

Loyola University Chicago

School of Law

LL.M in the Rule of Law for Development

2012-2013

Diffusion of Regulatory Impact Assessment

Georgia as a “Newcomer”

Supervisor: Professor Thomas F. McInerney

Name: Tamar Kusikashvili

Number of Pages: 50

Date Submitted: 31.07.13

Table of Contents

Introduction.....	3
The Emergence of RIA	6
What is RIA?.....	6
The Dissemination of RIA	8
RIA as a Transplant	11
OECD Best Practice	13
The experience of the Developing Countries	16
RIA implementation in the Eastern European Countries	18
Change in the Approach.....	27
Georgia as a Newcomer	30
Development Aid	31
Regulatory Decision Making Process	34
RIA Implementation Efforts.....	35
Lessons Learned.....	40
Conclusion	43
Bibliography	44

Introduction

Regulatory Impact Assessment (RIA) is a tool used in regulatory policy to analyze the impact of the proposed or existing regulations. The United States was the first country to use RIA in late 1970s. Shortly afterwards, it was extended to many Western European countries, including the UK, Finland, Netherland, Germany, etc. With pressure from the aid agencies and development banks it was soon transplanted in a number of developing countries. However, its effectiveness in low and middle income countries is uncertain. The RIA implementation process faced number of difficulties. The most common challenges that were identified in the process were: the lack of political will, lack of resources, capacity constraints of civil servants and conflicting policy objectives.

The challenges of RIA implementation in developing countries have been a subject of interesting discussions and debates. However, most of the literature developed on the topic focuses on the problems, rather than the reasons causing those problems. The paper tries to find the reasons of RIA failure by considering RIA as a tool which was artificially transplanted from the developed world to the developing countries. The paper examines whether the “one size fits all” RIA model exists and whether it is replicable in low and middle income countries. By looking into the failed attempts of implementing full-fledged RIAs in Eastern European countries, paper argues that it may be time for the international community to stop pushing for RIA implementation, acknowledging, that some transplants tend to be ineffective in developing countries.

In theory the development agencies should not be influenced by their domestic laws and foreign models, but in reality they tend to promote best practices, their own principles and laws by ignoring the local context and its particularities. RIA best practice is generally based on the successful models from the developed RIA systems, but the same results cannot be produced in developing countries by simply using RIA best practices. For example, Eastern Europe faced serious implementation gaps and problems even though the region received huge financial support from donor agencies. To achieve international legitimacy, governments of developing countries did not oppose the introduction of RIA in regulatory policy. However, in the majority of the cases RIA was not fully developed due to the insufficient support and commitment from the decision-makers. Moreover, RIA turned out to be incompatible with the legal traditions of the Eastern European countries. The idea of RIA was to serve as a democratizing force, but regrettably did not meet the expectations. RIA could not fit in the legal culture that was developed in these countries due to the Soviet legacy. Another barrier in applying RIA in the region was the lack of resources.

The country that now has to go through the same path is the Republic of Georgia. Since Georgia shares certain similarities with the Eastern European countries, the same problems are likely to emerge. The paper describes in details the attempts of introducing RIA in Georgia and provides some lessons learned.

The first chapter of the paper will provide an overview of how the different policy objectives led to the different approaches of RIA. While in Europe RIA is part of the “better regulation” or “smart regulation” agenda, in the United States it serves as a tool for the oversight of the regulatory agencies. However, the approach reflected in the paper is the one that is employed by the international donor community.

The second chapter tries to analyze the effectiveness of the diffusion of RIA. It tries to show that implementation of RIA as a transplant from the developed world to the developing countries was not a success story. It studies the irrelevance of the “best practices” of RIA in the low and middle income countries and presents the consequences of the efforts of implementing them when it is pushed by the donor agencies. The Eastern European case study provided in the chapter describes in detail the particular problems and challenges that were identified in the process of RIA implementation pushed by the OECD Sigma project, the EU, the World Bank and other international actors. Moreover, the chapter will try to identify whether the explicitly negative results of RIA implementation in the low and middle income countries led to the changes in the approach used by the donor agencies.

By describing RIA implementation efforts in Georgia, the last chapter of the paper tries to show that attempts of RIA implementation by donor agencies are predetermined to fail. Finally, the chapter concludes with some lessons learned.

The Emergence of RIA

What is RIA?

The definition of RIA depends on the approach of a particular country or organization. This section provides an overview of the most common explanations of what RIA is, why it is used in regulatory policy and what some different approaches exist. The OECD, a pioneer in the field of regulatory reform which has contributed to the dissemination of knowledge and expertise on RIA,¹ defines it as a “systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives.”²

According to the EU “RIA is designed to help in structuring and developing policies.” It identifies and assesses the problem at stake and the objectives pursued. It helps to identify the main options for achieving the objectives and analyses their likely impacts in the economic, environmental and social fields. It outlines advantages and disadvantages of each option and examines possible synergies and trade-offs.”³

In the United States, which also has a long experience of RIA, the assessments are carried out by the White House Office of Management and Budget (OMB). In defining RIA, the OMB underlines that “the purpose of the RIA is to inform agency decisions in advance of regulatory actions and to ensure that regulatory choices are made after appropriate considerations of the likely consequences. To the extent permitted by law, agencies should proceed only on the basis of a reasoned determination that the benefits justify the costs (recognizing that some benefits and

¹ OECD (2008) *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*, p. 7

² Regulatory Impact Analysis, OECD, available at: <http://www.oecd.org/gov/regulatory-policy/ria.htm>

³ Smart Regulation: Impact Assessment, available at: <http://ec.europa.eu/enterprise/policies/smart-regulation/impact-assessment/>

costs are difficult to quantify). Regulatory analysis also has an important democratic function; it promotes accountability and transparency and is a central part of open government.”⁴

The differences between the approaches of the Europe and the United States can be seen at a glance. Scholars sometimes tend to think about RIA with the US political system in mind.⁵ Within the US system, the key features are delegation to regulatory agencies, presidential oversight of rulemaking, the presence of a special type of administrative law, and judicial review of rulemaking.⁶ However, these features should not be taken for granted for systems different from the US.⁷ In Europe for example, administrative procedures acts are less specific on rulemaking.⁸ There is more direct ministerial control on delegated rulemaking which has a wider connotation, covering the production of rules by parliaments as well as agencies.⁹

At any rate, the common feature of RIA across the different systems is that it examines and measures the likely benefits, costs and effects of new or changed regulations.¹⁰ In other words, by assessing the positive and negative impacts of potential and existing regulatory measures, RIA, through *ex ante* and *ex post* assessments is intended to enhance the evidence-base for policy decisions.¹¹ It is a regulatory tool that provides decision-makers with valuable empirical data and a comprehensive framework in which they can assess their options and the consequences their

⁴ Regulatory Impact Analysis: A Primer, available at:

http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf, p. 2

⁵ Claudio M. Radaelli & Fabrizio De Francesco, *Regulatory Impact Assessment*, the Oxford Handbook of Regulation, p. 4

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Delia Rodrigo *Regulatory Impact analysis in OECD Countries: Challenges for Developing Countries*, June 2005, p. 5

¹¹ Colin Kirkpatrick & David Parker, *Regulatory Impact Assessment: Developing Its Potential for Use in Developing Countries*, Centre on Regulation and Competition, Birmingham, UK, 24 February, 2003, p. 1

decisions may have.¹² RIA furnishes empirical data that can be used to make wise regulatory decisions.¹³ A poor understanding of the problems at hand or of the indirect effects of government action can undermine regulatory efforts and result in regulatory failures.¹⁴ RIA is used to define problems and to ensure that government action is justified and appropriate.¹⁵

Sometimes RIA is seen as a tool for enhancing social welfare because policy makers increasingly value regulation that produces the desired results as cost-effectively as possible.¹⁶ In such case the underlying rationale for RIA is that regulations need to be assessed on a case by case basis to see whether they improve social welfare.¹⁷ Much government action involves trade-offs between different possible uses of resources to maximize the benefits to society.¹⁸

Since “better regulation” and later “smart regulation” became a crucial goal in the EU, RIA can be seen as part of that program as well. Governments had to adopt a consistent approach to the rule-making process and employ new policy tools, such as regulatory alternatives, consultation mechanisms and RIA.¹⁹ The approach reflected in the next chapters of the paper is the one that is employed by the international donor community.

The Dissemination of RIA

The use of RIA has widened across OECD countries. Already in 1966, Denmark had a precursor form of RIA to assess the economic and administrative impacts on the public sector

¹² *Supra* note 10.

¹³ *Ibid.* at 2

¹⁴ *Ibid.* at 5

¹⁵ *Ibid.* at 5

¹⁶ *Ibid.* at 2

¹⁷ *Supra* note 11, p. 3

¹⁸ *Supra* note 10, p. 2

¹⁹ *Ibid.*

and the administrative consequences for citizens and companies.²⁰ The history of formal and explicit RIA dates extends over 30 years, with the inclusion of benefit-cost analysis in Inflation Impact Analysis in the United States.²¹ Finland and Canada followed the United States towards the end of 1970s.²² Australia, the United Kingdom, Netherlands and Germany adopted RIA in the mid-1980s.²³ Since 1980, regulatory impact analysis (RIA) has become a global phenomenon in response to widespread pressures for more effective and efficient governance.²⁴ In the mid-1990s, international bodies – the OECD, the WTO, and the European Commission – began to call for empirical methods of decision-making, or explicitly for RIA.²⁵ Scott Jacobs noted in the overview of the 1997 OECD Report on RIA Best Practices, that, by 1996, around half of OECD countries had already adopted RIA.²⁶ The trend accelerated notably in 1997-1999 during the initial phase of the OECD regulatory reform program.²⁷ The European Union has also had an impact with its better regulation agenda on a number of remaining EU countries since 2002.²⁸

RIA has spread quickly over the last few years. By the end of 2000, 14 OECD countries had comprehensive RIA programs in place, and another 6 were using RIA for at least some regulations.²⁹

Between 1998 and 2005, the number of countries assessing the impact on competition and market openness increased from one third to two thirds.³⁰ There was also a significant increase of

²⁰ Jacobzone, S., C. Choi and C. Miguet (2004), “indicators of Regulatory Management Systems”, *OECD Working Papers on Public Governance*, 2007/4, OECD Publishing, p. 35

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Scott Jacobs, *Current Trends in Regulatory Impact Analysis: The Challenges of Mainstreaming RIA into Policy-Making*, 30 May 2006, p. 5

²⁵ *Ibid.*

²⁶ *Supra* note 20

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Supra* note 10, p. 3

the number of countries requiring an assessment of the impact on small businesses and other social groups, from roughly half of the countries in 1998 up to over two thirds in 2005.³¹

³⁰ Supra note 20, p. 38

³¹ *Ibid.*

RIA as a Transplant

As seen from the previous chapter and as correctly mentioned by Scott Jacobs, in the contemporary world RIA has become a norm of democratic governance especially for the states seeking to be integrated into global trade and investment markets.³² The diffusion of RIA has occurred with significant speed³³ and this trend continues over the current years. Back in 2005, Peter Ladegaard reported that RIA in one form or another was carried out in, among other countries, Tanzania, Uganda, Bulgaria, Croatia, Serbia, Romania, Estonia, Lithuania, Latvia, Poland, Mexico, South Korea, the Philippines, Algeria, Botswana, Jamaica, Albania, South Africa, Sri Lanka and Ghana.³⁴ However, RIA's rapid spread is attributable not only to its usefulness as a regulatory tool, but also to pressure from the international community. Competitiveness pressure is another reason for adoption of RIA by low and middle income countries.³⁵

The bilateral aid agencies and development banks, such as the World Bank, Asian Development bank, and African Development Bank have actively supported initiatives to promote the use of RIA in developing countries.³⁶ However, their role in promoting RIA has not been investigated sufficiently³⁷ even though several scholars have already raised the issue.

The purpose of this chapter is to consider RIA as a transplant from the developed world to developing countries and examine its diffusion by international organizations and donor

³² Supra note 24

³³ Peter Ladegaard (2005) *Improving Business Environments through Regulatory Impact Analysis: Opportunities and Challenges for Developing Countries*, p. 5

³⁴ Supra note 33

³⁵ Supra note 24

³⁶ Norman Lee, *Developing and Applying Regulatory Impact Assessment Methodologies in Low and Middle Income Countries*, Centre on Regulation and Competition, Working Paper Series, Paper No. 30, October 2002, p. 9

³⁷ *Ibid.*

agencies. This chapter aims to question the approach employed by the international community and provides a case study of the Eastern European countries.

To start with, the degree by which the legal principles and procedures are transferable to foreign jurisdictions has been the subject of an interesting recent literature.³⁸ Since the publication of Alan Watson's "Legal Transplants" in 1974, the diffusion of law has been an important topic in the international development literature.³⁹ Even though RIA is not a purely legal phenomenon as such, the discussion on transplant effect still applies, since the diffusion of law happens exactly as the diffusion of RIA.

Legal development around the world is actively promoted by the main developed Western European and North American countries.⁴⁰ Even though many commentators argue that foreign experts should not be promoting their domestic models, or any foreign models for that matter, what happens in reality is that foreign legal consultants' recommendations for reform in developing countries are strongly influenced by the consultants' home law.⁴¹ Together with foreign models and domestic laws, by promoting best practices they tend to disregard local problems and conditions.

However, as it will be demonstrated in the case studies, there is no one-size-fits-all RIA. The notion that the quality of RIA can be measured in a de-contextualized manner is conceptually flawed.⁴²

³⁸ Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, *The Journal of Legal Studies*, Vol. 35, No. 2 (June 2006), p. 339

³⁹ Holger Spamann, *Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law*, Discussion Paper No. 28, 4/2009, Harvard Law School, p. 3

⁴⁰ *Ibid.* at p. 31

⁴¹ *Ibid.*

⁴² *Supra* note 42

OECD Best Practice

The OECD has been reiterating best practices of RIA identified back in 1997. That same year OECD countries included a recommendation in the Report on Regulatory Reform, to “integrate RIA into development, review, and reform of regulations.”⁴³ Since then the OECD “best practice” RIA guidance has had a major influence on international thinking and approaches to RIA development and practice.⁴⁴ A recommendation passed by the OECD Council on Improving the Quality of Government Regulation contained ten questions⁴⁵ that policymakers should ask about any proposed regulation.⁴⁶ The checklist formed part of OECD “best practice” guidance.⁴⁷

This approach presumed that there was one template to follow, and that application of the template would guarantee success regardless of the context.⁴⁸ Although there were attempts to provide country specific reports, the OECD best practices did not provide a real forum for learning from different, context-sensitive national experiences.⁴⁹ Even in the country reports RIA implementation was analyzed against the benchmark of OECD “best practices”. Nevertheless it is the best practice and benchmarking that were popular in RIA circles, rather than context-sensitive lesson-drawing.⁵⁰ As it was argued by Radaelli, in all processes of administrative innovation and regulatory reform there were elements that could not be transferred from one

⁴³ OECD (1997) *Regulatory Impact Analysis: Best Practices in OECD Countries*, p. 7

⁴⁴ Supra note 36, p. 30

⁴⁵ OECD (1995) *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* (adopted on 9 March, 1995), p. 9, 10. Those ten questions are: is the problem correctly defined? Is government actions justified? Is regulation the best form of government action? Is there a legal basis for regulation? What is the appropriate level (or levels) of government for this action? Do the benefits of regulation justify the costs? Is the distribution of effects across society transparent? Is the regulation clear, consistent, comprehensible and accessible to users? Have all interested parties had the opportunity to present their views? How will compliance be achieved?

⁴⁶ Supra note 36, p. 13

⁴⁷ *Ibid.*

⁴⁸ Radaelli, Claudio M. “The Diffusion of Regulatory Impact analysis – Best Practice or Lesson-Drawing?” *European Journal of Political Research* **43**, 2004, p. 726

⁴⁹ *Ibid.*

⁵⁰ *ibid.* at 725

country to another without taking into account institutional legacies, state traditions and dominant legal culture.⁵¹

The advantage of identifying RIA best practice is that it highlights the critical areas to monitor.⁵² However, de-contextualized benchmarking is insensitive to the particular environment and experience of recipient countries and, instead of stimulating discussion and exchange, it silences the debate.⁵³ De-contextualized lists of best practice have several limitations.⁵⁴ They do not provide the whole picture; they are vague; they impede learning by ignoring the useful contribution of negative lessons, and may trigger inefficient attempts of adoption.⁵⁵ A set of best practice provides only one list of instructions to follow everywhere. This approach is not interested in identifying different pathways to success.⁵⁶ For example, the OECD included in its list the recommendation to “think carefully about the institutional architecture.” This is indeed a very important point, but what does it mean precisely? It could be clearer and more helpful for cross-national learning if examples of institutional architecture, both positive and negative, were provided.⁵⁷ The effectiveness of RIA should be analyzed as an integral component of a regulatory reform process within a specific country’s regulatory system.⁵⁸

The “one size fits all” approach of implementing RIA ignores the fact that RIA is not about products traded in a market, but about processes that are different from one case to the other.⁵⁹

⁵¹ Supra note 50, p. 726

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 734

⁵⁵ *Ibid.* at 742

⁵⁶ *Ibid.* at 743

⁵⁷ Supra note 50, p. 729

⁵⁸ Supra note 36, p. 31

⁵⁹ Supra note 50, p. 727

Indeed, the universality of the application of the best practices was disputed as there was some uncertainty concerning the precise basis upon which they have been constructed.⁶⁰

Apart from the fact that best practices are generalized and de-contextualized, it is possible that “the experience and thinking of a number of English-speaking OECD countries and certain northern EU states had been a stronger influence in shaping best practices.”⁶¹ As Lee underlines,

to the extent that these are the more developed RIA systems this may seem justifiable, but to the extent that RIA has not made the same progress in other countries (e.g. in southern EU countries and elsewhere), this may suggest that this “best practice” may be less appropriate in some country contexts. One way to verify or refute this is to better understand and explain the apparent lack of RIA progress in certain countries as a prelude to examining whether there are more appropriate RIA development paths for such countries to follow.⁶²

Lee points to a study of the six developing Asian countries which was concluded as follows: “there is no clear evidence of convergence to any common solution, let alone to OECD “best practice”, either on the formal aspects of regulatory regimes or, as yet, on regulatory practice. It also remains unclear whether [these countries] will adopt the institutional framework associated with current international “best practice”, or whether they will produce new variants on regulatory practice, but with different types of institution”.⁶³

In addition, the “rational-synoptic and technocratic theories” of the policy process that was implicit in certain OECD “best practices” could become a potential source of conflict and non-compliance.⁶⁴ Therefore, as suggested by Lee, “best practice” should be expressed in a more modest and flexible way, at least during the initial stages of RIA implementation.⁶⁵

⁶⁰ *Supra* note 36, p. 30

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.* at p. 31

⁶⁴ *Supra* note 36, p. 36

⁶⁵ *Ibid.* at p. 32

Another aspect that should be taken into consideration is the issue of the legitimacy, because cross-national experience shows that when impact assessment is built around only one support constituency the problems of legitimacy become insurmountable.⁶⁶ For example, in the case of Italy, which adopted RIA under the pressure from the OECD by a small group of policy advisers and a motivated minister, neither the business community, nor civil society was really interested in it.⁶⁷ As a result the momentum for RIA was lost.⁶⁸

The Experience of the Developing Countries

In some EU countries where RIA was imported with largely unrealistic models of the policy process, the result has been low quality RIA or no RIA at all.⁶⁹ In these circumstances, the concern in the low and middle income countries was that they found it challenging to follow OECD guidelines. The reason was that it was not readily transferable because of the very different economies of the developing countries and the greater focus on sustainability and poverty goals.⁷⁰

The use of RIA is not as advanced as donors and development consultants claim.⁷¹ Significant implementation gaps were identified in transition and developing countries.⁷² Often, RIA was not systematically applied although legal requirements had been adopted.⁷³ If an attempt was made to implement RIA into a country with incompatible policy processes, the

⁶⁶ Supra note 42, p. 939

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Supra note 11, p. 7

⁷¹ Supra note 33

⁷² *Ibid.*

⁷³ Supra note 33

result was that RIA proposal was either rejected or not implemented, or it was implemented but eventually became unworkable.⁷⁴

Whenever the cultural, social and historical context is not taken into account, RIA might face certain methodological and operational difficulties. Developing countries might not have sufficient level of expertise, resources and readily available information for undertaking impact analysis.⁷⁵ While data requirements of RIA are demanding, governments in some low and middle-income countries lack the capacity to collect the necessary data to undertake meaningful assessments.⁷⁶ The low and middle-income countries will possibly experience severe difficulties with technically-sophisticated methods of analysis and those that are very data demanding.⁷⁷ They may experience difficulties with the participative methods of information gathering and analysis.⁷⁸ Besides, if the decision-making environment is highly politicized, the results might be distorted to produce the outcomes that are more desired by the policy makers.⁷⁹ Ministers do not always follow the steps of the main elements of an ideal-typical format of impact assessment.⁸⁰ Consequently, instead of becoming a process capable of distributing incentives, it becomes a hurdle which may bring sanctions.⁸¹

Another factor that makes the measurements of the benefits and costs of the regulations in developing countries more difficult is the absence of obvious prices to use as proxies.⁸² Moreover, “econometric techniques and engineering studies to estimate costs, and surveys of what people are willing to pay for a regulatory change to assess benefits, are relatively well

⁷⁴ Supra note 36, p. 21

⁷⁵ Supra note 11, p. 8

⁷⁶ *Ibid.*

⁷⁷ Supra note 36, p. 32

⁷⁸ *Ibid.*

⁷⁹ Supra note 11, p. 8

⁸⁰ Supra note 42, p. 925

⁸¹ Supra note 50 p. 740

⁸² Supra note 22, p. 8

developed in industrial economies, but they may well be non-existent in low and middle-income countries.”⁸³

Apart from the market efficiency developing countries have other important goals to achieve, such as sustainable development and poverty reduction which implies a wider range of objectives for regulatory policy.⁸⁴ Therefore, if RIA is to promote sustainable development and poverty reduction by improving regulatory practice, it is essential that its introduction into low and middle income countries does not impose unacceptable delays in government decision making.⁸⁵

RIA requires an open and transparent process of decision making within government.⁸⁶ It reflects the realities of country’s political behavior.⁸⁷ Therefore, the consequences of institutional weaknesses may be a lack of long-term commitment to RIA within government, especially if it is imposed by donor agencies.⁸⁸ Even if RIA is undertaken in order to meet donor expectations, its results most probably will be ignored.⁸⁹ RIA might be existent in the form of a formal requirement which does not necessarily mean that it is used in the preparation of new legislation.⁹⁰

RIA implementation in the Eastern European Countries

This section tries to illustrate how all the challenges discussed in the previous section had arisen in the Eastern European context. It shows that despite the serious implementation

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* at 9

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Supra* note 11, p. 9

⁹⁰ *Supra* note 42, p. 929

problems and gaps, the donor community keeps introducing RIA even if it becomes ineffective later.

Raising capacities to draft new laws based on international best practices, including improved consultation and in some case assessment of possible impacts has been a subject of support by international community in the South and Eastern European Countries.⁹¹ Large doses of technical assistance have created a profusion of “expert manuals” of best practice but have yet to be sufficiently integrated and tailored.⁹² The region has continued to receive significant financial support from both EU and individual countries and multilateral institutions, such as World Bank, and its sister organization Foreign Investment Advisory Service (FIAS).⁹³ It was exactly the pressure from the international community that made the countries of the region to introduce RIA into their regulatory system.

On the other hand, governments do not refuse to introduce RIA since they want to achieve legitimacy in international context.⁹⁴ However, later in most cases the problems of RIA implementation tend to be related precisely to insufficient willingness of governments to implement RIA fully into their regulatory policy.⁹⁵ Despite the efforts from the international community, understating the impact of regulation on the private and social sector is usually poor in the region.⁹⁶ Some countries have started to prepare RIAs in specific policy areas and sectors, but none has fully adopted it in their regulatory policy.⁹⁷

⁹¹ OECD (2004) *Regulatory Governance in South East European Countries: Progress and Challenges*, p. 20

⁹² Colin Jacobs, *The Role of Regulatory Impact Assessment in Democratisation: Selected Cases from the Transition States of Central and Eastern Europe*, March 2005, Centre on Regulations and Competition Working Paper Series, Paper No. 101, p. 17

⁹³ Supra note 93

⁹⁴ Katarina Stranova, Jan Pavel, Katarina Krapez (2007): *Piloting Regulatory Impact Assessment: A Comparative analysis of the Czech Republic, Slovakia and Slovenia*, Impact Assessment and Project Appraisal, 25:4, p. 272

⁹⁵ Supra note 96

⁹⁶ Supra note 93, p. 56

⁹⁷ *Ibid.* at 37

It is apparent that RIA has taken root most quickly in common-law countries where new public management practices have been prevalent, for example, in the US, UK and Australia.⁹⁸ Its modest forms developed later in countries such as France and Germany.⁹⁹ However, in continental Europe, a more centralized and code-based legal system predominate which has a tendency toward more regulation and specifically, administration by law.¹⁰⁰ Central and Eastern European countries share the tradition of more than half a century of soviet influence which only served to increase the tendency toward centralization and authoritarian rule.¹⁰¹ This experience has been changing gradually after the independence in the 1990's.¹⁰² RIA should be understood within this change process which has been dramatic and created its own distortions.¹⁰³ However, undue time pressure to approximate to EU legislative norms has at times led to hasty and ill considered policy and law.¹⁰⁴ It was a process of transformation of law rather than discrete tailoring to the local context.¹⁰⁵

The experience of the three Baltic countries of **Estonia, Latvia and Lithuania**, as well as **Poland and Bulgaria** demonstrates that the reality about RIA has fallen short of expectation¹⁰⁶. In the run-up to the accession to European Union, Estonia, Latvia and Lithuania received technical assistance on public sector reform including advice on the introduction of RIA by authorities such as SIGMA, the World Bank and a variety of bilateral donors including the UK, Sweden, Denmark, Norway, Finland and Canada.¹⁰⁷ All three countries had a limited professional capacity and a considerable turnover of civil servants following the independence in

⁹⁸ Supra note 94

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Supra note 94, p. 5

¹⁰⁷ *Ibid.* at 4

1991.¹⁰⁸ The lack of capacity did not create a barrier for the accession to the European Union or for introducing RIA.¹⁰⁹

The experience of the Baltic countries reveals some common difficulties.¹¹⁰ First, there was a less focus on the actual impact and valuation of policies than on legislating which can be attributed to the past soviet legacy with its focus on command and control rather than open and democratic government.¹¹¹ Second, preparation for EU membership had a contradictory influence by creating time pressure and an overload for the public agenda with more emphasis on transposition rather than implementation.¹¹² Third, the implementation was patchy because of the lack of political leadership to extend RIA.¹¹³ In the absence of leadership from politicians, coordination was fallen to civil servants who had difficulties in coordinating Ministries, Agencies and donors.¹¹⁴

The largest disappointment has been the failure of RIA to act as a democratizing force.¹¹⁵ RIA process had not been used to its full potential as a means to increase awareness of government decisions.¹¹⁶ Besides, more active consultation with civil society in the form of NGOs, consumer associations and voluntary organizations was needed.¹¹⁷

Problems of RIA implementation emerged in **Slovakia, Slovenia and Czech Republic** as well. They approved a formal document claiming principles of better regulation in 2005.¹¹⁸ In all of these countries the requirement to apply *ex-ante* impact assessment to draft legislation was

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at 9

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Supra* note 94, p. 9

¹¹⁶ *Ibid.* at 10

¹¹⁷ *Ibid.*

¹¹⁸ *Supra* note 96

introduced prior to the development of the Better Regulation documents, mostly as a reaction to pressure from the European Commission and other relevant international organizations, such as the Organization for Economic Cooperation and Development.¹¹⁹

The potential threats were seen even from the pilot RIAs conducted in Czech Republic, Slovenia and Slovakia. The pilots did not bring the expected benefit of obtaining broader support in favor of RIA in any one of the countries.¹²⁰ In Slovakia the pilot project was supervised and managed by Dutch experts because there was no political will from the decision-makers to provide resources and let civil servants from the Ministry to participate in the process.¹²¹ In all three countries, even though some of the members of the team had undergone initial trainings, the team that developed the pilot RIA was extremely inexperienced.¹²² They were in charge of various other issues other than conducting RIA and they could not dedicate all their time and effort to the development of indigenous models to make sure that these would be appropriate to national country cases.¹²³ Consequently, the learning experience and elaboration of the pilot RIA had some limitations.¹²⁴

In all three countries, not all the recommendations for the RIA process were respected.¹²⁵ The largest deviation from the recommended procedure was ignorance of the consultation process.¹²⁶ The lack of interest on the part of governments had left the pilot RIA process as an isolated effort not mainstreamed into the policy-making process.¹²⁷ The results of the pilots were not disseminated. Besides, discussion on RIA disappeared and no detailed methodology was

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* at 276

¹²¹ *Ibid.* at 277

¹²² *Ibid.*

¹²³ *Supra* note 96, p. 277

¹²⁴ *Ibid.* at 278

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* at 279

approved.¹²⁸ As a result, the pilots had not demonstrated the potential benefits of RIA to the civil service, which, with limited capacity and interest, still regards RIAs as an additional burden.¹²⁹ In additions, the implementation of RIA in all three countries was being marginalized by the much narrower state budget and administrative burden agenda.¹³⁰

In countries such as **Hungary, Czech Republic, Slovakia, Slovenia and Estonia**, the results of RIA were quite confusing.¹³¹ For example, the examination of explanatory memoranda which forms part of RIA process reveals that information about the purpose of legislation is very general and does not provide detailed problem analysis.¹³² Important benefit of RIA is that it provides analysis of all alternative options of regulatory intervention. However, in the observed countries the analysis of effects was done for the options that were already chosen.¹³³

In Estonia, Slovakia and Slovenia the Statement of Impacts were attached to the explanatory memoranda of the proposals.¹³⁴ However, in Slovakia and Slovenia, most of them were of a very formalistic nature, with statements such as “no impact” or vague statements such as “the changes will be positive for society”, “there are no impacts on citizens, the state budget and the environment” or even “non-action will bring sanctions from the EU which are costly”.¹³⁵ No further explanations were provided.¹³⁶ Information on the administrative and organizational implications of the implementation of draft legislation was, in general, very limited or absent.¹³⁷ As for monitoring and *ex post* evaluation measures, in none of the countries was such

¹²⁸ *Ibid.*

¹²⁹ *Ibid.* at 280

¹³⁰ *Ibid.*

¹³¹ Katarina Stranova, *Regulatory Impact Assessment: Formal Institutionalization and Practice*, Journal of Public Policy, volume 30, issue 1, Cambridge University Press, 2010, p. 123

¹³² *Ibid.* at 124

¹³³ *Supra* note 133, p. 124

¹³⁴ *Supra* note 133, p. 125

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

information provided and it was not formally required.¹³⁸ There was no measurement of any benefits for the EU related legislation.¹³⁹ Slovenia was the only country which provided information on the benefits of EU related legislation, but they were not quantified.¹⁴⁰ The costs and benefits were not compared in any of these countries.¹⁴¹ The absence of such comparisons was mostly due to RIAs focusing either on costs or on benefits and only very rarely on both at once.¹⁴²

In Hungary, Czech Republic, Slovakia, Slovenia and Estonia the process of the implementation of RIA was very slow.¹⁴³

In Slovakia and Slovenia, the civil servants complied with RIA requirements formally, but not substantially.¹⁴⁴ The problem of the sufficient capacity in the line ministries was critical, because “the responsibility for RIAs rests primarily on civil servants working within the policy areas concerned”.¹⁴⁵

Therefore, the analysis of RIA implantation process in the countries observed, demonstrated that governments introduced RIA because of the pressure from the international community. However, later it became obvious that there was not enough political will to support it. Lack of resources and capacity constraints were other problems that created obstacles in applying RIA.

¹³⁸ *Ibid.*

¹³⁹ *ibid.* at 128

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.* at 133

¹⁴⁴ *Ibid.* at 135

¹⁴⁵ *Supra* note 133, p. 135

The same happened in **Serbia** where the Government adopted the so-called “Regulatory Reform Programme”.¹⁴⁶ In Serbia the World Bank had a project on RIA for a four year period with the budget of 1.79 million.¹⁴⁷ In 2008 in order to further improve and introduce a strategic approach in the area of regulatory reform, the Government of Serbia adopted a Regulatory Reform Strategy for the period 2008-2011.¹⁴⁸ However, Serbia’s regulatory reform slowed and in an attempt to revive it, a new Strategy for regulatory reform 2011-2014 was adopted in late 2011.¹⁴⁹

The results were not satisfactory and they were not improved over time. As it was reported in 2007, there was insufficient capacity in the Council for Regulatory Reform and in all relevant Ministries to undertake effective impact assessment of the large number of new regulations and legislation introduced under the reforms, due to very limited skills and experience.¹⁵⁰ The mandatory Impact Assessment Process was not fully implemented as foreseen because of the weak institutions and the prolonged period of political volatility.¹⁵¹

In 2012 the European Commission reported “the drafting process continues to lack transparency, sufficient structure and time for effective consultation of all interested parties, which would also make the legal environment more predictable. The implementation and monitoring of adopted legislation need to be improved. Ministries do not always follow up and even in some instances openly challenge the opinions and recommendations of independent regulatory bodies, including the State Audit Institution. The General Secretariat of the

¹⁴⁶ Mapping of an-ante Policy Impact Assessment, Experiences and tools in Europe, Resource Book for Practitioners, September 2007, p. 82.

¹⁴⁷ Projects & Operations: Regulatory Impact Assessment (RIA), available at: <http://www.worldbank.org/projects/P106880/regulatory-impact-analysis-ria?lang=en>

¹⁴⁸ European Commission (2012) progress report 2012, Serbia, p. 26 available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf

¹⁴⁹ *Ibid.*

¹⁵⁰ *Supra* note 148, p. 89

¹⁵¹ *Supra* note 148, p. 89

Government needs to be strengthened to be able to drive the policy system towards greater effectiveness and high-quality output.”¹⁵²

In **Macedonia** like in Serbia the debate on introduction of RIA in the legislative drafting was initiated by international finance institutions in the framework of their efforts for improvement of business environment, but was further stirred by the EU and facilitated through SIGMA in the context of reform of the public administration and building capacities for policy making.¹⁵³ The result was that RIA was mostly conceived as part of an economic reform package.¹⁵⁴ Consequently, RIA was being confined to specific sectors instead of being made fully part of the general policy-making.¹⁵⁵ The current system therefore still falls short of exploring the full potential of RIA as a tool for better regulation.¹⁵⁶ In particular, progress is still needed with regard to the quality of the assessments.¹⁵⁷ There appears to be a need for clear guidelines on how to conduct impact assessments.¹⁵⁸

Bulgaria is another country where both EU and the World Bank were actively involved in introducing RIA. Bulgaria started to move towards a simple RIA with the enactment of the Law on Reduction of Administrative Regulation and Administrative Control of Economic Activity in June 2003.¹⁵⁹ Donors tried to make the case for a better regulation unit and have funded pre-feasibility studies and workshops.¹⁶⁰ The EC also funded a project on better policy making.¹⁶¹ However, the same problems have been identified. The progress on establishing RIA

¹⁵² Supra note 150, p. 7

¹⁵³ Risteska, M. (2011) *Regulatory Impact Assessment in Macedonia and Estonia: Lessons (to be) Learned* Uprava, letnik IX, 3/2011, p. 142

¹⁵⁴ *Ibid.* at 150

¹⁵⁵ *Ibid.*

¹⁵⁶ Supra note 155, p. 150

¹⁵⁷ Supra note 155, p. 150

¹⁵⁸ *Ibid.*

¹⁵⁹ Supra note 93, p. 37

¹⁶⁰ Supra note 94, p. 15

¹⁶¹ *Ibid.*

infrastructure by creating a unit within the government to lead the process had not been successful.¹⁶²

Change in the Approach

It seems the approach gradually started to change, presumably because of the criticism and the explicitly negative experience of RIA implementation in the low and middle income countries. The changes can be identified in the later publications of OECD and other donors. Already in 2008 OECD Guidance for Policy Makers acknowledged that developing and transition countries had sometimes relied on international practices, which while essential as a point of reference, may be damaging if they are copied without reflection.¹⁶³ In such cases readapting and reinventing a national model became necessary, making it more costly and burdensome than if it had been planned at the beginning of the process.¹⁶⁴ Further the guidance says that “it is therefore important to acknowledge specificities and particularities when reflecting on the way RIA could be introduced and implemented”.¹⁶⁵

The OECD admits that as there might be a significant scarcity of reform resources, policy makers should evaluate the benefits and costs of improving regulatory quality through a potential implementation of RIA, comparing these with the results of other possible reforms.¹⁶⁶ To foresee challenges and risks and carefully allocate efforts throughout the reform process a consistent

¹⁶² *Ibid.*

¹⁶³ OECD (2008) *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*, p. 27

¹⁶⁴ *Supra* note 165

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

evaluation should be developed taking into account domestic characteristics of regulatory reform.¹⁶⁷

The problem of the lack of readily accessible and scarce data is also acknowledged. However, the guidance suggests that the relevance of RIA rests on the potential this tool offers to decision makers to be innovative, using information from available resources.¹⁶⁸

What is more, the guidance agrees that each country's policy objective might be different and the policy priorities might be the poverty reduction and not only market efficiency.¹⁶⁹ In addition, it proposes that the two-step approach may be useful for countries that do not have sufficient human and technical resources to undertake fully developed RIA for all regulation.¹⁷⁰ This initial differentiation might also be useful to facilitate a broader use of this policy tool in the regulatory system.¹⁷¹

However, OECD continues to say that lessons learnt from international experience could provide a valuable input to their project design.¹⁷² The good practices identified by the OECD for an effective introduction of RIA can serve as a basis to build an initial framework for RIA introduction in countries where there is not yet an institutionalized procedure of systematic regulatory impact assessment.¹⁷³

It is interesting to examine the approach of the World Bank as well. It recommends applying "RIA light" in low and middle income countries and argues that OECD experience

¹⁶⁷ *Ibid* at 23

¹⁶⁸ *ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Supra* note 165, p.29

¹⁷³ *Ibid.*

shows that RIA best practice is difficult to achieve.¹⁷⁴ Best practice RIA does not seem to be the best way to introduce and design RIA systems in developing countries, as they do not have the same amount of resources, capacities, technical skills and degree of transparency in decision-making processes.¹⁷⁵ Again, the results in countries that recently joined the EU have indicated that RIA processes exist more “in form, rather than in substance.”¹⁷⁶ In most cases, existing formal mechanisms are sometimes ignored due to the lack of appropriate skills, support structures and real commitment to their operation.¹⁷⁷ The WB publication suggests that for RIA to be feasible and effective in other contexts, the benchmark has to be adapted to the limited capacities that most developing countries face and recommends RIA Light approach which is pertinent for a number of countries that want to move from discretionary to more evidence based decision making gradually and without compromising sustainability over time.¹⁷⁸

However, these slight changes in the approaches do not seem to be a solution for RIA implementation problems in transition countries. The development agencies keep pushing the low and middle income countries to adopt RIA and the same problems keep emerging. There might be some developments, but in general RIA implementation has not produced much progress. Therefore, it may be the time to acknowledge that there is no “one size fits all” and that the efforts to transplant RIA in these countries have failed.

The next chapter tries to illustrate on the example of the Republic of Georgia that even though the development agencies see and report the implementations problems of RIA, they keep the pressure on the developing countries to implement it. They may be changing their views in

¹⁷⁴ World Bank Group, Investment Climate Advisory Services (2010) *Better Regulation for Growth: Governance Frameworks and Tools for Effective Regulatory Reform: Making It Work: “RIA Light” for Developing Countries*, p. 19

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid* at 42

the publications, but the methods in practice stay the same. For some reason they keep pushing for RIA, while they should be capable of foreseeing the failure.

Georgia as a “Newcomer”

Georgia is a small country located at the crossroads between Europe and Central Asia in the Caucasus Region. It declared independence in 1991 after the collapse of the Soviet Union. Since then Georgia suffered from severe economic crisis and corruption which lasted till 2003 Rose Revolution.

The new government that came into power successfully dealt with reforming the economy and fighting against corruption. The Georgian economy grew approximately 12% in 2007, based mainly on strong inflows of foreign investment and government spending.¹⁷⁹ In 2008-2009, Georgia was hit with the twin crises of the August 2008 armed conflict with Russia followed by the global economic downturn. Investor and consumer confidence deteriorated and foreign direct investment, exports, remittances, and bank lending reduced.¹⁸⁰ Currently, Georgia is a small transitional market economy of 4.4 million people. With income per capita at \$2,690 Georgia ranks as a lower middle-income country.¹⁸¹

Georgia is a semi-presidential republic, but after the next presidential election in October 2013, the amendments of the Constitution will enter into force transforming Georgia into parliamentary republic.

It should be mentioned that the reforms implemented since the 2003 Rose Revolution aimed at deregulating the economy, reducing corruption, setting up free-trade principles and

¹⁷⁹ United States of America, Department of Commerce (2009) *Doing Business in Georgia: 2009 Country Commercial Guide for U.S. Companies*

¹⁸⁰ Georgia overview, World Bank, available at: <http://www.worldbank.org/en/country/georgia/overview>

¹⁸¹ *Ibid.*

creating effective administration mechanisms to ensure economic development.¹⁸² By trying to create market-friendly environment, Georgian economic policy was successful in certain areas, especially in deregulating some areas of economic activities and simplifying certain procedures. For example, in that regard significant success was achieved in taxation and licenses and permits.

This chapter describes the first RIA implementation attempts of the donor community in Georgia. Georgia shares the same soviet legacy and to some extent the same challenges in its political, economic and social policy as many of the Eastern European countries. However, the previous negative experience of RIA in that region did not constitute a reason for the donor community to reassess the likely risks of the introduction of RIA in Georgia.

The proposed model did not fit the existing challenges of the country; in particular the Standard Cost Model which was recommended to be implemented in Georgia envisaged measuring and reducing administrative burden for the businesses while substantial part of the deregulation program was already carried out. RIA implementation attempts in Georgia reveal once again that the developing countries are not ready to implement full-fledged RIA systems either because it is incompatible with the policies of these states or because of the lack of political will and resources.

Development Aid

During the 1990s, Eastern Europe, including Georgia, had to begin an unprecedented effort of lawmaking on a grand scale.¹⁸³ Almost overnight, and following the demands of the people and international financial institutions, the former Communist countries of Eastern Europe

¹⁸² OECD (2011) *Development in Eastern Europe and the South Caucasus*, p. 115

¹⁸³ Loukas A. Mistelis “Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, *The International Lawyer*, Vol. 34, No. 3, Foreign Law Year in Review: 1999 (FALL 2000), p. 1065

seeking to build market-based democracies had to abandon their political, economic and legal institutions, which were based on centrally-planned economies.¹⁸⁴ They had to change large sections of their outdated legal systems.¹⁸⁵ However, in most cases (and Georgia was not an exception) the legislatures were not free to form law and policy.¹⁸⁶ Foreign technical advisors, among other actors, came in to promote the adoption of foreign law.¹⁸⁷ A great number of foreign concepts were introduced as if they were legal transplants to replace malfunctioning organs.¹⁸⁸ Like other Eastern European countries, Georgia was obliged to receive a large number of legal transplants. Some of them turned out to be successful, but some were ineffective and had to be gradually adapted over time.

One of the reasons of the failure of the legal transplants might be cultural difference. Culture derives from historical experience – as do the forms in which culture manifests, such as legal rules.¹⁸⁹ However, tailoring the transplanted systems to the specific Georgian context and culture was not a top priority for donor agencies in most cases, including in the case of RIA.

Technical assistance programs were carried out in Georgia by several influential agencies from “a large number of agencies and international (supranational, intergovernmental or nongovernmental) organizations that have emerged in the last 100 years.”¹⁹⁰ These agencies and organizations are often referred to as formulating agencies, a term that precisely describes one aspect of their activities but covers all new international law-making organizations.¹⁹¹ They claim to be the international standard setters in that they possess either acquired expertise in

¹⁸⁴ Supra note 184

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Pierre Legrand “European Legal Systems Are Not Converging”, *the international and comparative law quarterly*, vol. 45. No. 1 (Jan., 1996), p. 56

¹⁹⁰ Supra note 185, p. 1061

¹⁹¹ *Ibid.*

legislative drafting, or serve to aggregate international experience by virtue of their membership.¹⁹² They might be exporting their modified successful domestic legislation as well.¹⁹³

Substantial programs to extend legal assistance and offer legal advice abroad have been established by such governmental (or government funded-agencies) as USAID, the American Bar Association and the German Technical Co-operation (GIZ or former GTZ).¹⁹⁴

The promotion of the development of the rule of law, legal and institutional prerequisites for sustainable democracy, and legal and institutional frameworks for market economies have been the overall aims of virtually all foreign legal advice and aid programs.¹⁹⁵ More specifically, the principal goals of these reform programs have included “economic restructuring” and “democratic transition”.¹⁹⁶ The subsidiary goals include fostering the rule of law, civil society, “checks and balances” in government structures, legal accountability of executive power, the free flow of information about the government, privatization of state-owned assets, and market-compatible law reforms.¹⁹⁷

The project that aimed to introduce RIA in Georgia was initiated by GIZ in 2011 following some previous unsuccessful efforts in 2007. In general, GIZ has been actively involved in legislative drafting and administrative (local government) reforms in the region.¹⁹⁸ The next sections describe in detail how the idea of RIA implementation was first introduced in Georgia, and discuss some of the initial conditions that suggest RIA implementation may fail.

¹⁹² *Supra* note 184, p. 1061

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.* at 1063

¹⁹⁵ *Ibid.* at 1064

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

Regulatory Decision Making Process

This section describes the regulatory decision making process in Georgia in order to give an understating of the functioning of the system in this country. According to the Constitution, the right of legislative initiative in Georgia rests on the President of the country, a Parliamentary committee, a Parliamentary faction, the member of the parliament, the supreme representative bodies of Abkhazia and Achara, and not less than 30,000 electors¹⁹⁹. In practice most of the legislative initiatives come from the government or the ministries.

A draft law, prepared on the committee or received through legislative initiative, is discussed at a meeting of the relevant committee. The draft, with the view of the committee or explanatory note attached, is passed on to other Parliamentary committees and factions. It is published in the "Parliamentary Reports", a special issue of the Parliament.²⁰⁰

The draft law has to go through three readings in the Parliament. At the first reading general principles are discussed. If the draft passes the first reading, it is sent to the relevant committees, with all the remarks to be taken into consideration.²⁰¹ The draft - revised based on the remarks made by the Parliament - is submitted to a Parliamentary session for the second reading. At the second reading the draft is discussed in details by sections, chapters, clauses or parts of clauses, each being put to the vote.

For the third reading the members of Parliament may introduce only editorial remarks, after which the draft is submitted to the President of Georgia who signs it. Subsequently the law

¹⁹⁹ Constitution of Georgia, Art. 67.1

²⁰⁰ The Passage of a Draft Law in the Parliament, available at:
http://www.parliament.ge/site2/index.php?lang_id=ENG&sec_id=409

²⁰¹ *Ibid.*

is published officially and enters into force on the 15th day from publication, unless some other terms are indicated.

The legislative process is quite quick. What is more, according to the law there is a possibility that the parliament adopts the draft with all three readings throughout one week. There is no mandatory impact assessment procedure for the proposed drafts. Besides, there is no need for any consultations during the process.

Passing the secondary legislation is even easier. To a great extent the secondary legislation is comprised by ministerial decrees. Before 2011 the drafts of all the secondary legislation had to go through an expertise in the Ministry of Justice, which had to study the compliance of the draft with the constitution, international treaties and laws and prepare a legal opinion. However, since 2011 this requirement is not obligatory. There is no impact analysis undertaken for the secondary legislation. Consultation with the stakeholders is not necessary.

RIA Implementation Efforts

Although the law requires the explanatory notes of the draft legislation to include an assessment of the expected results of the draft, namely, analysis of the purpose and objective, as well as estimated financial and economic consequences of the draft and consultations with the experts, this analysis is almost never done. The explanatory notes of the drafts are only formal documents, which do not bear any weight in the regulatory process. Besides, the procedures for the regulatory impact analysis are not structured or formalized.

In 2007, Georgia unsuccessfully attempted to introduce some form of RIA in its regulatory policy. Pursuant to a pilot project, the line ministries were required to send their draft laws to a

newly installed unit in the Ministry of Economy and Sustainable Development that would assess the proposals for their impact on the business environment. The pilot project had only a minor impact, as only five pieces of draft legislation were sent voluntarily to the Ministry of Economy and Sustainable Development. There is not much evidence available on the project. However, one thing is certain: the project lacked political support and suffered from bad communication and coordination between the ministries.²⁰²

In 2009, the Ministry of Finance, in cooperation with the Sigma project of the OECD, organized several workshops about Regulatory Impact Assessment, but the direction of these efforts remains unclear.²⁰³

The most recent RIA implementation attempt was initiated in 2011 by GIZ. GIZ proposed to follow the path chosen by Germany and start implementing RIA by measuring administrative burden according to Standard Cost Model (SCM) methodology. SCM is a widely applied methodology for measuring administrative costs. It has been developed to provide a simplified, consistent method for estimating the administrative costs imposed on business by central government.²⁰⁴

In the framework of the project, GIZ hired an expert who prepared a report about the Prospect for Better Regulation in Georgia. The expert visited Georgia with short missions in July, 2011, and made the following recommendations about RIA implementation in Georgia:

- Political commitment from the highest level is crucial to implement regulatory reform. Major steps include the adoption of a government-wide regulatory policy, the

²⁰² Bastian Jantz *Status Report: Prospect for Better Regulation in Georgia*, prepared in the framework of the GIZ project “Reforms for the Future – Advisory Services for Legal and Judicial Reform in the South Caucasus”.

²⁰³ *Ibid.*

²⁰⁴ SCM Network to reduce administrative burdens, *International Standard Cost Model Manual, Measuring and reducing Administrative Burdens for Businesses*, p. 8.

appointment of a reform champion, and the establishment of a high level steering group for regulatory reform.

- A regulatory reform unit should be installed that acts as a help desk for methodological questions, a coordinating unit, and a central oversight body for the quality of the impact assessments. This body should be located within the ministry that is responsible for the implementation of the regulatory reform policy. The unit needs clearly defined responsibilities, continued political support, and adequate resources to operate.

- RIA procedures have to be adapted to the present administrative capacities. Thus, the question of what policy is subject to RIA is fundamental to making regulators familiar with the new tool. Clear criteria have to be established to ensure that the ministerial bureaucracy follows the same procedures.

- The skills required to conduct RIA are specialized and not widespread within the administration. Capacity building (guidelines, trainings, assistance, etc.) of select staff that will conduct RIAs in the line ministries is crucial in order to integrate RIA in the decision-making process.²⁰⁵

These recommendations merely reinterpret the “RIA Light” idea proposed by the World Bank discussed in the previous chapter. With respect to carrying out the recommendations, there was no strong political commitment to implement regulatory reform. Setting up a special regulatory reform unit was firmly rejected. As for the last two recommendations, the project had not progressed to such a scale to even discuss their relevance.

The second visit of the expert in Georgia took place in October, 2011. In the framework of this mission, a one day training session was conducted for the Department of Legal Drafting in

²⁰⁵ Supra note 205

the Ministry of Justice of Georgia. This Department was foreseen as a central unit responsible for carrying out impact assessments. Therefore, this training was supposed to be a general introduction to RIA.

The project created a group which was supposed to be in charge of RIA implementation in Georgia. The group consisted of representatives from the Ministry of Justice, the Ministry of Finance, the Ministry of Economy, the Chancellery of the Government of Georgia and the Parliament. Initially, the group did not have a member from the Statistics Office, but later, when it became clear that undertaking the measurement based on SCM would require a lot of statistical data, the Statistics Office was also involved. The Ministry of Justice was supposed to take the lead.

In the framework of the program, the Ministry of Justice came up with a strategy for implementing official regulatory impact analysis procedures in Georgia. According to the strategy, the first stage of the implementation of the regulatory impact analysis was to measure and reduce the bureaucratic costs imposed by the legislation and eliminate the administrative burdens. This was to be done by using SCM. However, this strategy was not formally approved government-wide.

The project as well as the strategy lacked political support from the highest level. The Government did not approve the draft of the decree prepared by the Ministry of Justice. The draft envisaged creating a council which would be responsible for coordinating RIA implementation. However, adoption of the draft was postponed indefinitely.

Interesting debates took place during the government meetings. The Prime Minister opposed the institutionalization of RIA or formally declaring a policy of reduction of

administrative burdens, since he believed that to a large extent the regulations were already simplified. He recalled the previous failure of RIA implementation and blocked the initiative.

Nonetheless, before drafting the strategy and the decree, the group that was already created informally had a study visit to Berlin, Germany in December 2011. The group attended meetings with several agencies, including the German Federal Chancellery, which had a special unit for regulatory improvement and was responsible for the program that aimed to eliminate administrative burden, the National Regulatory Control Council, the German Federal Ministry of Justice, the Federal Ministry of the Interior, the Parliament of Germany, the Federal Statistical Office, the Brandenburg State Government and the Chambers of Commerce and Industry. The visit gave the representatives a good idea of how SCM worked in Germany.

Based on this experience, the Georgian group decided to carry out a pilot project. The pilot trained three groups of about four members in the basics of the Standard Cost Model. Consequently, in the framework of the pilot project, each group was asked to measure the costs of one law based on the SCM. The laws that were chosen were the Law on Tobacco Control, the Law on Enforcement Proceedings, and the Law on the Licenses and Permits (which already had been revised). It should be mentioned that the group members were public servants responsible for carrying out other important tasks and could not devote much of their time to the calculation of the costs of the mentioned laws.

The results were summarized in March, 2012. A lot of questions were raised about the methodology used. The costs that were calculated during the pilots turned out to be inaccurate. Further, there was a problem with access to statistical data which in some cases resulted in artificial estimations. In addition, it became apparent that the civil servants, especially from the

law departments, were not ready to utilize this method in practice, because applying this model required additional analytic skills beyond the civil servants' legal training.

Nevertheless, in September, 2012 a manual for SCM was prepared. It was basically a translation of German and international Standard Cost Model Manuals. However, it was not tested or further utilized in practice, since after the elections in October 2012, the Government was changed and the program was suspended.

Lessons Learned

RIA implementation attempts in Georgia revealed problems that to some extent were very similar with the ones that emerged in the Eastern European countries. First of all, the process lacked political support. One of the concerns in the process was that RIA might cause delays in the legislative process. In transition countries like Georgia this is an important issue. One of the arguments in political circles against introducing RIA into regulatory policy was precisely the risk that it might cause obstacles in the legislative process. Georgia is a country where huge legislative changes might occur over night. Therefore, government officials were not eager to complicate the decision-making process. To change the political culture to promote better regulation, a change in the culture of policy making is needed.²⁰⁶ Strong support and commitment by the head of government is essential – otherwise, better regulation initiatives might get stuck in line with ministries' interests.²⁰⁷ Therefore, it should be taken into account that “the implementation of RIA systems is time consuming, controversial, and needs strong political support.”²⁰⁸ However, the question remains, whether developing countries like Georgia

²⁰⁶ Ljubinka Joksimovic *The Serbian Regulatory Reform and Governance*, 2010, p. 253

²⁰⁷ *Ibid.*

²⁰⁸ *Supra* note 33, p. 7

have the appropriate institutional capacity to ensure proper support for RIA, including sufficient transparency and monitoring of the process.

Secondly, in low and middle income countries the appropriate skills and experience of civil servants is a serious concern. Georgia faced the same problems while conducting its pilot project. A lot of inaccuracies occurred, and the civil servants involved in the process found it difficult to follow the guidelines. The results of the pilot project were not adequately analyzed, and thus were not reported.

RIA systems should empower existing policy concerns, at least initially, rather than bring forward new policy objectives.²⁰⁹ In some countries (such as the Scandinavian countries and the Netherlands), RIA systems have been adapted to focus on one particular regulatory concern: the reduction of administrative burdens.²¹⁰ In other countries (Australia, Canada, and the United States, for example), the emphasis of RIA is on broader “welfare maximization” issues.²¹¹ However, in Georgia, the proposed method of measuring administrative burden – the SCM – was not relevant for the country’s regulatory policy. The reforms undertaken by the Georgian government constantly aimed to simplify legislative requirements, eliminate bureaucratic barriers, and reduce the costs of compliance to citizens and the private sector. Therefore, the objective of using the SCM was already achieved without formally counting the costs of information obligation and without using the standard formulas. On the one hand, SCM was a good method to start with, because it is an easy tool to use in practice. On the other hand, formally implementing this method in regulatory policy and wasting government resources on conducting the measurement might be useless and ineffective. Georgia’s example once again suggests that one size does not fit all. The model that was a success in other countries was

²⁰⁹ *Supra* note 33, p. 7

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

inappropriate for Georgia. Successfully implementing RIA tools and methods in practice depends on the specific country context as well as the regulatory policy that this particular country carries out.

There is no universal model for the right RIA system, since appropriate solutions must be designed to fit within the specific circumstances of the country's values and institutions, as well as its stage of economic development.²¹² Another solution might be to let the low and middle income countries develop their institutional capacities and infrastructure to such a scale that the demand for RIA comes from the countries themselves, and not from external pressure from the international community. Unfortunately, the donor agencies in Georgia do not seem to be willing to reconsider their approach. Currently, negotiations have started between the EU and the Ministry of Justice with the aim to implement full-fledged RIA in Georgia.

²¹² *Supra* note 33, p. 7

Conclusion

This paper examines the diffusion of RIA in developing countries. A gap between the ideals of best practice and the reality of actual legal, administrative, political and economic processes in low and middle income countries means that a “one size fits all” approach is likely to produce perverse outcomes, or what are called “fatal remedies”²¹³. Another challenge lies in the fact that low and middle income countries lack the essential institutional underpinnings for effective regulatory reform.²¹⁴

The experience of the Eastern European countries reveals that the region could not replicate Western European models of RIA. The Eastern European countries had different policy objectives and challenges that made RIA implementation irrelevant at this stage of their development. “In the countries of the Balkan region (and elsewhere in Eastern Europe) RIA implementation lags behind, because it requires not only political support, but also resources for training, performing adequate RIAs, and the establishment of adequate institutional infrastructure.”²¹⁵

Georgia has faced the similar problems in the process of RIA implementation. First, there was no political will to support RIA implementation. The decision-makers were not eager to be bound by RIA results. They saw RIA as an additional burden that would block the legislative

²¹³ Yin-Fang Zhang & Margo Thomas *Regulatory Reform and Governance: A Survey of Selected Developing and Transition Economies*

²¹⁴ *Ibid.*

²¹⁵ Slavica Penev & Andreja Marusic *Progress in Transition and Reform Implementation in Serbia: Comparing to Other Western Balkan Countries with Main Focus on Regulatory Reform*, IFC, 2011

process rather than a tool for wise regulatory decision-making. Second, the proposed model of RIA did not fit the priorities of the country at the time.

Countries like Georgia need time to develop national institutions to a level where the demand for regulatory tools like RIA will emerge internally within the system. Otherwise, external pressure from development agencies is unlikely to succeed, at least when the suggested model of RIA does not fit the legal culture or policy objectives of a particular country. Therefore, it might be necessary to stop pushing for RIA implementation if it is obvious that there is no demand or dedication for it. However, donors are not willing to end their efforts towards RIA implementation in Georgia. Negotiations between the Georgian Ministry of Justice and the EU have already started. Presumably, implementation of the project will start in 2014. The results of this upcoming project will be the subject of further study. However, at this point it has to be concluded that the failed attempts of full-fledged RIA implementations demonstrated in this paper should be an indication for the international community to stop pushing for RIA implementation and acknowledge that some transplants are ineffective in developing countries.

Bibliography

Bastian Jantz *Status Report: Prospect for Better Regulation in Georgia*, prepared in the framework of the GIZ project “Reforms for the Future – Advisory Services for Legal and Judicial Reform in the South Caucasus”.

Claudio M. Radaelli & Fabrizio De Francesco, *Regulatory Impact Assessment*, the Oxford Handbook of Regulation

Colin Jacobs, *The Role of Regulatory Impact Assessment in Democratisation: Selected Cases from the Transition States of Central and Eastern Europe*, March 2005, Centre on Regulations and Competition Working Paper Series, Paper No. 101

Colin Kirkpatrick & David Parker, *Regulatory Impact Assessment: Developing Its Potential for Use in Developing Countries*, Centre on Regulation and Competition, Birmingham, UK, 24 February, 2003

Constitution of Georgia, available at:

http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf

Delia Rodrigo *Regulatory Impact analysis in OECD Countries: Challenges for Developing Countries*, June 2005

European Commission (2012) progress report 2012, Serbia, available at:

http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/sr_rapport_2012_en.pdf

Georgia overview, World Bank, available at:

<http://www.worldbank.org/en/country/georgia/overview>

Holger Spamann, *Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law*, Discussion Paper No. 28, 4/2009, Harvard Law School

Jacobzone, S., C. Choi and C. Miguet (2004), “indicators of Regulatory Management Systems”,
OECD Working Papers on Public Governance, 2007/4, OECD Publishing

Katarina Stranova, Jan Pavel, Katarina Krapez (2007): *Piloting Regulatory Impact Assessment: A Comparative analysis of the Czech Republic, Slovakia and Slovenia*, *Impact Assessment and Project Appraisal*, 25:4, 271-280

Katarina Stranova, *Regulatory Impact Assessment: Formal Institutionalization and Practice*,
Journal of Public Policy, volume 30, issue I, pp. 117-136, Cambridge University Press,
2010

Ljubinka Joksimovic *The Serbian Regulatory Reform and Governance*, 2010

Loukas A. Mistelis “Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations”, *The International Lawyer*, Vol. 34, No. 3, *Foreign Law Year in Review: 1999 (FALL 2000)*, pp. 1055-1069

Norman Lee, *Developing and Applying Regulatory Impact Assessment Methodologies in Low and Middle Income Countries*, Centre on Regulation and Competition, Working Paper Series, Paper No. 30, October 2002

Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, the *Journal of Legal Studies*, Vol. 35, No. 2 (June 2006), 339-363

OECD (1995) *Recommendation of the Council of the OECD on Improving the Quality of Government Regulation* (adopted on 9 March, 1995)

OECD (1997) *Regulatory Impact Analysis: Best Practices in OECD Countries*

OECD (2004) *Regulatory Governance in South East European Countries: Progress and Challenges*

OECD (2008) *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*

OECD (2008) *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*

OECD (2011) *Development in Eastern Europe and the South Caucasus*

Peter Ladegaard (2005) *Improving Business Environments through Regulatory Impact Analysis: Opportunities and Challenges for Developing Countries*

Pierre Legrand “European Legal Systems Are Not Converging”, *the international and comparative law quarterly*, vol. 45. No. 1 (Jan., 1996), pp.52-81

Projects & Operations: Regulatory Impact Assessment (RIA), available at:

<http://www.worldbank.org/projects/P106880/regulatory-impact-analysis-ria?lang=en>

Radaelli, Claudio M. (2005) “Diffusion without convergence: how political context shapes the adoption of regulatory impact assessment”, *Journal of European Public Policy*, 12:5, 924-943

Radaelli, Claudio M. “The Diffusion of Regulatory Impact analysis – Best Practice or Lesson-Drawing?” *European Journal of Political Research* **43**: 723-747, 2004

Regulatory Impact Analysis, OECD, available at: <http://www.oecd.org/gov/regulatory-policy/ria.htm>

Regulatory Impact Analysis: A Primer, available at:

http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf

Risteska, M. (2011) *Regulatory Impact Assessment in Macedonia and Estonia: Lessons (to be) Learned*, Uprava, letnik IX, 3/2011, 141-164

SCM Network to reduce administrative burdens, *International Standard Cost Model Manual, Measuring and reducing Administrative Burdens for Businesses*, available at:

<http://www.oecd.org/regreform/regulatory-policy/34227698.pdf>

Scott Jacobs, *Current Trends in Regulatory Impact Analysis: The Challenges of Mainstreaming RIA into Policy-Making*, 30 May 2006

Slavica Penev & Andreja Marusic *Progress in Transition and Reform Implementation in Serbia: Comparing to Other Western Balkan Countries with Main Focus on Regulatory Reform*, IFC, 2011

Smart Regulation: Impact Assessment, available at: <http://ec.europa.eu/enterprise/policies/smart-regulation/impact-assessment/>

The Passage of a Draft Law in the Parliament, available at:

http://www.parliament.ge/site2/index.php?lang_id=ENG&sec_id=409

United States of America, Department of Commerce (2009) *Doing Business in Georgia: 2009 Country Commercial Guide for U.S. Companies*

World Bank Group, Investment Climate Advisory Services (2010) *Better Regulation for Growth: Governance Frameworks and Tools for Effective Regulatory Reform: Making It Work: “RIA Light” for Developing Countries*

Yin-Fang Zhang & Margo Thomas *Regulatory Reform and Governance: A Survey of Selected Developing and Transition Economies*