INTERNATIONAL STANDARDS FOR ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT: INCREASING EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW

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"The Earth will not continue to offer its harvest,
except with faithful stewardship.
We cannot say we love the land
and then take steps to destroy
it for use by future generations."
— John Paul II

[Abstract It]: Questo contributo analizza l'importanza della realizzazione di una valutazione di impatto ambientale (VIA) adottando un approccio pressoché olistico nella protezione dell'ambiente. La VIA è obbligatoria in relazione ad attività che possono causare danni transfrontalieri. La Corte Internazionale di Giustizia ha dichiarato nella sua sentenza "Pulp Mills" che il dovere di eseguire una VIA in un contesto transfrontaliero è un principio del diritto internazionale. Dunque, il dovere di prevenire danni transfrontalieri è ben stabilito nel diritto internazionale (vedasi altresì la 2011 ITLOS Advisory Opinion) ed è considerato una regola consuetudinaria riconosciuta dalla Corte Internazionale di Giustizia. Un modo per implementare questo principio fondamentale del diritto dell'ambiente è quello di valutare i rischi di danno ambientale previsti per le attività ed i progetti proposti prima che gli Stati prendano la decisione di consentirne l'esecuzione. Questa valutazione ha propri contenuti e caratteristiche legali. Una VIA è uno strumento decisionale che consiste nell'analisi di un'attività o progetto prevista ed aiuta a determinare gli effetti negativi che l'attività potrebbe avere sull'ambiente e sulla collettività, in particolare per prevenire problemi ambientali come il degrado del suolo ma anche socioeconomici come l'assenza di posti di lavoro. Una volta valutati e compresi i rischi, gli Stati sono in una posizione migliore per decidere se autorizzare o meno l'attività proposta e per gestire i potenziali danni che ne derivano, con l'obiettivo di proteggere la popolazione e l'ambiente. Oltre all'obbligo generale consuetudinario di condurre una VIA in caso di probabile danno transfrontaliero, gli Stati sono anche guidati da una varietà di documenti internazionali legalmente vincolanti come trattati o accordi internazionali con istituzioni finanziarie (es. la Banca Mondiale). La VIA è uno strumento giuridico amministrativo altresì di carattere nazionale ed è eseguita dagli Stati, in accordo con le proprie strutture istituzionali interne. Centrale, in questo contributo è l'analisi della disciplina delle direttive europee che formano la disciplina più avanzata e moderna a livello globale.

[Abstract En]: This paper analyses the importance of the duty to carry out an Environmental Impact Assessment (EIA) adopting a holistic approach in protecting the

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environment. It is not disputed that an EIA is mandatory in relation to activities that are likely to cause transboundary harm. The International Court of Justice declared in its Pulp Mills Judgment that the duty to perform an EIA in transboundary context was a principle of international law. However, the obligation to carry out an EIA is also mandatory for activities that may adversely impact a global resource such as the marine environment (as recognised by the 2011 ITLOS advisory opinion) and there might also be an international obligation to carry out an EIA at the domestic level. The duty to prevent transboundary harm is well established in international law and is considered a customary rule as recognised by the International Court of Justice. One way of implementing this core environmental principle is to assess the environmental and social risks of harm foreseen for the proposed activities before states make the decision of allowing them to be carried out. This assessment, called the environmental and social impact assessment, has its own legal content and features. An ESIA is a decision-making tool that consists of the analysis of an intended activity and helps determine the adverse effects the activity could have on the environment, particularly to prevent environmental related issues such as land degradation as well as social issues such as unemployment. Once the risks are assessed and understood, states are in a better position to make a decision as to whether authorize the proposed activity or not, and to manage the potential harm resulting from it, with the goal of protecting the population and environment. In addition to the general customary obligation of conducting an EIA in case of likely transboundary harm, states are also guided by a variety of international legally binding documents such as treaties or international agreements with financial institutions. An EIA is a national tool; it is performed by states, in accordance with their own internal structures. If the state is not party to any international instruments providing for an EIA obligation, or if the obligation presents great flexibility regarding its implementation, the content, parties and procedures will be determined by domestic regulation. Pivotal in this paper is the analysis of the discipline of European directives that form the most advanced and modern EIA discipline on a global level.

1. Introduction.

Each sovereign state has the right to exploit its own resources.[1] The means of doing so are defined by its domestic legal framework. Regarding activities that can harm the environment, prevention measures rather than only establishing state responsibility have proven to be more effective in achieving effective environmental protection, because some damage could be irreversible.

There is more than one legal way to protect environment. One way is creating special areas or protected zones, where performance of any activity with a high level of impact, and sometimes, any activity at all, is not allowed. Another way is forbidding execution of a specific activity itself, because of its inherent impact. A third way is allowing certain activities to be executed, but under certain conditions and in a specific way, consistent with an environmental policy and certain environmental values.

In order to decide on those conditions and ways in which the activity would be allowed, states need to understand the activity and the domestic, transboundary and global impacts that it could produce on the population and the environment. The Environmental Impact Assessment (henceforth also referred to as "EIA") constitutes an important and widely accepted domestic technique that helps to anticipate, reduce and mitigate environmental and social risks.

One limitation to state activity are the rights of other sovereign states: under international customary law states have the duty to prevent, reduce, and control transboundary pollution and environmental harm resulting from activities within their jurisdiction or control[2]. One way of complying with this duty is assessing the risk of proposed activities before their implementation.[3]

The duty to carry out an EIA in a transboundary context is considered a rule of international customary law and a way of implementing the prevention principle[4].

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1 Principle 2 Rio Declaration on Environment and Development 1992 United Nations (UN), First Part: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources, pursuant to their own environmental and developmental policies…".

2 This principle is called "Principle of Prevention", and is also reflected in Principle 21 of the Declaration of the United Nations Conference on the Human Environment and Principle 2 Rio Declaration on Environment and Development 1992 United Nations (UN) "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

3 Pierre-Marie Dupuy, Jorge E. Viñuales, *International Environmental Law* (2nd ed.), Cambridge University, 2018.

4 Pulp Mill Case Judgment, International Court of Justice.

The International Court of Justice has ruled "…*that it may 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…*".[5] The International Court of Justice did not regulate the specific content of this obligation and the way it must be fulfilled by the states, also ruling that "*general international law [does not specify] the scope and content of an environmental impact assessment.*"[6] Thus, there are no specific mandatory requirements or detailed proceedings for the states to undertake the process of an EIA under customary law, which places treaty law and national implementation in a key position of establishing specific rules.

This paper has the purpose of analysing the current international standards for environment and social impact assessments, to specify how the EIA process is being undertaken and to describe what the current trends are.

In order to achieve the said purpose, this paper is divided in two sections. Section one will explain the concept of environmental impact assessment. It will be stated that the impacts of an activity cannot be evaluated in a narrow way and that a comprehensive process is needed, one that includes evaluation of both environmental and social impacts. Section two will explain how the EIA procedure is being undertaken in the European Union. Of note, each country evolves in a different way, with its own historical processes, and this reality also applies to the environmental protection. The way an EIA is carried out is influenced not only by environmental values and goals, but also by political and economic elements and considerations. Finally, the paper will assess general conclusions and deliver concrete policy recommendations.

2. SECTION I

The EIA concept and the traditional view of the Developing Countries.

Environmental Impact Assessment (EIA) is a process of carrying out a feasibility study or conducting a research to analyse the adverse effects of an activity or a project likely to be implemented on the population and the environment. It analyses the potential effects, makes projections about the future and contemplates mitigating

5 Paragraph 206, Pulp Mill Case Judgment, International Court of Justice.
6 Paragraph 205 Pulp Mill Case Judgment, International Court of Justice.

measures. The research includes ecological, economic and social effects that might result from the proposed project.[7]

The International Association for Environment Impact Assessment (IAEIA) defines the concept with practical details as the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and commitments made.[8] The IAEIA does not require adherence to predetermined outcomes, as it is a methodological decision-making tool.

As already mentioned, an effective EIA includes not only assessment of impact on the natural environment but also, the social impact, meaning, the consequences to human populations of any public or private actions that alter the way in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of a society.[9] The term also covers cultural impacts involving changes to the norms, values, and beliefs that guide and normalize the people's cognition of themselves and their society. The assessment of these risks is called a Social Impact Assessment, (henceforth also referred to as "SIA").

The notion of environment impact assessment has its origins in the National Environment Act of 1969 of the United States of America, and though it was embraced by the 1992 Rio Declaration, it was not until recently readily understood and accepted as a tool in developing countries.[10] An EIA was considered just another bureaucratic stumbling block on the path of development.[11] Secondly, it was perceived as a sinister means by which industrialized nations intended to keep developing countries from breaking the vicious cycle of poverty.[12] Thirdly, the experts in the developing countries were foreigners who were viewed as agents of

7 "Per sintesi critica sugli esiti dello studio di impatto ambientale che ai sensi dell'articolo 25 d.lgs. n. 152/2006 Dovrebbe trovare spazio nel parere di via, si devono intendere le considerazioni conclusive che è l'autorità competente è chiamata a svolgere sullo studio di impatto ambientale presentato dal proponente e sugli apporti consultivi di tutte le altre autorità che intervengono nel procedimento; e se presente *naturaliter* in ogni parere via, perché l'autorità deve motivare sia il rilascio del parere favorevole sia il rilascio del parere negativo, ed è normale che nel primo caso la sintesi critica sia meno rilevante nel contesto dell'atto, dovendosi ritenere che per i profili non espressamente evidenziati, l'autorità abbia ritenuto convincenti le argomentazioni contenute nello studio di impatto ambientale o le integrazioni che è , nel corso del procedimento, sono state richieste al proponente; ed è altrettanto normale che, al contrario, la sintesi critica sia più dettagliata in caso di parere negativo, perché l'autorità deve dare conto di tutte le criticità non superate" see, Tar Marche, Sez. I, 6 March 2014, no. 291.

8 International Association for Environmental Impact Assessment.

9 The Interorganizational Committee for Guidelines and Principles for Social Impact Assessment. Guidelines and Principles for Social Impact Assessment, May 1994, introduction.

10 Environmental Impact Assessment, General Procedure: Pacifica F. Achieng Ogola, Presented at Short Course II on Surface Exploration for Geothermal Resources, organized by UNU-GTP and KenGen, at Lake Naivasha, Kenya, 2-17 November 2007(pp.1).

11 *ibid. supra note 6 (pp.2).*

12 *ibid. supra note 6 (pp.2).*

colonization.[13] However, the need for EIAs has become increasingly pressing and it is now a statutory requirement in many developing countries.

3. The contemporary approach.

Both Principle 21 of the Stockholm Declaration 1972 and Principle 2 of the Rio Declaration 1992 stipulate that, in accordance with the Charter of the United Nations and the principles of international law, states have the sovereign right to exploit their own resources pursuant to their own environmental policies. Likewise, states have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction. The provisions require that states take appropriate steps to ensure environmental protection and notify others when there is a likelihood of adverse transboundary impact resulting from a proposed project.

Particular mention could be made of paragraph 6 of the preamble of the Stockholm Declaration that reminds states that the world has reached a stage in history where action should be taken to conserve the environment through active cooperation and prudent concern about environmental consequences. There are currently a high number of states that have adopted and introduced similar models to their domestic legal system in accordance with the principles enshrined in international instruments.

Within the international arena, several international and regional environmental treaties contain the obligation of carrying out an Environmental Impact Assessment. Among them, the most relevant instrument, because of its level of detail, is the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 1991[14], (henceforth referred to as the "Espoo Convention"). The Rio Declaration on Environment and Development of 1992, known as the "Rio Declaration" has influenced the adoption of further regulation, and its Principle 17 states that: "*Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority*".

13 *ibid: supra note 6 (pp.2).*

14 The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) was adopted within the framework of the United Nations Economic Commission for Europe in 1991, and entered into force in 1997. At present, it has 45 state parties. It is the most important agreement concerning EIA processes. For the text of the Espoo Convention, see: http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/conventiontextenglish.pdf

Over the last few decades, the concept was broadened to encompass global environmental issues. Such important global environmental problems include all kinds of pollution, climate change, ozone layer depletion, the use and management of oceans and freshwater resources, excessive deforestation, desertification and land degradation, hazardous waste and depletion of biological diversity.[15]

To summarize the concept:

An EIA is a process of identifying, analysing and forecasting the impact of a proposal on the natural environment (land, water and air) and socially (impact on health, culture and settlement).

An effective EIA includes the mitigating factors while assessing the present and future damage.

There are no predetermined environmental standards to be followed by states in conducting an EIA, as it is a decision-making tool.

The customary obligation of conducting an EIA does not have a precise established content, thus state obligations are laid down by international instruments and domestic regulation, with a high degree of discretion.

Insofar as the international instruments are concerned, an EIA is mandatory only for activities that are likely to cause transboundary harm.

Until recently it was not readily accepted by developing countries.

The sceptical view was that EIA is just another bureaucratic tool of the developed countries. Gradually, however, it got universal recognition and acceptance as a useful step towards preservation of environment and human welfare. Now, over 100 countries require an EIA for activities that might have transboundary harm.

Its introduction was unique because unlike other environment tools that preceded EIA, it includes the human welfare within the assessment. Special care and attention are given to the culture and values of ethnic minorities and indigenous people with distinct culture from that of the majority.[16]

15 Johannesburg Summit 2002.

16 "Con Il termine valutazione di impatto ambientale si suole indicare il procedimento amministrativo finalizzato ad individuare gli effetti significativi e negativi che taluni progetti opere possono comportare sull'ambiente ovvero sul patrimonio culturale. concepita quale strumento preventivo di tutela dell'ambiente, la valutazione di impatto ambientale allo scopo di individuare, descrivere e valutare virgola in modo appropriato, gli impatti diretti e indiretti di un progetto sui seguenti fattori: 1) l'uomo, la fauna la flora; 2) il suolo, l'acqua, l'area è il clima; 3) i beni materiali ed il patrimonio culturale; 4) l'interazione tra i predetti fattori. la valutazione di impatto ambientale deve concludersi con un provvedimento motivato sulla base dei risultati dell'attività istruttoria all' uopo svolta, i cui contenuti sono vincolanti ai fini della positiva conclusione dell'iter autorizzatorio del progetto sottoposto ad esame. Infatti, per espresso dettato normativo, la via costituisce presupposto parte integrante del procedimento di autorizzazione o approvazione di determinati interventi. La procedura di via, così come la valutazione ambientale strategica , è finalizzata la piena realizzazione del principio dello sviluppo sostenibile delle attività economiche e costituisce, dunque, attuazione della politica ambientale dell'unione europea, cioè di quell'insieme di provvedimenti e di misure miranti alla tutela dell'ambiente e delle risorse naturali, necessarie a salvaguardare la crescente scarsità delle risorse e la qualità della vita" see, Marta Lorusso,

4. Content: Environmental impacts

As previously mentioned, several environmental treaties contain the obligation of carrying out an Environmental Impact Assessment, and the most relevant instrument is the Espoo Convention, which will be used as a basis for a significant part of the paper.

In accordance with its Annex II, an EIA shall contain a description of the proposed activity and its purpose, reasonable alternatives including the no-action alternative, the environment that is likely to be affected, potential environmental impact with the estimation of its significance, explicit indication of predictive methods and underlying assumptions and relevant environmental data and indication of gaps and uncertainty.[17]

An effective EIA shall also include mitigating measures. Mitigating measures imply that most of the measures proposed target preventive actions mainly related to project design, location and implementation rather than curative interventions that handle adverse outcomes after the emergence of the anticipated problems.[18]

Instruments usually use the threshold of 'significant'[19] harm. The determination of what 'significant' harm is depends on the circumstances. Some situations require a higher threshold than others.[20]

The Espoo Convention has laid down a list of some activities for which an EIA is mandatory. The Convention also laid down criteria for activities that are not listed in

Valutazione di Impatto Ambientale, in Francesco Caringella, Ugo De Luca, *Manuale dell'Edilizia e dell'Urbanistica*, Manuali Operativi di diritto amministrativo, 2017.

17 Appendix II of the Espoo Convention. Information to be included in the environmental impact assessment documentation shall, as a minimum, contain, in accordance with Article 4: (a) a description of the proposed activity and its purpose; (b) a description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative; (c) a description of the environment likely to be significantly affected by the proposed activity and its alternatives; (d) a description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance; (e) a description of mitigation measures to keep adverse environmental impact to a minimum; (f) an explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; (g) an identification of gaps in knowledge and uncertainties encountered in compiling the required information; (h) where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and (i) a non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

18 The African Development Bank. Integrated Environmental and Social Impact assessment Guideline, October, 2003. p. 4.

19 For example, this is the case of the Espoo Convention, see Article 2(1), the United Nations Convention on the Law of the Sea, 1982, (articles 205 and 206); the ASEAN Agreement on the Conservation of Nature and Natural Resources 1985, (article 14); the Convention on Biological Diversity, 1992, (article 14), the Convention on the Transboundary Effects of Industrial Accidents, 1992, (Article 4).

20 For example, that is the case of Antarctica, regulated in the Madrid Protocol. See article 8(1), that makes reference to activities identified as having "*less than a minor or transitory impact*", "*a minor or transitory impact*", or "*more than a minor or transitory impact*" and article 1(2) of the Annex *"If an activity is determined as having less than a minor or transitory impact, the activity may proceed forthwith"*.

the Convention but are similar in effect and therefore require an EIA. Finally, Annex III of the Convention stipulates that projects close to the border of other states are deemed as having the same status as Annex I. Apart from this, Annex III of the Convention lays down the general criterion that has to be applied in determining whether a specific project needs an EIA or not. Usually, those projects included in the Annex I of the Espoo Convention could be seen as a reference for a mandatory EIA. The World Bank takes a different approach and classifies projects into three categories as follows: projects that seriously harm the environment and need a full EIA, projects that require further attention and those projects that do not warrant an EIA.[21]

5. Social Impact Assessment: The substantive link to human rights.

As an EIA, the Social Impact Assessment (SIA) traces some of its origins to the NEPA[22] 1969 passed by the United States of America Congress. That act requires that all federal agencies "*utilize a systematic interdisciplinary approach in decision making which may have an impact on man's environment*" (section102 (a)).

Social Impact Assessment can be seen as an interdisciplinary approach to be applied in the risk's assessment of a planned activity. It is possible to agree with D'Amore's opinion that sees the SIA "*as an attempt to predict the future effects of policy decisions (including the initiation of specific projects) upon people, their physical and psychological health, well-being and welfare, their traditions, lifestyle, institutions, and interpersonal relationships.*"[23] This interdisciplinary approach of the SIA intended to extend the EIA scope; it is widely recognized as a human rights approach to the global environmental issues.[24]

As governments, intergovernmental and nongovernmental organizations work towards strengthening the legal expression of a new generation of "ecological rights[25]" and to progressively integrate environmental concerns into the national, regional and international procedures aiming at the protection of human rights, new

21 See, the World Bank Environmental Assessment Sourcebook 1991.

22 The legal requirement for SIA was further strengthened by the NEPA regulations, which require that an Environmental Impact Statement (EIS) relate economic, social and physical impacts: "Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment".

23 See D'Amore L.J., *An Overview of SIA*; F.S. Tester and W. Mykes (eds), *Social Impact Assessment: Theory and Method and Practice,* Calgary, Detselig,1978.

24 For example, see right to development, participation, information, right to life, right to health and other social, cultural and economic rights.

practices have evolved which signify new developments in the field of law. Human rights are regarded as "indivisible and interdependent[26]," and perceived in all their dimensions including those related to environment and development.

6. A SIA: general approach and its applicability in different contexts

It is necessary to adopt an anthropocentric[27] approach[28] assuming that environmental protection is not end in itself[29] but a mean of protecting human beings[30] especially in the current geological era of the Anthropocene. Through this understanding it is possible to outline the significant features of a SIA and to consider a SIA as part of an EIA in order to facilitate the assessment of the impacts.

An integrated and systematic SIA can help to ensure that Bank operations achieve their objectives, and make sure they are sustainable and feasible within their social and institutional context. From that perspective, the African Development Bank has outlined an *integrated environmental and social impact assessment*[31] guideline. This

25 In its report, *Our Common Future*, the World Commission on Environment and Development analysed the interaction between the economy and the environment at the national and international level and provided a new understanding of the imperative of sustainable development. The concept of sustainable and environmentally sound development was consolidated by the Earth Summit in Rio de Janeiro into the Agenda 21 and clarified by a Declaration of 27 principles on Environment and Development, adopted at the conference. The Stockholm Declaration of 1972 had already affirmed the inextricable link between and civil and political rights (e.g., the right to freedom, equality and dignity) and also between environment and economic rights (referring to the right to live under adequate conditions, and in an environment that allows a life of well-being and dignity).

26 According to the 1986 Declaration on the Right to Development, the environment is the notion of the indivisibility and interdependence of all human rights (civil, political, economic, social and cultural). The claim to the right to a satisfactory environment cannot be separated from the claim to the right to development in its individual and collective aspects as well as in its national and international dimensions.

27 See P.Sand, J. Peel, *Principles of International Environmental Law*, Cambridge 3ed. 2012.

28 For a more comprehensive approach to SIA, Frank Vanclay asserts that "Social Impact Assessment includes the processes of analysing, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions (policies, programs, plans, projects) and any social change processes invoked by those interventions. Its primary purpose is to bring about a more sustainable and equitable biophysical and human environment." See F. Vanclay, *International Principles for Social Impact Assessment*, 2003.

29 Legal developments in other fora and contexts reflect a greater environmental consciousness and suggest that the protection of the environment is often recognized on its own terms, and not simply as a means of protecting humans. See, in particular, regulations concerning the protection of biodiversity (e.g., Environment Protection and Biodiversity Conservation Regulations, 2000).

30 See the UN General Assembly in 1968 that recognized the relationship between the quality of the human environment and the enjoyment of basic rights (UNGA Res. 2398).

31 "The crosscutting themes are defined as transversal issues that are critical to achieve sustainable development. They tend to overlap as they are interrelated and to cover a multitude of aspects", See African Development Bank, Integrated Environmental and Social impact assessment guidelines, October 2003 (page 3 and 4).

revised procedure is aimed at effectively handling crosscutting issues while assessing the environmental and social impact of a project. Similarly, the Asian Development Bank (ADB) has provided general guidance incorporating social issues in the assessment process (development of the role of women, cooperation with NGOs, human resource development, health and population, involuntary resettlement, poverty alleviation, indigenous people). The focal point of concern of a SIA is to assist and help communities and other stakeholders to identify development goals and ensure that positive outcomes are maximized.[32]

Furthermore, the methodology of a SIA[33] can be applied to a wide range of planned interventions and can be undertaken on behalf of a wide range of actors. The use of a SIA provides for a greater contribution to the process of adaptive management of policies, programs, plans and projects, especially in developing countries, by involving the affected citizens and the other stakeholders in understanding the potential risks of the impacts. From this perspective, it could be also seen as a process of the "democratization" of the risk assessment process by increasing the level of public participation. A SIA also considers that the various types of impacts are inherently and inextricably interconnected. It is crucial to underline here that some scholars consider SIA as "good practice should lead to improved local community development outcomes".[34] Therefore, it must develop an understanding of the evolution of the impacts that are created when change in one area causes impacts across other areas.[35] In other words, there must be consideration

32 "Social impact assessment (SIA) is now conceived as being the process of managing the social issues of development. There is consensus on what 'good' SIA practice is – it is participatory; it supports affected peoples, proponents and regulatory agencies; it increases understanding of change and capacities to respond to change; it seeks to avoid and mitigate negative impacts and to enhance positive benefits across the life cycle of developments; and it emphasizes enhancing the lives of vulnerable and disadvantaged people" see, Ana Maria Esteves, Daniel Franks, Frank Vanclay, *Social impact assessment: the state of the art*, Tandfonline, 2012, 34-42.

33 See, particularly, D'Amore who identifies three evolving models of SIA: 1) an adversary model, in which each key actor – the proponent, the government and the community – does their own SIA. This model can lead to a form of arbitration process or develop further in a quasi-judicial manner. This model tends to recognize conflict as legitimate, rather than something to be avoided, and as an integral component of planning. 2) a straightforward research model, where the impact assessment meets the guidelines established by one or more government agencies. 3) a collaborative model, where communications are established from the start of the SIA among all key actors; agreement is reached regarding terms of reference, the manner in which the study will be conducted, and by whom. This model purposes that such communication is possible and desirable.

34 Ilya Gulakov, Frank Vanclay, Jos Arts, *Modifying social impact assessment to enhance the effectiveness of company social investment strategies in contributing to local community development*, Tandfonline, 2020, 382-396.

35 These are the specific sub-fields usually involved in the Social Impact Assessment: landscape impacts; archaeological and cultural heritage impacts; community impacts; cultural impacts; demographic impacts; development impacts; economic and fiscal impacts; gender impacts; health and mental health impacts; impacts on indigenous rights; infrastructural impacts, institutional impacts; leisure and tourism impacts; political impacts (human rights, governance, democratization etc.); poverty; psychological impacts; resource issues (access and ownership of resources); impacts on social and human capital; and other impacts on societies.

of the so called "cumulative impacts"[36] with an analysis of the impacts that occurred as a result of activities and also the so called the evaluation of the potential environmental sacrifice and the socio-economic implications.[37]

In an international context, the objective of a SIA is to make sure that development maximizes its benefits and minimizes its costs. As it has been noted by Richard Parsons "SIA is experiencing both evolutionary and revolutionary forces for change".[38] This statement is credible by categorizing impacts in advance, better decisions can be made regarding which interventions should proceed and how they should proceed, and mitigation measures can be implemented to minimize the harm and maximize the benefits from a specific planned intervention or related activity. Basically, a SIA is an involving process, particularly because it covers a diverse group of activities which constitute the fields of application.[39]

Consequently, a SIA can be undertaken in different contexts. For example, some SIA issues are related to the protection of individual property rights. Where these

36 "L'art. 5 del d.lgs. n. 152/2006, Nel descrivere l'oggetto della valutazione di impatto ambientale, prevede espressamente che l'autorità competente debba valutare se tale impianto ha un impatto singolo o cumulativo. Del resto, e la stessa ragione giustificativa della procedura che impone di stabilire se quel determinato impianto, essendo connesso ad altro, possa arrecare un pregiudizio complessivo all'ambiente" see, Cons. St., Sez. VI, 14 October 2014, no. 5092. "La valutazione di impatto ambientale di un progetto deve essere effettuata tenendo conto dell'effetto di cumulo del progetto proposto con altri relativi alla medesima area territoriale, anche se questi ultimi siano stati solo autorizzati non siano ancora materialmente esistenti" see, Tar Sardegna, Sez. I, 15 April 2015, no. 280.

37 "La VIA implica scelte che coinvolgono rilevanti interessi pubblici di natura strategica e consiste in una complessa e approfondita analisi comparativa tesa a valutare il sacrificio ambientale rispetto all'unità socio economica del progetto, tenuto conto anche delle alternative possibili e dei riflessi sulla cosiddetta opzione zero; per tale ragione, è connotata da ampia discrezionalità, sindacabile solo nel caso in cui sia evidente lo sconfinamento del potere discrezionale riconosciuto all'amministrazione" see, Marta Lorusso, Valutazione di Impatto Ambientale, in Francesco Caringella, Ugo De Luca Manuale dell'Edilizia e dell'Urbanistica, Manuali Operativi di diritto amministrativo, 2017. Furthermore, "la valutazione di impatto ambientale non si sostanzia in una mera verifica di natura tecnica circa l' astratta compatibilità ambientale dell'opera, ma implica una complessa e approfondita analisi comparativa tesa valutare il sacrificio ambientale imposto rispetto all' utilità socio economica, tenuto conto anche delle alternative possibili e dei riflessi sulla stessa cosiddetta opzione zero; in particolare la natura schiettamente discrezionale della decisione finale e della preliminare verifica di assoggettabilità, sul versante tecnico ed anche amministrativo, rende fisiologico che si pervenga ad una soluzione negativa ove l'intervento proposto cagioni un sacrificio ambientale superiore a quello necessario per il soddisfacimento dell'interesse diverso sotteso all'iniziativa; Da qui la possibilità di bocciare progetti che arrechino vulnus non giustificato dalle esigenze produttive, ma suscettibile di venir meno, per il tramite di soluzioni meno impattanti in conformità ai criteri dello sviluppo sostenibile e alla logica della proporzionalità tra consumazione delle risorse naturali e benefici per la collettività che deve governare il bilanciamento di sostanze antagoniste" see, Cons. St., Sez. V, 2 October 2014, no. 4928.

38 "Using the example of New South Wales, Australia, forces for change include community pressure and shifting expectations, industry desire for clarity and certainty, departmental leadership, a collaborative approach to policy development, and perceived legitimacy of the guideline itself. Inhibiting these forces are general resistance to change, a concern around costs of good SIA, unfamiliarity with social sciences, and insufficient practitioner capacity. The recent Rocky Hill judgement, which highlights concepts such as community cohesion, sense of place, and distributive equity, may accelerate change" see, Richard Parsons, *Forces for change in social impact assessment*, Tandfonline, 2020, 278-286.

rights are violated, a SIA tends to concentrate on the negative impacts, trying to mitigate the impact (supporting the creation of a compensation procedure), while in other contexts, particularly in developing countries, a SIA focuses on greater concern with maximizing social utility[40] and sustainable development that is generally accepted by the community.[41]

7. The World Bank approach to the integrated EIA and SIA: Areas where a SIA is considered fundamental.

The technique of a SIA and an EIA is a requirement that has to be satisfied by the developing countries in order to receive financial aid from the World Bank. Particularly, the World Bank requires an exhaustive SIA in projects involving the displacement of populations by major infrastructure projects and effects on indigenous people. In these cases, the World Bank needs an analysis of the social, cultural and demographic characteristics of populations[42] that could be affected by a proposed project. At the same time, the World Bank cares for the cultural acceptability of a project and its overall compatibility with the environment and the implementation of the project.[43]

It can be concluded – in line with Frank Vanclay's opinion – that a SIA assesses much broader risks[44] than the issues often considered in EIAs and it can become a

39 For example: empowerment of local people; enhancement of the position of women, minority groups and other disadvantaged or marginalized members of society; development of capacity building; alleviation of all forms of dependency; increase in equity; and a focus on poverty reduction.

40 "There are three trends that will shape the future of IA theory, policy and practice: a shift from a project-by-project approach to better accommodation of cumulative impacts; increased cross-border policymaking to address shared issues and in recognition of natural resources as planetary resources; and the development of increased and improved methods of community-based SIA that radiate out from communities' perspectives, as opposed to overlaying project perspectives onto a community" see, Sara Bice, *The future of impact assessment: problems, solutions and recommendations*, Tandfonline, 2020, 104-108

41 The importance of participation was recognized in the Earth Summit as "the need of individuals, groups and organizations to participate in environmental impact assessment and to know about and participate in pertinent decisions." See, the *Vienna Declaration and Program of Action* (adopted by the World Conference on Human Rights on 25th June 1993) highlighting the importance of participatory democracy by stating that: "Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives."

42 "The emerging field of Indigenous impact assessment is under-developed compared to other forms of IA, particularly in terms of its theoretical foundation" see, Dyanna Jolly, Michelle Thompson-Fawcett. (2021) Enhancing Indigenous impact assessment: Lessons from Indigenous planning theory. *Environmental Impact Assessment Review* 87.

43 See, the World Bank Environmental Assessment Sourcebook 1991.

44 "SIA has learnt much over 50 years, however complex issues remain including involuntary resettlement, restoring livelihoods, place attachment, sense of place, maintaining intangible cultural heritage, and finding

tool of avoiding or mitigating controversies at a later stage. The social impacts taken in consideration affect one or more of the subsequent aspects:

- the way of living of people;[45]
- culture;
- community – its cohesion, stability, character, services and facilities;
- political systems – increasing democracy through public participation;
- environment[46] – the quality of the air and water people use; the availability and quality of the food they eat; the level of hazard or risk;
- health and wellbeing;[47]
- personal and property rights – for example illegal expropriations that affect people of lower socioeconomic strata.

The content of an EIA has not been laid down by customary law, so the states have a high degree of freedom to bind themselves through treaties and implementation of domestic regulation.[48] Through these international instruments, certain standards may be reached as to the general content. Annex II of the Espoo Convention, the most detailed of international instruments provides an important reference.

Accordingly, the content can be summarized as follows: (i) description of the proposed activity and its purpose, (ii) reasonable alternative including the no-action alternative, (iii) the environment that is likely to be affected, (iv) potential environmental impact with the estimation of its significance, (vi) explicit indication of predictive methods and underlying assumptions, vii) relevant environmental data and indication of gaps and uncertainty, and (viii) mitigating measures.

replacement land" see, Frank Vanclay, *Reflections on Social Impact Assessment in the 21st century*, Tandfonline, 2019, 126-131.

45 Ilse Aucamp, Stephan Woodborne, 'Can social impact assessment improve social well-being in a future where social inequality is rife?' (2020) *Impact Assessment and Project Appraisal* 38(2), 132-135.

46 See, the 1989 *Declaration of the Hague on the Environment* recognized, "the fundamental duty to preserve the ecosystem" and "the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-à-vis present and future generations to do all can be done to preserve the quality of the environment."

47 In 1990, the UN General Assembly declared that "all individuals are entitled to live in an environment adequate for their health and wellbeing, and the UN Commission on Human Rights (now the Human Rights Council) affirmed the relationship between the preservation of the environment and the promotion of human rights. See the UNGA Res. 45/94 (1990) and Res. 1990/41 (1990). The Human Right Council Continued to emphasize these linkages, see Res. 5/1, UN Doc. A/HRC/RES/5/1 (2007), Appendix I, and Res. 9/1, UN Doc. A/HRC/RES/9/1 (2008), which, *inter alia*, extend the mandate of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and waste on the enjoyment of human rights.

48 A good example of the different approaches taken by different states is given by the recent case between India and Pakistan regarding a hydroelectric project. Both states provided the court with different environmental assessments. Pakistan provided a complex and holistic analysis and India a simpler assessment based on more limited data. The Court confirmed the existing level of discretion of states regarding the content of EIA, by ruling that "… *there is no single "correct" approach to such environmental assessments"*. See, Permanent Court of Arbitration, *Indus Waters Kishenganga Arbitration* (Pakistan v. India) Final Award, 2013, paragraphs 97, 99 and 100.

An EIA is necessary and mandatory if the activity results in transboundary harm. It is not clear if an activity totally within the jurisdiction of one state has to be subject to an EIA. Thus, in theory, activities that do not result to transboundary harm are not subject to an EIA. Almost all financial institutions have their own criteria and establish the obligation to carry out an EIA for projects listed in their annexes, as a requirement for financing them. The World Bank, the European Bank and African Bank have put in place some standards for projects that they finance by listing some activities as requiring mandatory obligations and standards.

The assessment of risks does not involve only environmental impacts, but also social ones. A SIA combined with an exhaustive EIA is playing a key role in the evaluation process related to the implementation of projects both at the domestic and the global level.

It is fundamental to adopt an interdisciplinary approach (e.g., legal, anthropological, and economic) to cover all the different aspects that in a positive or negative way could influence the life of a certain group of people. Without any doubt, a SIA is going to be used more often as a practical tool that would permit understanding and predicting any kind of impact related to planned interventions in a specific territory or area. From that perspective, a SIA is very important for the realization, both in the developed and in the developing countries, of sustainable development, with a special regard for the protection of human rights.

8. SECTION II

9. Environmental Impact Assessment (EIA): The Case of the European Union.

The Environmental Impact Assessment (EIA) within the European Union scheme has its main legal basis in the EU Directive 85/337/EEC, known as the EIA Directive. This Directive has the purpose of creating an alternative system for the EU Member States: a mandatory and/or discretionary[49] procedure in order to assess the environmental impacts.

The Council of the European Union has amended the EU Directive 85/337/EEC in 1997, in 2003 and in 2009. In 1997, the Council of the European Union amended the EIA Directive by considering the EIA as a fundamental tool for environmental policy as described in the article 130 of the Treaty establishing the European Community

49 See Article 4 (1) of the EU Directive 85/337/EEC.

and of the Fifth Community Program of policy and action in relation to the environment and sustainable development.[50] The Directive 97/11/EC is focused *inter alia* on enlarging the field of application of the EIA and in upgrading the discipline of the EIA with regard to the United Nations Espoo Convention's requirements.

The Directive 2003/35/EC brought the Directive of the 1985 in line with the 1998 Arhus Convention. The EU Parliament and the Council of the European Union amended the Directive of 1985 in terms of understanding that an effective public participation[51] in making decisions facilitates the public to express, and the decision-maker to take account of, opinions and overall concerns relevant to those decisions; consequently, increasing the accountability and transparency of the decision-making process and contributing to support for the decisions made concerning environmental issues. Hence, the main goal of this Directive is to provide for helpful public participation and access to justice in respect to drawing up of certain plans and programs relating to the environment.

By adopting the Directive 2009/31/EC, the European Institutions modified the EIA Directive. This Directive[52] increased the number of types of private or public projects regarding "the transport, capture and storage of carbon dioxide (CO2)". On the whole, the Directive 2009/31/EC is strongly related to the ultimate goal of the United Nations Framework Convention on Climate Change, which is "to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". After the three amendments, the EU Directive 85/337/EEC has been codified in December 2011 through the promulgation of the Directive 2011/92/EU on *the assessment of the effects of certain public and private projects on the environment* (modified by the Directive 2014/52/EU). As a result of a review process[53], on October 26, 2012, the EU

50 The EU policy on the environment is based on the precautionary principle and on the principle that preventive action should be taken, as well as the environmental damage should as a priority be rectified, at the source and the polluter pays principle.

51 The participation also includes the contribution by associations, organizations and groups, in particular NGOs, to promoting and advocating environmental protection.

52 In accordance with article 1 "This Directive establishes a legal framework for the environmentally safe geological storage of carbon dioxide (CO2) to contribute to the fight against climate change".

53 "In July 2009, the EU Commission published a report on the application and effectiveness of the EIA Directive (COM (2009)378). The report outlines the strengths of the EIA Directive, highlights the main areas where improvements are needed and provides recommendations, where relevant. In June 2010, the Commission launched a wide public consultation. The consultation covers a broad variety of issues (e.g., quality of the EIA process, harmonization of assessment requirements between Member States, assessment of transboundary projects or projects with transboundary effects, role of the environmental authorities, and development of synergies with other EU policies). The phase of public consultation was concluded by a Conference for the 25th anniversary of the EIA Directive. The findings of the public consultation and the conclusions of the Conference have fed into the Commission's review process of the EIA Directive". See http://ec.europa.eu/environment/eia.htm

Commission[54] adopted a proposal for a revised Directive. Referring to the words of the Commission[55] "the Directive of the 1985 has been amended several times, but, following a wide stakeholder consultation, the Commission decided that the time has come for a comprehensive overhaul, adapting it to developments in policy and to legal and technical developments. The changes are also forward looking, and emerging challenges that are important to the EU as a whole, issues like resource efficiency, climate change, biodiversity and disaster prevention will now be reflected in the assessment process".

The Commission's proposal 2012 specifically aims to:

- "**Adjusting** the procedure (…) will ensure that only projects with significant environmental impacts are subject to such an assessment. Projects adapted to reduce their impacts and small–scale projects with local impacts should be approved more swiftly at lower cost, leaving authorities more time to focus on assessments of major projects with large-scale environmental impacts".
- **"Strengthening** rules to ensure better decision-making and avoid environmental damage".
- **"Streamlining** the various stages of the EIA process, by introducing timeframes and a new mechanism to ease the process when several assessments are required, and several authorities involved".

The EU Directives on EIA reflect the on-going environmental and socio-economic changes, bringing it in line with the principles of smart regulation (e.g., simplification and reduction of the administrative burden).

10. The Scope and Content of the EIA.

Since 1985, the EIA is applied to a variety of projects. The main legal provision that highlights the scope of the EIA within the context of the EU Directive 2011/92/EU is article 3.[56] Specifically, this article establishes a very comprehensive procedure by

54 Environment Commissioner Janez Potočnik said: "*For the past 25 years, the EIA Directive has helped ensure that environmental considerations are integrated into decision-making for projects. This has improved the sustainability of countless projects, while also empowering citizens and ensuring that they are informed and consulted before decisions are made. But loopholes need to be fixed, in particular concerning the quality of the assessment process, to make sure that projects that will affect the environment are properly assessed*." See the Press release, Brussels, 26 October 2012, Environment: Commission to streamline rules on environmental impact assessments of projects.

55 See the Press release, Brussels, 26 October 2012, Environment: Commission to streamline rules on environmental impact assessments of projects.

56 The EUCJ stated that "The wording of the EIA Directive indicates that it has a wide scope and a broad purpose". (C-72/95, Kraaijeveld and Others, paragraphs 31, 39; C-435/97, WWF and Others, paragraph 40; C-2/07, Abraham and Others – *Liège airport*, paragraph 32, C-275/09, Brussels Hoofdstedelijk Gewest and Others,

stating: "the Environmental Impact Assessment will identify… the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora,
- soil, water, air, climate and the landscape,
- material assets and the cultural heritage,
- the interaction between the factors between the factors referred to in points (a), (b) and (c)".

Thus, a very comprehensive procedure that involves these factors has to be carried out by the competent national authority in order to release the consent regarding those projects that can have a significant effect on the environment.

As stated above, the EU legal framework outlines an alternative EIA system for the EU Member States that in a case-by-case examination could ask for a mandatory or discretionary procedure to assess the environmental impact.

According to the Directive 2011/92/EU, on one hand a mandatory procedure of the EIA is required for those public or private projects having a strong impact on the environment that are listed in the Annex I of the Directive. These are projects related to the construction of several kinds of infrastructures in the energy sector (e.g., crude oil refineries or thermal power stations), treatment of radioactive waste or toxic and dangerous wastes, transportation.[57] On the other hand, with reference to article 4 (2), there is a discretionary procedural system for the Member States for those projects that are listed in the Annex II of the Directive. Specifically, the Member States have to determine through a so-called screening procedure if a particular project has a strong impact on the environment so that the need to use the EIA is determined to be either necessary or not. Nevertheless, when an EIA must be applied, the EU Member States have to strictly follow the criteria established in the Annex IV of the EU Directive 2011/92/EU.

11. Special focus on SIA: Content of the EIA.

The Social Impact Assessment (SIA) within the European Union system is still considered as being at its initial stage.[58] This seems to be mainly due to a lack of a

paragraph 29).

57 See the Annex I of the EU Directive 85/337/EEC.

58 "La valutazione di impatto ambientale non rappresenta solo un mero giudizio tecnico, ma presenta, al contempo, profili particolarmente intensi di discrezionalità amministrativa, sul piano dell' apprezzamento degli interessi pubblici in rilievo e della loro ponderazione rispetto all' interesse all'esecuzione dell'opera, sindacabile solo nel caso in cui sia evidente lo sconfinamento del potere discrezionale riconosciuto all'amministrazione" see, Tar Veneto, Sez. III, 7th May 2015, no. 489.

well-defined legislation that would be able to assess a particular social impact. Unfortunately, there is no clear definition of what a social impact is and consequently, it is not easy to assess such a kind of impact.

For guarantying a minimum basis of common understanding of what has to be considered relevant as a social impact under an Impact Assessment procedure, the EU Member States[59] produced a list that identifies a certain kind of impacts. Specifically, the EU Commission recognized the following categories of social impacts:

- "employment and labour markets";
- "standards and rights related to job quality";
- "social inclusion and protection of particular groups";
- "equality of treatment and opportunities";
- "non-discrimination";
- "private and family life, and personal data";
- "governance, participation, good administration, access to justice, media and ethics";
- "public health and safety";
- "crime, terrorism and security";
- "access to and effects on social protection, health and educational systems, and culture";
- "social impacts in third countries".

Without any doubt, this list represents a positive development for creating an effective and useful SIA procedure, possibly considered within an integrated assessment system (e.g., EIA – SIA) able to mitigate and monitor different types of impacts caused by construction of a particular infrastructure. It is important to highlight that this list significantly contributes to harmonization among the EU Member States in identifying the particular areas that can be affected wither positively or negatively. Surely, in these key areas an effective SIA would be a useful tool for reaching important public policy goals and to lead improvement in all of the five listed sectors. From this perspective, the SIA is well-considered in The Europe 2020[60] strategy that aims to reduce poverty and social exclusion, as well as to realize

59 See, the Guidance of the European Commission's integrated impact integrated assessment system 2011.

60 Member States decided to help 20 million people out of poverty by the year 2020. See also the "European Platform against Poverty and Social Exclusion" (which is the EU contribution to addressing the challenges of Poverty and Social Exclusion within the Europe 2020 Strategy). The platform concluded that: "Better policy coordination means that the social impact of policy initiatives needs to be carefully assessed and that potentially adverse social consequences should be minimized through equity-orientated and poverty-focused measures. The European Commission has subjected all major initiatives and legislative proposals to a comprehensive impact assessment (IA), including the social dimension. The Commission will continue to refine and improve the quality of its impact assessment to ensure that attention is paid to the social dimension. It is important that other

the conditions for a sustainable development by also covering issues like climate change and energy. In this context, a SIA is a procedure that clearly will be useful in the decision-making process, strengthening the consultation among the stakeholders and meaningful as a source of data and information.

The problem with the SIA is the absence of recognized standards, because today it is still difficult to define a social impact.

Certainly, there is relevancy to the conclusion of the study elaborated by the Centre for European Public Policy that stated: "*Social IA is still in its infancy in most systems. Where it takes place at all, the assessment of social impacts is often less well developed than the assessment of the budgetary, economic impact. Examples of IAs that contain an in-depth analysis of social impacts are few and far between; where they do exist, they are most often conducted on policies with specific social objectives. [...] Nonetheless, this study has found that effective social IA is possible. There are pockets and/or isolated examples of good practice*".

In many parts of the European Union, especially in this period of economic crisis, the necessity for an adequate and generally transparent SIA that works in an integrated system or specific way on a project activity (health, employment, etc.) is recognized. It would be relevant to insert the SIA into a common established European legal framework centred on public participation and, particularly, on the consultation with the local people and stakeholders.

12. The EIA Parties and Procedure in the EU.

In the EU model, the EIA is carried out at the national level by the Member States. Each of the Member State appoints the Competent National Authority[61] or Authorities that will have an important role in all the phases or stages of the environmental assessment procedure. It is precisely in accordance with the Directive 2011/92/EU, that the designated competent authority is responsible for performing the duties arising from the procedure in order to make the decision on giving consent to proceed with the realization of a particular project. Additionally, under the procedure, it is the so-called Developer or Applicant that requests the permission for a project. Alternatively, it could be a corresponding public authority that wants to initiate a project.

EU Institutions when modifying the Commission's proposals and the Member States at national level, assess the social dimension of their own proposals."

61 For example, the Ministry for Environment or any National Agency for the environmental protection as well as other regional authorities.

An important role is also played by the public concerned, defined as the affected or likely to be affected people that nowadays have the right to access to information, to take part in the procedure and to access to justice in environmental matters. These can be individuals or groups but also associations and non-governmental organizations that advocate for environmental protection, i.e., people that have an "interest in the environmental decision-making procedures" related to the realization of a project.

The EIA procedure[62] within the EU framework is made up of different phases:

- the applicant for authorization for a private project or the public authority which initiates a project can request the expert national authority to define what is supposed to be covered by the EIA information. In so doing, the applicant is in the condition to provide the necessary information (scoping stage);
- the applicant defined as developer is obliged to provide information on the potential environmental impact (according to the criteria established in the Annex IV);
- the environmental authorities and the public (and in the transboundary context, the affected Member States) must be informed and consulted;
- after the outcomes of the consultations, the national authority will make a decision by issuing an official pronouncement.
- eventually, the informed public could challenge the decision before the courts (public participation and access to justice).

13. The Procedural Rights.

These categories of principles found their legal basis in the Aarhus Convention 1998 that has been defined by the European Court of Justice (CJEU) as an "integral part of the legal order of the European Union". [63]

a) Access to information

By following and advancing the principles established in the Aarhus Convention 1998, the European legislation clearly provides the right to access information to the

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63 Consequently, the EUCJ has the competence to interpret the provisions of the Aarhus Convention and decide if these provisions have a direct effect. See the Case C-344/04 IATA and ELFAA [2006] ECR I-403, paragraph 36, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, paragraph 82).

concerned public. The Directive 2011/92/EU[64] states in article 6 paragraph 2 that the public concerned has to be informed about the most significant information regarding the development consent procedure.

The environmental information provided by the competent national authority is extremely important for strengthening the quality of the implementation of the subsequent public participation by to the public concerned or likely to be affected. Furthermore, at the national level the Member States must establish through their legislation a sort of "reasonable timeframes" to make any kind of useful information available to the public concerned. Environmental information is, for obvious reasons, considered in a special way during the development of consent procedure. The more the public concerned is informed, by having access to the information, the more effective is its participation in the decision-making process.

According to article 9 of the Directive 2011/92/EU, the public concerned has to be informed with regard to the positive or negative decision. On safeguarding the transparency of the procedure, art. 9 (1) stated that the public concerned has to know: the content of the decision, the motivation as well as the measures that the Competent authority should take in order to reduce the effects of the impact.

b) Public Participation

Within the impact assessment procedure, the public concerned has the right to effectively participate in the decision-making process. Once again, it is useful to make a *renvoi* to the Aarhus Convention that expressly establishes that before making a decision concerning certain kind of activities[65], the authorities and the developer are obliged to have public consultations.

In this perspective, the EU legislation recognizes the public needs as a priority in order to protect the right of every individual and groups to live in a healthy environment, handling environmental matters by providing for an effective public participation. By virtue of article 6 paragraph (4) of the Directive 2011/92/EU, the

64 See Article 6 paragraph 2: "The public shall be informed (…) of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided: (a) the request for development consent; (b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies; (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions; (d) the nature of possible decisions or, where there is one, the draft decision; (e) an indication of the availability of the information gathered pursuant to Article 5; (f) an indication of the times and places at which, and the means by which, the relevant information will be made available; (g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article".

65 See article 6 and the activities listed in Annex I of the Aarhus Convention 1998.

competent national authority has to ensure that the public concerned has the possibility to give opinions and to express comments: "*The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken*". Consequently, the Member States have the obligation of guaranteeing effective public participation by enacting appropriate domestic legislation.

All in all, effective public participation[66] is without doubt relevant in the development process, because the final decision will be based in part on the result of consultations with the public concerned and the information that the same public concerned was able to examine in virtue of its right to access information. Particularly, the participation of environmental NGOs is considered very important in terms of quality of the decision. From this perspective, public participation contributes to ensuring accountability and transparency of the whole decision-making process.

c) Access to Justice

In virtue of what is stated above, the public concerned should be kept informed and should effectively participate by assuming a more central role than in the previous EIA procedure scheme that dates from 1985.

Recalling the article 9 (2) and (4) of the Aarhus Convention 1998 that provides the right of the public concerned to access to justice, the EU legislation (in the codified Directive 2011/92/EU[67]) correspondingly established that the members of the public concerned can have access to justice in order "to review a procedure or to challenge a

66 "Members adopted amendments to ensure that the public would be informed and consulted. The public should have the contact information of and easy and quick access to the authority or authorities responsible for performing the duties arising from the directive. Due attention must be paid to the comments made and opinions expressed by the public. With a view to strengthening public access and transparency, a central portal providing timely environmental information with regard to the implementation of this Directive electronically should be made available in each Member State", see source 2012/0297(COD) - 09/10/2013 Text of the EU Commission Proposal.

67 See Article 11 (1) and (2) of the Directive 2011/92/EU: "1.Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive. 2. Member States shall determine at what stage the decisions, acts or omissions may be challenged."

substantive or procedural legality of a decision before a court of law" (or another judicial body).

For having access to justice two conditions must be met by the affected people: 1) they have a "sufficient interest[68]" or 2) according to the national administrative law of a particular Member States, they "maintain the impairment of a right". The directive leaves the Member States to establish at the domestic level what these two conditions for the admissibility of bringing a claim to a judicial body are.

Last but not least, the legal review of the procedure in environmental matters that eventually has to be undertaken by the members of the public concerned should be generally fair, equitable, timely and not prohibitively expensive. The main objective of the EU legislation is to ensure for the public concerned, what is defined as a "wide access to justice".

13. Case Law of the European Union Court of Justice (EUCJ).

The case law produced by the EUCJ provided a substantive interpretation of the EIA rules established through the Directives:

In the case C-420/11, Leth (paragraph 28), the Court clarifies the purpose of the EIA, recalling the 1985 Directive by stating that: "*the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community's objectives in the sphere of the protection of the environment and the quality of life*".

In the case C-392, Commission v Ireland (paragraph 66), the Court ruled that: "*Even a **small-scale project** can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the EIA Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration*".

With reference to Article 3 of the Directive 2011/92/EU, the Court, in the case C-404/09, Commission v. Spain (paragraphs 78-80), stated that: an impact "***assessment must also include an analysis of the cumulative effects** on the environment which that project may produce if considered jointly with other projects, in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment of the project in question". Furthermore, another case with the same*

68 The interests of any non-governmental organizations meeting the requirements may be taken into account to obtain access to justice. Such organizations might be subject of being impaired for the same purpose. As stated in article 11 (3), "what constitutes sufficient interest and impairment of a right shall be determined by the Member States" through a proper domestic legislation.

parties established what the procedure has to take in consideration: "it must include a ***description of the direct and indirect environmental impact of a project"*** (see C-322/04, Commission v. Spain, paragraph 33).

In the case C-392/96, Commission v. Ireland (paragraphs 65, 72), the Court made a significant statement in relation to the threshold and the criteria to be considered: "*A Member State which, on the basis of* ***Article 4(2)*** *of the EIA Directive, has established thresholds and/or criteria taking account of* ***only the size of projects****, without taking into consideration* ***all the criteria listed in Annex III*** *[i.e., nature and location of projects] exceeds the* ***limits of its discretion*** *under Articles 2(1) and* ***4(2)*** *of the EIA Directive*".

With reference to the contents of the EIA, the Court in the case C-332/04 Commission v. Spain ruled that: "*Article 3 of Directive 85/337 lays down that it must include a description of the* ***direct and indirect*** *environmental impact of a project*".

In the same case (C-332/04; paragraph 54), the Court ruled that the opinions expressed by the public concerned "***form part of the consent process*** *and are aimed at assisting the competent body's decision on granting or refusing development consent. They are therefore* ***preparatory in nature and not, generally, subject to appeal***".

In regard to participation and access to justice in the Case C-263/08 Djurgården, (paragraphs 36 and 38) the Court established: "***Article 6(4)*** *of Directive 85/337 guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment. Participation in the decision-making procedure has no effect on the conditions for access to the review procedure. Participation in an environmental decision-making procedure under the conditions laid down in Articles 2 (2) and 6 (4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure*".

In a case (C-240/09, *Lesoochranárske zoskupenie,* paragraphs 44-50 and 54) concerning the matter of access to justice, the Court ruled that: "*Article 9 (3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005* ***does not have direct effect*** *in European Union law. It is,* ***however,*** *for* ***the referring court to interpret, to the fullest extent possible****, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings* ***in accordance with the objectives of Article 9 (3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law****, in order to enable an environmental protection organization, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law*".

14. An assessment of the EIA in the Legislation of the European Union.

The European Union has a very advanced model of application of the Environmental Impact Assessment (EIA). In this framework, it is important to highlight that the EIA is well outlined in the codified Directive 2011/92/EU. Particularly, there are practical provisions regarding the implementation of the so-called procedural rights established in the Aarhus Convention. Nonetheless, the EU Member States do not always implement these principles, generally for political reasons.

Furthermore, it is true that the EU model takes in consideration the SIA. Nevertheless, there is a general problem of harmonization among the EU Member States. As was already noted, the Member States have adopted different ways of implementing an Impact Assessment procedure. On the one hand, it can be appreciated that for the majority of the EU Member States (e.g., Italy, France, Belgium, United Kingdom, Germany, Greece, Hungary), the SIA is a procedural part of an integrated assessment system that has to be focused on different types of impacts or on a case-by-case examination. The SIA is done just for a specific type of impacts (e.g., health, labour etc.). On the other hand, in some domestic legislation of other EU Member States (e.g., Austria, Cyprus, Spain, Latvia), the SIA is not present as such, but it is within a different procedure of ex-ante administrative procedures of forecasting or evaluation of potential social impacts. And broadly, the Member States prefer to pay their attention to economic, rather than social, impacts of a particular project. All in all, there are two extremes among the Member States that underline the necessity of a harmonization and common understanding of the issues.

Obviously, the European model of an EIA is a hybrid model that is in between the international and national law and it is able to elucidate on how the impact assessment procedures are performed in twenty-eight countries.

15. Conclusions and Concrete Policy Recommendations.

The EIA is an effective instrument for prevention of environmental harm. The EIA has become a settled practice among states. The goal of the EIA is to provide the authority with a deep understanding of the activity itself, its effects on environment

and people, with the final objective of contributing towards finding the best way of preventing, mitigating and compensating for the undesirable effects of the activity.

The International Court of Justice has confirmed the customary nature of this obligation in the cases of likely transboundary harm, despite the fact that the content is still to be determined. Several legal instruments laid down the requirement of carrying out an EIA and some of them give detailed standards and provide useful guidance. Additionally, the majority of domestic systems also contemplate this instrument.

In spite of its extensive recognition, a great challenge consists of finding the political will of states to bind themselves by the EIA and to implement high standards of regulation, upon which the effectiveness of the EIA will depend. Policy makers and legal advisors, both at the international and national level, could contribute to improving the status of the EIA and to spreading awareness of this tool. Here there is a room for some observations and final recommendations. Firstly, the prior character of the EIA is a fundamental feature. Without it, its preventive nature and its objectives would be jeopardized. Regulation must provide mandatory EIA before the authorization of the activity. Developing funding plans to enable the state authorities to monitor and assess the project at all the stages is necessary as well.

Secondly, it is common that regulations list the activities for which the EIA is mandatory, but a rule through which other non-listed activities can be assimilated to those listed because of their magnitude or potential effects is advisable, otherwise potentially harmful activities could be left out of the mandatory scope of the EIA.

Thirdly, a technique to improve the efficiency of the EIA is to harmonize the EIA regulation, especially among neighbouring states or states belonging to the same geographical region, as important industrial developments or activities may affect people and environment beyond national jurisdiction. Under this circumstance, the obligation of carry out an EIA would lead to a whole process of cooperation that would be difficult to achieve among states with very different EIA legal systems. Within a harmonization process, it will be possible to create common standards throughout the countries that will make the implementation of EIA easier and will make procedural rights consistently operative, ensuring transparency and accountability.

Fourthly, governments need to increase awareness of environmental protection and of the fact that environmental harm is often irreversible. The EIA, as any other legal or political process is implemented by persons, and as was shown, it consists of a process with many actors involved, each of them with different interests that need to be balanced. Among those interests, environmental considerations need to have an

important role, which is why encouraging early environmental education is highly advisable in order to permit the EIA to fulfil all of its goals.

Fifthly, Integration of new actors, the public in particular, is very important to achieving an integral process that will lead to better results. The EIA is a complex process that must give a voice to all the potentially affected and the outcome of the process must be taken into account. States have to notify and consult every likely affected State and its population in the same way as their own population. Information has to be provided in an early stage and public participation must be aimed at building real dialogue among the parties. Effective implementation of these principles will not only prevent environmental and human harm but will also avoid expensive legal proceedings. Finally and above all, in some contexts, governments should encourage the private and public business in changing their opinion on the EIA, since in the business community is often seen just as a costly barrier while in reality, the assessment procedure is a useful instrument that ensures the sustainability and contributes to obtaining social license of their activities and projects in the long term. Activities are usually carried out by private companies that know the project very well; and thus, they hold valuable information and advance technology for the assessment. Under these circumstances, even the EIA is mandatory for private actors; its involvement can bring substantial benefits. A good example to follow in this regard comes from the practice of international world banks and financial institutions that require EIA before financing some projects, and that have produces guidelines for the private sector characterized by detailed standards.