Establishing a Transboundary Environmental Impact Assessment Framework for the Mekong River Basin

An Assessment of the Draft
Mekong River Commission
TbEIA Framework

Prepared by the Environmental Law Institute
On behalf of ECO-Asia and USAID
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I. INTRODUCTION

The Mekong River Commission (MRC) is in the process of developing a transboundary environmental impact assessment (TbEIA) procedure for assessing proposed activities with potential transboundary environmental impacts in the Lower Mekong Basin. Many regions have implemented or are in the process of developing TbEIA frameworks for proposed activities that may result in significant adverse transboundary environmental harm, including the European Union, North America, Central America, and Central Asia. The MRC drew upon the lessons learned in these other regions in initiating development of TbEIA Guidelines for the Lower Mekong Basin. The MRC TbEIA Guidelines will consist of three components – a Framework Agreement, Guidance for implementing the Agreement, and an Institutional Support mechanism. The Framework Agreement will constitute the general foundation of the Guidelines – expressing the intent of the Member Countries to adopt TbEIA, confirming the commitments of the 1995 Agreement, establishing what activities trigger discussion of whether to conduct a TbEIA, and affirming the decision of all countries to agree on and comply with TbEIA arrangements. The Guidance will support implementation of TbEIA by assisting Member Countries in determining the best approach to take in different circumstances. The Institutional Support mechanism will consist of identifying necessary support measures and reviewing responsive MRC Secretariat proposals.[1] Currently, the MRC is revising the second version of the Framework Agreement ("Draft TbEIA Framework"). This report is meant to help guide the MRC in further developing the Framework.

This report assesses how further development of the Draft TbEIA Framework may be informed by recommended best practices in the field of TbEIA. It also analyzes how the Draft TbEIA Framework relates to the national EIA legislation and/or administrative requirements of the MRC member countries. Section II of this report outlines TbEIA recommended best practices, based on a survey of lessons learned from international, regional, and international financial institution practice. This section focuses on the agreements and documents that the MRC drew upon when preparing the Draft TbEIA Framework. Section III summarizes the national EIA requirements of the MRC member countries and the chronological development of the MRC TbEIA requirement and Framework drafts. Section IV discusses recommendations for how to revise the second version of the Draft TbEIA Framework to ensure it is consistent with international best practices and sufficiently harmonizes the national EIA requirements of the member countries, so that it can be effectively implemented and enforced.

II. INTERNATIONAL TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT RECOMMENDED BEST PRACTICES

A. Introduction to TbEIA

Transboundary environmental impact assessment (TbEIA) is a process in which governments, international institutions, and the public assess the likely or potential environmental (and often social and economic) impacts of a proposed activity. At both the regional and international levels, treaties and more informal mechanisms are emerging that include TbEIA as a means for taking both a precautionary and participatory approach to planning activities with potential transboundary impacts.[2] The practice of TbEIA has its genesis in multiple international environmental principles, and builds on the practice of environmental impact assessment (EIA) at the national level. Simply stated, a TbEIA is an EIA that is performed when environmental impacts have the potential to affect a State other than that in which the environmental harm or the project that results in the harm originates. While the general structure of a TbEIA has many elements in common with a domestic EIA (including public participation and the overall chronology of stages described above), a TbEIA imposes additional political, administrative, and regulatory layers to the process, making it much more complex than the EIA process.[3]

As the practice of TbEIA has expanded, TbEIA requirements have been included in several international environmental treaties, including the UN Convention on the Law of the Sea, the Nordic Environmental

[1] MRC Secretariat, Proposed Scope of a Framework Agreement and Guidelines on Transboundary Environmental Impact Assessment for the Lower Mekong Basin (July 2005).
[2] Troell *et al.*, *Transboundary Environmental Impact Assessment as a tool for promoting public participation in international watercourse management*, at 59, *in* ENHANCING PARTICIPATION AND GOVERNANCE IN WATER RESOURCES MANAGEMENT (Libor Jansky & Juha Uitto eds., 2006).
[3] *See generally* Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291 (2002).

Protection Convention, the Antarctic Protocol, and the Convention on Biological Diversity.[4] In the specific context of transboundary water management, TbEIA provisions also have been included in treaties such as the UN Convention on the Law of Non-navigational Uses of International Watercourses and the UN Economic Commission for Europe (UNECE) Helsinki Convention on the Protection of International Watercourses and International Lakes. In addition, the International Law Association Water Resources Committee and the Berlin Rules on Water Resources Law[5] consider the requirement to conduct TbEIA to be a rule of customary international law.[6]

The practice of TbEIA is rapidly evolving. Despite the continuing changes, however, there is a general set of international best practices that can be derived from the implementation efforts that have been and continue to be undertaken in several regions of the world. These practices are heavily informed by two distinct bodies: (1) two prominent examples of regional TbEIA requirements that are often looked to as models for sub-regional or basin-level agreements; and (2) the environmental assessment practices of international financial institutions that, although not transboundary by design, are commonly applied in a transboundary context.

i. Primary Examples

Among the most specific examples of regional TbEIA legal frameworks are the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) and the Draft North American Agreement on Transboundary Environmental Impact Assessment (Draft TEIAA).

Espoo Convention[7]

The Espoo Convention is arguably the most authoritative legal codification of TbEIA. The Convention requires its parties to "take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."[8] As a practical matter, the Espoo Convention requires that the country of origin open its EIA and decision-making procedures to the public and authorities in neighboring, potentially affected States, taking their comments into account.[9] The notification provisions require the country of origin to inform potentially affected States of the proposed project and its potential transboundary impacts "as soon as possible, and no later than when informing its own public…."[10] Affected States are to be given a "reasonable time" in which to notify the country of origin whether they intend to participate in the assessment process.[11] A State that has not been thus notified, but believes a project would result in significant transboundary effects, can request this information and an opportunity to participate.[12] If the countries agree, the provisions of the Convention apply; if not, any Country may submit the question to a commission of inquiry.[13]

The country of origin must furnish the potentially affected States with copies of the EIA documentation, and the Parties maintain joint responsibility for distributing the documentation to the public of the affected country[14] and for the submission of comments to the competent authority of the country of origin, again within a "reasonable time."[15] The parties should then enter into consultations regarding such issues as alternatives, mitigation measures, and mutual assistance.[16] There is no requirement that the preferences of the affected country dictate the final decision of the country of origin, but "due account" must be taken

[4] OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 231 (2007) (listing other examples as well).
[5] Environmental Resources Management for the Mekong River Commission, *Development of an EIA/SEA System for the Lower Mekong Basin: Background Review*, Element 2, Ref. 8003 (April 2002) [hereinafter ERM, *EIA for LMB*].
[6] MCINTYRE, *supra* note 4, at 235.
[7] The majority of this subsection comes directly from Troell *et al.*, *supra* note 2.
[8] Convention on Environmental Impact Assessment in a Transboundary Context, art. 2.1, Feb. 25, 1991, 1988 U.N.T.S. 310 (1997) [hereinafter Espoo].
[9] *Id*. art. 2(6). *See also* de Boer, *Bilateral Agreements for the Application of the UN-ECE Convention on EIA in a Transboundary Context*, 19 ENVTL. IMPACT ASSESSMENT REV. 85, 87 (1999).
[10] Espoo, *supra* note 8, art. 3(1).
[11] *Id.* art. 3 (1) & (2).
[12] *Id.* art. 3(7).
[13] *Id.*
[14] Throughout this report we refer to the "country of origin" and the "potentially affected country(ies)" because that is the terminology used in the Draft MRC TbEIA Framework. The terms are interchangeable with "party of origin" and "potentially affected party(ies)," which are commonly used in other agreements.
[15] *Id.* art. 4.
[16] *Id.* art. 5.

of the consultations between the parties undertaken pursuant to the Convention; including, for example, acknowledgement of comments received from authorities and the public of the affected country.[17]

Annex VI of the Convention enumerates elements that parties may include in bilateral or multilateral agreements to facilitate complete implementation of the Convention's requirements.[18] There are currently 42 parties to the Convention. An amendment that will allow countries outside the region to ratify the Convention was passed, but it has not yet entered into force.[19]

Draft TEIAA

The Draft TEIAA specifies a TbEIA procedure for Mexico, the United States, and Canada. The Draft was triggered by a requirement contained in a 1993 side agreement to the North American Free Trade Agreement, the North American Agreement on Environmental Cooperation, which mandated the promulgation of expert recommendations on TbEIA within three years. The expert group produced recommendations that it later turned into the Draft TEIAA.[20] However, a decade later the draft has yet to be finalized. Nevertheless, the provisions still provide useful guidance for TbEIA.

ii. International Financial Institution Requirements

While most major international financial institutions lack specific TbEIA requirements, their EIA requirements are often applied in a transboundary context. Among numerous others, the World Bank, Asian Development Bank (ADB), African Development Bank, Inter-American Development Bank, and UN Capital Development Fund all have environmental assessment procedures in place that are required for countries receiving their funding. The extent to which these EIA requirements explicitly apply to transboundary environmental impacts varies – for example, the World Bank clearly states that transboundary impacts must be considered, while the ADB only treats transboundary impacts superficially.[21]

B. General Considerations for a TbEIA Framework

i. Process

As domestic environmental impact assessment (EIA) has become a standard tool of environmental regulation and management, the international community has increasingly considered how the principles and approaches advanced in the domestic context might be applied to the management of transboundary resources. EIA is "[a]n assessment of the likely or potential environmental impacts of [a] proposed activity."[22] Rather than responding to environmental impacts as they occur, the EIA process enables decision-makers to anticipate the consequences of their actions and avoid or minimize adverse effects. Impact assessment is aimed not necessarily at requiring specific environmental outcomes, but rather at ensuring a more open and inclusive decision-making process to arrive at a better substantive result.[23]

TbEIA includes many of the same steps as a typical EIA regime. This is because a transboundary environmental assessment is essentially a mechanism for standardizing the involvement of other

[17] *Id.* art. 6.
[18] Espoo, *supra* note 8, annex VI.
[19] For more information, see the Espoo website at http://www.unece.org/env/eia/eia.htm. To date (Feb. 25, 2009) there are 13 parties to the amendment, but entry into force requires three-fourths of the signatories to ratify it (i.e. approximately 30).
[20] *See* Commission for Environmental Cooperation, Draft North American Agreement on Transboundary Environmental Impact Assessment (1997) [hereinafter Draft TEIAA], *available at* http://www.cec.org/pubs_info_resources/Law_treat_agree/pbl.cfm?varlang=english (last visited Mar. 13, 2009). The requirement for transboundary environmental impact assessment recommendations is contained in Article 10(7).
[21] World Bank Operational Policy 4.01, Environmental Assessment, § 3, Doc. OP 4.01 (Jan. 1999), *available at* http://go.worldbank.org/9LF3YQWTP0 (last visited Mar. 13, 2009) [hereinafter World Bank OP 4.01] ("EA takes into account the natural environment (air, water, and land); human health and safety; social aspects (involuntary resettlement, indigenous peoples, and physical cultural resources); and transboundary and global environmental aspects"); Asian Development Bank, Environmental Assessment Guidelines, ¶ 137 (2003) [hereinafter ADB EA Guidelines] (includes "impacts on international waterways and other transboundary issues" as one of the categories of environmentally sensitive areas, which it recommends classifying as requiring an EIA); *see* Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 NYU Envt'l L. J. 169 (2003), 217–19; ERM, *EIA for LMB*, *supra* note 5, Element 2, § 5.3.
[22] UN Environment Programme (UNEP) Governing Council Decision, Goals and Principles of Environmental Impact Assessment, prin. 4, 17 EPL 36, UNEP GC/DEC/14/25 (June 17, 1987).
[23] This paragraph comes from Troell *et al.*, *supra* note 2.

countries in the domestic environmental assessment process of the country of origin.[24] Like an EIA, a typical TbEIA consists of the following stages: screening, scoping, impact analysis, preparation of a draft TbEIA, public review and comment (often required at more than one stage of the process), production of a final TbEIA, and a final report review process. Following the final decision on how to implement a proposed activity or project (or an evaluated alternative), some TbEIA procedures provide mechanisms for filing an appeal and for long-term monitoring of the project.[25] Although production of the draft and final TbEIA reports is often based on a country's domestic EIA process, other TbEIA steps may vary from the domestic legal framework.

In addition to the standard components of a domestic EIA, a TbEIA adds requirements designed to ensure that all potentially affected countries are aware of and involved in the planning process for projects with possible transboundary impacts. The country of origin is required to notify all potentially affected parties of any possible transboundary impacts, after which the affected country is to indicate whether it wishes to participate in the country of origin's environmental assessment procedure. If the affected country wants to be involved in the environmental assessment, the parties will consult with each other and share relevant information about the project. A critical aspect of both EIA and TbEIA frameworks is the inclusion of public review procedures. With TbEIA, these procedures often provide the public of the affected country the same opportunities for participation as the public of the country of origin. However, the final decision remains the sole responsibility of the country of origin, with varying standards for the persuasiveness of the affected country's comments and consultations.[26] Finally, there may be follow-up provisions such as monitoring or reporting requirements. Dispute resolution mechanisms that can be triggered at certain stages of the process are also common.

ii. Legal Framework

One of the most important aspects of a successful TbEIA framework is that it incorporates "a clear set of legal, procedural, and institutional requirements and standards regarding how to conduct, review, and finalize [transboundary impact assessments]."[27] Clear and specific requirements for each stage of the TbEIA process have been shown to result in more accurate and effective assessments.[28] Particularly where national EIA regimes form the basis of TbEIA methodology, specificity also helps to streamline the process and reduce the likelihood of disputes regarding implementation. Critical aspects that require detailed language include:

- The triggers for the procedure;
- Responsible parties;
- Information exchange requirements;
- Public participation requirements;
- Dispute resolution mechanisms;
- Post-project assessment;
- Action and response timeframes; and
- Language requirements.

Often considered less important, three of these components are often overlooked: the need to specify appropriate timeframes,[29] which parties are responsible for the various stages,[30] and what languages

[24] Cassar & Bruch, *supra* note 21, at 172.
[25] *Id.* at 220–32.
[26] *See* UN Economic Commission for Europe (UNECE), pamphlet, Benefits and costs of transboundary EIA – Applying the UNECE Convention on Environmental Impact Assessment in a Transboundary Context (2007).
[27] Carl Bruch, Mikiyasu Nakayama, Jessica Troell, Lisa Goldman, & Elizabeth Maruma Mrema, *Assessing the Assessments: Improving Methodologies for Impact Assessment in Transboundary Watercourses*, 24 J. INT'L ASS'N FOR IMPACT ASSESSMENT 239, 245 (2008).
[28] *Id.*; Cassar & Bruch, *supra* note 21, at 238–39.
[29] Naho Mirumachi & Mikiyasu Nakayama, *Improving Methodologies for Transboundary Impact Assessment in Transboundary Watercourses: Navigation Channel Improvement Project of the Lancang-Mekong River from China-Myanmar Boundary Marker 243 to Ban Houei Sai of Laos*, 23 INT'L J. WATER RESOURCES DEV. 411, 420, 423 (2007).
[30] ERM, *EIA for LMB*, *supra* note 5, Element 2, § 3.

must be used.[31] As setting appropriate timeframes for the different stages of the TbEIA process leads to better assessments, it is important to carefully predetermine the length of time for each stage of the assessment. In addition, agreeing upon who is responsible for which aspects of the environmental assessment and the costs of implementation at the outset can avoid resource-consuming disputes and duplicative efforts throughout the process. For example, pursuant to an implementation agreement enacted between Estonia and Finland, the parties are specifically obligated to cover the costs of providing for public participation within their respective countries unless they explicitly agree otherwise.[32] Third, specifying the language(s) to be used for various TbEIA documents at the beginning of the process will help avoid unnecessarily delays and the need for last-minute translation services. The Draft TEIAA encourages the origin country to transmit the notification in the language of the potentially affected country as well as its own official language.[33] Guidelines developed by the United Nations Environment Programme (UNEP), which are currently being used by the littoral states of the Caspian Sea (Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan) while they develop a binding protocol on TbEIA, explicitly require notifications for Azerbaijan, Kazakhstan, Turkmenistan, and the Russian Federation to be provided in Russian, notifications for Iran to be provided in English, and notifications submitted to the Caspian Environment Programme to be provided in both languages.[34]

Harmonization versus Requiring Additional Agreements

There are two primary options for ensuring that a TbEIA framework provides sufficiently clear and specific procedural guidance. Beyond specifying the goals and objectives of the transboundary assessment process, these approaches focus on harmonizing the domestic EIA procedures of the various parties to a TbEIA agreement. The first way to do this is to include sufficient detail and minimum standards in the TbEIA agreement itself. Such an agreement is intended to be the sole source of procedural and substantive guidance for conducting TbEIA. An example of this type of agreement is the Draft TEIAA, which includes numerous appendices detailing the requirements for, among other things: notification documents; content of TbEIA studies; and how to determine "significant" adverse environmental impacts. The second option is for the parties to conclude a framework TbEIA agreement that enables parties to implement additional bi- or multi-lateral agreements that provide the necessary details regarding how actual assessments will be conducted when the requirement to do so is triggered. This is the approach taken by the Espoo Convention,[35] which has dozens of signatories sharing diverse types of transboundary resources. As a result, numerous bilateral agreements have been concluded among signatories to implement the requirements of the Convention. Espoo contains a list of the mandatory basic requirements for an environmental impact assessment regime,[36] although many of its requirements lack sufficient detail to guide implementation of an actual TbEIA (likely because the drafters anticipated that numerous bilateral agreements would be signed).

Because the MRC TbEIA agreement is focused on a single specific basin, the former approach – including enough detail and minimum standards in the agreement to guide the parties' actions – will likely be more effective and efficient.

Definitions

A common practice and simple way to reduce disputes over interpretation is to include a list of definitions at the beginning of an environmental assessment agreement. Both the Espoo Convention and the Draft TEIAA define the key terms used throughout the agreements (see Table 1). This can help clarify what country is being referred to, what triggers the agreement's requirements, which impacts are to be considered during a given stage, and the general scope of the procedural requirements of the agreement.

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[31] Cassar & Bruch, *supra* note 21, at 172.
[32] Agreement between the Government of the Republic of Estonia and the Government of the Republic of Finland on Environmental Impact Assessment in a Transboundary Context, Guidelines for the origin party, art. 16(2) (Helsinki, Feb. 21, 2002).
[33] Draft TEIAA, *supra* note 20, § 6.
[34] Guidelines on Environmental Impact Assessment in a Transboundary Context in the Caspian Sea Region: Step by step procedures, § 4.1 (UNEP & Caspian Environment Programme, 2003) [hereinafter Caspian Sea TbEIA Guidelines].
[35] Espoo, *supra* note 8, art. 8. "The Parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under this Convention." *See also* Espoo, Art. 2.2. "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention . . . ." *See also* Appendix VI, in which the Convention provides a list of elements upon which such agreements may be based.
[36] Espoo, *supra* note 8, app. II.

Table 1. Definitions included in the Espoo Convention and the Draft North American TEIAA.[37]

Espoo	**Draft TEIAA**
Parties – means, unless the text otherwise indicates, the Contracting Parties to this Convention	
Party of origin – means the Contracting Party or Parties to this Convention under whose jurisdiction a proposed activity is envisaged to take place	Party of origin – means the Party within whose territory a proposed project is intended to be carried out; (further refinement required)
Affected party – means the Contracting Party or Parties to this Convention likely to be affected by the transboundary impact of a proposed activity	Potentially affected party – means any Party or Parties whose territory could potentially be adversely affected by a proposed project located within the territory of another Party (further refinement required);
Concerned parties – means the Party of origin and the affected Party of an environmental impact assessment pursuant to this Convention	
Proposed activity – means any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure	Proposed project – [to be determined]
Environmental Impact Assessment – means a national procedure for evaluating the likely impact of a proposed activity on the environment	
	Transboundary Environmental Impact Assessment – means a domestic assessment procedure that is used to evaluate the transboundary environmental impacts of a proposed project
Impact – means any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors	Environmental impact – means any change caused by a proposed project on human health and safety, flora, fauna, soil, air, water, climate, the current use of lands and resources for traditional purposed by indigenous people or, physical structures, sites or artifacts that are of historical, archaeological, paleontological or architectural significance or, the interaction among these factors; it also includes impacts on cultural heritage or socio-economic conditions resulting from changes to those factors. Impact include direct, indirect and cumulative impacts;
Transboundary impact – means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the area under the jurisdiction of another Party	Transboundary environmental impact – means any environmental impact, either permanent or temporary in the territory of a Party caused by a proposed project, the physical origin of which is situated wholly or in part in the territory of another Party, and may include, inter alia, environmental impact on migratory species and marine resources and environmental impacts transmitted through shared water sheds and air sheds; (definition to be refined)
Competent authority – means the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity	Competent government authority – means that or those federal and non-federal authorities which Parties designate as responsible for performing duties arising out of this Agreement
The public – means one or more natural or legal persons	
	Mitigation measures – [to be determined]
	Post-project monitoring – [to be determined]

[37] Espoo, *supra* note 8, art. 1; Draft TEIAA, *supra* note 20, § 1.

C. Stages of a TbEIA

i. Screening

As with most domestic EIA regimes, a TbEIA typically begins with a "screening" phase that determines whether an assessment is actually required. There are two elements of the screening phase to consider: the screening standard, and who is responsible for implementing it.

The Screening Standard

The TbEIA requirement is commonly triggered by one of two methods: the project is of a type that automatically requires environmental assessment, or the project is qualitatively determined to likely result in "significant" environmental impact.[38]

Categorical Trigger of TbEIA

Some TbEIA agreements include a list of categories of projects that trigger the environmental assessment requirement. The Espoo Convention has such a list, with specific size and/or location thresholds for some of the activities. The Convention also enables parties to decide, on a case-by-case basis, whether an activity not on the list but likely to cause significant adverse transboundary environmental impacts should trigger the TbEIA requirement. Criteria for determining the "environmental significance" of such an unlisted activity are enclosed in an appendix.[39] The Central American Commission on Environment and Development, in an agreement aimed at strengthening EIA procedures in the region, is also developing a screening list of categories of projects that would trigger the assessment process. Although the Central American countries have not overtly required transboundary procedures, they have recognized the need to address transboundary impacts, and this agreement will help harmonize the region's domestic EIA requirements.[40]

The North American Draft TEIAA proffers a similar framework, but separates its screening process into two components: a trigger for notification and a trigger for conducting environmental assessment. Notification is triggered by a list of activities that resemble those on the Espoo Convention screening list, although, unlike Espoo, the Draft TEIAA only requires notification for listed activities planned within 100km of the parties' shared borders. Notification can also be triggered by a determination by the responsible government authority that the project may cause significant adverse transboundary environmental impacts, according to designated criteria set forth in the agreement and regardless of project proximity to either the US-Canada or US-Mexico borders. The requirement to complete a TbEIA, on the other hand, is only triggered by the latter qualitative category.[41] Like the North American Draft TEIAA, Estonia and Latvia also recognize geographic demarcation as a trigger under their bilateral agreement implementing Espoo – in this case, projects located within 15 km of the countries' common border trigger the TbEIA requirement.[42]

Qualitative Trigger of TbEIA

Qualitative determinations may also be used to assess whether a project is likely to cause "significant" transboundary environmental impacts that would require a TbEIA. This method is commonly employed by the international financial institutions, whose EIA requirements may be applied in a transboundary context. For example, both the World Bank and the ADB divide applicant projects into four categories, depending on their potential environmental impacts: [43]

- Category A projects are those that may result in significant adverse environmental impacts;

[38] Cassar & Bruch, *supra* note 21, at 221–24
[39] Espoo, *supra* note 8, app. I, art. 2.5, appendix III (in order of mention).
[40] Central American Commission on Environment and Development, Agreement for the Strengthening of the Systems Impact Assessment Environment in Central America [Spanish] (Approved by the Authorities of Environment and Natural Resources Central America on July 4, 2002), Art. A. *See also* Marianela Cedeño, *Assessment of Transboundary Environmental Impacts in Developing Countries: The Case of Central America*, *in* THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT (Kees Bastmeijer & Timo Koivurova, eds., 2008).
[41] Draft TEIAA, *supra* note 20, §§ 2, 10, app. III.
[42] Agreement between the Government of the Republic of Estonia and the Government of the Republic of Latvia on Environmental Impact Assessment in a Transboundary Context, art. 3, annex (Pärnu, Mar. 14, 1997).
[43] *Compare* World Bank OP 4.01, *supra* note 21, § 8; ADB EA Guidelines ch. V.

- Category B projects are those that will likely result in less adverse impacts than Category A projects;
- Category C projects will not likely result in adverse environmental impacts; and
- Category FI projects are those that involve a credit line through, or equity investment in, a financial intermediary.

Category A projects automatically require an EIA, while Category C projects do not require additional inquiry. The treatment of Category B projects, however, varies slightly between the two institutions – the World Bank requires an environmental assessment of narrower scope than that required for Category A projects, while the ADB requires an initial environmental examination to determine whether a full EIA is necessary.[44] More generally, the primary difference between the World Bank's and the ADB's approaches lies in how they determine a project's category. The World Bank considers the project type, location, sensitivity, proposed scale, and the nature and magnitude of potential impacts in assigning the applicant to a category.[45] The ADB, on the other hand, uses sector-based checklists to assess the sensitivity and vulnerability of environmental resources in the area and the project's potential to cause significant adverse environmental impacts.[46] Both institutions state that the special sensitivity of transboundary projects suggests placing them in Category A.[47]

Defining "Significant Environmental Impacts"

Both the Espoo Convention and the Draft TEIAA also contain lists of criteria to assist a country in determining whether the anticipated effects of a proposed activity rise to the level of likely "significant" transboundary environmental impacts, thus triggering TbEIA. The lists include factors relating to elements such as the nature of the proposed project and its environmental context, and are contained in Appendix III.

Who Implements Screening?

As important as what process is used to determine whether a project must undergo TbEIA is the question of who implements each stage of the process. There is substantial variation across domestic EIA regimes as to who is responsible for conducting the screening. In the transboundary context, the question is typically simpler because the responsibility is simply assigned to the "party of origin" – the country proposing the project or activity.[48] One open question in these cases is what institution or individual within the country of origin is directly responsible for decision-making. There is also the question of whether the affected country can likewise initiate the process.

The Draft North American TEIAA contains a clause allowing a potentially affected country to request information from the country of origin when it has reasonable concerns that a proposal may cause significant adverse environmental impacts, but it has not received notification.[49] However, the current version of the Draft TEIAA does not afford the potentially affected country the right to dispute the origin country's determination as to whether the TbEIA requirement has been triggered.[50]

Similarly, the Espoo Convention provides for the exchange of information about a proposed project when an affected country believes its environment would be significantly adversely affected by the activity, but has not received notification of it.[51] Unlike with the Draft TEIAA, however, this information generates discussion by the parties of whether there is likely to be significant transboundary harm. If the parties disagree on the conclusion, either country can request an inquiry commission to review the matter.[52] This

[44] *Contrast* World Bank OP 4.01, *supra* note 21, § 8, with ADB EA Guidelines, *supra* note 21, ¶ 127.
[45] World Bank OP 4.01, *supra* note 21, § 2. There is guidance available on what types of projects will typically fall within which categories, but it is non-binding. *See* Environmental Assessment Sourcebook, Update No. 2: Environmental Screen, available at http://siteresources.worldbank.org/INTSAFEPOL/1142947-1116495579739/20507375/Update2EnvironmentalScreeningApril1993.pdf (last visited Feb. 26, 2009).
[46] ADB EA Guidelines, *supra* note 21, ¶ 126
[47] *See* World Bank Assessment Sourcebook; ADB EA Guidelines, *supra* note 21, ¶ 137 (citing the WB Assessment Sourcebook)
[48] *See, e.g.*, Espoo, *supra* note 8, art. 2.4; Draft TEIAA, *supra* note 20, § 10.
[49] Draft TEIAA, *supra* note 20, § 8.1.
[50] There is no such clause within § 8, *Request for, and Exchange of, Information*, and § 19, the *Dispute Resolution* section, is currently no more than a placeholder.
[51] Espoo, *supra* note 8, art. 3.7
[52] *Id.*

provision was utilized by Romania when it believed the Convention should have applied to a Ukranian canal project in the Danube Delta.[53]

Recommended Best Practice

First, because the TbEIA process should provide as much certainty as possible, the recommended best practice for TbEIA screening is to include a list of activities that have been pre-determined to likely result in significant adverse environmental impacts. However, the screening process should also enable projects that do not appear on the list (but that may have significant environmental impacts) to trigger the TbEIA requirement. Along these lines, the TbEIA agreement should include a list of criteria to help determine whether an activity is likely to have significant environmental impacts. Second, a potentially affected country should have the option to initiate discussions regarding whether a proposed activity triggers the TbEIA requirement, although the final decision may remain with the origin country.

ii. Notification of Potentially Affected Countries

Notification is one of the central tenets of the TbEIA process. However, the trigger, timing, substance, and response provisions of mandatory notification are subject to variation.

Origin Party Responsibilities: Trigger, Timing, and Substance

The Draft TEIAA requires that the country of origin notify potentially affected parties of certain types of proposed projects planned within 100km of a shared border, or of any project that has the potential to cause significant transboundary environmental harm. This is broader than the trigger for actually conducting the assessments, which does not include a geographic nexus.[54] Notification is intended to provide sufficient information to make potentially affected parties aware of the nature of a proposed project or activity, and the Draft TEIAA provides a list of elements that notification should include, such as basic information on the project, its impacts, and the appropriate points of contact.[55]

Unlike the Draft TEIAA, the Espoo Convention does not distinguish between projects that trigger notification and those that trigger an assessment – both are required for all projects contained on the Convention's screening list that are likely to cause significant adverse transboundary impacts.[56] Espoo further provides that notifications should include information on the proposed activity, its possible transboundary impacts, the nature of the possible decision, and an indication of a reasonable time within which the country being notified must respond. Information about the process for conducting the EIA, including an approximate timetable for comments and relevant information about the proposed activity and possible significant impacts, must be included either in the initial notification or in the follow-up to a potentially affected country's response.[57] At their first meeting, the Espoo parties approved a draft decision recommending significantly more detailed notification.[58] The Caspian Sea TbEIA guidelines enacted by Azerbaijan, Iran, Kazakhstan, Russia, and Turkmenistan identify notification as the key element for implementing Espoo, and include the draft Espoo decision as guidance for notification content.[59]

The Draft TEIAA does not dictate when notification must be provided, but states that the origin country should notify the potentially affected country "as early as possible, but no later than when informing [the origin country's] own public."[60] Like the Draft TEIAA, Espoo provides somewhat vague guidance regarding timing, stating only that notification should occur as early as possible and at the latest when the public of the origin country is informed.[61] This same phrasing was reiterated in the recommendations the World Conservation Union (IUCN) proffered for development of TbEIA procedures in Central America.[62]

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[53] *See* Wiek Schrage, *The Convention on Environmental Impact Assessment in a Transboundary Context*, at 46-47, *in* THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT (Kees Bastmeijer & Timo Koivurova, eds., 2008).
[54] Draft TEIAA, *supra* note 20, §§ 2, 10.
[55] Draft TEIAA, *supra* note 20, § 7, app. II part I.
[56] *See* Espoo, *supra* note 8, app. I.
[57] Espoo, *supra* note 8, art. 3.2–3.5
[58] Espoo Convention, First Meeting of the Parties to the Convention, Draft Decision I/4, Oslo, Mar. 18-20, 1998.
[59] Caspian Sea TbEIA Guidelines, *supra* note 34, Guidelines for country of origin, art. 3.
[60] *Id.* §§ 2–3.
[61] Espoo, *supra* note 8, art. 3.1,
[62] Grethel Aguilar, Alejandro Iza & Marianela Cedeño, Evaluación de Impacto Ambiental Transfronteriza en Centroamérica: Lineamientos Generales, § 6.2.3 (IUCN, 2006).

The Espoo guidance document emphasizes the desirability of early notification, and recommends that implementing agreements specify when notification should be provided.[63]

Affected Country Responsibilities: Response Provisions

Both the Draft TEIAA and the Espoo Convention require the country of origin to allow "a reasonable time" for the affected country to respond to the notification.[64] The potentially affected country(ies) must then respond as to whether it would like to participate in the EIA procedure. If the country does not wish to take part in the EIA, the TbEIA requirement ceases to apply.[65]

By contrast, some TbEIA agreements mandate specific response times for affected parties. For example, the Espoo implementation agreement enacted between Estonia and Finland specifies a 60-day response time,[66] while that the agreement between Estonia and Latvia requires a response within one month.[67] The Caspian Sea guidelines also require a response within 30 days of receipt of notification.[68] The UN Convention on the Law of the Non-navigational Uses of International Watercourses mandates notification for actions that might significantly adversely affect international watercourses, requiring the country of origin to allow a potentially affected country six months to study the planned measures and their possible effects, and to respond.[69]

Recommended Best Practice

Due to variation in project planning and development procedures, standard international practice appears to require notification as early as possible, and no later than when the origin country informs its own public. This practice does not extend to response times, which can be more clearly specified in a TbEIA agreement (per the examples above) to ensure that any potentially affected parties do not miss the opportunity to effectively participate in the impact assessment. The notification should include an explanation of the methodology that will be used to select project alternatives and the opportunities for involvement of potentially affected parties and their publics.

iii. Scoping

If it is determined at the screening stage that a TbEIA is necessary, the next step is often a "scoping" stage.[70] Scoping refers to the process of identifying the boundaries of the proposed activity, the information that must be included and considered in the TbEIA, and the identities of the interested parties. To ensure the assessment is properly targeted, many TbEIA frameworks require consideration of possible alternatives to the proposed project or activity during the scoping stage, in addition to participation by the public.

The scoping requirements of international financial institutions are often detailed. For example, under the ADB guidelines for impact assessment, during scoping the party proponent must generate a Terms of Reference (TOR) for the EIA. The TOR should identify likely environmental impacts, concerns, and/or components that require further study; determine a general approach and methodology for the EIA; identify all potentially affected parties; and include a preliminary analysis of the role of an environmental management plan.[71] The World Bank also requires the project applicant to develop a TOR, which is then reviewed by the Bank. The World Bank's sample TOR contains a detailed list of elements and tasks required to complete the assessment.[72] Requiring preparation (and review) of a TOR can help avoid

[63] UNECE, Guidance on the Practical Application of the Espoo Convention, § 2.5.1, Doc. ECE/MP.EIA/8 (2006) [hereinafter Espoo Guidance].
[64] Draft TEIAA, *supra* note 20, § 7.2; Espoo, *supra* note 8, art. 3.2(c).
[65] Draft TEIAA, *supra* note 20, § 9; Espoo, *supra* note 8, art. 3.4.
[66] Estonia-Finland agreement, *supra* note 32, art. 7(3).
[67] Estonia-Latvia agreement, *supra* note 42, art. 7.
[68] Caspian Sea TbEIA Guidelines, *supra* note 34. For more information on the development of TbEIA in the Caspian Sea region, *see* Rie Tsutsumi & Kristy Robinson, *Environmental Impact Assessment and the Framework Convention for the Protection of the Marine Environment of the Caspian Sea*, *in* THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT (Kees Bastmeijer & Timo Koivurova eds., 2008).
[69] United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, arts. 11-13, UNGA A/51/49, 36 I.L.M. 700 (1997); ERM, *EIA for LMB*, *supra* note 5, Element 2, § 4, tbl.4.1.
[70] Cassar & Bruch, *supra* note 21, at 224–25.
[71] ADB EA Guidelines, *supra* note 21, app. II, § 3.
[72] The World Bank sample TOR includes an introduction, background information, objectives, identification of environmental assessment requirements, boundaries of the study area, and scope of work. It then identifies the "tasks" involved in the

three common errors: collecting irrelevant data, collecting data at the wrong time or in insufficient quantities, and/or failing to include key parameters.[73]

Neither Espoo nor the Draft TEIAA specifies requirements for the scoping stage, as each agreement depends on the domestic environmental assessment procedures of the countries of origin. The only scoping guidance added by the transboundary agreements is found in their lists of minimum elements that should be included within the TbEIA report.[74] The domestic EIA frameworks that they incorporate, on the other hand, may contain detailed requirements. First, domestic laws commonly require the country of origin to consider various permutations of the proposed activity (larger, smaller, in different locations, using different technologies),[75] including a "no-action" alternative. This consideration of alternatives can reveal other, less environmentally harmful approaches that may be taken to achieve the same goal. Second, domestic EIA procedures may contain public participation requirements. For example, the U.S. environmental impact assessment procedure requires an opportunity for public comment during the scoping stage and consideration of all comments by the permitting authority. This requirement has been lauded as an important aspect of the assessment process because of the input it generates on the identification of relevant issues.[76] In the transboundary context, it is important to consider whether the public of the potentially affected country is given equal opportunity to comment during scoping as the public of the country of origin.[77]

Some EIA procedures require less-intensive assessments for projects anticipated to cause less adverse environmental impacts. For example, as noted above, the World Bank requires an environmental assessment of narrower scope for its "Category B" projects, while the Asian Development Bank requires an initial environmental examination (IEE) to determine whether a full EIA is necessary.[78] The ADB has also outlined the expected outputs of the IEE scoping stage.[79] Finally, the degree of public participation required may be related to the category of project that is proposed – e.g., the ADB requires two rounds of public participation for Category A projects (which require an EIA), some form of public participation for Category B projects, and no public participation (though it is not forbidden) for Category C projects.[80]

Recommended Best Practice

Even though scoping is typically included in the domestic EIAs of the MRC member countries, the MRC may also wish to incorporate a general scoping requirement within the TbEIA Framework. The generation and review of a TOR prior to undertaking a full environmental assessment can help conserve resources (by collecting only necessary data), ensure that appropriate data is examined, and ultimately improve the accuracy of the resulting report. Public participation can also increase the effectiveness of this stage. Although it requires additional resources, public input will very likely generate comments that substantively inform the choices of alternatives, elements to be studied, and mitigation measures. Because it is during the scoping stage that the decision between alternatives is made, public participation is arguably most important at this juncture. For further explanation of the benefits and requirements of public participation, see Section (v) below.

iv. Preparation of the TbEIA

An environmental assessment is typically conducted in two stages. First, a draft assessment is produced, which is reviewed and subjected to public notice and comment. During this stage, studies are frequently

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assessment, which include providing descriptions of the proposed project, the environment (physical, biological, and socio-cultural), the relevant legislative and regulatory considerations, the potential impacts of the proposed project, and the project alternatives; then developing a mitigation plan, identifying institutional implementation needs, preparing a detailed monitoring plan, and assisting with public participation efforts. After listing recommendations for the assessment report format, the TOR concludes with identification of the types of consultants that should be included on the assessment team and a proposed schedule. *Id.* annex 1-3.

[73] World Bank Environmental Assessment Sourcebook, ch. 1, The Environmental Review Process, §§ 18–22 (1999).

[74] Espoo, *supra* note 8, art. 4.1, App. II; Draft TEIAA, *supra* note 20, § 10.1(a), app. IV.

[75] E.g., under the EIA requirement of the U.S. National Environmental Protection Act, the scoping process is used to define the scope of issues that need to be covered and which parties should be involved in the assessment. Public participation must be invited during this stage. *See* U.S. Code of Federal Regulations, 40 CFR 1501.7.

[76] For more information on the U.S. EIA requirement, see Environmental Protection Agency, National Environmental Policy Act (NEPA), Basic Information, http://epa.gov/oecaerth/basics/nepa.html#requirement.

[77] Espoo, *supra* note 8, art. 4.1, App. II; Draft TEIAA, *supra* note 20, § 10.1(a), app. IV.

[78] *See supra* note 44 and surrounding text.

[79] ADB EA Guidelines, *supra* note 21, app. III, § 3.

[80] *See* ADB EA Guidelines, *supra* note 21, § X(C)(1).

conducted to collect baseline data, identify potential impacts, and evaluate those impacts and alternatives. More comprehensive environmental impact evaluation and quantification follows, usually conducted by the project proponent or a consultant, who then compares alternatives and their predicted impacts. The preparation of the draft TbEIA is an important stage, and represents another opportunity for effective public participation. Next, the final assessment report is prepared and submitted for approval.

TbEIA Procedure

Most TbEIA agreements presume that the country of origin will conduct environmental assessment according to that country's own domestic procedures. However, domestic EIA requirements generally do not address the added layer of administrative, political, and financial decision-making that is required for involving one or more additional countries in the EIA process. Thus, it is critical that a TbEIA agreement fill in these procedural gaps. Additionally, in regions where the domestic EIA requirements are less developed or outdated, a TbEIA agreement can provide minimum requirements for countries to meet. For example, the Espoo Convention states:

> Each Party shall take the necessary legal, administrative or other measures to implement the provision of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment document described in Appendix II.[81]

Thus, Espoo requires certain minimum domestic EIA measures if none exist. Beyond this, Espoo specifies the necessary additional procedural steps that must be undertaken to complete a *transboundary* assessment appropriately, including notification of potentially affected parties, public participation across boundaries, and transboundary dispute resolution.

Contents of a TbEIA

The Draft TEIAA specifies that a TbEIA should include information on the nature of the proposed project and its spatial and temporal boundaries, the environment likely to be affected, any expected transboundary environmental harm and proposed mitigation measures, the project proponent, points of contact, summaries of public comments, and any additional relevant information.[82]

The Espoo Convention, for its part, requires descriptions of: the proposed activity and its purpose(s); reasonable alternatives; the environment likely to be significantly affected; the potential environmental impact of the activity and its significance; proposed mitigation measures; a description of the assessment methodology and assumptions; information gaps; and proposed monitoring and management elements. These descriptions are to be accompanied by a non-technical summary for use in public participation outreach.[83]

Although the ADB and World Bank do not have specific TbEIA procedures, their environmental assessment requirements are often applied in a transboundary context and thus form the basis of many TbEIAs in practice. Like the Draft TEIAA and Espoo, the ADB requires assessments to include descriptions of the project, the environment, the anticipated environmental impacts and mitigation measures, and project alternatives; an economic assessment and an environmental management plan with monitoring components; public consultation and disclosure; and a conclusion.[84]

The World Bank's environmental assessment requirement can be satisfied in a number of ways, the most common being completion of an EIA. A Bank-sanctioned EIA must be quite comprehensive and include: an executive summary; discussion of the policy, legal, and administrative framework; a description of the project; assessment of baseline data; predictions of environmental impacts; analysis of alternatives; an environmental management plan; a list of who prepared the assessment; references; records of interagency and consultation meetings; tables of relevant data; and a list of associated reports.[85]

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[81] Espoo, *supra* note 8, art. 2.2.
[82] Draft TEIAA, *supra* note 20, app. IV.
[83] Espoo, *supra* note 8, art. 4.1, app. II
[84] Asian Development Bank Operations Manual Bank Policies, Environmental Considerations in ADB Operations, OM Section F1/BP, § 8, n.3 (Sept. 25, 2006) [hereinafter ADB OM F1/BP].
[85] World Bank OP 4.01, *supra* note 21, annex B.

Table 2. Comparison of the general elements required to be included in a TbEIA report.

	Draft TEIAA	Espoo Convention	ADB	World Bank
Description of the proposed project	▪ Nature of the proposed project ▪ Project's spatial and temporal boundaries	▪ Description of the proposed activity ▪ Purpose of the proposed activity	Description of the proposed project	▪ Discussion of the policy, legal, and administrative framework ▪ Description of the proposed project
Environment	Environment likely to affected	Environment likely to be significantly affected	Description of the environment	Assessment of baseline data
Environmental Impacts	Transboundary environmental harm expected	Potential environmental impact and its significance	Anticipated environmental impacts	Predictions of environmental impacts
Mitigation Measures	Proposed mitigation measures	Proposed mitigation measures	Mitigation measures	
Alternatives	Site selection procedure and description of alternatives considered	Reasonable alternatives	Project alternatives	Analysis of alternatives
Environmental Management Plan and Monitoring	Follow-up measures	Monitoring and management elements	Environmental Management Plan with monitoring components	Environmental Management Plan
Public Participation	Summaries of the required public participation		Public consultation and disclosure	Records of interagency and consultation meetings
Summary or Conclusion	Non-technical summary	Non-technical summary	Conclusion	Executive summary
Other	▪ Additional relevant information ▪ Project proponent ▪ Points of contact	Description of the assessment methodology, assumptions, and information gaps	Economic assessment	▪ References ▪ Data tables ▪ Associated reports list ▪ Who prepared the assessment

Additional Considerations

A key objective when completing an environmental assessment is to ensure that the final report serves as a credible basis for decision-making and future action. Challenges to the veracity of an assessment may be based on the composition of the assessment preparation team and whether there are any factors that suggest the team was not objective and independent.[86] A related issue concerns who makes the final decision regarding approval of the environmental assessment. It is not uncommon for the parties to appoint an independent body – an existing regional body, a nongovernmental organization, an independent institution, or a specially created entity – to conduct the final review and decision-making to ensure independence and credibility.[87]

Another major issue concerns the scope of impacts to be covered by the assessment, particularly in a transboundary setting. Depending on the circumstances, the assessment may need to address the proposed project's direct impacts on the environment; direct impacts on socio-economic and cultural resources; indirect, secondary, and temporary effects; and/or cumulative and long-term effects.[88]

[86] Bruch *et al.*, *Assessing the Assessments*, *supra* note 27; Cassar & Bruch, *supra* note 21, at 220–21.
[87] Cassar & Bruch, *supra* note 21, at 230–31 (citing examples from the Mekong River Commission, Lake Victoria, and others).
[88] Environmental Resources Management (ERM), *Environmental Assessment in a Transboundary Context: Lessons for the MRC*, at A4, paper presented at the WUP Workshop on Transboundary Analysis Nov. 12–13, 2001 (2001).

The arguably most important consideration involves the role of the TbEIA in harmonizing the parties' individual EIA frameworks. Such harmonization can help ensure that the TbEIA process is easy to implement and perceived as an effective, valuable, and credible process, thus avoiding many pre- and post-project disputes. An example of a harmonization requirement may be found in a Directive issued by the European Council, which requires the members of the European Union to ensure their laws abide by the Directive's minimum standards.[89]

Finally, parties may specify who is to bear the costs of the various parts of the assessment process. For example, Estonia and Latvia state in their agreement implementing Espoo that the party of origin is to bear the costs of the EIA procedure, while each party will support the participation of its own members in any working groups formed.[90]

Recommended Best Practice

First, based on the various environmental assessment requirements listed above, a TbEIA report would ideally include the following elements:

- Description of the purpose and nature of the proposed project;
- Description of the baseline environment likely to be affected;
- Description of the anticipated significant transboundary environmental impacts;
- Description of reasonable alternatives to the proposed project (including a "no action" alternative);
- Description of proposed mitigation measures;
- An Environmental Management Plan and/or monitoring and management components;
- Record of sufficient opportunities for public participation, including the content of comments or responses received and how the assessment addresses those comments or why they are not addressed;[91] and
- Who prepared the environmental assessment.

In addition to the above information, the assessment might also include a description of methodology and references, as well as an economic assessment of the proposed project.

Second, steps should be taken to ensure the objectivity and independence of the environmental assessment team. If the assessment team is not perceived as credible, the public participation and consultation elements of the TbEIA process will be rendered ineffectual.

Third, it may be beneficial to specify what types of environmental impacts should be considered within the environmental assessment – e.g., direct, indirect, and cumulative. The appropriate types may vary depending on the circumstances of the proposed project, but in general all three types should be considered.

Fourth, attempts should be made to harmonize the EIA procedures of the parties to a TbEIA agreement to increase ease of implementation and reduce the likelihood of dispute.

v. Public Participation

Public participation is a critical component of any environmental impact assessment process. The International Association for Impact Assessment describes public participation as a "pillar" of impact assessment and has produced a best practices reference for practitioners.[92] The most basic justification for public participation is that it is the public who ultimately bears the environmental, social, and/or economic costs and benefits of a proposed activity.[93] In addition, involving the public in decision-making

[89] Cassar & Bruch, *supra* note 21, at 239–40 (citing Council Directive 85/337/EEC, 1985 O.J. (L 175) 40, as amended).
[90] Estonia-Latvia agreement, *supra* note 67, art. 16.
[91] For a detailed exploration of the role of public participation in TbEIA, *see* Troell *et al.*, *supra* note 2.
[92] P. Andre, B. Enserink, D. Connor & P. Coral, *Public Participation International Best Practices Principles*, Special Pub. Series No. 4 (International Association for Impact Assessment, 2006).
[93] ERM, *EIA for LMB*, *supra* note 5, Element 5, § 5.2 (citing S. Nicro, *Public Participation in Environmental Impact Assessment in ASEAN Countries: Thailand, the Philippines, Malaysia and Indonesia*, Paper prepared for International Association for Impact

can facilitate the process generally, improve the quality of the final decision, increase the credibility of and public support for the project, and improve implementation and monitoring efforts.[94] It has been emphasized that public opposition typically results more from a lack of information about a particular proposal than from disclosure of potential negative impacts.[95] Perhaps most importantly, a direct correlation has been observed between the extent of public participation and the overall accuracy of a TbEIA's predicted impacts.[96]

Public participation has greatly improved the impact assessment process. For example, when Uganda sought to institute a water hyacinth control program, its authorities were convinced by public comments to abandon plans to use chemical controls. Public comments also spurred consultations with Kenya and Tanzania.[97] It has been suggested that greater public participation in the planning of the Pak Mun and Rasi Salai Dams in the Mekong River Basin might have averted costly protests.[98] Some domestic EIA procedures even allow the public to challenge a decision not to undertake an EIA, giving the public a fundamental opportunity to influence the EIA process.

Nondiscrimination

Incorporating public participation in a transboundary setting adds several layers of complexity to the process, as it requires participation by the country of origin as well as by affected countries. TbEIA instruments have addressed this added complexity by requiring that public participation be nondiscriminatory – that is, by affording the public of the affected country as much opportunity to engage in the decision-making process as the public of the country of origin.[99] Both the Espoo Convention and the Draft TEIAA require nondiscriminatory public participation.[100]

Mandatory versus Discretionary Public Participation

In addition to mandating non-discrimination as a procedural matter, TbEIA agreements may also incorporate more substantive provisions on public participation. For example, the Draft TEIAA requires that the publics of both the affected and origin countries be allowed to (a) submit comments on the TbEIA process, and (b) engage in public hearings or meetings concerning the TbEIA.[101] While the Draft does not specify how this should be done, it emphasizes that the origin country must ensure that "any Potentially Affected Party has a meaningful opportunity to participate."[102] The process and results of any public participation that takes place should be summarized in the EIA.[103]

The Espoo Convention also contains substantive requirements on public participation.[104] According to the Convention, following notification of a TbEIA, public notice (including copies of the EIA documentation) and the opportunity to comment must be made available to the affected country.[105] Although the Convention itself does not provide further detail (since the EIA procedure of the country of origin is to apply), the parties to Espoo recognized the importance of public participation in their first two meetings and the need for additional guidance on it. Based on numerous case studies, the parties

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Assessment Conference, under the Asia- Europe Environmental Technology Center Project on Public Participation in Environmental Issues in ASEM Countries, Hong Kong, 2000).

[94] Bruch *et al.*, *From theory to practice: An overview of approaches to involving the public in international watershed management*, at 6, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES (Bruch *et al.*, eds., 2005).

[95] ERM, *EIA for LMB*, *supra* note 5, Element 5, § 5.2 (citing B. Lohani *et al.*, *Institutional Aspects of EIA in Asia*, *in* Environmental Impact Assessment for Developing Countries in Asia, Vol. 1 (ADB, 1997)).

[96] Bruch *et al.*, *Assessing the Assessments (2008)*, *supra* note 27, at 247 ("where there is more public involvement (and not just information dissemination) and the government takes public input seriously, the TIA seems to be more accurate; but where public involvement is rushed and not considered, the TIA often is problematic").

[97] Carl Bruch, Mikiyasu Nakayama, Jessica Troell, Lisa Goldman, & Elizabeth Maruma Mrema, *Assessing the Assessments: Improving Methodologies for Impact Assessment in Transboundary Watercourses*, 23 WATER RES. DEV. 391, 399 (2007) [hereinafter Bruch *et al.*, *Assessing the Assessments (2007)*].

[98] Carl Bruch, Libor Jansky, Mikiyasu Nakayama, Kazimierz A. Salewicz, & Angela Cassar, *From Theory to Practice: An overview of approaches to involving the public in international watershed management*, at 6, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES (Bruch *et al.*, eds., 2005).

[99] Troell *et al.*, *supra* note 2, at 59.

[100] *Id.*; Espoo, *supra* note 8, art. 2.6; Draft TEIAA, *supra* note 20, § 12.

[101] Draft TEIAA, *supra* note 20, § 12.

[102] *Id.*, § 11.1(a).

[103] *Id.* app. IV(6).

[104] Espoo, *supra* note 8, art. 2.6.

[105] *Id.* arts. 3.8, 4.2.

accordingly developed guidance and recommendations ranging from how to incorporate public participation in a national EIA system to determining which country should bear the associated costs.[106] The guidance also emphasizes that parties are expected to include public participation provisions within their domestic EIA laws.[107]

The World Bank also requires public consultation during the environmental assessment process for both Category A and Category B projects. The applicant is required to consult with project-affected groups and local nongovernmental organizations at least twice during the assessment process, both during the scoping phase and after the draft environmental assessment report has been prepared.[108] An update to the World Bank's environmental assessment sourcebook addresses the various benefits of and ways to integrate public participation elements, and provides guidance for developing a public consultation plan.[109] The ADB delineates nearly identical requirements in its operations manual and guidelines on environmental assessment.[110]

Timing

Particularly in a transboundary setting, allowing sufficient time for public participation is critical to ensuring that all relevant concerns can be raised[111] and that impacts are not under-predicted.[112] The Espoo parties' laws afford the public of the affected country anywhere from 30 days to 10 weeks, following notification, to comment on a proposed activity.[113]

Practical Implementation Concerns

Even with comprehensive public participation requirements in place, practical obstacles to effective participation can arise, particularly in a transboundary setting. For example, past experiences in the Mekong River Basin demonstrate that even when governments agree on the need for public participation, it is not easy to implement the provisions.[114] Parties may be predisposed toward a particular desired outcome and thus unlikely to acknowledge or agree with the views of the public of a potentially affected country. It may also be difficult to reconcile conflicting interests within different affected communities, or even within a single community, leaving the decision-maker to prioritize the concerns.[115] Further challenges include linguistic and cultural differences, as well as the time required to coordinate efforts across borders and large areas.

Responsibility for implementing and financing public participation varies among agreements. In the Estonia-Latvia Espoo implementation agreement, the affected party is responsible for organizing public participation (according to the national legislation of the interested states), with the origin party financing such participation.[116] By contrast, the implementation agreement between Estonia and Finland requires each state to arrange and finance public participation in its own country, unless the parties agree otherwise.[117] The Caspian Sea guidelines state that public consultation measures can be initiated by the affected country, the origin country, the project developer, or the public of the affected country. "[R]easonable and appropriate consultation" is financed by the project developer.[118]

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[106] UNECE, Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context, §§ 1.1–1.2, 2.1, 2.3, Doc. ECE/MP.EIA/7 (2006) [hereinafter Espoo Public Participation Guidance].
[107] *Id.* § 2.1.
[108] World Bank OP 4.01, *supra* note 21, § 14.
[109] WB, Environmental Assessment Sourcebook, Update 26, *Public Consultation in the EA Process: A Strategic Approach*, § 2 (1999).
[110] ADB OM F1/BP, *supra* note 84, § 9; ADB EA Guidelines, *supra* note 21, part X(C).
[111] Mirumachi & Nakayama, *Navigation Channel Improvement Project of the Lancang-Mekong River*, *supra* note 29, at 421–22.
[112] Bruch *et al.*, *Assessing the Assessments (2007)*, *supra* note 97, at 405.
[113] Espoo Public Participation Guidance, *supra* note 106, § 2.2, boxes 3, 5.
[114] Prachoom Chomchai, *Public participation in watershed management in theory and practice: A Mekong River Basin perspective*, at 149, *in* PUBLIC PARTICIPATION IN THE GOVERNANCE OF INTERNATIONAL FRESHWATER RESOURCES (Bruch *et al.*, eds., 2005).
[115] *Id.*
[116] Estonia-Latvia agreement, *supra* note 67, art. 16.
[117] *See supra* note 32 and surrounding text.
[118] Caspian Sea Guidelines, *supra* note 34, Guidelines for country of origin, art. 8.1. Useful references for public consultation are provided in Annex 4 to the guidelines.

Recommended Best Practice

As public participation is a vital element of an environmental impact assessment, explicit requirements for it should be included in any TbEIA framework. The requirements should be nondiscriminatory and would ideally be developed so as to harmonize the EIA procedures of the different parties to a TbEIA agreement. Other key elements include specific translation requirements, funding for affected communities to travel to meetings (as needed), and requirements ensuring the public is easily able to access the information. Finally, there should be a mechanism for ensuring the parties provide a meaningful response to public comments, including acknowledgment of comments received and justification for excluding any comments from the TbEIA.

vi. Post-Approval: Monitoring and Dispute Resolution

Even after the environmental assessment has been completed and approved, questions regarding the effective implementation of the project, including any conditions for project approval such as mitigation measures and/or a more comprehensive Environmental Management Plan (EMP), may remain. The importance of post-assessment monitoring and evaluation is emphasized in the *EIA Follow-Up International Best Practice Principles* bulletin of the International Association for Impact Assessment.[119]

Monitoring

Espoo permits any concerned country to initiate consultation regarding whether and how post-project analysis should be undertaken.[120] Such analysis serves to monitor compliance, review impacts so as to improve project management, and compare predicted and actual impacts to reflect on lessons learned.[121] The Draft TEIAA contains a placeholder for post-project monitoring requirements, but as of yet no requirements are specified.[122]

The World Bank specifically requires project proponents to report on the status of project implementation. Reports must include a description of project compliance with any environmental protection measures required by the Bank (such as creation and implementation of an EMP), the status of mitigation measures, and the results of monitoring efforts.[123] The ADB requires borrowing entities to submit semiannual reports on their EMP implementation, and the appropriate ADB department must review the project's environmental aspects annually.[124]

Dispute Resolution

The proactive creation of dispute resolution mechanisms helps conserve resources when disputes arise, by avoiding duplicative efforts to determine the appropriate resolution system by different parties. While most TbEIA regimes allow the country of origin to retain ultimate decision-making authority to approve or reject a final assessment, disputes may arise with respect to other components of a TbEIA agreement.

For example, the Espoo Convention provides a mechanism for potentially affected parties to challenge a finding at the screening stage as to whether a proposed project will likely cause significant adverse environmental impacts, and for both parties to jointly refer such matters to an inquiry commission.[125] If the dispute is over the interpretation or application of the Convention, Espoo specifies that the default approach is to have the parties negotiate or agree upon another method for resolving the disagreement. When becoming a party to Espoo, the parties may specify that, in the event a dispute cannot be resolved by such means, it will be referred to the International Court of Justice (ICJ) or an arbitral panel.[126] The Helsinki Convention and the Aarhus Convention contain identical provisions.[127] The ICJ generally can decide a dispute arising between states that accept its jurisdiction, with acceptance indicated by a special

[119] A. Morrison-Aunders, R. Marshall & J. Arts, *EIA Follow-Up International Best Practice Principles*, Special Pub. Series No. 6, International Association for Impact Assessment (2007).
[120] Espoo, *supra* note 8, art. 7.1.
[121] Espoo, *supra* note 8, app. V.
[122] Draft TEIAA, *supra* note 20, § 15.
[123] World Bank OP 4.01, *supra* note 21, § 19.
[124] ADB OM F1/BP, *supra* note 84, §§ 5, 12, 27.
[125] Espoo, *supra* note 8, art. 3.7; MCINTYRE, *supra* note 4, at 238.
[126] Espoo, *supra* note 8, art. 15
[127] Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Helsinki Convention"), art. 22 (Helsinki, Mar. 17, 1992); Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention"), art. 16 (Aarhus, Denmark, June 25, 1998).

agreement between the states, the signing of a treaty with a jurisdiction acceptance clause, or a unilateral declaration recognizing jurisdiction over disputes that arise with another state that similarly defers to the ICJ.[128] The East African Community Protocol on Environment and Natural Resources Management uses a similar structure, but refers parties to the East African Court of Justice rather than the ICJ.[129]

While the Draft TEIAA has yet to elaborate upon its placeholder dispute resolution section,[130] the World Bank permits affected members of the public to file an appeal if they believe the Bank has not adhered to its own policies.[131] The African Convention on the Conservation of Nature and Natural Resources specifies that affected members of the public from the affected country have the same right to administrative and judicial procedures as do persons of the origin country.[132]

Recommended Best Practice

First, mitigation measures and Environmental Management Plans are only as effective as the extent of their implementation. To ensure proper implementation, a TbEIA agreement should require short- and long-term monitoring efforts. The agreement should also include dispute resolution mechanisms for addressing objections to any part of the TbEIA process.

D. Introduction to Strategic Environmental Assessment (SEA)

As EIA has matured, countries and institutions have also begun to apply participatory planning mechanisms not only to proposed projects, but also to ***policies, plans, and programs*** in a process known as strategic environmental assessment (SEA). The essential elements of SEA were developed concomitantly with EIA, such as through "programmatic EIAs" mandated by the U.S. EIA law, the National Environmental Policy Act. Recently, however, greater international attention has been paid to improving and expanding the application of SEA, including in a transboundary context. The Protocol on Strategic Environmental Assessment to the Espoo Convention and related guidance documents provide the clearest articulation of this transboundary application to date.[133] While an in-depth analysis of SEA is beyond the scope of this Report, the authors would like to emphasize its importance in ensuring that environmental impacts are adequately considered, not just within the parameters of a single project or activity, but as part of the general planning processes for the region.

SEA offers a unique opportunity to strengthen transboundary cooperation on water management, as it requires consideration of a broader range of interrelated issues and their cumulative impacts in a precautionary manner. Substantively, an SEA seeks to determine how a given policy (or plan or program) proposal will affect several key variables, including:

- Potential direct and indirect outcomes;
- How potential outcomes will affect the environment (and often the public health and/or social and cultural impacts), including the scope and nature of those effects (including cumulative impacts);
- Potential mitigation of adverse environmental impacts and enhancement of environmental benefits; and
- Overall effects on the environment from each potential outcome.[134]

While SEA has evolved as an extension of EIA, it offers benefits related to the key variables above. These include: an opportunity to consider a wider range of alternatives and interactions related to developments in a sector or region more broadly, rather than just the design or siting of a single project; enhancing the ability of planners to address potential cumulative and large-scale impacts; and facilitating

[128] Statute of the International Court of Justice, arts. 35–36, 40 (1995); *see also* information available at International Court of Justice, www.icj-cij.org.
[129] East African Community Protocol on Environment and Natural Resources Management, art. 40.
[130] Draft TEIAA, *supra* note 20, § 19.
[131] Cassar & Bruch, *supra* note 21, at 232.
[132] Troell *et al.*, *supra* note 2, at 59.
[133] UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kiev, 2003), *available at* http://www.unece.org/env/eia/sea_protocol/contents.htm.
[134] László Pintér et al., STRATEGIC ENVIRONMENTAL ASSESSMENT: A CONCEPT IN PROGRESS: ANNOTATED TRAINING MODULE PREPARED FOR WORLD BANK INSTITUTE (2004).

sustainable development more broadly by allowing planners to address the consistency of plan or program objectives with other objectives, goals, or commitments.[135]

SEAs follow a process similar to that undertaken in a typical EIA. This includes a "scoping" stage aimed at identifying potential environmental (and other relevant) impacts and the relevant policy alternatives. Once the range of alternatives that will be studied has been identified, the heart of the SEA – the assessment itself – must delve into both the direct and indirect consequences of each policy option, including potential cumulative impacts of the policy across geographic boundaries and over time. The SEA also considers what mechanisms might be available to mitigate any negative environmental consequences and enhance potential environmental benefits that may flow from the policy. In addition, the SEA should determine the overall effects of the policy in light of planned mitigation measures, and any residual impacts that these measures may fail to address. Throughout the assessment phase, appropriate provisions must be made to involve stakeholders and the public in the process.

SEAs are intended to form the planning phase of an ***adaptive management framework*** using planning, implementation, evaluation, and modification. After determining the overall environmental implications of each identified policy alternative, the SEA should discuss the need for monitoring or other evaluation of the implemented strategy. In this way, as more information becomes available, the policies and processes informed by the SEA can be adapted to ensure that all environmental, social, and economic impacts are addressed appropriately. As with TbEIA, it is critical to inform stakeholders and the public of the various alternatives considered throughout the process, and to solicit feedback from stakeholders in order to inform the decision-making process. Often, stakeholders are able to provide valuable insights into the potential impacts of a given policy alternative, or can even identify alternatives not initially considered. They can also often provide suggestions for practical mitigation measures. Such participation will likely improve the accuracy and outcomes of SEAs.

III. LOWER MEKONG BASIN PRACTICES

A. Mekong River Commission Countries' Current EIA Requirements

i. Cambodia

In 1996, the Cambodian legislature enacted the Law on Environmental Protection and Natural Resource Management (EPNRM). Chapter III of the EPNRM provides for environmental impact assessments (EIAs) to be conducted on "every project and activity, private or public."[136] The provision is retroactive, requiring the completion of an assessment not only for newly proposed projects, but for existing and in-process works for which an EIA had not been submitted already.[137] An EIA must first be submitted to the Ministry of Environment for evaluation and review, then to the Royal Government for a final decision.[138] The thresholds for what size and types of projects are subject to the EIA requirement and the mandatory procedures for the assessments were to be determined by a Sub-decree of the Ministry of Environment (see below).[139] However, all investment project applications and state-proposed activities are now required to submit either an initial EIA (IEIA) or full EIA. The Ministry of Environment must abide by the timing requirements of the Law on Investment when reviewing such submissions.[140]

The Sub-decree on *Environmental Impact Assessment Process* was finalized in 1999.[141] The Ministry of Environment oversees its implementation, in conjunction with the various other ministries and institutions

[135] UNECE, "Applying the Protocol on SEA: Application of the UNECE Protocol on Strategic Environmental Assessment," *available at* http://www.unece.org/env/eia/documents/pamphlets/Pamphlet%20-%20SEA%20Protocol%20Implementation.pdf.
[136] Cambodian Law on Environmental Protection and Natural Resource Management (EPNRM), art. 6 (1996); *see also* World Bank Environment and Social Development Unit (EASES), *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements: Practices and Lessons Learned in East and Southeast Asia*, at 19 (April 2006) [hereinafter World Bank EIA Asia Report].
[137] Cambodia EPNRM, *supra* note 136; *see also* Cambodian Sub-Decree on Environmental Impact Assessment Process, art. 2, No. 72 ANRK.BK (Aug. 11, 1999).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] Cambodian Sub-Decree, *supra* note 137.

with relevant responsibilities.[142] Four broad categories of projects trigger the EIA requirement: industry, agriculture, tourism, and infrastructure.[143] The general EIA process begins with the project owner submitting IEIA and pre-feasibility study reports to the Ministry of Environment.[144] If the Ministry determines that the proposed project is likely to cause a serious impact to the environment or health and public welfare, then the project owner must submit a full EIA report and pre-feasibility study, accompanied by an Environmental Application Form; if it is a provincial project, the items must be submitted to the relevant provincial or urban Environmental Office.[145]

IEIAs and EIAs must contain an introduction and project summary, and describe the project, its purpose, the environment, and any public participation measures. The report must then detail the actual environmental impact assessment, any mitigation measures, and an Environmental Management Plan (EMP), before it specifies the responsible parties and provides overall conclusions.[146] Guidelines for environmental assessment reports (Declaration 49) and for determining service charges for report review, follow-up, and monitoring (Declaration 745) were issued in 2000. Whether the project owner submitted an IEIA or full EIA, the Ministry of Environment must review and provide findings and recommendations on the report within 30 days. A failure to do so indicates that the report is in compliance and the project may proceed.[147] After reviewing the EIA, the Ministry submits its decision to approve or reject the assessment to the Royal Government or Council for Development. The Royal Government or Council for Development then makes the final determination as to the adequacy of the EIA and whether the project should proceed.[148] The decision is accompanied by guidelines for the project owner's EMP. If any EMP provisions are violated, the approving entity and the Ministry of Environment must take steps to prevent the project from proceeding.[149]

There are four significant elements of the Cambodian EIA requirement. First, the Sub-decree contains an annex delineating the specific types and sizes of projects that require an IEIA/EIA. Of relevance to the Mekong River is the inclusion of hydropower, irrigation systems, port construction, and dredging activities.[150] Second, the Sub-decree does not mandate public participation in the EIA process, but rather "encourage[s]" such involvement and the consideration of public comments.[151] Third, there is little guidance regarding the type or extent of information that must be included in an IEIA or EIA. Fourth, the Ministry of Environment does not have clearly delineated standards to follow when determining the adequacy of an IEIA or EIA.

ii. Lao PDR

First specified in the National Environmental Action Plan of 1993, Lao PDR's EIA process was made mandatory by the Environmental Protection Law passed by the National Assembly in 1999.[152] The Environmental Protection Law also mandates that the Water Resources and Environment Administration (WREA) (which replaced the Science and Technology Environment Agency in 2007) will issue general regulations specifying the procedures and methods for EIAs, which sector-specific Development Project Responsible Agencies (DPRA) will then expand upon.[153] WREA oversees the Department of Water Resources, Department of Environment, Department of EIA, Department of Meteorology and Hydrology, Lao NMRC, and the Institute for Water Resources and Environmental Research.

The general EIA requirement mandates that all construction or other physical activities must obtain an Environmental Compliance Certificate.[154] Proposed projects with the potential to cause environmental

[142] *Id.* art. 33.
[143] *Id.* annex.
[144] *Id.* arts. 6–7.
[145] *Id.* art. 8–9, 13.
[146] ERM, *EIA for LMB*, *supra* note 5, Element 1, annex, box 2.1.
[147] Cambodian Sub-Decree, *supra* note 137, arts. 14–18.
[148] ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B2.3.
[149] Cambodian Sub-Decree, *supra* note 137, arts. 14–18, 27–28.
[150] ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B2.3.
[151] Cambodian Sub-Decree, *supra* note 137, art. 1.
[152] Lao PDR Environmental Protection Law, No. 99/02/NA, art. 8, (April 3, 1999). For a description of the history and over of the content of Lao's EIA requirement, see ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B4, and World Bank EIA Asia Report, *supra* note 136, annex 7.
[153] Lao PDR Environmental Protection Law, *supra* note 152, art. 8, ¶ 1–2.
[154] World Bank EIA Asia Report, *supra* note 136, annex 7.

impacts must submit an EIA in order to obtain a Certificate, while projects pre-dating the Environmental Protection Law that have caused environmental damage are required to propose mitigation measures.[155] The first step is for the project owner to submit a project description to the DPRA, which then assembles an ad hoc review team to determine whether the project is likely to cause environmental effects and thus must undergo environmental assessment. Within 30 days, the DPRA must consider comments received from other government entities and submit its final decision to STEA for approval; the project owner must receive an answer within 22 days of submission.[156] Lao PDR does not use type, size, or location thresholds to decide whether the project or activity is exempt, but rather evaluates them case-by-case.[157] The project description must include information on the project owner, type, size, location, intended product, necessary raw materials, estimate of waste outputs, quantity and source of labor, expected environmental and social impacts (positive and negative), and any mitigation measures that will be employed.[158]

Non-exempt projects must submit an Initial Environment Examination (IEE), which the project owner (or a hired consultant) prepares and analyzes to determine whether a full EIA is necessary.[159] The IEE should be accompanied by an EMP if there is no need for an EIA, or by Terms of Reference if there is.[160] If the project is entirely domestic, the IEE may be submitted only in Lao; foreign investment projects must be in both Lao and English.[161] The report is given to the DPRA, which has a total of 40 days to invite suggestions from potentially affected government entities and receive comment from concerned public parties, review the report and approve or deny the project owner's determination, and then forward its decision to the national or provincial STEA .[162] STEA then has 10 days to issue a Certificate, denial, or approval.[163] If an EIA is required, it must explain the potential impacts of the project and any mitigation or compensation measures, as compared to possible alternatives. Environmental, social, and economic impacts should be addressed, all pertinent laws should be listed, and a detailed EMP incorporating suggestions received on the general IEE EMP should be included.[164] Specific requirements for particular types of projects, such as electricity projects, road construction projects, and industrial projects, are contained in supplementary regulations. STEA has 60 days to review the EIA, invite comment from affected parties, and determine whether to issue an environmental compliance certificate, with or without conditions.[165] Finally, for the duration of approved projects, the owners must provide monthly monitoring reports to the relevant agencies.

Lao PDR's EIA requirements are noteworthy for three reasons. First, the initial screening process is based on an ad hoc assessment of whether the project or activity is likely to cause notable environmental impacts, not on minimum size, type, or location standards. Second, the EIA Regulation provides detailed guidance in its annexes with respect to the project description, the IEE, and the EIA. Finally, the EIA Regulation requires specific public participation elements: stakeholders should be notified of the project, information about the project and its likely impacts should be made available, and interested and affected parties should be consulted and invited to attend DPRA IEE review, STEA EIA review, and/or general public hearings or meetings.[166]

iii. Thailand

Thailand's National Environmental Quality Act has been in force for over 30 years, and since 1992 has contained a specific environmental impact assessment requirement. The relevant provisions created a general assessment process and authorized subsequent Ministry notifications that provided greater detail regarding the types of projects and activities requiring an EIA and the procedures and methods to follow

[155] Lao PDR Environmental Protection Law, *supra* note 152, art. 8, ¶ 3–4.
[156] Lao PDR Regulation on Environment Assessment, Decree No. 1770/STEA, art. 8 (Mar. 10, 2000); ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B4; World Bank EIA Asia Report, *supra* note 136, annex 7.
[157] ERM, *EIA for LMB*, *supra* note 5, Element 1, § 3, tbl 3.1.
[158] Lao PDR Regulation on Environment Assessment, *supra* note 156, art. 7, ¶ 3.
[159] ERM, *EIA for LMB*, *supra* note 5, Element 1, annex B4.
[160] *Id.*
[161] Lao PDR Regulation on Environment Assessment, *supra* note 156, art. 9, ¶ 3.
[162] *Id.*, art. 10, ¶ 1–4; World Bank EIA Asia Report, *supra* note 136, annex 7. The IEE is submitted to the national STEA if it involves a national project or activity, or the provincial STEA if the project or activity is local.
[163] Lao PDR Regulation on Environment Assessment, *supra* note 156, art. 10, ¶ 5.
[164] *Id.*, art. 14, ¶ 1.
[165] *Id.*, art. 13; World Bank EIA Asia Report, *supra* note 136, annex 7.
[166] World Bank EIA Asia Report, *supra* note 136, annex 7.

when conducting one. Currently, the Ministry of Natural Resources and the Environment (MONRE) has general oversight responsibility, while the Office of Natural Resources and Environmental Policy and Planning (ONEP) directly manages and participates in the process.

The initial screening step is conducted by the project proponent, and consists of determining whether the project fits into any of the type or size categories listed in Ministry Notification BE 2535.[167] If it falls outside the scope of the listed projects and activities, the project may continue unencumbered – the proponent need not even provide notice that the project is taking place.[168] If the project is of the size and/or type listed, however, then the proponent must follow EIA procedures. The National Environmental Quality Act created a bifurcated process for preparing and submitting EIAs, depending on whether the project being considered required Cabinet approval.

For private and public projects that do not require Cabinet approval, the project proponent must submit an EIA, prepared by a consultant registered with the ONEP, to both the appropriate permitting authority and the EIED.[169] Upon receipt, EIED has 15 days to decide if the report is adequate, and if so, another 15 days to review and prepare comments for it. Then one of the five Expert Review Committees – depending on whether the project concerns industry, water resources, mining, public works, or housing development – has 45 days to make a final decision on the EIA. It the project is rejected, the proponent can revise and resubmit the EIA, and the Expert Review Committee will have 30 days to re-review it. For public projects that do require Cabinet approval, the public entity must prepare an EIA during the initial development feasibility stage.[170] The public proponent first submits a Terms of Reference for an EIA to EIED and then an Expert Review Committee for analysis. If the ToR is approved, the proponent must have a full EIA prepared, which it will then again submit to EIED and then an Expert Review Committee. After the Expert Review Committee has reviewed EIED's comments and prepared its own, it refers the EIA to the National Environment Board for further analysis. Finally, the Cabinet receives the complete package and engages in a last round of review, during which it can request external experts to provide additional input, before it issues a binding decision. There is no timeframe specified for this process in the enacting legislation.

Public notification before the project commences is mandatory for state projects anticipated to have an extensive impact on the environmental quality or health of the local community. The rule does not provide criteria for determining what constitute extensive impacts. For all qualifying projects, the state agency is required to disseminate project information to the public, and may choose to engage in public consultation as well. There are no specifically stated factors for the state agency to consider when making this decision, but if the state chooses not to conduct public consultation, then upon the request of an interested party the Minister, Changwat Governor, or Bangkok Governor may order it. In addition, if the project will have severe impacts on the public at large, then the engagement of one or more public consultation methods is mandatory. It is unclear who determines whether the impacts are severe and what factors contribute to the decision. Acceptable consultation methods include opinion surveys, consultative meetings, or other methods prescribed by the Office of the Permanent Secretary to the Office of the Prime Minister. Regardless of method, a report of any consultation must be prepared and publicly disseminated within 15 days.[171]

Notable elements of Thailand's EIA requirements center on the EIA screening categories, the party responsible for making the threshold EIA determination, the distinction made for projects requiring Cabinet approval, and the voluntary public participation provisions. First, like Cambodia, Thailand uses a list of type and size thresholds to determine if the project requires an EIA. Of relevance to the MRC, the list includes dams and reservoirs, irrigation projects, commercial port projects, and construction near waterbodies in the vicinity of national or historic parks.[172] Second, Thailand allows the project proponent to determine whether the project is subject to the EIA requirement. Concerns of bias mean that such

[167] Thailand Ministry of Science, Technology and Environment (MOSTE), *Types and Sizes of Projects or Activities of Government Agencies, State Enterprises or Private Persons Required to Prepare an Environmental Impact Assessment Report*, Notification BE 2535 (1992). MOSTE was replaced by Ministry of Natural Resources and Environment (MONRE) in 2002.
[168] ERM, *EIA for LMB*, *supra* note 5, Element 1, § 3.2.
[169] Thailand Enhancement and Conservation of National Environmental Quality Act (NEQA), B.E. 2535, §§ 48–49, 51 (Mar. 29, 1992); ERM, Element 1, § 3.2; *see also* ERM, Element 1, Annex B1.
[170] Thailand NEQA, *supra* note 169, § 47; *see also* ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B1.
[171] Thailand Rule of the Office of the Prime Minister on Public Consultation, clause 4–7, 9, 12, B.E. 2548 (June 30, 2005).
[172] ERM, *EIA for LMB*, *supra* note 5, Element 1, Annex B1, Appendix 1.

authority is often given to a neutral third party. Third, public projects requiring Cabinet approval receive multiple additional levels of review, although they are not subject to time constraints. Fourth, the enacting legislation, the National Environmental Quality Act, does not contain any mandatory public participation requirements. Pursuant to the Prime Minister's rule, public consultation is only mandatory for state projects.

iv. Vietnam

The Vietnamese environmental impact assessment requirement stems from Article 18 of the Law on Environmental Protection, originally passed in 1993 and most recently amended in 2005.[173] Articles 18-23 outlined general mandates for EIA content and procedure.[174] The original requirements were expanded upon by an implementation decree finalized in August 2006, which clarified the relative responsibilities of the provincial, national, and private parties (Decree 80); these requirements, including the list of projects that require an EIA, were updated in February 2008 (Decree 21).[175] EIAs fall under the purview of the Ministry of Natural Resources and Environment (MoNRE),[176] and in September 2006 MoNRE issued a circular specifying the procedural requirements for both strategic environmental assessments and environmental impact assessments.[177] These decrees and circulars replaced those issued pursuant to the previous version of the Law on Environmental Protection.[178]

Pursuant to Article 18 of the Law on Environmental Protection, Decree 21 contains a detailed list of the types and sizes of projects that require completion of an EIA report.[179] There is a separate list for inter-branch and inter-provincial projects.[180] If an EIA is required, the report may be prepared by a project proponent or a hired consultant.[181] Consulting organizations must meet the conditions and conform to the limitations outlined in Decree 80.[182] MoNRE issued guidelines specifying the procedural and substantive elements the EIA report must contain.[183] In addition to an introduction and brief description of the project, the report must address the natural, environmental, economic, and social conditions that may be affected by the project; an assessment of the causes of environmental impacts and forecast of risks posed by project implementation and operation; mitigation measures; a monitoring and management program proposal; a cost estimate; a bibliography and methodology; and a conclusion.[184] The project proponent is also required to consult with the provincial People's Committee or Fatherland Front Committee. The proponent must submit a description of the major investment items, environmental issues, and environmental protection measures of the project to these committees, and request a response. The committees then have 15 working days to provide a written opinion, which must be made locally public, or they are presumed to have agreed with the project owner.[185] Any minutes from resulting

[173] Vietnam Law on Environmental Protection, art. 18, Presidential Proclamation No. 29/2005/L/CTN, *passed* Dec. 27, 1993, *implemented* Jan. 10, 1994, *amended* Nov. 29, 2005.
[174] Vietnam Law on Environmental Protection, *supra* 173, arts. 18–23.
[175] Vietnam Ministry of Natural Resources and Environment, Detailing and Guiding the Implementation of a Number of Articles of the Law on Environmental Protection, art. 6, Decree No. 80/2006/ND-CP (Aug. 9, 2006); Vietnam Ministry of Natural Resources and Environment, Amending and Supplementing a Number of Articles of the Government's Decree No. 80/2006/ND-CP of August 9, 2006, Detailing and Guiding the Implementation of a Number of Articles of the Law on Environmental Protection, Decree No. 21/2008/ND-CP (Feb. 28, 2008).
[176] The Ministry of Natural Resources and Environment replaced the Ministry of Science, Technology, and Environment in 2002.
[177] Vietnam Ministry of Natural Resources and Environment, Circular on Guideline for Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection, No. 08/2006TT-BTNMT (Sept. 8, 2006).
[178] Vietnam Ministry of Science, Technology, and Environment, Decree on Providing Guidance for the Implementation of the Law on Environmental Protection, arts. 9–20, No. 175-CP (Oct. 18, 1994); Vietnam Ministry of Science, Technology and Environment, Circular on Instruction for Guiding Environmental Impact Assessment to the Operating Units, No. 1420/QD-MTg (Dec. 26, 1994); Vietnam Ministry of Science, Technology and Environment, Circular, Regulations and Organization of the appraisal Council on Environmental Impact Assessments, No. 1807/QD-MTg (Dec. 31, 1994); Vietnam Ministry of Science, Technology and Environment, Circular on Guiding the Making and Evaluation of Reports on the Assessment of Environmental Impacts of Investment Projects, No. 490/1998/TT-BKHCNMT (Apr. 29, 1998).
[179] Vietnam Decree 21, *supra* note 175, app. I (Feb. 28, 2008) (updating the list from Vietnam Decree 80, *supra* note 175, app. I).
[180] Vietnam Decree 80, *supra* note 175, app. II.
[181] Vietnam Law on Environmental Protection, *supra* 173, art. 19(3).
[182] *Id.*, art. 19(5); Vietnam Decree 80, *supra* note 175, art. 8.
[183] Vietnam Circular 08, *supra* note 177, app. IV.
[184] *Id.*
[185] Vietnam Decree 21, *supra* note 175, § 4. Certain investment projects are exempted from this requirement. *Id.*

dialogues or written comment documents received from the committees must be attached to the EIA report, and any agreeing or dissenting opinions must be noted within it.[186]

When the EIA reports are complete, they must be submitted to an appraisal council. Authorized by Aritlce 21 of the Law on Environmental Protection, there are separate appraisal councils for (i) projects subject to approval by the National Assembly, Government, and Prime Minister, as well as inter-sector and inter-provincial projects; (ii) projects subject to approval by ministries, ministerial level agencies, and other government bodies, excluding inter-sector or inter-provincial projects; and (iii) projects subject to approval by the provincial level People's Committee and People's Councils. The approval entities themselves are responsible for establishing the appraisal councils, except that MoNRE takes responsibility for establishing councils for the first category of national-level projects.[187] The appraisal councils "giv[e] advice to assist competent agencies in examining and assessing the quality of [EIA] reports serving as the basis for consideration and approval according to regulations."[188]

The appraisal councils must follow the organizational and operational regulations issued by MoNRE in Decision 13.[189] National, inter-branch, or inter-provincial projects must be reviewed within 45 days of complete submission; all other projects must be reviewed within 30 days.[190] The national, ministerial, or provincial approving agency then has 15 working days from the receipt of the complete EIA report and accompanying appraisal council recommendation to issue an approval or rejection for the project.[191] If the project location, size, design capacity, or technology is changed, or if the project is not executed within two years of approval, the project proponent must submit an additional EIA report.[192]

Several features of the Vietnamese environmental impact assessment requirement should be noted. First, like Thailand and Cambodia, whether a project requires an EIA depends on whether it falls within threshold categories. Second, there are mandatory public participation provisions that solicit comment from provincial committees and community representatives, although it is unclear how those comments are weighed in the final decision-making process.

B. Comparing the Mekong River Commission Countries' Current EIA Requirements

There are four primary differences between the EIA requirements of the four MRC member countries.

First, there is variation as to whether and when public participation is mandatory or voluntary.

Second, the triggers for conducting a national EIA differ between the countries. Cambodia, Thailand, and Vietnam have adopted lists that delineate what types and sizes of projects trigger the EIA requirement, while Lao PDR has a qualitative standard that any project likely to result in significant environmental impacts requires an environmental assessment. The countries also differ as to who is responsible for undertaking the screening process, and whether projects that do not require EIAs must submit alternate documentation. For example, in Thailand, if the project owner determines that his project does not need an EIA, nothing more is required, but in Lao PDR all construction projects or activities require an Environmental Compliance Certificate.

Third, the requirements for the contents, timing, and preparation of the EIA itself vary between the member countries. The laws require different time periods for EIA preparation and review, and they designate different responsible parties for these stages. The mandatory contents of the EIA reports also vary from country to country (see Table 3).

[186] Vietnam Circular 08, *supra* note 177, art. III(2).
[187] Vietnam Law on Environmental Protection, *supra* 173, art. 21(7).
[188] Vietnam Decree 80, *supra* note 175, art. 11(3).
[189] Vietnam Circular 08, *supra* note 177, art. III.4.
[190] Vietnam Decree 80, *supra* note 175, art. 12.
[191] Vietnam Law on Environmental Protection, *supra* 173, art. 22(3).
[192] Vietnam Decree 80, *supra* note 175, art. 13.

Table 3. Comparison of the required contents of EIAs in the MRC member countries[193]

Cambodia	Lao PDR	Thailand	Vietnam
1. Introduction	1. Executive Summary (in Lao and English)	1. Executive Summary	1. Introduction
2. Project Summary	2. Introduction	2. Introduction, including project purpose and timetable, and EIA methodology	2. Brief Description of the Project
3. Purpose of the Project	3. Description of the Environment	3. Project Description and Site Justification	3. Natural, Environmental, Economic and Social Conditions
4. Project Description	4. Identification and Evaluation of Alternatives	4. Present Environmental Condition of Project Site	4. Environmental Impact Assessment
5. Description of the Environment	5. Presentation of Direct, Indirect and Cumulative Impacts of the Alternatives	5. Environmental Impacts from the Project	5. Solutions and Measures to Minimize Negative Impacts, to Prevent and Cope with Environmental Problems
6. Public Participation	6. Summary of Public Participation Activities	6. Mitigation Measures	6. Commitments to Implementation of Environmental Protection Measures
7. Environmental Impact Assessment	7. Identification of Chosen Alternatives and Reasons	7. Consideration of Alternatives	7. Construction Works of Environmental Treatment; Environmental Monitoring and Management Program
8. Environmental Mitigation Measures	8. Detailed Description of Chosen Alternative	8. Coordination with Other Government Activities	8. Cost Estimate for Environmental Construction
9. Environmental Management Plan	9. Environmental Management Plan	9. Monitoring Program	9. Community Consultation
10. Institutional Responsibility	10. Conclusions & Recommendations	10. Report Authors & Qualifications	10. Bibliography & Methodology
11. Conclusions & Suggestions	11. References	11. Appendices	11. Conclusion & Recommendation
	12. Annexes		

Fourth, substantial variation exists in the parties' monitoring requirements and responsibility for implementing them. Cambodia and Lao PDR require explicit Environmental Management Plans in the EIA reports themselves, while Thailand mandates a less expansive Monitoring Program. Vietnam generally states that monitoring is a joint effort to be undertaken by the oversight agency, the project proponent, and the public.

C. Mekong River Commission: Developing the Transboundary Environmental Assessment Requirement

i. The Mekong River Commission

The Mekong River begins in China and flows through Myanmar, Lao PDR, Thailand, Cambodia, and Vietnam. The Basin is divided among the six countries in the following approximate percentages: China 22%, Myanmar 3%, Lao PDR 25%, Thailand 25%, Cambodia 20%, and Vietnam 5%.[194] The Mekong is an important regional resource, acting as the major source of freshwater, livelihoods support, and hydropower to its riparian countries. For example, hydropower facilities along the river provide 720 MW to Vietnam, 615 MW to Lao PDR, and 225 MW to Thailand.[195]

In 1995, four of the six riparian countries (Cambodia, Lao PDR, Vietnam, and Thailand) signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995 MRC Agreement). As the member countries' interests in the Mekong River include hydropower development,

[193] Summary lists obtained from ERM, *EIA for LMB*, *supra* note 5, Annexes B2 (Cambodia) and B4 (Lao PDR); Vietnam Circular 08, *supra* note 177, app. IV; *Environmental Assessment in Thailand*, Office of Environmental Policy and Planning, Environmental Impact Evaluation Division (1998).
[194] Daniel Seligman, Colorado River Commission of Nevada, *World's Major Rivers: An Introduction to International Water Law with Case Studies* (2009), at 62 (citing the UNEP Atlas of Freshwater Agreements).
[195] *Id.*

water supply, irrigation, and agriculture,[196] the agreement established the Mekong River Commission (MRC) to promote the preservation and utilization of the basin. Myanmar and China later joined the MRC as Dialog Partners.

Two sections of the 1995 Agreement provide the foundation for establishing a TbEIA framework for the Mekong River. Article 3 emphasizes the need to protect the environment and ecological balance of the river "from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin."[197] Article 5, on Reasonable and Equitable Utilization, establishes notification and prior consultation requirements for utilization of the Mekong during the wet and dry seasons.[198] The doctrine of equitable and reasonable utilization is a basic tenet of international water law, as reflected by its categorization as customary international law by the International Law Association Water Resources Committee and the 2004 Berlin Rules on Water Resources Law.[199]

ii. The TbEIA Requirement

Pursuant to Article 5 of the 1995 MRC Agreement, *Procedures for Notification, Prior Consultation and Agreement (PNPCA)* were established by the MRC in 2003. The *Procedures* provide for varying combinations of notification and/or prior consultation for inter-basin versus intra-basin projects during the wet and dry seasons.[200] Notification is required for intra-basin use and inter-basin diversion of the tributaries, and intra-basin use during the wet season of the mainstream waters. Prior consultation is required for inter-basin diversion from the mainstream during the wet season, and intra-basin use of the mainstream or inter-basin diversion of surplus water during the dry season. An inter-basin diversion project during the dry season requires a specific agreement overseen by the MRC Joint Committee.[201]

In many respects, the *PNPCA* are a precursor to a TbEIA requirement. While not requiring an environmental assessment, they do demand notification and prior consultation – the first step of the TbEIA process. In essence, they act as a potential triggering mechanism – whenever the *PNPCA* apply, the country of origin should instigate consultations with the potentially affected parties to determine whether a TbEIA is necessary.[202]

The official development of a TbEIA agreement for the Lower Mekong Basin was initiated in 2002, in response to the Joint Committee's recommendations to adopt and apply TbEIA for water resources development. The MRC's commitment to developing a TbEIA agreement was subsequently reiterated in the *2006-2010 Strategic Plan*, which states that Goal 3 seeks in part to "[p]romote and support the implementation of transboundary EIA."[203] The Basin Development Plan (BDP), which was first initiated in 1995 with assistance from the World Bank, similarly committed to the development of a TbEIA. The BDP states that "the [TbEIA] procedure will provide the basis for harmonizing the different environmental impact assessment required under the laws of each Member State" and that the underlying principles would be completed by late 2005.[204]

iii. Summary of Minutes of TbEIA Development Meetings

The following is a brief summary of some of the key meetings and occurrences in the development of a TbEIA Framework.

At the Second Regional Meeting on TbEIA, held in Bangkok on 24 August 2005, it was reiterated that the underlying intent of developing TbEIA is "to provide a framework to integrate the consideration of

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[196] *Id.* at 236.
[197] Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995), art. 3.
[198] *Id.* art. 5.
[199] *See supra* notes 5–6 and surrounding text; *see also* Seligman, *supra* note 194, at 63.
[200] MRC, *Procedures for Notification, Prior Consultation and Agreement* (2003). For a summary table of the requirements of Article 5 of the 1995 Agreement, see George E. Radosevich & Douglas C. Olson, *Existing and Emerging Basin Arrangemetns in Asia: Mekong River Commission Case Study*, Third Workshop on River Basin Institution Development, World Bank, Washington DC, 24 June 1999, at 14 tbl.2. During the dry season, inter-basin use requires a specific agreement from the Joint Committee, while intra-basin use requires prior consultation. During the wet season, inter-basin use requires prior consultation, while intra-basin use requires notification. Use of tributaries always requires notification.
[201] *Procedures for Notification, Prior Consultation and Agreement*, *supra* note 200, Arts. 4–6.
[202] MRC, *Proposed Scope of a Framework Agreement and Guidelines on Transboundary Environmental Impact Assessment for the Lower Mekong Basin* (July 2005).
[203] MRC, Strategic Plan 2006-2010: Meeting the needs, keeping the balance, Goal 3.4 (2006).
[204] MRC, The MRC Basin Development Plan, *IWRM Strategy for the Lower Mekong Basin*, § 3.1.5, BDP Library Vol. 10 (2005).

[transboundary] impacts within existing national EAS system (sic) and to promote cooperation between the riparian countries in transboundary context to address [transboundary] issues by using EA as a tool." It was decided that the TbEIA should consist of three components: a Framework, Guidance, and Institutional Support. The parties discussed the ToR for the establishment of a TbEIA Working Group that would facilitate the development of these components.[205]

In October of the same year, the TbEIA Working Group convened in Vientiane. Consisting of one member of the MRC Secretariat (as Chair) and three representatives from each MRC member country – one from the National Mekong Commission, one from the Line Agency responsible for EIA, and one national expert – the Working Group agreed upon a Work Plan for the development of a TbEIA Framework. At this meeting, it was proposed that the Framework consist of: (i) a Statement of Intent; (ii) Definition of a Trigger; (iii) Notification and Response requirements; and (iv) Arrangement of TbEIA Study and Review and Mechanism for Dispute Resolution. There was debate about whether the TbEIA Study and Dispute Resolution should be divided into separate elements. The next Working Group meeting was to address the Framework outline in more detail and produce a complete draft.[206]

A draft of the TbEIA Framework was finalized on 8 June 2006. The parties noted that the Framework did not include a mechanism for modification, and it was decided that modification authority would be given to the Mekong River Commission Secretariat (MRCS), in the context of MRCS' duty to monitor the implementation of the Framework and make recommendations to the Joint Council if amendments are necessary. In addition to completing a Framework draft, the meeting participants tentatively agreed upon outlines for the Guidance and Institutional Support components of the TbEIA. The Guidance is to include sections detailing its purpose and objectives, the background to developing the Framework, the requirements for triggering TbEIA pursuant to the Framework, the methodology for the TbEIA process, and an assessment of what a TbEIA should incorporate substantively. The Institutional Support aspect of the work plan will address the roles and responsibilities of the MRCS and National Mekong Committees (NMCs) in supporting Framework implementation; how the Framework will be disseminated and implemented; how the MRCS can provide technical assistance; financial options; and capacity building for appropriate implementation of the Framework.[207]

iv. The Second Version of the Draft TbEIA Framework

On 28 February 2007, the Thai National Mekong Committee (TNMC) submitted a letter to the MRCS summarizing the issues addressed in a national consultation meeting on TbEIA that was held in October 2006. First, the TNMC recommended that the Framework be implemented on a voluntary basis. Second, the TNMC asked that the Framework include information about its background and drafting methodology. Third, the Framework should provide that TbEIA is required for projects that trigger national EIA laws and that may cause transboundary impacts, although water supply projects and projects about which the parties disagree should be excluded. Fourth, the TbEIA drafting process should serve merely as an example, with the Joint Commission making the final decision regarding what process is appropriate in a given situation. Finally, pilot studies on implementation of the Framework should be undertaken.[208] A work plan for the pilot studies is currently being implemented by the MRCS Environment Division, with assistance from an Environment Programme Coordinator from each NMC.[209]

A second version of the Draft TbEIA Framework was disseminated on 17 July 2007. There were five primary differences between the first and second versions:

1. Throughout the draft, the use of "state" or "member state" was changed to "country" or "riparian country";

[205] *Minute (sic) of the Second Regional Meeting on Transboundary Environmental Impact Assessment (TBEIA)*, Patumwan Princess, Bangkok, Thailand, 24 Aug. 2005.
[206] *Minute (sic) from the Working Group Meeting on Transboundary EIA*, MRCS, Vientiane, Lao PDR, 7 Oct. 2005.
[207] *Minutes of Meeting: Regional Meeting on TbEIA Framework Finalization*, MRCS, Vientiane, Lao PDR, 8 June 2006.
[208] Letter from Siripong Hungspreug, Director General, Thai Department of Water Resources, to Olivier Cogels, Chief Executive Officer, MRC Secretariat, 28 Feb. 2550 (2007).
[209] UNEP & MRCS, Annex 4: Workplan and Training Plan for Pilot Study and Revision of Transboundary Environmental Impact Assessment (TbEIA) Framework, § 5, from Sept. 22, 2008 roundtable meeting in Chiang Rai, Thailand (Jan. 2009).

2. An introductory paragraph was added, explaining that the TbEIA was produced by a TbEIA Working Group, as per the suggestion of the Joint Committee in 2003, and that the TbEIA consists of three components (Framework, Guidance, and Institutional Support);
3. The definition of a trigger in Paragraph 6 was revised so as not to be limited by the categories of projects listed in Paragraph 7;
4. Paragraph 7 was modified to specify that only projects of the listed types that trigger a domestic EIA requirement will trigger the TbEIA Framework; and
5. Paragraph 8, which encouraged riparian countries to engage in notification for projects of the types listed in Paragraph 7 that do not require an EIA, was modified to include all projects that may cause transboundary impacts.

The Guidance and Institutional Support components of the TbEIA procedure are forthcoming.

IV. RECOMMENDATIONS

The second version of the Draft TbEIA Framework developed by the Mekong River Commission (MRC) includes many of the key elements of TbEIA and incorporates lessons learned from transboundary assessments in other regions. This section provides recommendations for potential additions or revisions to the existing text that would harmonize and strengthen its existing provisions. The recommendations are based on the above discussion of TbEIA methodologies and practices around the world.

Each suggestion consists of four parts: (1) the general recommendation; (2) the rationale underlying the recommendation; (3) examples from other TbEIA agreements that contain similar provisions; and (4) suggested text for integrating the recommendation into the existing Draft TbEIA Framework. The suggested text takes the current text of Framework sections and displays how it could be modified: deleted text is shown as struck through (~~deletion~~), while added text is in bold italics (***addition***). In many cases, multiple options are provided for how to revise the existing text to comport with the lessons identified in the review of international practices, which are referred to as *"Tier I"*, *"Tier II"*, and *"Tier III"* options. The Tiers are presented in order of compliance with international best practices. *Tier I* refers to the option that will make the provision reflect all recommended best practices that have been identified for this assessment. *Tier II* refers to the option that will make the provision substantially compliant with international best practices. *Tier III* reflects the minimum option that will make the provision meet some, but not all, international best practices. A complete version of the Draft TbEIA Framework incorporating the *Tier I* suggestions is included as Appendix I.

1. Public Participation Provisions should be Mandatory and Nondiscriminatory with Respect to the Publics of the Concerned Parties

Recommendation: Encourage the creation or strengthening of provisions for public participation within the national EIA requirements, and ensure that any public participation undertaken for a transboundary project is nondiscriminatory between the public of the country of origin and potentially affected parties.

Rationale: Public participation is a critical aspect of environmental assessment. At its core, an EIA is about gathering information and exploring alternatives to ensure that the impacts of proposed developments on the environment are understood, acceptable, and managed appropriately. Meaningful public participation expands the information underlying the decision-making process[210] and strengthens the accuracy of the study; increases accountability on the part of decision-makers; and can facilitate public understanding of and support for a proposed activity. The failure to involve the public appropriately in EIA, on the other hand, can contribute to public resistance to the project, increased administrative costs, and a poorly designed and executed project.

[210] Involving the public in the assessment widens the potential sources for relevant information, including: supplementary baseline data about local environmental conditions and processes; improved understanding of all of the potential impacts of proposed projects; identification of a wider range of alternatives for sites, project designs, and mitigation measures; and clarification of the values and trade-offs associated with the various alternatives from the affected populations.

Examples: The World Bank and the Asian Development Bank require public participation during the environmental assessment process.[211] The Espoo Convention and the Draft TEIAA require that any public participation provisions contained within the applicable EIA procedure must be nondiscriminatory with respect to the publics of the origin and potentially affected parties.

Suggested Phrasing:

Tier I public participation provisions would make public participation mandatory and nondiscriminatory.

> Paragraph 11. Once a project has been deemed to trigger this TbEIA Framework, the country of origin shall send an Announcement to the designated authority of all potentially affected country(ies) informing them of the proposed development project~~; copied to MRCS~~. ***The potentially affected country(ies) will, to the extent possible, make this notification publicly available and put in place a process to receive comments on such notification. The country of origin will also send a copy of the Announcement to the MRCS.*** The Announcement will be sent no later than when the need for EIA under national legislation in the member state of origin is identified.
>
> ~~Paragraph 25. Information from the TbEIA Study will be made available to the public in the potentially affected riparian country in accordance with the potentially affected country's national EIA system.~~
>
> ***Paragraph 25. The country of origin shall provide opportunities to stakeholders and the public to participate in relevant TbEIA procedures regarding proposed activities and shall ensure that the opportunities provided to the public of the potentially affected riparian country(ies) are equivalent to those provided to the public of the country of origin. At a minimum, the country of origin shall provide for the submission of comments on the draft TbEIA study to the competent authority of the country of origin. Parties should refer to the Guidance for additional mechanisms for incorporating public participation into the TbEIA process and for recommendations on how to ensure the participation opportunities provided to the publics of the concerned countries are equivalent.***
>
> ***Paragraph 26. Each member country shall take the necessary legal, administrative, or other measures to ensure the establishment of an environmental impact assessment procedure that facilitates public participation. Riparian countries should refer to the Guidance for recommendations on when and how the public should be involved.***

Tier II public participation provisions would encourage public participation and require that it be nondiscriminatory.

> ~~Paragraph 25. Information from the TbEIA Study will be made available to the public in the potentially affected riparian country in accordance with the potentially affected country's national EIA system.~~
>
> ***Paragraph 25. The country of origin shall provide opportunities to stakeholders and the public to participate in relevant TbEIA procedures regarding proposed activities and shall ensure that the opportunities provided to the public of the potentially affected riparian country(ies) are equivalent to those provided to the public of the country of origin. At a minimum, the country of origin shall provide for the submission of comments on the draft TbEIA study to the competent authority of the country of origin. Parties should refer to the Guidance for additional mechanisms for incorporating public participation into the TbEIA process and for recommendations on how to ensure the participation opportunities provided to the publics of the concerned countries are equivalent.***

2. Clarifying, Harmonizing, and Strengthening the TbEIA Screening Process

Recommendation: Experience with TbEIA implementation suggests that TbEIA frameworks should specify minimum thresholds for the categories that trigger a TbEIA, and provide an alternate qualitative standard ensuring that any project likely to have "significant" transboundary environmental impact will similarly trigger a TbEIA. All of the MRC member countries except Lao PDR currently have screening lists of activities that trigger the need for impact assessment in their domestic EIA requirements. To avoid conflict, harmonization of these domestic requirements within the TbEIA Framework is highly desirable.

Rationale: The member countries' individual EIA triggers can be harmonized through the establishment of minimum screening thresholds in the TbEIA. Such thresholds will help project proponents determine with greater certainty whether their proposed activity will trigger the TbEIA requirement and reduce the likelihood of disputes over the issue.

Examples: The Espoo Convention provides categories of activities that signatories should ensure will trigger the TbEIA procedure. The Convention also permits either the origin or potentially affected country to initiate discussion as to whether any additional activity not on the list, but which is likely to cause

[211] World Bank OP 4.01, *supra* note 21, § 14; ADB OM F1/BP, *supra* note 84, § 9. *See* Appendix V for the text of the provisions.

significant adverse transboundary impacts, should trigger the TbEIA requirement. It then provides a list of criteria to use to determine whether the project is likely to cause significant adverse transboundary impacts. The Draft TEIAA takes a similar approach for its notification requirements, while simply requiring a TbEIA for any project likely to cause significant adverse transboundary environmental impacts, as determined by a list of factors. The World Bank likewise considers whether the project is likely to have significant adverse impacts.

Suggested Phrasing:

The *Tier I* screening process combines minimum size thresholds for the eligible project categories with a "significant environmental impact" standard. See Appendix II for the complete screening lists of the MRC member countries. The TbEIA Framework would provide criteria for determining whether significant environmental impacts are likely. Impacts would be defined in a new Definitions section (see Recommendation 8), rather than within the section discussing what triggers a TbEIA. Thus, paragraphs 9 and 10 of the current TbEIA Framework draft have been omitted below.

> II. ~~Definition of~~ Trigger
>
> Paragraph 6. This TbEIA Framework will be triggered when a proponent proposes a development project which requires EIA under ***the*** national legislation ***or administrative requirements*** of the member state of origin, and which has the potential to cause significant transboundary environmental impacts within another member state. The Framework will***,*** as far as possible***,*** be triggered no later than when the need for an EIA under national legislation of the member state of origin is identified.
>
> Paragraph 7. The development projects with the potential to trigger this TbEIA Framework are ***those*** projects that ***require an*** EIA ~~is required~~ under the national legislation ***of the country of origin***, ~~which can be grouped as follows~~ ***including, but not limited to, the following categories***:[212]
>
> (a) Hydropower projects [*the member countries should agree on a size threshold*];
>
> (b) Irrigation schemes [*the member countries should agree on a size threshold*];
>
> (c) Ports and riverworks [*the member countries should agree on a size threshold*];
>
> (d) Industrial & mining projects [*the member countries should agree on a size threshold*];
>
> (e) Aquaculture projects [*the member countries should agree on a size threshold*];
>
> (f) Navigation projects [*the member countries should agree on a size threshold*]; ~~and~~
>
> ***(g) Water supply projects*** [*the member countries should agree on a size threshold*]**;**[213]
>
> ***(h) Proposed dams and reservoirs;*** [*the member countries should agree on a size threshold*]; and
>
> ***(i) Groundwater abstractions*** [*the member countries should agree on a size threshold*].
>
> ~~Note: Water Supply was deleted from the list~~
>
> ~~Paragraph 8. If a development project (that may cause transboundary impacts) does not require an EIA within the country of origin, the country of origin will endeavour to inform the potentially affected country. The involved riparian country may then agree to develop a separate arrangement to address any potential transboundary impacts.~~
>
> ***[New] Paragraph 8. At the initiative of either concerned country, discussions shall be undertaken as to whether a proposed project not included in the above categories is likely to cause significant adverse environmental impacts and therefore should be treated as if it is included on the list contained in Paragraph 7. The determination of the likelihood of significant adverse environmental impacts shall be made according to the elements listed in Appendix I. If the parties do not agree, the MRCS shall facilitate a resolution of whether a proposed project triggers the TbEIA requirement according to the procedures outlined in Section V. If the transboundary environmental impacts are not expected to be significant, the country of origin should notify the potentially affected country(ies) according to the notification provision in Section III, and the concerned countries may then decide if they wish to voluntarily engage in a TbEIA.***

[212] Note: At present, the Tier I recommendation includes a "significant impact" threshold that allows additional categories of projects not included on this list to trigger the TbEIA requirement. If the "significant impact" threshold is removed, we would recommend significantly expanding the categories of projects contained on this list.

[213] Note: We understand that water supply was intentionally omitted from the original list of activities that would trigger the TbEIA. We include it on our recommended list to emphasize that it is an important type of riparian development that can have significant environmental effects.

Appendix I. Criteria to assist in determining the environmental significance of activities not listed in Paragraph 7

In considering whether proposed activities are likely to have significant transboundary environmental impacts, and therefore trigger the requirements of this Framework, the concerned Parties should consider the following factors:

1. ***Context: Contextual factors potentially relevant to determining the significance of a transboundary environmental impact include, but are not limited to:***
    a. ***The potentially affected human populations and vulnerable segments of this population (e.g., poor communities, women, children, indigenous populations, or elderly persons);***
    b. ***The geographic extent of the impact;***
    c. ***The ecological context of the impact;***
    d. ***Unique characteristics of the geographic area (e.g., proximity to historic or cultural resources, park lands, wetlands, wild and scenic rivers, or ecologically critical areas);***
    e. ***The violation of any standards provided by a Potentially Affected Country regarding the protection of health or the environment as specified in international, national and subnational legal instruments;***
    f. ***Probability of occurrence of the impact;***
    g. ***Scientific uncertainty with respect to the nature or intensity of the likely adverse impact;***
    h. ***Likelihood that the impact will adversely affect the livelihoods of individuals or communities.***
2. ***Intensity: Factors related to the intensity (severity or magnitude) of potential impacts are also relevant to the determination of significant transboundary environmental impacts. These factors include, but are not limited to:***
    a. ***Potential negative effects on public health or safety, including exposure to toxics;***
    b. ***Degree to which environmental impacts involve unique or unusual risks to human or ecological health;***
    c. ***Degree to which a project is likely to establish a regulatory precedent or the issuance of a permit in a new area, therefore allowing future projects to be carried out with significant transboundary environmental impacts;***
    d. ***Duration, potential for recurrence, and frequency of impacts of the proposed project;***
    e. ***Degree of irreversibility of the impacts;***
    f. ***Relationship to other projects that, even though individually insignificant, will cause or can reasonably be anticipated to cause significant cumulative impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment that is independent of whether a project is temporary in nature or is broken down into small component parts;***
    g. ***Degree to which physical or biological impacts of the project may adversely affect important historical or cultural resources or traditional uses by indigenous peoples of cultural, historical, and natural resources;***
    h. ***Degree to which the livelihoods of individuals and/or communities may be affected, with special consideration of poor or marginalized individuals or communities;***
    i. ***Degree to which a project may adversely affect threatened or endangered species or critical habitat of such species;***
    j. ***Degree to which biodiversity may be affected;***
    k. ***Degree to which natural ecological systems and landscapes may be transformed;***
    l. ***Degree to which a project may affect the quality or availability of renewable and non-renewable resources.***

The *Tier II* practice does not specify minimum size thresholds for the eligible project categories, but adds a "significant environmental impact" standard. As with Tier 1, the TbEIA framework would provide criteria for determining whether significant environmental impacts are likely. Again, significant impacts would be defined in a new Definitions section, rather than within the section discussing what triggers a TbEIA. Thus, paragraphs 9 and 10 of the current TbEIA Framework draft have been omitted below.

II. ~~Definition of~~ Trigger

Paragraph 6. ***In general,*** ~~T~~this TbEIA Framework will be triggered when a proponent proposes a development project which requires EIA under ***the*** national legislation ***or administrative requirements*** of the member state of origin and which has the potential to cause significant transboundary environmental impacts within another member state. The Framework will***,*** as far as possible***,*** be triggered no later than when the need for an EIA under national legislation of the member state of origin is identified.

Paragraph 7. The development projects with the potential to trigger this TbEIA Framework are ***those*** projects that ***require an*** EIA ~~is required~~ under the national legislation ***of the country of origin***, ~~which can be grouped as follows~~ **which includes *the following categories***:

(a) Hydropower projects;

(b) Irrigation schemes;

(c) Ports and riverworks;

(d) Industrial & mining projects;

(e) Aquaculture projects;

(f) Navigation projects; and

(g) Water supply projects.

~~Note: Water Supply was deleted from the list~~

~~Paragraph 8. If a development project (that may cause transboundary impacts) does not require an EIA within the country of origin, the country of origin will endeavour to inform the potentially affected country. The involved riparian country may then agree to develop a separate arrangement to address any potential transboundary impacts.~~

[New] Paragraph 8. At the initiative of either concerned country, discussions shall be undertaken as to whether a proposed project not included in the above categories is likely to cause significant adverse environmental impacts and therefore should be treated as if it is included on the list in Paragraph 7. The determination of the likelihood of significant adverse environmental impacts shall be made according to the elements listed in Appendix I. If the parties do not agree, the MRCS shall facilitate a resolution of whether a proposed project triggers the TbEIA requirement according to the procedures outlined in Section V. If the transboundary environmental impacts are not expected to be significant, the country of origin should notify the potentially affected country(ies) according to the notification provision in Section III, and the concerned countries may then decide if they wish to voluntarily engage in a TbEIA.

Appendix I. (see draft appendix included within the *Tier I* recommendation)

Tier III practice, the minimum recommended option, would focus on clarifying the current wording triggering application of the TbEIA Framework. As it is unclear whether the list of activities in this section is limited to those specified, the suggested language takes a more expansive view that does not impose such a limitation. Once again, significant impacts would be defined in a new Definitions section, rather than within the section discussing what triggers a TbEIA. Thus, paragraphs 9 and 10 of the current TbEIA Framework draft have been omitted below.

II. ~~Definition of~~ Trigger

Paragraph 6. This TbEIA Framework will be triggered when a proponent proposes a development project which requires EIA under ***the*** national legislation ***or administrative requirements*** of the member state of origin and which has the potential to cause significant transboundary environmental impacts within another member state. The Framework will***,*** as far as possible***,*** be triggered no later than when the need for an EIA under national legislation of the member state of origin is identified.

Paragraph 7. The development projects with the potential to trigger this TbEIA Framework are ***those*** projects that ***require an*** EIA ~~is required~~ under the national legislation ***of the country of origin***, ~~which can be grouped as follows~~ ***[including projects] within the following categories***:[214]

(a) Hydropower projects;

(b) Irrigation schemes;

(c) Ports and riverworks;

(d) Industrial & mining projects;

(e) Aquaculture projects; ***and***

[214] Note: At present, the Tier I recommendation includes a "significant impact" threshold in addition to the categories of projects that will trigger the TbEIA requirement. If the "significant impact" threshold is removed, we would recommend significantly expanding the categories of projects contained on this list.

(f) Navigation projects~~.; and~~

~~Note: Water Supply was deleted from the list~~

Paragraph 8. If a development project ~~(that may cause transboundary impacts)~~ does not require an EIA within the country of origin, ***but may cause adverse transboundary environmental impacts,*** the country of origin will ~~endeavour to~~ inform the potentially affected country***(ies) according to the notification provisions contained in Section III***. The ~~involved riparian country~~ ***concerned parties*** may then agree to develop a separate arrangement to address any potential transboundary impacts.

3. Specify Minimum Content of the TbEIA Methodology within the Framework

Recommendation: A list of minimum elements to be included in the TbEIA methodology should be specified in the Framework itself, rather than in the Guidance. Including information such as the identity of those who prepared the study and their qualifications will increase the study's perceived credibility. While most of the proposed elements listed below are already required by the member countries' domestic EIA processes, they should be harmonized within the TbEIA Framework.

Rationale: To ensure the TbEIA studies contain sufficient information about the likely impacts of proposed projects, required minimum elements should be specified within the TbEIA Framework.

Examples: The Espoo Convention and the Draft TEIAA both specify the components that should be included within a TbEIA. Espoo requires everything on its list to be included, while the Draft TEIAA only requires that elements be included "when available." The World Bank and Asian Development Bank also require certain minimum elements to be included in their environmental assessments.

Suggested Phrasing:

Paragraph 23. The results of the assessment of transboundary environmental impacts will be reported in English (or in any language mutually agreed between the involved riparian countries) and will include at a minimum, the ~~information as detailed in the Guidance~~ ***elements listed in Appendix III***.

Appendix III. Minimum Required Content of the Transboundary Environmental Impact Assessment Report

1. ***A description of the purpose and nature of the proposed project;***
2. ***A description of the methodology undertaken for the assessment, including identification of the entity(ies) that conducted the assessment;***
3. ***A description of the baseline environment (including the geographical scope) likely to be affected;***
4. ***A description of the anticipated environmental impacts;***
5. ***A description of reasonable alternatives to the proposed project, including a "no action" alternative;***
6. ***A description of proposed mitigation measures;***
7. ***An Environmental Management Plan and/or other follow-up, such as monitoring and management components;***
8. ***Summaries of public participation and consultation activities, including any comments received and responses made to those comments;***
9. ***A technical summary or conclusion;***
10. ***A non-technical summary or conclusion;***
11. ***Points of contact for inquiries related to the assessment; and***
12. ***Any additional relevant information.***

4. Require Project Monitoring and State the Objectives of Such Monitoring

Recommendation: The current monitoring provisions of the TbEIA Framework should be made mandatory and should state the purpose of such monitoring efforts.

Rationale: The International Association for Impact Assessment emphasizes the importance of monitoring in its *EIA Follow-Up: International Best Practice Principles* bulletin. Monitoring helps to ensure that

elements such as mitigation measures and Environmental Management Plans are effectively implemented and that unforeseen impacts can be addressed appropriately.

Examples: The World Bank and the Asian Development Bank require project proponents to report on their compliance with Environmental Management Plans and the status of monitoring and any mitigation measures. The Espoo Convention does not explicitly require monitoring, but allows concerned parties to initiate discussions regarding whether a "post-project analysis" should be completed (Espoo also provides guidance on the elements of such an analysis). The Draft TEIAA has yet to develop its post-project monitoring section.

Suggested Phrasing:

The Tier I monitoring provisions would require post-approval project monitoring and submission of annual monitoring reports to the MRCS. Under this recommendation, the TbEIA Framework would also explicitly state the objectives of monitoring efforts.

> Paragraph 28. Involved countries shall mutually determine ~~whether, and if so to what extent,~~ ***how best*** to conduct monitoring of any potentially significant transboundary environmental impacts (as reported in the TbEIA study) during preparatory groundworks, construction, operation and decommissioning, as relevant ~~of~~ ***to*** the proposed development project. ***Monitoring reports shall be submitted annually to the MRCS by the country of origin. The monitoring efforts shall be aimed at: ensuring compliance with any conditions set out in the authorization or approval of the project, as well as the effectiveness of mitigation measures; reviewing impacts so as to identify and manage unforeseen impacts, and to cope with uncertainties surrounding projected impacts; and assessing predicted versus actual impacts, in order to improve the predictive capacity and overall quality of future TbEIAs.***

The Tier II monitoring provisions would require post-approval project monitoring, but not the submission of annual reports. As with Tier I, the TbEIA Framework would explicitly state the objective of its required monitoring efforts.

> Paragraph 28. Involved countries shall mutually determine ~~whether, and if so to what extent,~~ ***how best*** to conduct monitoring of any potentially significant transboundary environmental impacts (as reported in the TbEIA study) during preparatory groundworks, construction, operation and decommissioning, as relevant ~~of~~ ***to*** the proposed development project. ***Monitoring reports shall be submitted annually to the MRCS by the country of origin. The monitoring efforts shall be aimed at: ensuring compliance with any conditions set out in the authorization or approval of the project, as well as the effectiveness of mitigation measures; reviewing impacts so as to identify and manage unforeseen impacts, and to cope with uncertainties surrounding projected impacts; and assessing predicted versus actual impacts, in order to improve the predictive capacity and overall quality of future TbEIAs.***

The Tier III monitoring provisions, by contrast, merely incorporate an explanation of the objective of any monitoring efforts undertaken.

> Paragraph 28. Involved countries shall mutually determine whether, and if so to what extent, to conduct monitoring of any potentially significant transboundary environmental impacts (as reported in the TbEIA study) during preparatory groundworks, construction, operation and decommissioning as relevant ~~of~~ ***to*** the proposed development project. ***The monitoring efforts shall be aimed at ensuring compliance with any conditions set out in the authorization or approval of the project, as well as the effectiveness of mitigation measures;, reviewing impacts so as to identify and manage unforeseen impacts, and to cope with uncertainties surrounding projected impacts; and assessing predicted versus actual impacts, in order to improve the predictive capacity and overall quality of future TbEIAs.***

5. SPECIFY THE REQUISITE CONTENTS OF THE NOTIFICATION ANNOUNCEMENT

Recommendation: The Framework should specify a list of minimum elements to include in the notification Announcement that a country of origin sends to a potentially affected country, alerting it that the TbEIA Framework has been triggered by a proposed project.

Rationale: Requiring certain types of information to be shared at the beginning of the TbEIA process will improve the effectiveness of public consultation and participation.

Example: The Draft TEIAA includes a list of elements that should be included in the notification document.

Suggested Phrasing:

> Paragraph 12. The Announcement will follow the format provided in the Guidance and be written in English. It will outline details of the proposed development project (including brief de***scriptions***~~tails~~ of ***the*** project location, purpose, maps,

scope/scale, proponent, and project schedule, etc.), the rationale for triggering the TbEIA process, and the ***timeline for undertaking the*** EIA ~~study schedule~~ (according to national legislation)***, as listed in Appendix II***.

Appendix II. Minimum Required Content of the Notification Announcement

a. Name and address of the project proponent;

b. A description of the proposed project (including nature, scope, scale, and purpose);

c. Any available information on potential transboundary impacts of the proposed project;

d. Description of the spatial and temporal characteristics of the proposed project (including location, project site (land use, ecological, and geographic characteristics), and identification of potentially affected areas);

e. Points of contact for the potentially affected country(ies) (including the federal official and interested non-federal officials to whom the Announcement is sent);

f. Points of contact for the country(ies) of origin (including the designated official, decisionmaking authority, and designated contact responsible for the assessment); and

g. An indication of a reasonable time within with potentially affected country(ies) should respond, taking into account the nature of the proposed project.

6. Specify a Timeframe for the Potentially Affected Country to Respond to Notification

Recommendation: When a Country of Origin provides notification to Potentially Affected Country(ies) that the TbEIA Framework has been triggered, the Potentially Affected Country(ies) must respond and indicate whether they wish to be involved in or informed about the TbEIA study. The allowable response time for the Potentially Affected Country should be specified in the TbEIA Framework, not the TbEIA Guidance.

Rationale: Providing a consistent mandatory response time will reduce the likelihood of confusion and conflict, especially since a failure to respond suggests that the Affected Country does not wish to be involved in the TbEIA process.

Examples: The Caspian Sea states specify in their TbEIA agreement that an Affected Country has 30 days to respond after receiving notification of a project that triggers the TbEIA requirement. The UN Convention on the Law of the Non-navigational Uses of International Watercourses, on the other hand, gives the Affected Country six months to respond.

Suggested Phrasing:

Paragraph 13. The designated authority of the potentially affected riparian country will solicit and collate responses from its relevant authorities/agencies, and ~~duly~~ ***within 30 [or 60] days of receipt of the Announcement, will*** submit an official Response to the Announcement to the designated authority of the country of origin***. The potentially affected country will also send a*** copy ***of the Response*** to the MRCS.

Paragraph 17. The Response from the potentially affected riparian country ***must*** be received by the designated authority of the member state of origin within ~~the timeframe specified in the Guidance~~ ***30 [or 60] days of the Affected Country's receipt of the Announcement***. If no Response is received within this timeframe, the country of origin may ~~consider~~ ***presume*** that the potentially affected country does not wish to be further involved in any TbEIA process. In such ~~circumstance~~ ***a case***, the member state of origin will ~~then~~ determine whether to carry out a review of potential transboundary environmental impacts ~~on the basis of~~ ***based on*** its own law and practice.

7. Provide Key TbEIA Documents in Multiple Languages to Facilitate Mutual Understanding and Meaningful Public Participation

Recommendation: The TbEIA Framework should specify the language(s) to be used for the TbEIA documents.

Rationale: Specifying the languages in which the documents must be provided will make it easier for the receiving country to understand (and translate) them, if necessary. Making the documents available in the language(s) of the origin country as well as the affected country will help ensure that all relevant officials and the public will be able to meaningfully participate in the assessment process.

Examples: The Draft TEIAA requires the country of origin to provide notification in its official language, and encourages it to be provided in the language of the potentially affected country as well. The Caspian Sea agreement requires notifications for Azerbaijan, Kazakhstan, Turkmenistan, and the Russian Federation to be provided in Russian; for Iran to be provided in English; and for the Caspian Environment Programme to be in both Russian and English.

Suggested Phrasing:

> Paragraph 12. The Announcement will follow the format provided in the Guidance~~ and be written~~ ***The Announcement will be provided*** in English***, the official language of the country of origin, and in the official language of any potentially affected countries***. ~~It~~ ***The Announcement*** will outline details of the proposed development project (including brief de***scriptions***~~tails~~ of ***the*** project location, purpose, maps, scope/scale, proponent, and project schedule, etc.), the rationale for triggering the TbEIA process, and the ***timeline for undertaking the*** EIA ~~study schedule~~ (according to national legislation)***, as listed in Appendix II***.
>
> Paragraph 14. The Response of ~~the~~ ***any*** potentially affected riparian country will follow the format provided in the Guidance ~~and be written~~***. The Response will be provided*** in English***, the official language of the potentially affected member state, and the official language of the country of origin***. The Response will indicate whether the potentially affected member state wishes to:
>
> > (a) be involved in ~~a~~ ***the*** TbEIA study (e.g. through sharing of information);
> >
> > (b) not be involved in any TbEIA study***,*** but be kept informed about the project / any assessment; or
> >
> > (c) have no further involvement in the project.
>
> Paragraph 23. The results of the assessment of transboundary environmental impacts will be reported in English ***and in the official languages of the origin country and the potentially affected country(ies), as well as in*** ~~(or in~~ any language mutually agreed ***upon*** between the involved riparian countries~~)~~***. The results*** ~~and~~ will include***,*** at a minimum, the information as detailed in ~~Guidance~~ ***Appendix III***.

8. Dispute Resolution Mechanism for Disagreements Regarding Trigger of the TbEIA Framework

Recommendation: While the current draft of the TbEIA Framework does contain a dispute resolution mechanism, the draft could clarify that this mechanism applies to disagreements over whether the TbEIA Framework has been triggered by a proposed project. In addition, the Framework could include an option to refer the dispute to the International Court of Justice (ICJ).

Rationale: Although the country of origin retains ultimate authority over the TbEIA process, potentially affected country(ies) should be able to petition the MRCS when there is disagreement over whether the TbEIA requirement has been triggered. Several existing TbEIA agreements specify the ICJ as an alternative decision-making entity to which the dispute can be referred.

Examples: The Espoo Convention allows any potentially affected country to challenge a finding by the country of origin regarding whether a proposed activity is likely to result in significant adverse transboundary environmental impacts, thus requiring a TbEIA. It also provides that if the parties cannot resolve a dispute amongst themselves, they may refer the matter to the ICJ.

Suggested Phrasing:

> V. ***Dispute Resolution***~~ Mechanism for resolving disagreements~~
>
> Paragraph 31. If a disagreement arises regarding the interpretation of this Framework, any riparian country may raise its concern to the MRCS and request the MRCS to facilitate a resolution ***of the dispute***. If the MRCS is unable to resolve the disagreement in interpretation, it shall refer the matter to the Joint Committee and***,*** if necessary***,*** ~~further~~ to the Council in order to reach ***a*** resolution. ***If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).***
>
> Paragraph 32. If a disagreement arises between any riparian ***member*** countries during the implementation of this Framework, ~~the~~ ***any concerned*** member state~~s concerned undertake, at the request of any riparian countries, to enter into consultation~~ ***may request a consultation with other concerned countries*** in order to reach consensus on the issue. If such consultation ~~is unsuccessful in reaching~~ ***does not lead to*** a solution considered satisfactory to the riparian countries, the issue can be referred to the MRCS and onwards to the Joint Committee and if necessary the Council, for resolution. ***If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).***
>
> **[New]** ***Paragraph 33. If a disagreement arises between the concerned parties regarding whether a proposed activity triggers the TbEIA Framework, the member states concerned shall undertake a consultation, at the***

request of any riparian countries, in order to reach consensus on the issue. If such consultation does not lead to a solution considered satisfactory to the riparian countries, the issue can be referred to the MRCS and onwards to the Joint Committee and if necessary the Council, for resolution. If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).

9. INCLUDE KEY DEFINITIONS

Recommendation: The TbEIA Framework should include a section defining key terms used in the Framework.

Rationale: Including a set of definitions within the Framework will clarify the meaning of the provisions and reduce confusion or misunderstanding regarding their requirements.

Examples: The Espoo Convention and the Draft TEIAA both include a short set of definitions, while the Draft TEIAA definitions have not been completed. Table 3 (below) compares the definitions in these three agreements. Recommended definitions for the MRC TbEIA Framework are included in the right-most column. The definitions for "Impact area" and "Environmental impact" are modified versions of paragraphs 9 and 10 in the second version of the Draft MRC TbEIA Framework.

Suggested Phrasing: A new Article II could be added directly after the Preamble, containing the following definitions (note that "environmental impact" and "transboundary environmental impacts" are based on the definitions contained in the TbEIA Framework, paragraphs 9 and 10):

Article II. Definitions

(a) Country of origin – ***means the riparian country(ies) under whose jurisdiction a proposed activity is intended to take place***

(b) Affected country/Potentially affected country – ***means the riparian country(ies) likely to be affected by the transboundary impact of a proposed activity***

(c) Concerned countries/parties – ***means the country(ies)/party(ies) of origin and the potentially affected country(ies)/party(ies)***

(d) Environmental Impact Assessment – ***means a national procedure for evaluating the likely impact of a proposed activity on the environment***

(e) Transboundary Environmental Impact Assessment – ***means a procedure for evaluating the likely transboundary impact of a proposed activity on the environment***

(f) Environmental impact – ***means*** ~~***in the context of this framework include***~~ ***changes to the quality and quantity of the water, including morphology, in the Mekong River and its tributaries, and any consequent changes to the ecology and human livelihoods that depend on the Mekong and its tributaries***

(g) Transboundary environmental impact – ***means*** ~~***in the context of this framework include***~~ ***any environmental impact within the territory of any riparian country other than the country of origin***

(h) Competent authority – ***means those federal and non-federal authorities designated by countries/parties as responsible for performing duties arising out of this Agreement***

(i) Public – ***means one or more natural or legal persons***

(j) Proposed activity/project – ***means any activity or project subject to a decision of a competent authority in accordance with an applicable national procedure***

(h) Significant impact – ***see Appendix I for the criteria to consider in determining significant impacts***

V. CONCLUSION

Transboundary environmental impact assessment is increasingly being used to coordinate project planning and development so as to minimize environmental harm and conflicts among countries sharing valuable resources. TbEIA agreements have been implemented in numerous regions worldwide, with still more agreements under development. A TbEIA agreement draws upon and supplements the domestic EIA procedures of its signatories to determine whether a proposed activity may result in adverse environmental impacts beyond the country of origin. If so, the parties may engage in coordinated research and consultation to determine the significance of potential impacts and whether they might be

avoided or mitigated. As with domestic EIAs, TbEIAs aim to ensure that all relevant information is considered and that all interested parties are engaged in the development process.

The MRC has produced a substantial Draft TbEIA Framework for the Lower Mekong Basin that outlines a method for determining the potential transboundary environmental impacts of proposed activities. To assess how the Draft TbEIA Framework comports with regional and international practice, this report surveys international practices in the field, summarizes the MRC member countries' domestic EIA procedures, and describes the development of the Draft TbEIA Framework. Based upon this analytical foundation, the Report provides recommendations for revising the current Draft TbEIA Framework. The suggested modifications seek to ensure that the Framework both harmonizes the member countries' domestic EIA processes and adheres to recommended international best practices.

At its base, a TbEIA agreement is a tool for gathering and distributing information about a proposed activity. The research conducted for this report identified two elements that were repeatedly emphasized. First, meaningful public participation is a critical element of the assessment process, increasing the effectiveness and appropriateness of information gathered and alternatives considered. Second, it is important to provide clear, specific standards for the interested parties to follow. Specifying the procedures for conducting a TbEIA will help ensure that the assessment's predictions are accurate and that they enable decision-makers to reach an informed outcome.

The MRC has made great strides in developing a comprehensive TbEIA procedure for the Lower Mekong Basin. Incorporating the recommendations within this report can help ensure that the agreement is consistent with international best practices and that it minimizes potential conflicts between the EIA requirements of the member countries. Once the TbEIA Framework has been completed, corresponding recommendations might be suggested for the second element of the MRC TbEIA procedure, the Guidance.

APPENDIX I. PROPOSED DRAFT FRAMEWORK FOR TbEIA

The following draft incorporates the Tier I recommendations provided in this report. Minor language changes have been included as well.

Framework for Transboundary Environmental Impact Assessment (TbEIA) for the Lower Mekong Basin

The representatives from the MRC Riparian Countries participated in the Working Group on Transboundary Environmental Impact Assessment (WG on TbEIA) to initiate the process of drafting the TbEIA Guidelines as suggested by the JC in 2003. The Working Group Meeting and Working Sessions included Regional Meetings to discuss the content of the Framework, to outline steps and to draft and revise the Framework. The agreed components of TbEIA include the 1) Framework, 2) Guidance, and 3) Institutional Support.

I. Statement of Intent

1. In recognition of the co-operation enshrined within the 1995 Mekong Agreement to promote the sustainable development, utilisation, conservation and management of the Mekong River Basin water and related resources; in response to the MRC Council Resolution of 1998 and the Joint Committee's decision of 2003, the MRC riparian countries hereby adopt a Framework for conducting Transboundary Environmental Impact Assessment (TbEIA) where needed.

2. This TbEIA Framework recognises that economic development projects in the Mekong Basin are already causing concern amongst riparian countries about their potential to cause transboundary environmental impacts. A commonly understood Framework for TbEIA will therefore help to facilitate co-operation between member states aimed at preventing, minimising and managing such impacts, regardless of national borders.

3. The Framework explicitly responds to *Article 3* of the 1995 Mekong Agreement. It aims to support the protection of the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from these development projects.

4. In the context of this TbEIA Framework and under the direction shaped by the 1995 Agreement, the focus is on issues related to water (e.g., its quantity, flow or quality) and/or issues impacted by water (e.g. ecology of the river system and dependent human livelihoods) which cross the borders of the Riparian Countries.

5. The application of this TbEIA Framework by the Riparian Countries shall not affect any requirement to carry out EIA under the national legislation of the member state within which the proposed development project is to be located (the country of origin) and that state's development approval processes.

II. Definitions

(a) *Country of origin* – means the riparian country(ies) under whose jurisdiction a proposed activity is intended to take place

(b) *Affected country/Potentially affected country* – means the riparian country(ies) likely to be affected by the transboundary impact of a proposed activity

(c) *Concerned countries/parties* – means the country(ies)/party(ies) of origin and the potentially affected country(ies)/party(ies)

(d) *Environmental Impact Assessment* – means a national procedure for evaluating the likely impact of a proposed activity on the environment

(e) *Transboundary Environmental Impact Assessment* – means a procedure for evaluating the likely transboundary impact of a proposed activity on the environment

(f) *Environmental impact* – means changes to the quality and quantity of the water, including morphology, in the Mekong River and its tributaries, and any consequent changes to the ecology and human livelihoods that depend on the Mekong and its tributaries

(g) *Transboundary environmental impact* – means any environmental impact within the territory of any riparian country other than the country of origin

(h) *Competent authority* – means those federal and non-federal authorities designated by countries/parties as responsible for performing duties arising out of this Agreement

(i) *Public* – means one or more natural or legal persons

(j) *Proposed activity/project* – means any activity or project subject to a decision of a competent authority in accordance with an applicable national procedure

(k) *Significant impact* – see Appendix I for the criteria to consider in determining significant impacts

III. Definition of Trigger

6. This TbEIA Framework will be triggered when a proponent proposes a development project which requires EIA under the national legislation or administrative requirements of the member state of origin and which has the potential to cause significant transboundary environmental impacts within another member state. The Framework will, as far as possible, be triggered no later than when the need for an EIA under national legislation of the member state of origin is identified.

7. The development projects with the potential to trigger this TbEIA Framework are those projects that require an EIA under the national legislation of the country of origin, including, but not limited to, the following categories:

    (a) Hydropower projects [*the member countries should agree on a size threshold*];

    (b) Irrigation schemes [*the member countries should agree on a size threshold*];

    (c) Ports and riverworks [*the member countries should agree on a size threshold*];

    (d) Industrial & mining projects [*the member countries should agree on a size threshold*];

    (e) Aquaculture projects [*the member countries should agree on a size threshold*];

    (f) Navigation projects [*the member countries should agree on a size threshold*];

    (g) Water supply projects [*the member countries should agree on a size threshold*]**;**

    (h) Proposed dams and reservoirs; [*the member countries should agree on a size threshold*]; and

    (i) Groundwater abstractions [*the member countries should agree on a size threshold*].

8. At the initiative of any concerned country, discussions shall be undertaken as to whether a proposed project not included in the above categories is likely to cause significant adverse environmental impacts, and therefore should be treated as if it is included on the list contained in Paragraph 7. The determination of the likelihood of significant adverse environmental impacts shall be made according to the elements listed in Appendix I. If the parties do not agree, the MRCS shall facilitate a resolution of whether a proposed project triggers the TbEIA requirement according to the procedures outlined in Section V. If the transboundary environmental impacts are not expected to be significant, the country of origin should notify the potentially affected country(ies) according to the notification provision in Section III, and the concerned countries may then decide if they wish to voluntarily engage in a TbEIA.

9. Impacts addressed by this TbEIA Framework shall include those that significantly affect the mainstream and/or the major transboundary tributaries within the territory of any riparian country other than the country of origin.

10. Environmental impacts in the context of this framework include changes to the quality and quantity of water, the morphology of the river and any consequent changes to the ecology and human livelihoods that depend on these.

IV. Informing Potentially Affected Countries and their Response

11. Once a project has been deemed to trigger this TbEIA Framework, the country of origin shall send an Announcement to the designated authority of all potentially affected country(ies) informing them of the proposed development project. The potentially affected country(ies) will, to the extent possible, make this notification publicly available and put in place a process to receive comments on such notification. The country of origin will also send a copy of the Announcement to the MRCS. The Announcement will be sent no later than when the need for EIA under national legislation in the member state of origin is identified.

12. The Announcement will follow the format provided in the Guidance. The Announcement will be provided in English, the official language of the country of origin, and in the official language of any potentially affected countries. The Announcement will outline details of the proposed development project (including brief descriptions of the project location, purpose, maps, scope/scale, proponent, and project schedule, etc.), the rationale for triggering the TbEIA process, and the timeline for undertaking the EIA (according to national legislation), as listed in Appendix II.

13. The designated authority of the potentially affected riparian country will solicit and collate responses from its relevant authorities/agencies, and within 30 [or 60] days of receipt of the Announcement, will submit an official Response to the Announcement to the designated authority of the country of origin. The potentially affected country will also send a copy of the Response to the MRCS.

14. The Response of any potentially affected riparian country will follow the format provided in the Guidance. The Response will be provided in English, the official language of the potentially affected member state, and the official language of the country of origin. The Response will indicate whether the potentially affected member state wishes to:

    (a) be involved in the TbEIA study (e.g. through sharing of information);

    (b) not be involved in any TbEIA study, but be kept informed about the project / any assessment; or

    (c) have no further involvement in the project.

15. In case (a) paragraph 14, the Response will indicate the contact details of the designated authority/ responsible agency who will coordinate communications with the country of origin on the TbEIA process to be followed.

16. In case (b) & (c) paragraph 14, the member state of origin will then determine whether to carry out a review of potential transboundary environmental impacts on the basis of its own law and practice.

17. The Response from the potentially affected riparian country must be received by the designated authority of the member state of origin within 30 days of the affected country's receipt of the Announcement. If no Response is received within this timeframe, the country of origin may presume that the potentially affected country does not wish to be further involved in any TbEIA process. In such a case, the member state of origin will determine whether to carry out a review of potential transboundary environmental impacts based on its own law and practice.

V. Arrangements for TbEIA Study, Review and Monitoring

18. The aim of the TbEIA study is to provide objective information to the riparian countries on potential transboundary impacts and how they can be prevented, managed and mitigated.

19. On receiving the Response from a potentially affected riparian country(ies) indicating its desire for transboundary impacts to be assessed, the member state of origin and the potentially affected country will initiate a dialogue to define how potential transboundary environmental impacts are to be studied and results reviewed. The parties will mutually agree upon the scope of potential transboundary environmental impacts to be assessed, clear communication lines and a time schedule for the exchange of information.

20. In reaching this agreement and in completing the assessment of transboundary environmental impacts, every effort will be made by all involved riparian countries to avoid impacting the time schedule for completing the EIA process, as defined in the law of the country of origin.

21. In agreeing how potential transboundary environmental impacts are to be studied (ref. paragraph 19), involved member states may consider the options outlined in the Guidance.

22. The involved riparian countries will duly exchange information needed to assess potential transboundary environmental impacts in a timely manner.

23. The results of the assessment of transboundary environmental impacts will be reported in English and in the official languages of the origin country and the potentially affected country(ies), as well as in any language mutually agreed upon between the involved riparian countries. The results will include, at a minimum, the information as detailed in Appendix III.

24. On completing the TbEIA study, the information indicated in paragraph 23 and elaborated in the Guidance will be shared between the potentially affected country(ies) and the country of origin in accordance with the communication lines and time schedule agreed in paragraph 19; a copy will be provided to the MRCS.

25. The country of origin shall provide opportunities to stakeholders and the public to participate in relevant TbEIA procedures regarding proposed activities and shall ensure that the opportunities provided to the public of the potentially affected riparian country(ies) are equivalent to those provided to the public of the country of origin. At a minimum, the country of origin shall provide for the submission of comments on the draft TbEIA study to the competent authority of the country of origin. Parties should refer to the Guidance for additional mechanisms for incorporating public participation into the TbEIA process and for recommendations on how to ensure the participation opportunities provided to the publics of the concerned countries are equivalent.

26. Each member country shall take the necessary legal, administrative, or other measures to ensure the establishment of an environmental impact assessment procedure that facilitates public participation. Riparian countries should refer to the Guidance for recommendations on when and how the public should be involved.

27. In order to reach a consensus on how any potentially significant transboundary environmental impacts can be prevented, minimised and/or managed, consultations between the country of origin and the potentially affected country can be requested by any country if necessary. The MRCS will facilitate or provide independent input should this be requested by the riparian country.

28. The country of origin makes the decision on the proposed development project, taking due account of the views raised by any potentially affected country.

29. Involved countries shall mutually determine how best to conduct monitoring of any potentially significant transboundary environmental impacts (as reported in the TbEIA study) during preparatory groundworks, construction, operation and decommissioning, as relevant to the proposed development project. Monitoring reports shall be submitted annually to the MRCS by the country of origin. The monitoring efforts shall be aimed at: ensuring compliance with any conditions set out in the authorization or approval of the project, as well as the effectiveness of mitigation measures; reviewing impacts so as to identify and manage unforeseen impacts, and to cope with uncertainties surrounding projected impacts; and assessing predicted versus actual impacts, in order to improve the predictive capacity and overall quality of future TbEIAs.

30. If, as a result of monitoring, the country of origin or the potentially affected country has reasonable grounds for concluding that there is a significant transboundary environmental impact, it shall immediately inform the other party. The involved countries will then consult and reach consensus on necessary measures to reduce or eliminate the impact. At the request of the involved countries, such consultation will be facilitated by the MRCS.

31. When determining arrangements for the study, review and monitoring of potential transboundary environmental impacts, the involved countries will agree on the source of, and equally seek to secure the necessary funds to, support the consideration of transboundary environmental impacts.

VI. Dispute Resolution

32. If a disagreement arises regarding the interpretation of this Framework, any riparian country may raise its concern to the MRCS and request the MRCS to facilitate a resolution of the dispute. If the MRCS is unable to resolve the disagreement in interpretation, it shall refer the matter to the Joint Committee and, if necessary, to the Council in order to reach a resolution. If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).

33. If a disagreement arises between any riparian member countries during the implementation of this Framework, any concerned member state may request a consultation with other concerned countries in order to reach consensus on the issue. If such consultation does not lead to a solution considered satisfactory to the riparian countries, the issue can be referred to the MRCS and onwards to the Joint Committee and if necessary the Council, for resolution. If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).

34. If a disagreement arises between the concerned parties regarding whether a proposed activity triggers the TbEIA Framework, the member states concerned shall undertake a consultation, at the request of any riparian countries, in order to reach consensus on the issue. If such consultation does not lead to a solution considered satisfactory to the riparian countries, the issue can be referred to the MRCS and onwards to the Joint Committee and if necessary the Council, for resolution. If a regional resolution cannot be reached, the parties may refer the dispute to the International Court of Justice (ICJ).

VII. Roles and Functions of the MRC

35. Roles and functions of the MRC's institutions in the context of this Framework are as follows:

Institution	Roles and Functions in the context of this Framework
Council	• Resolution of any disagreements that cannot be resolved by the Joint Committee
Joint Committee	• Resolution of any disagreements that cannot be resolved by the MRCS
MRCS	• Receive, log and file all Announcements, Responses, results of TbEIA studies and any subsequent monitoring results exchanged by the riparian countries in the context of this Framework • Facilitate consultation and the resolution of disagreements when requested • Update the JC of any proposed development projects undergoing the TbEIA process and their progress • Provide, in an open and transparent manner, impartial technical advice to member states and the JC on any element of the TbEIA process if requested to do so • Assist in identifying sources of finance to support the implementation of this Framework, and where requested by the riparian countries, equitably manage the use of these sources
NMC/NMCS	• Promote the implementation of this Framework within their respective riparian countries • Facilitate and actively engage in its implementation • Receive, log, file and track the progress of Announcements, Responses, TbEIA study results and any subsequent monitoring results received or issued by their respective riparian countries • If designated to do so by the member state, act as the designated agency for the issue and receipt of documentation associated with the implementation of this Framework (e.g., Announcements and Responses, information exchange, study results, etc.)

VIII. Implementation Arrangements

36. Implementation of this Framework is to be facilitated by:

    (a) Guidance documentation;

    (b) Support mechanisms.

37. Based on this Framework and if required, the riparian countries may enter into bilateral and/or multi-lateral agreements to elaborate more detailed arrangements.

Appendix I. Criteria to assist in determining the environmental significance of activities not listed in Paragraph 7

In considering whether proposed activities are likely to have significant transboundary environmental impacts, and therefore trigger the requirements of this Framework, the concerned Parties should consider the following factors:

3. Context: Contextual factors potentially relevant to determining the significance of a transboundary environmental impact include, but are not limited to:

a. The potentially affected human populations and vulnerable segments of this population (e.g., poor communities, women, children, indigenous populations, or elderly persons);

b. The geographic extent of the impact;

c. The ecological context of the impact;

d. Unique characteristics of the geographic area (e.g., proximity to historic or cultural resources, park lands, wetlands, wild and scenic rivers, or ecologically critical areas);

e. The violation of any standards provided by a Potentially Affected Country regarding the protection of health or the environment as specified in international, national and subnational legal instruments;

f. Probability of occurrence of the impact;

g. Scientific uncertainty with respect to the nature or intensity of the likely adverse impact;

h. Likelihood that the impact will adversely affect the livelihoods of individuals or communities.

4. Intensity: Factors related to the intensity (severity or magnitude) of potential impacts are also relevant to the determination of significant transboundary environmental impacts. These factors include, but are not limited to:

a. Potential negative effects on public health or safety, including exposure to toxics;

b. Degree to which environmental impacts involve unique or unusual risks to human or ecological health;

c. Degree to which a project is likely to establish a regulatory precedent or the issuance of a permit in a new area, therefore allowing future projects to be carried out with significant transboundary environmental impacts;

d. Duration, potential for recurrence, and frequency of impacts of the proposed project;

e. Degree of irreversibility of the impacts;

f. Relationship to other projects that, even though individually insignificant, will cause or can reasonably be anticipated to cause significant cumulative impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment that is independent of whether a project is temporary in nature or is broken down into small component parts;

g. Degree to which physical or biological impacts of the project may adversely affect important historical or cultural resources or traditional uses by indigenous peoples of cultural, historical, and natural resources;

h. Degree to which the livelihoods of individuals and/or communities may be affected, with special consideration of poor or marginalized individuals or communities;

i. Degree to which a project may adversely affect threatened or endangered species or critical habitat of such species;

j. Degree to which biodiversity may be affected;

k. Degree to which natural ecological systems and landscapes may be transformed;

l. Degree to which a project may affect the quality or availability of renewable and non-renewable resources.

Appendix II. Minimum Required Content of the Notification Announcement

(b) Name and address of the project proponent;

(c) A description of the proposed project (including nature, scope, scale, and purpose);

(d) Any available information on potential transboundary impacts of the proposed project;

(e) Description of the spatial and temporal characteristics of the proposed project (including location, project site (land use, ecological, and geographic characteristics), and identification of potentially affected areas);

(f) Points of contact for the potentially affected country(ies) (including the federal official and interested non-federal officials to whom the Announcement is sent);

(g) Points of contact for the country(ies) of origin (including the designated official, decisionmaking authority, and designated contact responsible for the assessment); and

(h) An indication of a reasonable time within with potentially affected country(ies) should respond, taking into account the nature of the proposed project.

Appendix III. Minimum Required Content of the Transboundary Environmental Impact Assessment Report

13. A description of the purpose and nature of the proposed project;
14. A description of the methodology undertaken for the assessment, including identification of the entity(ies) that conducted the assessment;
15. A description of the baseline environment (including the geographical scope) likely to be affected;
16. A description of the anticipated environmental impacts;
17. A description of reasonable alternatives to the proposed project, including a “no action” alternative;
18. A description of proposed mitigation measures;
19. An Environmental Management Plan and/or other follow-up, such as monitoring and management components;
20. Summaries of public participation and consultation activities, including any comments received and responses made to those comments;
21. A technical summary or conclusion;
22. A non-technical summary or conclusion;
23. Points of contact for inquiries related to the assessment; and
24. Any additional relevant information.

APPENDIX II. SCREENING LISTS

i. Cambodia

Projects Requiring an IEIA or EIA[215]

No.	*Type and activities of the projects*	*Size / Capacity*
A	**Industrial**	
I	*Foods, Drinks, Tobacco*	
1.	Food processing and caned	≥ 500 Tones/year
2.	All fruit drinks manufacturing	≥ 1,500 Litres / day
3.	Fruit manufacturing	≥ 500 ones/year
4.	Orange Juice manufacturing	All sizes
5.	Wine manufacturing	All sizes
6.	Alcohol and Beer brewery	All sizes
7.	Water supply	≥ 10,000 Users
8.	Tobacco manufacturing	≥ 10,000 Boxes/day
9.	Tobacco leave processing	≥ 350 Tones/ year
10.	Sugar refinery	≥ 3,000 Tones / year
11.	Rice mill and cereal grains	≥ 3,000 Tones / year
12.	Fish, soy bean, chili, tomato sources	≥ 500,000 Litres/ year
II.	*Leather tanning, Garment and Textile*	
1.	Textile and dyeing factory	All sizes
2.	Garments, washing, printing, dyeing	All sizes
3.	Leather tanning, and glue	All sizes
4.	Sponge- rubber factory	All sizes
III.	*Wooden production*	
1.	Plywood	≥ 100,000m^3/year (log)
2.	Artificial wood	≥ 1,000 m^3/year (log)
3.	Saw mill	≥ 50,000m^3/year (log)
IV.	*Paper*	
1.	Paper factory	All sizes
2.	Pulp and paper processing	All sizes
V.	*Plastic, Rubber and Chemical*	
1.	Plastic factory	All sizes
2.	Tire factory	≥ 500 Tones /year
3.	Rubber factory	≥ 1,000 Tones /year
4.	Battery industry	All sizes
5.	Chemical production industries	All sizes
6.	Chemical fertilizer plants	≥ 10,000 Tones /year
7.	Pesticide industry	All sizes
8.	Painting manufacturing	All sizes
9.	Fuel chemical	All sizes
10.	Liquid, powder, solid soaps manufacturing	All sizes
VI	*Mining production other than metal*	
1.	Cement industry	All sizes
2.	Oil refinery	All sizes
3.	Gas factory	All sizes
4.	Construction of oil and gas pipeline	≥ 2 Kilometers
5.	Oil and gas separation and storage facilities	≥ 1,000,000 Litres
6.	Fuel stations	≥ 20,000 Litres
7.	Mining	All sizes

[215] Annex of Cambodia Sub-Decree, *supra* note 137.

8.	Glass and bottle factory	All sizes
9.	Bricks, roofing tile manufacturing	150,000 piece /month
10.	Flooring tile manufacturing	90,000 piece /month
11.	Calcium carbide plants	All sizes
12.	Producing of construction materials(Cement)	900 tones/month
13.	Cow oil and motor oil manufacturing	All sizes
14.	Petroleum study research	All sizes
VII	*Metal industries*	
1.	Mechanical industries	All sizes
2.	Mechanical storage factory	All sizes
3.	Mechanical and shipyard enterprise	All sizes
VIII	*Metal Processing Industrials*	
1.	Manufacturing of harms, barbed wires, nets	≥ 300 Tones/month
2.	Steel mill, Irons, Aluminum	All sizes
3.	All kind of smelting	All sizes
IX	*Other Industries*	
1.	Waste processing, burning	All sizes
2.	Waste water treatment plants	All sizes
3.	Power plants	≥ 5 MW
4.	Hydropower	≥ 1 MW
5.	Cotton manufacturing	≥ 15 Tones/month
6.	Animal's food processing	≥ 10,000 Tones/year
B.	**AGRICULTURE**	
1.	Concession forest	≥ 10,000 Hectares
2.	Logging	≥ 500 Hectares
3.	Land covered by forest	≥ 500 Hectares
4.	Agriculture and agro-industrial land	≥ 10,000 Hectares
5.	Flooded and coastal forests	All sizes
6.	Irrigation systems	≥ 5,000 Hectares
7.	Drainage systems	≥ 5,000 Hectares
8.	Fishing ports	All sizes
C.	**TOURISM**	
1.	Tourism areas	≥ 50 Hectares
2.	Goal field	≥ 18 Holes
D.	**INFRASTRUCTURE**	
1.	Urbanization development	All sizes
2.	Industrial zones	All sizes
3.	Construction of bridge-roads	≥ 30 Tones weight
4.	Buildings	Height ≥ 12 m or floor ≥ 8,000 m^2
5.	Restaurants	≥ 500 Seats
6.	Hotels	≥ 60 Rooms
7.	Hotel adjacent to coastal area	≥ 40 Rooms
8.	National road construction	≥ 100 Kilometers
9.	Railway construction	All sizes
10.	Port construction	All sizes
11.	Air port construction	All sizes
12.	Dredging	≥ 50,000 m^3
13.	Damping site	≥ 200,000 people

ii. Thailand

List of projects requiring an EIA report, in accordance with Notification *BE 2535 (1992)* and Notification *No 2 BE 2535 (1992)*

Item	Types of Projects or Activities	size
1.	Dam or Reservoir	With storage volume of hundred million cubic meters or more, or storage surface area of 15 square kilometer or more
2.	Irrigation	Irrigated area of 80 000 rails (12,800 hectares) or more
3.	Highway or road as defined by the Highway Act, passing through following areas: • wildlife sanctuaries and wildlife non-hunting areas as defined by the Wildlife Conservation and Protection Act • national park as defined by the National Park Act • watershed area classified as class 2 by the Cabinet Resolution • mangrove forests designated as the National Forest Reserve • coastal area within 50 meters of high tide level	All projects with equivalents to or above the minimum standard of rural highway, including road expansion on existing route
4.	Commercial port	With capacity for vessel of 500 gross tons or more
5.	Commercial airport	All sizes
6.	Mass transit system under the Mass Transit System and Expressway Act or project as the same characteristic or mass transit which use rail	All sizes
7.	Coastal land reclamation	All sizes
8.	All type of projects located in the areas approved by the Cabinet as class 1B watershed area	All sizes
9.	Industry • Petrochemical industry • Oil refinery • Natural gas separation or processing • Chlor-alkaline industry requiring sodium chloride (NaCl) as raw material for production of sodium carbonate (Na2CO3), sodium hydroxide (NaOH), hydrochloric acid (HCL), chlorine (Cl2), sodium hypo-chloride (NaOCl) and bleaching powder • Irons and/or steel industry • Cement industry • Smelting industry other than iron and steel • Pulp industry	Using raw materials which are produced from oil refining and/or natural gas separation, with production capacity of 100 tons/day or more All sizes All sizes Production capacity of each or combined products of 100 tones/day or more Production capacity of 100 tones/day or more (production capacity shall be calculated by using tone/hour furnaces capacity multiply by 24 hours) All sizes Production capacity 20 tons/day or more Production capacity 20 tons/day or more
10.	Chemical fertilizes industry using chemical process	All sizes
11.	Pesticide industry producing active ingredient by chemical process	All sizes
12.	Central waste treatment plant as defined by the Industry Act	All sizes
13.	Sugar industry • producing raw sugar, white sugar and refined sugar • producing glucose, dextrose, fructose or similar substance	 • All sizes • Production capacity of 20 tons/day or more
14.	Industrial estate as defined by the Industrial Estate Authority of Thailand Act or projects with similar feature	All sizes

15.	Thermal power plant	Capacity 10 MW or more
16.	Petroleum development • geophysical drilling, exploration and/or production • oil and gas pipeline system	All sizes
17.	Mining as defined by the Mineral Act	All sizes
18.	Hotels or resort facility	80 rooms or more
19.	Residential building as defined by the Building Control Act	80 rooms or more
20.	Building in areas adjacent to river, coastal area, lake or beach or in the vicinity of national parks or historical park which may affect the environmental quality of the areas	With height of 23 meters or more, or total floor area or individual floor area in the building is 10 000 square meters or more
21.	Land allocation of residential or commercial purpose	200 land pots or more or total developed area exceed 100 rails (16 hectares)
22.	Hospital which located in • area adjacent to river, coastal area, lake or beach • area other than above	 • With 30 in-patient's beds or more • With 60 in-patient's beds or more

"It is should be noted that the MNRME just has the new Notification *BE 2552 (2009)* Specifying the types and sizes of projects or activities which are required to prepare EIA reports and Specifying the procedures, rules, methods and guidelines for the preparation of EIA report, but it has not come into effect now."

iii. Vietnam

Appendix. List of Projects Subject to Making of Environment Impact Assessment Reports[216]

No.	*Projects*	*Size*
1	Important national projects and works in which investment guidelines are submitted to the National Assembly for decision under the National Assembly's Resolution No. 66/2006/NQ11 of June 29, 2006	All
2	Project suing part of the whole of land areas of nature conservation zones, national parks, historical-cultural relic areas, world heritages, biosphere reserves, and famous scenic places, ranked or not yet ranked, which are protected under decisions of provincial/municipal People's Committees	All
3	Projects involving risks of directly and badly affecting water sources in river basins, coastal areas and areas having protected eco-systems	All
Group of construction projects		
4	Projects to build infrastructures in urban centers or residential areas	Covering 50 ha or more
5	Projects to build infrastructures in industrial parks, hi-tech parks, industrial clusters, export-processing zones or trade village clusters	All
6	Projects to build supermarkets or markets	With 200 business places or more
7	Projects to build sports centers	Covering 10 ha or more
8	Projects to build hospitals	With 50 hospital beds or more
9	Projects to build hotels and rest homes	With 100 rooms or more
10	Projects to build tourist and entertainment resorts	Covering 10 ha or more
11	Projects to build tourist service establishments (infrastructure and physical foundations) in coastal areas and on islands	With a wastewater volume of 1,000 m^3 or more per day and night
12	Projects to build golf courses	With 18 holes or more
13	Projects to build cemeteries (burial, incineration or other forms)	All
14	Projects to build underground works	All
15	Projects to build houses with basements	Basement of 10 m or more deep
16	Projects to build combat works, military training centers, shooting grounds and defense ports	All
17	Projects to build military warehouses	All

[216] Vietnam Decree 21, *supra* note 175, app. I.

18	Projects to build defense economic zones	All
19	Projects to build prisons and detention camps	All
Group of projects to manufacture construction materials		
20	Cement production projects	Design capacity of 300,000 tons or more of cement per year
21	Projects on grinding of clinker for cement production	Design capacity of 1 million tons or more of cement per year
22	Projects to produce bricks and roofing tiles	Design capacity of 10 million or more standard tiles and bricks per year
23	Projects to produce other construction materials	Design capacity of 10,000 tons or more of products per year
Group of projects to manufacture construction materials		
24	Projects to build underground traffic works (subways and tunnels)	500 m or more in length
25	Projects to build motorways, and roads of grades I to III	All
26	Projects to build, renovate and upgrade motorways, and roads of grades I to III	50 km or more in length
27	Projects to build grade-IV roads	100 km or more in length
28	Projects to build railways	50 km or more in length
29	Projects to build overhead railways	All
30	Projects to build telpher lines	500 m or more in length
31	Projects to build permanent road and railway bridges	200 m or more in length (excluding the length of access roads)
32	Projects to build traffic works	Requiring resettlement of 1,000 or more people
33	Projects to build river ports and seaports	Accommodating vessels of 1,000 DWT or more
34	Projects to build fishing wharves	Accommodating fishing vessels with 100 arrivals or more per day
35	Projects to build airports and airfields	All
36	Projects to build passenger car terminals	Covering 0.5 ha or more
37	Projects to produce hot asphalt concrete	Design capacity of 30,000 tons or more of products per year
Group of energy and radiation projects		
38	Projects to build nuclear reactors	All
39	Projects to build production, business and service establishments using radioactive substances or discharging radioactive wastes	All
40	Atomic power or thermal nuclear projects	All
41	Thermo power projects	Design capacity of 30 MW or more
42	Wind power projects	“Covering an area of 100 ha or more
43	Solar power projects	Covering an area of 100 ha or more
44	Hydropower projects	With a reservoir of a capacity of 300,000 m^3 or more of water
45	Projects to build high-voltage power lines	100 km or more in length
46	Projects to manufacture electric wires and cables	Capacity of 2,000 tons or more of aluminum per year (or equivalent)
Group of electronic and telecommunications projects		
47	Projects to build radio transmission and radio transmission-receipt stations	Design capacity of 2 kW or more
48	Projects to manufacture electric and electronic appliances	Design capacity of 10,000 or more appliances per year
49	Projects to manufacture electric and electronic components	Design capacity of 500 tons or more of products per year
50	Projects to build telecommunications lines	100 km or more in length
51	Projects to manufacture telecommunications cables	All
Group of projects on irrigation, forest exploitation and forestation		
52	Projects on reservoirs and irrigation lakes	With a reservoir of a capacity of 300,000 m^3 or more of water
53	Projects on irrigation works	Covering 200 ha or more
54	Seaward expansion projects	All

55	River and sea embankment projects	1,000 m or more in length
56	Projects involving exploitation or conversion of use purposes of headwater protection forests, breakwater forests or special-purpose forests	Covering 5 ha or more
57	Projects involving exploitation or conversion of use purposes of natural forests	Covering 20 ha or more
58	Forestation and forest exploitation projects	Forestation of 1,000 ha or more; exploitation of forests of 200 ha or more
59	Projects to build consolidated rubber, cassava, sugarcane, coffee, cocoa, tea and pepper growing areas	Covering 100 ha or more
60	Projects to build consolidated vegetable and flower growing areas	Covering 100 ha or more
Group of mineral exploitation projects		
61	Projects to exploit minerals on the mainland for use as construction materials	Exploitation capacity of 50,000 m^3 or more of materials per year
62	Projects to exploit minerals for use and ground fill-up materials	Exploitation capacity of 100,000 m^3 or more of materials per year
63	Projects to exploit, dredge and salvage-exploit minerals in river beds for use as construction materials	Capacity of 50,000 m^3 or more of materials per year
64	Projects to exploit solid minerals (without using chemicals)	A mined volume (including minerals and discharged earth and rock) of 100,0000 m^3 or more per year
65	Projects to exploit and process solid minerals containing hazardous substances or involving use of chemicals	All
66	Projects to process solid minerals	- Design capacity of 50,000 tons or more of products per year - A volume of 500,000 tons of more of discharge dearth and rock per year, for coal sorting
67	Projects to exploit groundwater	Exploitation capacity of 10,000 m^3 or more of water per day and night
68	Projects to exploit natural mineral water (underground or on surface) for bottling	Exploitation capacity of 120 m^3 or more of water per day and night
69	Projects to exploit natural miner water (underground or on surface) for service purposes (bathing, medical treatment and other purposes)	Exploitation capacity of 500 m^3 or more of water per day and night
70	Projects to exploit surface water	Exploitation capacity of 50,000 m^3 or more of water per day and night
Group of oil and gas projects		
71	Projects to exploit oil and gas	All
72	Projects on petrochemical refineries (except projects on LPG extraction and lubricant preparation)	All
73	Projects to produce petrochemical products (surfactants, plasticizers, methanol)	All
74	Projects to build oil and gas pipelines	All
75	Projects to build oil and gas entrepots	Storage capacity of 1,000 m^3 or more
76	Projects to build oil and gas depot areas	All
Groups of waste treatment projects		
77	Projects on re-processing and treating ordinary solid wastes	All
78	Projects to build dumping sites for industrial and hazardous wastes	All
79	Projects to build dumping sites for garbage	For 500 households or for use by people of a district or more
80	Projects to build concentrated industrial wastewater treatment systems outside industrial parks, export-processing zones and hi-tech parks	All
81	Projects to build concentrated daily-life wastewater treatment systems	Design capacity of 1,000 m^3 or more of wastewater per day and night
82	Projects on purchase and preliminary processing of scraps (including imported scraps)	Design capacity of 3,000 tons/year
83	Projects on vessel clean-up (all types of vessels)	All
84	Projects to dismantle old vessels (of all kinds)	All
Group of mechanical engineering and metallurgical projects		
85	Ferrous and non-ferrous metallurgy projects	Design capacity of 3,000 tons or more of products per year

86	Steel rolling projects	Design capacity of 5,000 tons or more of products per year
87	Vessel building and repair projects	Vessels of 1,000 DWT or more
88	Projects to manufacture, repair and assemble locomotives and cars	Design capacity of 500 units or more per year
89	Projects to manufacture, assemble and repair motorcycles	Design capacity of 10,000 units or more per year
90	Projects on mechanical engineering and manufacture of machines and equipment	Design capacity of 1,000 tons or more of products per year
91	Projects on metal plating, coating and polishing	Design capacity of 1,000 tons or more of products per year
92	Projects to manufacture shaped aluminum	Design capacity of 2,000 tons or more of products per year
93	Projects to manufacture and repair weapons and military materials and technical equipment	All
94	Timber processing projects	Design capacity of 5,000 m^3 or more per year
95	Plywood processing projects	Design capacity of 100,000 m^2 or more per year
96	Household woodwork manufacture projects	Design capacity of 10,000 or more products per year
97	Projects to produce fine art articles	Design capacity of 1 million or more products per year
98	Projects to produce glass, ceramic and porcelain	Design capacity of 1 million products or more per year
99	Projects to produce sanitary porcelain	Design capacity of 10,000 tons products or more per year
100	Projects to produce enameled tiles	Design capacity of 1 million m^2 or more per year
101	Projects to produce bulbs and thermos flasks	Design capacity of 1 million or more products per year
Group of food processing and beverage projects		
102	Food processing projects	Design capacity of 5,000 tons or more of products per year
103	Cattle and poultry slaughter projects	Design capacity of 1,000 cattle or 10,000 poultry or more per day
104	Frozen aquatic product processing projects	Design capacity of 1,000 tons or more of products per year
105	Sugar production projects	Design capacity of 20,000 tons or more of sugar per year
106	Alcohol and spirit production projects	Design capacity of 100,000 liters or more of products per year
107	Beer and beverage production projects	Design capacity of 100,000 liters or more of products per year
108	Monosodium glutamate production projects	Design capacity of 5,000 tons or more of products per year
109	Milk processing projects	Design capacity of 10,000 tons or more of products per year
110	Edible oil processing projects	Design capacity of 10,000 tons or more of products per year
111	Confectionery production projects	Design capacity of 5,000 tons or more of products per year
112	Ice production projects	Design capacity of 3,000 ice bars or more per day and night (for 50 kg bars) or 150,000 kg or more of ice water per day and night
Group of agricultural product processing projects		
113	Cigarette production projects	Design capacity of 30,000 packs or more per year
114	Cigarette material processing projects	Design capacity of 1,000 tons or more of products per year
115	Cereals processing projects	Design capacity of 10,000 tons or more of products per year
116	Rice grinding and processing projects	Design capacity of 20,000 tons or more of products per year

117	Manioc starch processing projects	Design capacity of 1,000 tons or more of products per year
118	Cashew nut processing projects	Design capacity of 10,000 tons or more of products per year
119	Tea processing projects	Design capacity of 10,000 tons or more of products per year
120	Coffee processing projects	Design capacity of 5,000 tons or more of products per year, for the wet processing method; 10,000 tons or more of products per year for the dry processing method; 1,000 tons or more of products per year, for processing coffee powder and instant coffee
Group of feed processing and cattle, poultry rearing and aquaculture projects		
121	Cattle, poultry and aquatic animal feed processing projects	Design capacity of 5,000 tons ore more of products per year
122	Projects to process aquatic by-products	Design capacity of 1,000 tons or more of products per year
123	Projects to process fish meal	Design capacity of 1,000 tons or more of products per year
124	Aquaculture projects (intensive/semi-intensive farming)	Water surface area of 10 ha or more
125	Extensive aquaculture projects	Water surface area of 50 ha or more
126	Projects on aquaculture on sand	All
127	Large-scale cattle raising projects	1,000 cattle heads or more
128	Large-scale poultry raising projects	20,000 poultry heads or more; 200 or more for ostriches; 100,000 or more for quails
Group of chemical fertilizer and plant protection drug projects		
129	Projects to produce chemical fertilizers	Design capacity of 2,000 tons or more of products per year
130	Projects on warehouses of chemicals and plant protection drugs	Storage capacity of 2 tons or more
131	Projects to produce plant protection drugs	All
132	Projects to bottle and pack plant protection drugs	Design capacity of 1,000 tons or more of products per year
133	Projects to produce organic fertilizers and micro-fertilizers	
Group of chemical, pharmaceutical and cosmetic projects		
134	Projects to produce pharmaceuticals	Design capacity of 50 tons or more of products per year
135	Projects to produce vaccines	All
136	Projects to produce veterinary medicines	Design capacity of 50 tons or more of products per year
137	Projects to produce cosmetics	Design capacity of 50 tons or more of products per year
138	Projects to produce plastics and plastic products	Design capacity of 500 tons or more of products per year
139	Projects to produce plastic packages	Design capacity of 2 million or more products per year
140	Projects to produce paints and base chemicals	Design capacity of 500 tons or more of products per year
141	Projects to produce detergents and additives	Design capacity of 1,000 tons or more of products per year
142	Projects to produce projectile power, explosives and fire equipment	All
143	Projects to produce industrial explosives	All
144	Salt production projects	Covering 100 ha or more
Group of paper and stationery production projects		
145	Projects to produce pulp and paper (form raw materials)	Design capacity of 1,000 tons or more of products per year
146	Projects to produce paper from pulp and recycling	Design capacity of 5,000 tons or more of products per year
147	Projects to produce stationery	Design capacity of 1,000 tons or more of products per year
Group of dyeing textile and garment projects		
148	Projects on dyeing textiles	All
149	Projects on non-dyeing textiles	Capacity of 10 million m or more of fabric per year
150	Projects to produce and process garment products involving	Design capacity of 50,000 or more

	laundering and bleaching	products per year
151	Projects on production and processing of garment products without laundering and bleaching	Design capacity of 2 million or more products per year
152	Industrial laundering projects	Design capacity of 50,000 or more products per year
153	Projects to produce silk and artificial yarn	Design capacity of 1,000 tons or more of products per year
Group of other projects		
154	Projects on rubber latex processing plants	Design capacity of 5,000 tons or more of products per year
155	Projects on rubber processing plants	Design capacity of 1,000 tons or more of products per year
156	Projects to manufacture footwear	Design capacity of 1 million or more of products per year
157	Projects to manufacture car and tractor tires and tubes	Design capacity of 50,000 or more of products per year for cars and tractors; 100,000 or more products per year, for bicycles and motorcycles
158	Projects to manufacture accumulators and batteries	Design capacity of 50,000 kWh per year or 100 tons or more of products per year
159	Projects on leather tanning plants	All
160	Projects to produce and extract liquefied CO_2 gas	Design capacity of 30,000 tons or more of products per year
161	Projects to manufacture fire-fighting equipment and products	All
162	Other projects on renovation, upgrade and expansion	Of a nature, size and capacity equivalent to projects numbered 1 to 161, except for projects numbered 25 and 26 of this Appendix

iv. Espoo

Appendix I. List of Activities

1.	Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
2.	Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
3.	Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated nuclear fuels or for the storage, disposal and processing of radioactive waste.
4.	Major installations for the initial smelting of cast-iron and steel and for the production of non-ferrous metals.
5.	Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilization of more than 200 tonnes per year.
6.	Integrated chemical installations.
7.	Construction of motorways, express roads */ and lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more.
8.	Large-diameter oil and gas pipelines.
9.	Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes.
10.	Waste-disposal installations for the incineration, chemical treatment or landfill of toxic and dangerous wastes.
11.	Large dams and reservoirs.
12.	Groundwater abstraction activities in cases where the annual volume of water to be abstracted amounts to 10 million cubic metres or more.
13.	Pulp and paper manufacturing of 200 air-dried metric tonnes or more per day.
14.	Major mining, on-site extraction and processing of metal ores or coal.
15.	Offshore hydrocarbon production.
16.	Major storage facilities for petroleum, petrochemical and chemical products.
17.	Deforestation of large areas.

*/ For the purposes of this Convention:
- "Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:
(a) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;
(b) Does not cross at level with any road, railway or tramway track, or footpath; and
(c) Is specially sign-posted as a motorway.
- "Express road" means a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).

v. Draft TEIAA

Appendix I. List of Projects Requiring Notification

(This Appendix will be developed further as the categories of projects listed are intended only to indicate the type of projects which may be considered. As well, the possibility of using specific lists for each Party will be explored.)

A.	Industrial Projects
B.	Mine and Mineral Processing Projects
C.	Energy and Energy Transmission Projects
D.	Water Management, Containment and Diversion Projects
E.	Waste Management, Treatment, Storage and Disposal, Projects
F.	Nuclear Related Projects
G.	Oil and Gas Projects
H.	Forestry Projects
I.	Transportation Projects
J.	Tourism and Recreational Projects
K.	Defense

vi. ADB

2. Determining the Environment Category[217]

25. All loans and investments are subject to classification for the purposes of determining environmental assessment requirements. Environment categories are to be determined (see Chapter V for a detailed description) using REA. REA uses sector-specific checklists developed based on the ADB's past knowledge and experience. These checklists consist of a set of questions relating to (i) the sensitivity and vulnerability of environmental resources in project area, and (ii) the potential for the project to cause significant adverse environmental impacts. Checklists have been developed for many sectors and are included in Appendix 1.

26. The process of determining a project's environment category is to be initiated by the RD sector division, which will prepare a REA screening checklist, taking into account the type, size, and location of the proposed project. Through REA, a project is classified as one of the environmental categories (A, B, C, or FI). The RD sector division director will submit proposed environment category and the checklist to the Director, RSES for concurrence or further discussion as required. Final categorization will be the responsibility of the chief compliance officer (CCO). As defined in OM 20, Projects are classified into

(i) Category A: Projects with potential for significant adverse environmental impacts. An environmental impact assessment (EIA) is required to address significant impacts.

(ii) Category B: Projects judged to have some adverse environmental impacts, but of lesser degree and/or significance than those for category A projects. An initial environmental examination (IEE) is required to determine whether or not significant environmental impacts warranting an EIA are likely. If an EIA is not needed, the IEE is regarded as the final environmental assessment report.

(iii) Category C: Projects unlikely to have adverse environmental impacts. No EIA or IEE is required, although environmental implications are still reviewed.

[217] *See* ADB EA Guidelines, *supra* note 21, at 16–17.

(iv) Category FI: Projects are classified as category FI if they involve a credit line through a financial intermediary or an equity investment in a financial intermediary. The financial intermediary must apply an environmental management system, unless all subprojects will result in insignificant impacts.

vii. World Bank

Environmental Screening[218]

8. The Bank undertakes environmental screening of each proposed project to determine the appropriate extent and type of EA. The Bank classifies the proposed project into one of four categories, depending on the type, location, sensitivity, and scale of the project and the nature and magnitude of its potential environmental impacts.

(a) *Category A*: A proposed project is classified as Category A if it is likely to have significant adverse environmental impacts that are sensitive, diverse, or unprecedented. These impacts may affect an area broader than the sites or facilities subject to physical works. EA for a Category A project examines the project's potential negative and positive environmental impacts, compares them with those of feasible alternatives (including the "without project" situation), and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance. For a Category A project, the borrower is responsible for preparing a report, normally an EIA (or a suitably comprehensive regional or sectoral EA) that includes, as necessary, elements of the other instruments referred to in para. 7.

(b) *Category B*: A proposed project is classified as Category B if its potential adverse environmental impacts on human populations or environmentally important areas--including wetlands, forests, grasslands, and other natural habitats--are less adverse than those of Category A projects. These impacts are site-specific; few if any of them are irreversible; and in most cases mitigatory measures can be designed more readily than for Category A projects. The scope of EA for a Category B project may vary from project to project, but it is narrower than that of Category A EA. Like Category A EA, it examines the project's potential negative and positive environmental impacts and recommends any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance. The findings and results of Category B EA are described in the project documentation (Project Appraisal Document and Project Information Document).

(c) *Category C*: A proposed project is classified as Category C if it is likely to have minimal or no adverse environmental impacts.

Beyond screening, no further EA action is required for a Category C project.

(d) *Category FI*: A proposed project is classified as Category FI if it involves investment of Bank funds through a financial intermediary, in subprojects that may result in adverse environmental impacts.

[218] *See* World Bank OP 4.01, *supra* note 21.

APPENDIX III. DETERMINING SIGNIFICANT ADVERSE TRANSBOUNDARY IMPACTS

i. Espoo

Appendix III. General Criteria to Assist in the Determination of the Environmental Significance of Activities not Listed in Appendix I

1.	In considering proposed activities to which Article 2, paragraph 5, applies, the concerned Parties may consider whether the activity is likely to have a significant adverse transboundary impact in particular by virtue of one or more of the following criteria:
(a)	Size: proposed activities which are large for the type of the activity;
(b)	Location: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar Convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population;
(c)	Effects: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.
2.	The concerned Parties shall consider for this purpose proposed activities which are located close to an international frontier as well as more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development.

ii. Draft TEIAA

Appendix III. Factors for determining significant adverse transboundary impacts (the use and nature of this list will be the subject of further development)

The determination of whether adverse transboundary environmental impacts are significant involves consideration of the following factors:	
1)	**<u>Context</u>: Context factors potentially relevant to the determination of significance of a transboundary environmental impact include, for example:**
a)	The potentially affected human populations and vulnerable segments of population (e.g., children, elderly persons);
b)	Geographic extent (region and localities);
c)	Ecological context;
d)	Unique characteristics of the geographic area (e.g., proximity to historic or cultural resources, park lands, wetlands, wild and scenic rivers, or ecologically critical areas);
e)	Where provided by the Potentially Affected Party, standards regarding the protection of health or the environment as specified in international, national and subnational legal instruments;
f)	probability of occurrence;
g)	scientific uncertainty;
2)	**<u>Intensity</u>: Intensity factors potentially relevant to the determination of severity or magnitude of transboundary environmental impacts include, for example:**
a)	Degree of toxic and other impacts on public health or safety;
b)	Degree to which environmental impacts involve unique or unusual risks;
c)	Degree to which a project is precedential in establishing a regulatory precedent or the issuance of a permit in a new area and therefore may cause future projects to be carried out with significant transboundary environmental impacts;
d)	Duration, potential for recurrence and frequency of impacts;
e)	Degree of irreversibility of impacts;
f)	Relationship to other projects that, even though individually insignificant, cause cumulative or can reasonably be anticipated to cause significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment and is independent of whether a project is temporary in nature or is broken down into small component parts;
g)	Degree to which physical or biological impacts of the project may adversely affect important historical or cultural resources or, traditional uses by indigenous people of cultural, historical and natural resources;
h)	Degree to which a project may adversely affect threatened or endangered species or its habitat that has been determined to be critical;
i)	Degree to which biodiversity is affected;
j)	Degree to which natural ecological systems and landscapes are transformed;
k)	Degree to which a project may foreclose or reduce the quality or availability of renewable and non-renewable resources.

APPENDIX IV. MINIMUM CONTENTS OF A TRANSBOUNDARY ENVIRONMETAL IMPACT ASSESSMENT STUDY

i. Espoo

Appendix II. Content of the Environmental Impact Assessment Documentation

Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4:

(a)	A description of the proposed activity and its purpose;
(b)	A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
(c)	A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
(d)	A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
(e)	A description of mitigation measures to keep adverse environmental impact to a minimum;
(f)	An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
(g)	An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
(h)	Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
(i)	A non-technical summary including a visual presentation as appropriate (maps,graphs, etc.).

ii. North American Draft TEIAA

Appendix II. Content of notifications

PART I Notification of proposed project	
A.	**BASIC INFORMATION**
1.	Information on the nature of the proposed project
a)	Name and type of proposed project
b)	Scope of proposed project (e.g. main project and any/all peripheral activities)
c)	Scale of proposed project (e.g. size, production capacity)
d)	Description of proposed project
e)	Purpose of proposed project
2.	Information on the spatial and temporal boundaries of the proposed project
a)	Description of the location of the proposed project, including distance from nacec.border and description of the project site (land use, ecological and/or physical-geographic characteristics)
b)	Description and location of the environment potentially affected
3.	Identification of proponent/developer
a)	Name and address of proponent/developer
B.	**POINTS OF CONTACT**
1.	Points of contact and general information for the possible affected Party or Parties
a)	Designated federal official of the Potentially Affected Party (e.g. name, address, telephone and fax numbers)
b)	If known, list of designated and/or relevant non-federal officials of the Potentially Affected Party to whom notification of assessment is sent (e.g. name, address, telephone and fax numbers)
2.	Points of contact for the Party of Origin
a)	Designated official of the Party of Origin
b)	Decision-making authority (i.e. competent authority) if different than designated official of the Party of Origin
c)	Designated contact in the Party of Origin responsible for the assessment (e.g. name, address, telephone and fax numbers)
C.	**TIME FRAME FOR POTENTIALLY AFFECTED PARTY TO RESPOND**
1.	Time frame for the Potentially Affected Party to respond, provide comments, if any, and/or indicate its intention to participate in a transboundary environmental impact assessment if one is undertaken, in accordance with Article 7.2.
PART II Notification of intent to conduct an assessment	
A.	**ADDITIONAL INFORMATION ON THE PROPOSED PROJECT**
1.	Additional information on proposed project per Part I, as appropriate, if not already included in the notification of proposed project
2.	Information on the nature of the proposed project

a)	Description of proposed project, including relevant stages of installation, operation and decommissioning, as well technology used
b)	Brief information on the existing physical and biological characteristics of the environment, which may affect the nature of the transboundary impacts
3.	Information on the spatial and temporal boundaries of the proposed project
a)	Existing land use in the location
b)	Rationale for location of proposed project
c)	Time-frame for proposed project (e.g. start and duration of construction and operation)
d)	Maps and other pictorial documents connected with the information on the proposed project
e)	Description and location of the environment likely to be affected
f)	For proposed projects requiring permit or other type of approval: date application received
B.	**INFORMATION ON THE PUBLIC PARTICIPATION PROCESS IN THE PARTY OF ORIGIN**
1.	Public participation procedures
2.	Expected start and duration of initial public consultation
3.	Locations, dates, times of scheduled public consultation sessions (e.g. scoping sessions)
4.	Opportunities for participation by Potentially Affected Party's public
C.	**OPPORTUNITIES FOR POTENTIALLY AFFECTED PARTY TO PARTICIPATE**

Appendix IV. Basic content of a transboundary environmental impact assessment

1)	**Information on the nature of the proposed project**
a)	Name and type of proposed project
b)	Scope of proposed project (e.g. main project and any/all peripheral activities requiring assessment)
c)	Scale of proposed project (e.g. size, production capacity)
d)	Description of proposed project, including relevant stages of installation, operation and decommissioning, as well technology used
e)	Purpose of proposed project
f)	Inputs and outputs (e.g. raw material, power sources)
2)	**Information on the spatial and temporal boundaries of the proposed project**
a)	Description of the location of the proposed project
b)	Existing land use in the location
c)	Rationale for location of proposed project
d)	Time-frame for proposed project (e.g. start and duration of construction and operation)
e)	Maps and other pictorial documents connected with the information on the proposed project
f)	Site selection procedure or approval procedure for the project and description of alternative sites considered
3)	**Information on the environment likely to be affected, expected adverse transboundary environmental impacts and proposed mitigation measures**
a)	Description and location of the environment likely to be affected by proposed project, including, as appropriate:
i)	Physical elements of the environment (e.g. land, air and water)
ii)	Biological resources of the environment (e.g. wildlife, including migratory and endangered species)
iii)	Human populations
iv)	Cultural, archaeological and historical resources
b)	Description and significance of expected adverse transboundary environmental impacts of proposed project and, as appropriate, alternatives to the project (e.g. types, location, magnitude, including impacts of accidents and malfunctions)
i)	Direct impacts from emissions and discharges and, physical alteration of landscape on:
	- Physical elements of the environment (e.g. land, air and water)
	- Biological resources of the environment (e.g. wildlife, including migratory and endangered species)
	- Human populations
	- Cultural, archaeological and historical resources
ii)	Indirect environmental impacts
	- Impacts of secondary facilities (e.g. access roads, worker housing)
	- Impacts of induced development (e.g. population growth due to increase employment)
iii)	Cumulative environmental impacts
	- Impacts of similar actions in the area (e.g. dams along a watershed) added to the incremental impact of the proposed project
	- Impacts of other reasonably foreseeable actions in the area added to the incremental impact of the proposed project
c)	Follow-up measures

d)	Proposed mitigation measures (e.g. measures to prevent, eliminate or minimize adverse transboundary environmental impacts)
e)	Sustainable development issues (placement to be determined)
4)	**Proponent/Developer**
a)	Basic information on the proponent/developer (e.g. name, address, previous experience/similar projects)
5)	**Points of contact**
a)	Listing of the names of the governmental firms/agencies primarily responsible for the preparation and/or analysis of the environmental impact assessment
6)	**Public Participation**
a)	Summary of coordination carried out with national and sub-national government agencies and the public within the country of origin and the potentially affected country
b)	Summary of substantive comments and responses
7)	**Additional Information**
a)	Gaps in knowledge/data
b)	Difficulties encountered in assessment
c)	Explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used
d)	Non-technical summary of project
e)	Traditional uses by indigenous people of cultural, historical and natural resources;
f)	Regulatory approvals required

APPENDIX V. PUBLIC PARTICIPATION PROVISIONS

i. Espoo

Article 2. General Provisions

2. Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in Appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in Appendix II.

6. The Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

Article 3. Notification

8. The concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

Article 4. Preparation of the Environmental Impact Assessment Documentation

2. The Party of origin shall furnish the affected Party, as appropriate through a joint body where one exists, with the environmental impact assessment documentation. The concerned Parties shall arrange for distribution of the documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin within a reasonable time before the final decision is taken on the proposed activity.

ii. Draft TEIAA

12. Public Participation

12.1 The Party of Origin shall allow the public of the Potentially Affected Party to:

a) submit comments for the transboundary environmental impact assessment process, and;

b) participate in any public hearing or meeting relating to the transboundary environmental impact assessment held by the Party of Origin within its territory;

to the same extent accorded to the public of the Party of Origin, with the exception of any costs of and funding for such participation. The Party of Origin shall make best efforts to facilitate the attendance of the public of the Potentially Affected Party at such hearings or meetings, subject to its applicable laws and regulations relating to entry and exit of persons.

12.2 The Potentially Affected Party shall make available to its public relevant information received from the Party of Origin regarding a proposed project.

iii. World Bank

Public Consultation

14. For all Category A and B projects proposed for IBRD or IDA financing, during the EA process, the borrower consults project-affected groups and local nongovernmental organizations (NGOs) about the project's environmental aspects and takes their views into account. The borrower initiates such consultations as early as possible. For Category A projects, the borrower consults these groups at least twice: (a) shortly after environmental screening and before the terms of reference for the EA are finalized; and (b) once a draft EA report is prepared. In addition, the borrower consults with such groups throughout project implementation as necessary to address EA-related issues that affect them.

Disclosure

15. For meaningful consultations between the borrower and project-affected groups and local NGOs on all Category A and B projects proposed for IBRD or IDA financing, the borrower provides relevant material in a timely manner prior to consultation and in a form and language that are understandable and accessible to the groups being consulted.

16. For a Category A project, the borrower provides for the initial consultation a summary of the proposed project's objectives, description, and potential impacts; for consultation after the draft EA report is prepared, the borrower provides a summary of the EA's conclusions. In addition, for a Category A project, the borrower makes the draft EA report available at a public place

accessible to project-affected groups and local NGOs. For SILs and FI operations, the borrower/FI ensures that EA reports for Category A subprojects are made available in a public place accessible to affected groups and local NGOs.

17. Any separate Category B report for a project proposed for IDA financing is made available to project-affected groups and local NGOs. Public availability in the borrowing country and official receipt by the Bank of Category A reports for projects proposed for IBRD or IDA financing, and of any Category B EA report for projects proposed for IDA funding, are prerequisites to Bank appraisal of these projects.

18. Once the borrower officially transmits the Category A EA report to the Bank, the Bank distributes the summary (in English) to the executive directors (EDs) and makes the report available through its InfoShop. Once the borrower officially transmits any separate Category B EA report to the Bank, the Bank makes it available through its InfoShop. If the borrower objects to the Bank's releasing an EA report through the World Bank InfoShop, Bank staff (a) do not continue processing an IDA project, or (b) for an IBRD project, submit the issue of further processing to the EDs.

iv. ADB

c. Public Consultation and Information Disclosure

9. *Public Consultation*. ADB requires public consultation in the environmental assessment process. For category-A and -B projects, the borrower must consult with groups affected by the proposed project and with local nongovernment organizations (NGOs). The consultation needs to be carried out as early as possible in the project cycle so that views of affected groups are taken into account in the design of the project and its environment mitigation measures. Such consultation will also take place during project implementation to identify and help address environmental issues that arise. For category-A projects, ADB ensures that the borrower or private sector sponsor carries out public consultation at least twice: (i) once during the early stages of EIA field work; and (ii) once when the draft EIA report is available, and before loan appraisal by ADB. The public consultation process should be described in the EIA and SEIA reports. ADB's *Environmental Assessment Guidelines* describe the best practices for consulting stakeholders and providing access to information.

10. *Information Disclosure*. The SEIA, or in the case of category-B projects that are deemed environmentally sensitive,9 the SIEE, shall be posted on ADB's website at least 120 days before ADB Board considers the loan, or in relevant cases, before approval of category A or category B subprojects deemed environmentally sensitive or major changes in project scope. The 120-day rule applies to all public and private sector category-A projects and to those category-B projects deemed to be environmentally sensitive. ADB shall make the full EIA or IEE available to interested parties on request. For a public sector project involving equity investment in a financial intermediary, or a credit line for subprojects, that requires an environmental management system under the environment policy, the RRP shall include a description of the environmental management system.

11. To facilitate the required consultations with project affected groups and local NGOs, ADB ensures that the borrower or project sponsor provides relevant information on the project's environmental issues in a form and language(s) accessible to those being consulted. For category-A projects, this should happen (i) during the early stages of EIA field work; and (ii) when the draft EIA report is available, and before appraisal.

12. A loan agreement may require that certain environmental monitoring reports be prepared during the course of a project. Such environmental monitoring reports shall be posted on ADB's web site upon submission to ADB. ADB shall require private sector sponsors to make environmental monitoring reports available to affected people and to submit these to ADB for web posting.