

Transboundary Environmental Impact Assessment in the European Union

The Espoo Convention and its Kiev Protocol on
Strategic Environmental Assessment

Edited by Simon Marsden and Timo Koivurova

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Transboundary Environmental Impact Assessment in International Law

Timo Koivurova

CHAPTER OUTLINE

This chapter examines the development of transboundary environmental impact assessment (TEIA) in international law. After an introduction, the chapter proceeds to consider the development of TEIA through treaty and soft law instruments and discusses its position in customary or 'general' international law. Development of transboundary norms to address potential significant environmental effects in shared areas, and in areas beyond national jurisdiction (ABNJ), are next considered, together with the role of TEIA in relation to international financial institutions. The Espoo Convention and Kiev Protocol are also introduced and their provisions are analysed in this chapter, and the relationship between the Espoo Convention in particular and other aspects of international law is explained and evaluated in the light of recent jurisprudence of the International Court of Justice (ICJ).

INTRODUCTION

Environmental Impact Assessment (EIA) can be defined – at its minimum – as a government-controlled procedure involving the public within which scientific assessments are conducted of the potential environmental impacts of a proposed activity that may be environmentally harmful. Its goals include improving the quality of information so decision-makers can make better decisions from the viewpoint of the environment, raising the level of public participation in relation to environmental protection. TEIA is often perceived only as an extended EIA procedure between territorial states that includes transboundary impacts and foreign actors into the domestic EIA of the origin state. Yet today the concept has

been enlarged to cover EIA procedures designed to evaluate possible impacts by human activities on the environment in ABNJ of states.

It was the spread of national EIA procedures that made it possible to conclude legally relevant instruments and treaties on TEIA. Since TEIA tries to integrate foreign impacts and foreign actors into the operation of the national EIA procedure of the origin state in cases where transboundary impacts are likely, this is best done by an international treaty, given that states' jurisdiction is confined to certain pieces of territory.

Treaties or other instruments that try to organize a TEIA procedure must take into account the basic fact that states have differing national EIA procedures. From the viewpoint of the functioning of a TEIA procedure, the ideal situation would obviously be one in which all the contracting states had an identical EIA procedure, for the potentially affected state and its public would know when and how to participate in the EIA procedure taking place in accordance with the EIA procedure of the origin state. While this has to a significant extent been achieved by the implementation of the Espoo Convention and Kiev Protocol in relation to European Union (EU) Member States, domestic EIA procedures still differ to some extent, making the organization of TEIA complicated. With respect to non-EU Member States, the situation is of course even more complicated.

DEVELOPMENT OF TRANSBOUNDARY EIA IN TREATY AND SOFT LAW

The first national EIA procedures appeared at the end of the 1960s and beginning of the 1970s. The then European Economic Community (EEC) was at the forefront of also introducing a legally binding TEIA procedure with its 1985 EIA Directive.¹ This Directive, which will be studied more closely in Chapter 3, was however preceded firstly by a type of embryonic TEIA procedure fleshed out in the 1974 Nordic Environmental Protection Convention (NEPC), and secondly by a resolution of the US Senate in 1978 containing the outline of a general convention for TEIA which urged other nations to participate in the negotiations for such a convention.² It is of interest to briefly study these early procedures before considering other provisions for TEIA in treaty and soft law (including the Espoo Convention and Kiev Protocol), which followed after the EIA Directive.

Nordic Environmental Protection Convention

The 1974 NEPC³, which is still in force, contains two fairly rudimentary TEIA procedures, the choice of which depends on which governmental authorities of the origin state are in charge of the licensing decision on the environmentally harmful activity. The scope of both procedures relies on the concept of

'environmentally harmful activities', which is defined in detail in Article 1(1); the definition only includes stationary activities.

The environmental effects of these stationary activities are not defined exhaustively since the Article only enumerates certain pollution effects and provides that other pollution effects are also covered.⁴ Although both of the TEIA procedures of the NEPC are based on the concept of environmentally harmful activities, they have a somewhat different scope in that the procedure involving the examining authority and the supervisory authority of the concerned states is triggered when a 'nuisance of significance'⁵ takes place whereas that involving the central governments requires that 'considerable nuisance'⁶ is caused. Hence, the threshold at which transboundary pollution is deemed to occur is lower in the former procedure.

If the licensing decision is made by a 'Court or the Administrative Authority'⁷, the procedure is carried out by this examining authority and the supervisory authority⁸ of the potentially affected state. All environmentally harmful activities that 'may entail nuisance of significance in another Contracting State'⁹ are covered by a procedure carried out by the licensing authority of the origin state and the supervisory authority of the affected state. The origin state's licensing authority is obligated to 'send as soon as possible a copy of the documents of the case to the supervisory authority of the other State'.¹⁰ The licensing authority must also allow the supervisory authority to give its opinion on the matter.

If the supervisory authority so requests, the permit authority must require from the applicant, 'such additional particulars, drawings and technical specifications as the examining authority deems necessary for evaluating the effects in the other State'.¹¹ Hence, the origin state is obligated to conduct a TEIA. In addition, the supervisory authority is entitled to conduct its own investigations on the potential transboundary impacts 'as it deems necessary'¹², which means that the affected state also has a right to have such information taken into account in the licensing procedure of the origin state. Interestingly, 'if necessary for determining the damage caused in another State'¹³ the supervisory authority of the potentially affected state is obligated to organize an on-site inspection upon request by the examining authority. In the estimate by one author, 'this provision is intended to enable the examining authority to gather all possible evidence as to the damage caused before it reaches a decision in the matter'.¹⁴

Environmentally harmful activities 'which may entail considerable nuisance in another Contracting State'¹⁵ and which are controlled by the central government of the origin state, are governed by a procedure that is carried out by central governments of the concerned states. If the potentially affected state so requests, the central governments must arrange consultations on the matter. In these cases, both of the concerned states are also entitled to demand that an advisory opinion be given by an inquiry commission.¹⁶ When such a commission is appointed, the dispute cannot be decided until the commission has given its opinion.¹⁷

Proposed Convention of the US Senate

The scope of the above-mentioned 1978 proposed convention by the US Senate¹⁸ was broad since all major projects that might reasonably be expected to have adverse effects on the environment of other states or ABNJ were to be assessed, and the results of such 'international environmental assessments' were to be communicated to the potentially affected state as well as the United Nations Environment Program (UNEP), especially in cases of potential damage to the environment of ABNJ.¹⁹ In case the potentially affected state or, in the case of global commons (ABNJ), if UNEP so requested, the origin state was to consult these affected subjects 'with a view towards preventing or minimizing any potential adverse environmental consequences beyond its territory'.²⁰ If the potentially affected state or UNEP so requested, the origin state was to 'refrain from initiating the project or activity for a period of not more than 90 days after submission of an international environmental assessment'.²¹ However, if the postponement of the project '[involved] serious risks to the safety of life or property or would otherwise be clearly infeasible', the origin state could go ahead with the project.²² The Senate's call for negotiations of an international convention on this basis never took off, but internally the US President adopted in the same year an Executive Order, which placed federal agencies under an obligation to assess the environmental effects of major federal actions with respect to the 'environment outside the United States, its territories and possessions'.²³

UNEP Goals and Principles of EIA

An important legally relevant instrument to the development of TEIA was the 1987 Goals and Principles of Environmental Impact Assessment adopted by UNEP.²⁴ Under this soft-law instrument, states are generally encouraged to conclude arrangements for cooperation not only with regard to potential transboundary impacts of an inter-state character but also, interestingly, with regard to potential pollution affecting ABNJ.²⁵ Principle 12 of the Goals and Principles requires that if the national EIA procedure indicates that the environment of another state is 'likely to be significantly affected by a proposed activity',²⁶ the origin state should notify the potentially affected state and 'transmit to the potentially affected state any relevant information from the EIA'.²⁷ If an agreement is reached between the states, timely consultations should take place between them. The principal importance of the document is that it was used as a model in the negotiations for the Espoo Convention.²⁸

Espoo Convention

The first full-fledged TEIA procedure was not adopted until 1991, with the conclusion of the Espoo Convention on Environmental Impact Assessment in a

Transboundary Context.²⁹ The Convention regulates situations where a significant adverse transboundary impact is likely to be caused to a state's environment by a proposed activity in another contracting state (the origin state). It aims to manage these situations by requiring the parties to cooperate with each other before the activity is undertaken. In order for this procedure to function effectively, the Espoo Convention requires the states parties to establish national and/or sub-national EIA procedures that allow for the integration of foreign impacts and foreign actors.³⁰

The TEIA procedure prescribed in the Convention differs in respect of activities listed in Appendix I and those that are not listed. The Convention contains a presumption that a TEIA procedure must be initiated in regard to the activities listed in Appendix I of the Convention. These activities are not, however, automatically included in the scope of the Convention; rather, it is presumed that in normal circumstances they are 'likely to cause a significant adverse transboundary impact'. In order to enforce this presumption with regard to the listed activities, the Convention contains a special mechanism for evaluating whether the criteria provided in Article 3(1) are fulfilled. If the origin state decides not to initiate a procedure with regard to an activity listed in Appendix I, the concerned states are, according to Article 3(7), obligated to discuss whether the TEIA procedure should be applied. If discussions between the states fail, either party has the right to initiate an inquiry commission procedure in which an expert panel gives its opinion on whether the activity is likely to cause a significant adverse transboundary impact. The Convention contains a reverse presumption with respect to those activities not listed in Appendix I: it is presumed that they do not fulfil the criteria laid down in Article 3(1) in normal circumstances. This presumption can be rebutted by showing that exceptional circumstances exist; for instance, the activity may be located very near an international border. The criteria for these exceptional circumstances are enumerated in Appendix III of the Convention and the procedure for states to negotiate on these proposed activities in Article 2(5).

The transboundary EIA procedure can thus commence in respect of both activities listed in Appendix I and other activities. When the origin state first notifies the potentially affected state on the basis of Article 3(1), the affected state must next confirm that it wants to participate in the procedure.³¹ The origin state is then obligated to study the transboundary impacts together with the affected state and allow the public³² of that state to participate in the process on the same terms as its own public would be entitled to.³³ After the impact assessment, the affected state has an opportunity through consultations with the origin state to comment on the proposed activity and its likely impacts; the public of the affected state is entitled to provide its comments on the proposed activity on the same terms as apply to the public of the origin state.³⁴ The final decision taken on the proposed activity in the origin state must take due account of the comments from the potentially affected state and its public and must be delivered

to the affected state.³⁵ The states' parties are not required to determine whether the impacts studied ultimately materialize, as post-project analysis is optional.³⁶

The institutional development within the Espoo Convention has progressed over time. The MOP, representing the voice of states' parties, has taken place four times and has adopted many important decisions pertaining to the institutional structure of the Espoo Convention. The Bureau of the Convention and the Working Group on EIA were established as organs coordinating the work pertaining to the development of the system of the Convention between the MOP. Secretariat tasks are handled by the United Nations Economic Commission for Europe (UNECE). The Implementation Committee studies potential non-compliance with the obligations of the Convention and reviews the Convention's implementation. The system of the Espoo Convention can most appropriately be qualified as an example of a recent phenomenon in international law that has developed in the field of environmental protection in particular and which Churchill and Ulfstein refer to as an autonomous institutional arrangement (AIA).³⁷

Kiev Protocol

The SEA Protocol to the Espoo Convention was signed in an extraordinary meeting of the parties in Kiev, 21–23 May 2003, by 35 countries, together with the EC. The Protocol primarily harmonizes the SEA procedures for the contracting states but it also includes provisions on transboundary SEA. Where the proposed plan or programme is likely to have significant transboundary effects, including health impacts,³⁸ Article 10 of the Protocol is applicable. If the potentially affected state opines that it is likely to be significantly affected by the proposed plan or programme, it has a right to request that the origin state commences the transboundary procedure. However, should the origin state consider that no such effect is likely, there exists no procedure, such as the inquiry commission procedure of the Espoo Convention, for the potential affected state to dispense the finding of the origin state.

The origin state is obligated to notify the potentially affected state before the adoption of the plan or programme 'as early as possible'. The notification must contain the environmental report and information regarding the decision-making procedure. The potentially affected state is obligated to respond within the time specified in the notification as to whether it wishes to participate in the procedure. If it so indicates, the two parties are to initiate consultations about the likely transboundary effects of the plan or programme and the measures to mitigate its environmental effects. Significantly, the parties are also obligated to organize the participation of the public and the environmental and health authorities of the potentially affected state on the same terms as apply to the public in the state of origin.

According to Article 11, all states' parties are obligated to ensure that the final decision on the plan or a programme takes due account of the environmental report and the comments received from the public, the expert authorities and, in the case of potential transboundary impact, the authorities and public in the potentially affected state. All the participants of the SEA procedure must also be sent the final decision, including a summary statement of how the environmental concerns were taken into account in the decision, how the comments by the public and expert authorities were considered in the decision-making and why a certain decision was taken *vis-à-vis* other reasonable alternatives. Importantly, as stipulated in Article 12, all the parties are also required to monitor the environmental effects of the implementation of the plans and programmes.

Draft North American TEIA Agreement

The draft TEIA, was negotiated under the umbrella of the North American Commission for Environmental Cooperation (NACEC), even though two of the parties are also signatories to the Espoo Convention. The draft TEIA is different in structure from the TEIA procedure of the Espoo Convention, as the national EIA procedures of both Canada and the US differ generally from those in Europe.³⁹ Although the negotiations between Canada, the US and Mexico produced a draft agreement, it is yet to be negotiated into an international treaty between the concerned states and currently there is no sign that such a process would be set in motion.

The draft TEIA contains two separate procedures: a notification procedure and a TEIA procedure. The origin state is obligated to notify the potentially affected state if certain objective criteria are fulfilled. If the proposed project is closer than 100 kilometres to the international border of the states, or if it belongs to the classes of activities defined in Appendix I of the TEIA, notification must be carried out by the origin state. This is a very objective criterion for initiation of the notification procedure, even more objective than that of the Espoo Convention, in which the notification duty is based on two criteria, i.e., that the proposed activity must be among the categories of activities listed in Appendix I of the Convention and that it must be likely to cause significant adverse transboundary impact on the environment of other contracting states. However, the notification duty of the Espoo Convention triggers the full TEIA procedure, whereas in the draft TEIA it is only a duty to notify other contracting states about the proposed activity, and nothing else. In the draft TEIA, the duty to conduct a TEIA is separated from the duty of notification. At this stage, the origin state is left with much larger discretion as to whether to initiate a TEIA: the only criterion is whether significant adverse transboundary environmental impact is likely from the proposed activity. The determination of whether such effects will ensue from the proposed project is made by the origin state alone, guided by the criteria in Appendix III of the instrument. The potentially affected state has no

right to dispute the findings of the origin state other than by appeal to the general dispute settlement provisions of the instrument.⁴⁰

ILC Draft Articles on Prevention

The International Law Commission (ILC) has provisionally adopted draft articles on 'prevention of transboundary damage from hazardous activities'. It seems clear that these articles will remain drafts even if there were plans in place to aim for an international treaty when these were adopted. In any case, the draft articles may well have consequences for the development of customary law on the subject because they have already been adopted by the ILC and are general in scope.

The draft articles apply to a broad set of situations. They include all activities which 'involve a risk of causing significant transboundary harm through their physical consequences'⁴¹ and are not prohibited by international law. The required physical consequences are not confined to likely impacts; only the existence of risk is required. According to Article 2(a), this includes both 'a low probability of causing disastrous harm and a high probability of causing other significant harm'. 'Harm' is defined to include harm to 'persons, property or the environment'.⁴² The geographical scope of the draft articles is broad since the link between the activity and the origin state is established through the criterion of 'jurisdiction or control', which includes the areas of jurisdictional competence of states.⁴³ A potentially affected state is also defined inclusively as any state 'which has jurisdiction or control over any other place where such harm is likely to occur'.⁴⁴

The states are required to establish prior procedures – both impact assessment⁴⁵ and licensing procedures – for the environmentally harmful activities.⁴⁶ The origin state must notify the potentially affected state if the assessment indicates a risk of significant transboundary harm.⁴⁷ This notification must be done in a timely manner, and the origin state must transmit to the potentially affected states 'the available technical and other relevant information on which the assessment is based'.⁴⁸ The potentially affected state must respond to this notification within a reasonable time.⁴⁹

If the origin state does not notify the potentially affected state, and the affected state has reasonable grounds to believe that the draft articles apply, the latter can make a request for the origin state to apply Article 10.⁵⁰ If the origin state in turn finds that the draft articles are not applicable, it must 'so inform the other state within a reasonable time, providing a documented explanation'.⁵¹ In such an eventuality, the potentially affected state has a right both to enter into consultations⁵² and to request that the origin state takes measures to minimize the risk or 'suspend the activity in question for a period of six months unless otherwise agreed'.⁵³ If the origin state refuses to apply the draft articles, Article 17(2) provides that if the concerned states have not reached an agreement

within six months, the potentially affected state can initiate a fact-finding procedure. The report of the fact-finding commission has only an advisory character.⁵⁴ The origin state must ensure that the public likely to be affected is provided with information relating to the activity, the risk involved and the harm that may ensue.⁵⁵ In addition, the public is guaranteed an undefined right to make its views known.⁵⁶

TRANSBOUNDARY EIA AND CUSTOMARY INTERNATIONAL LAW

There is a clear connection between TEIA and the no-harm Principle (sometimes referred to as no-significant harm principle), given that TEIA is often seen as the procedural component of the no-harm principle, which is articulated in principle 2 of the Rio Declaration and has been endorsed by the ICJ as being part of general international law.⁵⁷ Principle 2 reads:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The primary rule here is that of no-harm, namely that the states have responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to ABNJ. This primary rule is not an absolute one, that is, an obligation of result, requiring the origin state to prevent damage to the environment of other states or in ABNJ. It is a due diligence principle, which requires states to take all appropriate measures to prevent or minimize the risk of significant transboundary harm, which includes domestic policies and legislation on private and public conduct capable of preventing or at least minimizing the risk of significant transboundary harm and to take account of evolving standards of technology.⁵⁸ Given that the no-harm rule is an obligation of diligent prevention and control of foreseeable risks, it is equally clear that in most cases of potential transboundary harm, TEIA must be undertaken.

Pulp Mills on the River Uruguay case

This issue was authoritatively dealt with by the ICJ in the recent *Pulp Mills* case between Uruguay and Argentina.⁵⁹ In this dispute over the potential and actual environmental harm caused by the construction and operation of pulp mills located close to the mutual border river between the disputing states, the ICJ, in 2010, made some interesting statements over the status of TEIA in general international

law as part of the overall no-harm and due diligence principles (even if it resolved the dispute mainly by applying the 1975 Statute of the River Uruguay).

The Court confirmed that the no-harm principle is a customary rule, and as such has its origins in the due diligence that is required of a state in its territory. For this reason, the Court argued, a state is obligated to use all the means at its disposal in order to avoid activities that take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state.⁶⁰

The Court, importantly, elaborated also on the procedural requirements under general international law in cases of breach of the no-harm and due diligence principles. It stated that due diligence cannot be considered to have been exercised, if the party planning the works liable to affect the quality of the border river did not undertake an EIA on the potential effects of such undertakings and did confirm that customary or general international law requires the origin state to undertake an EIA in cases where there is a risk of the proposed industrial activity having a significant adverse transboundary impact. In the words of the Court:

In this sense, the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.⁶¹

Yet the Court was careful in navigating between views that argue on the one hand that there already exists a fairly specific scope and content for TEIA based e.g., on the Espoo Convention, and on the other, that it is enough that some sort of TEIA is done.⁶² According to the Court, the starting-point is that general international law does not specify any clear scope and content for EIA. Yet, it did also state:

... it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.⁶³

The Court clearly perceives that EIA and other procedural duties form part and parcel of the principles of no-harm and due diligence. What is interesting is how much emphasis the Court places on the exact requirement to carry out an EIA as a mandatory requirement of no-harm and due diligence in transboundary pollution cases. Another interesting feature is that the ICJ emphasizes one aspect that is left optional, for instance in the TEIA prescribed by the Espoo Convention, namely the continuous monitoring of the effects of the project.⁶⁴ Here the Court seems to have followed its reasoning in its earlier judgment in the *Gabčíkovo-Nagymaros* case, where it essentially took the view that evaluation of the environmental risks of proposed activities and monitoring of the materialized impacts should be seen as part of the concept of sustainable development⁶⁵, a view that was even further clarified by the then Vice-President of the ICJ, Christopher Weeramantry, in his separate opinion.⁶⁶

TRANSBOUNDARY EIA IN SHARED AREAS

Shared areas contain resources that are not fully subject to the exclusive jurisdiction or control of a state but cannot be deemed to be common property of all states either. Usually, there is a certain measure of common interest in exercising shared rights over the resource in question, which is most often a geographically confined one. Well-known examples are enclosed or semi-enclosed seas (such as the Baltic Sea, where the TEIA can become quite a complex procedure to organize, as will be shown in Chapter 9) and international rivers. The role of TEIA is different in the management of shared resources than it is in situations of potential transboundary pollution between states. The clearest difference is that TEIA is normally only one of the policy tools to protect the environment and regulate the use of a shared resource.

For a long time, the law relating to transboundary watercourses has been considered *lex specialis* from the operation of the no-harm principle. The 1966 'Helsinki Rules on the Uses of the Waters of International Rivers' (hereinafter 'the Helsinki Rules')⁶⁷ are widely taken as representing the basic principles governing the use of international rivers.⁶⁸ Chapter 2 in particular of these rules, which relates to the principle of equitable utilization, has received the status of *lex lata* and was endorsed in the 1997 Convention on Non-Navigational Uses of International Watercourses prepared by the ILC.⁶⁹ Yet, the recent judgment by the ICJ in the *Pulp Mills* case provides nuance to this view. According to paragraph 204 of the judgment:

... a practice, which in recent years has gained so much acceptance among states that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity

may have a significant adverse impact in a transboundary context, in particular, on a shared resource. (emphasis mine)

Hence, it seems that the principles of no-harm and due diligence require TEIA in particular on a shared resource such as a border river, an argument that consolidates the view that no-harm principle – together with associated TEIA – complements the considerations of equitable use in international rivers and drainage basins.

TRANSBOUNDARY EIA IN AREAS BEYOND NATIONAL JURISDICTION

In a typical case, TEIA between states takes place between the sovereign areas of states, where both the origin and the affected state have exclusive jurisdiction. Hence, the treaties regulating such TEIA need to be built on those premises, as a reciprocal affair between two or more states regarding the transboundary impact. International areas and parts of shared areas are not the subject of exclusive territorial jurisdiction of one state, which creates differences in respect of TEIA issues. The terms 'origin state' and 'affected state' that are normally used with regard to territorial TEIA between states are not well suited to TEIA in shared and international areas, where activities as well as their impacts may take place outside the territory of a state; for example, if the environmental impacts of an activity take place in international areas, the term 'affected state' does not apply. This may have consequences for the various procedural and substantial components of a TEIA procedure, for instance, for questions of who should be notified and consulted.

Areas beyond national jurisdiction (ABNJ) are those areas or resources that lie outside of the jurisdiction of any nation or group of nations. Space, the deep seabed, the high seas and, to a different degree, Antarctica, are all ABNJ, areas which face challenges from the viewpoint of environmental protection, given that they and their resources are 'common things', available for consumption by everyone. From the legal point of view, ABNJ fall squarely within the principles of no-harm and due diligence discussed above, as articulated in Principle 2 of the Rio Declaration:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. (emphasis mine)

As analysed above, the ICJ has many times confirmed that this principle is now part of the corpus of international law, and is thus applicable to all states of the world. It has to be admitted that even if this principle is *lex lata*, the obligation that states are required to ensure that no significant harm is caused to ABNJ has gained its main support from international treaties and other instruments rather than actual state practice.

The most developed EIA regime for a *sui generis* type of ABNJ is functioning in the Antarctica.⁷⁰ Yet there are also some interesting developments as regards space activities and the deep seabed.⁷¹ Articles 204–206 of the UN Convention on the Law of the Sea (UNCLOS) outline clear but general legal obligations to conduct an EIA over the potential effects of planned activities under their jurisdiction or control that may cause substantial pollution of or significant and harmful changes to the marine environment in general. In a similar vein, the Convention on Biological Diversity (CBD) in its Article 14(1) obligates states to conduct TEIAs over impacts to biological diversity in ABNJ.⁷² The most recent developments have taken place in international discussions over how the biodiversity in ABNJ should be managed.⁷³ Even if no consensus has yet emerged, it is interesting that both main processes that have tackled the issue – United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity in ABNJ and the thematic programme of marine and coastal biodiversity of the CBD – have endorsed TEIA as an important means of protecting biodiversity in ABNJ. The UN Working Group recommended to the UN General Assembly (16 March 2010) the role of TEIA in the following way:

Environmental impact assessments

14. *The General Assembly should recognize the importance of environmental impact assessments, in particular for the implementation of ecosystem and precautionary approaches.*

15. *It should request the Secretary-General to include, in the annual report on oceans and the law of the sea, information on environmental impact assessments undertaken with respect to planned activities in areas beyond national jurisdiction, including capacity-building needs, on the basis of information requested from States and competent international organizations.*

16. *It should recognize the importance of further developing scientific and technical guidance on the implementation of environmental impact assessments with respect to planned activities in areas beyond national jurisdiction, including consideration of the assessment of cumulative impacts.*⁷⁴

TRANSBOUNDARY EIA AND INTERNATIONAL FINANCIAL INSTITUTIONS

The development of environmental policy in multilateral development banks predates many of the well-known international environmental agreements.⁷⁶ This early interest of development banks in environmental issues may be explained by the strong interrelationship between economic development and environmental issues. While certain environmental concerns may in part be addressed by promoting economic development, development projects may cause significant adverse environmental consequences.⁷⁷

Probably a combination of various factors explains why, since the end of the 1980s, development banks have paid increasing attention to the environmental aspects of their lending activities. These factors include the growing environmental consciousness worldwide, awareness of environmental concerns of development projects, attention to these issues by international commissions and NGOs, and the development of declarations and agreements regarding environmental protection. In particular, EIA for development projects has become a central instrument of the environmental guidelines and policies of development banks. The World Bank has played a central role in this trend with its 2007 revised Operation Policy Statement 4.01 and Best Practice 4.01 on Environmental Assessment.⁷⁸ On a regional level, the European Bank for Reconstruction and Development (EBRD) has played a strong role in EIA, explicitly using the Espoo Convention as the main standard in projects likely to involve transboundary impacts.⁷⁹

Governments play a key role in developing and implementing TEIA procedures. Although non-state actors have been involved in the negotiating process of certain TEIA systems, it is the state governments that remain the main actors: they have reached agreement on the various components of TEIA, such as the threshold for determining the need to conduct an EIA and various procedural arrangements, and they must ensure that legal entities under their jurisdiction are subjected to the EIA requirements in accordance with the TEIA system and that the system is being applied in practice. As development banks are primarily owned by governments, governments have had a great deal of influence on the banks' use of EIA as an instrument of environmental policy.

However, anthropogenic transboundary impacts on the environment or other values and interests (e.g. human rights and cultural values) are certainly not the exclusive concern of governments. With the globalization of the economy, prevention and control of adverse social and environmental impacts by multinational companies operating in developing countries has become a topical issue internationally. Particularly in the last 15 years, corporate social responsibility (CSR) in industry has

become an important subject of research and practice. Among the many developments that illustrate this trend are the establishment of the World Business Council for Sustainable Development,⁸⁰ the adoption of the OECD Guidelines for Multinational Enterprises⁸¹ and the emphasis on the need to develop partnerships in order to involve business in searching for solutions to sustainability issues. While in the past CSR was often considered important for the prevention of damage to a company's reputation, environmental performance is now increasingly and explicitly considered part of a company's core areas of concern.

The special position of the financial sector has been widely acknowledged in developments towards increased responsibility for industry in sustainability issues, among these the prevention of adverse transboundary environmental effects. Financial institutions may have great influence on the environmental performance of industries and even governments through the stock market, direct investments and insurance practices. This influence may be established by banks' choices of which companies they wish to do business with and what terms they set for their clients. With respect to investment activities, this is called 'Socially Responsible Investment' (SRI): expanding stock market practice to evaluate the social records of companies, including their record of environmental compliance and performance, for instance, the one in use in the Johannesburg Stock Exchange.⁸²

Commercial banks have also responded to this trend, for instance, by developing sustainable funds. With the adoption of the Equator Principles, 65 commercial banks have committed themselves to make an effort to ensure that the projects these banks finance are developed in a manner that is socially responsible and reflect sound environmental management practices. EIA takes a central place in the principles, thereby confirming that it is a fundamental component of SRI. Currently (October 2010), the Equator Principles are put through a Strategic Review process, the intention being to produce a multi-year strategic vision to make sure that the 2006 Equator Principles⁸³ retain their viability in environmental and social risk management for project finance within the financial sector.

CONCLUSION

TEIA has clearly become an important instrument of environmental policy and law in many parts of the world and has been prescribed by a number of international conventions.⁸⁴ Certain conventions apply to activities that may cause significant impacts on the environment of a neighbouring country, while only a few regulate EIA for activities in certain ABNJ. In areas where such agreements do not apply, TEIA has increasingly been implemented through the application of national EIA legislation to activities with potential significant transboundary impacts. Parallel to the development and implementation of these

systems initiated and adopted by state governments, financial institutions have adopted and continuously improved policies to limit the risk of getting involved in a project that would be inconsistent with the aim of sustainable development, for instance, because the project would cause environmental degradation. The instrument of EIA constitutes a central component of these policies, given that many of the World Bank financed investment projects require an EIA report and the EBRD is committed to applying the Espoo Convention when a project it finances is likely to have transboundary impacts, even if the host country is not a party to the Convention.

It is also likely that the spread of TEIA will gradually continue. Even if the ICJ in the 2010 *Pulp Mills* case was hesitant in using the Espoo Convention as establishing standards for due diligence, this was mainly due to the fact that the Court needs to be careful in not applying conventions that are not in force for the disputing parties. It is important that the ICJ has now confirmed that TEIA – in cases where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context – can now be considered a requirement under general international law and thus be binding on all states.⁸⁵ States that are currently applying national EIA law to activities with potential transboundary impact in a certain region may, at a certain moment in time, decide to harmonize their practices by the adoption of a TEIA agreement or guidelines for that particular region, or to become part of an already existing TEIA agreement, such as the Espoo Convention.⁸⁶

Financial institutions will most likely continue to promote this process: by requiring EIA in the process of financing a project, a state government becomes familiar and experienced with applying the instrument of EIA and may thereby be prompted to adopt national EIA legislation, to apply such legislation to transboundary impact situations, to become a party to an existing TEIA convention, or to initiate a process of developing a new TEIA agreement for a region. In respect of state governments that are already parties to a TEIA agreement, financial institutions may stimulate governments to implement such agreements adequately. Moreover, financial institutions may promote the spreading of TEIA directly in their relations with private operators.

Finally, TEIA will probably be developed further for ABNJ. In view of the recent developments regarding ABNJ, TEIA for these areas will require serious attention in the near future. A particularly important development is the emerging consensus on having a strong role for TEIA in managing difficult issues related to marine biological diversity in ABNJ.

TEIA has evolved most clearly within the UNECE region. The Espoo Convention and its SEA Protocol are clearly the leading legally binding treaties on TEIA, the Convention having 45 parties in North America, Europe and Central Asia and its SEA Protocol recently having entered into force (11 July 2010). If states are serious about observing their customary law TEIA obligations, it seems fairly obvious that they should make use of the standards of the Espoo

Convention for TEIA – an observation that applies also to multilateral development and commercial banks when they grant loans for projects likely to have significant adverse transboundary impacts. The first meeting of the Espoo Convention opened up the membership of the Convention to any UN member state; unfortunately, it will probably still take quite some time for this amendment to enter into force.⁸⁷ The same applies to multilateral development and commercial banks when they grant loans for projects likely to have significant adverse transboundary impacts.

Even if it can be concluded that the Espoo Convention and other international TEIA standards are a best guarantee for states to follow their customary law obligations, it is also the case that TEIA procedures are currently and increasingly taking place mainly within the UNECE region in general and between Member States of the EU in particular. In many instances, customary law obligations are not followed as standard practice, in contrast with the situation where states have negotiated, implemented and continuously develop a specific international convention for TEIA, such as the Espoo Convention. The EU has implemented the requirements of the Espoo Convention in a very rigorous manner, as will be shown in Chapter 3, which has further increased existing TEIA procedures between the EU Member States.

NOTES

- 1 Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) (OJ L175, 5.7.1985, p40).
- 2 Senate resolution 49 passed by the Senate on 21 July 1978. It is reproduced in 4 *ILM* 1082 (1978). In the following year, the Council of the OECD made a recommendation to the member governments on the 'Assessment of Projects with Significant Impacts on the Environment'. However, this recommendation only referred to 'environmental assessment procedures for actions that might have significant transboundary effects' (paragraph 8). The recommendation adopted on 8 May 1979 (C (79) 116). The recommendation can be found in Hohmann, H. (ed) (1992) *Basic Documents of International Environmental Law: The Important Declarations*, Graham & Trotman Ltd, vol 1, pp400–401, available also at <http://sedac.ciesin.org/entri/texts/oecd/OECD-4.15.html>
- 3 The 1974 Nordic Environmental Protection Convention (NEPC). The NEPC was signed on 19 February 1974 by Finland, Sweden, Norway and Denmark and came into force on 5 October 1976. It is still in force. The NEPC contains a Protocol, paragraph 1 of which provides: 'In connection with the signing today of the Nordic Environmental Protection Convention the duly authorized signatory agreed that the following comments on its application shall be appended to the Convention'. For an overview of the Convention, see Broms, B., *The Nordic Convention on the Protection of the Environment*, in Flinterman, Kwiattkowska, Lammers (eds) (1986) *Transboundary Air Pollution: International Legal Aspects of the Co-operation of States*, Martinus Nijhoff Publishers, pp141–152.

4 Ibid., Article 1 of the NEPC ends its enumeration of pollution effects with 'etc.'
 5 Ibid., Article 5.
 6 Ibid., Article 11.
 7 Ibid., Article 5.
 8 Ibid. Article 4 defines the concept of 'supervisory authority': 'Each State shall appoint a special authority (supervisory authority) to be entrusted with the task of safeguarding general environmental interests insofar as regards nuisances arising out of environmentally harmful activities in another Contracting State'.
 9 Ibid., Article 5.
 10 Ibid.
 11 Ibid., Article 6.
 12 Ibid., Article 7.
 13 Ibid., Article 10.
 14 See Broms 1986, Ibid. note 3, p 148.
 15 Article 11 of the NEPC.
 16 Ibid., Article 12. The Espoo Convention contains a similar provision which is discussed later in this chapter and also in Chapters 3 and 5.
 17 Ibid.
 18 Senate resolution 49 passed the Senate on 21 July 1978. It is reproduced in 4 *ILM* 1082 (1978).
 19 Article I of the resolution.
 20 Ibid., Article II(1).
 21 Ibid., Article II(2).
 22 Ibid.
 23 Section 1 of the Executive Order, Executive Order 12114 - Environmental effects abroad of major Federal actions, available at www.archives.gov/federal-register/codification/executive-order/12114.html
 24 Reproduced in Basic Documents of International Environmental Law, vol 1, 1992, pp187-190, Ibid. note 2, also available at www.penelope.drec.unilim.fr/penelope/library/Libs/Int_nal/unep/unep.htm
 25 Principle 11 of the Goals and Principles.
 26 Ibid., Principle 12.
 27 Ibid.
 28 For an analysis of this connection, see Connelly, R., The UN Convention on EIA in a Transboundary Context: a Historical Perspective (1999) *Environmental Impact Assessment Review*, vol 19, pp37-46.
 29 The Convention on Environmental Impact Assessment in a Transboundary Context, printed in 30 *ILM* 800 (1991), and can be accessed via the home page of the Convention at www.unep.org/env/eia/documents/conventiontextenglish.pdf The Convention entered into force on 10 September 1997.
 30 Espoo Convention, Article 2 (2, 3 and 7).
 31 Ibid., Article 3 (1, 2 and 3).
 32 Ibid. The expression 'The public' was defined in Article 1(x) of the Espoo Convention simply as 'one or more natural or legal persons'. Due to the influence of the Aarhus Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters (25 June 1998, Aarhus, Denmark, in force

30 October 2001, 38 *ILM* 517 (1999)), the second MOP, held in Sofia in 2001, adopted an amendment to the Espoo Convention, adding the following to Article 1(x): 'and, in accordance with national legislation or practice, their associations, organizations or groups'.
 33 Ibid., Article 3 (1, 2 and 3), Article 3 (4-8) and Article 2(6) on non-discrimination.
 34 Ibid., Articles 4 and 5.
 35 Ibid., Article 6.
 36 Ibid., Article 7 and Appendix V.
 37 Churchill and Ulfstein argued in 2000 that a special feature of recent multilateral environmental agreements has been that states' parties not only conclude an agreement with binding obligations but also establish institutional frameworks, such as COPs, to oversee the development of the treaty system rather than setting up traditional inter-governmental organizations for this purpose. They also perceive that such AIAs, as they call them, can be considered as inter-governmental organizations (IGO) for the purpose of applicable law even though they are of a less formal nature and less permanent than the traditional IGOs. It seems clear that the system of the Espoo Convention qualifies as such an AIA. See Churchill, R. and Ulfstein, G., (2000) Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *American Journal of International Law*, vol 94, pp623-659.
 38 There is a significant difference between the Protocol and the Espoo Convention where the definition of environmental effect is concerned. The Protocol states explicitly that 'environmental effect' includes effects on the state of biodiversity, an element of the environment that was left out of the Espoo Convention's definition of 'impact' in Article 1(VII). The Protocol also places greater emphasis on impacts to human health than the Convention does. This focus manifests itself in many parts of the Protocol and is partly attributable to the influence of the World Health Organization (WHO) on the drafting of the instrument. On the other hand, in contrast to the Protocol, the Convention's definition of 'impact' covers changes in socio-economic conditions where such effects are caused by changes in physical factors.
 39 The main difference is that the European EIA Directive procedures are triggered if objective criteria are fulfilled, notably in relation to a list of large scale environmentally harmful activities. If the procedure is initiated, it normally continues until the licensing decision is made. The North American EIA procedures contain more flexibility, as was noted above. Especially in the federal EIA procedure of the US, the agency in charge can decide to make a preliminary impact study after which it may decide whether a full-blown impact study is required or whether the project can proceed. See Gilpin, A. (1995) *Environmental Impact Assessment (EIA): Cutting Edge for the Twenty-First Century*, Cambridge University Press.
 40 See further, Craik, N., Transboundary Environmental Impact Assessment in North America: Obstacles and Opportunities in Bastmeijer, K. and Koivuova, T. (eds) (2008) *Theory and Practice of Transboundary Environmental Impact Assessment*, Martinus Nijhoff, Leiden pp93-117.
 41 Article 1 of the draft articles. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf

- 42 Ibid., Article 2(b).
- 43 Ibid., Article 2(d).
- 44 Ibid., Article 2(e).
- 45 Ibid. Article 8 provides: 'Any decision in respect of the authorization of an activity within the scope of the present draft articles shall be based on an evaluation of the possible transboundary harm caused by that activity'.
- 46 Ibid., Article 7.
- 47 Ibid., Article 10(1).
- 48 Ibid.
- 49 Ibid., Article 10(2).
- 50 Ibid., Article 13(1).
- 51 Ibid., Article 13(2).
- 52 Ibid., Article 11(1).
- 53 Ibid., Article 13(3).
- 54 Ibid., Article 17(2).
- 55 Ibid., Article 9.
- 56 Ibid.
- 57 The ICJ first stated this view in its Advisory Opinion in the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p226, paragraph 29. The Court also repeated this passage in the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, p7, paragraph 53.
- 58 See Birnie, P., Boyle, A. and Redgwell, C. (2009) *International Law & the Environment*, Oxford University Press, in particular pp143–150.
- 59 *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20 April 2010, Judgment, available at www.icj-cij.org/docket/files/135/15877.pdf. For recent commentary, see De Mulder, J., (2010) Case Note, *Review of European Community and International Environmental Law*, vol 19, no 2, pp263–267.
- 60 Ibid., paragraph 101.
- 61 Ibid., paragraph 204.
- 62 Ibid., paragraphs 203–205. The Court did emphasize another instrument taken up by Argentina, namely the above-mentioned UNEP Guidelines on EIA. Yet, it stated that these principles as non-binding international technical standards should be taken into account when interpreting and applying Article 41(a) of the Statute of the River Uruguay, which referred to such standards (paragraph 205).
- 63 Ibid., paragraph 205.
- 64 After a careful examination, the Court came to the conclusion that Uruguay had acted with the requisite degree of due diligence in conducting its transboundary EIA over the harmful effects of permitting the construction of the Botnia pulp mill, even if it also found Uruguay to have violated procedural obligations of the 1975 Statute.
- 65 *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, p7. Paragraph 140 of the judgment reads: 'In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature [...]. The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage [...]. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development [...]' *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Ibid. note 65, p111.
- 66 In his separate opinion, Weeramantry provided, under the heading 'The Principle of Continuing Environmental Impact Assessment' (at 88–119) the following: 'I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring'. Ibid. p111.
- 67 The Helsinki Rules can be obtained in vol. 1, Basic Documents of International Environmental Law, p227. These rules were adopted by a non-governmental expert body of international lawyers, the ILA.
- 68 Article I of the Helsinki Rules declares: 'The general rules of international law as set forth in these chapters'. Thus, the intent was to codify the law relating to transboundary watercourses. Although the term 'international river' is used in the name of these rules, they apply to 'international drainage basin', a term defined in Article II of the Helsinki Rules as follows: 'An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus'.
- 69 Articles 5 and 6 of the 1997 Watercourses Convention. In the 1966 Helsinki Rules, equitable utilization is defined in the following manner: Article IV provides: 'Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin'; the beginning of Article V adds: 'What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case'; and finally, Article VI states: 'A use or category of uses is not entitled to any inherent preference over any other use of category of uses'. Article 6 of the 1997 Watercourses Convention is the most relevant here. Paragraph 1 of the Article provides: 'Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances'. Paragraph 3 adds: 'The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole'. See also the ILC produced 2008 Draft Articles on the Law of Transboundary Aquifers, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf

- 70 Bastmeijer, K. and Roura, R., Environmental Impact Assessment in Antarctica in Bastmeijer, K. and Koivurova, T. (eds) (2008) *Theory and Practice of Transboundary Environmental Impact Assessment*, Martinus Nijhoff, Leiden, 175–219.
- 71 See Part II in *Theory and Practice of Transboundary Environmental Impact Assessment*, Ibid. note 70.
- 72 Article 14(1) of the Convention on Biological Diversity prescribes that: 'Each Contracting Party, as far as possible and as appropriate, shall: ... (c) Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate; (d) In the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage ...', available at www.cbd.int/convention/conventions.html
- 73 For a comprehensive overview, see Warner, R. (2009) *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework*, Martinus Nijhoff Publishers, in particular pp207–235.
- 74 The Working Groups recommendation to the General Assembly can be found at the beginning of the Co-Chairs document, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/277/20/PDF/N1027720.pdf>
- 75 The COP provided that: '8. Invites Parties, other Governments and relevant organizations, including in the context of the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, to cooperate in further developing scientific and technical guidance for the implementation of environmental impact assessments and strategic environmental assessments for activities and processes under their jurisdiction and control which may have significant adverse impacts on marine biodiversity beyond national jurisdiction, taking into consideration the work of Food and Agriculture Organization of the United Nations, the International Maritime Organization, and other relevant organizations, with a view to ensuring such activities are regulated in such a way that they do not compromise ecosystem integrity, and to report to the COP at its Tenth Meeting on progress made in that regard; 9. Notes the need for capacity-building for developing countries, in order to fully implement existing provisions of environmental impact assessment, as well as the challenges and difficulties in carrying out environmental impact assessment in areas beyond national jurisdiction; 10. For the purpose of paragraphs 8 and 9 of the present decision, taking into account the relevant provisions of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity, decides to convene an expert workshop, including experts from different relevant organizations, with balanced regional and sectoral representation, to discuss scientific and technical aspects relevant to environmental impact assessment in areas beyond national jurisdiction with a view to contributing to the development of such scientific and technical guidance,

- building on ongoing relevant sectoral, regional and national environmental impact assessment efforts'; Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its Ninth Meeting (IX/20. Marine and Coastal Biodiversity), UNEP/CBD/COP/DEC/IX/20, 9 October 2008, available at www.cbd.int/doc/decisions/cop-09/cop-09-dec-20-en.doc
- 76 See, among others, Steer, A. and Mason, J. (1995) The Role of Multilateral Finance and the Environment: A View from the World Bank, *Indiana Journal of Global Legal Studies*, vol 3, pp35–45.
- 77 See Guyett, S. C. (1991–92) Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development, *New York University Journal of International Law and Politics*, vol 24, p892.
- 78 See the OP, available at <http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,contentMDK:20064724-menupK:64701637-pagePK:64709096-piPK:64709108-theSitePK:502184,00.html> and BP available at <http://web.worldbank.org/WEBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,contentMDK:20064614-menupK:64701637-pagePK:64709096-piPK:64709108-theSitePK:502184,00.html>
- 79 See the EBRD's Environmental and Social Policy (May 2008), available at www.ebrd.com/downloads/about/sustainability/2008policy.pdf
- 80 Available at www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?MenuID=1
- 81 The text is available at www.oecd.org/dataoecd/56/36/1922428.pdf
- 82 Available at www.jse.co.za/about-us/media/press-releases/full-story/06-05-04/Launch_of_JSE_Socially_Responsible_Investment_Index.aspx
- 83 Available at www.equator-principles.com/documents/Equator_Principles.pdf
- 84 For comprehensive studies, see Craik, N. (2008) *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, Cambridge University Press and Theory and Practice of Transboundary Environmental Impact Assessment, Ibid. note 70.
- 85 *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20 April 2010, Judgment, paragraph 204, available at www.icj-cij.org/doc/docet/files/135/15877.pdf
- 86 This is, however, not yet possible, given that the first amendment to the Convention, which makes it potentially possible for any UN member to become a party outside of the UNECE region, has not yet entered into force. See the current status of ratification of the first amendment, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-4-a&chapter=27&lang=en
- 87 Article 17(2) addition: 'Any other State, not referred to in paragraph 2 of this Article, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties. The Meeting of the Parties shall not consider or approve any request for accession by such a State until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 27 February 2001', available at www.uncece.org/env/eia/about/amendment.html. For a proposal on how to speed up this process, see Knox, J. (2003–05) Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment, *New York University Environmental Law Journal*, vol XII, pp153–168, at p168, available at www1.law.nyu.edu/journals/envtlaw/issues/vol12/1/12n1a6.pdf