

ASSESSING THE CANDIDATES FOR A GLOBAL TREATY ON TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

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INTRODUCTION

The absence of a global treaty on environmental impact assessment (EIA) is an obvious gap in international law. No one would suggest that international environmental law is as developed as domestic environmental law, but it does have counterparts to most areas of domestic regulation. There are global treaties on air pollution, water pollution, hazardous waste, toxic chemicals, biodiversity generally, and endangered species in particular, not to mention regional agreements on many of the same topics.¹ The

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¹ See, e.g., Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, S. TREATY DOC. NO. 107-5, U.N. Doc. UNEP/POPS/CONF/2, reprinted in 40 I.L.M. 532; Convention on Biological Diversity, June 5, 1992, S. TREATY DOC. NO. 103-20, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993); United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, opened for signature Mar. 22, 1989, 1673 U.N.T.S. 57, 28 I.L.M. 657 (entered into force May 5, 1992); Vienna Convention for the Protection of the Ozone Layer, opened for signature Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988) [hereinafter Vienna Convention]; United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994); International Convention for the Prevention of Pollution from Ships, 1973, done Nov. 2 1973, T.I.A.S. No. 10,561, 1313 U.N.T.S. 3, as modified by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, concluded Feb. 17, 1978, 1340 U.N.T.S. 3, 17 I.L.M. 546 (entered into force Oct. 2, 1983); Convention on International Trade in Endangered Species of Wild Flora and Fauna, opened for signature Mar. 3,

absence of a treaty on domestic EIA—that is, EIA of activities’ domestic effects—is unsurprising, because international environmental law still has little to say about domestic environmental protection. But it may seem somewhat surprising that there is no global treaty on EIA of activities with transboundary effects—transboundary EIA.

Two factors in particular might be thought to provide a foundation for a global treaty. First, transboundary EIA seems to follow logically from a fundamental concept in international environmental law, which is expressed concisely in Principle 21 of the 1972 Stockholm Declaration: “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.”² Many scholars have pointed out that, to be effective, Principle 21 needs procedural corollaries: an obligation to conduct transboundary EIA to make sure that a proposed activity will not cause transboundary harm, as well as obligations to notify other countries and to consult with them about such projects.³ Since national governments often express support for Principle 21—they adopted it again in the 1992 Rio Declaration,⁴ and they have included it in preambles of international environmental treaties⁵—one might think that they

1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975).

² Stockholm Declaration of the United Nations Conference on the Human Environment, *adopted* June 16, 1972, *Report of the United Nations Conference on the Human Environment*, G.A. Res. 2997, U.N. GAOR, 27th Sess., 21st mtg., princ. 21, at 2 & Corr. 1, U.N. Doc. A/CONF.48/14, *reprinted in* 11 I.L.M. 1416, 1420 (1972) [hereinafter Stockholm Declaration]. The excised language says that States also have, “in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies.” *Id.* Although the two clauses—the right and the responsibility—seem to contradict one another, the responsibility is usually read as a limitation on the right.

³ Knox, *supra* note *, at 295-96 (internal citations omitted).

⁴ United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, *adopted* June 14, 1992, princ. 2, U.N. Doc. A/CONF.151/5/Rev.1, *reprinted in* 31 I.L.M. 874, 876 (1992). The Rio Declaration modifies the Stockholm language slightly, by adding the words “and developmental” after “environmental.”

⁵ See, e.g., Vienna Convention, *supra* note 1, at 30, 1513 U.N.T.S. at 325; United Nations Framework Convention on Climate Change, *supra* note 1, at 2, 1771 U.N.T.S. at 166; Stockholm Convention on Persistent Organic Pollutants, *supra* note 1, at 2, 40 I.L.M. at 533.

could agree on the procedures necessary to give it force.

A second possible foundation for a global treaty on transboundary EIA is the enormous popularity of domestic EIA, which has been adopted in some form by most countries in the world.⁶ One might imagine that nations could agree to base a global EIA treaty on their own domestic EIA laws. Even though the laws often do not provide for transboundary EIA, nations that have invested the time and expertise necessary to develop domestic EIA presumably should be willing to agree to take the relatively smaller step of carrying out transboundary EIA of activities within their jurisdiction, in return for receiving the reciprocal benefits of transboundary EIA of activities that might affect them.

And yet, despite the connection with Principle 21 and the popularity of domestic EIA, there is no global treaty on transboundary EIA. This Article suggests three principal obstacles that have blocked agreement. It then describes two possible candidates for a global treaty that have emerged in recent years and assesses whether and how they appear to address the obstacles satisfactorily. The Article concludes by suggesting some steps that might increase the likelihood of adoption of a global treaty on transboundary EIA.

I

OBSTACLES TO A GLOBAL TREATY ON EIA

The first two obstacles to a global treaty on EIA arise from the very factors that would appear to provide a basis for it: Principle 21 and the prevalence of domestic EIA.

The difficulty with relying on Principle 21 as a basis for transboundary EIA is that Principle 21 is unworkable as written and too vague as interpreted. As written, the rule seems to tell States: "allow no transboundary harm."⁷ But that would require the cessation of all economic activity near borders, which nearly everyone agrees is impracticable.⁸ To avoid this problem, scholars

⁶ See BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996).

⁷ Stockholm Declaration, *supra* note 2.

⁸ See *Rio Declaration on Environment and Development: Application and*

often argue that Principle 21 may be read to include a threshold of significant harm (rather than just harm) and a requirement of due diligence (rather than an obligation of result).⁹ With these modifications, it would say, in effect, “make diligent efforts to allow no significant transboundary harm.” As a rule of international law, this formulation is much more acceptable to States, but it leaves unclear exactly what a nation must do to prevent significant harm. The vaguer the substantive requirement, the more difficult it is to base clear procedural rules on it.

The problem with building a global EIA treaty on domestic EIA statutes is the converse: not that there is not enough law, but that there is too much. Domestic EIA laws are generally similar in that they require a government to consider the environmental effects of certain types of projects before deciding whether to authorize them.¹⁰ However, developing countries often require only a limited consideration of the environmental effects of a narrow range of projects,¹¹ while more developed countries often broaden the range of proposals subject to EIA. EIA laws in these countries require the officials reviewing the project to consider alternatives to it, give more opportunities for public comment, require consideration of measures to mitigate any harms the project may cause, and provide for independent judicial or administrative review.¹² Moreover, even similar EIA laws usually differ in their details—in how they provide for public participation or independent review, for example.¹³ To reach an agreement that

Implementation, Report of the Secretary General, U.N. Commission on Sustainable Development, 5th Sess., para. 23, U.N. Doc. E/CN.17/1997/8 (1997) (“Certainly not all instances of transboundary damage resulting from activities within a State’s territory can be prevented or are unlawful.”), <http://www.un.org/esa/sustdev/csd/CSD5.htm>.

⁹ See Knox, *supra* note *, at 293. See also Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169 (2003).

¹⁰ Cf. Peter H. Sand, *Lessons Learned in Global Environmental Governance*, 18 B.C. ENVTL. AFF. L. REV. 213, 256-57 (1991).

¹¹ Clive George, *Comparative Review of Environmental Assessment Procedures and Practice*, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES 25, 49 (Norman Lee & Clive George eds., 2000).

¹² See, e.g., Erika L. Preiss, Note, *The International Obligation to Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabcikovo-Nagymaros Project*, 7 N.Y.U. ENVTL. L.J. 307, 315-16 (1999).

¹³ See generally CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW (1995).

extends domestic EIA requirements to transboundary effects, those differences have to be reconciled.

A third obstacle to a global treaty arises from the nature of transboundary environmental harm. Relatively few types of pollution are truly global in the sense that they affect the world as a whole by, for example, depleting ozone or contributing to climate change. As a result, nations typically look to agreements with their neighbors, rather than global treaties, to address more local harms.¹⁴ Canada, for example, has a clear incentive to enter into an agreement with the United States to assess proposed sources of transboundary pollution, since sources along the northern United States border can affect the Canadian environment. But Canada has almost no incentive to enter into an EIA treaty with, say, India. The limited scope of most transboundary pollution therefore militates in favor of a series of bilateral or regional treaties between neighboring countries, rather than a global agreement on EIA.

In fact, the only detailed agreement on transboundary EIA to have entered into force is a regional agreement, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention or Espoo), which requires Parties to assess the transboundary environmental effects of specified actions and to notify and consult with potentially affected Parties about those effects.¹⁵ The Espoo Convention was signed in 1991 by members of the United Nations Economic Commission for Europe (UNECE), which is composed of European nations as well as Canada and the United States. Most European nations now belong to the Espoo Convention, as does Canada; the United States has signed, but not ratified it.¹⁶

¹⁴ See, e.g., Agreement on Air Quality, Mar. 13, 1991, U.S.-Can., T.I.A.S. No. 11,783; Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., 35 U.S.T. 2917; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, 1302 U.N.T.S. 217 (entered into force Mar. 16, 1983).

¹⁵ Convention on Environmental Impact Assessment in a Transboundary Context, *done* Feb. 25, 1991, 1989 U.N.T.S. 310 (1997), 30 I.L.M. 800 (1991) (entered into force Sept. 10, 1997) [hereinafter Espoo Convention].

¹⁶ Env't & Human Settlements Div., UNECE, Convention on Environmental Impact Assessment in a Transboundary Context: Participants, at <http://www.unece.org/env/eia/convratif.html> (last updated Dec. 21, 2003) [hereinafter Espoo Participants]. Mexico, Canada, and the United States have also tried to negotiate a North American treaty on transboundary EIA under the

II

ASSESSING THE CANDIDATES FOR A GLOBAL TREATY

Two candidates for a global treaty on transboundary EIA emerged in 2001. First, the Parties to the Espoo Convention adopted an amendment to that Convention that would allow nations outside the UNECE to join it.¹⁷ Second, the International Law Commission (ILC) adopted Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, an ambitious attempt to codify Principle 21 and its procedural corollaries, including transboundary EIA.¹⁸

Neither of these instruments is likely to become a global treaty in the near future. States would have to convert the ILC Draft Articles into a treaty (e.g., through a diplomatic conference), and they are unlikely to consider doing so until ILC has performed related work on liability for transboundary harm. Moreover, by its terms, the amendment to Espoo will only be effective after it has been ratified by each of the thirty-four Parties to Espoo as of February 2001.¹⁹ Through July 2003, only two Parties (Germany and Luxembourg) had done so.²⁰

auspices of the North American Agreement on Environmental Cooperation, but they have been unable to reach agreement. See John H. Knox, *The CEC and Transboundary Pollution*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 80, 84-86 (David L. Markell & John H. Knox eds., 2003). See also Madrid Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, art. 8, Annex I, S. TREATY DOC. NO. 102-22, at 30, 30 I.L.M. 1461, 1464 (1991) (providing detailed procedures for EIA for proposed activities in Antarctica).

¹⁷ *Report of the Second Meeting [of the Parties To the Convention on Environmental Impact Assessment in a Transboundary Context]*, U.N. ESCOR, 2d mtg., at 11 & Annex XIV, at 144, U.N. Doc. ECE/MP.EIA/4 (2001) (adopting and annexing Amendment to the Espoo Convention) [hereinafter *Report of the Second Meeting*], <http://www.unece.org/env/documents/2001/eia/ece.mp.eia.4.e.pdf>.

¹⁸ See *Report of the International Law Commission*, U.N. GAOR, 53rd Sess., Supp. No. 10, at 370-77, U.N. Doc. A/56/10 (2001), <http://www.un.org/law/ilc/reports/2001/2001report.htm>. ILC is composed of independent legal experts, appointed by the United Nations General Assembly, with a mandate to codify and progressively develop international law. ILC regularly drafts international agreements for consideration by the General Assembly. See generally ILC, INTRODUCTION (1998) (describing ILC's composition and history), at <http://www.un.org/law/ilc/introfra.htm>.

¹⁹ *Report of the Second Meeting*, *supra* note 17, at 144.

²⁰ Env't & Human Settlements Div., UNECE, Amendment To the Convention on Environmental Impact Assessment in a Transboundary Context:

Nevertheless, either Espoo or the ILC Draft Articles could serve as the basis for a global treaty on EIA if States so choose, and in any event, they provide interesting models for any future efforts to arrive at a global treaty. The following sections examine how each addresses the obstacles described above.

A. *The ILC Draft Articles*

ILC tried to resolve both of the problems with Principle 21: its impracticability as drafted and its vagueness as interpreted. The Draft Articles avoid the former problem by including both of the modifications to Principle 21 described above: they provide that “[t]he State of origin shall take *all appropriate measures* to prevent *significant* transboundary harm or at any event to minimize the risk thereof.”²¹

The ILC Draft Articles attempt to clarify the vagueness of this language by making clear that the “appropriate measures” required to be taken are those specified in the Draft Articles—not only the procedural obligations of notification, consultation, and assessment, but also obligations more directly aimed at fleshing out the nature of the central substantive requirement.²² In particular, the ILC Draft Articles require the States concerned (that is, the State of origin and the State likely to be affected)²³ to consult with one another “with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk

Participants, at <http://www.unece.org/env/eia/amendratif.html> (last updated Dec. 21, 2003).

²¹ *Report of the International Law Commission, supra* note 18, art. 3, at 372 (emphasis added). To remove any doubt, the ILC commentary on the Draft Article makes clear that the obligation is one of due diligence. *Id.* at 391.

²² *Id.* (“The phrase ‘all appropriate measures’ refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm.”).

²³ *Id.* art. 2(f), at 371. The Draft Articles further define State of origin as “the State in the territory or otherwise under the jurisdiction or control of which the activities [covered by the Draft Articles] are planned or are carried out,” and State likely to be affected as “the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk.” *Id.* art. 2(d)-(e). The Draft Articles cover all “activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.” *Id.* art. 1.

thereof,”²⁴ and to “seek solutions based on an equitable balance of interests.”²⁵ To that end, the ILC Draft Articles set out six factors States must take into account, including the degree of risk of significant transboundary harm, the importance of the activity causing the risk (considering its advantages to the State of origin in relation to the harm to the State likely to be affected), and the economic viability of the activity in relation to the costs of prevention.²⁶

These changes do not solve the problem, however, because the factors do not make the standard any more certain or predictable in practice. In many ways, Principle 21 looks like a nuisance standard, and the list of equitable factors in the ILC Draft Articles resembles the factors United States courts are supposed to take into account in deciding whether to enjoin an activity as a nuisance.²⁷ Even in a domestic legal system with courts available

²⁴ *Id.* art. 9(1), at 373.

²⁵ *Id.* art. 9(2).

²⁶ *Id.* art. 10, at 374. In full, the list of factors is:

(a) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(c) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

(e) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Id.

²⁷ The factors include the extent and character of the harm, the social value that the law attaches to the type of use or enjoyment involved, the suitability of the particular use or enjoyment to the character of the locality, the burden on the person harmed of avoiding the harm, the suitability of that activity to the character of the locality, and the impracticability of preventing or avoiding the invasion that causes the harm. RESTATEMENT (SECOND) OF TORTS §§ 826-828 (1979).

to create a body of precedent applying the standard, however, nuisance law is notoriously unpredictable.²⁸ Without international courts to provide a similar function, the ILC Draft Articles' standard is likely to be even more so.

The ILC Draft Articles ignore the problem of differing domestic EIA laws by stating the requirement for assessment of transboundary harm in very general terms and leaving the content of the assessment to the domestic law of the State carrying it out.²⁹ ILC thus takes a kind of top-down approach, which assumes that the procedural corollaries will fall into place once the central substantive obligation is better understood. But there is no reason to believe that the procedural differences in domestic EIA laws would resolve themselves, even if States did agree on the central substantive obligation.

Finally, the ILC Draft Articles do not address States' likely preference for a regional EIA treaty that would include their closest neighbors. As a result, the ILC Draft Articles might have difficulty attracting a large number of countries initially; many countries might not want to join without some assurance that their neighbors would join as well. They might, however, be attractive to smaller groups of countries willing to join the treaty together.

²⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984) ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."); Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 188 (1995) ("No property lawyer familiar with the 'impenetrable jungle' of nuisance law would suggest that reliance on nuisance law would increase predictability.").

²⁹ *Report of the International Law Commission, supra* note 18, art. 7, at 373 ("Any decision in respect of the authorization of an activity within the scope of the present articles shall . . . be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment."). The ILC commentary on the Draft Article says that, beyond certain minimum requirements, the assessment "should contain an evaluation of the possible transboundary harmful impact of the activity" and "should include the effects of the activity not only on persons and property, but also on the environment of other States. . . . The specifics of what ought to be the content of assessment is left to the domestic laws of the State conducting such assessment." *Id.* at 405.

B. *Espoo Convention*

The Espoo Convention addresses each of the obstacles quite differently from the ILC Draft Articles. Where the ILC Draft Articles leave the procedural requirements largely to be filled in by domestic law,³⁰ the Espoo Convention sets out detailed requirements for notification, assessment, and consultation for projects with transboundary effects.

For example, it requires a Party under whose jurisdiction a proposed activity may take place to notify potentially affected Parties as early as possible, details what the notification must include, requires the Party of origin to undertake an EIA before it decides to authorize or undertake the proposed activity, allows affected Parties and the public to participate in the EIA process, specifies the information that the EIA must include, requires the concerned Parties to make the EIA documentation public, and requires the Party of origin to consult with the affected Party concerning any potential transboundary impact and measures to reduce that impact.³¹ As I have explained elsewhere, these requirements draw on the domestic EIA laws of its most powerful signatories—the European Union countries, Canada, and the United States.³²

But the Party of origin is only required to take into account the EIA and comments that it receives from potentially affected Parties and the public; it is not required to avoid any potential transboundary harm identified through the EIA process.³³ The Espoo Convention includes a version of Principle 21. However, Espoo includes not only the two usual modifications (significant harm and due diligence), but also several terms that soften the standard further so that almost any country could claim to be in compliance with it simply by pointing to its existing environmental laws and treaties: “[t]he Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact

³⁰ *Id.*

³¹ Espoo Convention, *supra* note 15, arts. 2-5, at 312-315, 30 I.L.M. at 803-06.

³² Knox, *supra* note *, at 301-05.

³³ Espoo Convention, *supra* note 15, art. 6, at 315, 30 I.L.M. at 806-07.

from proposed activities.”³⁴ Nor does the Convention include guidance, as the ILC Draft Articles do,³⁵ for States to follow when determining how best to comply with the standard; instead, the measures needed are left to the discretion of the Parties.

In sum, the Espoo Convention takes a bottom-up approach to prevention of transboundary harm, which assumes that prevention will be more likely to occur if the procedural obligations are clearly laid out and followed, but does not actually impose a clear obligation of prevention. This approach addresses the first obstacle—the difficulty of relying upon Principle 21 as a basis for transboundary EIA—by refusing to rely upon the Principle at all, except perhaps as a goal for which to aim.

Although one can doubt whether strict procedural requirements, by themselves, will inexorably lead to less transboundary pollution,³⁶ studies of the effectiveness of domestic EIA generally conclude that EIA often leads to modifications of proposed projects that may reduce their environmental harm.³⁷ On the other hand, the studies also show that EIA rarely leads to decisions to halt projects altogether, and that countries rarely monitor projects after approval to determine the degree to which modifications reduce environmental harm.³⁸ Clearer benefits of EIA laws are that they often increase the voice of the public in the decision-making process and help officials to make better-informed decisions.³⁹

Espoo’s detailed exposition of the procedural requirements addresses the second problem—the differences in domestic EIA systems—by setting clear minimum standards for all countries. As

³⁴ *Id.* art. 2(1), at 312, 30 I.L.M. at 803.

³⁵ See discussion *supra* Part II.A.

³⁶ See *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484 (1991).

The move toward procedural duties provides only a superficial gloss of international consensus. . . . State compliance with procedures bears little relation to curtailing transboundary pollution [T]he shift to procedural obligations renders compliance with international law inconsequential for actually protecting the environment. . . . [and] may in fact legitimate environmentally hazardous conduct.

Id. at 1493, 1513.

³⁷ See Knox, *supra* note *, at 317.

³⁸ See *id.*

³⁹ See *id.* at 317-18 (discussing legitimizing influence of “sunshine effect” brought on by public participation).

a result, it decreases doubt as to what countries must do to comply. Another effect of setting clear procedural standards, however, is that countries whose domestic standards are different from those standards may find it difficult to agree to them.

By deriving its requirements from the domestic EIA systems of the most developed countries, Espoo greatly increases the likelihood that those countries will easily be able to comply with the international standards. For example, Espoo requires EIA only for proposed projects of specific types that are listed in an appendix and that require government authorization.⁴⁰ The first of these limits follows from the similar requirements of the European Union members and the second from the laws of Canada and the United States.⁴¹ Moreover, Espoo allows Parties to enter into bilateral or multilateral agreements through which they may implement their obligations under the Convention.⁴² In this way, countries can agree on particular mechanisms that comport with their domestic systems, as long as the mechanisms satisfy Espoo's minimum requirements.⁴³

⁴⁰ *Id.*; Espoo Convention, *supra* note 15, art. 2(3), at 312, 30 I.L.M. at 804 (“The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.”). The Espoo Convention defines “proposed activity” as “an activity or major change to an activity subject to a decision” of a “competent authority,” which in turn is defined as “the national authority or authorities designated by a Party as responsible for performing the tasks covered by this Convention and/or the authority or authorities entrusted by a Party with decision-making powers regarding a proposed activity.” *Id.* art. 1, at 311-12, 30 I.L.M. at 803.

⁴¹ See Council Directive 85/337/EEC, 1985 O.J. (L 175) 40, 41, 44-47, <http://europa.eu.int/eur-lex/en/index.html> (setting out list of activities for which EIA is required); National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(2)(C), 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4332(2)(C) (2000)) (requiring EIA for “major Federal actions significantly affecting the quality of the human environment”); 40 C.F.R. § 1508.18(a) (2003) (providing that such actions include actions conducted, financed, regulated, or approved by federal agencies); Canadian Environmental Assessment Act, ch. 37, § 5(1), 1995 S.C. 617 (1992) (Can.) (requiring EIA for projects with federal government involvement). Directive 85/337/EEC was in place when Espoo was negotiated and signed; it has since been replaced by Council Directive 97/11/EC, 1997 O.J. (L 073) 5.

⁴² Espoo Convention, *supra* note 15, art. 8, at 316, 30 I.L.M. at 807.

⁴³ See *Report of the Second Meeting*, *supra* note 17, at 11 (endorsing bilateral or multilateral agreements as “valuable tool[s] for promoting the proper application of the Convention,” and attaching guidance to the Parties on such

Countries with lower domestic EIA standards may find the detailed requirements of Espoo a disincentive to join. To agree to the Espoo requirements, such countries would have to choose either: (a) to adopt stricter EIA requirements for transboundary effects than for domestic effects, which might be difficult or impossible politically; or (b) to raise their domestic EIA standards, which might be prohibitively expensive. By facilitating their ability to use the Espoo Convention as a model for improving their domestic EIA systems, the Espoo Parties have encouraged European countries with transitional economies to choose the second option. Urszula Rzeszot has said,

In many [Central and Eastern European] countries, [Espoo] was the means of drawing the attention of politicians and high-level decision makers to EIA. In some of the countries it provided much needed methodological advice and understanding of the functioning of the western-style EIA system, making it possible to model solutions on those found to be effective elsewhere, as well as avoiding the mistakes of others.⁴⁴

In principle, Espoo could play a similar role with respect to other countries looking to improve their domestic EIA systems.

Espoo originally addressed the third obstacle—countries' preference for agreements on transboundary harm that include their neighbors—simply by limiting its scope to European and North American countries.⁴⁵ Now that most of those countries have joined,⁴⁶ they might create a kind of snowball effect, in which the membership of Espoo naturally expands as countries along the borders of the existing Parties decide that it is in their interest to join an agreement that includes their neighbors. In addition, existing Parties have an incentive to convince their neighbors to join. For example, Russia is not yet a party to Espoo, but several of its neighbors are, including Finland, Kazakhstan, and Ukraine.⁴⁷ Those countries have presumably already done much of the work

agreements).

⁴⁴ Urszula A. Rzeszot, *Environmental Impact Assessment in Central and Eastern Europe*, in HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT: ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE: IMPACT AND LIMITATIONS 123, 127 (Judith Petts ed., 1999).

⁴⁵ See Espoo Convention, *supra* note 15, arts. 16-17, at 318-19, 30 I.L.M. at 810-11.

⁴⁶ Espoo Participants, *supra* note 16.

⁴⁷ *Id.*

necessary to bring themselves into compliance with Espoo's obligations. They now have an incentive to convince Russia to join so that they have the benefits of receiving transboundary EIA of projects in Russia. If Russia joined, it would then have a similar incentive to bring in non-UNECE countries that neighbor it, such as China and Japan. In this way, Espoo could gradually ripple across the globe.

Of course, this ripple effect could take an extremely long time.⁴⁸ For Espoo to become a global treaty in the foreseeable future, nations other than those current Parties that are neighbors would have to decide that it is in their interest to join. Why might they do so? Why would South Africa, for example, want to join an agreement on transboundary harm that is primarily composed of European countries? Moreover, from an environmental point of view, why would a global EIA agreement be preferable to a series of regional agreements?

Many of the non-parties to Espoo are developing countries, whose domestic EIA standards are lower than those of Espoo with respect to the range of projects covered, consideration of alternatives and mitigation, and public participation. Regional transboundary EIA agreements among those countries would be very likely to do no more than extend their domestic EIA systems to transboundary effects—not a bad result, but not as good as joining Espoo, especially if joining Espoo led to improvements in their domestic EIA laws.

Like the Central and Eastern European countries, many developing countries in other parts of the world would undoubtedly be happy to improve their domestic EIA systems if they had the necessary financial and technical assistance. If the Espoo Parties chose, they could give these developing countries that assistance, just as the countries of Western Europe have assisted other European countries.⁴⁹ Indeed, much of the implementation of Espoo to date has involved workshops, reports, databases, and other forms of cooperation designed to obtain and disseminate information about how its requirements can work in

⁴⁸ Among other problems, any number of bottleneck countries, such as those in North and Central America, could delay the snowball effect indefinitely.

⁴⁹ See EUROPEAN COMMTYS., AGENDA 21: THE FIRST FIVE YEARS 147-50 (1997).

practice. Providing this kind of expertise to developing countries could serve as a powerful incentive for them to join.

By itself, however, it is almost certain not to be enough. Many developing countries would need financial assistance to take on the obligations of Espoo and still more assistance to reform their domestic EIA systems to meet those standards. In February 2001, at the second meeting of the Espoo Parties, their Ministers of the Environment issued a declaration encouraging international financial institutions such as the World Bank, the European Bank for Reconstruction and Development, and the Asian Development Bank to assist countries to carry out EIA according to principles and procedures consistent with the Convention.⁵⁰ If development banks and other funding sources heeded this call, they could greatly encourage developing countries around the world to join Espoo.

Funds for international development are limited, of course, and one might argue that they should be spent on more immediate concerns than improving domestic and transboundary EIA procedures. However, better EIA procedures would have positive effects beyond reducing environmental harm. Bringing public input into the decision-making process, as Espoo requires, would help to strengthen or create avenues for public participation in democratic governance generally.

CONCLUSION

This brief review of the candidates for a global treaty on transboundary EIA shows that the Espoo Convention has several advantages over the ILC Draft Articles. Espoo avoids trying to unravel the Gordian knot of Principle 21—it includes detailed procedural requirements that would reconcile differing domestic EIA procedures, it has an existing base of members that could provide the basis for a snowball effect, and it sets standards that could provide a very useful model for countries seeking to improve their domestic EIA laws.

For Espoo to become global, however, current Espoo Parties would have to embrace that as a goal. The amendment of February 2001, opening participation to non-UNECE members

⁵⁰ *Report of the Second Meeting*, *supra* note 17, at 145-46.

does not indicate that they have done so. As noted above, the amendment only comes into force when all thirty-four of the Parties to Espoo as of February 2001, have ratified it.⁵¹ As a result, any one of those Parties could block it from ever having effect. Even after it comes into force, non-UNECE members may join Espoo only with the approval of the meeting of the Parties.⁵²

The Parties could relax both of these requirements by adopting a new amendment that would enter into force upon its acceptance by three-fourths of the Parties—rather than by all of them⁵³—and that would then allow non-UNECE members to join Espoo without further approval, just as the UNECE members may now.⁵⁴ Adopting such an amendment would be the most important step the Parties could take toward making the Espoo Convention a truly global treaty.

⁵¹ See *supra* notes 17, 19 and accompanying text.

⁵² Amendment to the Espoo Convention, in *Report of the Second Meeting supra* note 17, Annex XIV, at 144. This approval would not need to be unanimous, however. According to the Rules of Procedure adopted at the first meeting of the Parties, if efforts at consensus fail, decisions shall be made by a three-fourths majority vote of the Parties present and voting, except that procedural matters shall be taken by a simple majority vote of the Parties present and voting. Rules of Procedure, R. 37, in *Report of the First Meeting [of the Parties To the Convention on Environmental Impact Assessment in a Transboundary Context]*, U.N. ESCOR, Annex I, at 13, U.N. Doc. ECE/MP.EIA/2 (1998), <http://www.unece.org/env/documents/1998/eia/ece.mp.eia.2.e.pdf>.

⁵³ A three-fourths requirement for entry into force would be in accordance with the rule for amendments in the Convention itself. Espoo Convention, *supra* note 15, art. 14, at 318, 30 I.L.M. at 809-10.

⁵⁴ UNECE members may join simply by depositing an instrument of ratification, acceptance, approval, or accession. Espoo Convention, *supra* note 15, art. 17, at 319, 30 I.L.M. at 811.