



Expert assessment of the pilot project, including recommendations for improving the transboundary EIA procedure and Post-Project Analysis

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“Linking Environment and Security in Belarus”

Joint project with UNECE, UNDP and UNEP on “Managing Environmental Security Risks with EIA and SEA”



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1. Background

The pilot project was executed as part of the project “Linking Environment and Security in Belarus” implemented through the “Environment and Security” Initiative (ENVSEC, www.envsec.org) by United Nations Economic Commission for Europe (UNECE), the United Nations Environmental Programme (UNEP) and the United Nations Development Programme (UNDP) in cooperation with the Ministry of Natural Resources and Environmental Protection of Belarus and Ministry of Ecology and Natural Resources of Ukraine. The project aims to promote environmental sustainability in Belarus taking into consideration the security aspect and having a particular focus on regional cooperation and application of regional environmental instruments (such as United Nations environmental conventions).

The overall objective of the project was to build administrative capacity and enhance legal and institutional development for applying the transboundary environmental impact assessment and strategic environmental assessment procedures to projects, plans and programmes subject to environment and security challenges in Belarus and - where there is a transboundary context - Ukraine, and to foster stakeholder dialogue and access to information in relation to projects with transboundary environmental impacts.

The UNECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) and its Protocol on Strategic Environmental Assessment (Protocol on SEA) were used as the main instruments to achieve this. In addition to the pilot project on post-project analysis, the project activities included a legislative review on SEA¹ and three local level workshops on SEA². The project also contributed to UNECE capacity building activities on SEA and EIA carried out in the framework of a regional programme “Towards Greener economies in the Eastern Partnership” (EAP-Green), implemented jointly by the Organisation for Economic Co-operation and Development (OECD), UNECE, UNEP and the United Nations Industrial Development Organization (UNIDO) and financed by the European Commission.

2. Introduction to the pilot project

The Espoo Convention together with its Protocol on SEA set out the obligations of Parties to assess the environmental impact of certain activities, plans and programmes at an early

¹ See “Review of legislation on strategic environmental assessment of Belarus with regard to implementation of the Protocol on SEA to the Espoo Convention” available at <http://www.unece.org/env/sea/eapgreen.html>

² See workshop report “Implementing the Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in Belarus” available at <http://www.unece.org/env/sea/eapgreen.html>

stage of planning. They also lay down the general obligation of States to notify and consult each other on projects and plans under consideration that are likely to have a significant adverse environmental impact across boundaries. The Espoo Convention contains provisions for post-project analysis (PPA) that allows Parties to co-operate also during the project implementation phase.

Belarus joined the Espoo Convention in 2005 and requested the Convention secretariat to support it in reaching full compliance with the obligations of the Convention. The efforts to support Belarus in this respect have to date, among other things, included a pilot project to carry out the first full transboundary EIA for a planned hydropower plant on the Neman River with Lithuania as the potentially affected Party. The project was carried out with financial support obtained through the Environment and Security Initiative and was implemented by UNDP Belarus and the Ministry of Natural Resources and Environmental Protection of Belarus with the support of UNECE Convention secretariat in 2009 and 2010. Notwithstanding the recent good developments in the field of transboundary EIA procedures in Belarus, there are still certain processes where external support is required to ensure establishment of good and solid practices for transboundary cooperation with regard to transboundary EIA.

Until the implementation of this pilot project, Belarus did not have experience in carrying out a transboundary post-project analysis in accordance with the Convention, and therefore requested the Espoo Convention secretariat to assist in improving its capacities in this field through conducting a pilot project. A pilot project on post-project analysis allows Parties to co-operate also during the project implementation phase and is a good way to promote access to information on transboundary environmental impacts and building public confidence - providing reliable information about the actual impacts of the project and decreasing uncertainty, misinformation and related disagreements.

This pilot project was included in the workplan adopted by the Meeting of the Parties to the Espoo Convention in June 2011.

3. Scope and expected outputs of the project

The specific objective of the pilot project was to establish practice in the post-project analysis of projects subject to a transboundary EIA procedure and to improve cross-border dialogue between Belarus and Ukraine in monitoring and mitigating transboundary impacts. The project selected as the pilot case was the exploitation of the chalky deposits "Khotislavskoye" (2nd phase), which has been subject to a transboundary EIA procedure between Belarus and Ukraine.

Post-project analysis

According to article 7 of the Espoo Convention, the concerned Parties, at the request of any such Party, shall determine whether and if so to what extent, a post-project analysis shall be carried out taking into account the likely significant adverse transboundary impact of the activity for which an environmental impact assessment has been undertaken pursuant to the Espoo Convention. Any post-project analysis undertaken shall include surveillance of the activity and the determination of any adverse transboundary impacts. It can be undertaken, for instance, to monitor compliance with regulations and mitigation measures, or to verify past predictions in order to develop EIA process. When results of the post-project analysis provide reasonable grounds for concluding that there is a significant transboundary impact concerned Parties have to inform each other and to consult on necessary measures to reduce or eliminate the impact.

Appendix V of the Convention sets the more detailed objectives of the post-project analysis which include:

- a) Monitoring compliance with the conditions as set out in the authorization or approval of the activity and the effectiveness of mitigation measures;
- b) Review of an impact for proper management and in order to cope with uncertainties;
- c) Verification of past predictions in order to transfer experience to future activities of the same type.

The expected outputs of the pilot project on post-project analysis were:

1. Recommendations for post-project analysis in transboundary EIA in Belarus and Ukraine including recommendations for public participation and access to information developed.
2. Recommendations for improving transboundary EIA procedure to better predict transboundary impacts and mitigation measures developed.
3. Experts, officials and NGOs/public in Belarus and Ukraine trained in post-project analysis.
4. Recommendations for an addendum of post-project analysis in projects subject to transboundary EIA procedure to the bilateral agreement between Belarus and Ukraine developed.
5. Established practices between Belarus and Ukraine on post project analysis in a transboundary context.
6. Bilateral working group for conducting monitoring on the “Khotislavskoye” deposit established.
7. Extensive monitoring programme for “Khotislavskoye” approved and monitoring on-going.
8. Authorities in the countries of Eastern Europe aware of the main results of the project.

4. Legislative framework for the post-project analysis in Belarus and Ukraine

The existing legislative frameworks for environmental impact assessment and state ecological expertise in Belarus and Ukraine do not explicitly provide for post-project analysis procedure (see Annex I for more details). Monitoring of the environmental impacts of the implemented activities is based on so called “sectoral legislation” - the national environmental protection legislation concerning air, water and soil protection, and relevant environmental monitoring regulations and systems of Belarus and Ukraine. Currently these laws do not provide for transboundary monitoring, notification and exchange of information between the parties concerned according to the Article 7 of the Espoo Convention.

Cooperation under the Espoo Convention and establishment of a bilateral agreement thus were identified as most feasible mechanisms to carry out PPA procedures. Belarus and Ukraine started development of a draft bilateral agreement for the implementation of the Espoo Convention between the countries in 2011. The bilateral agreement will serve as a tool to overcome practical difficulties related to carrying out transboundary environmental impacts procedures and could be enhanced with the relevant PPA details.

5. Results of the pilot project

The transboundary EIA procedure for “Khotislavskoye” (2nd phase) was officially completed in June 2011, when Belarus provided Ukraine the final decision on the proposed project. However, during bilateral consultations in spring 2011, the Parties agreed that they would develop an extensive environmental monitoring programme for the impacts of the activity.

The aim of the PPA was to analyse both the activity as well as its potential adverse transboundary impacts, i.e. the impacts of the “Khotislavskoye” chalk deposit development on the environment of in the territory of Belarus as well as in the area of the Shatsky lakes in Ukraine.

The “Khotislavskoye” chalk deposit is located in Belarus (Brestskaya Oblast, Maloritski raion) within 250 meters of the border between Belarus and Ukraine. The Shatsky National Park on the Ukrainian side of the border is close to the project area, which is part of the trilateral Belarus-Polish-Ukrainian biosphere reserve “Polesiye” and Shatsky Lakes (Svyatoye and Turskoye Lakes).

5.1. Bilateral working group on environmental monitoring

The pilot project provided a framework for the two Parties to establish cooperation on transboundary environmental monitoring involving experts from both countries. During this pilot project the cooperation was secured through establishment of a bilateral working

group to oversee the monitoring. In addition a task force was set up to evaluate the results of the pilot project and provide guidance and recommendation for further application of the post-project analysis procedure between Ukraine and Belarus.

The bilateral working group oversaw the conduct of monitoring and evaluation of the ex-post environmental impacts of the mining activities at the “Khotislavskoye” chalk deposit site during the project and it is intended to continue its functions also after the completion of the project. The tasks of the working group included preparation of a monitoring programme and conducting the planned extensive environmental monitoring on surface and ground waters, as it was agreed by the Parties. See the report of the bilateral working group for more details³.

The bilateral working group consisted of:

- Four Belarusian experts – one from State enterprise “SPC on Geology”; one from The Central Research Institute for Complex Use of Water Resources (CRICUWR); one from The State Scientific and Production Amalgamation “The Scientific and Practical Centre of the National Academy of Sciences of Belarus on Bioresources”, the National Academy of sciences of Belarus and one from JSC “Belgorkhimprom”.
- Four Ukrainian experts – one from The Ukrainian Scientific Research Institute of Ecological Problems (USRIEP); one from Volynskaya Hydrogeological and Meliorative Party of the State Agency of Water Resources of Ukraine; one from The State Environmental Academy of Postgraduate Education and Management and one from The National Joint Stock Company “Nadra Ukrayny”.

The working group was supported by two international consultants and two local consultants (one from Belarus and one from Ukraine). During the work of the bilateral working group, the Ukrainian experts were able to examine in detail the "Program for monitoring on surface and groundwater in the territory of the Republic of Belarus, area of stage II of the chalky deposits “Khotislavskoye” prepared by the Belarussian authorities. The monitoring program was discussed by experts from leading scientific institutions from both countries.

The monitoring was based on analyses of surface and ground waters in the area of the possible adverse impacts on the environment. As a result of the field works during the summer 2013 the working group analyzed the monitoring data from hydrological stations and from wells located in the vicinity of the chalky deposits “Khotislavskoye”. During the initial stage of the quarry development (up to 25 m depth), the efficiency of the water

³ Report by the bilateral working group for the environmental monitoring of the Khotislavskoye quarry, Pilot project in Belarus and Ukraine on post-project analysis of environmental impact in transboundary context, April-December 2013. Online available at: http://www.unece.org/fileadmin/DAM/env/eia/documents/EnvSec/Minsk_April_14/WG_report_ENG_1_.pdf

protection measures was quite high, and no tangible changes in the impact zone were identified. Comparative analysis of the monitoring data demonstrated that the level of ground water in wells and boreholes had hardly changed as a result of the development of the quaternary deposits and the removal of the overburden at the quarry. The magnitude of groundwater variations was within 0.3-0.5 meters in the areas adjacent to the quarry and in the territory of the Shatsky National Park. These variations primarily depend upon atmospheric precipitation. No changes were identified in vegetation and soil cover.

A study of the technical documentation for the second stage of the quarry development (up to 45 meters depth) shows that project doesn't plan for any environmental protection (preventive) measures for the confined water horizon, but only for the subsoil layer. This is a cause of serious concern which can be seen in the Report of the working group⁴.

Based on the evaluation of the monitoring results the bilateral working group assessed the effectiveness of the applied mitigation measures and proposed recommendations for improvement of the EIA in transboundary context.

5.2. Task-force on post-project analysis

A task force on post-project analysis consisting of Belarusian and Ukrainian government officials and other experts and international and national consultants was set to evaluate the results of the pilot project and develop recommendation for regular application of PPA and improving existing transboundary EIA procedures. The task force assessed and discussed the conclusions and proposals made by the bilateral working group. Based on the findings of the working group and the experiences from the pilot project the task force prepared recommendations for the post-project analysis, including both project specific and more general procedural recommendations, e.g. related to setting up working groups, development of a PPA work plan, public participation and access to information (see section 7.2 below). Recommendations for improving the transboundary EIA procedure have been also prepared as a result of the pilot project (see section 7.1 below). The task force further developed recommendations for an addendum on post-project analysis for projects subject to the transboundary EIA procedure, to the bilateral agreement being negotiated between Belarus and Ukraine (Annex II).

5.3. Workshops on public participation and post-project analysis

Two workshops on public participation and post-project analysis were foreseen to be held during the implementation of the pilot project- one in Belarus and one in Ukraine. The aim of the workshops was to provide the public a possibility to review and comment on the draft recommendations developed for post-project analysis including the recommendations for

⁴ Report by the bilateral working group for the environmental monitoring of the Khotislavskoye quarry, Pilot project in Belarus and Ukraine on post-project analysis of environmental impact in transboundary context, April-December 2013

public participation and access to information. The workshops were also aimed at general awareness rising of the public, mass media and profile specialists about post-project analysis and the results of the pilot case “Khotislavskoye” as well as about the current efforts of Belarus and Ukraine to develop practice in and common approach to transboundary EIA.

The first workshop was held on February 21, 2014 in Khotislav, Maloryta district, Brest region, Belarus. The information about the workshop was announced in regional and district newspapers and official web-pages of local authorities as well as on the official web-page of the Ministry of Natural Resources and Environmental Protection of Belarus. In total 45 participants took part in the workshop, including three representatives from Ukrainian side, namely the city of Volyn. The Environment and Natural Resources Department of Volyn Administration in Ukraine made a statement expressing great concern on the water level of Shatsky lakes. There were no other comments or proposals from the participants.

The second workshop was planned to be held in Ukraine at the end of February 2014, but had to be cancelled due to the extraordinary situation in the country in spring 2014. The Ukrainian public was informed on the results of the pilot project through publishing this report at the website of the Ministry of Ecology and Natural Resources of Ukraine.

The results of the pilot project were presented at a subregional conference in Minsk on 15 April 2014. In the conference the Focal Points to the Espoo Convention from Belarus and Ukraine together with the Chair and the Co-Chair of the bilateral working group on environmental monitoring introduced the work done in the framework of the pilot project and presented the lessons learned during conducting the post-project analysis. Participants from Armenia, Azerbaijan, Georgia, Lithuania, Poland, Russian Federation and the Republic of Moldova were interested to learn from and appreciated the experience of Belarus and Ukraine. They were particularly interested on the intention of the two countries to include provisions on post-project analysis in the bilateral agreement on implementation of the Espoo Convention. The report of the meeting is available at the Convention’s website⁵. The recommendations presented in this report have been revised based on the comments received during and after the final conference.

6. Conclusions

The specific objective of the pilot project - to establish practice in the post-project analysis of projects subject to a transboundary EIA procedure and to improve cross-border dialogue between Belarus and Ukraine in monitoring and mitigating transboundary impacts - was achieved in the agreed timeframe by the well organized activities and common

⁵ <http://www.unece.org/env/eia/meetings/subregional2014.html>

understanding during the implementation of the pilot project. The disagreements between the parties were settled through dialogue and justification of arguments. Another positive aspect of the work was that recommendations were elaborated for addressing the discovered weaknesses and gaps in the national EIA systems, notably related to the post-project analysis. The recommendations proposed by the international and national consultants were accepted by the Parties without essential remarks.

Based on all above, the conclusion is that the objectives of the pilot project (see section 3 above) were achieved and expected outputs delivered, including:

1. Bilateral working group for conducting monitoring on the “Khotislavskoye” deposit was established.

The bilateral working group was an efficient instrument for joint monitoring of environmental impacts of the development project. Extensive monitoring programme for “Khotislavskoye” was approved and implemented to allow evaluation of the ex-post environmental impacts and verification of whether the environmental impacts and mitigation measures were predicted adequately.

2. Exchange of monitoring information between the parties, as well as the public access to it, was facilitated.

Establishment of the bilateral working group also provided a possibility to create a system for exchange of information on the monitoring of surface and ground waters. The monitoring results were posted on the websites of the Ministries of Environment of the Republic of Belarus and Ukraine, as well as on the websites of the Ukrainian Scientific Research Institute of Ecological Problems, National Joint Stock Company "Nadra Ukraine", Institute of Water Problems and Land Reclamation, National Academy of Agricultural Sciences of Ukraine.

The Parties agreed to continue exchange of monitoring data from the same sampling area on an annual basis in form of information-analytical notes based on the agreements reached by the countries in 2011. This is a good ground for future EIA procedures in transboundary context between Belarus and Ukraine including post-project analysis.

3. Recommendations for improving transboundary EIA procedure to better predict transboundary impacts and identify mitigation measures were developed (see section 7.1 below).
4. Recommendations for carrying out post-project analysis within EIA procedure were provided.

The project encompassed not only the pilot case study on monitoring results of the activity through a post-project analysis, but also development of the recommendations for post-project analysis considering also the best practices for public participation and access to information, including recommendations for post-project analysis in Belarus and Ukraine (see section 7.2. below). In addition, recommendations were made for the addendum on post-project analysis in projects subject to transboundary EIA procedure to the bilateral agreement between Belarus and Ukraine (see Annex II).

Summarizing the final results from the pilot project, it should be noted that the approach used was appropriate and successful. That is why the results from the project application can be disseminated to all countries in Eastern Europe and, through a subsidiary body to the Meeting of the Parties to the Espoo Convention, to all countries in the UNECE region as a “good practice”.

7. Recommendations

7.1. Recommendations for improving transboundary EIA procedure to better predict transboundary impacts and mitigation measures developed

1. Determine clear steps and set conditions for participation of the affected Party in the EIA process conducted by the Party of origin in order to insure equal rights to:
 - Be informed at each phase of the EIA procedure including after issuing of the final decision for further development of the activity that has been subject to the assessment (according to Art. 6 of the Convention);
 - Be provided with possibilities for making comments on the proposed activity and the EIA documentation, including making proposals for mitigation measures and post-project monitoring;
 - Be provided with equal (identical) environmental information concerning the state of environment and environmental impacts in the project area.
2. The transboundary EIA procedure should include all the steps presented in the scheme (Annex III) in order to ensure that the transboundary impacts are adequately predicted.
3. As appropriate, the countries should also strive to improve their EIA systems based on the recommendations provided at the UNECE “General guidance on enhancing consistency between the Convention and the environmental impact assessment within the State ecological expertise in countries of Eastern Europe, the Caucasus and Central Asia”.

7.2. Recommendations on post-project analysis in Belarus and Ukraine including public participation and access to information

1. Establish a format for an EIA decision, which includes separate segments for conditions, mitigation measures and post project monitoring.

Using such format, in particular in the transboundary context, will help addressing existing gaps in the Belarusian and Ukrainian legislation as to the definition and content of a final decision as presented below. The format also provides conditions for further cooperation between the countries in the framework of the post project analysis procedure.

As in many other countries, in Belarus and Ukraine there is no clear definition of a “final decision” that is to be used in the framework of the application of the Espoo Convention. After the state environmental expertise conclusions there is normally also a construction permit granted by competent construction authorities and sometimes additionally also another decision of a permitting nature. However, there is no clear indication which of these decisions finally permits the activity to take place. Sometimes also the legal nature of such a decision is not specified.

The proposed EIA decision as a separate document should be an integral part of the final decision according to Art. 6 of the Convention. This recommendation aims to facilitate the practical implementation of the Convention and to overcome the differences between the final permission documents for any activity – construction permit, development consent, permission in the field of atomic energy use, etc.

The proposed format for the EIA decision, in particularly for the transboundary cases, is presented in Annex IV.

2. Include provisions for the post-project analysis into the draft bilateral agreement between Belarus and Ukraine on implementation of the Espoo Convention.

The recommendations for an addendum on post-project analysis of the projects subject to transboundary EIA procedure to the bilateral agreement between Belarus and Ukraine have been developed (see Annex II). According to this draft addendum each of the countries should develop in consultation with each other the following:

- A procedure for conducting PPA of the transboundary impacts of the activity that has been subject to transboundary EIA procedure, including:
 - Well-defined steps for post-project analysis, and operating and information exchange rules;
 - Provisions for bilateral consultations (and follow up steps) on necessary measures to reduce or eliminate the impact when, as a results of the PPA, the Party of origin or the affected Party identifies that there are reasonable grounds for concluding that there is a significant adverse transboundary impacts or factors have been discovered which may result in such an impacts.
- A PPA programme that aims to :
 - Monitor compliance of the project with the conditions set out in the EIA decision and effectiveness of the mitigation measures and verify past predictions, and;

- Facilitate regular exchange of environmental information between the Parties during the project implementation phase.

3. Ensure public access to post-project analysis documentation.

The task force recommended that the Parties should ensure that the following documents are actively disseminated and available to the public in both countries:

- EIA decision in the format referred in point 1 above;
- Results of the PPA including monitoring data, its interpretation and conclusions as to effectiveness of the implemented mitigation measures.

Also the public access to the information in both countries should be efficiently organized and may include publishing of the information:

- On the web-pages of the Ministries of Environment, their regional structures; National Environmental Agencies; municipalities; local governments and other state institutions;
- In the newspapers – at national and local level as announcements;
- On the information desks in the buildings of the concerned municipalities, local governments;
- In the libraries of the concerned cities and villages;
- In the offices of NGO's;
- Through social networks;
- In the Aarhus centers;
- In the offices of the proponents.

Annex I: National legislation related to implementation of post-project analysis in Belarus and Ukraine

Belarus⁶

The Law of the Republic of Belarus on State Environmental Expertise has been in force since 2009; it sets the requirements to conducting state environmental assessment. The law governs the relations in the area of state environmental assessment and aims at ensuring environmental security during the implementation of project solutions for economic and other scheduled activities. There are a number of bylaws which govern the procedure for conducting state environmental assessment. These include the Resolution of the Council of Ministers of the Republic of Belarus on Several Measures to Implement the Law of the Republic on State Environmental Assessment. This Resolution affirms the Provision on the Procedure for State Environmental Assessment and the Provision on the Procedure for Environmental Impact Assessment.

These provisions determine the procedure for conducting state environmental assessment review for facilities under state environmental assessment and the procedure for conducting environmental impact assessment inclusive of potential transboundary impact, economic and other scheduled activities. The conduct of environmental impact assessment is governed by the technical code of common practice Rules for Conducting Environmental Impact Assessment and Report Preparation.

This document sets the following requirements:

- Requirements to preparing the program for the conduct of environmental impact assessment;
- Requirements to assessing the current environmental conditions;
- Requirements to describing the sources and assessing potential types of impact from scheduled activities on environment;
- Requirements to forecasting and assessing environmental changes during construction, operation and decommissioning of the facilities to be used for the scheduled activities;
- Requirements to developing measures for prevention, minimization and/or compensation for significant harmful environmental impact during construction, operation and decommissioning of the facilities to be used for the scheduled activities;
- Requirements to drawing main conclusions from the environmental impact assessment outcome;

⁶ See also below *Note: Comments on Report "Draft Expert Evaluation of the Pilot Project, Including Recommendations to Facilitate EIA and PPA Procedures in Transboundary Context"* provided after presentation of the draft recommendations at the final conference (15 April 2014).

- Requirements to the contents of the report on environmental impact assessment, mapping (graphic) materials attached to the report on environmental impact assessment;
- Requirements to conducting public discussions and consultations.

The Belarusian legislation does not specify a direct procedure for post-project analysis. Control over the implementation of project solutions is carried out in compliance with the Laws and Codes on Environmental Components (Law on Protection of Atmospheric Air, Water Code, etc.) as well as within the local monitoring system which oversees the activities of the facility from the moment of its commissioning.

Ukraine

The main elements of PPA, such as the national system of the state environmental expertise and monitoring were embedded within the Ukrainian legislation mainly through the Law «On State Environmental Expertise» and Law «On Environmental Protection». The Law «On State Environmental Expertise» sets out the procedure according to which authorized government agencies, environmental groups and citizen expert associations, based on inter-sectoral environmental research, analysis and evaluation of pre-project, project and other documentation or facilities, the implementation and effect of which could adversely affect or impact on the environment, and aims to prepare conclusions on the compliance of the planned or carried out activity with the standards and requirements of the legislation on the protection of the environment. Since 2000 the Law «On environmental expertise» was altered for 7 times, partially due to the necessity of compliance with the Espoo Conventions and within the harmonization of the Ukraine and EU legislation process. It is necessary to point out that any activity which is considered to be environmentally dangerous is subject to the State Environmental Expertise. Additionally, the Environmental Expertise also provides for the public participation procedure.

This was the case up until 2012. In June 2012, the Law *On Urban Development Activities* altered *State Ecological Expertiza of the planned projects of construction*. The appropriate provisions requiring performance of *State Ecological Expertiza* for the projects adversely affecting the environment were struck out of the legislation. Since then Ministry of environmental protection of Ukraine performs assessment of documentation that evaluates environmental impact of some proposed construction projects (OVNS).

The current EIA system in Ukraine looks as follows:

According to the Law of Ukraine *On Urban Development Activities*, mandatory *Expertiza of project documentation on construction* (including on environmental issues) is performed if:

- 1) A project is considered a construction project of the 4th or the 5th class of complexity. A project is considered to be of the 4th class, if failure of a construction alternatively endangers at least 300 people at the facility, 10000 people within a vicinity of the facility; causes damages exceeding 15000 minimal wages, or loss of a

cultural heritage site of local importance, or of an infrastructure facility of regional importance. For the 5th class the above mentioned thresholds are higher.

- 2) All activities included in *the List of environmentally dangerous activities* approved by the Cabinet of Ministers of Ukraine on August 28, 2013, Order # 808 (compatible with the Aarhus Annex I and Espoo Appendix I) are considered to be projects of a 4th or 5th class.

In such cases, a developer itself, or a consultant prepares a chapter of the project documentation called OVNS (translated into English as Assessment of Impact on the Environment). OVNS, as before, is prepared in accordance to DBN (State Constructing Norms) A.2.2-1-2003 "Structure and Contents of Environmental Impact Assessment Materials in Project Designing and Constructing of Industrial Enterprises, Buildings, and Facilities. Basic Principles of Design".¹ DBN sets some provisions on public participation during preparation of OVNS. The last step of public participation at this stage is that a developer may amend (a possibility, not an obligation) OVNS to accommodate public opinion.

At the next stage OVNS with the rest of project documentation is submitted for *Expertize of project documentation on construction (hereinafter - Expertiza)*. *Expertiza* analyses the quality of project documentation checking whether it complies with construction, sanitary, safety, environmental and other relevant rules and standards. *Expertiza* can be performed by both private and public institutions (certified by the Ministry of Construction). After that, the project documentation together with *Expertiza Report* is submitted for a construction permit. The permit is issued within 10 days after the submission of an application for a construction permit.

The Law of Ukraine On Urban Development Activities as well as normative acts on the procedures for conducting *Expertiza* and issuance of the construction permit contain no provisions insuring that the results of PP during OVNS were taken in due account by a developer, or providing for any public participation at the stages of *Expertiza* or permit issuance. Therefore, it is hardly possible to challenge a construction permit in court based on lack of PP in decision-making procedure.

The recent amendments to the *Law of Ukraine On Urban Development Activities* (November 2012) include a new requirement which makes it mandatory for the appropriate projects to include not only documents assessing the environmental impact (OVNS), but also a report on such assessment as well as public participation report. However, the law provides that the procedure for the assessment shall be established by the Cabinet of the Ministers of Ukraine.

The function of compliance control is carried out by the State Environmental Inspection (SEI) and State Environmental Prosecution Department. In case if the conditions for the implementation of the project, set out in the conclusions of the State Environmental Expertise, are breached the guilty persons are subject to administrative, civil and even criminal responsibility.

On the other hand, the Law «On environmental protection» provides for the creation of the State Environmental Monitoring System. It is a multilevel (monitoring is carried out on the national, regional and local level) system, aimed to observe, collect, process, store and

analyze the information on the state of the environment. Monitoring is carried out by 10 State Bodies. The results of the monitoring are published each year and disseminated through the NGOs and local environmental authorities (available on the Ministry on Environmental Protection web-site as well).

Within the context of the PPA it is necessary to state that relevant Ukrainian legislation does not include the transboundary element of monitoring yet, though the Constitution, *Law on international treaties* and the *Law on ratification of the Espoo Convention* provide for the superiority of the international legislation and therefore the last is applied in case of collision.

Definition of “final decision” in the national legislation of Belarus and Ukraine

According to the Belarusian legislation the “final decision” making procedure is regulated by the legislation in the field of architecture, urban-planning, and construction activity, as well as legislation in the field of atomic energy use. However, the legislative framework does not provide a formal definition of the “final decision”. The decision of the local executive and administrative body on the location of the project (decision on permitting the construction of the object) shall be understood as the “final decision” under the EIA procedure.⁷

At the same time, as environmental authorities produce “Conclusions of state ecological expertise”, a document which doesn’t have a clear legal status as an administrative document –is it a letter or statement with recommendations, or is it a decision with certain obligations for the proponent? It contains the ecological aspects for the adoption or rejecting of the activity. This conclusion shall be made taking into account, inter alia, the materials of the public hearings in Belarus and the public hearings and consultations in the affected Parties.

Similar gaps exist in the Ukrainian legislation that does not provide definition for the “final decision” either. OVNS with the rest of project documentation is submitted for *Expertize of project documentation on construction (hereinafter - Expertiza)*. *Expertiza* analyses the quality of project documentation checking whether it complies with construction, sanitary, safety, environmental and other relevant rules and standards. *Expertiza* can be performed by both private and public institutions (certified by the Ministry of Construction). After that, the project documentation together with *Expertiza Report* is submitted for a construction permit. The permit is issued within 10 days after the submission of an application for a construction permit.

The Law of Ukraine *On Urban Development Activities* as well as normative acts on the procedures for conducting *Expertiza* and issuance of the construction permit contain no provisions insuring that the results of PP during OVNS were taken in due account by a developer, or providing for any public participation at the stages of *Expertiza* or permit issuance. Therefore, it is hardly possible to challenge a construction permit in court based on lack of PP in decision-making procedure.

⁷ Report of the Republic of Belarus on the implementation of the Convention on environmental impact assessment in a transboundary context for the period 2010-2012

Note: Comments on Report “Draft Expert Evaluation of the Pilot Project, Including Recommendations to Facilitate EIA and PPA Procedures in Transboundary Context”

Distinguished colleagues, this report is aimed at drawing your attention to some discrepancies of the report when the current legislation of Belarus is applied as referred to by you.

The conclusion in section 3 about reasonable grounds for a bilateral agreement as a tool of post-project analysis (further referred to as PPA) procedures is considered not very convincing. Without down-grading the significance of bilateral international agreements, in our opinion, the attention should be paid to the national legislation of Belarus on EIA and monitoring as well as to possible ways of its improvement as to pilot PPA.

So, the term “post-project analysis” is mentioned twice in points 9.5 and 16.12 of the Rules of environmental impact assessment approved by Resolution of the Council of Ministers of the Republic of Belarus No. 755 dated from May 19, 2010 (as amended on March 29, 2013) “On Some Measures of Implementation of the Law of the Republic of Belarus “On State Environmental; Expertise” dated from November 9, 2009”, but its content is not disclosed.

The Republic of Belarus has quite a well-developed system of the National environmental monitoring system on the basis of the Law of the Republic of Belarus “On Environmental Protection” and Resolution of the Council of ministers of the Republic of Belarus No. 949 dated from July 14, 2003 (as amended on July 12, 2013) “On the National Environmental Monitoring System in the Republic of Belarus”. In particular, as to develop this resolution, the following acts were adopted:

- Provision on Surface Water Monitoring and Use of Its Data within the National Environmental Monitoring System of the Republic of Belarus;
- Provision on Underground Water Monitoring and Use of Its Data within the National Environmental Monitoring System of the Republic of Belarus;
- Provision on Air Monitoring and Use of Its Data within the National Environmental Monitoring System of the Republic of Belarus;
- Provision on Local Environmental Monitoring and Use of Its Data within the National Environmental Monitoring System of the Republic of Belarus.

The principles of information exchange of monitoring data are established in these acts, but there is a gap with the PPA.

It is evident that recommendations to bridge these gaps would allow to form a universal PPA mechanism.

Faithfully Yours,

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Annex II: Draft recommendations for an addendum to the bilateral agreement between Belarus and Ukraine on implementation of the Espoo Convention with provisions on post-project analysis

Article 8 of the Convention (Bilateral and Multilateral Co-operation) states: "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. Such agreements or other arrangements may be based on the elements listed in Appendix VI.". The Guidance on the Practical Application of the Espoo Convention⁸ notes that there are many issues that can be agreed upon in advance by Parties that expect to have transboundary assessments on a regular basis. The Convention provides a legal basis for agreements (Article 2, para. 2, and Article 8). Appendix VI to the Convention contains elements for such agreements. These agreements are not a precondition for the application or ratification of the Convention but should be seen as a way of achieving effective application.

Belarus and Ukraine are currently negotiating bilateral agreements with its neighbouring countries on EIA and, where relevant, to supplement existing agreements with provisions for post-project analysis of transboundary EIAs⁹.

The active work on the draft bilateral agreement for the implementation of the Espoo Convention between Belarus and Ukraine was started in 2011 as a way of overcoming the practical difficulties related to transboundary EIA procedures.

After the bilateral agreement is signed and approved all relevant national legislation should be brought in line with the agreement.

These recommendations were prepared in the framework of a pilot project on post-project analysis between Belarus and Ukraine. They were elaborated by experts on EIA (consultants) in cooperation with a task force set up for the pilot project, consisting of Belarusian and Ukrainian government officials. These recommendations for the addendum aim to assist the countries in incorporating procedures for post-project analysis in to the draft bilateral agreement on implementation of Espoo Convention and to facilitate the process of concluding the agreement.

The recommendations are presented below and may be considered as a "good practice" in this area.

1. **The objectives of the PPA** specified in the addendum should correspond but not be limited to those that are set out in the Annex V to the Espoo Convention. Notably, objectives of the PPA should include:

⁸ Available at http://www.unece.org/env/eia/pubs/practical_espoo.html

⁹ "Environment for Europe" mid-term review of the Astana Conference main outcomes: multilateral environmental agreements, Assisting countries in joining and implementing the United Nations Economic Commission for Europe multilateral environmental agreements (ECE/CEP/2013/8), para 15 (e).

- Control and monitoring of the compliance with the conditions and measures set out in the EIA decision for approval of the activity, and the effectiveness of mitigation measures;
 - Analysis of the type and scale of the impacts to ensure the appropriate level of management and preparedness for taking action in conditions of uncertainty of the predictions;
 - Verification of past predictions in order to transfer experience to future activities of the same type – lessons learned.
2. The addendum should present **clearly defined steps for PPA** in the EIA procedure in a transboundary context. This will ensure the quality of the results of the assessment process. The first action should be related to identifying whether and if so to which extent, a PPA shall be carried out. Any concerned Party may request to initiate such a process (Espoo Convention, Art. 7). Consultations between the concerned Parties on a need of PPA may be conducted at any stage of the EIA procedure, but not later than the adoption of the final decision.
 3. In addition, the addendum should present **organisational arrangements for carrying out a PPA in the transboundary context**. Taking into account existing financial and institutional circumstances in each of the countries, the task force suggests that each country should **establish a national working group on PPA (WG)** with permanent members. To facilitate the PPA process the permanent WG members should be nominated by a Minister's decree indicating only positions of the nominated experts (the name of the nominated member should not be mentioned). Thus a need for new nominations will be avoided when staff is changed.

National working groups might have a status of an intergovernmental advisory body, and the recommendations it gives can be binding for their members. This should be addressed when bringing the national legislation in line with the bilateral agreement. The Working group is not responsible for allocating the funds for the monitoring but merely proposes the measures necessary to the subjects of the monitoring (budgetary) process. Its main function is to provide the administrative scientific coordination and ensure that significant adverse transboundary impacts are prevented, and that in case of significant adverse transboundary impact or factors are discovered which may result in such an impact, the involved Parties consult on necessary measures to reduce or eliminate the impact.

Composition of the national working groups

Each of the national working groups with permanent members may be composed of representatives of the competent environmental authorities of the Party, experts from scientific and other relevant organizations, representatives of NGO's and public concerned and according to the international legislation or at the request of any party, environmental consultants. As minimum each of the national working groups with permanent members should include experts on: air, water - underground and surface, soils, biodiversity, waste, chemicals, radiation, noise, vibration etc. The exact

composition of the WG for each particular case should be determined on case by case principle depending on the type of the activity and in accordance with the operating rules.

Initiation of activities

The national working groups can begin their work in a coordinated manner after both Parties accepted that PPA will be carried out.

Operating rules for the national working groups

During the application of the PPA the national working groups should follow the Operating rules adopted by the Parties that should be further developed and laid down as an Annex of the addendum to the Bilateral Agreement. The Operating rules of the national working groups should include determinations for: working language, definitions of used terminology and terms, if necessary, experts/specialists – permanent members of each national WG, depending on the specific features of the project/activity, other experts, if needed, timeframe for common work, provisional agenda for the work, procedures for coordinating joint activities and activities conducted at a national level, including monitoring, preparation of findings, recommendations, conclusions, etc.

4. Parties should also **agree upon the financing of the PPA process**. According to the “polluter pays” principle the Party of origin should provide the necessary funds (if extra funds are needed) for the monitoring in both countries. The Parties could however decide otherwise, as appropriate.
5. The addendum should also include **provisions on development and the content of a PPA program** for each individual case.

5.1. The PPA program should be elaborated and agreed between the Parties prior to taking the EIA decision if the parties didn't agree otherwise.

5.2. The PPA programme should include at least the following:

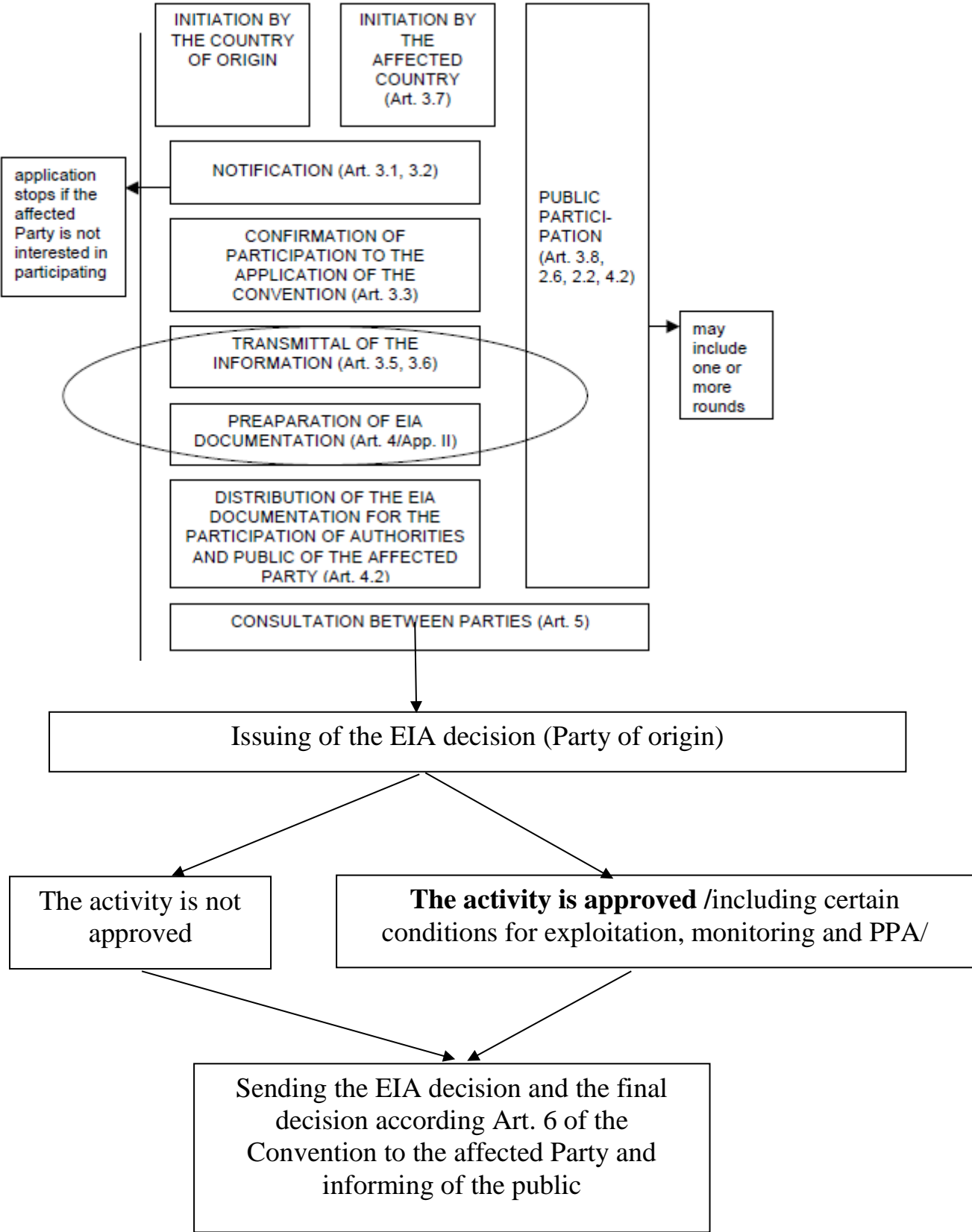
- Specific objects for carrying out PPA identified by taking into account the likely significant adverse transboundary impacts of the activity on the environment and/or impacts about which there are doubts regarding their significance.
- Reference to the project development phase during which the PPA will be carried out - preparatory phase (elaboration of project design); construction phase (during construction works); exploitation phase (operation of the project elements); decommissioning and reclamation of the site.
- Indication of the overall time frame for the PPA process specifying deadlines for its individual stages.
- Description of division of responsibilities between participating competent authorities in each of the Parties.

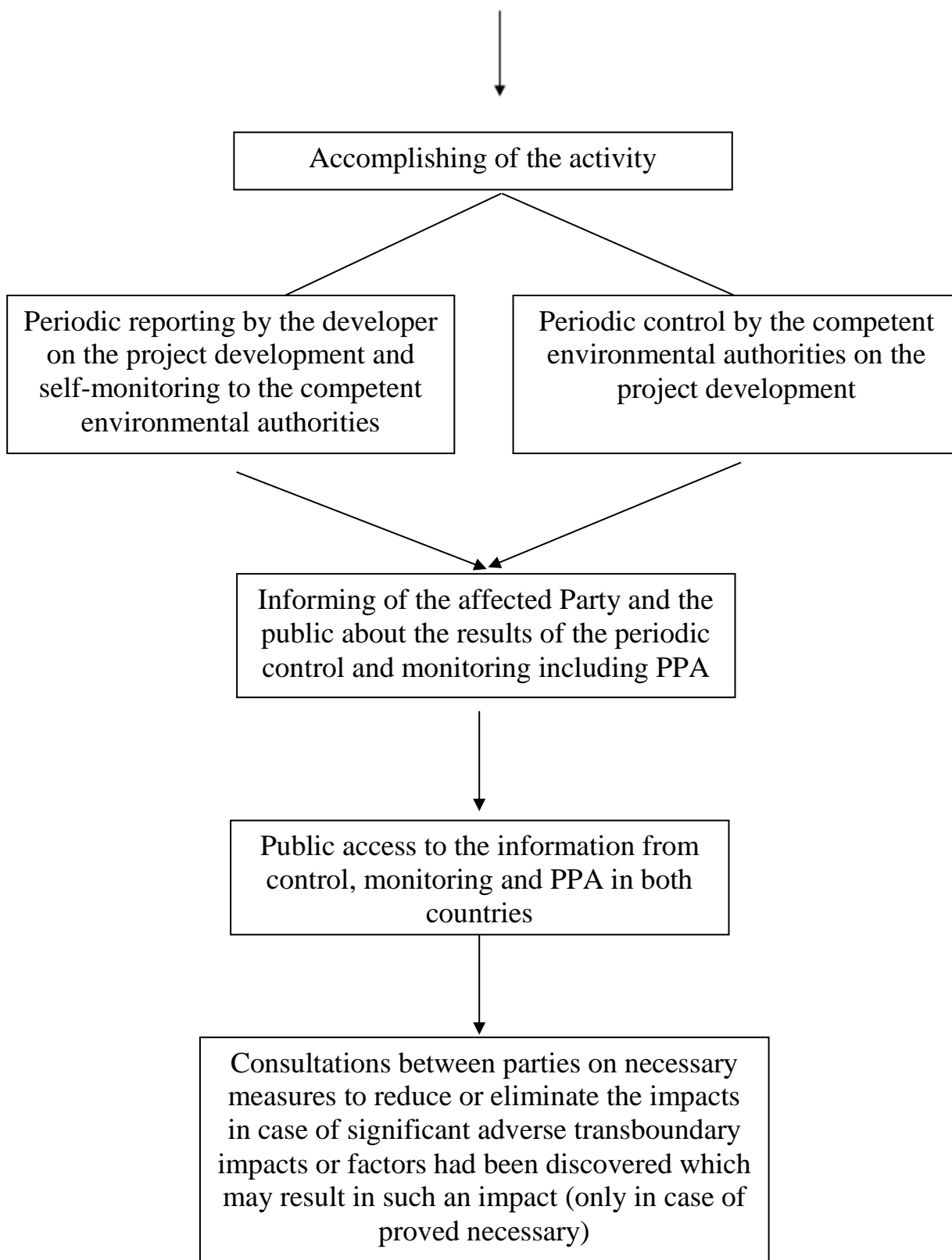
- Monitoring programme of environmental impacts from the project activities, including monitoring of relevant environmental media and components, such as air, water, soil, waste, biodiversity, etc.
- Assessment of compliance of the mitigation measures with the conditions as set out in the EIA decision and their effectiveness.
- Verification of past predictions made during the EIA procedure in order to transfer experience to future activities of the same type.
- Provisions for consultations between Parties on necessary measures required to reduce or eliminate identified likely significant adverse transboundary impacts and/or factors that may cause these impacts.
- Provisions for exchange of environmental monitoring information between the competent authorities of each of the Parties.
- Provisions for publishing of reports and monitoring materials prepared by the national working groups in order to make them available to the public in each of the Parties.

5.3. The national working groups based on consultation can change the PPA program during the PPA process based on the Operating rules or in case of unpredictable environmental circumstances.

6. Finally, the addendum should also include the reference to the nature and the form of the conclusions or recommendations developed by the national working groups. A requirement for documentation of the final results and recommendations as well as a procedure on how the results of the PPA should be taken into account should also be included. As a part of the procedure for conducting PPA a mechanism for consultations on necessary measures to reduce or eliminate the impact between the Parties when, as result of PPA, the Party of origin or the affected Party identifies reasonable grounds for concluding that there is a significant adverse transboundary impacts or factors have been discovered which may result in such an impacts should be established.

Annex III: Scheme of the recommended EIA procedure in transboundary context, including post-project analysis according to the Espoo Convention





Annex IV: Format of the EIA decision

E I A D E C I S I O N

№/...../date/

The activity/project for „..... (the name of the activity/project)“ may be carried out/ may not be carried out

Name of the proponent.....

Address, trade registration /for juridical bodies/

I. Brief description of the activity/project

.....

II. Legal basis for the decision taking

The legal base for taking the final decision/development consent must be presented including the requirements of the Espoo Convention and the bilateral agreement between parties.

.....

III. Conditions for realization of the activity/project and mitigation measures. Terms for implementation of the measures (in case of necessity).

A. During the design period

B. During the construction period

C. During the exploitation and reclamation

D. Implementation measure plan

№	Measures	Period for implementation /during the design, during the construction, during the exploitation and reclamation	Results from implementation of the measure	Terms for implementation of the measures
1				
2				

3				
4				

IV. Factual basis for decision taking

Brief description of the provided EIA procedure must be presented including information about each step, starting with the notification /including affected party/, elaboration of the EIA report, consultations /with the affected party also/, public hearings.

V. Motives

Brief presentation of the conclusions from the EIA report, from the state ecological expertise and from the transboundary procedure and consultations.

Competent authority:

(Position, name, sign)