17 of the Regulation.
90 Appendix "B" Guidelines on Environmental Impact Assessment.

guidance on public participation at the screening and/or scoping and assessment stage in non-binding guidelines (e.g. **China**)[91].

At the **review and decision-making stage**, there are a range of different mechanisms adopted for public participation. National legislation which includes a requirement for public participation at the screening or scoping stage, generally requires public participation at this stage as well (e.g. **Indonesia** and **Kenya**). It should be noted, that whether public participation is required at the scoping and assessment or review stage is not always clear. Many laws require public participation prior to the submission of the final report to the authorities, thus public participation is feeding into the process only at the final stages of the assessment. However, the distinction taken in this report, of whether public participation requirements are linked to the scoping or review stage, is whether public participation takes place early on, ideally influencing the general scope of the EIA before the detailed assessments take place (scoping), or only later, when the bulk of the assessment work has already been undertaken, but additional work potentially needs to be undertaken in order to respond to comments/input received by the public (as part of the review stage).

The **mechanisms for public participation** at the review and decision-making stage include:

1. Making the draft report publicly available and providing the opportunity to submit comments;
2. Requiring a summary of the report, including in local language(s)
3. Presenting and discussing the report face-to-face at public meetings or workshops;
4. Establishing a committee composed of different stakeholders and potentially equipped with the power to call on people/ witnesses; and
5. Combinations of 1, 2 and 3 above.

In some countries the project proponent is responsible for ensuring public participation under the oversight of the respective government agency, while in other countries it is the government who is in charge of consulting the public. Regarding the **impact** of the measures implemented, a key factor is to what extent it is ensured that the feedback provided is reflected in the final report put forward for approval or disapproval by the authorities. Respective measures that are increasingly being adopted in national legislation include the requirement to submit protocols of for example public hearings and to justify how far comments have or have not been taken into account.

In **China**, before submitting the EIA report of the construction project for approval, the project owner is required by law to explain the relevant situation to the potentially affected public and solicit public opinions from experts and relevant stakeholders. Further, the submitted report should have an enclosed explanation on whether the solicited opinions have been adopted.

Similar to the situation in **China,** prior to submitting the final EIA report the proponent in **Georgia** is required to arrange a public hearing in a district administrative centre, where the activity is planned to be implemented. First, the proponent has to make an **announcement**. The proponent is

91 Revised General Technical Guidelines (2011).

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. The information can also be requested from the public and local authorities. Within one week after the announcement, the proponent has to submit the preliminary EIA report to the Ministry of Environment and Natural Resources Protection. This is the first point at which the Ministry is formally involved in the EIA process. The period for receiving written comments from the public (and from the Ministry) is 45 days [52].

Between 50 and 60 days after the announcement has been made, the **public hearing** has to be held. The Ministry has the possibility of attending the public hearings as a participant and making comments on the EIA documentation at that stage. The proponent then submits the final EIA report to the Ministry with regard to the comments of the public and other stakeholders. The proponent must also 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 is not mandatory). The law requires that comments made by the public are considered in the EIA report and the protocol forms the basis of making this determination [52].

The implementation of these provisions in **Georgia** is not regarded as effective. The level of public participation is perceived as low, the public is considered to have low capacity and overall only a few instances have been recorded where a preliminary EIA report was changed following commenting [52]. The current reform process aims to address shortcomings of the current legislation and implementation practice, including regarding public participation.

In **Peru**, public participation should be applied to all stages of the EIA process.[92] The sectoral regulations require that mechanisms for participation need to be implemented before the EIA study is submitted. In particular, the project proponent needs to present a plan for public participation for each stage of the EIA process.

Among the mechanisms of citizen participation that can be used by the proponent are: publication of notices, distribution of executive summaries, workshops or briefings, public hearings with the participation of interpreters for local languages. While the project proponent can choose the mechanisms to be used during the development of the report, the competent authorities are responsible for conducting effective public participation at the review stage. This includes facilitating access to information and dissemination of the same as well as ensuring that comments received by the public are considered in the final report. For the latter, the proponent needs to include the outcomes of public participation in the EIA report. With regard to the mandatory public hearings it should be highlighted that at least one of them must be carried

92 Supreme Decree No. 019-2009-MINAM, article 68.

out in the area of the population closest to the area of influence of the project.[93]

In contrast to the previous examples of public participation mechanisms, the following examples of national legislation present cases where the state authorities (or an established review panel) are responsible for public participation following the submission of the draft EIA report by the proponent.

In **India**, public consultation has two components comprising of (a) a **public hearing** at the site or in its close proximity for ascertaining concerns of local affected people; and (b) **submission of comments** from other concerned persons having a plausible stake in the environmental aspects of the project, following the placement of a summary EIA report on a specified government website.

Generally, the various state pollution control boards are responsible for public participation for all projects to which the EIA notification applies. Following information submitted by the proponent (including a summary of the salient features of the project in both English and local languages), the State Pollution Control Boards are first required to give notice in at least two newspapers widely circulated in the region around the project, mentioning the date, time and place of public hearings. In addition to the general requirement to conduct public hearings, public access to executive summaries must be made available at the Pollution Control Board and other Government offices and all available information must also be made available to environmental groups and concerned parties upon request. The hearings must be completed within 60 days of the proponent submitting documentation to the Pollution Control Board. After completion of the public consultation, the applicant shall address all the material environmental concerns expressed during this process, and make appropriate changes in the draft EIA and Environmental Management Plan.[94] In addition, the Board must send minutes of the completed hearing to the competent authorities, which then decides whether to grant an environmental clearance. The Notification 2006 also stipulates that in case it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed, the public consultation does not need to include the public hearing. A very detailed procedure for undertaking public hearings is included in Appendix IV of the Notification 1997.

In **Nigeria**, the degree of public participation in EIA decision-making varies between the different EIA systems. Public participation is enshrined in the legislated EIA procedure of the Federal Ministry of Environment and the system of the Department of Petroleum Resources, but as already mentioned is absent from the Urban and Regional Planning Act [16].

In the following, the requirements included in the federal EIA law will be presented with regard to the review stage.95 As at the screening stage, interested members of the public are given the opportunity to provide input through comments on project reports which are put on display. Further, the comments received may lead to the referral of the project to **mediation or a**

93 Supreme Decree No. 019-2009-MINAM, article 68; Law 27446, article 14.

94 Notification 2006 of India.

95 Section 7 and 24.

**review panel**.[96] In case of a referral of the project to a review panel, the organization of a public hearing is mandatory.[97] Furthermore, the comments concerning those effects received from the public are one of the factors explicitly listed for consideration of a review panel.[98] In case of referral to mediation, the participation of parties "who are directly affected by or have a direct interest in the project" in the mediation is determined by the federal Environmental Protection Council, established by the National Environmental Standards & Regulations Enforcement Agency.[99]

However, as already outlined with respect to public participation at the screening stage in Nigeria, public participation is considered to remain one of the weak links of the EIA process. The lack of appropriate skills and prior experience in public participation on the part of the EIA teams, the public, and the Federal Ministry of Environment is regarded as the critical factor next to the already outlined challenges such as the politicization of the environmental assessment process [43,54].

Regarding the requirements for public participation in **Canada**, a distinction has to be made between the two types of EIA introduced in section *3.1 EIA arrangements*:

1. If the EIA is **conducted by a responsible authority**, the respective authority must generally ensure that the public is provided with an opportunity to participate[100]. If the EIA is conducted by the Canadian Environmental Assessment Agency, as one of the responsible authorities, the public specifically has the opportunity to comment on the draft EIA report prepared by the proponent.[101]
2. If the EIA is **conducted by a review panel**, the holding of public hearings for any "interested party" is a mandatory requirement. This has to be done in a manner that offers any interested parties an opportunity to participate.[102] An 'interested party' in the context of a public hearing by the review panel is any person who is directly affected by the carrying out of the designated project or who has relevant information or expertise, in the opinion of the review panel.[103]

According to the EIA information provided by the Government of Canada, the primary purpose of the public hearings is to allow the review panel to obtain the information required to complete its assessment of the potential environmental effects of the proposed project.[104] Therefore the review panel for example also has the competence to summon witnesses.[105] And the final EIA report prepared by the review panel and submitted to the Minister for the (final) decision-making needs to include a summary of the comments received from the public.[106]

According to non-binding guidelines, the public also has the opportunity to comment on the Terms of References for the review panel. Further, the public needs to be consulted when the Canadian

96 Section 29, Referral by the Council.
97 Section 36 (b).
98 Section 16 (c).
99 Section 32.
100 Article 24.
101 Article 25.
102 Article 43 (c).
103 Article 2 (2).
104 https://www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.htm.
105 Article 45.
106 Article 43 (d)(ii).

Environmental Assessment Agency determines whether the environmental impact statement prepared by the project proponent contains sufficient information to allow the review panel to conduct its sufficiency review. The review panel also needs to provide the opportunity for the public to provide comments regarding the sufficiency of the information provided in the finalized environmental impact statement of the proponent, before initiating a public hearing.[107]

Importantly, the responsible authorities are also obliged to establish **a participant funding program** to facilitate the participation of the public in the environmental assessment of designated projects, including with regards to the ones referred to a review panel.[108]

At the **follow-up stage**, thus following impact assessment and project approval, only a very limited number of national laws include specific requirements for public participation. For example, in the **Mekong region** it is observed that current regulations and (non-binding) guidelines for public consultation and participation in the EIA process generally end when the project is approved, thus there is no public involvement in implementation [87]. At the same time this issue is receiving increased attention in the literature due to the acknowledged key importance of the follow-up stage. Specifically with regard to the involvement of indigenous peoples, the criticism is made that even where opportunities for their involvement in the EIA process exist, these are often limited to processes designed to determine whether a project should proceed, and do not continue into the operational phase of resource development [88].

One mechanism to provide the opportunity for public stakeholders to engage in follow-up measures is to make compliance or monitoring reports submitted by the project owner publicly available. This is for example the case in India.109 [89] And in **Kenya,** each member of the public has the right to petition the National Environmental Management Authority to cause an audit to be carried out on any project, after showing reasonable cause in writing.110 In addition, any complaints against the Authority or any person, including in relation to EIAs, will be investigated by the Public Complaints Committee as an autonomous environmental ombudsman. Similarly in **China,** citizens, legal persons and other organizations are entitled to report and complain in relation to environmental pollution and ecologically damaging activities and thus to support monitoring of EIA outcomes. In addition, organisations that meet specified conditions may file a public interest lawsuit to the people's courts [49].

Detailed provisions for active participation during the follow-up phase were adopted in **South Africa** in 2014, where follow-up measures were generally significantly strengthened. In addition to the requirement to make all audit reports publicly available, interested and affected parties also have the right to participate in finding relevant solutions. More specifically, in case the holder of an environmental permit is required to submit recommendations to amend the

107 https://www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html.
108 Article 57 and 58.
109 2006 Notification, Article 10 (ii).
110 Article 39.

**Key points on public participation at the different stages of the EIA process**

- Many EIA laws require public participation "only" at the assessment and/or review stage, thus when an EIA report has been developed, and prior to (final) decision-making of the competent authority. However, it is argued that public participation is most effective if it takes place at the **earliest stage possible**, thus ideally at the screening stage;
- If required, public participation **at the screening stage** regularly consists of the opportunity to provide comments following public announcement of the project;
- Mechanisms for public consultation at the **scoping and review stage** include public hearings, face-to-face meetings, the establishment of a review committee, the submission of comments and public information programs;
- At the **follow-up stage**, thus following impact assessment and project approval, only a very limited number of national laws include specific requirements for public participation. Public participation mechanisms at the follow-up stage include compliance assurance monitoring, environmental inspections, bringing non-compliance to the notice of regulators (complaint process) or judiciary (law suit) and dispute settlement;
- The **responsibility** to conduct public participation often rests with the project proponent, but in some cases also the public authorities are charged with the task.

Environmental Management Plan or closure plan in order to rectify identified shortcomings in an environmental audit report, such recommendations must have been made subject to a public participation process. The process must be agreed to by the competent authority and found appropriate in order to bring the proposed amendments to the Environmental Management Plan and/or closure plan to the attention of "potential and registered interested and affected parties, including organs of state which have jurisdictions in respect of an aspect of the relevant activity and the competent authority" [90].[111]

In summary, public participation mechanisms at the follow-up stage include compliance assurance monitoring, environmental inspections, bringing non-compliance to the notice of regulators (complaint process) or judiciary (law suit) and dispute settlement [89].

### *Who is the public?*

The wide range of different approaches with regard to the steps in an EIA process highlight an additional key question regarding public participation, and that is, who exactly is **the public** to be consulted or engaged in the EIA process? Clarity on who the public is, is considered crucial in order to determine the benefits of public participation as well as to inform the design of effective measures [83].

As regards the definition of the public in national EIA legislation, many laws distinguish between the different types of mechanisms for public participation. Whereas the opportunity to provide comment on a project announcement or a draft EIA report is generally provided to

111 S34 (5).

the **general public per se**, the opportunity to participate in face-to-face meetings where the project and/or draft EIA report are presented and discussed are often restricted to **those (directly) affected by the project**. In addition to those affected, several laws also aim at involving other interested parties, such as environmental groups.

In **China,** the 2014 Environmental Protection Law includes a chapter on "Information Disclosure and Public Participation", which introduced the commitment to make public the full text of the EIA report of the construction project upon receipt by the competent department. At the same time, the opportunity to participate in hearings or to make oral or written submissions to the Pollution Control Boards is restricted to local residents, environmental groups and others located at the project site likely to be affected. Further, the law introduced the requirement to file a public interest lawsuit.

In **Kenya,** 'affected parties and local communities' have to be consulted by the proponent at the scoping stage, whereas the opportunity to provide comments or to participate in public hearings at the review stage (if deemed necessary by the National Environmental Management Authority) are available to the public generally. Nevertheless, public hearing shall be conducted at a venue convenient and accessible to people who are likely to be affected by the project.[112] And also at the follow-up stage each member of the public has the opportunity to petition the Authority to cause an audit.[113]

In **Fiji** it is similar to **Kenya**. Affected parties, local communities and customary resource owners are often involved with projects from an early stage of the EIA process. Communities are again involved as part of the public consultation process required under the law. The public also has the opportunity to appeal decisions made.

In **Denmark,** the public is defined as a) one or more natural or legal persons (companies, etc.) directly or indirectly affected or likely to be affected by the plan, program or project; b) associations and organizations that have the protection of the landscape, cultural heritage, natural or environmental interests as objective, if the association or organization has statutes or regulations documenting this purpose, and the association or organization represents at least 100 members.[114]

Whereas some regard it as generally impossible to consult everybody in the EIA process who might be considered to constitute the public [1], others argue that everyone interested in a given project/EIA procedure should be invited to participate because environmental decisions affect virtually everybody's quality of life. [83] However, it is acknowledged, that allowing everybody to participate, while at the same time potentially not being able to meet everybody's expectations, including due to capacity constraints, may lead to frustration and, eventually, decrease people's willingness to participate in EIAs. For example, it has been observed that the fact that comments received from the public were often not taken into account by the EIA agency in **Costa Rica** and **Nicaragua** has led people to refrain from formally participating in EIAs and to make

112 Articles 21 and 22.
113 Article 39.

114 Paragraph 5 (1).

use of informal forms of participation instead (such as protest marches, boycotts, etc.) [83].

In this context, recent changes to **Canada's** environmental assessment law can be highlighted, which restricted some public participation requirements to those who are either "directly affected" or have "relevant information". Critics have argued that for environmental assessment processes to be effective and legitimate, they must incorporate a combination of values and interests that are representative of the broader public. Furthermore, it is concluded that restricting participation to the "directly affected" is far too narrow a test for processes like environmental assessment that are designed to determine the public interest. Lastly, it is also generally observed that the 2012 revision moved in the opposite direction from the general tenor in the literature, that with respect to public participation mechanisms, generally, more should be done not less [6].

Following a change in government, as well as the results of the 2014 Fall Report of the Commissioner of the Environment and Sustainable Development, which also identified some gaps and issues in some of the practices for public and Aboriginal participation[115], the Government of **Canada** is currently undertaking a review of environmental and regulatory processes, including federal environmental assessment processes. Indigenous issues and participation feature prominently among the assessed revision options.[116]

Regarding groups that have been historically marginalized in many countries, it should be noted that the rights of **indigenous peoples** to be involved in environmental projects has gained increasing recognition at the international policy level [88]. The 2007 UN Declaration on the Rights of Indigenous Peoples The Declaration requires States to consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (article 19), including undertaking projects that may affect their land, territory or resources including mining and other utilization or exploitation of resources (article 32). Other key international instruments include the Akwé: Kon Guidelines as voluntary guidelines for the conduct of cultural, environmental and social impact assessments adopted by the Conference of the Party to the Convention on Biological Diversity in 2004 and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Indigenous consultation may also be driven by other national constitutional requirements, for example in **Canada, Australia** and **New Zealand** [91].

However, only a limited number of countries' national EIA legislation include specific provisions related to indigenous peoples' participation. In **Peru**, for example, while the EIA law includes a provision to promote the participation of peasant and native communities (under the ILO Convention 169)[117], there is also a specific law dealing with the right of indigenous

115 http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201410_04_e_39851.html#hd3f.

116 http://www.canadianeraperspectives.com/2017/04/expert-panel-recommends-significant-changes-to-canadas-environmental-assessment-regime-2/.

117 Supreme Decree No. 019-2009-MINAM, article 71.

peoples to prior consultation regarding legislative or administrative measures that might affect them.[118] Importantly, the law does not grant the right to veto. The approval of the Prior Consultation law was a significant turning point in the Peruvian Government's engagement with indigenous communities.

In addition, and similarly to other marginalized groups, obstacles in participation also arise from limited capacity of indigenous peoples to participate at the local level, as well as the fact that the extent to which they do participate is often the result of conflict caused by an initial failure to involve them. Another challenge, as already outlined, is the fact that their involvement is often limited to procedural steps prior to EIA report or project approval, and does not continue in the operational phase of the project [88].

However, most importantly in relation to the participation of indigenous peoples there are two key structural challenges related to the EIA system per se. Firstly, there is a clear tension between the laws that leave the responsibility to undertake the EIAs with private actors and facilitate participation of affected communities, and the laws that acknowledge the communities right to participate [92]. Secondly, indigenous people are frequently alienated by EIA processes due to their highly formal nature, the dominance of technical discourse as well as the application of short time frames that are inappropriate in the context of indigenous decision-making [88].

As a result the need has been highlighted to recognize, establish or improve the legal standing of indigenous people in the national EIA framework or to explore new EIA systems characterized by shared involvement and responsibility or (at least

**Key points on "the public"**

- With regards to the definition of the public, many EIA laws distinguish between the different types of mechanisms for public participation; e.g. only those (directly) affected by the project may attend face-to-face meetings;
- Critics have argued that for environmental assessment processes to be effective and legitimate, they must incorporate a combination of values and interests that are representative of the broader public;
- In contrast to the situation in the United States or many European countries, environmental NGOs seldom participate in the EIA process;
- Only a limited number of countries' national EIA legislation include specific provisions related to the participation of indigenous peoples and the need has been highlighted to (1) recognize, establish or improve their legal standing in the national EIA framework or to (2) explore new EIA systems characterized by shared involvement and responsibility or (at least in part) local empowerment and control.

118 Prior Consultation Law of Peru 29785 (2011).

in part) local empowerment and control, where control over the scope, form and content of an EIA is given to the local community(ies) and it is exercised usually through community representatives [1]. For more information on this with regard to the follow-up stage, please view section *3.2.5 Follow-up and adaptive management.*

Lastly, and not only with regard to indigenous peoples, but local communities more broadly, it should be noted that **climate change** has been identified as a necessary point of discussion in stakeholder consultations. This includes the consultation of stakeholders who can provide their relevant local knowledge as input as well as those that need to be educated on climate change before they can engage in the conversation about the likely impact of the planned project, specifically in regards to the types of adaptation measures needed [63].

### *Implementation challenges*

The *legal right* to participate in the EIA process is only one side of the coin. The other side being the *capacity* of the public to get involved. This is linked to issues such as education and awareness, about the project itself as well as the EIA process, the availability of resources, including time, and importantly also whether a culture of participation exists or not, as well as whether a sense of usefulness of participation exists or not. A relevant measure to address some of these challenges is the above mentioned **participant funding program** established by **Canada**.

Regarding the legal requirements, critical factors along with the type of mechanisms available, are the definition of the public who can participate, the responsiveness to feedback provided, the **timelines** provided in the legislation, and the participation of indigenous people in the EIA process. This can also be illustrated with the example of the **European Union**. Whereas the recent revision of the EIA Directive of the European Union is generally perceived to have missed an important opportunity to strengthen public participation provisions in Member States, the revision also introduced a new minimum time frame for public consultation of 30 days, which will extend the time for public consultation in at least six Members States [5]. In **Nigeria** the 21-day display of the EIA report is not regarded as adequate for anyone to make incisive comments especially for complex projects. Another major drawback which has been highlighted is that the general public in the country is comparatively indifferent and poorly informed about the potential negative environmental effects, and in particular the long-term impact. Thus limitations on public involvement include for example, language barriers and the inability to read and/or interpret the provided project information – both issues which can be partially alleviated by public hearings where explanations can be provided face-to-face [43].

Challenges in implementing public participation provisions related to the prevailing **culture** in a country or region can be illustrated with the example of **China**. The reasons for the issue of non-participation by the public in EIAs have been identified as including political and cultural restraints as well as lack of capacity, poor governance, inappropriate participatory design and lack of information [93]. Furthermore, and in contrast to the situation in the United States or many European countries, **non-governmental environmental organizations** seldom participate in the

**Key points on implementation challenges of public participation**

- Regarding the legal requirements, critical factors along with the type of mechanisms available, are the definition of the public who can participate, the responsiveness to feedback provided, the timelines provided in the legislation, and the participation of indigenous people in the EIA process;
- A sufficient time duration for the public to make comments is crucial in order for the public to learn about the project and give useful input;
- The reasons for the issue of non-participation by the public in EIAs in some cases have been identified as including political and cultural restraints as well as lack of capacity, poor governance, inappropriate participatory design and lack of information;
- A key factor for the impact of the measures implemented is to what extent it is ensured that the feedback provided is reflected in the final report put forward for approval or disapproval by the authorities.

EIA process. Instead, it has been observed that citizens have mostly been participating on an individual basis [94]. In that regard it will be interesting to observe how far the recent 2014 revision of the Environmental Protection Law, which includes a new chapter dedicated to the role of civil society in environmental protection, will shape future public participation in EIA processes in the country.

Observed challenges with respect to public participation in **Egypt** include the fact that public consultations are often ignored or undertaken only for certain donor-funded projects [95] and that the system is ineffective in practice as environmental impact statements are often considered confidential and not fully disclosed to the public, instead only a summary of the study is shared [14].

Experience in the **Pacific** is lack of understanding of technical terms used in the EIA report. This is also a challenge during public consultation.

### 3.2.4 Review and (final) decision-making

*Review of the EIA report and process*

The **review stage** of the EIA process, i.e. the review of the EIA report prior to the decision on whether a project can go ahead taking environmental considerations into account, is a key element of the EIA process. The objective is to verify whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. This does not only include information on the identified impacts on the environment, but for example, also whether the project proponent has the capacity to implement the suggested mitigation measures and avoid adverse impacts [1,14,96].

In most EIA systems, EIA review is a formal procedure and is either undertaken by:

1. Environmental agencies
2. Sectoral agencies that are in charge of issuing the final permit or licence

**Table 6: Overview of section content related to EIA review and (final) decision-making**

| | Review and (final) decision-making | | | | |
|---|---|---|---|---|---|
| Specific issue | Review process | Substantive guidance for the final decision | Review period | Validity of EIA licence | Right to appeal |
| Case study countries and illustrative examples* | Lebanon; Kazakhstan; Cameroon; Vanuatu; Peru; Kenya | EU; Oman; Georgia; Tanzania | EU; Panama; India; Lebanon; Peru | Vanuatu; Lebanon; Denmark; Kazakhstan; Kenya | Bhutan; New Zealand; Panama; Peru; Egypt, Tanzania; Denmark |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

to start with implementation of the proposed project

3. An intergovernmental body or committee
4. An independent body, generally established by environmental agencies

In addition, and as already dealt with in section *3.2.3 Public participation*, comments from the public on the EIA report are an integral part of the review process in many countries [1]. Also, in the **Pacific**, governments sometimes seek assistance from EIA consultants or regional organisations (e.g. University of the South Pacific, Secretariat of the Pacific Regional Environment Programme) to support their review of EIA reports.

According to most national laws, the review is guided by **review criteria or checklists**, often also included in annexes to the law or in non-binding implementation guidelines. These may be related to the format of the report, for example the requirement to include a non-technical executive summary, or the content of the report, e.g. which issues need to have been assessed (in reflection of the assessment criteria discussed in section *3.2.2 Scoping and impact analysis*). However, not all laws include provisions on review criteria. In cases where Terms of References (ToR) were developed at the scoping stage, EIA reports are assessed against these, either complementary to the legal provisions or as the only point of reference. A key issue is the extent to which EIAs are reviewed for procedural adherence only or whether there is a **substantive review**.

In the following a number of legal approaches with regard to the review stage of the EIA process will be presented.

In **Lebanon**, and following public consultation, the Ministry of Environment internally reviews the final report prior to approval or disapproval. The Ministry studies the reports through a technical committee formed by the Department of Environmental Technology. The technical committee member's profiles depend on the nature of the project and would include representatives of concerned departments at the Ministry.[119] The committee members are also provided with **guidelines for evaluation** of the EIA reports. The result of the review by the technical committee is communicated to the project proponent

119 2275/2009.

by the Minister as a formal decision (EIA approval or disapproval).[120] The final decision on the EIA report is communicated to the public via posting on a public board by the concerned Municipality for 15 days, exempt of confidential information related to Intellectual Property Rights, Industrial Property Rights and budgeting.[121]

The project proponent has the opportunity to object to the decisions. In this case a second review is undertaken by the technical committee, regularly following the submission of additional information by the project proponent.[122] The competent sectoral government agency for the issuance of the development permit also has the option to object the decision of the Ministry of Environment. In that case the project is presented to the Council of Ministers for study and final decision on EIA approval or disapproval.[123] This means that the decision of the Ministry of Environment can be overturned by other sectors for political reasons.

In **Kazakhstan**, the EIA report is reviewed by the Committee of Environmental Regulation and Control of the Ministry of Energy. The regulations provide for the involvement of external experts through the establishment of expert commissions[124], however, in practice this is not being implemented. In addition, the law sets out the participation rights for the public concerned at the stage of the state environmental review, but it is interpreted that this provision is complied with through the submission of the protocol of the public hearing conducted by the developer to the authorities. There are no specific provisions stipulating which parameters an EIA needs to be assessed against and no Terms of Reference are developed earlier on in the process. Instead, the **state environmental review** assesses the EIA documentation against the general requirements of: 1. Substantiation of the proposed activities; 2. Whether the EIA was complete and correct; 3. Efficiency, completeness and sufficiency of the proposed measures on environmental protection; 4. Compliance with requirements of laws, standards and rules; and 5. Compliance with requirements on conducting public hearings if they are required. As is common with state environmental reviews (SER), widely implemented in former socialist countries of the USSR, the criteria indicate a focus on compliance with technical norms and standards, rather than on the environmental impacts of the project [97].

In **Cameroon**, once the Environmental and Social Impact Assessment (ESIA) has been submitted to the Ministry of Environment, Nature Protection and Sustainable Development, the Ministry can undertake **on-site visits** to qualitatively verify the information included in the assessments and to obtain feedback by the concerned public.[125] The outcomes are transmitted in a report to the **Inter-ministerial Committee**. The Committee, led by the Ministry, consists of representatives from the following ministries: environment; agriculture; mining and industry; small and medium enterprises; livestock and fisheries; planning; water and energy; scientific research; tourism; public works; transport; urban development; financial affairs; public health; defence; and forests.[126]

120 Art. 1(5), 1/229.
121 Art. 8(2), 10 and 11-EIA decree.
122 Art. 14-EIA Decree 8633; Art. 2,3 – Decision No. 1/262.
123 Art. 14-2/EIA decree.
124 Rules on conducting the state environmental review adopted by the Order of the Minister of Energy of 16 February 2015 No. 100.
125 Decree 2013/0171/PM, article 18.
126 Decree 2006/1577/PM, article 3.

The review is done against the Terms of Reference developed at the scoping stage. In addition, criteria used for the review are described in the non-binding guidelines for carrying out and evaluating EIAs.

Despite some very favourable provisions, this procedure has been criticized as there is only limited use of external expertise in the review process in Cameroon, limited funds to conduct on-site visits, the competences of reviewers are not outlined, and there is no legal requirement to make the outcome of the review public [98].

Similarly to the EIA system in Cameroon, the EIA report in **Vanuatu** is also reviewed by a committee established and chaired by the Director of the Environment Department against the project's Terms of Reference. However, as well as representatives from the Government, the 10 people of each committee also include representatives from the relevant industry, non-governmental organizations, local communities and academics as considered appropriate by the Director.[127] Sometimes, the Secretariat of the Pacific Regional Environment Programme (SPREP) also assists in the review of EIA reports.

In **Peru**, review by the public and the **competent sectoral authorities** takes place in parallel. Once the review is finalised, the proponent needs to address the comments that were submitted by both. As for the competent authorities, the review includes the assessment of whether the EIA complies with the Terms of Reference and whether the identified potential negative environmental impacts resulting from the project could have unacceptable effects. While studies of sectoral projects are approved by the relevant competent authorities, MINAM has the power to randomly review the EIAs of such approved projects in order to improve the functioning of the EIA system[128]. After completing the review and evaluation of the EIA, the competent authority must

**Key points on review of the EIA report and process**

- Serves the function of verifying whether the information provided is sufficient and adequately presented so as to form a sound basis for decision-making. This for example also includes whether the project proponent has the capacity to implement the suggested mitigation measures and avoid adverse impacts;
- Not all national EIA laws include provisions on review criteria. In cases where Terms of References (ToR) were developed at the scoping stage, EIA reports are assessed against these, either complementary to the legal provisions or as the only point of reference;
- According to most national laws, the review is guided by review criteria or checklists, often also included in annexes to the law or in non-binding implementation guidelines. These may be related to the EIA process, the format of the report, or the content of the report (substantive review).

127 CAP 283, Article 22, Order 175, Article 12 and 13.
128 Supreme Decree No. 019- 2009-MINAM, article 7; Resolución Ministerial N° 239-2010-MINAM.

issue the resolution accompanied by a report that supports the resolved, which is an integral part of it and is made publicly available.[129]

In **Kenya,** review of the EIA report is undertaken by the **lead (sectoral) agencies** against the Terms of Reference stipulated at the scoping stage, and the public – through consultation or public hearing. In order to facilitate the final decision-making by the National Environmental Management Authority, the Authority may also establish a Technical Advisory Committee to advise on the quality and content of the EIA report.

Regarding the consultation of experts in committees or other review bodies, suggestions have been made to make the inclusion of independent **climate change** experts to peer-review the EIA report a mandatory requirement [63].

### *(Final) Decision-making*

Regarding the (**final**) **decision-making** on the EIA process and report, several EIA laws include specific guidance on what to take into account when making the final decision, such as comments received from the public and/or other government departments. On enabling **public access** to the final decision, several EIA laws also include provisions related to the content of the decision. This in particular includes requirements to include Environmental Management and Monitoring Plans and conditions as part of the final decisions. Making these publicly available will support follow-up measures – by the public as well as by other agencies and stakeholders involved.

And while the EIA systems in most countries are self-regulatory in that the responsible authority retains the discretion to move ahead with projects notwithstanding the results of the EIA and public participation, some laws also provide substantive guidance for the final decision. A number of legal approaches illustrating the range of approaches are presented in the following.

The recently revised Directive on EIAs of the **European Union** requires that the decision to grant development consent by Member States must incorporate a **reasoned conclusion** on the significant effects on the environment, taking into account the EIA and consultation with the public and relevant authorities.[130] Further, it is not only required that the public and specified authorities are 'promptly' informed of the final decision, but also that they are informed of how the results obtained from the EIA and consultation have been incorporated or addressed.[131]

In **Oman** the EIA law provides **guidance on the substance** of the EIA decision and thus the decision to issue an environmental permit or not. It is stipulated that the EIA study needs to confirm that the benefits of the source of area of work surpass the potential damage to the environment, thus, that the project design needs to be adjusted if that is not the case. Furthermore, it is stated that no permit shall be issued to practice any activity, which may cause inevitable or incurable damage to the environment.[132]

In **Georgia,** a development permit can only be issued on the basis of a positive conclusion on the ecological

129 Supreme Decree No. 019-2009-MINAM, article 54.

130 Article 8.
131 Article 9(1)(b).
132 Article 16.

expertise provided by the expert (review) commission, established by the Ministry of Environment and Natural Resource Protection. The environmental impact permit comes along with permitting conditions. The law on Licenses and Permits stipulates that the conditions and findings of the conclusion made by the state ecological expertise present the **permitting conditions**. 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 plans for each stage of the activity [52].

In **Tanzania**, the law provides specific guidance for when the Minister of Environment shall disapprove and recommend to the licencing authority that the project should not be licenced or, where the licence has been issued, be cancelled. This is the case if: (1) The project or undertaking is likely to cause significant adverse impacts on the environment; (2) There are no alternatives which can mitigate or remedy the significant likely harm to the environment; (3) The proponent has failed to abide with the mitigation measures stated in the Environmental Impact Statement or conditions issued by the Minister; or (4) There are compelling social, economic, health, cultural, or religious reasons which may or are likely to lead to irreversible impacts on the society.[133]

**Key points on final decision-making on the EIA report**

- Several national EIA laws include guidance on the final decision-making;
- Legal provisions address (1) what to take into account when making the decision, such as comments received from the public and/or other government departments; (2) enabling public access to the final decision; and (3) the content of the decision; this in particular includes requirements to include Environmental Management and Monitoring Plans and conditions as part of the final decisions;
- Ensuring public access to the decision supports follow-up measures, including by other government entities;
- While the EIA systems in most countries are self-regulatory in that the responsible authority retains the discretion to move ahead with projects notwithstanding the results of the EIA and public participation, some laws also provide substantive guidance for the final decision.

### *Duration of the review and validity of the EIA approval*

In order to provide planning security for the developer and reduce unjustified delay in the implementation of the planned project, several laws include provisions on the **maximum duration of the review**. Many laws also include provisions on the **validity of an issued EIA approval/ Environmental licence**, in order to take

133 Article 93.

into account the fact that environmental circumstances are constantly changing.

According to the new **EU** Directive, Member States shall ensure that the competent authority makes its determination on EIA approval or disapproval as soon as possible and within a period of time not exceeding 90 days from the date of submission of the final EIA report. In exceptional cases, for instance relating to the nature, complexity, location or size of the project, the competent authority may extend that deadline. In that event, the competent authority shall inform the developer in writing of the reasons justifying the extension. In contrast, the maximum review period in **Panama** is only 40 days, in **India** and **Lebanon** 60 days and in **Peru** 70 days.

Regarding the timeline for the validity of EIA approvals, national approaches vary considerably. Whereas EIA approval in **Vanuatu** is generally valid fora duration of 12 months[134], the validity of the same in **Lebanon** is 2 years, 3 years in **Denmark**[135] and up to 10 years in **Kazakhstan**.[136]

While the validity of the EIA licence is only of relevance until implementation has (substantively) commenced, many laws also include the requirement to submit a new EIA after EIA approval has been obtained under certain circumstances, or limit the time period in general under which a project can be executed under a "one-off" EIA approval. In **Kenya**, for example, it is mandatory to submit a new EIA report after the EIA licence has been issued, in case (a) there is a substantial change or modification in the project or in the manner in which the project is being operated; (b) the project poses environmental threat which could not be reasonably foreseen at the time of the study, evaluation or review; or (c) it is established that the information or data given by the proponent in support of his application for an EIA licence was false, inaccurate or

**Key points on the duration of the review and the validity of the EIA approval**

- Several laws include provisions on the maximum duration of the review; however, the length varies considerably and at the lower end is often criticised for not allowing sufficient time for (meaningful) input; in particular if approval is assumed to have been provided after the time period has passed without any feedback.
- Many laws also include provisions on the validity of an issued EIA approval/ environmental licence, in order to take into account the fact that environmental circumstances are constantly changing. The issue is closely linked to follow-up measures undertaken during the post-decision phase.
- Most countries provide the opportunity to appeal against the EIA-based decision, often as part of domestic administrative law.

134 Order 175, Article 16.
135 Chapter 16, Paragraph 39.
136 Article 51(6) in conjunction with Article 76(1) of the Environmental Code.

intended to mislead[137]. The whole issue is closely related to the next stage of the EIA process, termed follow-up, and will thus be further dealt with in section

*Follow-up and adaptive management.*

Finally, it should be highlighted that most countries provide the opportunity to appeal against the EIA-based decision, often as part of domestic administrative law in implementation of Principle 10 of the Rio Convention and the Aarhus Convention. This is, for example, the case in **Bhutan**, **New Zealand**, **Panama**[138], **Peru**[139], **Egypt** and **Tanzania**[140]. Mostly, however only the project proponent has the right to appeal. In some cases, the person negatively affected has this right, and in a few cases everyone with a legal interest in the outcome and/or specific national associations and organization. With respect to the latter, in **Denmark** this applies to any association or organisation "*whose purpose is the protection of nature and the environment or the safeguarding of essential user interests in land use, and has statues or regulations, documenting this purpose and represents at least 100 members*".[141]

### 3.2.5 Follow-up and adaptive management

The EIA process does not stop with an EIA approval decision or the development consent granted by the competent authority. Instead, the process can be divided into a pre- and post-decision phase [99]. Whereas the pre-decision phase focuses on predicting environmental impacts with the aim of mitigating for significant impacts, the follow-up phase aims to ensure that the **actual impacts** of the project – whether predicted or not – are mitigated where negative, and enhanced where positive, and that the mitigation measures that were a condition of approving the EIA are complied with. Follow-up measures are thus the key requirement for an EIA to not be linear, i.e. terminating with the decision to go ahead with a project, but dynamic, thus constituting the missing link between EIAs and effective project implementation and management [4,5,88,99,100].

**Table 7: Overview of section content related to EIA follow-up and adaptive management**

| | Follow-up and adaptive management | | | |
|---|---|---|---|---|
| Specific issue | Compliance reports and site inspections | Compliance and monitoring powers | Environmental audit reports | Measures to strengthen implementation |
| Case study countries and illustrative examples* | India; Lebanon | Vanuatu; China | South Africa | Mongolia; Lebanon |

**Please note that this list is not exhaustive, but instead flags examples from the case study countriesand illustrative examples featured in the report*

137 Article 64 EMCA, 28 Regulations.
138 Executive Decree 123 (2009), articles 54-55.
139 Supreme Decree No. 019-2009-MINAM, article 59.
140 EIA and Audit Regulation of Tanzania, Article 61.
141 Act on environmental assessment of plans and programs and specific projects (EIA) of Denmark, 2016, Paragraph 50.

The generic term of EIA follow-up measures is widely used to include a number of activities and can be described in the following way [99]:

- **Monitoring:** the collection of data and comparison with standards, predictions or expectations;
- **Evaluation:** the appraisal of the conformance with standards, terms and conditions (especially mitigation measures) in the EIA licence or approval, predictions or expectations as well as the environmental performance of the activity;
- **Management:** making decisions and taking appropriate action in response to issues arising from monitoring and evaluation activities (including enforcement measures by the authorities); and
- **Communication:** informing the stakeholders as well as the general public about the results of EIA follow-up.

Monitoring can be further broken down into compliance, mitigation and impact monitoring. [1]

Regarding the rationale of EIA follow-up, and while acknowledging that a thorough EIA in the pre-decision phase is always a necessary pre-requisite to inform project planning, it is further highlighted in the literature that the assessment during the pre-decision phase is not in and of itself a sufficient condition for sound planning, decision-making and management of projects, since there will always be **uncertainties and gaps in knowledge** (i.e. future environment conditions and synergies in a changing climate) [99]. This is also supported by practical experience which suggests that advances in EIA have been greater in respect of the development of impact management and mitigation approaches than in the development of predictive techniques and methods [100]. Moreover, follow-up measures are not only of huge importance for a specific EIA process, but also support the improvement of EIA methodology more generally [4].

Despite this, most national EIA systems as well as EIA practice have a clear focus on the pre-decision phase, including **overemphasis on the EIA report itself**, with the perception that it is an end product instead of a legally binding commitment. As well as the level of detail of the provisions and the structure of the law, this is for example, also reflected in the fact that panels, committees or commissions established as part of EIA processes are regularly suspended once a decision is made to approve a project and that follow-up regularly doesn't have a central role in institutional mandates. In addition, a challenge is often that **permitting conditions** are not made available to all relevant agencies [47]. A limited number of EIA systems also do not include any legal requirements related to follow-up measures (e.g. in **Kazakhstan**). As a result, it is widely perceived that there is a considerable implementation gap or even lack of knowledge about impacts of projects after development consent has been granted [51,88]. This is of particular concern given the recorded and projected changes in the biosphere driven by **climate change**.

With regard to ensuring follow-up of a project's Environmental Management Plan and approval conditions with respect to climate change, it has for example been suggested to make use of a watchdog group, on an independent monitoring agency to enforce responsibility of the project proponent and/or the (local)

governing authority. This could include the verification of compliance of proponent performance with other national climate change related standards or policies [63].

The reasons for the observations on a **focus on the pre-decision phase** include the tendency of regulators and politicians to focus on 'new' projects, and on project approval in order to generate the economic growth regarded as essential to electoral survival, and to consequently under-resource follow-up measures. The focus on the pre-decision phase reflects these **powerful political imperatives** that are generally intrinsic to regulatory regimes. Furthermore, the concept of EIAs, if applied properly and enshrined in legally binding provisions, can help to address these shortcomings because of its focus on the whole project life cycle [88].

At the same time, and also due to the widely acknowledged implementation gap of EIAs in many jurisdictions142, there has been increased attention on strengthening follow-up measures in the academic literature, and in EIA practice as well as in legal frameworks [101]. Recent legislative reforms that put an emphasis on strengthening EIA follow-up measures were for example undertaken in **South Africa** (2014) and **China** (2014).

The basis for the post-decision phase is frequently the **Environmental Management (and Monitoring) Plan (EMP),** agreed upon in the pre-decision phase. The Environmental Management Plan is implemented throughout the project life cycle and it will usually be made an integral part of the EIA decision, generally through the establishment of terms and conditions [1,51]. Thereby, the Environmental Management Plan is not regarded as a static document, instead the project owners should regularly be required to make ongoing adjustments in their project in order to minimize unpredicted environmental impacts (an approach often referred to as "adaptive management") [4]. In order to achieve this, national legislation that includes follow-up measures generally includes minimum requirements for monitoring as well as enforcement measures. Enforcement measures include that the validity of environmental approvals ceases in case of non-compliance with permit conditions as well as a penalty regime.

As can be seen in the following country examples, while the specific legal requirements vary considerably, many of the associated implementation challenges are of a similar nature and are mostly related to the lack of capacity, including institutional capacity.

In **India**, the law includes provisions on **post-environmental clearance monitoring**. Introduced in 2006, the project proponents are bound to submit biannual compliance reports to the concerned regulatory authority. The Terms of Reference for the post environmental clearance monitoring are included in the environmental clearance **conditions**. In addition, government officials visit the industrial units every six months, or each year, to verify the compliance status and report to the Ministry of Environment and Forests. The same accounts for projects under the responsibility of the State Pollution Control Boards [89]. Provisions

142 See upcoming UN Environment Global Report on Environmental Rule of Law.

on **non-compliance** are included in India's Environmental Protection Act.[143]

At the same time, a progressive measure is the fact that the responsible authority has the power to set up an **environmental monitoring committee** for an approved project to assist and guide the proponent in the management of the monitoring program where the scale of likely impacts, or the level of public concern, warrant such action [64].

Similarly, the project proponent in **Lebanon** is required to submit follow-up reports to the Ministry of Environment for review, in accordance with the **Environmental Mitigation and Monitoring Plan.** Further, the Ministry is also required to conduct site visits to check if the Environmental Management Plan is being implemented.[144] The Law does not include any details regarding the frequency of submitting monitoring reports or the frequency of site visits by the authorities. In case of any non-compliance with the submitted Environmental Management Plan, the project proponents shall be subject to a penalty.[145] This has been criticized, as even if the EIA decree states that the project proponent is responsible for any unanticipated impact, no clear mechanism for determining this impact and assessing the damage is provided. Furthermore, it is unclear what the roles of licencing agencies are with regard to monitoring the implementation of Environmental Monitoring Plans, since according to the law they also receive a copy of the plan [51]. However, at a minimum the licencing agencies incorporate environmental aspects in their checklists for inspection.

While the EIA law in **Vanuatu** does not provide minimum requirements for monitoring obligations by the project owner or implementer (instead these are usually determined through the approval conditions including any Environmental Management Plan) the law stipulates fairly detailed **monitoring powers of the Director of the Environment Department**. The Director has the power to issue a notice in writing when e.g. a breach of a term or condition of an approval has been detected. The notice may also include the order to suspend or cancel EIA approval and to restore any affected area.[146] Powers related to **compliance and monitoring inspections** further provide for the department to cause a site or activity to be inspected to ascertain whether there has been:

1. Any change in the environmental conditions of the site or the environmental impact of the activity on the surrounding area; or
2. Compliance with conditions of EIA approval, including any Environmental Management Plan or mitigation measure that is required as a condition of the approval.

The project proponent might also be required to meet the **costs** incurred in compliance inspection, including but not limited to convening of a review committee, site inspection and transport expenses. The project proponent can **appeal** against a decision of the Director.[147]

**The legal powers of enforcement officers** include, for example, power of entry into the premises of the proponent, sampling

143 Article 15-17.
144 Art. 11- EIA Decree 8633.
145 Art 58 of law 444.
146 CAP 283, Article 26.
147 Order 175, Article 20.

and interviewing.[148] The law also includes detailed provisions on the **powers of the Director for variation or cancellation of EIA approval.**[149] Under specific conditions, including in the case of new information or significant changes in the circumstances, the Director may vary the terms of the EIA approval, including any conditions attached to it or even cancel the EIA approval and require the site to be restored. Prior to taking such action, the Director may obtain the advice of an **EIA consultant** or the **EIA review committee.** Further, a variation of an EIA approval requested by the project proponent that would result in material change in the use of the land to which the approval relates, must be subject to a new EIA.

Lastly, an important procedural provision stipulates that for any matter relating to environmental impact, evidence given by an enforcement officer that there has been, or may be, a harmful or adverse effect on the environment, is considered as **prima facie evidence** of the alleged matter by the courts. In implementation of the **precautionary approach** this means that based on the first impression the evidence is accepted as correct until proved otherwise.

In contrast to the EIA law in **Vanuatu,** detailed provisions with regard to the obligations of the project owner have been adopted in **South Africa.** Following a recent legislative reform in 2014, it is a legal requirement to submit an **environmental audit report** to the competent authority, prepared by an independent person with the relevant expertise, at intervals as indicated in the environmental authorization. The Regulation also provides detailed **requirements on the content** of the audit reports regarding Environmental Management Plans and closure plans. Regarding Environmental Management Plans, it is mandatory to include verifiable findings in a structured and systematic manner, on:

i The level of performance against and compliance of an organization or project with the provisions of the requisite environmental authorisation or Environmental Management Plans; and
ii The ability of the measures contained in the Environmental Management Plan to sufficiently provide for the avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity.[150]

Where the findings of an environmental audit report indicate (a) insufficient mitigation of environmental impacts associated with the undertaking of the activity; or (b) insufficient levels of compliance with the environmental authorisation or Environmental Management Plan; the holder must, submit recommendations to amend the Environmental Management Plan in order to rectify the shortcomings identified in the environmental audit report.151 The provisions on public participation in determining potential solutions are presented in *section 3.2.3 Public participation.*

Regarding the **link of an EIA system to the environmental auditing system** in a country more broadly, project auditing should generally be regarded as part of

148 Order 175, Article 22.
149 Order 175, Article 23.
150 S34 (2).
151 S34 (4).

the EIA follow-up stage as it applies to the operational phase of a facility. This is for example also reflected in the titles of some EIA laws.152 And whereas for a simple project, a traditional approach can be followed, focusing on implementing the Environmental Management Plan during both construction and operation, a higher level of complexity/depth will be needed for larger or more complex projects. This is usually achieved by requiring an **Environmental Management System** (EMS) to be developed for any such project after environmental approval has been obtained. The Environmental Management System will be based on the findings of the EIA, and is subject to revision based on changes in conditions on the ground. Environmental auditing will then be conducted to ensure that the Environmental Management System in place is being implemented. During construction, the Environmental Monitoring Plan can act as an Environmental Management System interface between the EIA and the next development phases [51].

The legal approach taken in **China** with regard to follow-up measures distinguishes between the construction and operation phase of an approved project, providing the opportunity to **adjust mitigation and monitoring measures** already at this crucial stage. After the construction phase of the project, the developer is required to submit an application and necessary monitoring information to the Ministry of Environmental Protection or the Environmental Protection Bureaus for a **follow-up inspection**. Operation can only start after compliance with approval conditions is confirmed by the competent authority. When conditions do not tally with the examined and approved EIA report, it is a legal requirement to conduct a **post-assessment of environmental impacts**. There are no requirements for external monitoring. An internal Environmental Management Strategy is usually developed that details the extent of monitoring, for both the construction and operation phases.

A challenge for the effective implementation of the EIA system in China is **insufficient resources of environmental authorities** and structural challenges with regard to the environmental governance system in general [49]. This in particular applies to monitoring, which is considered to be dominated by compliance monitoring instead of broader impact monitoring (ecosystem and landscape impacts) [102].

The **new 2014 Environment Protection Law** provides for the possibility of applying higher penalties to achieve compliance by developers and also introduces the possibility to file a **public interest lawsuit**. With regard to the latter it should be noted that a whole new chapter has been included dedicated to the role of civil society in environmental protection [49].

In reflection of the different legal approaches, a key element for the **effectiveness of EIA follow-up measures** is firstly, whether the legal process in place ensures that sufficient information is available at regular intervals throughout the life cycle of the project. Secondly, that based on this information adequate arrangements are put into place to use the findings in a comprehensive manner. As Abaza et.al put it, "*no purpose is served by collecting data that is "shelved" and not used, either because it is not the right information required for impact management or because*

152 E.g. Environmental (Impact Assessment and Audit) Regulations of Kenya, 2003.

*there are no institutional arrangements in place for taking action*" [1]. In this context, the important role of **public participation at the follow-up stage** of the EIA process has already been highlighted in section *3.2.3 Public participation*.

An additional point to be made with regard to public participation is that monitoring is also important for the purposes of "risk assurance". Thus, where local people may be concerned about the impacts of a project on a specific issue or resource, the agreement to implement and fund a monitoring programme can be an important factor in reducing public fear and hostility regarding the project. More generally, **monitoring programmes** should be socially responsive and credible to the public. Thus, beyond making the results of monitoring publicly available, it is considered useful to have an arrangement where the local community interacts more directly with the project owner or implementer and the control agency, for example by jointly reviewing the results of monitoring, identifying any outstanding issues and agreeing on the way forward [1]. As presented in section *3.2.3 Public participation,* such a legal approach has been implemented in **South Africa**.

The benefits of public involvement at the follow-up stage and access to information in the context of EIAs more broadly can also be illustrated by the fact that it has been shown that EIA follow-up in countries with weak environmental legislation or enforcement depends to a great extent on pressure from the public [51,64].

And with respect to **optimizing indigenous participation** in environmental management, the goal is regarded as mutually re-enforcing with achieving effective EIA follow-up. Thus a permanent environmental monitoring board with substantial indigenous participation can provide both goals simultaneously, since indigenous ways of understanding and managing the environment are regularly inherently oriented towards adaptive management. Moreover, the custodial responsibilities for the environment are culturally derived and thus do not diminish as time passes but must be performed throughout a project's life. It is therefore concluded that greater indigenous participation is likely to result in a stronger focus on EIA follow-up. And for obvious reasons this approach can also facilitate the application of indigenous traditional ecological knowledge [88].

Next to strengthening public participation, including indigenous people's participation, **entry points for strengthening the implementation of follow-up measures** include amongst others:

- Requiring a financial guarantee for the implementation of follow-up measures as included in environmental licence conditions;
- Involvement of project financiers to enforce Environmental Management Plans;
- A tiered licence system (i.e. the requirement to check compliance with terms and conditions of one licence in order to grant the next licence);
- Expanding penal and legal powers of the competent enforcement agencies;
- Creating a dedicated Environmental Fund; and
- Creating regional monitoring networks.

**Key points on follow-up and adaptive management**

- Follow-up measures ensure that EIA is not only about predicting impacts, but also about compliance with environmental approval conditions (i.e. agreed mitigation measures) and determining and addressing actual impacts of development activities, thus making the link between EIAs and effective project implementation and management;
- Nevertheless, most national EIA systems have a clear focus on the pre-decision phase, including overemphasis on the EIA report itself, with the perception that it is an end product instead of a legally binding commitment; however, there is an increased attention on strengthening follow-up measures in the academic literature, in EIA practice and in national EIA laws;
- The basis for the post-decision phase is frequently the Environmental Management (and Monitoring) Plan, agreed upon in the pre-decision phase, and generally the terms and conditions of the environmental approval decision;
- The Environmental Management Plan is not regarded as a static document, instead the project owners should regularly be required to make ongoing adjustments in their project in order to minimize unpredicted environmental impacts (an approach often referred to as "adaptive management");
- While the specific legal requirements in national EIA laws vary considerably, many of the associated implementation challenges are of a similar nature and are mostly related to lack of detail of the legal provisions (in particular with regard to monitoring and enforcement powers) and lack of capacity;
- Key elements for the effectiveness of EIA follow-up measures are (1) whether the legal process in place ensures that sufficient information is available at regular intervals throughout the life cycle of the project, and (2) that based on this information adequate arrangements are put into place to use the findings in a comprehensive manner (i.e. enforcement measures);
- With respect to optimizing indigenous participation in environmental management, the goal is regarded as mutually re-enforcing with achieving effective EIA follow-up;
- There are a number of entry points for strengthening the implementation of follow-up measures, including expending the powers of the competent enforcement agencies, creating regional monitoring networks and requiring a financial guarantee for the implementation of follow-up measures.

In relation to the first point, the project implementer for mining projects in **Mongolia** is for example required to make a 50 percent **deposit of the required costs** for the annual implementation of the Environmental Management Plan in a special government account for environmental protection. In case of good performance the funds deposited will be reimbursed to the project implementer according to certain schedules. It should be noted therefore, that the Environmental Management Plans are only approved for 5 years and that following the 5 years they will be reviewed together with the detailed EIA report.

The Environmental Law in **Lebanon** creates the framework for the establishment of an **Environmental Fund** to provide additional resources for monitoring activities on environmental matters which could be used for EIA follow-up. However, the fund has not yet been implemented [51].

With regard to the last point in the list, the suggestion has been made in relation to India to develop **co-ordinated monitoring plans** for areas together with industries and monitoring authorities. It is assumed that such an integrated effort for bringing together the expertise, funds and operational support for monitoring will increase the reliability of the data and, in addition, will address the issue of paucity of resources [89].

### 3.3 Emerging trends

1. While there is generally a broad spread of EIA legal requirements globally, there has been a development towards **weakening the EIA process** in some countries in order to speed up the process for economic development and growth. This development goes against the principle of non-regression which prohibits any recession of environmental law or existing levels of environmental protection. The principle is not recognized as legally binding, but is emerging in states and at an international level [103].
2. With regard to the **legal and institutional framework for EIAs** two major trends can be observed:
   a. In some countries, there is a move towards decentralization with regard to EIA oversight and/or implementation, including follow-up (often where previously a central environmental agency was the sole authority in charge);
   b. In other countries, a central dedicated EIA agency has been established to provide oversight and review of the EIA system and guidance for EIA implementation (often in cases where sectoral agencies play a central role in the EIA process, including regarding EIAs as a pre-condition for sectoral permitting).
3. **Public participation requirements** are being expanded in some countries, while at the same time mostly being limited to the scoping and review stage. More recently adopted legal measures to strengthen public participation include the need to publicly respond to inputs made and to justify the (final) decision on EIA approval or disapproval. At the same time, rights for participation at face-to-face meetings are mostly restricted to the (directly) affected public, to be determined at the discretion of the proponent and/or the authority. Obstacles for active participation, such as lack of capacity, are only being addressed in limited cases.
4. Legal provisions on **access to EIA relevant documents** are being strengthened in a number of national EIA frameworks, reflecting the wide range of media now available. Only a number of approaches however address issues such as language barriers or different levels of education and knowledge systems, through for example requirements regarding the EIA report format. Also only in exceptional cases are documents that are developed during the follow-up phase being made publicly available.
5. While the opportunity to **appeal** against a decision in the EIA process by the aggrieved person is generally

provided by law, some recent laws also provide the right to appeal for environmental non-governmental organisations in the form of a public interest lawsuit.

6. The above three points regarding access to information, justice and particularly public participation in environmental decision-making, are all strongly linked to **human rights law**, and particularly to certain procedural rights (often now termed "environmental rights"). At the international and regional levels, recognition of these procedural obligations can be seen in a number of key instruments including Rio Principle 10 and the Aarhus Convention, and in relation to indigenous peoples, the 2007 UN Declaration on the Rights of Indigenous Peoples. In addition at the national level, an increasing number of countries have adopted specific laws or constitutional provisions relating to access to environmental information.[153] Recognition of the links between human rights and the environment generally has greatly increased in recent years, as illustrated and indeed catalysed by the work of UN Environment, the Office of the High Commissioner on Human Rights and the Human-Rights Council-mandated Special Rapporteur on Human Rights and the Environment and others, to elucidate and operationalize key linkages in this area, and to highlight ood practices.[154] In relation to EIAs this can be seen by an increasing number of countries directly incorporating these environmental rights into their EIA procedures.[155]
7. In order to achieve better compliance, recent legal revisions often strengthen the **penalty regime**, including by creating liability for different actors involved in the EIA process, such as EIA consultants.
8. An increased focus on **follow-up** can also be observed in more recent legislation, including through the establishment or strengthening of rules regarding monitoring, reporting and response actions such as environmental permit variation and cancellation, and generally through better links to a country's audit system. Nevertheless, the pre-decision stage is still generally the focus and only in exceptional cases have provisions on public participation during follow-up been established or strengthened as well.
9. Linked to developments in international and regional policy

153 For example Chile's Environmental Framework Law; Article 112 of the Norwegian Constitution which specifically provides for "a right to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out" and the Right to Environmental Information Act adopted by the Czech Republic.

154 See the website of the Special Rapporteur on Human Rights and the Environment (Professor John Knox) available at: http://srenvironment.org/, and his 2015 Good Practices Report to the Human Rights Council available at: http://environmentalrightsdatabase.org/which describes more than 100 good practices in the use of human rights obligations relating to the environment. One-page summaries of the good practices are also available on a searchable, stand-alone website: http://environmentalrightsdatabase.org/. The website of UN Environment is also a good resource with links to a number of recent reports and studies on the linkages between human rights and the environment including in the context of climate change. See http://www.unep.org/divisions/delc/human-rights-and-environment.

155 See for example one-page summary of "Good Practices in relation to public participation in EIA procedures - laws of multiple states" available at: http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/GoodPracticesCategories.aspx.

agendas, increased focus can be observed in more recent EIA legislation on issues such as **climate change** and **human health**. In some cases, respective provisions are introduced in non-EIA legislation. In addition, several **non-binding guidelines** have been developed, including with regard to how to consider **ecosystem services** in EIAs. A very recent emerging issue is sea bed mining where plans to adopt specific guidance materials have been announced by concerned countries.

10. In some countries there is a shift from EIAs to **Environmental and Social Impact Assessments** (ESIAs) as the key term.
11. Provisions on **cumulative impacts** and on assessing alternatives have been further detailed/fleshed out in recent legislation in order to ensure their proper implementation. In some cases this has been done vis-à-vis SEA processes in a country or region.
12. While the EIA process per se is not about implementing a specific environmental standard, but rather about ensuring that all relevant information is available for informed decision-making, including through public participation, some rather recent laws contain some substantive guidance with regard to **mitigation, such as on compensation and offsetting.**
13. With respect **to triggers for recent EIA legal reforms** the incentive to comply with international or regional legal agreements or policy agendas features prominently. Another identified trigger was the observation that in some cases where EIA systems had been managed by sectoral authorities, there was a lack of credibility in relation to the outcomes of the assessments and the final decisions being made.


SILVER MINES OF CERRO RICO POTOSI, BOLIVIA BY VLADIMIR MILISIC

# Chapter 4

# SEA systems – Legal and institutional frameworks for SEAs

## 4.1 SEA arrangements

### 4.1.1 Triggering SEAs

The triggering point for SEAs is the intention of a government agency to adopt a **plan, programme or policy**. A key difference to the EIA process is that instead of project proponents, whether private or public, legal SEA requirements are generally "only" binding for public institutions. Therefore, SEAs are generally initiated by the same public institution and only in some cases overseen by another body, for example a central environmental authority. Due to these characteristics of SEAs, political commitment, including a feeling of trust in the potentials of the SEA process, as well as the backing up of the SEA process by legislation, are considered important elements for SEA effectiveness [104].

As with the EIA process, a critical issue is at what **point in time** the SEA process needs to be started. In most cases, SEAs are initiated once the first version of the plan, programme or policy has been drafted, thus once a number of important (strategic) decisions related to the plan, programme or policy have already been made. In these cases SEAs evaluate different development scenarios (including alternatives and their cumulative impacts) and prepare an SEA report which might be subject to external or public review, prior to the adoption of the plan, programme or policy. In other cases, SEAs are introduced earlier on in the decision-making process, at the time of setting strategic aims and goals and therefore regularly having a wider spectrum of alternatives [105].

**Key points on triggering SEAs and key elements of the process**

- SEAs are generally initiated by the same public institution and only in some cases overseen by another body;
- Key elements of an effective SEA process include political commitment, a feeling of trust in the potentials of the SEA process and the backing of the SEA process by legislation;
- SEAs regularly have a wider spectrum of alternatives if introduced at the time of setting strategic aims and goals, and not only once a first version of the plan, programme or policy has been drafted.

### 4.1.2 SEAs and other planning processes

There are challenges in differentiating SEAs from other planning processes. In some cases, principles and elements of SEAs will be integrated in other planning processes, and in other cases there may be benefits to the kind of structure that SEAs bring – in terms of the process and links to EIAs.

**Key points on SEAs and other planning processes**

- SEAs can be an independent process or integrated within other planning processes;
- In many countries with a perceived shortcoming of EIAs, a strong need for adopting a legally binding and independent SEA process has been identified.

The approach taken depends on the type of plans, programmes and policies that are made subject to the SEAs requirement (higher or lower policy level or both), as well as on the existing planning procedures and planning practice in a country. In that context, reference to informal or "**para-SEA**" [106] should be made. This relates to countries where no formal SEA requirements have been adopted, but where nevertheless "*sustainability issues are effectively considered and where SEAs ultimately lead to political change*" [107]. In such situations, there is in fact no longer a need or a possibility to differentiate between SEAs and planning. As outlined in section *1 Introduction and Objectives*, such close integration of "SEAs" in the planning process can be considered as the ideal scenario, since it ensures that environmental considerations receive adequate attention from the very beginning of the process, alongside economic and social considerations. In cases where the concept of SEAs is already well entrenched in planning processes and political discourse, promoting SEAs as a new process may not be a good way forward. Instead countries should examine how "*existing planning and policy development processes might benefit from the adoption of specific SEA thinking and methods, so the net effect is that SEAs are integrated with planning processes in a way that is acceptable to planners and policy-makers*".

The majority of SEAs undertaken around the world are at the 'formal' end of SEA typologies [108]. In countries where no legal requirements have been adopted to date related to SEAs, and where there is a perceived severe shortcoming of EIAs (as "piece meal" – for example with regard to mining in Africa), a strong need for adopting legal SEA requirements and processes has been identified in order to influence EIAs through action at the regional and strategic level [12,54,109].

### 4.1.3 Institutional set-up (and the link to EIAs)

Regarding the link to EIAs, it is widely acknowledged that in order to be effective, (formal) SEAs need to have direct **tiering** and terms and conditions for project specific developments and regional monitoring programs. In other words: SEAs and project-based EIAs should be considered in sequence. Following the assessment of a range of development

**Table 8: Overview of section content related to SEA systems**

| | SEA systems | | | | | |
|---|---|---|---|---|---|---|
| Specific issue | Integration within EIA legislation | SEA laws | Integration within sectoral laws | Cabinet Directive | Voluntary guidelines | Tiering of the SEA and EIA process |
| Case study countries and illustrative examples* | Kenya; Tanzania; Mongolia; China | Indonesia; EU; Indonesia; Panama | New Zealand | Canada | South Africa | Kenya; Indonesia |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

options (alternatives) at the SEA-level as well as the likely cumulative impact of each scenario, project-based EIAs will be triggered by specific development applications in order to assess in greater detail the likely impacts of available project implementation options [109–111]. Nevertheless, even if SEAs are ideally applied before licences are issued, post-project approval SEA can also be important to both industry and regulators for regional monitoring and improving project performance [111].

Next to tiering another important element for effective SEA is the need for **cross-sectoral cooperation** in order to adequately assess cumulative and cross-sectoral impacts. This can for example be achieved through the establishment of a cross-sectoral committee, ideally playing a role at the scoping as well as at the review stage, or generally the legal requirement to consult key agencies, in case there is one sectoral institution spearheading the SEA. In other cases (for example when planning for the offshore environment), a **multi-sectoral approach** will be required for the comprehensive consideration of the environment at the strategic planning level [111]. This issue is linked to the coverage of SEAs and i.e. the type of plans that need to be informed by SEAs. In that context and with regard to **Egypt**, the need for a "zoning atlas" is highlighted, that would bring together mapping and zoning efforts in the country among various institutions [112]. And with respect to mining in **Africa** it is concluded that strategic assessments within the context of national and regional development processes are needed that inform conservation targets, but also goals for mining, transport, employment and agriculture [109].

Among the countries that have introduced SEAs as a legal requirements, a range of different approaches have been adopted. In a number of countries (e.g. in **Kenya** and **Tanzania**), legal provisions have been integrated within EIA legislation whereas in others (e.g. in **Indonesia** and **Canada**) separate laws or regulations have been adopted. In some cases, legal requirements have also been integrated within other sectoral legislation (e.g. in **New Zealand**). There is also a great variability in the scope of the tiers of strategic decisions, thus whether plans, programmes and policies are covered or only a subset thereof, as well as the sectors covered [113]. It should also be recalled that in contrast to EIAs there is only a limited number of countries among the approximately 40 countries that have SEA systems in place, which introduced

legal requirements to conduct SEA [12]. A prominent example of a **voluntary SEA system** has been implemented in **South Africa.** SEAs are used on an ad hoc basis and not according to a legally-prescribed process. Instead, a number of SEA guidance documents have been adopted.

In the following, a number of SEA arrangements illustrating the wide variety of approaches will be presented. The first two examples from **Kenya** and **Tanzania**[156] show amongst others that a clear distinction between EIAs and SEAs as two different processes is not always made in national legislation.

In **Kenya,** the 1999 Environmental Management and Coordination Act, in the pre-2015 version, included SEAs due to its broad definitions of 'EIAs' and 'project'. However, the term SEA and a specific definition of SEAs was only introduced in the 2013 implementing regulation[157] and subsequently through the 2015 amendment. As well as including a definition of SEAs, the 2013 implementing regulations include provisions specifically for SEAs under Part VI on miscellaneous provisions. It is stipulated that SEAs shall be conducted by lead authorities in consultation with the National Environmental Management Authority and that the focus is on considering effects of implementing alternative policy scenarios. The clear distinction between EIAs and SEAs in the 2013 implementing regulation indicates that provisions are only of relevance to SEAs, if SEAs are being explicitly referred to. As opposed to the project-level EIAs, for which the 2013 implementing regulations include detailed provisions, relevant guidance for the SEA process can only be found in non-binding guidelines on SEAs adopted in 2012. In addition, a new section in the Environmental Management and Coordination Act, introduced through the 2015 amendment, makes SEAs an explicit legal requirement and provides a definition of those plans, programmes and policies that are subject to SEAs.[158]

On the issue of **tiering of the SEA and the EIA process**, the law stipulates that no licensing authority under any law in force in Kenya shall issue a trading, commercial or development permit or license for any micro project activity **likely to have cumulative significant negative environmental impact**, before it ensures that a strategic environmental plan encompassing mitigation measures, and approved by the National Environmental Management Authority, is in place.[159]

The criticism has been made that SEAs need to be given more prominence in the law and made obligatory for certain policies, plans and programmes so that guidance and evaluation of project-level EIAs is enhanced [46]. SEAs have therefore, for example, been included in the draft Petroleum Bill that is currently being finalized. Further, and with regard to the SEA guidelines, specific 'how to' measures for the implementation of many of the 'deliverables' are considered to be lacking. Instead they are characterized as purely aspirational and are lacking legal force (Mutui et al).

156 Please note that the legal framework for SEA in Tanzania is not complete yet. Draft SEA guidance is currently circulating for review.

157 Environmental (Impact Assessment and Audit) Regulations of Kenya, 2013.

158 Environmental Management and Coordination Act no 8 of 1999, amended in 2015, Section 57A.

159 Article 4 (3) of the Regulation.

As well as provisions on the EIA process, the Environmental Management Act of 2004 of Tanzania also includes specific provisions on environmental assessments of plans, programmes and policies, thus SEAs.160 Based on the definition of project in the 2005 Environmental Impact Assessment and Audit Regulation, the Regulation deals with both EIAs and SEAs. However, the process outlined in the law is designed to deal with project-level EIAs, and does not provide further detail on any of the SEA-related provisions in the Environmental Management Act; draft SEA guidance is currently circulating.

According to the Environmental Management Act, each public institution is required to conduct an SEA when preparing regulations, public policies, programmes or development plans. And also when preparing a Bill, the drafting institution or person responsible is required to conduct an SEA. The law also specifies in which cases it is required to undertake an SEA for a Bill.[161] In that context it should be highlighted that the law also stipulates that where a **mineral or petroleum resource is identified** and before specific details are planned or a hydro-electric power station or a major water project are planned, the Ministry responsible for mining, energy or water shall carry out an SEA.[162] Importantly, the Minister of Environment is empowered to review any decision not to undertake an SEA.[163]

In other pieces of national (and regional) legislation, a **clear separation between EIA and SEA processes** is made from the very beginning. **European Union** SEA legislation and **Mongolian** legislation also give an indication when the SEA should be initiated.

The **European Union** adopted SEA legislation in 2001 for **plans and programmes**, with a view to promoting sustainable development.[164] The legislation has been transposed into national legislation in all member states. Countries aspiring to EU membership are also aligning their SEA arrangements with the EU framework as well as the SEA Protocol to the UNECE Convention on EIAs in a transboundary context (for example **Georgia**), the development of which was influenced by the SEA legislation of the European Union [12].

According to the 2001 EU legislation, plans and programmes, including modifications to them, are those:

- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and
- which are required by legislative, regulatory or administrative provision.[165]

The legislation provides for the SEA to be carried out **during the preparation** of a plan or programme and before its adoption or submission to the legislative procedure. Further, Member States are obliged to either integrate the requirements into existing procedures for the adoption of plans

160 Part VII.
161 Article 104 (1).
162 Article 105 (1).
163 Article 104 (IV).

164 EC Directive 2001/42/EC (European Parliament 2001), Article 1.
165 EC Directive 2001/42/EC (European Parliament 2001), Article 2.

and programmes or incorporate them into procedures specifically established to comply with the legislation. With regard to **sequencing of different impact assessments**, the legislation stipulates that where plans and programmes form part of a hierarchy, "*Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy*".

In **Mongolia**, the SEA process was introduced by the 2012 Environmental Impact Assessment Law as a separate type of impact assessment from EIAs, covering **plans, programs and policies**. According to the law, the line ministry that initiates and develops the policy, program and plan shall ensure that the strategic assessment is conducted **during the development** of the document, and submit the assessment report along with the accompanying documents to the central administrative body in charge of environmental affairs, prior to getting it reviewed at the cabinet meeting.[166] In addition, and as already outlined in section *3.2.2 Scoping and impact analysis*, the law introduces **cumulative impact assessments** as a third type of impact assessment next to EIAs and SEAs, which takes place at a regional level and defines the methods and actions that assist elimination and mitigations of impacts in a specific area. Detailed regulations on conducting strategic and cumulative impact assessments have been adopted in 2013, followed by a Ministerial Order with detailed guidelines for cumulative impact assessment.

In **China**, the 2014 Environmental Protection Law stipulates that any development plan and construction project is subject to an EIA.[167] Thus, **SEAs for plans** (commonly referred to as PEIA in China) and EIAs for construction projects are mandatory requirements. In addition, the law requires departments of the State Council and people's governments of provinces, autonomous regions and municipalities directly under the Central Government, to take into full account their environmental impacts when developing economic and technical policies (**SEAs for policies**). Prior to the introduction of PEIAs by law, **Regional EIAs** (REIA) were the main mode of SEA implementation in the country and still play an important role today [114].

PEIAs shall be applied to **plans** for *land utilization, and construction, development and utilization plans of regions, drainage areas and sea areas* and **special plans** for *industry, agriculture, animal husbandry, forestry, energy resources, water conservancy, communications, urban construction, tourism and natural resources* proposed and developed by relevant ministries and commissions of the State Council and local governments and their departments. The plan owners are responsible for initiating and conducting SEAs when in the process of drawing up plans.

Regarding the challenge of implementing a **multi-sectoral approach**, it is regarded as a shortcoming that the national economic and social development plans (the most important integrated plans with considerable potential impacts on the environment), are generally exempted from the SEA requirement [114].

166 Article 5.1.

167 Article 19.

There are also a number of recent legal developments with regard to SEA arrangements. In the following, two examples from **Indonesia** and **Panama** will be presented which aim at integrating SEAs in planning processes.

In **Indonesia** the requirement to undertake SEA for **policies, plans and programmes** was introduced with the adoption of the new Environmental Protection and Management Bill in 2009. The objective of the SEA (abbreviated to KLHS in Bahasa) is to ascertain the principles of **sustainable development,** and the central government, as well as the regional governments, are required to conduct SEA. The law specifies the type of documents for which SEAs need to be undertaken, with further information included in the SEA implementing regulation, which was only adopted in **2016** and includes detailed provisions on the SEA process.[168] Documents covered include spatial plans as well as national and regional medium and long term development plans, thus also plans which regularly implement a **multi-sectoral approach**.

The head of the unit planning to issue a respective document (at the national, provincial or municipal level), governs the making and implementation of the SEA.[169] Further, the SEA report is considered an inseparable part of the policy, plan or program assessed.[170] Despite the rather recent adopted guidance, there is already a considerable number of SEAs undertaken.

Regarding **tiering** of SEAs and EIAs, the law provides that an activity can be exempted from the obligation to conduct a full EIA if the location of the activity is within a district/city that has already adopted a detailed spatial plan and/or a district/city strategic area spatial plan.[171]

In **Panama,** the specific provisions on SEAs were only adopted in **2017** through an Executive Decree. SEAs are undertaken by the respective public institution under the oversight of the Ministry of Environment, which is responsible for review and approval of the SEA report. SEAs are required for all **public plans, policies and programs** provided that:

- They have been included in the list prioritized by the Ministry of Environment (the list is still pending)
- There is an expressed request from the Ministry of Environment either on its own initiative or at the request of civil society or a private entity; or
- The plan issuing institution voluntarily requests it.[172]

In contrast in **Canada,** the SEA system has been introduced by way of a Cabinet Directive and not by law. The **Cabinet Directive** on the Environmental Assessment of **Policy, Plan and Program** Proposals sets out the expectations of ministers and Cabinet on when an SEA should be conducted and what it should consider.[173] It requires that the environmental analysis be **fully integrated into the proposal development process**. It

168 Article 15 (2) and Government Regulation of the Republic of Indonesia no 46 about procedures for implementing Strategic environmental studies, 2016, Article 3.
169 Article 17 of the 2016 SEA Regulations.
170 2016 SEA Regulation, Article 23.
171 Article 13 of the 2012 Regulation on Environmental Permits.
172 Decree 4/2017, articles 8-9.
173 Government of Canada (2010). The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.

specifies that ministers expect an SEA when the following two conditions are met:

- The proposal is submitted to an individual minister or Cabinet for approval;
- The implementation of the proposal may result in important environmental effects, either positive or negative.

Complementary guidelines that include guiding principles and describe the overall process were last updated in October 2010.[174]

A 2010 evaluation of the Cabinet Directive came to the conclusion that overall SEA has had little demonstrable impact in contributing to the federal government's environmental priorities and needs. Little evidence was found that SEAs are optimizing the positive, and/or minimizing the negative, environmental effects of the government's policies, plans and programs. It was also concluded that there is a lack of consensus among SEA practitioners on whether the Directive is the best method to achieve the goal of more environmentally-sustainable policies plans and programs. Further, it was observed that performance with respect to SEAs varies greatly across government. Similarly the quality of SEAs conducted was found to vary significantly, sometimes within the same department. An additional finding was that where the Directive is applied, the SEA is **typically undertaken late in the policy, plan or program development process** and thus does not include an adequate analysis of options for meeting objectives, or the range of environmental implications, including cumulative effects. Furthermore, a **lack of oversight and support from central agencies** was observed, also illustrated by the fact that there are few consequences

**Key points on SEA institutional set-ups (and the link to EIAs)**

- In contrast to EIAs, there is only a limited number of countries among the approximately 40 countries that have SEA systems in place, which introduced legal requirements to conduct SEAs
- There is a great variability in the scope of the tiers of strategic decisions, thus whether plans, programmes and policies are covered or only a subset thereof, as well as the sectors covered.
- The provision of guidance to EIAs through direct tiering with EIA processes and cross-sectoral cooperation are key elements of an effective SEA system
- In many cases specific 'how to' measures for the implementation of many of the provisions are lacking in guidance documents; instead they are characterized as purely aspirational and are lacking legal force.

174 Government of Canada (2010). Guidelines for Implementing the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.

to departments for inadequately implementing SEAs.[175]

However, a separate review of SEA practice in Canada concluded that there is no clear answer as to whether a more formalized and legislated SEA would be advantageous. Instead, a key finding was that some of the 'better' SEA experiences in Canada have "*neither carried the SEA name tag nor occurred under formal SEA requirements; rather, such cases have been integrated with government or private sector [plan, programme and policy] development*" [110].

## 4.2 The different steps of the SEA process

In the following sections the different steps of the SEA process, as outlined in *figure 2* (highlighted in blue), will be presented, including case studies and illustrative examples from legal approaches implemented in countries around the world. Due to the **iterative nature of SEAs**, individual SEA processes may result in a repeat of steps, thus the outlined process should be regarded as illustrative rather than definitive.

### 4.2.1 Screening

Since an SEA is usually initiated by the plan, programme or policy-issuing institution, it is the same institution which conducts the screening in order to determine whether an SEA is required. Some laws however provide for a central environmental agency to review the decision made, in particular if it is decided that no SEA is needed (e.g. in **Tanzania**)[176]. In the case of **Kenya**, the non-binding SEA guidelines, revised in 2011, specify that the National Environmental Management Authority undertakes screening and has to decide within 7 working days. Importantly, there is generally only one process to be applied for all SEAs, and not a number of different processes that depend on the project categorization, as in the case for EIAs (with different levels of detail depending on the determined likely impact threshold). In addition, SEA legislation normally only includes few or no explicit provision on the screening stage and the term screening is generally absent, too. Instead the focus is mostly on scoping and/or review and final decision-making.

The approaches to determine whether a SEA needs to be undertaken is similar to that for an EIA. These are commonly the listing of plans, programmes or policies for which SEAs are mandatory, the provision of criteria to determine the need on a case-by-case basis for other plans, programmes and policies, as well as a hybrid approach. In pursuit of the objective to **sequence or tier SEAs and EIAs**, some laws also link the screening decision in the SEA process to the EIA legal systems.

The following case study from the **European Union** provides an example of rather detailed provisions regarding the screening stage. This includes a link to the nature legislation of the regional organisation.

The SEA legislation of the European Union stipulates that during the preliminary assessment, and thus in order to narrow down the application of SEAs to those

175 Evaluation of the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals, 30 June 2009. https://www.canada.ca/en/environmental-assessment-agency/programs/strategic-environmental-assessment/third-party-evaluation-implementation-cabinet-directive.html.

176 The Environmental Management Act of Tanzania, 2004, Article 104 (4).

**Figure 2: SEA process flowchart, adapted from [115]**

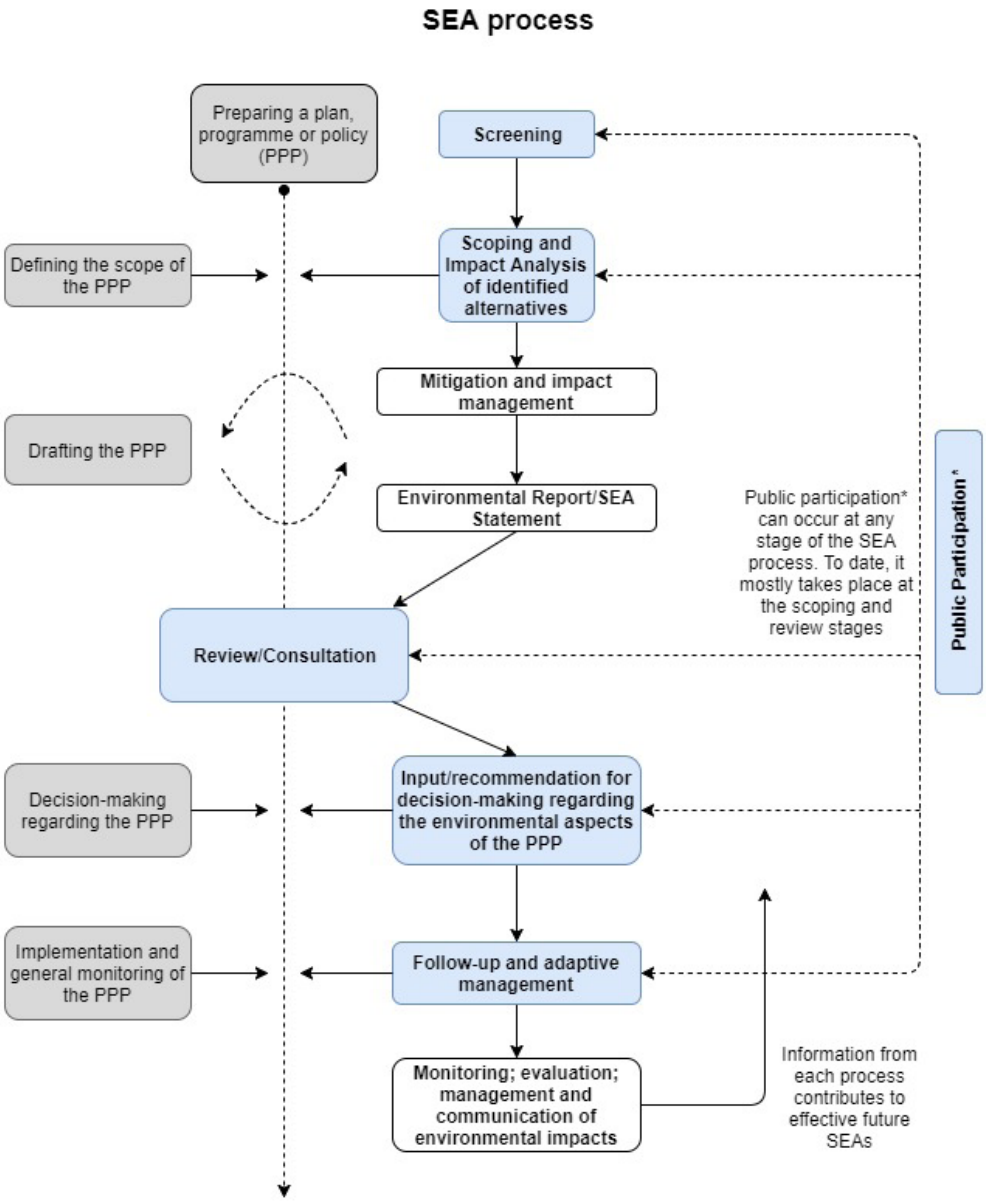

**Table 9: Overview of section content related to SEA screening**

| | Screening | |
|---|---|---|
| Specific issue | Role of an environmental agency | Detailed legal provisions |
| Case study countries and illustrative examples* | Kenya; Tanzania | EU |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

**plans and programmes** that are likely to have *significant* environmental effects, Member States are required to conduct SEAs for a number of listed sectors. This sets the **framework of future development consent or projects for which EIAs are mandatory** under the EIA legislation of the European Union.

Furthermore, SEAs have to be carried out for plans and programmes which, in view of the **likely effect on sites**, have been determined to require an assessment pursuant to the nature-related legislation of the European Union (namely the **Habitat Directive**). An exception is made for cases in which plans and programmes only refer to the use of small areas at local level or minor modification to plans and programmes, unless likely significant effects are determined. The likely significant effect also needs to be determined for all other plans and programmes not listed in the legislation, thus on a **case-by-case basis**. This does not account for plans and programmes with the sole purpose of serving national defence or civil emergency as well as financial or budget plans and programmes, all of which are generally exempt from the SEA requirement. As in the case of the EIA legislation of the European Union, **criteria to be taken into account for the determination of a likely significant impact** are stipulated in an Annex to the legislation. The SEA legislation also provides that Member States shall ensure that the screening decision, including the reasons for not requiring an SEA, are made available to the public.[177]

The SEA Legislation of the European Union has been transposed into national legislation in all Member States, for example the 2013 law on environmental assessment of plans and programs of **Denmark**, amended in 2014. In 2017 the legislation was replaced by a consolidated EIA-SEA Act.[178]

SEA legislation generally does not include any requirements for consultation at the screening stage, but for example in the case of **Denmark** the SEA law provides for the consultation with concerned authorities before taking the screening decision.[179]

### 4.2.2 Scoping and impact analysis

Whereas several laws include content requirements for SEAs of differing levels of detail, only some deal with scoping as a separate step in the process. This is for example the case in Denmark and China.

Whereas in **Denmark** the responsible authority is explicitly required to define

177 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Article 3.
178 Lovbekendtgørelse nr. 448 af 10. maj 2017 om miljøvurdering af planer ogprogrammer og af konkrete projekter (VVM).
179 Paragraph 32.

## Key points on screening in SEAs

- Some laws provide for a central environmental agency to review the screening decision made by the plan, programme or policy-issuing institution;
- SEA legislation normally only includes few or no explicit provisions on the screening stage and the term screening is generally absent. Instead the focus is mostly on scoping and/or review and final decision-making;
- Despite the recognized importance of consulting the public early on in the process, SEA legislation generally does not include any requirements for consultation at the screening stage;
- In alignment with the Aarhus Convention a number of countries requires the authorities to make a screening decision public, including the reasons for not requiring a SEA in case of a negative decision.

the environmental report content, the specific scope for plans in **China** are set jointly by the responsible authority and the competent environmental agency, and are submitted to the State Council for approval.

In **Kenya** the 2003 EIA (and SEA) Regulation generally states that SEAs are undertaken by lead agencies in consultation with the National Environmental Management Authority, with further details included in the non-binding SEA guidelines. With regard to scoping, the guidelines specify that the lead agency needs to submit the scoping report prepared by a **licensed SEA expert** for review by the Authority, which needs to communicate its decision within 21 days.

In all cases where no specific scoping provisions are included, it can be assumed that the plan, programme or policy initiating institution, determines the scope of the SEA, guided by the content requirements stipulated in national legislation and potentially additional non-binding guidelines.

A number of countries include a requirement for **public participation at the scoping stage**. Among the legislation

**Table 10: Overview of section content related to SEA scoping**

| | Scoping | | |
|---|---|---|---|
| Specific issue | Responsibility | Public participation | Content requirements, including re alternatives |
| Case study countries and illustrative examples* | Denmark; China; Kenya | Kenya; Panama; Mongolia; Indonesia | Kenya; Tanzania; Indonesia; Denmark; Mongolia |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

reviewed, the **Kenyan** legislation makes reference to (potential) stakeholder meetings at the scoping or assessment stage, but this is not a mandatory requirement.[180] And the very recent legislation of **Panama** includes the requirement to develop a stakeholder engagement plan at the scoping stage[181], but does not stipulate any details as to the content of the plan. It only states that the entity responsible for developing the SEA should convene the relevant public institutions according to the evaluation object, and other key actors for its implementation. In addition public participation is recommended in the **Kenyan** SEA guidelines, starting at the scoping stage. More information on public participation, including with regard to the scoping stage in the case of **Mongolia** and **Indonesia**, will be provided in section *4.2.3 Public participation*.

### *Responsibilities for preparing SEAs*

Generally SEA legislation does not also include the requirement to commission **external experts** for the assessment. However, **Mongolia's** relevant legislation includes the need for the SEA to be undertaken by an authorized professional organization, with the collaboration of think tanks, independent experts and inspectors. And **Panama's** legislation provides for the option of having the SEA elaborated by external consultants instead of specialists of the responsible institutions.[182]

### *Content requirements*

Most SEA relevant legislation reviewed, included the objective and purpose of SEAs as well as specifications on content requirements. Nevertheless, it has been noted that often vague and inadequate environmental objectives seem to be a major problem at the SEA scoping stage. The **balance between environment and socio-economic** issues is regularly regarded as unclear and the scope of SEAs is generally too broad. This also applies to the requirement to assess alternative scenarios, where insufficient guidance is provided, including on baseline assessments [104].

As a result it has been found that there is an important **deficit in the integration of biophysical, social, institutional, and economic aspects in SEAs**, which can be addressed by using the concept of **ecosystem services**. Instead, assessments are often significantly restricted to a number of biophysical aspects of the environment – at least in cases where assessed initiatives have direct territorial materialization [105]. In addition, even though considered to be at the core of SEAs, **alternative assessment** is usually limited in practice, in particular when compared to academic expectations. With regard to the system governing SEAs of offshore developments in the **United Kingdom** and (Atlantic) **Canada**, it has for example been concluded that the degree to which alternatives could be considered was constrained by "*the tier of application at the plan or program level, the regulator's mandate of issuing rights, and the level of pre-existing off-shore development*." In addition, the absence of broader policy-level alternatives was listed as a deficiency in the SEA process [111]. The observation that alternatives are seldom assessed in a comprehensive manner has also been made with regard to SEA implementation practice in **China** [114].

180 Article 42 and 43 of the EIA Regulation.
181 Executive Decree No. 4 of 2017.
182 Decree 4 of 2017, article 12.

In the following a number of legal approaches will be presented. These illustrate the wide range of approaches to determining the scope of SEAs, including with regard to the **definition of environment**, and **mitigation and monitoring measures**. In addition, and in line with the rationale behind establishing SEA legal systems as well as EIA legal systems, the presented examples are representative of the fact that most national SEA legislation puts emphasis on the requirement to assess alternatives.

In **Kenya**, the 2003 EIA (and SEA) Regulations state that the assessment shall consider the effect of implementation of **alternative** policy actions taking into account a number of considerations reflecting a **broad definition of environment**, including for example socio-economic factors, human settlement and cultural issues.[183] Furthermore, the Regulation includes detailed provisions on the content of the SEA report, including with respect to the coverage of the environmental analysis and recommendations, outlining suggested policy changes and proposed **mitigation** measures. However it has been criticized for focusing much less on the environmental aspects, and more on the other sustainability aspects [116].

In **Tanzania**, the 2004 Environmental Management Act determines the content of each SEA statement prepared, including regarding **alternatives** and practicable measures to **mitigate** any likely adverse effects. The Minister of Environment also has the competence to prescribe additional content requirements by regulation. Regarding the requirement to undertake SEAs where a **mineral or petroleum** resource is identified, further requirements are outlined for the assessment of the marked area. These include (1) identification of ecologically sensitive and protected areas; (2) identification and description of communities around the area; (3) recommendations for land reclamation and limitations on development in different areas; and (4) considerations related to assessing cumulative impacts.[184]

In **Indonesia**, the Environmental Protection and Management Act specifies that the assessment should among others include information on

- The **capability of the environment to support and carry development**;
- Estimated environmental impacts and risks;
- Performance of **service/ecosystem service**;
- Efficiency in the utilization of natural resources;
- Vulnerability and capacity of **adaptation to climate change**; and
- Security and potential of biological diversity.

The 2016 Regulation on SEAs includes additional detailed guidance on conducting SEAs and the minimum content that needs to be included in the report. In addition to the factors listed in the Environmental Protection and Management Act, these "sustainability issues" include:

- The level and status of the number of **poor people** or the livelihoods of a community and the threatened **sustainability of community livelihoods**;

183 Article 42 (2).

184 Article 104 and 105.

- Risks to public health and safety; and/or

Threats to the protection of certain areas traditionally inhabited by **communities and indigenous and tribal peoples**.[185]

The Regulation also includes a dedicated article on assessing alternatives.186 It describes different dimensions of assessing alternatives, such as *"change or adjustment of size, scale, and location that better meet the considerations Sustainable Development"* and *"giving direction or signs to maintain or enhance ecosystem function"*. It is further specified that alternative formulations to improve a policy, plan, and/or program shall serve as a basis in formulating recommendations for improvement for the SEA decision.

In **Denmark**, the law outlines the content requirement of the assessment and states that **reasonable alternatives** should be taken into account. Further, a description of the measures envisaged concerning **monitoring** needs to be included.[187]

Finally, the legal approach taken in **Mongolia** should be highlighted. According to the national legislation, SEAs, as an

**Box 2: An illustrative example on the scope of SEA from the United Kingdom – The development of the Humber Flood Risk Management Strategy**

As part of the scoping stage, the Environment Agency set two types of SEA objectives: appraisal objectives and aspirational objectives. Not all of the aspirational objectives were significant at the strategic level. However, they are intended to guide the Agency's work in the Humber and during implementation of the strategy, when a more detailed EIA will be needed for each of the capital scheme projects. They were also used as an additional test of the overall performance of the strategy and its contribution to the Agency's vision.

**Appraisal**

Key issue addressed by the SEA at strategy level.

- Protection of people, property and infrastructure.
- Protection and enhancement of a European site.
- Port and navigation activities (geomorphology).

**Aspirational**

Issues identified as 'non-strategic' but still important.

- Risks of unknown archaeology and contamination.
- Detail of protected species.
- Local landowner concerns and aspirations

Source: *RSPB (2007). Strategic Environmental Assessment – learning from practice. Focusing on strategic issues and integrating stakeholder views.*

185 Article 9.
186 Article 15.
187 Paragraph 12 and 13.

**Key points on scoping in SEAs**

- Whereas several laws include content requirements for SEAs of differing levels of detail, only some deal with scoping as a separate step in the process;
- A number of countries include a requirement for public participation at the scoping stage;
- Vague and inadequate environmental objectives are often a challenge; in particular the balance between environment and socio-economic issues is regularly regarded as unclear;
- National legislation regularly requires assessing alternatives, but implementation is often lacking;
- In some cases sectoral laws provide specific content requirements for specific sectors or activities.

assessment separate from the cumulative impact assessment, focus on **climate change and natural disasters**. Detailed regulations on conducting strategic (and cumulative impact assessments) have been adopted in 2013.[188]

With respect to the consideration of **climate change** in SEAs, it has been noted that climate change mitigation, which is essential to reducing greenhouse gas emissions, has generally been dealt with poorly in SEA practice, even though considered feasible from a technical perspective. Furthermore OECD guidance published in 2010 suggests that a well-performed SEA can fulfil several functions in relation to climate change adaptation, such as improving the availability and quality of climate information and climate proofing of documents prepared without any reference to climate change [107].

For an illustrative example on the scope of an SEA please view *Box 2*.

188 2012 Environmental Impact Assessment Law of Mongolia, Article 3 and 5.

### 4.2.3 Public participation

As in the case of EIAs, public participation is a **fundamental element** of the SEA process. It serves the same objective, but at a higher level of decision-making, thus defining the parameters for development, for example in a sector or geographical area [1]. The need to ensure that not only the most relevant environmental information is available and considered in the final decision-making and implementation, but also that divergent interests, aims and perspectives of a range of stakeholders are adequately taken into account, illustrates the key importance of making SEA a collaborative process which should prominently incorporate public participation mechanisms [105].

At the same time **differences in the required administrative procedures for public participation among the EIA and SEA process** are being widely acknowledged. This is due to the fact that the scale, scope and range of most SEAs make them significantly different from EIAs. This applies in particular with respect to informal or para-SEAs as described in section *4.1.3 Institutional set-up (and the*

**Table 11: Overview of section content related to Public Participation in SEA**

| | Public participation | | |
|---|---|---|---|
| SEA stage | Scoping and impact analysis | Review and decision-making | Follow-up |
| Case study countries and illustrative examples* | Canada; Nigeria | Tanzania; Panama; China; EU | China; Canada |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

*link to EIAs),* which for example regularly do not produce SEA reports that can be subject to consultation, instead the results are directly integrated into the planning documents. The type of public participation in such contexts will thus inevitably be different from typical EIA situations and likely a more continuous process, since public participation requirements in this case should be integral elements of the whole planning cycle [1,108].

Another difference that is likely to influence the design of public participation mechanisms is the fact that all SEA processes operate within **politically motivated decision-making areas**. Some governments, for example, may not welcome public participation at certain early stages of policy formulation [1]. In addition, SEAs appear to mainly influence plans through mitigation measures, thus steering implementation rather than affecting strategic planning choices [111,117].

Finally, and linked to the last point, another difference to the EIA process is the fact that regularly the plan, programme or policy-initiating authority is in charge of the SEA process, and that only in some cases (and to a limited degree when compared to the EIA process) does an environmental agency perform oversight functions. Involvement of an "independent" actor thus only happens at the review stage, with limited influence or control of any requirement for public participation early on in the process.

In many countries these challenges are not visibly dealt with. Moreover, many national laws make explicit reference to SEA reports that are either informed by public comments or to be made subject to review by the public, thus focusing only on a specific SEA output document [105]. And similarly to the EIA process, only in limited cases does national legislation provide mechanisms for public participation at the screening or follow-up stage. Thus public participation is not generally incorporated as a key element in the crucial initial phase of strategic planning and/or during the post-decision phase. However, in particular with regard to public participation requirements in the follow-up stage, it needs to be pointed out that the general **accountability framework** in a country can potentially fulfil SEA requirements for continued interaction with the public during plan, programme and policy implementation and review, as can be illustrated with the example of **Canada**.

Nevertheless, and even if the contribution of SEA requirements to "*the establishment of participatory and inclusive arenas*" is regarded as limited, it is generally acknowledged that SEAs have the potential

to expand the scope of **democratic control over public policies**. This is for example being achieved through dissemination and monitoring provisions that are enhancing transparency [117]. In addition, there is evidence that involving the public in SEAs is likely to have influence on the final decision outcome, thus the design of the plan, programme or policy [104,111].

In the following, a number of legal approaches to ensure effective public participation in the SEA process will be presented. These illustrate the fact that most SEA legislation requires public participation "only" at the assessment and/or review stage, thus when an SEA is being developed to assess the environmental impact of a draft plan, programme or policy, and prior to final decision-making of the competent authority. Thereby, the most widely used mechanism is the opportunity to submit comments following publication of relevant documents, despite the widely acknowledged limitations of this approach, as outlined in section *3.2.3 Public participation.*

In addition to the examples presented in section *4.2.2 Scoping and impact analysis* in which public participation is required at the **scoping stage** (namely **Kenya** and **Panama**), further information is detailed below in relation to this requirement in **Mongolia** and **Indonesia**.

In **Mongolia**, the requirements for public participation for SEAs provide that the competent authority for impact assessment shall disclose the information on the development program and plan or the project through its website. It is further required that feedback shall be obtained from the public in the course of the development of the program or plan for a **period of 30 working days** following public announcement, thus at the **scoping and assessment stage**. The comments need to be incorporated in the report that will be subject to final review by the technical committee, where they will be reflected upon. The Ministry of Environment and Green Development of Mongolia approved a detailed procedure on public participation in EIAs/SEAs in 2014.

In **Indonesia**, the 2009 law includes a requirement to involve communities and stakeholders in the SEA process.[189] The 2016 Regulation provides further details by outlining that the identification and formulation of the issue of **sustainable development** shall be conducted by gathering input from the community and stakeholders through public consultation. Thus, public participation is required at the **scoping and assessment stage**. In addition the SEA report must be made a **public document**. Regarding the mechanism for public participation, the Regulation stipulates that the involvement of the community and stakeholders can include giving opinions, and suggestions; expert assistance; technical support; and delivery of information and/or reporting.[190] **Communities and stakeholders** are considered to include those that are directly and indirectly affected by the policies, plans, and/or programs; and those with relevant information and/or expertise on the substance of the policy, plan, and/or program.[191] In order to ensure effective involvement of communities and stakeholders the Regulation also requires "*monitoring and evaluation*" of the public participation requirements "*at the time*

189 Article 18 (1).
190 Article 32 (2).
191 Article 33.

**Key points on public participation in SEAs**

- As in the case of EIAs, public participation is a fundamental element of the SEA process; similarly to the EIA process, national legislation does only provide mechanisms for public participation at the screening or follow-up stage in limited cases;
- At the same time, differences in the required administrative procedures for public participation among the EIA and SEA process, in particular regarding scale, scope and range, are being widely acknowledged;
- SEAs have the potential to expand the scope of **democratic control** over public policies. This is for example being achieved through dissemination and monitoring provisions that are enhancing transparency;
- The most widely used mechanism is the opportunity to submit comments following publication of relevant documents, despite the widely acknowledged limitations of this approach.

*of manufacture of the SEA by a competent authority*"[192].

At the **review stage**, public participation is required in **Tanzania**, **Panama**, **China** and the **European Union** for all its Member States.

In **Panama**, and in addition to requirements at the scoping stage (see section *4.2.2 Scoping and impact analysis*) the SEA report is subject to public consultation at the **review stage**. The responsible entity must present basic information on its institutional website, in a national newspaper and by note to the institutions and key stakeholders. Any natural or legal person can **send comments or observations**, which will be included in the final version of the SEA report that will be presented to the Ministry of Environment, including the way in which they were considered.[193] Due to the very recent adoption of the Decree in 2017, information on implementation is not yet available.

In **Tanzania**, national legislation includes a requirement for public participation at the **review stage**, and only in case of a disagreement between the Environmental Agency and the plan, programme, policy, strategy or bill initiating institution. Further, it is at the **discretion of the Minister of Environment** to consult the public, i.e. to subject the respective document to public review or to conduct a **public hearing**.[194]

**European Union** SEA legislation makes it mandatory that the **draft plan or programme and the draft SEA report** is made available to competent authorities and the public. Both shall be given an **early and effective opportunity within appropriate time frames** to express their opinion before the finalization of the plan or programme. With regard to **the public** to be consulted the legislation further

192 Article 35 and 36.
193 2017 Decree.
194 The Environmental Management Act of Tanzania, 2004, Article 104 (IX).

specifies that the public affected or likely to be affected or having an interest, including non-governmental organisations, such as those promoting environmental protection and other organisations concerned, is to be identified by the Member States.[195]

And whereas most countries include a **requirement to make the SEA report public** following public consultation, this is not the case in all countries.

In **China,** the compiling organisation is required to solicit the opinions on the **draft Plan Environmental Impact Assessment (PEIA) statement** from relevant units, experts and the public, seriously consider these opinions and enclose an explanation on whether to adopt the opinions in the statement. In addition, the 2014 Environmental Protection Law also requires soliciting opinions from experts and relevant stakeholders when developing economic and technical policies[196]. However as opposed to the EIA process, there is **no legal requirement to make the full text of the PEIA report public**. An evaluation of public participation in SEA in China came to the conclusion that it is 'insufficient, ineffective and pro forma', 'information is not completely disclosed' and there are problems due to 'insufficient environmental consciousness and low educational background of the public'. Thus, the disclosed information is often regarded as insufficient to meet the needs of the public, since the general public does not understand it [114].

Similar to China, **Kenya** has been criticised for providing too little information on SEAs on the government website of the National Environmental Management Authority and that in order to build upon transparent governance and public engagement as stated in the Guidelines, more effort at availing SEA reports is needed [116].

At the **follow-up stage**, only a very limited number of countries' SEA legislation include legal requirements for public participation.

In **China** the law entitles citizens, legal persons and other organizations to report and complain in relation to environmental pollution and ecological damage activities and thus to support monitoring of EIA and SEA outcomes.

In **Canada**, and in response to an independent review of the **Cabinet Directive on SEA** referred to above, the Government revised the guidelines to strengthen accountabilities and emphasize transparency by including new public reporting requirements for SEAs. This includes new reporting to Parliament on the results of SEAs and their impacts on the goals and targets of the Federal Sustainable Development Strategy through the Departmental Performance Reports.[197]

### 4.2.4 Review and (final) decision-making

Similar to the EIA process, review of the SEA report in many cases, takes place through public participation (see section 4.2.3 Public participation) and by a public authority. The public authority is generally an environmental agency, and, in

195 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, Article 6.

196 Article 14.

197 https://www.canada.ca/en/environmental-assessment-agency/programs/strategic-environmental-assessment/third-party-evaluation-implementation-cabinet-directive.html.

particular with regard to national policies, in a limited number of cases also an inter-ministerial committee.

For example, in addition to the already outlined consultation of the public, review and approval of the SEA in **Panama** is the responsibility of the **Ministry of the Environment**, which must issue the resolution that approves or rejects the SEA. At the provincial or local level, the task can be delegated to the respective Regional Directorate within the Ministry of Environment.

to be subjected to public review or to a public hearing before making a **final determination**.[199]

Similarly, but not quite as strict, SEA legislation in **China** provides that in the case of PEIA for special plans, the conclusion and the opinion of **examination teams**, called together by the competent environmental authorities, must be **used as an important basis for decision-making** by the authority approving the plan. Further, SEAs for plans (PEIAs) are considered **an integral part of the plan,** and

**Table 12: Overview of section content related to SEA review and decision-making**

| | Review and decision-making | | |
|---|---|---|---|
| Specific issue | Review process | Recommendations | SEA statement |
| Case study countries and illustrative examples* | Panama; Tanzania; China; Indonesia; Kenya | Tanzania; China; Indonesia | Tanzania; Denmark |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

Whereas the SEA legislation in Panama does not determine that potential recommendations provided in the Resolution are binding on the plan, programme or policy issuing institution, thus that the relevant document needs to be changed accordingly, it is a **legal requirement to comply with recommendations** made by the Minister of Environment in **Tanzania**. Thus, the plan, programme or policy issuing institution has to submit a new report and or a revised document.[198] In case no agreement can be found on the content of a revised SEA decision and its implication for the reviewed document, the Minister of Environment may order the documents

those plans without environmental impact sections and chapters or explanations will not be approved by the plan's examining and approving department. A critical issue in the implementation of the provisions however is that there is a controversy between the competent authority of environmental protection and other departments (e.g. plan compiling and approval departments) about the **power to convene the review team** for the SEA report [114]. This issue is related to the challenges associated with **cross-sectoral cooperation** as outlined earlier.

In addition to procedural requirements for review of SEAs, the recently adopted

198 Article 104 (VI), Article 105 (VI).

199 Article 104 (IX).

Indonesian SEA legislation also provides **substantive guidance for the approval** of plans, programmes and policies.

SEA legislation in **Indonesia** includes a requirement for **validation of the SEA (KLHS) by the Minister of Environment and Forestry**, for national and provincial policies, plans and/or programs, and by the Governor, for district-level policy, plans and programs, following a written validation request by the drafter. Furthermore it is stipulated that if no validation decision is issued within a time limit of **twenty working days**, the compiler is deemed to have obtained the validation.[200]

Regarding the **implications of the findings for the approval of the SEA as well as EIAs**, the law further stipulates that "*in the case of the results of KLHS certifying that the support and carrying capabilities have been excessive,*

a. The development policies, plans, and/or programs shall be improved in accordance with recommendation of KLHS; and
b. *All businesses and/or activities already surpassing the support and carrying capabilities of the environment shall not be permitted anymore*."[201]

While the intention of the **fictional validation** after twenty working days is likely to speed-up the process, it should be noted that twenty working days is regularly not sufficient for a comprehensive review. More generally, and in particular in the absence of sufficient capacities, such an approach is likely not to lead to more timely review decisions, but risks leading to decision without validation by the environmental authorities and thus undermines the effectiveness of the process.

The option for SEA **review by an inter-ministerial committee,** prior to the approval of a policy by cabinet, is provided in the **SEA Guidelines** of **Kenya** (in addition to guidance for stakeholder participation). Whereas the country's EIA regulations do not set out how the review of SEAs should take place, the Guidelines suggest that SEAs are reviewed by the National Environmental Management Authority. For **plans and programmes**, the Authority may constitute a Technical Advisory Committee to provide independent technical comment, and in the case of **policies** the Authority may constitute an **Inter-ministerial Committee on Environment**. The final decision on the policy will be determined by the National Environment Council, aided by a concise briefing note from the Minister/Cabinet Secretary, informing the decision-makers of the key environmental issues linked to the policy with emphasis on the recommended alternatives and their ranking. The National Environment Council is responsible for policy formulation, setting national goals and objectives and determining priorities for the protection of the environment. Once the National Environment Council reaches a decision, the Minister of Environment informs the Minister responsible for the proposed policy on the decision outcome. The responsible minister then tables the policy proposal (cabinet paper) to the cabinet for approval.

As highlighted in the next section (*4.2.5 Monitoring and follow up*), documentation of SEA results is a crucial step for enhancing

200 Article 25-27.
201 Article 17.

**Key points on public participation in SEAs**

- Similar to the EIA process, review of the SEA report in many cases takes place through public participation and by a public authority, regularly an environmental agency;
- In addition to procedural requirements for review of SEAs, the recently adopted **Indonesian** SEA legislation also provides **substantive guidance for the approval** of plans, programmes and policies; in addition it is for example a **legal requirement to comply with recommendations** made by the Minister of Environment in **Tanzania;**
- Many countries include the requirement in their legislation to either submit a separate SEA report and/or to integrate the SEA outcome and conclusions in the proposed strategic document.

accountability, including with regard to mitigation measures. Many countries include the requirement in their legislation to either submit a separate SEA report or via direct integration of the SEA outcome and conclusions in the proposed strategic document [113].

As already outlined, this is for example the case in **Tanzania**, where the law includes the requirement to **include a SEA Statement** on the likely effects that the regulation, public policy, programme or development plan may have on the environment when promulgating the respective instrument.[202]

Detailed requirements for the content of a supplementary statement to the final plan or program prepared by the Authority are provided in **Denmark's** SEA law, which provides that the authority shall prepare a statement of:

1. How environmental considerations are integrated into the plan or program,
2. How the environmental report and the opinions received in the public consultation stage, are considered,
3. Why the approved or adopted plan or program is selected based on the reasonable alternatives dealt with, and
4. How the authority will monitor the significant environmental effects of the plan or program.

As in the case of EIA, the **capacity** to implement suggested mitigation measures by government authorities should be a key consideration in the final decision-making, since in practice this often seems to be an obstacle for implementation.

### 4.2.5 Follow-up and adaptive management

As in the case of EIAs, there is a wide understanding that the post-decision phase on an ex-ante assessment of a plan, programme or policy, and thus the implementation of the respective strategic document, should be considered part of an effective SEA process. It is here where the **actual impacts** occur, in particular also when project-level implementation occurs under the established planning

202 Article 104 (2)

**Table 13: Overview of section content related to SEA follow-up and adaptive management**

| | Follow-up and adaptive management | | | |
|---|---|---|---|---|
| Specific issue | Compliance/ implementation of recommendations | Environmental impact/ effectiveness | Transparency | Evaluation criteria/ checklists |
| Case study countries and illustrative examples* | Peru; Panama | Indonesia; China; Panama | Canada | Kenya |

**Please note that this list is not exhaustive, but instead flags examples from the case study countries and illustrative examples featured in the report*

framework. However, follow-up of SEAs face many of the same challenges observed with regard to EIAs, such as for example, limited institutional capacity and generally a lack of legal requirements for follow-up. Instead, the focus of follow-up measures is, in many cases, on monitoring the influence of an SEA on a planning process, instead of plan performance and impact [105,110,118,119].

In addition, a number of challenges have been identified specifically with regard to SEA follow-up. These include the following [110,118,119]:

1 Generally there is a long time period for a strategic planning instrument to materialize;
2. It is difficult to attribute environmental changes to a specific strategic planning instrument;
3. There is a broad variety of plans, programmes and policies at the different planning levels, thus follow-up has to be case sensitive in the absence of a single general model.

At the same time it has been concluded, as in the case of EIAs, that verification of whether the predictions of the ex-ante assessment materialized is only one side of the SEA follow-up coin. The other, and arguably more important one, is to monitor and respond to actual changes, which are by their nature also being influenced by other factors than the respective plan, programme or policy, in order to verify whether the implementation of the strategic document needs to be adjusted in order to achieve the desired objectives [105].

In the following, a number of legal approaches for follow-up are presented.

In **Indonesia**, provisions on SEA monitoring and evaluation were introduced through the recent legal reform in 2016. As well as the establishment of the respective competences the Regulation provides that SEA monitoring and evaluation is carried out by the responsible government authorities, a) *at the time of SEA development*, and, b) *against SEA implementation following validation*. The focus is also on **effectiveness of the SEA**, including effectiveness of the involvement of communities and stakeholders and quality and effectiveness of SEA recommendations integrated in policies, plans and programmes. Further details are provided on the process (reporting of

monitoring results) and the objective of monitoring and evaluation.[203]

In **China**, the law requires timely follow-up, monitoring and evaluation on the **environmental impact of special plans**. The planning departments are responsible for conducting such **monitoring and for reporting** the results to the authorities that approved the plans. As already outlined in the section on public participation, the law also entitles citizens, legal persons and other organizations to report and complain in relation to environmental pollution and ecological damage activities and thus to **support monitoring** of SEA (and EIA) outcomes.

In **Peru**, the Environmental Assessment and Control Agency is responsible for **monitoring and controlling the implementation of the recommendations** included in the SEA report and is required to report the results to the Controller General of the Republic.[204] There are no detailed provisions however as to the process to be followed in case of **non-compliance** with the contents of the environmental report.

In **Panama**, the recently adopted SEA legislation briefly refers to follow-up. In particular it is stated that the Ministry of Environment may carry out audits or similar instruments to review the **compliance and effectiveness** of the SEA results. The Ministry of Environment is further empowered to issue the **methodology for follow-up as well as guidelines for the correct implementation of SEAs**. Monitoring of SEAs at the regional or local level may also be delegated to the Regional Directorate of the respective Ministry of Environment.[205] No legal requirements are stipulated regarding monitoring or reporting obligations of the plan, programme or policy-implementing institutions.

As a general observation, commonly, no legal provisions are provided in national SEA legislation regarding the process to be followed in case of **non-compliance** with the contents of the environmental report, or in case for example mitigation measures prove to be ineffective. The absence of respective provisions is due to the political nature of planning processes. Government response actions to perceived shortcomings are political decisions and therefore linked to the general **accountability framework** in a country. In that context, the SEA legislation of the **European Union** provides the option for member states to use already existing monitoring arrangements in order to comply with the SEA monitoring requirements.[206]

In **Canada**, follow-up was one of the areas targeted by the Government in response to the above mentioned independent review of the Cabinet Directive in 2010. The revised Guidelines strengthen accountabilities and emphasize transparency by including new **public reporting requirements for SEAs**. This includes new **reporting to Parliament** on the results of SEAs and their impacts on the goals and targets of the Federal Sustainable Development Strategy through the Departmental Performance Reports.[207]

203 Government Regulation no. 46 concerning procedures for implementing SEA of Indonesia, 2016, Article 35-38.
204 Supreme Decree No. 019-2009-MINAM, Article 65.
205 Decree 4/2017, articles 8-9.
206 Article 10.
207 https://www.canada.ca/en/environmental-assessment-agency/programs/strategic-environmental-assessment/third-party-evaluation-implementation-cabinet-directive.html.

### Key points on follow-up and adaptive management

- Follow-up of SEAs faces many of the same challenges observed with regard to EIAs, such as, for example, limited institutional capacity and generally a lack of legal requirements for follow-up;
- In many cases, the focus of follow-up measures is on monitoring the influence of an SEA on a planning process, instead of plan performance and impact;
- Specific challenges for SEA follow-up include the regularly long time period for a strategic planning document to materialize as well as the difficulty to attribute environmental changes to a single strategic planning instrument;
- As a general observation, commonly, no legal provisions are provided in national SEA legislation regarding the process to be followed in case of non-compliance with the contents of the environmental report, or in case for example mitigation measures prove to be ineffective;
- Many countries do not ensure public access to SEA monitoring results and evaluations in their national legislation; this lack of transparency is a severe obstacle to holding government institutions accountable for their policies and actions.

However, many countries do not ensure **public access to SEA monitoring results and evaluations** in their national legislation. This lack of transparency is a severe obstacle to holding government institutions accountable for their policies and actions.

Another key observation in relation to legal approaches to SEA follow-up, is that in many countries the central environmental agency has the competence to set more detailed rules in the form of **SEA Guidelines**.

In **Kenya** for example, there are no legally binding provisions regarding follow-up. Nevertheless, the plan, programme or policy-issuing institution is considered responsible for monitoring and evaluation of the strategic document under the oversight and control of the National Environmental Management Authority [116]. Further, detailed provisions for follow-up are included in the **SEA Guidelines**. Firstly, it is stipulated that an Environmental Management Plan should be included in the SEA report, which regularly include a monitoring programme. In addition the guidelines outline that the institution shall monitor the plan, programme or policy and submit the report to the Authority annually or at intervals that will be prescribed by the Authority. It is also stipulated that at some point a formal evaluation of the monitoring results should take place as part of the revision or renewal of the plan, programme or policy. Notably, the SEA guidelines also provide detailed information for conducting monitoring and reporting in its annexes. The "**SEA Evaluation Criteria**" also elaborate on the importance of evaluation, arriving at the conclusion that extending the focus to include the effects on institutional and

capacity-building issues is necessary in order to determine whether the SEA led to sustainable plan, programme or policy design and implementation. And the provided **checklist of key questions** for evaluation is also targeted at evaluating the influence on direct and indirect goals of relevance to sustainable development and accountability. Reference to internal standards, such as from the International Association for Impact Assessment (IAIA), have been made as well.

Finally, and similar to suggestions made regarding EIA follow-up, making use of a watchdog group or an independent agency to monitor implementation of SEA mitigation measures regarding specific issues, such as **climate change**, can be considered.

### 4.3 Emerging trends

1. The trend towards **broader application of SEAs** is continuing globally. There is an increasing recognition by a range of stakeholders that some/many of the shortcomings of EIAs – for example regarding the consideration of alternatives and cumulative effects – can only be addressed effectively at the strategic level and ideally prior to any project-level developments.
2. In some countries, achievements of informal SEA systems are highlighted, however, in the majority of countries where severe shortcoming of planning processes with regard to taking into account environmental considerations are observed, the **establishment of legal SEA requirements** is regarded as crucial. This includes legal measures related to sequencing or tiering of different plans, programmes and policies as well as of SEAs and EIAs, and the strengthening of accountability systems.
3. While there is a trend towards strengthening of SEA systems, a number of **shortcomings** prevail. This is widely perceived to be linked to the fact that legal approaches are often rooted in the logic of EIA systems, thus not sufficiently taking into account the particular characteristics of environmental assessments at the strategic planning level [105].
4. There is an increasing recognition that SEAs need to be promoted as the first and most important legal tool to **promote environmental mainstreaming** in sectoral and cross-sectoral policies. At the same time it is regarded as crucial to manage expectations with regard to the individual SEA process in order to demonstrate its potential as well as limitations, depending for example, on the tier of application at the plan or programme level, and thus to be a "*worthwhile part of planning and development*" [111].
5. There is a trend towards the adoption of **non-binding procedural SEA guidelines** in order to guide implementation of often rather brief legislative requirements. In addition, and in many cases, at the regional rather than the national level, guidelines are adopted to facilitate assessing impact related to environmental factors such as climate change, biodiversity, ecosystem services and health. In that regard, developments towards the establishment of separate assessment processes with regard to certain issues, e.g. climate change or health, should be noted as well.
6. Despite growing recognition of SEAs as a tool to strengthen democratic control, surprisingly little guidance is provided in many countries'

SEA legislation regarding **public participation**, including access to information (e.g. monitoring reports). While this may partly be due to the perception that SEA and planning processes are inherently linked to the general accountability framework of a country, and thus measures or rules related to public participation as well as for example, follow-up, might be established elsewhere, these links should at least be made visible in order to strengthen transparency and implementation. At the same time SEAs can be a tool to strengthen such key governance principles.

# Chapter 5

## Key findings and concluding remarks

It is without question that EIAs continue to be one of the (if not the) most important environmental planning and management tools globally. Since EIAs first entered the stage almost 50 years ago, and quickly gained momentum at international and regional levels, national governments across the world integrated EIAs into their legal frameworks and gained experience in implementation. Consequently, there is a huge wealth of literature on achievements and success stories as well as remaining shortcomings and challenges. Legal reform processes regularly target EIA systems in order to further strengthen and improve them.

While there is also a wide recognition of the importance of SEAs, uptake and in particular implementation has been slower in many countries. This is due to the fact that SEAs are mostly being developed in response to perceived limitations of EIAs, thus SEAs influence government planning processes (and thus highly political processes) instead of concrete physical developments. Nevertheless, there are recent promising developments in different parts of the world, including on tiering of SEAs and EIAs, and it can be hoped that soon SEAs will be as widely applied as EIAs – whether as a separate process or integrated in national planning processes.

However, in relation to both EIAs and SEAs, many of the observed challenges in implementation can seem daunting. Even in cases where the different steps of the process are followed properly (procedural compliance), questions about the tools' effectiveness, i.e. whether better environmental outcomes are achieved with them than without them, prevail. This is also linked to the issue of lack of available, accessible and suitable data. Further, elements widely considered to be at the heart of EIAs are questioned, since there is a perception amongst some stakeholders that the benefits of the often time-consuming and complex processes do not outweigh the costs. Instead, crucial economic growth for the benefit of society is perceived to be unnecessary delayed. This has even triggered legislative changes to backtrack/weaken the processes in some countries. This is a worrying development – and at the same time nothing new.

EIAs and SEAs were developed in order to shift the paradigm that in particular economic, but also social considerations, are more important than, or can be separated from, environmental considerations, and thus were regularly not sufficiently dealt with in decision-making. Considerable achievements have been made in the last decades in shifting this paradigm, as illustrated by a range

of international and regional agreements and policies related to environmental matters and more broadly, sustainable development. Most recently this includes for example the adoption of the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals, the ongoing negotiations for a new instrument on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdictions (EIA is one of the key topics addressed), as well as the campaign for a global pact to protect the human right to a clean, healthy environment.

At the same time, and as can also be seen at the international and regional policy level, the "right" balance between the three pillars of sustainable development will never be a given, but a continued subject of public discourse and the politics of the day. In fact, the issue is at the very heart of EIAs and SEAs themselves. The objective of the tools is not the implementation of a specific environmental standard, but instead it is to ensure or work towards a level-playing field between all stakeholders through public participation and access to information, including in the crucial post-decision or follow-up phase.

As presented in this stocktaking report of EIA and SEA legislation globally, there is a wealth of implementation experience, and promising legal approaches have been developed in order to rectify shortcomings and further strengthen EIA and SEA systems across the globe, while taking into account specific regional and national circumstances. It is hoped that this report will further foster and encourage this crucial exchange for the betterment of the global environment.

KIOGA NILE HYDROPOWER PLANT IN JINJA, UGANDA, EASTERN AFRICA BY ALEXANDER KUGUCHIN.

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GOLD MINES BY VITALI NESTERCHUK

# Annex: Useful resources

There is a wide range of resources available to foster understanding of and build capacity related to the further development and implementation of EIAs and SEAs. These include academic articles and books as well as grey literature, such as reports by organisations involved in capacity building activities globally, for example by the International Association for Impact Assessment (IAIA), or for a specific region, for example by the Institute for Global Environmental Strategies (IGES) with respect to Asia.

These include academic article and books as well as grey literature, such as reports by organisations involved in capacity building activities globally, for example by the International Association for Impact Assessment (IAIA), or for a specific region, for example by the Institute for Global Environmental Strategies (IGES) which operates the Asian Environmental Compliance and Enforcement Network (AECEN)[1]

A number of key resources are listed below.

**Websites with EIA and SEA relevant resources, including national legislation**

**http://www.unece.org/env/eia/welcome.html - UNECE: Environmental Assessment**

The United Nations Economic Commission for Europe (UNECE) was set up in 1947 by the he Economic and Social Council (ECOSOC). It is one of five regional commissions of the United Nations. UNECE also sets out norms, standards and conventions to facilitate international cooperation within and outside the region.

**http://www.iaia.org/ - The International Association for Impact Assessment**

IAIA is the International Association for Impact Assessment, the leading global network on best practice in the use of impact assessment for informed decision making regarding policies, programs, plans and projects

**http://www.eia.nl/en - Netherlands Commission for Environmental Assessment**

The Netherlands Commission for Environmental Assessment (NCEA) is an independent expert body that provides advisory services and capacity development on environmental assessment. The website includes a repository of EIA & SEA country profiles that give information on

1 Information on Environmental Impact Assessment in Asia by AECEN is available from http://www.aecen.org/eia-compendium.

the environmental assessment legislation of a specific country.

**https://www.ecolex.org/ - ECOLEX**

ECOLEX is an information service on environmental law, operated jointly by FAO, IUCN and UN Environment. Its purpose is to build capacity worldwide by providing the most comprehensive possible global source of information on environmental law.

**https://eialaws.elaw.org/ - Database on EIA Law globally**

The Environmental Law Alliance Worldwide (ELAW) helps communities speak out for clean air, clean water, and a healthy planet. ELAW is a global alliance of attorneys, scientists and other advocates collaborating across borders to promote grassroots efforts to build a sustainable, just future.

### Guidance and training material

**http://eia.unu.edu/about.html - EIA Open Educational Resource**

This open educational resource on Environmental Impact Assessment (EIA) is based on the United Nations Environment Programme (UNEP) EIA Training Resources Manual, Second Edition, edited by Barry Sadler and Mary McCabe. The EIA-wiki also includes the UNEP compendium of "Studies of EIA Practice in Developing Countries". These publications were initially developed by UNEP in response to the demand for training and capacity building in environmental impact assessment, in particular from developing countries and to provide a list of case studies on how EIA is implemented. The content of the EIA course module is based on the first 11 training topics of UNEP's EIA Training Resources Manual and was edited and modified by subject matter experts from RMIT University in Australia.

**Secretariat of the Pacific Regional Environmental Programme (SPREP), "Strengthening environmental impact assessment: guidelines for Pacific Island countries and territories" (2016)**

The publication is targeted at government officers who are responsible for administering or managing EIA, or who engage with the EIA process in other regulatory or development proponent capacities (e.g. officers working in areas such as planning, health, energy, water, transport, fisheries, agriculture, natural resources). The EIA Guidelines are applicable to the full range of projects and economic development sectors in the Pacific and aim to support the implementation of current EIA legal requirements and to strengthen Pacific-based application of the EIA process.

**UN Environment: Guidelines for conducting Integrated Environmental Assessments (2017)**

This document is the result of UN Environment Member State requests in both Governing Council and the UN Environment Assembly and is meant to provide guidance for a wide range of different types of Integrated Environmental Assessments. These can range from global to regional to rapid response assessments and emerging issues assessments. The Guidelines should be considered a 'living document' since they will be used and improved throughout the sixth Global Environment Outlook process as well as other on going assessment processes.

UN environment

United Nations
Environment Programme