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Nadia Sanchez Castillo

Yongmin Bian

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China's Obligation to Conduct Transboundary Environmental Impact Assessment (TEIA) in Utilizing Its Shared Water Resources

ABSTRACT

New water development projects in China threaten the environment of international rivers. Chinese law, however, does not require developers to assess the effects of proposed projects on the environment outside China's borders. Nevertheless, examples of transboundary cooperation and international agreements provide a basic legal foundation that allows China to implement transboundary environmental impact assessments (TEIA) as a standard practice. This article explores China's customary law obligation to conduct TEIA by examining relevant treaties and instances of joint action. The article finds that a basic legal structure is already in place to support carrying out environmental impact assessments in a transboundary context, particularly regarding China's shared water resources, and concludes that this legal foundation could help move China toward implementing full TEIA procedures.

I. INTRODUCTION

Transboundary Environmental Impact Assessment (TEIA) is a procedure to evaluate how a proposed activity will impact the environment beyond the borders of the State conducting the activity.¹ TEIA is a tool that helps States cooperate to manage shared natural resources, such as international watercourses. TEIA is one of the most important techniques to implement principles and rules of international environmental law, because it prevents environmental harm, promotes cooperation

* J.D., LL.M., Ph.D. researcher (Leiden University) n.n.a.sanchez.castillo@umail.leidenuniv.nl.

** Ph.D., Professor of the Law School, University of International Business and Economics, bianyongmin@uibe.edu.cn. She thanks the support provided by the China Institute for WTO Studies, UIBE (132XWTO01).

1. See, e.g., Alan Boyle, *Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention*, 20 REV. OF EUROPEAN CMTY AND INT'L ENV'T LAW 227 (2011); Timo Koivurova, *The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)*, in MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL 219, 221, 239 (Geir Ulfstein et al. ed., 2007).

among states, and consequently helps avoid conflicts.² As discussed further below, customary international law requires States conduct TEIA on planned projects that have possible adverse transboundary environmental effects. International jurisprudence recognizes the obligation to conduct TEIA in Pulp Mills,³ the advisory opinion on Responsibilities and Obligations in the Area,⁴ and the Indus Waters Kishenganga Arbitration.⁵

China has international borders with fourteen States: North Korea, Russia, Mongolia, Kazakhstan, Afghanistan, Kyrgyzstan, Tajikistan, India, Pakistan, Nepal, Bhutan, Myanmar, Laos, and Vietnam. Since the borders in the Northeast, Northwest, and Southeast are high mountains, most rivers flow from China to its neighbors. China shares forty-one major rivers and lakes with its neighbors, fifteen of which are considered of great importance.⁶ China's reliance on these international rivers substantially accelerated after China launched its Western Development Campaign in 2000.⁷

Chinese national law does not require assessing transboundary environmental impacts even though Chinese development works threaten the natural environment of international river basins. An example is the environmental impact caused by dams.⁸ Although the Chinese Environmental Impact Assessment law (EIA law)⁹ requires the government to assess the environmental impacts of projects built within Chi-

2. See, e.g., PATRICIA BIRNIE, ALAN BOYLE AND CATHERINE REDGEWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 167–70 (2009); See generally PHILLIPPE SANDS AND JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 619 (2012).

3. Pulp Mills on River Uruguay (Arg. v. Uru.), 2010 I.C.J. 18 (April 20). See discussion *infra* accompanying notes 56–63.

4. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 14, ITLOS Rep 2011 (Int'l Trib. L of the Sea, Feb. 1, 2011). See discussion *infra* accompanying notes 56–63.

5. Indus Waters Kishenganga Arbitration (Pakistan v. India), Final Award (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1392. See discussion *infra* accompanying notes 56–63.

6. He Daming, Zhao Wenjuan, and Feng Yan, *Research Progress of International Rivers in China*, 14 J. OF GEOGRAPHY SCI., SUPP. 21 (2004).

7. See The State Council of China, *State Council on the Implementation of the Western Development Notice a Number of Policy Measures*, ST. COUNCIL GAZ., No. 33 (2000), http://www.gov.cn/gongbao/content/2001/content_60854.htm.

8. See, e.g., U.N.E.P., *World Commission on Dams, Dams and Development: A New Framework for Decision-making*, 15–16 (2000).

9. The Law of the People's Republic of China on Environmental Impact Assessments, 9th National People's Congress (2003), *Zhonghua Renmin Gongheguo Falu Huibian*, available at <http://www.ecolex.org/ecolex/ledge/view/RecordDetails;DIDPFDSLjsessionId=15F6C9E5F81D3E9E4B47C03A24F44042?id=LEX-FAOC040204&index=documents>.

nese territory,¹⁰ the EIA law makes no reference to environmental impacts outside of China. The 2009 Regulation on the Planning of Environmental Impact Assessment (2009 Regulation),¹¹ which applies, *inter alia*, to the environmental effects within Chinese territory, stipulates that EIA of proposed water works should consider the impacts on the watershed of the river.¹² In international water law, the term 'watershed' refers to the whole geographical area covered by the water flowing into an international river.¹³ The 2009 Regulation, however, only applies to the effects on the watershed situated in Chinese territory, even where planned measures could have environmental effects on the portion of the watershed in one of China's neighboring States.¹⁴

Despite the lack of the domestic legislation mandating TEIA, tools to assess transboundary impacts remain available. In fact, China has already taken steps through specific instances of transboundary cooperation to prevent environmental harm in its shared rivers. In addition, certain international agreements signed by China provide for TEIA and others can be considered as instruments facilitating a TEIA. These agreements and examples of transboundary cooperation establish a basic legal foundation that could help China and its neighbors move towards full implementation of TEIA procedures. This article argues, therefore, that although Chinese national law does not require an environmental impact assessment of the effects of proposed projects on the environment outside China's borders, China's international practice provides some basic legal foundation to enable a future TEIA requirement for projects that might have transboundary environmental impacts.

10. *Id.* art. 3.

11. People's Republic of China State Council Order, Planning Environmental Impact Assessment Ordinance, N. 559 (2009) ST. COUNCIL GAZ., Aug. 21, 2009 (China), available at http://www.gov.cn/zwgk/2009-08/21/content_1398541.htm.

12. *Id.* art. 8, para. 1.

13. U.N. Convention on the Non-navigational Uses of International Watercourses, May 21, 1997, G.A. Res. 51/229, Annex, art. 2 paras. (a) and (b), U.N. GAOR, 51st Sess., Supp. No. 49, U.N. Doc. A/51/49 (Aug. 17, 2014); Int'l Law Assoc., Helsinki Rules on the Uses of the Waters of International Rivers, art. II (Aug. 1966); see also Patricia Wouters, *The International Law of Watercourses: New Dimensions*, in COLLECTED COURSES OF THE XIAM ACADEMY OF INTERNATIONAL LAW 347, 384-92 (Martinus Nijhoff 2011). Watersheds are also called 'drainage basins' or 'catchment areas.' See, e.g., STEPHEN C. McCaffrey, *THE LAW OF INTERNATIONAL WATERCOURSES* (2nd ed. 2007).

14. This situation may change because of the enactment of the Technical Guidelines for Plan Environmental Impact Assessments: General Principles. Ministry of Env't of China, Planning Environmental Impact Assessment: Technical Guidelines (effective Sept. 1, 2014) DEPARTMENT OF ENVLT. PROTECTION BULLETIN (China), available at http://www.mep.gov.cn/gkml/hbb/bgg/201406/t20140606_276597.htm. Article 7.2.4 provides that plans that may cause obvious transboundary negative impacts should be identified as plans of significant environmental impact.

China's emerging trend towards TEIA is slow and variable.¹⁵ Awareness of the tools available could help China legally require full implementation of TEIA procedures faster and more consistently. Part II of this article identifies cases in China of transboundary cooperation exemplifying the existence of a basic legal structure enabling TEIA. After briefly elaborating on the obligation to conduct TEIA pursuant to customary international law, Part III explores China's practice regarding its customary international law obligation. It examines relevant international agreements that provide a basic legal structure to support the argument for a future TEIA requirement, particularly for China's shared water resources. Part IV identifies international agreements that China has already made that either require TEIA or facilitate TEIA. The article concludes that this legal foundation is the starting point for full implementation of TEIA for all planned projects involving a risk of transboundary environmental harm.

II. CHINA'S TRANSBOUNDARY COOPERATION: TEIA IN EMBRYO

China has already applied the basic elements of TEIA in several instances of transboundary cooperation. These instances include China's transboundary cooperation with riparian States of the Mekong River, with India, and with Russia. In these situations, China is taking steps—though rudimentary—in the right direction. These examples illustrate some existing basic legal structure enabling TEIA in its initial or embryonic phase.

In the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin,¹⁶ China's neighbors in the Mekong area, Laos and Vietnam, agreed with Thailand and Cambodia to establish a sophisticated management mechanism led by the Mekong River Commission (MRC).¹⁷ The four signatories have made successful cooperative efforts to jointly manage and protect the Mekong River including conducting strategic environmental impact assessments of hy-

15. See, e.g., Simon Marsden, *Assessment of Transboundary Environmental Effects in the Pearl River Delta Region: Is There a Role for Strategic Environmental Assessment?*, 31 ENVTL. IMPACT ASSESSMENT REV. 593 (2011).

16. Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Mekong River Comm'n For Sustainable Dev., Apr. 5, 1995, available at <http://www.mrcmekong.org/assets/Publications/policies/agreement-Apr95.pdf> [hereinafter *Mekong Agreement*].

17. For a detailed description of the functioning of the MRC see, e.g., Beatriz Garcia, *Exercising a Community of Interests: A Comparison between the Mekong and the Amazon Legal Regimes*, 39 H.K. L.J. 421, 436–41 (2009).

dropower projects on the main stream of the river¹⁸ and, more recently, developing guidelines for transboundary environmental impact assessment.¹⁹ Even though China is not part of the MRC, China signed an agreement with the MRC to address lower riparian's concerns about China's upstream utilization of the Mekong River (known upstream as the Lancang River). This agreement, the Agreement on Provision of Hydrological Information of the Lancang/Mekong River during Flood Season by the People's Republic of China to the Mekong River Commission Secretariat, was renewed in 2008.²⁰

Likewise, China and India signed the Memorandum of Understanding on Provision of Hydrological Information of the Yarlung Tsangpo/Brahmaputra River in Flood Season by China to India to address similar concerns in India regarding China's utilization of the Yarlung Tsangpo River (known downstream as the Brahmaputra River).²¹ To implement both of these agreements, the Chinese Ministry of Water Resources planned to build more stations along China's international rivers to collect hydrological information.²² This collection of data not only promotes cooperation between China and neighboring States but also strengthens China's capacity to jointly monitor its shared waters, exchange information, and prevent transboundary harm.

The spill of petrochemical pollutants into the Songhua River, the largest tributary of the Heilong/Amur River, played an important role in promoting transboundary environmental cooperation between Russia

18. INT'L CTR. FOR ENVTL. MGMT., STRATEGIC ENVIRONMENTAL ASSESSMENT OF HYDROPOWER ON THE MEKONG MAINSTREAM, FINAL REPORT (2010), available at http://icem.com.au/documents/envassessment/mrc_sea_hp/SEA_Final_Report_Oct_2010.pdf.

19. See *Transboundary EIA*, MEKONG RIVER COMM'N FOR SUSTAINABLE DEV., www.mrcmekong.org/about-the-mrc/programmes/environment-programme/transboundary-eia/ (last visited Sept. 21, 2014).

20. This agreement was first signed in 2002. See Press Release, MEKONG RIVER COMM'N FOR SUSTAINABLE DEV., Agreement on Provision of Hydrological Information Renewed by China and MRC, China-MRC (Aug. 29, 2008), available at <http://www.mrcmekong.org/news-and-events/news/agreement-on-provision-of-hydrological-information-renewed-by-china-and-mrc>.

21. Memorandum of Understanding on the Brahmaputra River in Flood Season Hydrological Data, China-India, available at <http://www.fsou.com/html/text/eag/1006692/100669213.html>. In view of the time of the year when melted glacier waters begin to flow downstream from the Tibetan plateau, China and India agreed in 2013 to extend in 15 days the original data provision period of June 1 to October 15 to start from May 15 each year, see *Memorandum of Understanding on Strengthening Cooperation on Trans-border Rivers*, Embassy of India (Oct. 23, 2013), available at <http://www.indianembassy.org.cn/newsDetails.aspx?NewsId=438&BId=1>.

22. See MINISTRY OF WATER RES., *International Rivers Hydrological Station Network Construction Planning*, (Jan. 12, 2002), http://www.mwr.gov.cn/slzx/jbc/swjb/200201/t20020112_125367.html.

and China. The Songhua River originates in the Chinese province of Jilin and flows north where it joins the Heilong River forming a natural border with Russia. It then continues into Russia, where it is named the Amur River, and enters into the Sea of Okhotsk. On November 13, 2005, an explosion occurred in a petrochemical plant owned by the Jilin Petrochemical Corporation in Jilin province, discharging an estimated 100 tons of toxic substances made up of a mixture of benzene and nitrobenzene into the Songhua River.²³ Concentrations of pollutants in the water exceeded the levels permitted in China,²⁴ which left the city of Harbin in Heilongjiang province without a water supply for four days.²⁵ Competent authorities of both States cooperated to mitigate the effects of the pollution.²⁶ For instance, the Chinese government provided daily information to the Embassy of the Russian Federation in Beijing,²⁷ Russian experts travelled to Heilongjiang province for inspection tours, and China supplied equipment for water monitoring.²⁸ In addition, the two States formed a joint monitoring team to take water samples and test benzene and nitrobenzene concentrations.²⁹

Subsequently, on February 21, 2006, China and Russia signed the Memorandum Between the People's Republic of China and the Russian Federation on Joint Monitoring of the Quality of Waters of Transboundary Rivers (2006 Memorandum),³⁰ which covered transboundary rivers and their tributaries. A foundation for joint monitoring of shared waters and exchange of information between the two States was set up with this agreement, together with a strong shared will to prevent transboundary environmental harm.³¹

23. WANG CANFA ET AL., *Pondering over the Incident of Songhua River Pollution from the Perspective of Environmental Law*, in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY 291 (Michael Faure & Song Ying eds., 2008).

24. Wang Jin, Huang Chiachen & Yan Houfu, *Reflections from the Transboundary Pollution of Songhua River*, in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY, *supra* note 23, at 273.

25. Wang Canfa et al., in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY, *supra* note 23.

26. Wang Jin et al., in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY, *supra* note 24, at 273–74. See also Song Ying, *International Legal Aspect of the Songhua River incident*, in CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY, *supra* note 23, at 316–17.

27. U.N. Env't Programme, *The Songhua River Spill China, Field Mission Report 14* (Dec. 2005), available at www.unep.org/PDF/China_Songhua_River_Spill_draft_7_301205.pdf.

28. *Id.*

29. *Id.*

30. See Chinese Ministry of Environmental Protection, *Freshwater Environment, 2006 ENVIRONMENT IN CHINA*, http://jcs.mep.gov.cn/hjzl/zkgb/06hjkzgb/200706/t20070619_105424.htm (June 19, 2007).

31. *Id.*

A case illustrating successful cooperation based on the 2006 Memorandum is the pollution of the Mangniu River, a tributary of the Songhua. In August 2006, less than one year after the accident in the Shonghua River, chemical waste from a local chemical factory was accidentally discharged into the Mangniu River.³² The local government made every effort to prevent the pollutants from flowing into the Songhua.³³ In compliance with the 2006 Memorandum, China informed Russia of the discharge of pollutants. Russia and China jointly inspected and monitored the shared river within the Chinese territory near the Russian border. Russia confirmed in due course its territory did not suffer adverse environmental impact.³⁴ The 2006 Memorandum and its subsequent implementation thus show the willingness of the States to work jointly on shared water resources to prevent the disastrous consequences of pollutants flowing down the river into the territory of neighboring States. This transboundary cooperation provides a foundation for TEIA, which is a preventive measure based on joint monitoring and information exchange.

These examples of joint action between China and riparian states of the Mekong River, and between India and Russia, illustrate the existence of TEIA in embryo. These actions, combined with the international customary law obligation to conduct TEIA and international agreements providing for and facilitating TEIA, establish a foundation for China to require mandatory TEIA for future projects. The following section elaborates on the obligation to conduct TEIA pursuant to customary international law.

III. THE OBLIGATION TO CONDUCT TEIA

Customary international law³⁵ requires States to conduct TEIA of planned projects that may adversely affect transboundary environments. The international customary law obligation to conduct TEIA is based on the well-established general obligation of States to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national ju-

32. Guoxuan, *China and Russia jointly monitoring of the quality of transboundary waters*, CHINA ENVIRONMENT DAILY (Sept. 10, 2006), http://www.cenews.com.cn/historynews/06_07/200712/t20071229_30553.html.

33. Xu Qi, *For the Safety of People on Both Banks of the River*, CHINA ENVIRONMENT DAILY (Sept. 1, 2006), <http://www.envir.gov.cn/info/2006/9/91154.htm>.

34. Guoxuan, *Supra* note 32.

35. Customary international law is one of the sources of international law. *See, e.g.*, Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (1974).

isdiction. Principle 21 of the Stockholm Declaration³⁶ and Principle 2 of the Rio Declaration³⁷ state this general obligation. The United Nations General Assembly (UNGA) expressly adopted Principle 21, recognizing it as a basic rule governing the international responsibility of States in regard to the environment.³⁸ Judicial decisions,³⁹ environmental treaties,⁴⁰ and other international instruments⁴¹ confirm Principle 21 as a principle of customary international law. Concerning shared water resources, Principle 3 of the 1978 United Nations Environment Programme (UNEP) Draft Principles on the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (UNEP Draft Principles) articulates this same obligation.⁴² For international watercourses, the ob-

36. United Nations Conference on the Human Environment, Stockholm, Switz., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1972).

37. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), Annex I (Aug., 12, 1992).

38. G.A. Res. 2996 (XXVII), at 42, U.N. Doc. A/8901 (Dec. 15, 1972).

39. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, 226, ¶ 29 (Jul. 1996) (“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.”). This principle was previously stated in the Trail Smelter case (U.S. v. Can.) 3 I.R.A.A. 1907, 1965 (April 16, 1938 and March 11, 1941); The ICJ reaffirmed this principle in the cases Gabcikovo-Nagymaros, Case Concerning the Gabcikovo-Nagymaros Project, Advisory Opinion, 1997 I.C.J. 92, ¶ 53 (Sept. 1997); and Pulp Mills, *see infra* note 56, ¶ 193.

40. *See, e.g.*, International Plant Protection Convention, art. 1, Dec. 6, 1951, 1963 U.N.T.S. 68, available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=196534; Nuclear Test Ban Treaty, Aug. 5, 1963, 480 U.N.T.S. 6964, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20480/volume-480-I-6964-English.pdf>; African Conservation Convention, Jun. 16, 1968, available at <http://www.unep.ch/regional seas/legal/afr.htm>; World Heritage Convention, Nov. 6, 1972, available at <http://www.environment.gov.au/topics/heritage/about-australias-heritage/world-heritage/world-heritage-convention>; UN Convention on the Law of the Sea, Dec. 10, 1982, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm; Biodiversity Convention, 1992, available at <https://www.cbd.int/doc/legal/cbd-en.pdf>; and Climate Change Convention, 1992, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

41. Charter on the Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GOAR, 29th Sess., U.N. Doc. A/RES/29/3281, art. 30 (Dec. 12, 1974), available at <http://research.un.org/en/docs/ga/quick/regular/29>; World Charter for Nature, G.A. Res. 37/7, U.N. GOAR, 37th Sess. U.N. Doc. A/37/PV.48, ¶ 21(e) (Oct. 28, 1982), available at <http://research.un.org/en/docs/ga/quick/regular/37>.

42. *Environmental Law Guidelines and Principles on Shared Natural Resources*, UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States adopted at the Sixth session of the UNEP Governing Council, in response to G.A. Res. 2129 (XIVIII), Dec. 13, 1973, available at <http://www.unep.org/training/programmes/>

ligation not to cause significant harm is recognized in universal,⁴³ regional,⁴⁴ and basin water agreements.⁴⁵ This established international customary law obligation is the basis for the responsibility of all States to conduct TEIA where transboundary environmental harm may occur.

In addition, several international principles reflect the international law obligation to require TEIA. Principle 4 of the UNEP Draft Principles provides for EIA of planned measures that create the risk of transboundary harm.⁴⁶ The UNGA took note of the Draft Principles and requested all member States to use them as “guidelines in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States,”⁴⁷ without prejudice to those Principles already part of customary international law.⁴⁸ The UNEP also adopted the 1987 Goals and Principles of Environmental Impact Assessment⁴⁹

Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/Enviro_Law_Guidelines_Principles_rev2.pdf. Principle 3 in relevant part reads: “1. States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction” and “3. Accordingly, it is necessary for each State to avoid the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment.” *Id.* at 2.

43. U.N. Convention on the Non-navigational Uses of International Watercourses provides that in utilizing an international watercourse in their territories watercourse States shall “take all appropriate measures to prevent the causing of significant harm to other watercourse States.” *Supra* note 13, art. 7.

44. UNECE Water Convention, *infra* note 93, art. 2(1); Protocol on Shared Water Resources in the Southern African Development Community (SADC), art. 3(10) (2000), available at http://www.sadc.int/files/3413/6698/6218/Revised_Protocol_on_Shared_Water_courses_-_2000_-_English.pdf.

45. Mekong Agreement, *supra* note 16, art. 4; see, e.g., Convention on Cooperation for the Protection and Sustainable use of the Danube River, art. 2(3), June 9, 1994, available at <http://www.icpdr.org/main/icpdr/danube-river-protection-convention>; Charter of Water of the Senegal River, at art. 5(2), May 20, 2002, available at http://iea.uoregon.edu/pages/view_treaty.php?t=2002-SenegalRiverWaterCharter.EN.txt&par=view_treaty_html.

46. Principle 4 reads: “States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.” *Supra* note 42 at 2.

47. Co-operation in the field of the environment concerning resources shared by two or more States. G.A. Res. 34/186, ¶ 3, U.N. Doc. A/RES/34/186 (Dec. 18, 1986).

48. *Id.* ¶ 2; see also U.N. Environment Program: Governing Council Approval of the Report of the Intergovernmental Working Group of Experts On Natural Resources Shared by Two or More States, 17 I.L.M. 1091 (1978) at 1096 (5th Sess., Jan. 23–Feb. 7, 1978, statement made by the representative of Mexico, explanatory note attached to the Draft Principles, *supra* note 42).

49. In direct reference to transboundary environmental harm, one of the goals set herein is “[t]o encourage the development of reciprocal procedures for information exchange, notification and consultation between States when proposed activities are likely to

whose Principles 11 and 12 require notification, exchange of information, and consultation between States on activities likely to have significant transboundary environmental effects. Like the UNEP Draft Principles, the UNEP Goals and Principles of EIA were endorsed by the UNGA.⁵⁰ The Rio Declaration,⁵¹ the World Charter for Nature,⁵² the Brundland Report,⁵³ Agenda 21,⁵⁴ and the ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities⁵⁵ also contain principles that influenced the international community to recognize TEIA as international customary law.

In 2010, the International Court of Justice (ICJ) confirmed the customary international law status of the obligation to conduct TEIA. The Pulp Mills case⁵⁶ stated that the 1975 Statute of the River Uruguay:

have significant transboundary effects on the environment of those States.” U.N. Env’tl. Programme, Env’tl. Impact Assessment, ¶ 3, Jan. 16, 1987, available at [http://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/](http://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/(select%20%22UNEP+(1987)+Goals+and+Principles+of+Environmental+Impact+assessment%22+from+list+of+treaties)) (select “UNEP (1987) Goals and Principles of Environmental Impact assessment” from list of treaties). The UNEP Principles on EIA include early stage assessment, clear criteria and procedures for determining applicability of EIA, minimum content, assessment with a degree of detail commensurate with the likely environmental significance, impartial examination of information prior to the decision, public participation, reasoned decision, publicity, and monitoring. These Goals and Principles are general in nature and “may be further refined when fulfilling EIA tasks at the national, regional and international levels.” *Id.* at Preliminary Note.

50. International co-operation in the field of the environment. G.A. Res. 42/184, ¶ 11, U.N. Doc. A/RES/34/186 (Dec. 11, 1987).

51. Principle 17 states that “[EIA] shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment.” *Supra* note 37.

52. World Charter for Nature, *supra* note 41, para. 11(c), stating that “[a]ctivities which may disturb nature shall be preceded by an assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance”

53. The Brundtland Report provides that States “shall make or require an environmental assessment of planned activities which may have significant transboundary effects.” World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc A/42/427 Annex 1, ¶ 16, para. 16 (Aug. 4, 1987), available at <http://www.un-documents.net/wced-ocf.htm>.

54. *Rio Declaration*, *supra* note 37, at ¶¶ 7.41, 15.5, 18.40(g).

55. The draft articles provide that decisions on activities within their scope shall be based on an assessment of possible transboundary harm, including any environmental impact assessment. *Report of the International Law Commission*, 56 GAOR Supp. No. 10, at 402, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n 157, U.N. Doc. A/CN/4/SER/A/2001/Add.1 (part 2).

56. *Pulp Mills on River Uruguay* (Arg. v. Uru.), 2010 I.C.J. 18 (April 20). In this case, Argentina claimed that Uruguay breached the 1975 Statute of the River Uruguay through the authorization, construction and commissioning of two pulp mills on the River Uruguay with reference in particular to the effects of such activities on the quality of the waters of the river. *Id.* at ¶ 1.

[H]as to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due 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.⁵⁷

A year later, the International Tribunal for the Law of the Sea (ITLOS) reaffirmed the customary law nature of this obligation in the advisory opinion on Responsibilities and Obligations in the Area,⁵⁸ stressing that TEIA is not only a treaty obligation (under UNCLOS⁵⁹ art. 206) but also a general obligation under customary international law.⁶⁰ Furthermore, the Permanent Court of Arbitration stated in the 2013 partial award on the Indus Waters Kishenganga Arbitration⁶¹ that “[t]here is no doubt that States are required under contemporary customary inter-

57. *Id.* ¶ 204. Already in the Nuclear Tests case (1995) Judge Weeramantry affirmed in his dissenting opinion that the requirement to carry out an environmental impact assessment was “gathering strength and international acceptance, and ha[d] reached the level of general recognition at which [the ICJ] should take notice of it.” Request for Examination of Situation in Accordance with Paragraph 63 of Court’s Judgment of 20 December 1974 in Nuclear Tests (New Zealand v. France) Case, 1995 I.C.J. 288, 344 (Sept. 22) (dissenting opinion of Judge Weeramantry).

58. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion, 14, ITLOS Rep. 2011 (Int’l Trib. L of the Sea, Feb. 1, 2011) [hereinafter ITLOS Rep. 2011]. The Council of the International Seabed Authority requested the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea to render an advisory opinion on the following questions: What are the legal responsibilities and obligations of States Parties to the UNCLOS with respect to the sponsorship of activities in the Area? What is the extent of liability of a State Party for any failure to comply with the provisions of the UNCLOS? What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the UNCLOS? Letter from Nii Allotey Odunton, Int’l Seabed Auth., to H.E. Judge Tullio Treves, ITLOS (May 11, 2010), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Letter_from_ISBA_14_10_2010_E.doc.pdf.

59. See U.N. Convention on the Law of the Sea, *infra* note 67.

60. ITLOS Rep. 2011, *supra* note 58 ¶¶ 145–47 (quoting ¶ 204 of the Pulp Mills case, *supra* note 56).

61. Indus Waters Kishenganga Arbitration (Pakistan v. India), Final Award (Perm. Ct. Arb. 2013), http://www.pca-cpa.org/showpage.asp?pag_id=1392. Pakistan requested that a Court of Arbitration determine the permissibility under the Indus Waters Treaty of the Kishenganga Hydro-Electric Project located on the Kishenganga/Neelum River, a tributary

national law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State.”⁶² These recent international judicial decisions demonstrate the customary international law obligation binding on all States to conduct TEIA when there is a risk of transboundary environmental harm.

Finally, the international customary law obligation to conduct TEIA is also linked to the international customary law principle of prevention, which requires States to act with due diligence.⁶³ Indeed, due diligence is “the core base of the provisions intended to prevent significant transboundary harm” according to the International Law Commission (ILC).⁶⁴ In *Pulp Mills*, the ICJ affirmed that vigilance and prevention are essential to ensure the “preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil.”⁶⁵ Thus, failure to undertake an EIA where significant transboundary harm is likely could constitute a failure to act with due diligence. The obligation to conduct TEIA therefore encourages compliance with other customary law obligations, such as the principle of prevention.

IV. CHINA’S PRACTICE REGARDING TEIA

China’s recent steps to comply with the international customary law obligation to conduct TEIA confirm its adherence to international norms in the TEIA context. The following discussion identifies relevant agreements, which show that China’s international practice supplies a legal foundation to implement TEIA. The relevant agreements signed by China could be divided into two types: those providing for TEIA and those facilitating TEIA. These agreements provide a basic legal structure that China could build upon to require TEIA in the future.

A. Agreements providing for TEIA

Agreements providing for TEIA are the Memorandum of Understanding on Environmental Principles Governing the Tumen River Economic Development Area and Northeast Asia (1995 MoU),⁶⁶ the United

of the Jhelum River. The project is designed to generate power by diverting water from a dam site on the Kishenganga/Neelum to the Bonar Nallah, another tributary of the Jhelum.

62. *Id.* ¶ 449; *see also* ¶ 450 (quoting ¶ 204 of the *Pulp Mills* case, *supra* note 56).

63. *Pulp Mills* case, *supra* note 56, ¶ 101.

64. *Report of the International Law Commission*, *supra* note 55, art. 9, cmt. ¶ 6.

65. *Pulp Mills* case, *supra* note 56, ¶ 188.

66. Memorandum of Understanding on Environmental Principles Governing the Tumen River Economic Development Area and Northeast Asia, China-Mong.-N. Kor.-

Nations Convention on the Law of the Sea (UNCLOS),⁶⁷ and the Convention on Biological Diversity (Biodiversity Convention).⁶⁸ As signatory to these agreements, China adheres to international customary law that requires TEIA when there is a risk of environmental harm beyond the limits of its national jurisdiction.

China, Mongolia, Russia, and North and South Korea signed the 1995 MoU. The Tumen River flows through Northeast Asia, forming the border between China and North Korea and then between Russia and North Korea before entering the Sea of Japan. It provides environmental principles governing the Tumen River economic development area. The 1995 MoU integrates environmental concerns into the plans for regional development.⁶⁹ It is also a key foundation for the Greater Tumen Initiative, an intergovernmental platform for economic cooperation and sustainable development.⁷⁰ In the 1995 MoU, the parties agreed to an obligation to conduct TEIA or, as it is named in the agreement, regional environmental assessment. Article 1(2) reads:

The Contracting Parties will conduct jointly (and periodically update) a regional environmental assessment (EA) evaluating the local, national, regional and global environmental implications of contemplated development plans for the Region as a whole, and will prepare jointly a regional environmental mitigation and management plan (EMMP) for preventing and mitigating harm to, and promoting enhancement of, the environment, based on the results of the regional EA and other relevant data.

This provision is significant because it shows that China and its neighbors in the Tumen River region expressly undertook to conduct TEIA of projects involving transboundary environmental risks.

Russ.-S. Kor. Dec. 6, 1995, GREATER TUMEN INITIATIVE, available at <http://tumen-programme.org/UploadFiles/pdf/Documents/1995%20GTI%20Agreements%20and%20Memo.pdf> [hereinafter 1995 MoU]. The parties agreed that the 1995 MoU would be valid for a period of ten years from the date of its entry into force (Feb. 6, 1996) and would be automatically renewed for successive periods of ten years, unless agreed otherwise by the Contracting Parties (article 3.4). To date, no such agreement exists so the 1995 MoU remains valid. See GREATER TUMEN INITIATIVE (2013), <http://www.tumenprogram.org>.

67. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994; China became party on June 7, 1996).

68. U.N. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993; China became party Jan. 5, 1993).

69. 1995 MoU, *supra* note 66, at paras. 1.1–1.7.

70. See *About Us*, GREATER TUMEN INITIATIVE (2013), <http://www.tumenprogram.org/?list-1524.html>. See also Simon Marsden, *Developing Approaches to Trans-boundary Environmental Impact Assessment in China: Cooperation through the Greater Tumen Initiative and in the Pearl River Delta Region*, 9 CHINESE J. INT'L L. 393 (2010) (Eng.).

Moreover, the parties must achieve the goal of attaining environmentally sound and sustainable development of the region in accordance with “the environmental requirements of the multilateral development banks of which the Contracting Parties are members.”⁷¹ The requirements of lending institutions such as the World Bank strengthens the parties’ commitment to conduct TEIA because these institutions require TEIA of international projects proposed for financing.⁷²

The 1995 MoU demonstrates an existing practice of TEIA through express commitment reinforced by the requirements of international lending institutions. This basic legal foundation for TEIA of projects concerning China and neighboring States in the Tumen River Region could serve as a model for other efforts of transboundary cooperation to manage China’s shared rivers.

As signatory to the UNCLOS, China shows its commitment to prevent transboundary environmental harm and to conduct TEIA to assess environmental impacts outside its borders. Although the UNCLOS does not regulate international rivers, it provides criteria based on the above mentioned general obligation of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. In fact, States party to the UNCLOS must take all measures necessary to ensure activities under their jurisdiction or control do not pollute other States or their environment⁷³ and to assess the potential effects of planned activities under its jurisdiction or control that may cause substantial pollution of, or significant and harmful changes to, the marine environment.⁷⁴ Subsequent judicial interpretation strengthens these provisions. As mentioned above, the ITLOS’ advisory opinion on Responsibilities and Obligations in the Area stressed that the obligation to conduct TEIA is both a treaty obligation under art. 206 of UNCLOS and a customary law obligation.⁷⁵ The same tribunal decided the MOX Plant case⁷⁶ about the extent of the obligations following from art. 206. In this

71. 1995 MoU, *supra* note 66 at Objectives (d).

72. See, e.g., World Bank Operational Policy (OP) 4.01 - Environmental Assessment (Jan. 1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>.

73. 71 United Nations Convention on the Law of the Sea, art. 194, 10 Dec. 1982, 1833 U.N.T.S. 396.

74. *Id.* art. 206.

75. ITLOS Rep. 2011, *supra* note 5860.

76. The MOX Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3, 2001, 10 Rep. 9 (noting that Ireland requested access to information from the UK about the building and operation of the MOX Plant at Sellafield in order to protect the marine environment of the Irish Sea and Ireland applied for provisional measures that could restrain

case, Judge ad hoc Székely stated, "environmental impact assessment is a central tool of the international law of prevention."⁷⁷ These provisions and its judicial interpretation contribute to the basic legal structure that enables more comprehensive TEIA implementation.

Finally, the Biodiversity Convention is significant because water development works could threaten biological diversity.⁷⁸ Dams, for instance, block the movements of migratory species up and down the river, causing extinction. They also change sediment levels, affecting species adapted to natural levels, and the changed conditions in rivers flooded by reservoirs make reservoirs unsuitable for riverine species.⁷⁹ As party to the Biodiversity Convention, China undertook to introduce domestic legislation that requires environmental impact assessment of planned measures likely to have adverse effects on biodiversity.⁸⁰ When the effects cross its international borders, China must notify affected State(s), exchange information, and consult on activities likely to affect significantly and adversely the biological diversity of other States.⁸¹ In addition, it must notify immediately the potentially affected States in case of imminent or grave danger or damage, originating in its territory, to biological diversity in the territory of other States.⁸²

Besides providing for domestic EIA, it may be argued that these provisions also provide for TEIA. Both the obligation to introduce EIA procedures in domestic law and the obligation to notify and consult with neighboring States when transboundary harm to biodiversity may occur, indicate that the required domestic EIA procedure should arguably include assessment of transboundary effects.⁸³ Naturally, in most cases of environmental risk, it is impossible to meaningfully notify and consult

the UK from commissioning the plant; the ITLOS ordered the parties to cooperate and to engage in consultations, including exchange of information, without further delay).

77. *Id.* Separate Opinion of Judge *ad hoc* Székely ¶ 14.

78. See U.N.E.P., World Commission on Dams, Dams and Development, *supra* note 8.

79. Conditions change in reservoirs because running water becomes still, causing silt deposits and new deep-water zones, which cools temperature and decreases oxygen. See DON E. McCALLISTER ET AL., BIODIVERSITY IMPACTS OF LARGE DAMS, 23–46 (2001), available at <http://intranet.iucn.org/webfiles/doc/archive/2001/IUCN850.pdf>.

80. Convention on Biological Diversity, *supra* note 68, art. 14(1)(a).

81. *Id.* art. 14(1)(c).

82. *Id.* art. 14(1)(d).

83. According to China's Fourth National Report on Implementation of the Convention on Biological Diversity, biodiversity conservation is being included in EIA procedures. See MINISTRY OF ENVTL. PROT., CHINA'S FOURTH NAT'L REPORT ON IMPLEMENTATION OF THE CONVENTION ON BIOLOGICAL DIVERSITY 49–50 (2008), <http://www.cbd.int/doc/world/cn/cn-nr-04-en.pdf>.

with neighboring countries without prior assessment.⁸⁴ TEIA, thus, facilitates compliance with the obligation imposed by the Biodiversity Convention to notify the affected State. These provisions may be interpreted as providing for TEIA or, at least, as providing basic elements encouraging TEIA.

B. Agreements facilitating TEIA

China's existing international obligations to prevent trans-boundary environmental harm also strengthen the argument for a mandatory TEIA policy in China. This section explores relevant international agreements that facilitate implementation of TEIA procedures.

In the area of shared water resources, several bilateral agreements show the parties' commitment to prevent trans-boundary environmental harm in the shared river. For instance, the 1994 Agreement on Protection and Utilization of Border Waters⁸⁵ signed by China and Mongolia stipulates that the parties shall cooperate in monitoring the conditions of transboundary waters and reducing water pollution.⁸⁶ It also stipulates that the parties shall take all measures to prevent, reduce, and avoid environmental harm from man-made accidents.⁸⁷ In addition, the 2001 Cooperation Agreement on the Utilization and Protection of Transboundary Rivers,⁸⁸ between China and Kazakhstan, provides for exchange of hydrological information.⁸⁹ The agreement also requires

84. There is a link between effective exchange of information and notification to other States and EIA. In fact, the ICJ noted in the Pulp Mills case that the acting State must notify the affected party of the results of EIA to "enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts." Pulp Mills case, *supra* note 56, ¶ 119. Similarly, article 12 of the UN Watercourses Convention mandates prior notification of planned measures with possible adverse effects, which "shall be accompanied by . . . the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures." U.N. Watercourses Convention, *supra* note 13, art. 12. Therefore, the reference to EIA "acknowledges the link between effective notification and trans-boundary EIA by expressly requiring that the results of any EIA accompany the notification." See Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 NAT. RESOURCES J. 157, 185 (2006); see also CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 111 (2013).

85. Agreement on Protection and Utilization of Border Waters, China-Mong., Apr. 29, 1994, available at http://www.law-lib.com/law/law_view.asp?id=77528.

86. *Id.* art. II.

87. *Id.* art. VI.

88. Agreement on Cooperation in the Use and Protection of Transboundary Rivers, China-Kaz., art. 6, Sept. 12, 2001, available at http://chinainternationalwaterlaw.org/pdf/treaties/kazakhstan/2001_en.pdf.

89. *Id.* art. 6.

joint research on issues including: the feasibility of preventing or mitigating the impacts of flooding, freezing, and other natural disasters and monitoring of water quality and quantity.⁹⁰ Based on this agreement, the parties established in 2003 the China-Kazakhstan Joint Commission on the Use and Protection of Transboundary Rivers.⁹¹ Finally, the 2008 Agreement on Reasonable Utilization and Protection of Transboundary Waters signed by China and Russia requires the parties to exchange information on the condition of the shared river.⁹² Although these agreements do not require TEIA, they refer to elements that either create the need for TEIA (prevention of transboundary harm) or facilitate it (joint monitoring and exchange of information). Thus, these agreements both show that existing practice is conducive to implementing TEIA and outline a basic legal structure to support China and its neighbors in complying with their international customary law obligation to conduct TEIA.

Some of China's neighboring States also ratified multilateral agreements relevant to the joint management of transboundary watercourses and TEIA. These are the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("UNECE Water Convention"),⁹³ the UNECE Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention"),⁹⁴ and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention").⁹⁵ Since some of China's neighbors are party to these treaties, their provisions on TEIA could affect negotiations on management of shared water resources between China and those neighbors. China, therefore, has an incentive to fully implement TEIA.

90. *Id.* art. 5.

91. *Id.* art. 8.

92. *Agreement on the Reasonable Use and Protection of Transboundary Water, China-Russ.*, Jan. 9, 2008, available at <http://chinainternationalwaterlaw.org/pdf/treaties/russia/2008.pdf>.

93. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992, 1936 U.N.T.S. 269, [hereinafter UNECE Water Convention], available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&lang=en.

94. Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309, [hereinafter Espoo Convention], available at https://treaties.un.org/pages/ViewDetails.aspx?mtdsg_no=XXVII-4&chapter=27&lang=en.

95. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention], available at https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-13&chapter=27&lang=en.

China shares eight international watercourses with Russia⁹⁶ and two with Kazakhstan.⁹⁷ Russia and Kazakhstan are parties to the UNECE Water Convention, which emphasizes environmental protection of transboundary watercourses and contains specific provisions on TEIA. It stipulates that, to prevent, control, and reduce transboundary impact, the parties must conduct environmental impact assessment and other means of assessment.⁹⁸ According to article 9, State parties shall enter into basin-specific bilateral or multilateral agreements that establish joint management bodies. In compliance with this provision, Russia entered into several bilateral agreements for the use and protection of its shared rivers, including the Convention between Russia and Kazakhstan on the Joint Use and Protection of Transboundary Waters.⁹⁹ In addition, the above-mentioned 2001 Agreement on Cooperation on the Utilization and Protection of Transboundary Rivers between China and Kazakhstan and the Joint Commission demonstrate Kazakhstan's observance of article 9. Since China signed the 2001 Agreement with Kazakhstan, the provisions of the UNECE Water Convention could play a role in negotiations between China and Kazakhstan even though China is not party to it. This Convention thus strengthens the argument for TEIAs in China.

Another facilitating agreement is the Espoo Convention. Kazakhstan and Kyrgyzstan¹⁰⁰ ratified the agreement in 2001; Russia signed the agreement in 1991 and expressed the intention to ratify it in 2011.¹⁰¹ Ac-

96. Heilong/Amur River, Tumen River, Argun River, Irtysh-Ob River, Wusuli/Ussuri River, Shuifeng River, Kherlen River, Xingkai/Khanka Lake. See, e.g., Patricia Wouters & Huiping Chen, *China's 'Soft-path' to Transboundary Water Cooperation Examined in the Light of two UN Global Water Conventions - Exploring the 'Chinese Way'*, 22 J. OF WATER L. 229, 246 (2012), available at http://www.academia.edu/3841874/_Chinas_Soft-Path_to_Transboundary_Water_Cooperation_Examined_in_the_Light_of_Two_UN_Global_Water_Conventions_-_Exploring_the_Chinese_Way_.

97. *Id.* at 245.

98. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *supra* note 93, art. 3(1)(h).

99. Other agreements are the Agreement between the Government of the Russian Federation and the Government of the Republic of Belarus Concerning Cooperation in Protection and Rational Use of Transboundary Waters (2002), and the Agreement between the Government of Ukraine and the Government of the Russian Federation Concerning the Joint Use and Protection of Transboundary Waters (1992). See *Groundwater in Transboundary Water Cooperation Agreements in Eastern Europe, Caucasus and Central Asia* (April 16, 2010), http://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/Groundwater_agreements_overview_inf3.pdf.

100. China shares the Aksu River with Kyrgyzstan. See Wouters & Chen, *supra* note 96, at 245.

101. See Press Release, UNECE, UNECE welcomes the Russian Federation's intention to ratify the Aarhus and Espoo environmental conventions, ECE/ENV/11/P26 (June 23, 2011), available at http://www.unece.org/press/pr2011/11env_p26e.html.

ording to this Convention, the parties shall establish an EIA procedure to prevent, reduce, and control significant adverse transboundary environmental impact from proposed activities.¹⁰² The party of origin must provide EIA documentation to the affected party¹⁰³ and consult with the affected party concerning, *inter alia*, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact.¹⁰⁴ Similarly to the UNECE Water Convention, the Espoo Convention could be relevant to China's relations with Kazakhstan and Kyrgyzstan (and arguably with Russia)—even though China is not party to it—because the signatory States must comply with its provisions. Actually, Russia participated in TEIA procedures initiated by some of its neighbors who were party to the Espoo Convention despite the fact that Russia has yet to ratify it.¹⁰⁵ The Espoo Convention thus further enforces the international customary law obligation to conduct TEIA when there is a risk of transboundary environmental harm.

Finally, the same may be said about the Aarhus Convention. The Aarhus Convention,¹⁰⁶ like the Espoo Convention, requires that TEIA procedures give an opportunity for public participation in decision-making.¹⁰⁷ Three of China's neighbors are party to the Aarhus Convention: Kazakhstan, Kyrgyzstan, and Tajikistan. It stipulates that each party shall guarantee the public right of access to information, participation in

102. Espoo Convention, *supra* note 94, art. 2(1)(2).

103. *Id.* art. 4(2).

104. *Id.* art. 5.

105. KAJA PETERSON & VALDUR LAHTVEE, THE RUSSIAN FEDERATION AND THE ESPOO CONVENTION: CURRENT SITUATION AND FUTURE CHALLENGES 10 (Stockholm Environment Institute Tallinn Centre 2007), available at <http://www.seit.ee/failid/168.pdf>. For instance, Russia participated in the international consultations conducted in the context of the Nord Stream pipeline. See Nord Stream, Fact Sheet: Permitting Process for the Nord Stream Pipeline (March 2012), available at <http://www.nord-stream.com/download/document/152/?language=en>.

106. Aarhus Convention, *supra* note 95, Preamble and art. 6(2)(e).

107. The aim of public participation in TEIA is to promote the transparency and legitimacy of decision-making processes in projects with transboundary effects. Principle 7 of the UNEP Goals and Principles of EIA states that members of the public “should be allowed appropriate opportunity to comment on the EIA.” United Nations Env’t Programme, Reg’l Seas Programme, An Approach to Env’tl. Impacts Assessment for Project Affecting the Coastal and Marine Env’t, Reg’l Seas Reports and Studies No. 122 at 6 (1990), available at <http://www.unep.org/regionalseas/publications/reports/RSRS/>. In addition, Principle 10 of the Rio Declaration provides for appropriate access to environmental information and the opportunity to participate in decision-making processes involving the environment. *Supra* note 37. With respect to water resources, Agenda 21 states that integrated water resources management should be carried out “based on an approach of full public participation, including that of women, youth, indigenous people and local communities in water management policy-making and decision-making.” *Id.* ¶ 18.9(c).

decision-making, and access to justice in environmental matters.¹⁰⁸ The Aarhus Convention stipulates that parties also inform the public about activities subject to TEIA procedures.¹⁰⁹ The Aarhus Compliance Committee (ACC), which examines compliance with the Convention,¹¹⁰ urged Kazakhstan to examine the relevant environmental and procedural legislation and case law to “identify whether it sufficiently provides judicial and other review authorities with the possibility to provide adequate and effective remedies in the course of judicial review.”¹¹¹ The fact that three of China’s neighboring States, Kazakhstan, Kyrgyzstan, and Tajikistan, are currently party to the Aarhus Convention and that they could be compelled to comply with it through the ACC could play a role in negotiations between China and these neighbors encouraging China to implement TEIA procedures as well as strengthening public participation.¹¹²

V. CONCLUSION

In some circumstances, China has already begun transboundary cooperation concerning TEIA. These actions, combined with a clear international customary law obligation and international agreements obligating China and its neighbors to conduct TEIA, establish a foundation for China to require mandatory TEIA for future projects.

Existing transboundary cooperation with riparian States along the Mekong and Brahmaputra rivers boosts China’s capacity to undertake TEIA with respect to these river basins. Cooperation with Russia also shows the parties’ commitment to preventing transboundary harm and

108. Aarhus Convention, *supra* note 95, art. 1.

109. *Id.* art. 6(2)(e).

110. U.N. Econ. and Soc. Council, Econ. Comm’n for Eur., Report of the First Meeting of the Parties, Addendum, Decision I/7 Review of Compliance, Oct. 21–23, 2002, ECE/MP.PP/2/Add.8, ¶ 14 (Apr. 2, 2004), <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

111. U.N. Econ. and Soc. Council, Econ. Comm’n. for Eur., Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Fourth Session, Decision IV/9c on compliance by Kazakhstan with its obligations under the Convention, ECE/MP.PP/2011/2/Add.1, ¶ 4 (June 29–July 1, 2011), http://www.unece.org/fileadmin/DAM/env/pp/mop4/Documents/Excerpts/Decision_IV-9c_Compliance_by_Kazakhstan_e.pdf.

112. China does have regulations on access to information and public participation in environmental procedures including the Central People’s Government of the People’s Republic of China. Measures of Environmental Information Disclosure (in force May 1, 2008), available at http://www.gov.cn/flfg/2007-04/20/content_589673.htm. However, implementation seems to fall short of its potential. See, e.g., Wanxin Li, *Self-Motivated versus Forced Disclosure of Environmental Information in China: A Comparative Case Study of the Pilot Disclosure Programmes*, 206 THE CHINA QUARTERLY 331, 333–34, 351 (June 2011).

to jointly managing their shared rivers. These instances of joint action demonstrate the existence of TEIA in embryo.

International customary law requires all States to conduct TEIA when there is risk of transboundary environmental harm. *Pulp Mills*,¹¹³ the advisory opinion on *Responsibilities and Obligations in the Area*, and the *Indus Waters Kishenganga* Arbitration recognize this obligation. This recognition evolved from the general obligation to ensure activities within the jurisdiction or control of a State do not cause damage to the environment of other States.

Agreements providing for TEIA offer some basic legal structure for China and its neighbors to use when addressing the environmental effects of planned measures on shared water resources. The 1995 MoU and the UNCLOS expressly require TEIA. The Biodiversity Convention requires introducing EIA procedures in domestic legislation and notifying neighbor states of planned measures that may have adverse transboundary effects on biodiversity. Because of the considerable impact of water development works like dams on biological diversity, domestic EIA procedures provided for in the Biodiversity Convention should assess the transboundary effects of planned projects on shared rivers to effectively notify the affected States. In addition, certain agreements could set the stage for a comprehensive TEIA policy because they contain basic elements such as joint monitoring, exchange of information, and bilateral cooperation to prevent transboundary environmental harm. Other agreements also influence China's future use of TEIA because some of China's neighboring States must comply with TEIA provisions in the UNECE Water Convention, the Espoo Convention, and the Aarhus Convention. Although China is not party to the latter agreements, their provisions could nevertheless play a role in negotiations between China and its neighbors party to them. All these international agreements lay down elements for further development of TEIA encouraging China and neighboring States to observe the customary law obligation to conduct TEIA.

In sum, agreements providing for and facilitating TEIA as well as cases of transboundary cooperation show that some basic legal structure is in place to support TEIA to protect all of China's shared water resources. Increased awareness within China that this foundation exists and starting from scratch is unnecessary could help China expand its current practices and require comprehensive TEIA procedures in the future.

113. *Pulp Mills* case, *supra* note 56.

