



Mekong River Commission

Cambodia • Lao PDR • Thailand • Viet Nam

For sustainable development

Summary note

Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin

Final draft

In an effort to communicate openly with broader stakeholders of the Mekong River Commission (MRC) and to help them participate in MRC's regional stakeholder forums more meaningfully, the MRC Secretariat has prepared this summary report to present key and substantive points from selected on-going technical work of the MRC which is in the process of development and finalization in consultation with its member countries.

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10 September 2018

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1. Introduction and Background

1.1. Objectives

The 1995 Mekong Agreement called for the sustainable development, utilisation, conservation and management of the Mekong river basin, water and related resources. The guidelines for Transboundary Environmental Impact Assessment (TbEIA) aim to support the application of these objectives specifically:

- Article 3: Protection of the environmental and ecological balance
- Article 5: Reasonable and equitable utilisation
- Article 6: Maintenance of flows on the mainstream
- Article 7: Prevention and cessation of harmful effects
- Article 8: State responsibility for damages

The guidelines aim to support and reinforce the implementation of relevant MRC technical knowledge and methodologies for effective environmental management of common environmental issues. They also are designed to support national Environmental Impact Assessment (EIA) systems to apply EIA on projects with potential transboundary impacts, whilst allowing meaningful participation of Member Countries by keeping national EIA legislation in place and therefore not needing prior harmonisation of national legislation and procedures. The guidelines allow progressive improvement and development of TbEIA processes.

1.2. Background

The TbEIA guidelines are based on those drafted from 2004-2010 resulting from a series of workshops, seminars and national and regional consultations, as well as reviewing legislation and institutions. The current guidelines build on the procedure for Notification, Prior Consultation and Agreement (PNPCA) and other procedures. It also draws on lessons learnt during the support of consultation on other dam projects (Xayaburi, Don Sahong and Pak Beng) and the 3S River studies, as well as TbEIA in other regions, for example the 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary context (Espoo Convention).

At the final consultation workshop in Siem Reap, Cambodia, in May 2018, the four MRC Member Countries agreed the overall structure and contents of the TbEIA Guidelines and requested the MRC Secretariat to submit a briefing note, including a final draft, to MRC Joint Committee for consideration of further application.

The TbEIA is designed as a supporting tool to facilitate cooperation in conducting EIA for projects with potential transboundary environmental impacts, whilst respecting the differences among the EIA legislations in Member Countries and the specifics of their national EIA systems. Therefore, the decision of approval is made by the country whose territory the project is based in, and the TbEIA procedures will follow those in the EIA legislation for that country.

1.3. Principles

TbEIA is based on the following principles:

- State Sovereignty- Development of project that has been subject to TbEIA is approved by the relevant decision-making authority of the member country whose territory the project is based. The TbEIA process follows national EIA legislation of the Member Country where the project is located.
- Polluter pays- all negative environmental and social impacts are the burden of the proponent (developer).
- Good faith and Good Neighbourliness- ensure the prevention and minimisation of damage to neighbouring countries and avoid using TbEIA to obstruct development plans in neighbouring countries.
- Reciprocity principle- favours, benefits and penalties should be returned in kind from one country to another, i.e. allow for effective and mutually beneficial transboundary consultations.

1.4. Scope

Member Countries are encouraged to ensure that national EIA procedures consider transboundary environmental impacts for:

1. Any projects that have the capacity to “cause a negative impact on the Protection of the Environment and Ecological Balance” (Article 3, Mekong Agreement, 1995) or to “affect reasonable and equitable utilisation (Article 5, Mekong Agreement, 1995).
2. Any of the following:
 - (a) Hydropower projects;
 - (b) Irrigation schemes;
 - (c) Ports, river works, and navigation projects;
 - (d) Industrial & mining projects;
 - (e) Aquaculture projects.
3. if a project falls into scope of 1995 Mekong agreement but does not require an EIA under the relevant national legislation, then the Member Country is encouraged to notify other countries in accordance with the PNCNA procedure (figure1).

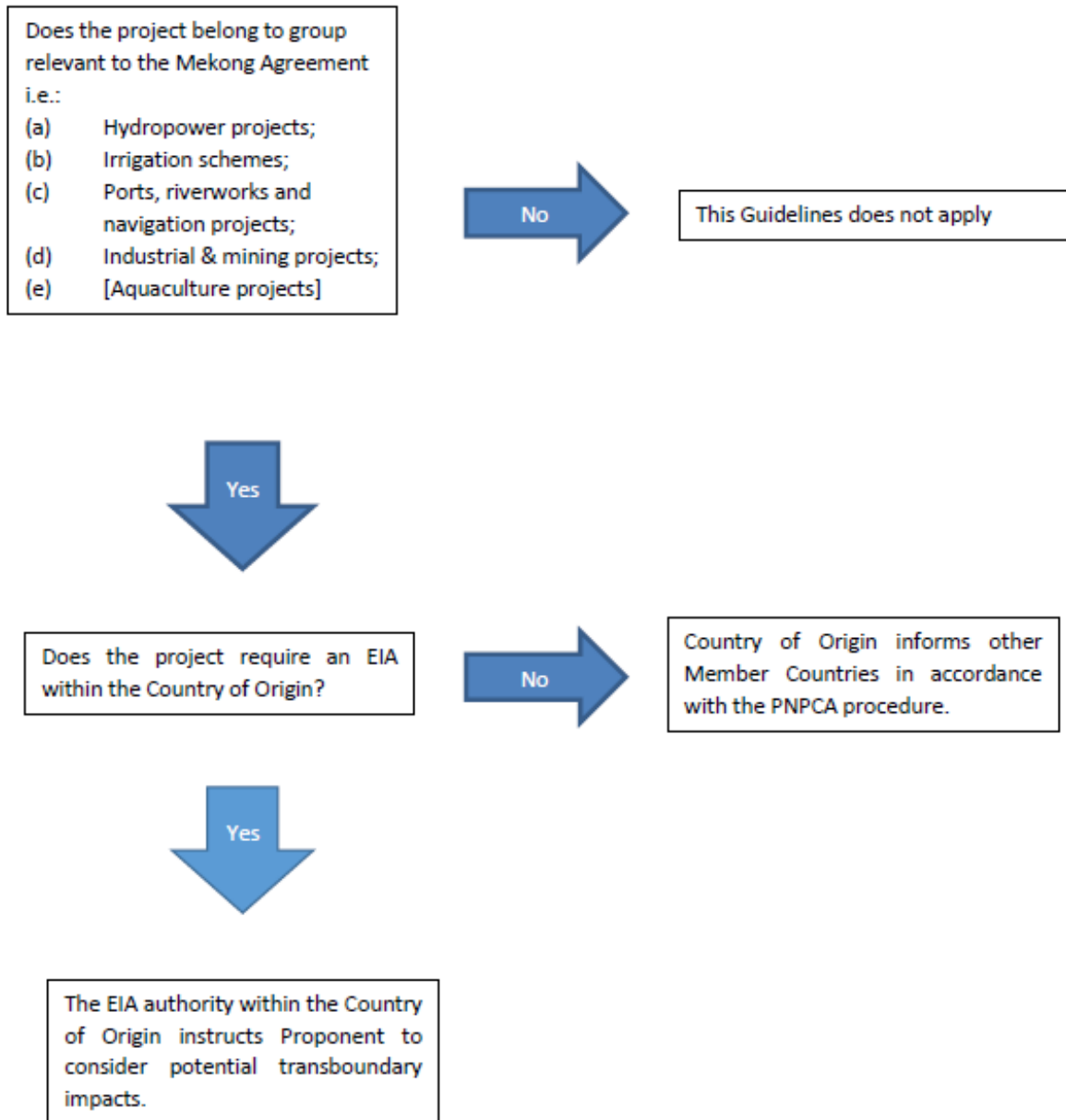


Figure 1: Scope of Application of TbEIA Guidelines

2. TbEIA Process

2.1. Identification of potential Transboundary Environmental Impacts and need for EIA

The Country of Origin is recommended to encourage proponents to identify potential transboundary environmental impacts early to allow proper consideration in the planning phase.

Technical Implementation

- The EIA responsible authority in the Country of Origin should consider whether the proposed project falls within the scope of the 1995 Mekong Agreement.
- If the project does not require an EIA under the national EIA legislation of the Country of Origin, then the Country of Origin is advised to inform other potentially affected Member Countries.
- If an EIA is required under national legislation of the Member Country, then relevant authorities should inform the Proponent at an early stage to take potential transboundary impacts into consideration and identify the Proponent's approach.
- Transboundary Environmental impacts should be identified with the aid of the checklist with potential transboundary impacts for specific projects, which will be supported by consultants and other experts.
- The proponent assists the EIA-responsible authority in the determination of the projects need for TbEIA. The proponent must also provide information on the proposed project, e.g. project description, potential environmental impacts under different scenarios (e.g., normal and worse-case), potential Transboundary Environmental Impacts, the potential affected stakeholders and countries, and any proposed consultation and data collection activities.
- Any Member Country can request a preliminary consultation request for information on any development projects that might affect them.

2.2. TbEIA Initiation and Early Consultation

A TbEIA initiation letter is sent to inform potentially affected countries and invite them to consultations to discuss any potential impacts. The affected country(ies) should respond within 30 days and indicate whether they want to participate in consultations.

Technical implementation

- **A formal letter of initiation** to the potentially affected countries is prepared by the proponent and EIA authority during the EIA scoping stage. This is delivered via the MRC. The letter should include information on the proposed project, any potential transboundary impacts, the expected duration of EIA process and nature of potential decision, and a proposal for early consultation to establish EIA scope and practical steps of analysis of transboundary impacts.
- The proponent Initiates TbEIA via project preparation steps like feasibility studies and preliminary analyses.
- **Proponent is encouraged to assist drafting the TbEIA Initiation letter**, including the summary of project information, expected transboundary impacts, and proposal for Early consultations, for the convenience of the Country of Origin's EIA-responsible authority.

The following should be included in the letter of initiation:

- Present the proposed project's details and expected transboundary impacts

- Present preliminary proposal for scope of EIA analyses, including analyses addressing potential transboundary impacts. Receive feedback and note concerns expressed by the Potentially Affected Country; and
- Discuss with relevant authorities of the Potentially Affected Country the practical steps for conducting analysis (e.g. provision of existing data, surveys, sampling, and consultation with potentially affected local communities) on its territory.
- **Potentially Affected Country(ies) acknowledges the receipt of the TbEIA Initiation letter** within 30 days and indicates interest to participate in, and availability for the Early consultations.
- **If the Potentially Affected Country(ies) choose to participate in the EIA process, the response should be sent as a formal letter** and contain the following information:
 - Acknowledgement of the intention to participate in the EIA;
 - A summary of readily available information on relevant topics in the Potentially Affected Country (e.g. protected areas, or sensitive ecosystems that might be affected by the proposed project);
 - Information on the national EIA public consultation process in the Potentially Affected Country, including contacts of statutory consultees (if any);
 - Language of documents;
 - Comments on proposed timing of the EIA process; and
 - Specifying type of information of most interest (e.g. Mekong mainstream water flow alteration).

2.3. Determination of Scope of the Transboundary Assessment (TbEIA Scoping)

Scoping is conducted by the Proponent in line with the EIA legislation of the Country of Origin. The Scoping report and early consultation is used to determine whether there are any potentially significant transboundary impacts and how they could be addressed in the EIA report.

Purpose

The general purpose of the scoping phase of an EIA is to identify potential environmental impacts that should be further addressed in the EIA Report, including identification of likely affected territories. There are no universally accepted and applicable quantitative standards for the determination of the [significance] of transboundary environmental impacts and the national EIA legislations of the Member Countries vary with regards to EIA requirements according to list, size, magnitude, nature and location of proposed projects.

Considerations

Three main factors that can be considered to preliminary estimate the [significance] of transboundary environmental impacts of a development projects adopted from the UNECE Espoo convention include:

- **Size:** proposed projects/activities which are in large scale;

- **Location:** proposed projects/activities located in or close to sensitive areas of the Mekong mainstream and its major tributaries, and
- **Effect:** proposed projects/activities, which are complex and could generate adverse effects on water quality and quantity, flow regimes, river morphology, and biodiversity and which may have implications on human health and livelihoods, and aquatic ecosystems in other concerned Member Countries.

Technical Implementation

- **It is the responsibility of the Proponent to perform the preliminary (i.e. scoping) analyses.** The Proponent shall make effort to investigate potential transboundary impacts of the proposed project and identify potentially affected territory regardless of the administrative borders. Here the opinions, concerns and information shared by the Potentially Affected Country(ies) should be considered.
- **The EIA-responsible authority proceeds according to the national EIA legislation, while taking into account the preliminary analysis prepared by the Proponent** (e.g. Scoping Report), and the results of the Early consultations.

2.4. Preparation of the EIA Report

The EIA report is prepared by the Proponent following EIA legislation of the Country of Origin to highlight potential transboundary environmental impacts. In this period, Proponents are permitted to ask the Country of Origin for access to relevant information, conduct surveys and assist in organising consultations with the public and relevant authorities.

Technical implementation

- EIA report prepared by the Proponent in compliance with the EIA requirements in the Country of Origin and advised by the EIA-responsible authority.
 - The conducting of the analyses relevant to the assessment and preparing of the EIA Report is entirely the responsibility of the Proponent.
 - Typically, a specialized consultant is commissioned to act on behalf of the Proponent in all aspects related to the EIA process, namely to advance EIA analyses and related consultations, and to draft the EIA Report in compliance with the applicable regulation of the Country of Origin.
- Proponent ensures that applied methodology reflects and makes use as appropriate the technical and methodological resources available due to activities of the MRC.
- For any EIA concerning hydropower projects, relevant MRC resources shall be considered. For details and full list of MRC Guidelines and Procedures please visit MRC web page. <http://www.mrcmekong.org/publications/policies-procedures-and-guidelines/?start=0>.
- The description of the monitoring, mitigation measures and environmental management plan presented in the EIA Report shall clearly indicate the commitment (including commitment to finance implementation of the proposed measures) of the project Proponent.
- The Joint Environment Monitoring of Mekong Mainstream Hydropower Projects (JEM), which is currently being developed, shall be used to inform the EIA analysis,

and support MCs to jointly monitor and report transboundary environmental impacts during construction and operation, to inform mitigation and management, wherever appropriate to ensure that it is based on credible data and shared understanding of the environmental situation.

- Potentially Affected Country is recommended to provide the Proponent with access to information on the relevant aspects of the potentially affected environment on its territory and conduct surveys on its territory and assist in organizing consultations with potentially affected public and relevant authorities.

EIA Report should include the following elements:

- Description of the purpose and nature of the proposed project;
- Description of the baseline environment likely to be affected (including the environment on the potentially affected territory of Concerned Member Country);
- Description of the anticipated [significant] transboundary environmental impacts (or explicit justified conclusion that no [significant] transboundary impacts are expected);
- Description of reasonable alternatives to the proposed project (including a “no action” alternative);
- Description of proposed mitigation measures;
- An Environmental Management Plan and/or monitoring and management components;
- Record of sufficient opportunities for public participation, including the content of comments or responses received and how the assessment addresses those comments or why they are not addressed; and
- Acknowledgement of who prepared the environmental assessment.

2.5. Transboundary consultation of the EIA Report (regional consultations through PNPCA)

The EIA report is forwarded to the Potentially Affected Country(ies) when the Country of Origin makes it available to its own public. Formal transboundary consultations are undertaken using mechanisms established in PNPCA procedure, to which the potentially affected country provides comments.

Technical implementation

- National consultations on the EIA Report are carried out in the Potentially Affected Countries. The Proponent ensures preparation of support materials (presentations, maps, explanatory visuals etc.) to facilitate these consultations and provides translation as required of the original EIA Report in the languages specified.
- Once national consultations are completed, the EIA-responsible authority receives comments and opinions on the EIA Report from the Potentially Affected Country via the MRCS and NMCS to take into consideration in further actions.
- The Potentially Affected Country(ies) are free to conduct a quality review exercise for the received EIA Report based on their own national practices, e.g.: Establishing an independent panel selected from the environmental authority, and related key line

agencies and recognized experts including affected people to review in order to avoid or reduce bias; and carefully review and examine the project activities, transboundary environmental impacts and their proposed mitigation measures, and monitoring activities detailed in the EIA Report if reflected the local context and requirements.

2.6. Public participation, dissemination of information and consultation with the potentially affected country

National consultations of the EIA report are carried out in the Potentially Affected Countries. The EIA report is disseminated to stakeholders to allow them to gain influence and participate in the decision-making process. Results of these consultations are compiled for consideration.

Technical Implementation

- Consultation takes place in the Potentially Affected Country without direct involvement of any authorities from Country of Origin.
- Proponent is responsible for conducting the public consultation process for Potentially Affected Country(ies), following the MRC document '*Public participation in the context of the MRC*' and the requirements in the regulations of the Potentially Affected Country.
- NMCS ensures all relevant documentation on the proposed project and the EIA Report are transmitted to concerned parties.
- The NMCS supports national consultations and public participation process organized by the proponent and collects the comments to the EIA Report.
- It is advised that the EIA-responsible authority supports the national consultation process and participates in consultation events. It can conduct its own review of the EIA Report in order to form an opinion (see section "Transboundary consultation of the EIA Report" above), which along with the comments acquired through the public participation and national consultations will be in a consolidated manner transmitted by the NMCS via MRCS to the Country of Origin in accordance to PNPCA.

2.7. EIA approval and Decision-making

The EIA-responsible authority approves according to the applicable national procedures. The Country of Origin decides whether to implement, taking into consideration the views of the Potentially Affected Countries. The affected countries are provided with the decision, supplemented with responses to their comments, explanations of and descriptions of reasonable solutions and measures for minimising and mitigating any potential affects.

Technical implementation

- The final approval of the EIA Report by the national EIA-responsible authority takes place in full compliance with the national legislation of the Country of Origin, after the Proponent responsible for conducting the EIA study fulfils all necessary steps of the EIA process, including adjusting or correcting the EIA Report based on received comments when required.

- Decision on a proposed project is taken by a designated authority of the Country of Origin, and the TbEIA cannot in any way limit the national authority's decision-making freedom. The EIA aims at supplying the decision-making authority objective and scientifically sound information about potential risks and likely environmental consequences of a proposed project.
- Any decision-making authority (i.e. authority approving the project or granting a development permission) must (as per national legislation) take into due account and respond to the findings of the EIA Report. While doing so, the decision-making authority should ensure that commitments of the project Proponent related to the implementation of Environmental Management Plan, and Environmental Monitoring are included into the relevant permitting documents.
- The Country of Origin is recommended to ensure that the Potentially Affected Countries consulted through the PNPCA process are provided with the final decision and a statement containing:
 - Responses to the comments received through the formal transboundary consultations;
 - Explanation how reasonable alternatives and practical measures for preventing, minimizing or offsetting/mitigating the adverse transboundary environmental impacts were considered in the final decision on the proposed project;
 - Description of measures for monitoring and management of any residual transboundary environmental impacts and risks.
- Proponent finalizes the EIA Report in line with the national legislation of the Country of Origin, while following instructions from the EIA-responsible authority. That may include substantial revisions or additions if the (transboundary) consultation process revealed such need.
- Proponent prepares response to the consolidated comments received through the consultation process for the convenience of the national EIA-responsible authority as well as participates in drafting the statement accompanying the final decision for the convenience of the decision-making authority.
- The Potentially Affected Country acknowledges receipt of the final decision on the project implementation and the accompanying statement related to the EIA conclusion. This marks a formal end of the TbEIA. Any potential further comments or disagreements shall be dealt with through other means, e.g. through a discussion on a political level.

2.8. EIA Results, Environmental Monitoring Programme (EMP) Implementation and Monitoring

The Country of Origin ensures the Proponent complies by implementing the agreed procedures and measures and conducts continuous monitoring to establish any unforeseen impacts. Monitoring data will be made available to affected countries and if they feel monitoring is unsatisfactory, they can raise concern and the monitoring programme can be adjusted.

Technical Implementation

This shall be achieved namely through consistent incorporation of the conditions related to the implementation of the EMP and monitoring into all subsequent planning and permitting procedures and their enforcement.

- The designated authority (determined through transboundary consultation) of the Country of Origin shall regularly publish the monitoring results and ensure their transmission via MRCS and NMCs to all Concerned Member Countries.
- The Environmental Monitoring Programme should contain key components to allow Potentially Affected Countries to review and check for compliance and effectiveness during the project implementation.

Key Components to include in the Environmental Monitoring Programme:

- Mitigation measure work plan
- Monitoring work plan
- Public participation process of EMP formulation (if any)
- Staffing and training work plan
- Cost estimates for EMP implementation
- Time schedule of EMP implementation and reporting

3. Costs of Transboundary EIA

- Administrative costs of EIA-responsible authority and other authorities participating in TbEIA are covered in a standard manner as in any domestic EIA.
- Costs of participating in early consultations and formal transboundary consultations on EIA Report (travel costs, etc.) should be covered by the Proponent.
- Proponent covers all the costs associated with the conducting the EIA analyses, preparation of the EIA Report etc. within a scope defined by the EIA-responsible authority in the Country of Origin (granting the final EIA approval). That includes also all the costs associated with conducting analyses concerning impacts on the territory of Potentially Affected Country(ies), such as travel costs for experts, costs of consultations with local potentially affected communities, costs of obtaining relevant data, etc.
- In principle, the Proponent of the project responsible for conducting the EIA is also responsible for covering all the costs for national and the transboundary consultations. In practice, some assistance of the Concerned Member Countries can be sought.
- The post-EIA implementation of the measures planned for mitigation of potential negative impacts and environmental monitoring can be substantial and even capable of affecting the overall project economic viability. In general, the polluter-pays principle is a departing point for necessary case-by-case arrangement that must be concluded before the final decision on the project implementation is made.
- The Proponent and later the operator of a project shall bear the costs of adjusting the design, or the mode of operation of the project to ensure compliance with the Environmental Management Plan and operation of the monitoring.

- Costs of participating in Early consultations and formal Transboundary consultations on EIA Report (travel costs, etc.) for the potentially Affected Country(ies) should be secured through agreement with the Proponent.
- For the consultation events taking place on its the territory (namely public consultation and participation) can be recommended that the Potentially Affected Country(ies) interested in maximizing the effectiveness of the public participation within its jurisdiction supports the process through in-kind contribution, e.g. providing space in public buildings for the meetings, and through covering costs associated with the participation of its official representatives (e.g. representatives of EIA-responsible authority and other relevant agencies) in the consultation events. Such costs-sharing arrangement shall be also understood as an incentive for the Potentially Affected Country to maximize efficiency of the consultation process and refrain from stipulating non-standard requirements entailing excessive costs to be borne by the project Proponent.
- Costs of an Independent review of the EIA Report if conducted as a part of the PNPCA process by the MRCS PNPCA Task Group and supporting Expert Group(s) shall be covered by the MRCS.
- Covering the costs associated with an additional national review of the EIA Report (if conducted) shall be ensured by the Concerned Member Country from its own resources as it is clearly in its interest to evaluate thoroughly the EIA Report received from the Country of Origin. Seeking an external financial support for such exercise shall be recommended. MRC Secretariat shall provide assistance with such effort.

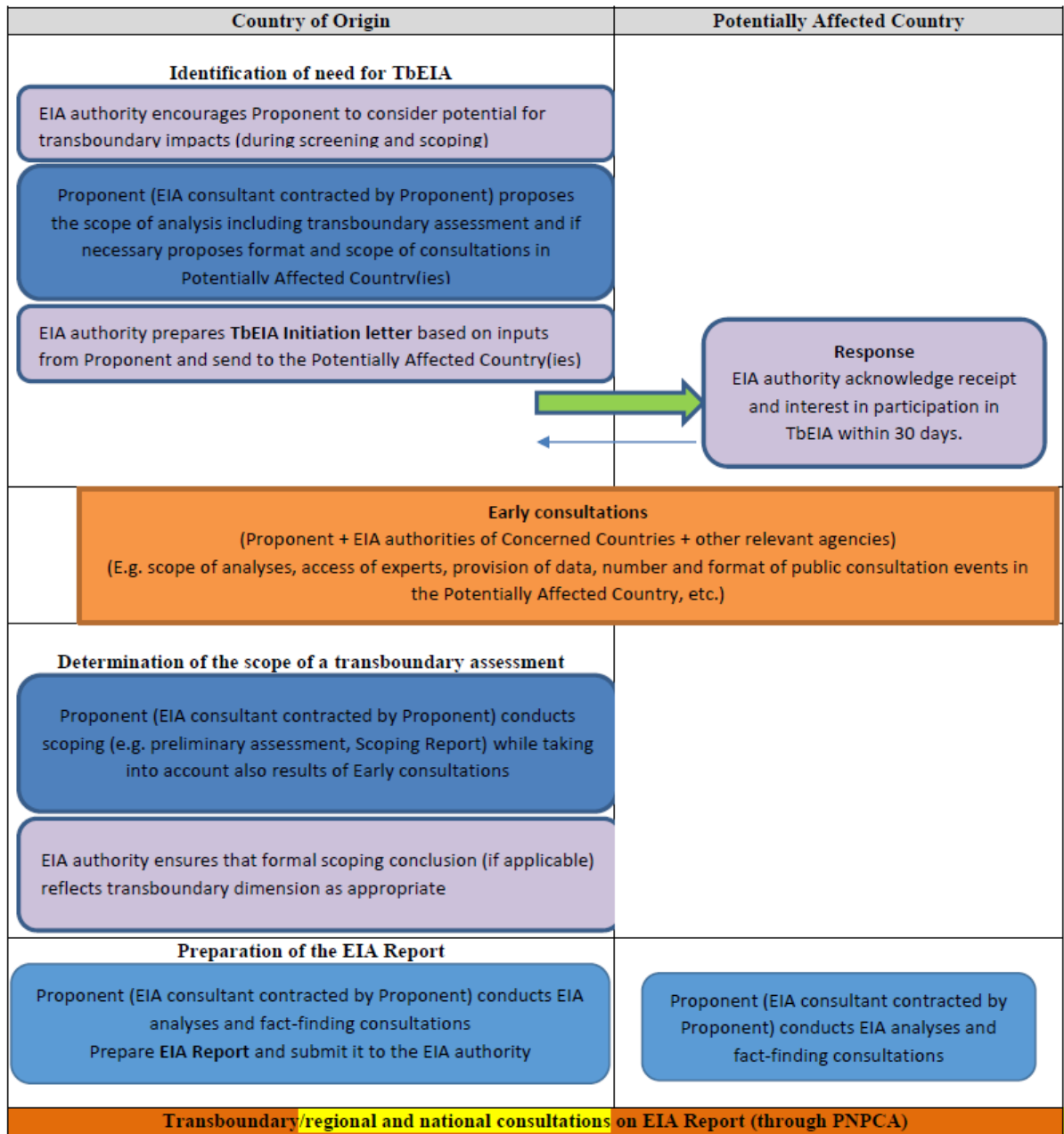
4. Guideline Revision Procedure

- Each Member Country will report on annual basis to the MRC Secretariat and other Member Countries on its arrangements for implementation of this Guidelines into national regulatory and institutional frameworks and on experience with its practical application. The MRC Secretariat will facilitate exchange of experience with the application of this Guidelines.
- The Guidance shall be treated as a flexible document that can be gradually amended and developed to reflect the accumulated experience and new aspirations of the Member Countries for advancing sustainable management and development in the Lower Mekong Region.

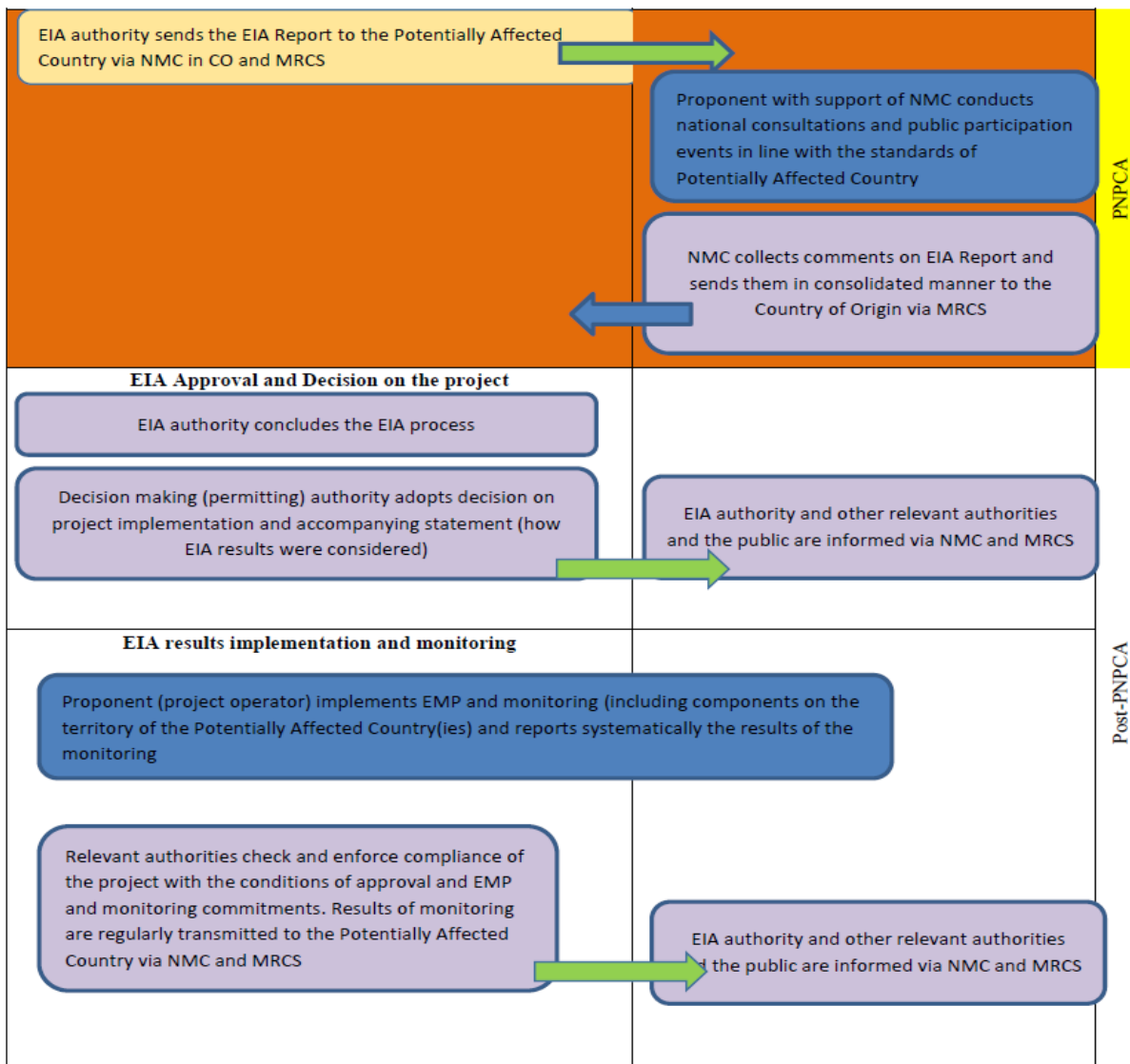
5. Conclusion

The TbEIA guidance aims to facilitate MRC cooperation and support the protection of the environment, natural resources, aquatic life and conditions, and the ecological balance of the Lower Mekong River Basin and prevention and cessation of harmful effects resulting from development projects. They aim to do this by allowing cooperation in conducting EIA for projects with potential transboundary environmental impacts, while respecting the differences among the EIA legislations in Member Countries and specifics of their national EIA systems. The guidelines have set out the principles and procedures to follow in any development projects with the potential for transboundary impacts.

Annex 1: TbEIA Process Scheme



Pre-PNPCA



Note: Terms "Pre-PNPCA" and "Post-PNPCA" do not appear in the MRC documents, and are used here in a purely technical manner, to indicate steps/activities conducted before the initiation of the formal PNPCCA process, and after its conclusion respectively.



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