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Transboundary environmental assessment in the Aral Sea basin: the interplay of international and domestic law

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Abstract
This paper discusses the interplay between domestic law and international law taking the example of transboundary environmental assessment. Tracing historical evolution of environmental assessment at domestic and international planes and analyzing legal frameworks that regulate environmental assessment as applied to transboundary waters in the Aral Sea basin, the paper demonstrates how international law and domestic law interact and influence each other in various instances, including norm formation, interpretation, implementation and application. The obligations to conduct transboundary environmental assessment deserve a special attention in the context of the current large scale hydropower development in the Aral Sea basin, shared by Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. While the countries' economies and livelihoods of their population depend profoundly on the availability and quality of the basin's waters, such dependency exacerbated a delicate ecological balance in the region and put under stress its environmental integrity.

Keywords: environmental impact assessment, Central Asia, international law, national law, transboundary waters

Paper type: Research paper

1. Introduction

It has been increasingly acknowledged that international law and domestic law are not two separate systems but rather interact and influence each other in various instances, including norm formation, interpretation, implementation and application.[1] This paper will focus on transboundary environmental assessment (TEA) to illustrate how the interplay between

[1] See eg J. H. F. Panhuys, "Relations and Interactions between International and National Scenes of Law" (1964) 112 Recueil des Cours , H. Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process" (1996) 75 Nebraska Law Review 181, M. Finnemore and K. Sikkink, "International Norm Dynamics and Political Change" (1998) 52 International Organization 4, 887.

domestic and international law has influenced its present development and operation. The first section of the paper will trace the historical evolution of environmental assessment at the domestic and international planes with a view to highlighting milestones that shaped its scope and nature. The subsequent section will look at the international and domestic legal frameworks that regulate environmental assessments as applied to transboundary waters in the Aral Sea basin to demonstrate that domestic frameworks form a fundamental part of TEA. The obligations to conduct TEA deserve a special attention in the context of the current large-scale hydropower development in the Aral Sea basin, shared by Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. [2] The countries' economies and livelihoods of their population depend profoundly on the availability and quality of the basin's waters. Such dependency exacerbated a delicate ecological balance in the region and put under stress its environmental integrity. [3] The third section of the paper will use TEA in the Aral Sea basin as an example of a legal interaction to discuss the interplay between international and domestic factors in enabling effective TEA through more a transparent, inclusive, reasoned and institutionalized decision-making process. This part will be drawn on legal and international relations scholarship that considers process as constituting and enabling effective law. [4] The paper concludes with a summary of its main findings.

2. Environmental assessment: scope, nature and historical development

Environmental impact assessment (EIA) is a national procedure for evaluating the likely impact of a proposed activity on the environment prior to a decision being made about whether it should be proceeded[5] Unlike an EIA, which deals with 'projects', strategic environmental assessment (SEA) operates at strategic levels of decision-making and seeks to evaluate the likely environmental consequences of draft plans, programs, policies and legislation. The term environmental assessment (EA) will be used in this paper to embrace both EIA and SEA.

[2] Since Afghanistan has not been involved in regional water management so far, it will not be considered in the present paper.
[3] For discussion of the water-related challenges in the region see generally Dukhovny, V. & de Schutter J. (2011), Water in Central Asia: Past, Present, Future. Taylor & Francis Group
[4] See, e.g. T. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990); M. M. Reisman, S. Wiessner, and A. R. Willard, "The New Haven School: A Brief Introduction" (2001) 32 Yale Journal of International Law 575; A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995); H. Koh, "Why Do Nations Obey International Law?" (1997) 106 Yale Law Journal 2599; J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, *Cambridge Studies in International and Comparative Law* (Cambridge: Cambridge University Press, 2010); A. Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics" (1992) 46 International Organization 391; M. Finnemore, "Are Legal Norms Distinctive?" (2000) 32 New York University Journal of International Law and Politics 699.
[5] UNECE Convention on Environmental Impact Assessment in a Transboundary Context, 30 ILM 800 (1991) (adopted 25 February 1991, entered into force 10 September 1997) [Espoo Convention], J. Holder and D. Mcgillivray, eds., *Taking Stock of Environmental Assessment: Law, Policy and Practice* (New York: Routledge-Cavendish 2007). See also International Association for Impact Assessment, What Is Impact Assessment? at www.iaia.org/publicdocuments/special-publications/What%20is%20IA_web.pdf and Convention on Biodiversity, Impact Assessment Programme at www.cbd.int/impact/.

The first EA systems emerged within a national context. As early as 1969, the United States National Environmental Policy Act (NEPA) introduced the concept of EA by requiring that '[a]ll agencies of the Federal Government shall … include in every recommendation for major Federal actions significantly affecting the quality of the human environment, a detailed statement on … the environmental impact of the proposed action.'[6] In doing so, the Act sought to 'promote efforts which will prevent or eliminate damage to the environment and biosphere.'[7] However, as the Supreme Court cemented later, 'NEPA does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.'[8] Hence, NEPA was established to promote a preventive, transparent and democratic *process* of environmental decision-making to be followed both at the project and strategic/programmatic levels.[9]

The EA procedures emanating from NEPA rapidly spread around the world, Canada, Australia, New Zealand and France being among the first nations that established mandatory EA procedures. A particular set of legal, administrative and political circumstances predetermined the divergence of EA development in individual countries and regions.[10] Holder described a pattern of the EA evolution in Europe as follows,

> In Europe, the development of environmental assessment has been more linear [as compared to the United States], with slow expansion of the subject matter of environmental assessment from exclusively project-based assessment to a position in which more strategic (plans and programmes) forms of assessment now provide a framework for the 'sub-'assessment of projects, and a 'super' expanded form (impact or sustainability analysis) gives equal standing to social, economic and environmental factors, leaving little practical or conceptual space for an ecological approach beyond a limited environmental remit.[11]

Howarth observes, however, that with the adoption of the European Union Water Framework Directive, Europe may be able to provide a model for restoring missing but necessary *substantive* elements of EA by building on the model of impact assessments required under the Directive, where decision makers are given a clear framework within which decisions can

[6] National Environmental Policy Act of 1969 (NEPA) § 102(2)(c), 42 USC § 4332 (2000).
[7] Ibid, § 2.
[8] Per Stephans J in *Robertson v Methow Valley Citizens Council* 490 U.S. 332, 104 Led2d 351 (1989).
[9] NEPA, §102(2)(c) where the term 'major Federal actions was subsequently defined to include projects and programmes, rules, regulations, plans, policies, procedures, and legislative proposals advanced by federal agencies.'
[10] C. Wood, *Environmental Impact Assessment: A Comparative Review*, 2nd ed. (Essex: Pearson Education, 2003) at 13 stating that '[e]very EIA system is unique and each is the product of a particular set of legal, administrative and political circumstances.'
[11] J. Holder and D. McGillivray, eds., *Taking Stock of Environmental Assessment: Law, Policy and Practice* (New York: Routledge-Cavendish 2007)

be taken, including to avoid any decision that would lead to deterioration in water quality and/or a breach of pre-existing EU environmental standards.[12]

In the Union of the Soviet Socialist Republics (USSR), the nascent form of the EA system emerged in 1985, due to western influence but essentially nested in the Soviet economic planning framework. Two documents laid the foundation for this development, namely the USSR Supreme Council Resolution of 3 July 1985, which directed national authorities to establish a mandatory procedure for an environmental expert review of all proposed technologies and materials as well as projects related to the development and reconstruction of industrial infrastructure, and the USSR State Construction Committee's Regulation of 23 December 1985, which required developers to undertake 'a complex assessment of the optimality of proposed technical decisions on rational natural resources use and measures to prevent a negative impact on the environment from the construction and operation of the activities and facilities.' [13] As such, the system consisted of a state environmental expert review (SEER) undertaken by national agencies to determine whether a planned or existing activity meets ecological and human security requirements and whether this activity may be allowed to be undertaken or to proceed, and an EIA procedure conducted by a developer as a basis for the SEER. In 1988, the scope of the SEER was extended to include the environmental assessment of plans and programs in addition to individual projects.[14] Under this model, the EIA provided the information for an expert panel to make its decision under the SEER. Only activities with a positive evaluation from the expert panel could be implemented. What radically distinguished the Soviet EA system from its western counterparts, however, was that impact assessments were usually carried out by planning institutions within the General Schemes for the Placement and Development of Productive Forces. These schemes were the strategic documents that would define the most appropriate locations for productive forces across the country taking into account the needs of territories and branches of economy. These schemes were not linked to individual projects, but to territorial areas or administrative units. In the context of land and water resources development, two separate Schemes for Complex Water Resources Use and Protection for two principal river basins in Central Asia, namely the Amudarya and Syrdarya, detail water use and protection, including the development of new projects in these basins.[15] While arguably

[12] W. Howarth, "Substance and Procedure under the Strategic Environmental Assessment Directive and the Water Framework Directive," in Jane Holder and Donald McGillivray, eds., *Taking Stock of Environmental Assessment: Law, Policy and Practice* (New York: Routledge-Cavendish 2007), 149-90 .

[13] O. M. Cherp et al., *Environmental Assessment and Environmental Expert Review. In Russian*, 3 ed. (N/A: Ecoline, 2000).

[14] Decree of 7 January 1998 of the Central Committee of the Communist Party of the Soviet Union and the Council of Ministers on The Radical Reform of Nature Protection.

[15] See Resolution of the Expert Sub-Commission to the Gosplan (State Planning Committee) State Expert Commission of the USSR (12 March 1982); Protocol of the Scientific and Technical Council of the Ministry of Water Resources Management of the USSR on Approval of the Principles of Inter-Republican Water Allocation of the Syrdarya River Basin Resources No 413 (29 February 1984); Protocol of the Scientific and Technical Council of the Ministry of Water Resources Management of the USSR on Approval of the Principles of Inter-Republican Water Allocation of the Amudarya River Basin Resources No 556 (10 September 1987); Decision of the Gosplan State Expert Commission of the USSR No 11 (5 March 1982) (on file with author).

taking a more comprehensive approach, the Schemes could not ensure adequate protection of the environment, due to the predominance of economic considerations in decision-making during the Soviet era. They were essentially oriented towards water resources development and less concerned by negative environmental implications.

EA norms have not only spread horizontally to several countries worldwide, they have also influenced the development of EA procedures within international organizations. The Organization for Economic Cooperation and Development (OECD) recommended its member governments to establish EIA procedures for domestic decision-making and use EIA in granting aid to developing countries.[16] International financial institutions (IFIs) such as the World Bank introduced the mandatory requirement to conduct an EA prior to financing certain projects 'to help to ensure that they [these projects] are environmentally sound and sustainable, and thus to improve decision making.'[17]

EA has also been widely promoted in various soft law instruments at the international level. The Principle 17 of the Rio Declaration, conceived as the strongest evidence of the international support for EIA, states,

> Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority.[18]

Furthermore, the United Nations Environmental Programme (UNEP) Governing Council adopted goals and principles for EIA as a recommendation to member states to establish EIA procedures.[19] In recent decades, the need to perform EIAs for activities that may affect the environment within national jurisdictions and beyond has been recognised in a range of

[16] OECD Recommendation C(74)216 on the Analysis of the Environmental Consequences of Significant Public and Private Projects (1974); OECD Recommendation C(79)116 on the Assessment of Projects with Significant Impacts on the Environment (1979); OECD Recommendation C(85)104 on Environmental Assessment of Development Assistance Projects and Programmes (1985); OECD Joint Recommendations on the Environmental Assessment of Development Assistance Projects and Programmes (1985 and 1986) in OECD, OECD and the Environment (Paris: OECD, 1986)

[17] The detailed provisions of EIA procedures, addressing both domestic and transboundary effects, are formalised in Operational Policy 4.01 World Bank OP 4.01, para 1. World Bank, Operational Policy 4.01, at http://www.env.go.jp/earth/coop/coop/document/10-eiae/10-eiae-7.pdf. World Bank OP 4.01, para 7 reads, 'Depending on the project, a range of instruments can be used to satisfy the Bank's EA requirement: environmental impact assessment (EIA), regional or sectoral EA, environmental audit, hazard or risk assessment, and environmental management plan (EMP).EA applies one or more of these instruments, or elements of them, as appropriate. When the project is likely to have sectoral or regional impacts, sectoral or regional EA is required.' See also See eg World Bank's Operational Policy 4.01 at http://www.env.go.jp/earth/coop/coop/document/10-eiae/10-eiae-7.pdf; Asian Development Bank's Environmental Policy and Operations Manual (OM) 20: Environmental Considerations in ADB Operations and the 2003 Environmental Assessment Guidelines.

[18] Principle 17 of the Rio Declaration. See also Agenda 21; World Charter for Nature, GA Res 37/7, UN GAOR 37th Sess, Agenda Item 21, UN Doc A/Res/37/7 (1982)

[19] UNEP, Governing Council Decision: Goals and Principles of Environmental Impact Assessment, Principle 4, UNEP/GC.14/17 Annex III, UNEP/GC/DEC/14/25 (17 June, 1987).

treaties,[20] judicial decisions,[21] works of publicists[22] and authoritative international organizations.[23]

At the global level, some multilateral environmental agreements included EA-related provisions either in their main texts or those have been developed in subsequent treaty practices. The United Nations Framework Convention on Climate Change refers to 'impact assessment' as one of 'appropriate methods' that shall be employed by countries 'taking into account their common but differentiated responsibilities' and 'with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change' (Article 4).

The Convention on Biodiversity[24] requires that 'Each Contracting Party, as far as possible and as appropriate, shall introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures' (Article 14(1)(a)) and ensure

[20] See eg (UNECE Convention on Environmental Impact Assessment in a Transboundary Context, 30 ILM 800 (1991) (adopted 25 February 1991, entered into force 10 September 1997) [Espoo Convention] ; UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 31 ILM 1312 (adopted 17 March 1992, in force 6 October 1996) [1992 UNECE Convention] ; North American Agreement on Environmental Cooperation, 14 September 1993, (1993) 32 ILM 1480 (entered into force 1 January 1994), Articles 2(1)(e) and 10(7)(a); United Nations Convention on the Law of the Sea, 18 December 1982, 21 ILM 1261 (entered into force 16 November 1994), Articles 204—206; Agreement between the Government of the Republic of Latvia and the Government of the Republic of Estonia on Environmental Impact Assessment in a Transboundary Context (signed 14 March 1997 between Estonia and Latvia) 1986 UNTS 116; and European Council Directive 85/337, OJ 1985 L175/40, amended by EC, Council Directive 97/11, OJ 1997 L73/5, and by EC, Council Directive 03/35.

[21] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), General List No 92 [1997] ICJ, 37 ILM 162 [1998] Case Concerning Pulp Mills on the River Uruguay (Argentina V Uruguay) ICJ General List No 135 (2010) <http://www.icj-cij.org/docket/files/135/15877.pdf> [Pulp Mills Case] ;

[22] See g P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment*, 3rd ed. (Oxford: Oxford University Press, 2009) at 169 at 440 states '…the EIA norm not only may be binding as a matter of treaty law but also may have grown, at least in the European context, to a (regional) customary legal rule.' N. CRAICK, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (New York: Cambridge University Press, 2008) Di Leve, C.E., "International Environmental Law and Development," 10 Geo. Int'l Envtl. L. Rev. 501 (1998), at 522; Handl, G., "Environmental Security and Global Change: The Challenge of International Law", 1 Y.B. Int'l Envt'l L. 3 (1990). Handl noted that, 'in light of recent state practice, … it will be increasingly difficult to maintain that states are not (yet) obliged under customary international law to assess potential transboundary effects'. G. HANDL, "Transboundary Impacts " in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 531-49 at 541;

[23] The ILA's *Commentary to Berlin Rules on Water Resources* [2004] Report of the Seventy-First International Law Association Conference, Berlin [Commentary to Berlin Rules] UNEP, Governing Council Decision: Goals and Principles of Environmental Impact Assessment, Principles 4, 11 and 12, UNEP/GC.14/17 Annex III, UNEP/GC/DEC/14/25 (17 June, 1987); Principle 17 of the Rio Declaration; Agenda 21; World Charter for Nature, GA Res 37/7, UN GAOR 37th Sess, Agenda Item 21, UN Doc A/Res/37/7 (1982)..

[24] UN Convention on Biological Diversity, 31 ILM 818 (adopted 5 June 1992, in force 29 December 1993) [Convention on Biodiversity]

that the environmental consequences are 'duly taken into account' (Article 14(1)(b).[25] Although the Ramsar Convention does not explicitly obliges states to conduct EIAs, a number of recommendations and resolutions of the Conference of the Contracting Parties (COP) have encouraged the use of EIA procedures as 'one means of fostering wise use of wetlands.'[26] It worth noting that the Joint Work Programme of the Ramsar Convention and Convention on Biodiversity has 'encouraged close cooperation in taking forward their respective programmes on impact assessment and minimizing adverse impacts.' As a result, the Convention on Biodiversity's voluntary guidelines on biodiversity-inclusive environmental impact assessment and draft guidance on biodiversity-inclusive strategic environmental assessment have been adopted by the Ramsar COP-10 first in 2002 and then in 2008.[27] Therefore, subsequent practices under the multilateral environmental agreements can serve as a valuable source of more detailed provisions on EIAs.[28] Finally, the 1997 UN Convention on the Law on Non-navigational Uses of International Watercourses, to which Uzbekistan is a party, considers EIA as a source of 'available technical data and information' under a general obligation to notify and exchange information on planned measures.[29]

The Conventions under the auspices of the UNECE formulated EA provisions in a more robust way by requiring state parties to undertake EIAs. The 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which became global in 2016, requires its parties, including Kazakhstan, Turkmenistan and Uzbekistan in Central Asia, to take measures to ensure that an EIA and 'other means of assessment' are applied by the Parties in order to 'prevent, control and reduce transboundary impact' (Article

[25] See also Decisions adopted by the Conference of the Parties (COP) to the Convention on Biodiversity on Article 14 Impact Assessment and Minimizing Adverse Impacts, including Decision IV/10-C 'Measures for implementing the Convention on Biological Diversity', 4th COP, Bratislava, 4-15 May 1998; Decision V/18 'Impact assessment, liability and redress', COP5, Nairobi, 15-26 May 2000; Decision VI/7-A 'Identification, monitoring, indicators and assessments', COP6, The Hague, 7-19 April 2002; Decision VI/10-D 'Article 8(j) and related provisions', 7th COP, Kuala Lumpur, 9-20 and 27 February 2004; Decision VII/7 Environmental impact assessment and strategic environment assessment, 7th COP, Kuala Lumpur, 9-20 and 27 February 2004 ; Decision VIII/28 'Impact assessment: voluntary guidelines on biodiversity-inclusive impact assessment', Curitiba, 20-31 March 2006.

[26] Article 3 of the Convention lays the foundation for these resolutions and recommendations. See also Recommendation VI.2: Environmental Impact Assessment, COP6, Brisbane, Australia, 19-27 March 1996; Resolution VII.16: The Ramsar Convention and impact assessment: Strategic, environmental and social, COP7, Costa Rica, 10-18 May 1999; Resolution X.17: Environmental Impact Assessment and Strategic Environmental Assessment: updated scientific and technical guidance, COP10, Changwon, Republic of Korea, 28 October-4 November 2008. Recommendation 1.6; Recommendation 4.10; Recommendation 3.3.

[27] Guidelines on Biodiversity-Inclusive Environmental Impact Assessment and Strategic Impact Assessment was adopted as an annex to the Ramsar COP10 Resolution X.17. <http://www.ramsar.org/pdf/res/key_res_x_17_e.pdf>.

[28] A. Wiersema, "The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements" (2009-2010) 31 Michigan Journal of International Law 213 discussing the legal status of Conference of the Parties decisions.

[29] UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 ILM 700 (adopted 21 May 1997, entered into force 17 August 2014) [1997 UN Convention] Article 12 reads,

> Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.

3(1)(h)).[30] The 1991 Espoo Convention, a regional stand-alone instrument on EIA, obliges its parties, including Kazakhstan and Kyrgyzstan, to assess the transboundary environmental impact of specified activities and to notify and consult with potentially affected Parties about those effects by prescribing detailed steps for such an assessment. The SEA Protocol augments the Espoo Convention by ensuring that the Parties integrate environmental assessment into their plans and programmes, and, to the extent appropriate, into policies and legislation, at the earliest stages.[31] At the sub-regional level under the umbrella of the Commonwealth of Independent States, Central Asian countries also agreed to conduct an EIA, to take steps to harmonise national EIA procedures, and exchange information about EIA results.[32]

Supported by consistent state practice all over the world, EIA has reached the status of a customary obligation for activities that may have a transboundary impact. Having considered implicitly the issue of transboundary EIAs in a few previous cases, the International Court of Justice (ICJ) has stated in the recent *Pulp Mill* case,

> [I]t 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.[33]

The Court went on to clarify the legal nature of EIA in an international domain by stating,

> [D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable [to] affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[34]

By this statement the Court expressed its authoritative opinion and supported the view of the majority of scholars to locate the normative origin of transboundary EIA in prior substantive and procedural international legal obligations, such as the obligation to protect the environment, the obligation not to cause significant harm and the duty to cooperate, exchange

[30] See also UNECE Guide to Implementing the Convention Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (5th Sess 10-12 November 2009 Geneva) ECE/Mp.Wat/2009/L.2. , [UNECE Guide to Implementing the Convention] at 69 para 199.

[31] Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, (adopted 21 May 2003, entered into force 11 July 2010) [Protocol on SEA]

[32] Agreement on Interaction in the Field of Ecology and Environmental Protection, (signed 8 February 1992; all CARs are parties) [1992 CIS Agreement on the Environmental Interaction] Articles 2 and 3, and Agreement on Informational Cooperation in the Field of Ecology and the Environmental Protection, (11 September 1998; among others ratified by Kazakhstan, the Kyrgyz Republic and Tajikistan) [1998 CIS Agreement on Informational Cooperation] Articles 2(1) and 3.

[33] Pulp Mill at 61 para 204. See also Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand vs France) Case, 1995 ICJ 228, 344 (Separate Opinion of Justice Weeramantry). Weeramantry states that the principle of TEIA was 'gathering strength and international acceptance, and [had] reached the level of general recognition [such that the] Court should take notice of it'; *Gabčíkovo-Nagymaros Case,*.

[34] *Pulp Mill* at 61 para 204. See also Judge Weeramantry's separate opinion.

information, consult and notify,[35] rather than in domestic EIA norms. The former point was advanced by Knox, who views transboundary EIA as 'an offshoot of domestic EIA laws extended in accordance with the principle of non-discrimination.'[36]

These international developments have in turn influenced the design of domestic EA systems and their operation in both domestic and international decision-making. For instance, although the EA systems in the countries of Central Asia remain closer to the Soviet model where EIA is nested in SEER, recent modification and expansion so as to include more features of internationally accepted EIA standards are evident. The accession of the Central Asian states, excluding Uzbekistan, to the Aarhus Convention strengthened the participatory element of EIA, which partly addresses concerns that the practice of these countries relies heavily on the environmental expert review as 'an expert-centered approach to environmental assessment, with a consequential lesser emphasis on public consultation.'[37] Kazakhstan and the Kyrgyz Republic, which joined the Espoo Convention, have also made progress in revising EIA requirements in their national legislations. Interestingly enough, Tajikistan, which is not a party to the Espoo Convention, nonetheless refers to its provisions in the national regulatory framework on EIA. Thus, the Regulation on EIA of 3 October 2006 states that its provisions were designed taking into account the legal and regulatory framework of the Republic of Tajikistan as well as international experiences, including the Espoo Convention.[38] Another example of a influence of the Espoo Convention was observed by Timo Koivurova in his analysis of the *Vuotos Project* case, where well before the entry into force of the Convention, Finland decided to notify Sweden of the potential negative effects of proposed activities on the Swedish marine environment.[39] The prominent role of the Espoo Convention in directing state practice comes as no surprise, given its normative roots on general principles and rules of international law, such as the obligation of states to prevent transboundary harm, the obligation to cooperate and notify each other on planned measures with possible adverse effects, and the principle of non-discrimination.

[35] See eg, Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (New Zealand vs France) Case, 1995 ICJ 228, 344; G. Handl, "The Environment: International Rights and Responsibilities" (1980) 74 American Society of International Law Proceedings 223; at 76-7; J. G. LAMMERS, "International and European Community Law Aspects of Pollution of International Watercourses," in W. Lang, H. Neuhold, and K. Zemanek, eds., *Environmental Protection and International Law International Environmental Law and Policy Series* (London/Dordrecht/Bostom: Graham & Trotman/Martinus Nijhoff, 1991), 115-46 131 at 131; and *Commentary to Berlin Rules*, that states 'Implementation of the precautionary principle requires careful planning and the evaluation of the likely effects of significant actions before the action is implemented. The primary, but not the only, method that this will occur is through the impact assessment process that is now part of the requirements for the protection of the environment under international law.'

[36] J. H. Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 American Journal of International Law 291

[37] Craick, N. *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (New York: Cambridge University Press, 2008)

[38] Procedure on EIA of 3 October 2006 approved by Resolution of the Government of the Republic of Tajikistan (on file with author).

[39] T. Koivurova, "The Case of Vuotos: Interplay between International, Community and National Environmental Law" (2004) 13 Review of European Community & International Environmental Law 1,

The practices of development banks have also contributed to nourishing EIA systems, especially in developing countries. First of all, their practical and detailed guidelines are helpful in implementation of assessment procedures. In addition to their advisory function, the banks' policies establish an obligatory assessment procedure for the projects that seek the development banks' funding. This is the case for several development projects in the Aral Sea basin. The World Bank has supported the preparation of the Assessment Study for the Rogun HPP in Tajikistan to assess its (a) technical and economic validity and dam safety issues, and (b) environmental and social impacts.[40] The Techno-Economic Assessment Study (TEAS) was designed to investigate the technical and economic aspects of the construction of the Rogun project, including dam type, dam height, construction phasing, reservoir operations and dam safety issues, and the entire Vaksh River Development Master Plan. The Environmental and Social Impact Assessment (ESIA) sought to address the environmental, socio-economic and cultural situation at the project site, identify potential impacts, including the cumulative impact of the entire Vakhsh river cascade on the relevant areas of Tajikistan and all the riparian states.[41] Among others, the ESIA assessed Tajikistan's energy policy from the environmental and social perspectives (strategic assessment),[42] and riparian and cross-border impacts (regional impacts).[43] The assessments were based on Tajik laws and regulations, international good practices and the World Bank's Safeguard Policies which are particularly interesting from the perspective of the interaction between domestic and international law.[44] The assessment found that the construction and operation of the dam are feasible and its overall impact can be mitigated based on monitoring activities to manage the environmental and social impacts. [45] These findings did neither convince downstream countries,[46] nor regional experts[47] who questioned assessments methods, modelling simulations and inaccurate

[40] World Bank, 'Assessment Studies for Proposed Rogun Regional Water Reservoir and Hydropower Project in Tajikistan' <http://go.worldbank.org/ZQXIA8J0H0> accessed 7 April 2011. It was announced in mid-November 2010 that the Rogun feasibility study tender was won by a consortium comprising France's Coyne et Bellier Consulting Engineers, Italy's Electroconsult, and Great Britain's IPA Energy Water Consulting. <http://en.rian.ru/international_affairs/20101125/161493582.html> accessed 7 April 2010.

[41] *Environemntal and Social Impact Assessment Study (ESIA) for the Rogun Hydroelectric Power Plant Construction Project. Terms of Reference*, World Bank (3 April 2010) [ToR for the Rogun ESIA]

[42] para 21-22

[43] Such regional impacts might include but not limited to 'the impacts (during the construction and operating phases of Rogun HEP) on irrigation, agriculture, drinking and industrial water supplies, sanitary flows, sedimentation, flooding etc in the downstream countries, as well as impact on the agreed flow of water to Aral Sea and impacts on the downstream countries relating to the safety of the dam, at 4. See also *ToR for the Rogun ESIA*, para 27, and also paragraphs 16, 33, 44, 47, 51, 52, 55, 56, 58, 60.

[44] As an organisation with international legal personality, the World Bank committed to pursue its activities in compliance with international environmental instruments. The World Bank Operational Manual. Operational Policies OP 4.01, 1999 para 3 states that 'The Bank does not finance project activities that would contravene [the obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements]'.

[45] World Bank, 'Assessment Studies for Proposed Rogun Regional Water Reservoir and Hydropower Project in Tajikistan'. Online: < http://www.worldbank.org/en/country/tajikistan/brief/final-reports-related-to-the-proposed-rogun-hpp> accessed 15 August 2018.

[46] Statement by Mr. Rustam Azimov, First Deputy Prime-minister and Minister of Finance of the Republic of Uzbekistan. PROCEEDINGS of the High Level Meeting on Regional Riparian Issues in the Context of the "World Bank Note on Key Issues for Consideration on the Proposed Rogun Hydropower Project" (4 August 2014).

[47] SIC ICWC opinion on the findings of World Bank supported assessment studies for Rogun HPP, August 2014 (on file with author).

interpretation of existing legal documents and practices with respect to annual and seasonal water withdrawals and the determination of so-called historic flows.

The above overview has shown that the modern system of EA has evolved through mutual influence of international and domestic factors that also shaped the content of obligations related to TEA which will be considered next.

3. Transboundary environmental assessment in the Aral Sea basin: international and domestic legal frameworks

This section will discuss how international and domestic laws interact to guide the Central Asian states conduct in triggering and undertaking EA procedures for activities that may have a transboundary impact on the Aral Sea basin.

The transboundary waters of the Aral Sea basin, shared by Afghanistan, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan, are a vital source for the development of the countries' economies and for sustaining the livelihood of their population. The Soviet legacy left five Central Asian countries with environmental degradation, natural resources dependent economies, high interdependencies in terms of water infrastructures. Resource based economies exacerbated a delicate ecological balance in the region and has put under stress the region's environmental integrity. Furthermore, it has aggravated the competition for water between sectors such as irrigated agriculture and hydropower production and ultimately between the upstream (the Kyrgyz Republic, Tajikistan and Afghanistan) and downstream (Kazakhstan, Turkmenistan and Uzbekistan) countries, which are all trying to reach energy and food self-sufficiency.[48] It follows that transboundary water cooperation became a key element for peaceful and equitable management of the resource.

After gaining their independence five Central Asian countries signed agreements among themselves that laid the foundation for transboundary water management in the region.[49] Some countries also joined regional and global treaties dealing with water and environmental issues.[50] Despite the abundance of different treaties, a specific and clear procedure for

[48] Dukhovny, V. A., & Schutter, J. d. (2011). *Water in Central Asia: past, present, future*. Boca Raton: CRC Press/Balkema.

[49] Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, and the Republic of Uzbekistan on Cooperation in the Field of Joint Management of the Use and Conservation of Water Resources of Interstate Sources, Almaty (signed 18 February 1992); Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, and the Republic of Uzbekistan on Joint Actions for Addressing the Problems of the Aral Sea and Its Coastal Area, Improving the Environment, and Ensuring the Social and Economic Development of the Aral Sea Region, Kzyl-Orda (signed 26 March 1993).

[50] Treaties under the umbrella of the Commonwealth of Independent States: Agreement on Interaction in the Field of Ecology and Environmental Protection, Moscow (signed 8 February 1992; all CARs are parties); Agreement on Informational Cooperation in the Field of Ecology and the Environmental Protection, Moscow (11 September 1998; among others ratified by Kazakhstan, the Kyrgyz Republic and Tajikistan); Agreement between Government of the Republic of Belarus, the Government of the Russian Federation, the Government of the Republic of Kazakhstan and the Government of the Republic of Tajikistan on the Main Principles of Interaction in the Field of Rational Use and Protection of the Transboundary Water Bodies Moscow (adopted 11 September 1998, in force for Belarus, Russian Federation and Tajikistan 6 June 2002). Global MEAs: Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar (adopted 2 February

transboundary environmental assessment (TEA) is still lacking in the international regulatory framework as applied to the transboundary waters in the Aral Sea basin. For instance, there are diverse thresholds to trigger the obligation to conduct EIA for activities that may cause transboundary harm, arising from applicable law. Customary law and the Espoo Convention require a likelihood of *significant* adverse impact/harm to be foreseen for conducting a TEA.[51] Some regional and sub-regional treaties, including the 2006 Framework Convention on Sustainable Development in Central Asia, pending its entry into force, the 1992 CIS Agreement on the Environmental Interaction and the 1998 Environmental Cooperation Agreement, lower the threshold of risk by requiring the likelihood of *adverse* impact or *any* impact that potentially may cross a border when deciding whether a TEA is required.[52] While the presence of different standards does not help to increase consistency and coherence of the legal frameworks in general, it is hardly disputable that the threshold of significant harm is the minimum, which the Central Asian states have to comply with.

Furthermore, none of treaties applicable to all countries of the Aral Sea basin detail the content and process of TEA. The Espoo Convention contains requirements on the type of information which a transboundary EIA should include and the process to follow but those provisions are obligatory only for Kazakhstan and the Kyrgyz Republic. The Guidelines on EIA in a Transboundary Context for the Central Asian states developed by the countries' experts on the basis of the Espoo Convention provide a good starting point, but are not substitute to binding commitments.[53] A lack of consistent state practice and *opinio juris* did not allow the International Law Commission to specify the content of the assessment in the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Instead, the issue has been referred to the domestic laws of the state conducting such assessment, the only guidelines being that the assessment should include an evaluation of the possible harmful impact of the planned activity on persons, property and the environment of

1971, entered into force 21 December 1975) 996 UNTS 245; UN Convention on Biological Diversity, Rio de Janeiro (adopted 5 June 1992, in force 29 December 1993) 31 ILM 818; N Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris (adopted 14 October 1994, entered into force 26 December 1996) 33 ILM 1328; UN Framework Convention on Climate Change, New York (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM 849

[51] See e g, Principle 17 of the Rio Declaration; Article 7 of the ILC's 2001 Article and its commentary in ILC Report (2001) at 157 para 1, *Espoo Convention*, .

[52] art 2(b) reads,

> [The Parties] shall ensure that any plans, strategies, projects and activities that may have adverse affect on natural resources and the environment as a whole are subject to appropriate impact assessments at early stages; and that ecological monitoring and audit of these are conducted regularly.

The 1992 CIS Agreement on Environmental Interaction use the expression 'affect or may affect the interest' and the 1998 CIS Environmental Cooperation Agreement - 'have or may have impact'.

[53] UNECE *Draft Guidelines on EIA in a Transboundary Context for Central Asian Countries* Meeting of The Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, Working Group on Environmental Impact Assessment, Item 4(d) of the provisional agenda, 10th Sess, 21–23 May 2007, Geneva, ECE/MP.EIA/WG.1/2007/6 <www.unece.org/env/documents/2007/eia/wg.1/ece.mp.eia.wg.1.2007.6.e.pdf>. See also Environmental Impact Assessment in a Transboundary Context: Pilot Project in Central Asia. Project Report 2010 <www.osce.org/documents/eea/2010/02/42814_en.pdf>. Currently, countries are working on the second

other states.[54] A similar approach has been taken by the ICJ in the *Pulp Mills* case, when the court stated,

> ... 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.[55]

Thus, the domestic EA systems form a fundamental part of international EA obligations. In the Aral Sea basin, EIA as a national procedure seeking to ensure environmentally informed decision-making has been established in each country, although consistency and comprehensiveness of its requirements as well as the reflection of the transboundary aspects of EIA vary. The national legislation of Kazakhstan, the Kyrgyz Republic and Tajikistan scantly capture transboundary impacts in the domestic EIA systems.

The Tajik Law states that 'feasibility studies and projects of economic activities that may have an adverse effect on the environment of neighbouring countries or the implementation of which necessitates the use of shared natural resources; or which affect the interests of neighbouring countries, as defined in the international legal acts recognised by the Republic of Tajikistan,' are subject to a mandatory environmental expert review.[56] This requirement is further supported in the 2006 Procedure on EIA in Tajikistan which states that an EIA is a mandatory procedure for planned activities that may have a transboundary impact and should be conducted in accordance with the provisions of the Espoo Convention and of the bilateral and multilateral agreements to which Tajikistan is a party.[57] The Procedure also requires that information about all sources of possible adverse impact on the environment, including one in a transboundary context, to be gathered, and that the affected public, including in the areas of transboundary impact, be informed. The 2017 Law on EIA in Tajikistan stipulates that TEA shall be conducted according to the order approved by the Government of the Republic of Tajikistan as well as international legal acts acknowledged by Tajikistan (Article 21).[58]

[54] International Law Commission Commentary to 2001 Draft Articles, Commentary to Article 7 of the ILC's 2001 Articles (2001), paras 6-8.

[55] Pulp Mills Case,

[56] 2003 Law of Tajikistan on Environmental Expert Review, Article 7. See also Article 88 of 1993 Law of Tajikistan on the Nature Protection stating as one other principle of international cooperation that 'economic activity carried out on the territory of the state must not harm the natural environment within its jurisdiction and beyond'.

[57] 2006 Procedure on EIA in Tajikistan, Chapter 3.

[58] Law of the Republic of Tajikistan as of 18 July 2017 No 1448 "On environmental impact assessment", Government Decree of the Republic of Tajikistan as of 1 August 2014 No 509 "On procedures to organize and conduct environment impact assessment", Government Decree as of 3 December 2012 No 697 "On procedures to conduct state ecological expertise", Government Decree as of 3 July 2013 No 253 "On the list of objects and types of activities that require development of materials on environmental impact assessment"

The 1997 Regulation on EIA in the Kyrgyz Republic requires the EIA documentation to include 'analysis of ecological information, including consideration of cumulative and synergistic effects and any kind of transboundary impact.'[59] The 2015 Regulations on EIA in the Kyrgyz Republic specify that the project initiator should provide for funding to conduct a TEA, the public can take part in all stages of consultations on EIA, including TEA, and in the planning of activities that might have potential transboundary effect, the EIA procedure has to be conducted according to the Espoo Convention and other relevant treaties in force for Kyrgyzstan.[60]

In Kazakhstan, the 2003 Rules on EIA for national, sectoral and regional programmes also require the content of EIA to embody 'possible significant transboundary environmental impacts.'[61] The Environmental Code of Kazakhstan states, however, that the specifics of EIA for 'objects with transboundary impact' shall be found in international agreements ratified by the Republic of Kazakhstan,[62] while the Law on Environmental Expert Review of the country introduces a definition of 'transboundary object' and assigns to the central executive body in the environmental field the task of performing a state environmental expert review of 'strategic, transboundary and ecologically hazardous objects'; and approving the documentation that regulates the activity of 'strategic, transboundary and ecologically hazardous objects' with a view to ensuring 'full consideration of ecological requirements'. The Ministry of Energy of the Republic of Kazakhstan in cooperation with UNECE and EU is currently analyzing domestic legislations with a view of improving EIA related provisions and introducing SEA requirements.[63]

The provisions of national laws of Central Asian countries do not provide precise methodologies for *how* TEA should be carried out. In particular, they fall short of specifying detailed procedures as to how to ensure that the transboundary effects of the project are examined and taken into due account, and as to how to collect and disseminate information on

[59] 1997 Regulation on EIA in the Kyrgyz Republic, Para 8. See also Annex 2 Terms and definitions which includes term 'transboundary impact.' See also Regulations on the procedure of the state environmental assessment, approved by the Government of the Kyrgyz Republic on May 7, 2014 No 248.

[60] Regulations on the procedure of EIA in the Kyrgyz Republic approved by the Government of the Kyrgyz Republic on February 13, 2015 No 60.

[61] Decree 129-п of the Ministry of the Environmental Protection of the Republic of Kazakhstan of 9 June 2003 on Rules for environmental impact assessment of proposed activities within preparation of the national, sectoral and regional programmes on development of economic sectors and of schemes for the location of industry. Appendix 1 para 10.

[62] Article 43 of the Environmental Code of Kazakhstan. See also The Decree №204-п of the Ministry of the Environmental Protection of the Republic of Kazakhstan of 28 June 2007 on Instruction on the environmental impact assessment of proposed economic and other activities within preparation of pre-planned, pre-project and project documentation (as amended on 26 March 2010). 2007 Instruction on EIA for pre-planned, pre-project and project documentation states, however, that the specifics of EIA for 'objects with transboundary impact' are to be defined in international agreements and convention ratified by Kazakhstan.

[63]. SEA and EIA in Kazakhstan: the analysis of legislation is completed and recommendations are developed. Source: www.energo.gov.kz

transboundary effects.[64] Some minimal standards can be found in the Espoo Convention to which Kazakhstan and the Kyrgyz Republic are parties, and to which Tajikistan explicitly stated its adherence.[65] In contrast, Turkmenistan and Uzbekistan are neither parties to the Espoo Convention nor have been designated any provisions on transboundary aspects of EIA in their respective legislations.

The absence of the provisions on TEA in domestic legal frameworks does not preclude the impossibility for undertaking such assessments. For example, although NEPA does not explicitly contain provisions on transboundary effects or a requirement to conduct assessments in a foreign territory, the 1997 Council on Environmental Quality Guidance on NEPA 'has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.' US case law also supports this interpretation.[66]

In Europe, the EIA and SEA Directives set up the minimum standards for the harmonization of the Member States' EA systems. The EU Water Framework Directive, which regulates both transboundary and domestic waters, also establishes assessment-related obligations to be applicable across the EU.[67] Arguably, the approximation of national laws contributes to successful cooperation between the countries. In this regard, it seems advisable for the Central Asian countries to avoid and minimize the divergent development of their EA systems at least with the respect to transboundary waters. Hence, accession to the Espoo Convention or the adoption of a specific regional agreement would help countries to harmonise their laws at the transboundary level and to address the problem of reciprocity by binding all parties to the same minimum standards with respect to the activities that might have transboundary impacts.

4. Transboundary environmental assessment in the Aral Sea basin as a legal interaction

This section will use TEA in the Aral Sea basin as an example of a legal interaction to discuss the interplay between international and domestic factors in enabling effective TEA through more inclusive, transparent, reasoned and institutionalized decision-making process. An extensive body of international law and international relations studies observed the

[64] See also 2007 UNECE Draft Guidelines on EIA in a Transboundary Context for Central Asian Countries stating that 'in almost all CA countries there is no concrete mechanism for carrying out transboundary EIA, covering all its aspects and satisfying all international requirements, in particular the Convention's requirements. The procedure for submitting information on a proposed activity, not only to the public but also to Government bodies, is not addressed in the legislation.'

[65] The President of the Republic of Tajikistan adopted the Decree of 1287 on Accession to UNECE Convention on environmental impact assessment in a transboundary context on 17 February 2004 but the Depositary of the Convention have not received the ratification documents yet.

[66] Eg Swinomish Tribal Cmty. v. FERC, 627 F.2d 499, 510-12 (D.C. Cir. 1980) (concluding that the agency took a "hard look" at the Canadian impacts of dam construction in Washington State).

[67] European Council Directive 85/337, OJ 1985 L175/40, amended by EC, Council Directive 97/11, OJ 1997 L73/5, and by EC, Council Directive 03/35, European Council Directive 2001/42/EC On the Assessment of the Effects of Certain Plans and Prgrammes on the Environment, *Council Directive (EC) 2000/60/EC Establishing a Framework for Community Action in the Field of Water Policy [2000] OJ L327 (EU Water Framework Directive)*, [EU Water Framework Directive] , See also HOWARTH,

significance of process for constituting and enabling effective law.[68] Too often legal studies offer a formalistic and positivist analysis of law that fails to discuss the role of processes in building legal relations. [69] A richer understanding of law and its operation can be gained if we look at law as constituted by and enabling continuous process of interactions among actors, serving to generate, elaborate and refine shared understandings and collective expectations about the meaning and implementation of the norms.

To illustrate the point, the process of TEA in the Aral Sea basin will be analyzed through the lenses of inclusiveness, transparency, discursiveness and institutionalization. These four interrelated process features have been distilled from the process-oriented scholarship as the features that enable more effective interactions.[70]

The *inclusiveness* of the process helps to unfold what actors have a voice in TEA process. The very idea of EA as an all-encompassing decision-making platform invites for the broadest participation possible. The actors involved in TEA include various governmental and non-governmental agencies along with the public and individuals (affected populations, experts,

minority groups, etc) within and across the national borders.[71] However, the level of participation and inputs from these actors may vary.

Experts' contribution to TEA process is fundamental for substantive reasons as those who have a special knowledge, expertise or skill can advance scientifically informed outcomes.[72] As was noted above, the domestic legislation of Tajikistan and the Kyrgyz Republic includes provisions on the interaction of experts from other countries in conducting environmental expert review.[73] Another matter is to ensure the neutrality of expertise, which is usually upheld by the separation of evaluative and decision-making functions in EIA process. This issue is especially sensitive for TEA. Thus, the World Bank sought to uphold the independence of expertise in assessing the possible impacts of the Rogun HPP by involving independent consultants to conduct studies and then making the studies subject to review by

[68] See, e.g. Franck, ; Reisman, Wiessner, and Willard, ; Chayes and Chayes, ; Koh, "Why Do Nations Obey International Law?" ; Brunnée and Toope; Wendt; Finnemore, "Are Legal Norms Distinctive?" .

[69] Allott, 'The concept of international law' at 36: 'Law is not, as so often supposed, a system of legal rules. Law is a system of legal relations. A legal system is infinite number of interlocking legal relations forming a network of infinite density. A legal relation (right, duty, power, freedom, liability, immunity, disability) is a pattern of potentiality into which actual persons and situations may be fitted.'

[70] Ziganshina, D. (2014), Promoting Transboundary Water Security in the Aral Sea Basin through International Law, Martinus Nijhoff Publishers.

[71] See eg A. Z. Cassar and C. E. Bruch, "Transboundary Environmental Impact Assessment in International Watercourse Management" (2003) 12 New York University Environmental Law Journal 169 at 177 stating that '[o]ne of the most commonly regarded benefits of an EIA is its built-in process of public participation'.

[72] See eg D. Bodansky, "Legitimacy," in Daniel Bodansky, Jutta Brunnee, and Ellen Hey, eds., *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) suggesting three alternative bases of legitimacy comprised of democracy, public participation and expertise.

[73] 2003 Law of Tajikistan on Environmental Expert Review, Article 11 and 1999 Law of the Kyrgyz Republic on Environmental Expert Review, Article 7.

international independent panels of experts. Technocracy can also be mitigated by making the EIA process and decisions subject to public scrutiny and control.

Public participation serves to ensure that values such as democracy and public accountability are respected in the TEA process. Under the Aarhus Convention, which addresses environmental decision-making more generally, when activities listed in Annex I to the Convention are proposed, the state of origin is required to notify and extend participation rights to the public regardless of whether the proposed activity is likely to have a significant adverse transboundary impact. Arguably, the latter provision includes the involvement of 'external' public in a case of transboundary EIA. The Espoo Convention clearly envisages this possibility, by requiring concerned Parties to ensure that the affected public is informed about the proposed activities (Article 3(8)), that it receives documentation on the EIA (Article 4(2)), and that it has an opportunity to participate in the EIA procedures to the same extent as the public located in the Party of origin (Article 2(6)). Still, there exists no right under the Espoo Convention for foreign citizens to request information held by another State.[74]

A question may arise as to whether an affected state, as opposite to the affected 'foreign' public or experts, is entitled to participate in TEA. The national laws of the countries do not allow for another state's participation in an EIA procedure, while providing for the possibility to consult (Tajikistan and the Kyrgyz Republic), or to conduct join or international EIAs. In contrast, the Espoo Convention extends the passive right to be notified about the results of EIAs by allowing the affected party to participate in EIAs.[75]

Finally, the World Bank and other regional development banks play an important role in TEA processes in the developing world. It was argued elsewhere that the IFIs can play a more prominent role in promoting and supporting the development and maturity of domestic EIA

[74] See also 'Inspired by new trends in international law, in general, and environmental law, in particular', the ILC included in its Draft Article a requirement on providing information to 'the public likely to be affected'. *Article 13 on Information to the public reads,*

> States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

However, this innovative development did not find support of the ICJ in the *Pulp Mills* case which found 'no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina'. 124 In addition to Articles 2.6 and 3.8 of the Espoo Convention, Argentina also invoked Principles 7 and 8 of the UNEP Goals and Principles and Article 13 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Confusingly, the Court considered the UNEP instrument relevant in rejecting the existence of a legal requirement to consider alternatives in the conduct of an EIA.125 The Commentary to Article 13 the ILC Draft Articles makes it quite clear that, in addition to the provision of information to the public, it would require States 'to ascertain the view of the public' likely to be O. Mcintyre, "The Proceduralisation and Growing Maturity of International Water Law" 22 Journal of Environmental Law 3, 496.

[75] Articles 3(3)-(6) on the notification stage and Article 4(2) on preparation of EIA documentation.

requirements[76] and serve as 'informal agents for compliance' with international EIA obligations.[77]

Transparency refers to 'the degree of openness in conveying information and a device of strategic negotiations signalling the trustworthiness of the actors' in interactions.[78] Clearly, the notion of transparency hosts different meanings and ideas. To evaluate the transparency of TEA in the present study, we will refer to textual transparency, substantive transparency and operational transparency. Textual transparency or the transparency of commitments can be best analysed through the accessibility and specificity of international and domestic legal frameworks. As was discussed in the previous section, there is still room for improvement of specificity of international commitments and domestic legal provisions with respect to TEA in the Aral Sea basin. Substantive transparency takes place when an existing legal framework contains provisions related to information exchange and information disclosure to the public. Hence, the participatory element of the EA discussed above is additional value added to greater transparency. With respect to information disclosure, the 1998 Aarhus Convention lays the necessary transparency requirements for environmental decision-making. In abstract terms, EIA as a standardized set of procedures that ensure that decision-makers have full information and the public has its input into environmental decision-making appears to reflect perfectly this characteristic.[79] In practical terms, however, the lack of actual access to environmental information appears to be a challenge in the Aral Sea basin context. Finally, ooperational transparency requires accessibility and clarity with regard to implementation of and compliance with commitments through a visible monitoring or compliance (performance) review system. Such system is largely absent in the regional regulatory framework in the Aral Sea basin.[80] Stronger linkages between international and domestic levels would help to increase the degree of openness of the TEA process in the region.

Discursiveness reflects the quality of a process that allows participants 'to produce meaning' through 'verbal interchange' such as communication, reasoning and argumentation. The process features of TEA are greatly strengthened by enabling discursive and reasoned decision-making at both domestic and international scales. The TEA procedure relies upon, and further develops, a discursive decision making by structuring interaction between parties

[76] M. M. Nazari, "The Transboundary EIA Convention in the Context of Private Sector Operations Co-Financed by an International Financial Institution: Two Case Studies from Azerbaijan and Turkmenistan" (2003) 23 Environmental Impact Assessment Review 4,

[77] Mcintyre, 497. In his analysis of *the Pulp Mills* case, McIntyre observes,

> In the absence of the [sic] guidance from the Court, the content of an EIA will often be dictated by the safeguard policies of multilateral development banks and other international financial institutions involved in funding projects with the potential to cause transboundary harm, thus cementing the well-established role of such institutions as informal agents for compliance with international environmental law.

[78] C. Ball, "What Is Transparency?" (2009) 11 Public Integrity 4, 293.

[79] See also CASSAR and BRUCH, 177 stating that a 'EIA is an important practical mechanism for advancing the transparency, participation, and accountability.'

[80] See D. Ziganshina, "International Water Law in Central Asia: Commitments, Compliance and Beyond" (2009) 20 Journal of Water Law 2/3, 96

with often competing interests. TEA shifts discussions from 'interests' to 'reasons' on which decisions are based by requiring the reasoned argumentation of decisions.[81] By providing a forum, although temporary, for communication, exchange of views and, more importantly, reasons between experts, stakeholders and the public, TEA helps to promote shared understanding.[82] In international settings, by requiring decisions to be reasoned and justified, TEA enables states to fulfill their obligation of *meaningful* consultation, notification and negotiation in good faith.[83] This potential of the TEA process is still to be realised in the Aral Sea basin. The lack of culture of reasoning and deliberation which is evident in the Aral Sea basin context might hamper the effective TEA process.

Institutionalisation characterizes whether interactions are formalised into organisations and made part of a structured organisational system. The element of institutionalisation is embedded in the TEA system of the Central Asian countries through the work of governmental agencies, the Interstate Ecological Council, MEAs bodies, and IFIs. At the domestic level, the ministries (or state committees) of the environment are the lead governmental agencies responsible for environmental expert review and cooperation with other countries' relevant authorities, for example, through the points-of-contact provisions under the Espoo Convention.[84] Under the 1992 CIS Agreement on Environmental Interaction, Parties gave a mandate to the Interstate Ecological Council 'to conduct, with the participation of representatives of the Parties concerned, the environmental expert review of programmes and the development forecasts of industrial forces, investment and other projects, which affect or may affect the interests of two or more High Contracting Parties' (Article 5). This provision has not been invoked yet. The 1992 UNECE Convention lists the participation in the implementation of EIAs relating to transboundary waters as one of the tasks of joint bodies,[85] but the functions of the river basin commissions in the Aral Sea basin do not include the EIA-related tasks. Under the Espoo Convention, the parties may set up institutional arrangements or enlarge the mandate of existing institutions to give full effect of its EIA provisions,[86] they can make a submission to an inquiry commission to advise on the likelihood of significant adverse transboundary impact if they cannot reach agreement between themselves,[87] and consequently to the implementation committee to challenge the non-compliance by the

[81] See M. Weber, *Economy and Society: An Outline of Interpretive Sociology* ed. Guenther Roth and Claus Wittich, vol. 1 (Berkeley/London: University of California Press, 1978) at 979 ('The only decisive point for us is that in principle a system of rationally debatable "reasons" stand behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means'). See also J. STEFFEK, "The Legitimation of International Governance: A Discourse Approach" (2003) 9 European Journal of International Relations 2, 249 at 262

[82] See H. WILKINS, "The Need for Subjectivity in EIA: Discourse as a Tool for Sustainable Development" (2003) 23 Environmental Impact Assessment Review 4,

[83] Craick, Birnie, Boyle, and Redgwell, at 165, 9

[84] Decision I/3, para. 1, see List of Points of Contact at <www.unece.org/env/eia/points_of_contact.htm>.

[85] Article 9 of the 1992 UNECE Convention.

[86] Espoo Convention, Appendix VI Elements for bilateral and multilateral co-operation.

[87] Espoo Convention art 3 and app IV.

parties.[88] The Aarhus Convention provides another forum for the parties and the public concerned to communicate their concerns about a Party's compliance to the Compliance Committee.[89] In a similar fashion, the World Bank provides for locally affected people who believe that they may be adversely affected by the bank-financed operations an opportunity to challenge the activities of an international institution through internal administrative mechanism – inspection panels.[90] Finally, the institutional platforms of multilateral environmental agreements provide a robust forum for interaction between national and international actors and further development of the EIA rules and procedures.

To sum up, the linkages between international and domestic actors, processes and institutions are evident in the process-related characteristic of TEA. Arguably, such interplay contributes to enabling effective TEA systems through more transparent, inclusive, reasoned and institutionalized decision-making process.

5. Conclusion

This paper explored the interaction between international and domestic scenes of law with regard to the TEA procedure. The overview of the historical development of EA was helpful to demonstrate that modern transboundary EA systems have evolved through mutually nourishing processes at domestic and international levels, which in turn seem to be influenced by a range of factors, including the contextual, historical and temporal dimensions. TEA became an essential part of the procedural system of transboundary water cooperation out of recognition that understanding the consequences of a state's activities is a necessary preliminary to meeting the due diligence obligation of the no-significant harm and the duty to cooperate, exchange information, consult and notify. Due diligence requires countries to adopt appropriate assessment measures individually within their domestic systems, while the duty to cooperate prescribes countries to trigger assessment procedures for the activities that may cause transboundary effects.

The analysis in the second section of the paper showed that domestic EA systems form a fundamental part of transboundary EA frameworks due to the very nature of the obligations related to EA, which require the countries to adopt domestic EA systems and trigger them for the activities that may cause transboundary effects. In the context of the Aral Sea basin, more consistent endeavours are required to ensure that impact assessment procedures for activities that may have transboundary impacts are set up on a reciprocal and equivalent basis. This can be done by adopting a specific regional agreement tailored to the specific context of the Aral Sea basin, which would provide a basis for the harmonization of the national frameworks and allow the countries to have the same minimum standards to be followed in the case of planned

[88] The Committee was established by the Meeting of the Parties in February 2001 (decision II/4 of the second Meeting of the Parties, revised as decision III/2, which provides the structure and functions of the Implementation Committee and procedures for review of compliance).

[89] *UNECE,* Aarhus Convention Compliance Committee, *at* *http://unece.org/env/pp/ccBackground.htm*.

[90] World Bank, *The Inspection Panel: About us*, at http://www.worldbank.org/.

measures. The harmonization of provisions related to the content and procedures of EA in domestic legislation could add value to increasing effectiveness of the overall regulative framework in the basin.

Finally, the relevance of both domestic and international factors in the process-related characteristics of TEA, namely its inclusiveness, transparency, discursiveness and institutionalisation, demonstrated that sound linkages between the levels of regulative systems are crucial for enabling effective interaction between various actors.

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