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VOLUME 1

Theory and Practice of Transboundary Environmental Impact Assessment

Edited by

Kees Bastmeijer

Timo Koivurova

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Chapter 1

Introduction

Kees Bastmeijer and Timo Koivurova

1. INTRODUCTION

This book examines thirteen systems of Transboundary Environmental Impact Assessment (TEIA) currently in use or being developed in different parts of the world. The aim of the work is to trace the history and content of the systems and – as the title suggests – to disseminate information on the practical experiences gained in their development and implementation. In providing a study of each system by experts, the book enables the reader to compare and contrast the systems, helping him or her to identify good practices that will enhance TEIA in the future. The concluding chapter of the volume provides a contribution to this comparison and to the discussion on the status of TEIA in international environmental law.

Environmental Impact Assessment (EIA) is an environmental policy instrument that 'is considered a necessary tool in order to give the environment its proper place in the decision-making process by improving the quality of information to decision makers, so that environmentally sensitive decisions can be made paying careful attention to minimising impacts, improving the planning of activities and protecting the environment.'[1] TEIA is generally associated with EIA between territorial states, but the contributors to this volume understand it more broadly as encompassing EIA procedures designed to evaluate possible impacts by human activities on another state's environment or the environment of areas beyond a state's national jurisdiction. In line with this definition, we have

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1 With Woodliffe, we adopt this definition of EIA from 'Policies and Systems of Environmental Impact Assessment', ECE/ENVWA/15.1991, at 1. See J. Woodliffe, 'Environmental Damage and Environmental Impact Assessment', in M. Bowman and A. Boyle (eds.), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford: Oxford University Press, 2002) 133-147, at 134.

divided the book into three parts: Part I 'Transboundary EIA between States', Part II 'EIA for Activities in International and Shared Areas' and Part III 'EIA Required by International Financial Institutions'.

One reason for using the word 'transboundary' instead of 'international' is to make a clear departure from the current extensive literature that uses the term 'international EIA' but mainly consists of comparisons between domestic EIA systems. A number of other terminological choices have had to be made as well. As different jurisdictions use different EIA terminology, the contributors to the book have felt that 'EIA' should be used to refer to project-level EIA and 'SEA' (Strategic Environmental Assessment) to strategic-level EIA. The focus of the book is transboundary EIA systems for the simple reason that transboundary SEA systems are a very recent phenomenon and have not induced challenges where implementation or application is concerned.[2] Throughout the book, the main TEIA system – that based on the Convention on Environmental Impact Assessment in a Transboundary Context – is referred to as 'the Espoo Convention', because this is the most frequently used short name of Convention.[3]

This introductory chapter outlines the normative landscape of TEIA both in general terms and in respect of each of the three parts of the book. The status of TEIA in general international law is the first issue examined (section 2) – a discussion continued in more specific terms in the concluding chapter of the book. The section pays a good deal of attention to the no-harm principle, as we consider this to be one of the fundaments of TEIA. Section 3 then takes up the normative development related to each of the three parts of the volume. This provides the reader with a general framework before reading the chapters dealing with individual systems. Finally, the chapter sets out the focus and scope of the book in more detail (section 4).

2 The most well-known transboundary SEA systems are the EC Directive on SEA (Art. 7) and the Protocol on Strategic Environmental Assessment to the Espoo Convention, Kiev, Ukraine, 21 May 2003, Art. 10. Directive 2001/42/EC of the European Parliament and of the Council on the Assessment of the Effects of Certain Plans and Programmes on the Environment, Luxemburg, 27 June 2001.

3 The Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, in force 1997, 30 *International Legal Materials* (1991), at 800. The name derives from the place where the Convention was signed – Espoo, Finland. The history of the Espoo Convention has been presented in detail by Robert Connelly, who acted first as a rapporteur for the Warsaw seminar and later as chairman of the Working Group to elaborate the Draft Convention on Environmental Impact Assessment in a Transboundary Context. See Robert G. Connelly, 'The UN Convention on EIA in a Transboundary Context: A Historical Perspective', 19 *Environmental Impact Assessment Review* (1999), at 37-46.

2. THE DEVELOPMENT OF TEIA IN INTERNATIONAL LAW

2.1 The No-Harm Principle

Inspired by the *Trail Smelter* case of 1941[4] and the *Corfu Channel* case o the International Court of Justice (ICJ),[5] the scholarly world put forwar many formulations of a principle that would govern the responsibility o states for transboundary environmental pollution. A consensus on a expanded version of such a principle began to emerge when the 197 Stockholm Declaration was adopted. Principle 21 of the Declaration i particular was increasingly cited as the authoritative formulation:

> States have, in accordance with the Charter of the United Nations and th principles of international law, the sovereign right to exploit their ow resources pursuant to their own environmental (and developmental) policie and the responsibility to ensure that activities within their jurisdiction c control do not cause damage to the environment of other States or of area beyond national jurisdiction.[6]

This principle has been called 'the cornerstone of internationa environmental law'[7] and 'the basic rule for the elaboration of multilatera conventions.'[8] Particularly since the end of the 1970s, the second part of thi principle (or similar wording) has been included in an extensive number c

4 *Trail Smelter Case (Canada v. United States of America)*, Award of Arbitral Tribunal 1 March 1941, part three. The Tribunal in this case stated: 'under the principles international law, as well as the law of the United States, no state has the right to use permit the use of territory in such a manner as to cause injury by fumes in or to th territory of another or the properties of persons therein, when the case is of seriou consequence and the injury is established by clear and convincing evidence. Th formulation came to be known as the principle of *sic tuo utere* in accordance with an ol maxim derived from the Roman legal system. All the documents related to the ca (summary, report, agreements and awards) can be found in Cairo A.R. Robb (ed.), 'Ear Decisions', 1 *International Environmental Law Reports* (1999), at 231-331.

5 See the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland Ireland)*, Judgment of 9 April 1949, I.C.J. Reports (1949), at 22. The Court in this ca stated 'every State's obligation not to allow knowingly [their territories] to be used f acts contrary to the rights of other States.'

6 Declaration of the United Nations Conference on the Human Environment, Stockholr 16 June 1972, 11 *International Legal Materials* (1972), at 1416, Principle 21; and R Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, *International Legal Materials* (1992), at 874, Principle 2.

7 Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambrid University Press, 2003, 2nd edn), at 236.

8 Rene Lefeber, *Transboundary Environmental Interference and the Origin of Sta Liability* (The Hague: Kluwer Law International, 1996), at 22.

multilateral environmental treaties and declarations[9] and become known as 'the principle of due diligence' or 'the principle of no-harm'. In 2001, the principle received a prominent place in the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities of the International Law Commission.[10]

The ICJ has stated in two recent cases that the no-harm principle must be regarded as *lex lata*:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[11]

Particularly in view of these ICJ cases, a consensus has grown among scholars that the no-harm principle is *lex lata*.[12] More recently, this has been

9 See, e.g., Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, in force 1983, *United Nations Treaty Series* 21623, the Preamble; World Charter for Nature, GA Res. 37/7, 28 October 1982, para. 21(d); United Nations Convention on the Law of the Sea, Montego Bay, Jamaica, 10 December 1982, in force 16 November 1994, 21 *International Legal Materials* (1982), at 1261, Arts. 193 and 194(2); the Preamble of the 1985 Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1988), at 1529, Rio Declaration, *supra* note 6, at Principle 2; United Nations Framework Convention on Climate Change Convention, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992), at 849, the Preamble; and Art. 3 of the 1992 Biodiversity Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992), at 818. For a more complete list, see Rene Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, *supra* note 8, at 21 (footnotes 6-8); and Philippe Sands, *Principles of International Environmental Law*, *supra* note 7, at 244-245.

10 See the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries 2001, adopted by the International Law Commission at its 53rd session, para. 3. The document is available on the UN website, at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf> (accessed 22 November 2006).

11 The ICJ first expressed this view in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 6 July 1996, I.C.J. Reports 1996, at 226, para. 29. The Court repeated this passage in the case concerning the *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment 25 September 1997, I.C.J. Reports 1997, at 7, para. 53.

12 See, among others, Rene Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, *supra* note 8, at 19-25; Patricia Birnie and Alan Boyle, *International Law & The Environment* (2nd edn, Oxford: Oxford University Press, 2002), at 109; and Philippe Sands, *Principles of International Environmental Law*, *supra* note 7, at 236. However, there are a few scholars who refuse to accept that the principle of no-harm is a valid principle of international law. This is the position taken by Peter Malanczuk in *Akehurst's Modern Introduction to International Law* (7th revised edn, London: Routledge, 1997), at 245-247, but perhaps the most recent and well-known

confirmed by the Permanent Court of Arbitration in the *Iron Rhine Arbitration* case.[13] With the opinion so widespread that the no-harm principle is part of *lex lata*, the scholarly debate on the principle has moved on to study what exactly it requires of states. The references to 'activities within their jurisdiction or control' in the second part of Principle 21 and the relevant ICJ cases make it clear that the scope of the principle – and thereby of the responsibility of states – is considerably broader than the principle of non-harmful use of territory adopted in the *Trail Smelter* case and *Corfu Channel* case.[14] The term 'jurisdiction' refers not only to a state's (use of the) areas of sovereignty but also to its jurisdictional competence, e.g., the competence to regulate activities in its Exclusive Economic Zones (EEZ) and on its continental shelf as well as activities conducted by nationals in areas outside its territory. Furthermore, whereas the older formulations of the principle were restricted to *inter se* relations, its present elaboration protects the environment of international areas as well, making it an *erga omnes* norm.

From the substantive viewpoint, there exist numerous and diverse views as to what the principle means in practice.[15] As regards the term 'environment', it has been stated in the literature that 'while material injury of some kind is a necessary element of the customary obligation to control transboundary harm, this is not limited to the loss of resources or amenities of economic value to man, but can extend to the intrinsic worth of natura

effort to deny the legal status of the principle is that of Knox in 2002. Yet, Knox's view of how customary international law develops is not generally accepted, as he seems to require almost universal and uniform state practice, whereas the modern view of customary law perceives it as a process that is increasingly influenced by *opinio juris*. In fact, Knox's view of no-harm as not produced by customary law seems to derive from his general dissatisfaction with customary law as a source of international law: 'The time has come to recognize that customary international law is nearing the end of its useful life [because of treaty-law replacing it]. It should be allowed to pass into history, rather than forced to become a myth.' See John Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment', in 96 *American Journal of International Law* (2002), at 291-319.

13 Permanent Court of Arbitration in *Iron Rhine Arbitration Case (Belgium v. Netherlands)*, 24 May 2005, The Hague, para. 122, available at: <www.pca-cpa.org/upload/files/BE%20Reply.pdf> (accessed 1 February 2007).

14 See Philippe Sands *Principles of International Environmental Law*, *supra* note 7, at 242-243. With reference to *the Corfu Channel Case*, Sands states that, according to the ICJ 'the principle of sovereignty embodies "the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states".'

15 For an overview, see R. Pisillo-Mazzeschi, 'Forms of International Responsibility for Environmental Harm' in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm*, (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1991), at 15-35.

ecosystems, including biological diversity and areas of wilderness or aesthetic significance.'[16]

Where the 'threshold of harm' is concerned, the majority opinion seems to be that the no-harm principle refers to 'significant harm' only.[17] However, it has also been noted that Principle 21 of the Stockholm Declaration and other principles 'omit any qualifying reference to the level of harm or damage, and cast some doubt on the general assumption.'[18]

The nature of the obligation has also been broadly discussed: is it an obligation of due diligence or an obligation of result?[19] It has been argued that Principle 21 of the Stockholm Declaration and other principles do not provide clear guidance here and that 'the decisions of international tribunals in the *Trail Smelter* case, the *Corfu Channel* case, the *Lac Lanoux* case and the *Nuclear Tests* cases can be interpreted to support conclusions of absolute/strict liability or fault-based liability.'[20] However, the general view in the literature appears to be that the no-harm principle must be considered an international minimum standard providing a test in which a state's conduct is compared to what a 'reasonable' or 'good' government would do in a specific situation of transboundary pollution. The standard does not allow a poor national environmental protection system in the origin state to be used as a pretext for transboundary pollution nor is it an objective standard that is breached merely by a state's causing material damage to the environment of other states.[21] As stated in the literature, '[t]he advantages of this standard of conduct are its flexibility and the fact that it does not make the state an absolute guarantor of the prevention of harm'; however, it is also noted that this standard 'offers little guidance on what legislation or controls are required of states in each case.'[22] The standard is objectified when states

16 Patricia Birnie and Alan Boyle, *International Law & the Environment*, *supra* note 12, at 122.

17 See, among others, Rene Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, *supra* note 8, at 24 and 26-27. Lefeber states, 'the relativity of the obligation has found expression in the required amount of environmental interference and not in the required amount of harm.' See *Ibid.*, at 24-25.

18 Patricia Birnie and Alan Boyle, *International Law & the Environment*, *supra* note 12, at 123.

19 See, among others, *Ibid.*, at 112-114.

20 Philippe Sands, *Principles of International Environmental Law*, *supra* note 7, at 881.

21 In a literal reading, infringement of the due diligence principle does not seem to require anything other than the causing of damage. However, it was clear already at the Stockholm Conference that the additional requirement of diligence was an integral part of the concept. See Gunther Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Person', 74 *American Journal of International Law* (1980), at 525-565.

22 See, among others, Patricia Birnie and Alan Boyle, *International Law & the Environment*, *supra* note 12, at 112-113.

conclude an international treaty in which the degree of care is agreed upon Furthermore, in addition to international treaties, jurisprudence, stat practice and the literature have elaborated the standard in more detai through the identification of more concrete components that form part of thi broad due diligence obligation. TEIA is one of these components.

2.2 Interrelationship of the No-Harm Principle and TEIA

There is widespread scholarly consensus that the source state must appl TEIA in order to observe the no-harm principle.[23] It would be hard for a stat to argue that it had acted in due diligence if it had not even studied what th impacts of a proposed project on another state's environment would be Hence, should significant harm occur to the affected state, the source stat has breached the no-harm principle if it has not even conducted a TEIA. I the literature, TEIA has also been regarded as a component of othe international environmental principles. For instance, Cassar and Bruc conclude that TEIA 'has the potential to successfully incorporate som significant, yet practically difficult, elements of international law, includin the precautionary principle.'[24] Whether TEIA itself has developed into principle of customary international law will be discussed in the concludin chapter of the volume.

Despite the extensive discussions and developments, the no-harm principle remains a general principle that leaves ample room for states t implement and apply it in practice. Treaties and other normative instrumen are of great importance for states in implementing the principle, sinc without any specific treaty on TEIA, the likelihood of a state observing th requirements of the no-harm principle are lessened. Also important are th normative instruments concluded by non-state actors, for these, too, wi enhance the quality of EIA in general and TEIA in particular. TEIA treati also serve to operationalise the no-harm principle, providing concrete rul on how to conduct TEIA in specific regions and circumstances.

The following three sections outline the normative landscape for each the parts of the book, i.e., 'Transboundary EIA between States', 'EIA f

23 See, among others, Rene Lefeber, *Transboundary Environmental Interference and t Origin of State Liability*, *supra* note 8, at 54; J. Woodliffe, 'Environmental Damage a Environmental Impact Assessment', *supra* note 1, at 135-136; and A.Z. Cassar and C. Bruch, 'Transboundary Environmental Impact Assessment in International Watercour Management', 12 *New York University Environmental Law Journal* (2003), 169-244, 181.

24 A.Z. Cassar and C.E. Bruch, 'Transboundary Environmental Impact Assessment International Watercourse Management', *supra* note 23, at 242-243. See also Woodliffe, 'Environmental Damage and Environmental Impact Assessment', *supra* n 1, at 141.

Activities in International and Shared Areas' and 'EIA in International Financial Institutions'. The intention is to give the reader a sense of how TEIA has developed in these three separate but interrelated areas and thus provide the necessary backdrop for the treatment of individual TEIA systems that follows.

3. THREE DIMENSIONS OF TEIA

3.1 Transboundary EIA between States

Introduction

The best-known TEIA systems are those that operate between territorial states. These systems focus on the source state making a transboundary environmental impact assessment of the likely impacts on the environment of the potentially affected state(s). It was the spread of national EIA procedures and the work of international organisations, such as the Organization for Economic Co-operation and Development (OECD) and the United Nations Environment Programme (UNEP), that made it possible to conclude international treaties and other normative instruments on TEIA.[25]

[25] There are many relevant normative instruments adopted by several international organisations and these can be found among 'the important declarations', Hohmann, H. (ed.), 1 *the Basic Documents of International Law* (London: Graham & Trotman, 1992). The main international organisations in this field are the United Nations General Assembly (UNGA), the United Nations Environment Programme (UNEP), the Organization for Economic Cooperation and Development (OECD), the United Nations Economic Commission for Europe (UN ECE) and the Council of Europe. See, e.g., the following UN instruments: GA Res. 2995 (XXVII) of 1972, Cooperation Between States in the Field of the Environment; Charter of Economic Rights and Duties of States, 1974 (Art.3); UNEP Goals and Principles of Environmental Impact Assessment, 1987; Provisions for Cooperation Between States in Weather Modification. For the OECD, see, e.g., OECD recommendation on the Assessment of Projects with significant Impact on the Environment, 1979; OECD Recommendation on the Analysis of Environmental Consequences of Significant Projects, 1974; OECD Principles Concerning Transfrontier Pollution, 1974 (paras 6, 8); Equal Right of Access in Relation to Transfrontier Pollution in relation to implementation; Strengthening International Cooperation on Environmental Protection in Transfrontier Regions; Provision of Information to the Public and Public Participation in Decision-making Processes Related to the Prevention of, and Response to Accidents Involving Hazardous substances. See, e.g., the following UN ECE instruments: Declaration of Policy on Prevention and Control of Water Pollution, Including Transboundary Pollution; Decision on International Cooperation on Shared Water Resources; Decision on Principles Regarding Cooperation in the Field of Transboundary Waters, 1987. A relevant instrument concluded by the Council of Europe is the Air Pollution in Frontier Areas. See also Chapter 8 of Agenda 21, especially Section 8(5b). Agenda 21 can be found from Stanley P. Johnson, *The Earth Summit; the United Nations Conference on Environment and Development (UNCED)* (The Hague/ London: Martinus Nijhoff/Graham & Trotman, 1993), at 125-508.

These organisations promoted the development of international TEIA treaties on the basis of experiences with domestic EIA systems. In fact, various treaties regarding TEIA between states aim to integrate the affected states and their public into domestic EIA procedures and to include the studies of likely transboundary impacts in the overall impact assessment of a proposed activity.

Yet the application of national EIA to transboundary environmental impacts is not the only source contributing to the development of the international TEIA system. For instance, the Nordic Environmental Protection Convention, taken up by Timo Koivurova in Chapter 4, contained a rudimentary transboundary EIA procedure. The Convention, which entered into force already in 1976, did not seek to harmonise national EIA procedures with regard to transboundary impacts, as EIA procedures did not exist at the time in the Nordic countries. Its purpose was to create a transboundary EIA procedure and it contained elements which clearly provided a precedent for later negotiations on transboundary EIA.

The first full-blown transboundary EIA procedure having international importance, the EIA Directive of the EC, was not introduced until 1985. Prior to adoption of the Directive, however, the US – a country that had pioneered the idea of EIA – put forward an interesting proposal that a transboundary EIA treaty should be developed. A 1978 resolution of the United States Senate took this proposal forward, providing the outline of a general convention for a transboundary EIA procedure and urging other nations to participate in the negotiations for such a convention.[26] Although the resolution did not lead to any treaty negotiations, it will be useful to examine it here as a first outline of a convention on the matter.

The 1978 US Proposal for a convention on transboundary EIA

The scope of the proposed convention was broad since all major projects that might reasonably be expected to have adverse effects on the environment of other states or international areas were to be assessed. Moreover, the results of these 'international environmental assessments' were to be communicated to the potentially affected state as well as the United Nations Environment Programme (UNEP), especially in cases of potential damage to the

[26] Senate resolution 49 passed the Senate on July 21, 1978. It is reproduced in 4 *International Legal Materials* (1978), at 1082. In the following year, the Council of the OECD made a recommendation to the member governments entitled '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' (para. 8). Recommendation adopted on 8 May 1979 (C (79) 116). The recommendation can be found in 1 *Basic Documents of International Environmental Law* (1992), *supra* note 25, at 400-401.

environment of international areas.[27] Where the potentially affected state or, in the case of the global commons, UNEP so requested, the origin state was to consult the affected subjects 'with a view toward preventing or minimizing any potential adverse environmental consequences beyond its territory.'[28] 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.'[29] However, if 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.[30] The idea of having a procedure to cover impacts on global commons was truly an innovative one, but it has not been taken forward; for example, it was not incorporated in the Espoo Convention.

The 1985 EC Directive

As indicated above, the 1985 EIA Directive placed more of an emphasis on harmonising the national EIA procedures of the member states of the EC than on extending the procedure to foreign impacts and actors.[31] Article 7 of the Directive provides only that if the origin state or the potentially affected state so wishes, the documents of the EIA study must be delivered to the affected state. The potentially affected state is only given a right to consultations. Upon closer scrutiny, it can thus be seen that the Directive introduced only a minimum transboundary EIA procedure between the member states of the EC. Nevertheless, the Directive provided a first example of a legally binding procedure that at least connected the potentially affected state in some way to the EIA procedure of the origin state.

The 1987 UNEP Goals and Principles of EIA

A more extensive instrument – albeit soft law – was the 1987 Goals and Principles of Environmental Impact Assessment adopted by UNEP.[32] Like the 1985 EIA Directive, this instrument placed much more emphasis on the harmonisation of national EIA procedures than on the involvement of foreign actors and impacts in the procedure,[33] but it provided more refined

27 Art. I of the resolution.
28 *Ibid.*, Art. II (1).
29 *Ibid.*, Art. II (2).
30 *Ibid.*
31 See The 1985 Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment (the 1985 EIA Directive). The Directive is reproduced in OJ No. L 175/40, 85/337/EEC.
32 Reproduced in 1 *Basic Documents of International Environmental Law, supra* note 25, at 187-190.
33 This is evident from the fact that of the 13 principles of the document, only three are concerned with transboundary extension of the EIA procedure (Principles 1, 11 and 12), whereas 11 principles apply to the harmonisation of national EIA procedures.

rules for the extension of the EIA procedure to foreign impacts and actors. Firstly, it urges states generally 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 'areas beyond national jurisdiction,'[34] an idea mirroring the earlier notion in the US proposal. 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,'[35] the origin state should notify the potentially affected state and 'transmit to the potentially affected State any relevant information from the EIA.'[36] If an agreement is reached between the states, they should arrange timely consultations. The principal importance of this soft-law instrument is that it served as one of the models in the negotiations for the Espoo Convention.[37]

The 1991 Espoo Convention and its implementation in EC law

The first full-fledged transboundary EIA procedure was not set out in an international treaty until 1991, when the Espoo Convention was concluded. The Convention is the principal treaty that focuses exclusively on transboundary EIA and has already 40 states and the EC as parties. When the EC became a party to the Convention, it became necessary to amend the EIA Directive of 1985, which in its original form did not fulfil the requirements set out in the Convention. The amendment to the EIA Directive was adopted in 1997, and member states were obligated to implement the amended directive by the year 1999.[38]

The Espoo Convention will be covered in Chapter 2 of this book, authored by the Secretary of the Convention, Wiek Schrage. In defining the scope and content of this book, it was decided not to discuss the EC Directive on EIA separately, the main reason being that the principal aim of the Directive, as amended, is to transpose the requirements of the Espoo Convention into EC environmental law. However, it should be noted that EC law goes beyond the provisions of the Espoo Convention in regard to several issues. For instance, the Directive better guarantees the rights of the public to participate in the transboundary EIA procedure and requires more clearly

34 Principle 11 of the Goals and Principles.
35 *Ibid.*, Principle 12.
36 *Ibid.*
37 For an analysis of this connection, see Robert G. Connelly, 'The UN Convention on EIA in a Transboundary Context: A Historical Perspective', *supra* note 3, at 38.
38 Council Directive 97/11/EC of 3 March 1997 Amending Directive 85/337/EEC on the Assessment of the Effect of Certain Public and Private Projects on the Environment. OJ 1997 No. L073, 14 March 1997.

that the comments and views of the affected state and its public be taken into account when making the final permitting decision on the proposed activity.

North America

A transboundary EIA procedure – the draft Transboundary Environmental Impact Assessment Agreement (draft TEIA) – has been negotiated under the umbrella of Northern American Commission for Environmental Cooperation (NACEC), even though two of the parties (Canada and the US) are signatories to the Espoo Convention, and Canada a party to it as well. Although the negotiations between Canada, the United States and Mexico produced a draft agreement in 1998, it has yet to be developed to a treaty, a procedure that will be studied in Neil Craik's contribution (Chapter 5).

International Law Commission

In its project 'International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law', the United Nations International Law Commission (ILC) provisionally adopted draft articles on 'prevention of transboundary damage from hazardous activities.'[39] It is not yet certain whether these articles will form the basis for an international treaty or be adopted in another form. In any case, the draft articles are likely to influence the development of customary international law on the subject, as they have already been adopted by the ILC and are universal 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'[40] and are not prohibited by international law. The required physical consequences are not confined to

39 The ILC decided at its forty-ninth session (1997) to consider the topic in two parts, the first stage being the adoption in 2001 of the draft articles on Prevention of transboundary harm from hazardous activities. The Commission recommended to the UN General Assembly the elaboration of a convention on the basis of the draft articles, the Assembly responding that the second part of the project should be completed. The ILC adopted the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities in 2006, thus concluding work on the topic 'International liability for injurious consequences arising out of acts not prohibited by international law.' For the second part, the Commission only recommended that the General Assembly endorse the draft principles by a resolution and urge states to take national and international action to implement them. It is not yet clear how the General Assembly will now – when the project has been completed – respond to the Commission's recommendation to elaborate a new Convention on the basis of the draft articles. See the 2006 Report of the ILC (A/61/10), at 101-105, available at <http://untreaty.un.org/ilc/reports/2006/2006report.htm> (accessed 11 April 2007).

40 Draft articles on the prevention of transboundary damage from hazardous activities 2001, adopted by the UN International Law Commission in its fifty-third session, Official Record of General Assembly, fifty-sixth Session, Supplement No. 10 (A/56/10), Art. 1.

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 as including harm to 'persons, property or the environment.'[41] 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.[42] 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.'[43]

The ILC articles require states to establish both impact assessment[44] and licensing procedures for environmentally harmful activities.[45] The origin state must notify the potentially affected state if the assessment indicates a risk of significant transboundary harm.[46] This notification must be made 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.'[47] The potentially affected state must respond to this notification within a reasonable time.[48]

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.[49] If the origin state in its turn finds that the draft articles are not applicable, it must 'so inform the other State within a reasonable time, providing a documented explanation.'[50] In such an eventuality, the potentially affected state has a right both to enter into consultations[51] and to request that the origin state take measures to minimise the risk or 'suspend the activity in question for a period of six months unless otherwise agreed.'[52] If the origin state refuses to apply the draft articles, Article 17(2) provides that if the states concerned have not reached an agreement within six months, the potentially affected state can initiate a fact-finding procedure, although the report of the fact-

41 *Ibid.*, Art. 2(b).
42 *Ibid.*, Art. 2(d).
43 *Ibid.*, Art. 2(e).
44 *Ibid.*, Article 8 states: '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.'
45 *Ibid.*, Art. 7.
46 *Ibid.*, Art. 10(1).
47 *Ibid.*
48 *Ibid.*, Art. 10(2).
49 *Ibid.*, Art. 13(1).
50 *Ibid.*, Art. 13(2).
51 *Ibid.*, Art. 11(1).
52 *Ibid.*, Art. 13(3).

finding commission has only an advisory character.[53] 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.[54] In addition, the public is guaranteed an undefined right to make its views known.[55]

TEIA systems in the making

More recently, governments outside of Europe and North America have become aware of the need to consider the development of TEIA procedures. Particularly in regions of countries with relatively fast economic growth, TEIA is being given a place on the political agenda. In many states, national environmental law includes the instrument of EIA, but the potential transboundary impacts of major infrastructure projects or plans for new industrial installations require governments to consider whether the national EIA legislation ensure an adequate assessment of the impacts. The environmental policies of financial institutions and other organisations involved in developing projects constitute an additional impetus for the increased focus on TEIA. In certain regions, governments have jointly decided that the application of national EIA to transboundary environmental issues is not sufficient and started developing TEIA systems comparable to the Espoo Convention. A prominent example is the protocol on transboundary EIA for the Caspian Sea region, which is in an advanced stage of development. This protocol will be discussed by Rie Tsutsumi and Kristy Robinson in Chapter 3. Similar developments are slowly taking shape in various other regions of the world. In Chapter 6, Marianela Cedeño discusses such developments for the regions of Central America.

3.2 EIA for Activities in International and Shared Areas

TEIA in international and shared areas differs from TEIA between states in various respects. In a typical case, TEIA between states takes place between the sovereign areas of states, where both the source 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. For instance, the terms 'source state' and 'affected state', commonly used with regard to TEIA between states, are not well suited to TEIA in shared and international areas.

53 *Ibid.*, Art. 17(2).
54 *Ibid.*, Art. 9.
55 *Ibid.*

In such areas, 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 the question who should be notified and consulted.

Transboundary EIA regarding shared areas

Shared areas are resources that are not (fully) subjected 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, international rivers or migratory species. In this book, the Arctic is defined as a shared resource, even though much of the region falls within the territorial sovereignty and jurisdiction of the eight Arctic states. The Arctic is certainly a geographically confined area because of its climatic conditions, and some portions of the Arctic are part of the global commons, in particular the core of the Arctic Ocean. In addition, as will be shown in Timo Koivurova's chapter, the Arctic states have also established a management regime – now functioning under the Arctic Council – to address the environmental protection and sustainable development concerns of the region.

The role of TEIA is different in the management of shared resources from what it is in the 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.

UNEP principles of conduct regarding shared resources

By far the most influential instrument in regulating shared resources is paradoxically a non-binding one, the 1978 UNEP Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.[56] This landmark instrument was preceded by a set of UN General Assembly resolutions on the topic, with even the 1974 Charter of Economic Rights and Duties of States touching on the issue in its Article 3. Importantly, UNEP Principle 4 urges states to conduct EIAs before engaging in any activity which may significantly affect the environment of another state sharing the resource. The problem with this and other normative

56 The document is reprinted in 17 *International Legal Materials* (1978), at 1094.

instruments dealing with shared resources is that they have not been able to define what resources the term covers.

Treaties including TEIA for shared areas

There are notable examples of treaty regimes governing a shared resource and including TEIA as one policy tool in its management. One of the better-known regimes is the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, in particular its Article 7, which subjects the TEIA procedure to international law or supra-national obligations.[57] Hence, the planned natural gas pipeline from Russia to Germany – running through the Baltic Sea and crossing the Exclusive Economic Zones (EEZ) of Finland, Sweden and Denmark – will be handled primarily through the Espoo Convention. The Russian Federation, which is not a party to the Convention, has agreed to observe the Convention as far as it considers this possible according to its own legislation.[58]

[57] Article 7 reads:

1. Whenever an environmental impact assessment of a proposed activity that is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area is required by international law or supra-national regulations applicable to the Contracting Party of origin, that Contracting Party shall notify the Commission and any Contracting Party which may be affected by a transboundary impact on the Baltic Sea Area.
2. The Contracting Party of origin shall enter into consultations with any Contracting Party which is likely to be affected by such transboundary impact, whenever consultations are required by international law or supra-national regulations applicable to the Contracting Party of origin.
3. Where two or more Contracting Parties share transboundary waters within the catchment area of the Baltic Sea, these Parties shall cooperate to ensure that potential impacts on the marine environment of the Baltic Sea Area are fully investigated within the environmental impact assessment referred to in paragraph 1 of this Article. The Contracting Parties concerned shall jointly take appropriate measures in order to prevent and eliminate pollution including cumulative deleterious.

[58] The environmental impact assessment for the planned offshore natural gas pipeline from Russia to Germany presents a major challenge in applying the Espoo Convention. The project proponent is Nord Stream AG, a company jointly owned by Russian and German interests, and the 1,200-kilometre pipeline is planned to go through the maritime zones of Russia, Finland, Sweden, Denmark and Germany on the seabed of the Baltic Sea. The pipeline would traverse the economic zone outside Finnish territorial waters for a distance of 369 kilometres. The first stage of the procedure under the Espoo Convention was for the parties of origin (Russia, Finland, Sweden, Denmark and Germany) to officially inform each other, as well as Poland, Latvia, Lithuania, and Estonia, who are also the likely affected parties. Nord Stream AG has prepared an EIA programme describing the reports needed to conduct a good quality environmental impact assessment. The assessment will be disseminated in the countries of origin, whereby the public will have an opportunity to influence the EIA programme. In Finland, the programme was made available for public inspection in 33 municipalities on the Gulf of Finland coast and archipelago in the southern part of the Archipelago Sea. Public hearings were held on 11-14 December 2006 in the cities of Helsinki, Hanko, Turku and Kotka. The Regional Environment Centre of Uusimaa collected the opinions and comments of the citizens, municipalities and authorities and prepared its own statement with reference to these sources at the end of February 2007. The party responsible for the project must then revise the programme in light of this information. Once the alternatives put forward in the impact assessment programme and their impacts have been examined, the results will be compiled into an assessment report, which citizens will be given an opportunity to comment on. Significantly, because of the Espoo Convention, Finnish citizens will have the opportunity to express their views on the environmental impacts of the entire project through the assessment procedure that is under way, and their opinions will be conveyed to the relevant countries. By the same token, Russia, Estonia, Latvia, Lithuania, Poland, Germany, Denmark and Sweden can take part in the assessment procedure in Finland. Nord Stream AG expects the environmental report (EIS) to be ready by mid-2007. There are pending discussions of the planned gas pipeline also in the Helsinki Commission. See the press releases at <www.internat.naturvardsverket.se/> (accessed 11 April 2007) and the recent news by the Finnish Ministry of the Environment that the assessment programme, in its opinion, by the company is too general and needs to be supplemented, see <www.ymparisto.fi/default.asp?contentid=224627&lan=fi&clan=en> (accessed 11 April 2007).

Another interesting EIA development is the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, which does not, however, contain express TEIA regulations. The Mekong River Commission, a body established by the Agreement, has begun discussing how TEIA could be introduced. The Commission engaged consultants in the effort to get the four states parties (Cambodia, Lao People's Democratic Republic, Thailand and Vietnam) to incorporate transboundary impacts into their national EIA procedures.[59] According to a person working for the Commission, the parties have not as yet implemented any TEIA.[60]

As these examples indicate, watercourses are significant 'shared areas' in respect of which TEIA has become increasingly important. This has been discussed in detail in a comprehensive publication by Cassar and Bruch in 2003:

> With 261 major river basins shared by two or more sovereign nations worldwide, international watercourses constitute a significant class of transboundary environments that require improved planning, regulation, and management. Moreover, the widespread nature of international watercourses in conjunction with increasing water scarcity has meant that nations increasingly

[59] See the Annual Report of 2001 by the Commission, at <www.mrcmekong.org/download/Annual_report/annual_report_2001.pdf> (accessed 11 April 2007), at 10.

[60] E-mail communication by the authors with the official on 26 April 2006.

> recognize the need to consider management of transboundary waters that respects both political borders and ecological realities such as watershed delineations.[61]

Cassar and Bruch focus on TEIA as an instrument to 'improve environmental management practice and cooperation between nations sharing watercourses;'[62] however, they also discuss the 'roots of TEIA' and the sources of international law of TEIA. The editors of the present volume recommend this publication, as it is the first to discuss various TEIA systems in the context of watercourses as well as the practical experiences of these systems.

Environmental Impact Assessment regarding international areas

In the literature, global commons have been defined as 'those areas or resources outside the jurisdiction of any nation or group of nations.'[63] Space, the deep seabed, the high seas and Antarctica are all part of the global commons. As noted by Spectar, 'the phrase "global commons" harks back to the civil law concept of "res communes", "things common to all; that is, those things which are used and enjoyed by every one, even in single parts, but can never be exclusively acquired as a whole, e.g., light and air".'[64] This definition directly highlights the weak position of the global commons from the perspective of environmental protection or the protection of other values: the areas and their resources are 'common things', available for consumption by everyone. This weak position has received substantial attention in the literature under the title 'the tragedy of the commons', a phrase introduced by Hardin in 1968.[65] Bosselman and Clancy discuss Hardin's work and explain that 'Hardin theorized that in communal property systems, each individual enjoys the benefit of exploiting the resource to its maximum, while the cost of this increased utilization is spread out over all users.'[66] The

61 A.Z. Cassar and C.E. Bruch, 'Transboundary Environmental Impact Assessment in International Watercourse Management', *supra* note 23, at 171-172.

62 *Ibid.*, at 171.

63 See J.L. Dunoff, 'Reconciling International Trade with Preservation of the Global Commons: Can We Prosper an Protect?', 49 *Washington and Lee Law Review* (1992), 1407-1454, at 1408. See also E.A. Clancy, 'The Tragedy of the Global Commons', 5 *Indiana Journal of Global Legal Studies* (1997-98), 601-619, at 603.

64 J.M. Spectar, 'Elephants, Donkeys, or other Creatures? Presidential Election Cycles & International Law of the Global Commons', 15 *American University International Law Review*, 975-1038, at 976, footnote 1. Spectar refers to Black's Law Dictionary (6th edn, 1990), at 1304-1305.

65 G. Hardin, 'The Tragedy of the Commons', 162 *Science* (1968), 1243, reprinted in F.P. Bosselman, 'Replaying the Tragedy of the Commons', 13 *Yale Journal on Regulation* (1996), at 391.

66 See F.P. Bosselman, 'Replaying the Tragedy of the Commons', *supra* note 65, at 391-392 and E.A. Clancy, 'The Tragedy of the Global Commons', *supra* note 65, at 604.

end result is that '[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.'[67]

Since Hardin introducing the 'tragedy of the commons', many problems in respect of the commons have been identified and discussed. Most of the publications emphasise that the tragedy is not just a theory but a reality. For instance, Kunich has noted in respect of the oceans: 'As a global common, the oceans at once seem to belong to everyone and no one. We have treated them accordingly for too long.'[68]

On the other hand, one may say that the environment falling within the global commons is less vulnerable compared to other areas because its accessibility and the possibilities for exploitation by humankind are much more limited. This has indeed been the case for a long time and while the 'isolation' still has a certain protective effect, various factors appear to increase the sensitivity of the commons. For instance, technology is developing fast, creating all sorts of new opportunities. These trends directly influence new plans and proposals for the exploitation of minerals, new advanced scientific research initiatives and developments in the tourism sector. In respect of this last example, we note a substantial increase in tourism to Antarctica since 1990 and the more recent development of deep-sea tourism and tourism to space. Thus, it is expected that the intensity and diversity of human activities in the global commons will further increase.

The global commons already received attention in the Stockholm Declaration of 1972:

> A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organisations in the common interest.[69]

Particularly during the last 25 years, the special values of the global commons and the risk of overexploitation have been increasingly recognised by governments and the global commons have become the subject of various international agreements, declarations and other soft-law instruments.

However, one may ask whether these instruments ensure adequate protection of the environment of the commons today. We will come back to this question in the concluding chapter.

67 Quotation from Hardin 1968, 'The Tragedy of the Commons', *supra* note 65.

68 J.C. Kunich, 'Losing Nemo: The Mass Extinction Now Threatening the World's Ocear Hotspots', 30 *Colombia Journal of Environmental Law* (2005), at 130.

69 Stockholm Declaration, *supra* note 6, para. 7.

These concerns, as well as the applicability of the no-harm principle to areas beyond national jurisdiction and the recognition that TEIA is an important component of that principle, raise the question to what extent TEIA has been developed in respect of the global commons. This is the central issue of Part II of this book.

3.3 Transboundary EIA and International Financial Institutions

Development Banks

The development of environmental policy in multilateral development banks (development banks) predates many of the well-known international environmental agreements.[70] This early interest of development banks in environmental issues may be explained by the strong interrelationship between economic development and environmental issues. The preamble of the Stockholm Declaration emphasised this interrelationship by stating that '[i]n the developing countries most of the environmental problems are caused by under-development.'[71] While certain environmental concerns may in part be addressed by promoting economic development, development projects may cause significant adverse environmental consequences.[72]

In 1980, the Independent Commission on International Development Issues, often referred to as the 'Brandt Commission' after its chairman, Willy Brandt,[73] also drew attention to the interrelationship between stimulating economic development and environmental protection.[74] The

70 See, among others, A. Steer and J. Mason, 'The Role of Multilateral Finance and the Environment: A View from the World Bank', 3 *Indiana Journal of Global Legal Studies* (1995), at 35-45.

71 Stockholm Declaration, *supra* note 6, preamble, para. 4.

72 See S.C. Guyett, 'Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development', 24 *New York University Journal of International Law and Politics* (1991-92), at 892.

73 See <www.brandt21forum.info/BrandtCommission2.htm> (accessed 1 February 2007). The establishment of this commission in 1977 was based on the idea of the president of the World Bank at that time, Robert McNamara. The commission 'examined the problems facing the global economy in the early 1980s' and 'was to be autonomous, would not interfere with ongoing international negotiations, and would make recommendations to help improve the climate of North-South relations.'

74 See the Brandt Report, *North-South: a Program for Survival* (Boston: MIT Press, 1980), summary available at <www.stwr.net/content/view/43/83/> (accessed 1 February 2007). According to Shihata, the Commission 'indicated that protection of the environment could no longer be seen as an obstacle to development, but rather needed to be considered as an essential aspect of it.' See I.F.I. Shihata, 'The World Bank and the Environment: A Legal Perspective', 16 *Maryland Journal of International Law & Trade* (1992), at 2.

Commission emphasised the importance of EIA and the role of development banks in applying this instrument. Shihata stated:

> after stating that environmental impact assessments should be undertaken whenever investment of other development activities may have adverse environmental consequences, the Commission urged multilateral development banks to be ready to assist in carrying out environmental assessments to ensure that an ecological perspective would be incorporated into development planning.[75]

As noted by Guyett, the report 'Our Common Future' of 1987 of the World Commission on Environment and Development (known as the Brundtland Commission) also emphasised the role of development banks in preventing environmental degradation by developing projects.[76]

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.[77] 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. In Chapter 12 of this book, Jean-Roger Mercier describes this process, the current EIA policies and procedures applied by the World Bank, as well as practical experiences of these policies and procedures.

As noted above, the environmental policy of development banks predates many of the well-known international environmental agreements; after such agreements are adopted, however, development banks play a role in promoting their implementation. This applies to TEIA. In Chapter 13, Elizabeth Smith discusses the role of the European Bank for Reconstruction and Development (EBRD) in supporting the implementation of the Espoo Convention.

75 See I.F.I. Shihata, 'The World Bank and the Environment: A Legal Perspective', *supra* note 74, at 2. Shihata refers to the Brandt Report *North-South: a Program for Survival*, *supra* note 74, at 115.

76 See Guyett 1991, 'Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development', *supra* note 72, at 893-894.

77 I.F.I. Shihata, 'The World Bank and the Environment: A Legal Perspective', *supra* note 74, at 892.

Commercial banking and EIA as an instrument of Socially Responsible Investment

State governments play a key role in developing and implementing the TEIA systems described in sections 3.1 and 3.2 above. Although non-state actors, e.g., environmental pressure groups, have been involved in the negotiating process of certain TEIA systems, it is state governments that are the main architects: 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 an exclusive concern of governments. With the globalisation of the economy, prevention and control of adverse social and environmental impacts by multinational companies operating in developing countries has become a hotly debated 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,[78] the adoption of the OECD Guidelines for Multinational Enterprises,[79] and the emphasis on the need to develop partnerships in order to involve business in searching for solutions to sustainability issues.[80] 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 business'.

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

78 See <www.wbcsd.org/> (accessed 1 March 2007).

79 For the text of the OECD Guidelines for Multinational Enterprises, see <www.oecd.org/daf/investment/guidelines> (accessed 1 March 2007). For more information, see <www.oecd.org/dataoecd/12/21/1903291.pdf> (accessed 1 March 2007).

80 See also Leonie Schreve's discussion on CSR in Chapter 14 of this book.

be established by banks' choices of which companies they wish to do business with and what terms they set for their clients. Where investmen activities are concerned, this responsibility is often called 'Socially Responsible Investment' (SRI): 'SRI combines investors' financia objectives with their concerns about social, environmental and ethical [... issues.'[81] In the stock market, this has become an important issue: 'There is an expanding socially responsible investment movement that evaluates the social records of companies, including their record of environmenta compliance and performance, when making investment decisions, in the stock market.'[82]

Commercial banks respond to this trend, for instance, by developing sustainable funds, and such 'special products' are often successful According to a ten-year review on SRI in the United States (1995-2005) '[s]ocially and environmentally screened mutual funds have experienced substantial growth in the number and diversity of products and screen offered.'[83] According to the review, 'over those ten years, socially responsible investment assets grew four percent faster than the entire universe of managed assets in the United States.'[84] The report also notes tha SRI is a global trend: 'investor involvement in promoting corporat responsibility and providing economic opportunities for underserved populations has clearly become an emerging trend all around the world.'[85]

With the adoption of the Equator Principles, more than 45 commercia banks aim to 'ensure that the projects we finance are developed in a manne that is socially responsible and reflect sound environmental managemer practices.'[86] EIA takes a central place in the principles, thereby confirmin that it is a fundamental component of SRI. Leonie Schreve will discuss th principles and their practical implementation and application in Chapter 1 of this volume.

81 See European Sustainable and Responsible Investment Forum (Eurosif), European SR Study 2006, available at: <www.eurosif.org/content/download/580/3548/version/1/file/Eurosif_SRIStudy_2006_ omplete.pdf> (accessed 1 December 2006), at 1.

82 See Clifford Rechtschaffen, 'Enforcing the Clean Water Act in the Twenty-Fir Century: Harnessing the Power of the Public Spotlight', 55 *Alabama Law Review* (200 03), at 806.

83 2005 Report on Socially Responsible Investing Trends in the United States – 10 Ye Review, prepared by Social Investment Forum (Washington 2006), available a <www.socialinvest.org/areas/research/trends/sri_trends_report_2005.pdf> (accessed 1 December 2006), at v.

84 *Ibid.*, at iv.

85 *Ibid.*, at 36.

86 See the preamble of the Equator Principles, available at <www.equator-principles.com (accessed 1 February 2007).