THE MYTH AND REALITY OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

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The dominant story of transboundary environmental impact assessment in international law has the following elements: (1) customary international law prohibits transboundary pollution; (2) according to the classic version of this prohibition, contained in Principle 21 of the 1972 Stockholm Declaration, states must ensure that activities within their territory or under their control do not harm the environment beyond their territory; (3) to ensure that activities within their jurisdiction will not cause transboundary harm, states must assess the potential transboundary effects of the activities; and (4) to that end, states enter into international agreements requiring them to carry out transboundary environmental impact assessment (transboundary EIA) for activities that might cause transboundary harm.

Despite its popularity, this story is not true. It belongs to what Daniel Bodansky has called the "myth system" of international environmental law: a set of ideas that are often considered part of customary international law but do not reflect state practice and, instead, "represent the collective ideals of the international community, which at present have the quality of fictions or half-truths."1 European and North American countries are adopting regional agreements that provide for transboundary EIA.2 But these agreements do not require transboundary EIA for all activities that might cause transboundary harm, and they do not link it to any hard substantive prohibition against transboundary harm. In short, these agreements do not much resemble the mythic story of transboundary EIA. At the same time, the agreements are not meaningless. They require EIA for certain types of actions, specify the elements an EIA must include, and provide for significant public participation in the EIA process.

What, then, is going on? If transboundary EIA agreements are not designed to end transboundary pollution in accordance with Principle 21, what are they designed to do? One clue is that the agreements were not written on a clean slate. Most countries in North America and Western Europe have already enacted domestic EIA laws, which are limited in scope and lacking in substantive prohibitions but do contain detailed procedural obligations and provide important avenues for public participation. In large part, the regional EIA agreements reflect these domestic EIA laws. In fact, the main way that the agreements extend beyond the domestic laws is by ensuring that states apply EIA without extraterritorial discrimination—that they take extraterritorial effects into account just as they take domestic effects into account, and that they enable foreign residents to have access to the domestic EIA procedures to the same extent as local residents. Another principle in international environmental law describes exactly this approach: the principle of nondiscrimination.

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which says that countries should apply the same environmental protections to potential harm in other countries that they apply to such harm in their own. Examined closely, each regional transboundary EIA agreement is an application of the principle of nondiscrimination.

The nondiscrimination principle has often been overlooked, cast into shadow by the glow surrounding Principle 21, which is generally considered to be the cornerstone of international environmental law. But Principle 21 suffers from serious weaknesses as a cornerstone of international law, not the least of which is that it does not seem to be a law at all. Perhaps it would be more appropriate to think of it as a capstone that has never been set. Despite limitations of its own, the principle of nondiscrimination may provide a better blueprint for the EIA agreements.

In part I of this article, I describe two stories of transboundary EIA: the mythic view of transboundary EIA as a corollary to Principle 21, and a more mundane view of transboundary EIA as an offshoot of domestic EIA laws. In part II, I show how the two regional agreements on transboundary EIA do not support the mythic view of transboundary EIA and, instead, extend domestic EIA in accordance with the principle of nondiscrimination. I also examine the International Law Commission’s draft articles on prevention of transboundary harm, which move much more closely to the mythic view. In part III, I defend the usefulness of the regional EIA agreements. I conclude with some brief observations on the danger of confusing the myth of Principle 21 with the reality of international law.

I. TWO STORIES OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT

**Transboundary EIA as a Requirement of Principle 21**

One way to look at transboundary EIA is as a logical requirement of Principle 21 of the 1972 Stockholm Declaration, which says:

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 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.

Treatises, textbooks, and scholars state that Principle 21 is considered to be customary international law. Indeed, it has been called the cornerstone of international environmental law. But despite the near unanimity on the importance of Principle 21 and the great amount of scholarly attention given to it, its meaning has remained indefinite. The problem does...
not consist in reconciling its two apparently contradictory clauses. The prevailing view is that the responsibility must be read as a limitation on the right—in other words, that states have the right to exploit their own resources provided that they ensure that activities within their jurisdiction or control do not harm the environment beyond their territory. Otherwise, the second clause would be a nullity. And, unsurprisingly, negotiators of the language said at the time that they intended the second clause to limit the first. The focus has therefore centered on the second clause, so much so that when scholars refer to Principle 21, they often refer only to the limiting language.

The more difficult issue has been to decide exactly what that language means. What are states required to do with respect to activities within their jurisdiction or control that cause (or might cause) transboundary environmental damage? On its face, the language seems clear: each state must ensure that such activities do not harm the environment outside its territory. Therefore, states must take steps to avoid any such harm, including that committed by private actors, and if harm nevertheless occurs, states must be accountable under traditional notions of state responsibility for the damage. This reading meshes nicely with the language of Principle 21 but has the problem—an uncomfortable one, for a would-be principle of customary international law—that it does not seem to enjoy the necessary support in state practice. As Oscar Schachter has observed, "To say that a state has no right to injure the environment of another seems quixotic in the face of the great variety of transborder environmental harms that occur every day."

Although some scholars have still argued that all transboundary environmental harm should be presumptively unlawful, the idea that Principle 21 prohibits all transboundary harm has generally been rejected. Instead, most scholars adopt one or both of two limitations. First, they add the term significant or substantial before damage, so that the rule becomes that states should prevent all significant or substantial transboundary environmental harm from activities under their jurisdiction or control. Second, they construe Principle 21 as reflecting an obligation of performance—due diligence—rather than an obligation of result.


10 Louis B. Sohn, The Stockholm Declaration on the Human Environment, 14 Harv. J. Int’l L. 423, 492 (1973) (citing statement of Canadian delegation that the “principle reflects existing rules of international law, the first element in it stressing the rights of states, ‘while the second element made it clear that those rights must be limited or balanced by the responsibility to ensure that the exercise of rights did not result in damage to others’”).

11 Oscar Schachter, The Emergence of International Environmental Law, 44 J. Int’l Aff. 457, 463 (1991); see also Bodansky, supra note 1, at 110–11 (“Although I am unaware of any systematic empirical study of this issue, transboundary pollution seems much more the rule than the exception in interstate relations. Pollutants continuously travel across most international borders through the air and by rivers and ocean currents.”); Schachter, supra, at 462 (“On its own terms, [Principle 21] has not become state practice: States generally do not ensure that the activities within their jurisdiction do not cause damage” to the environments of others.”).


13 E.g., UN Secretary-General, Rio Declaration on Environment and Development: Application and Implementation, UN Doc. E/CN.17/1997/8, para. 23 [hereinafter Report of the Secretary-General] (“The exact scope and implications of [Rio] principle 2 are not clearly determined yet. Certainly not all instances of transboundary damage resulting from activities within a State’s territory can be prevented or are unlawful.”).

14 For examples of substantial, see EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 73 (Art. 10) (1987) [hereinafter WCED EXPERTS GROUP]; International Law Association, Rules of International Law: Application to Transfrontier Pollution, Art. 3 (1), in 60 ILA, CONFERENCE REPORT (1992). For an example of significant, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §601 (1987) [hereinafter RESTATEMENT]. See also Kamen Sachariev, The Definition of Thresholds of Tolerance for Transboundary Environmental Injury Under International Law: Development and Present Status, 37 Neth. Int’l L. Rev. 193, 196 (1990) (concluding that since the Stockholm Conference, "significant" is the most common term "used to describe the threshold of tolerable transboundary environmental harm or interference").

15 See, e.g., Günther Handl, National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered, 26 Nat’l Res. J. 405, 429 (1986). The distinction between the two approaches is not always clear. For example, it is unclear whether the Restatement endorses due diligence or a strict obligation of result. RESTATEMENT,
Although the limitations may be combined in various ways,¹⁶ the majority probably includes both limitations.¹⁷ The result would be to read Principle 21 to require states to undertake due diligence to prevent significant (or substantial) transboundary environmental harm from activities within their jurisdiction or control.

This reading leaves many issues unanswered, because its terms are inherently vague and, in the absence of a system that provides authoritative interpretations of their application to specific cases, are likely to remain so.¹⁸ For example, substantial and significant may be interchangeable,¹⁹ or substantial may refer to a much higher level of harm than significant.²⁰ Significant may mean only greater than de minimis,²¹ or something more. Adding due diligence compounds the problem. An obligation of result is relatively easy to apply—if transboundary harm (or significant transboundary harm) has occurred, the state has violated its obligation. If not, not. But how does one know if a state has failed to exercise due diligence? Examining whether transboundary harm has occurred does not take one very far, since it is easy to imagine situations in which harm might occur despite the utmost efforts on the part of the state of origin to prevent it, and, conversely, in which harm might not occur despite the failure of a state to undertake any due diligence at all. Moreover, none of these variations (at least, none that has any substance) necessarily comports with state practice—hence Bodansky's treatment of Principle 21 as part of a myth system rather than as a customary law.²²

The consequences of failing to prevent transboundary environmental harm raise another set of conceptual problems. Normally, the law of state responsibility would suggest that in the event of a violation of the principle (however characterized), the state of origin would be bound to make good any resulting harm to the affected state. Many scholars would undoubtedly support that result.²³ But some scholars, notably those on the International Law Commission, have pursued the possibility that states might be liable for transboundary harm even if they comply with their obligations, whatever those might be. That is, if harm results even though states have complied with a due diligence obligation of conduct, they might still be required to make good (be liable for) the resulting harm to the affected state. The ILC approach thus raises the possibility of liability without responsibility.²⁴

¹⁶ supra note 14, §601(1) (providing that a state is obliged "to ensure that activities within its jurisdiction or control ... are conducted so as not to cause significant injury," but qualifying the obligation with the phrase "to the extent practicable under the circumstances"); see also David D. Caron, The Law of the Environment: A Symbolic Step of Modest Value, 14 YALE J. INT’L L. 528, 536 (1989) (analyzing §601(1)).

¹⁷ For example, some areas of conduct might be subject to a strict obligation of result, while others would be subject only to an obligation of due diligence. See Alan Boyle, State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction? 39 INT’L & COMP. L.Q. 1, 14-15 (1990).


²⁰ See WCED EXPERTS GROUP, supra note 14, at 75 (defining "substantial harm" as "harm which is not minor or insignificant").

²¹ supra note 12, at 796 ("[I]n both domestic American usage and international law, the term 'substantial' connotes a magnitude of harm that is a quantum step greater than merely 'not insignificant.'").

²² Bodansky, supra note 1, at 114-16.


²⁴ It might be more accurate to call it liability beyond responsibility, since the ILC seems to contemplate that breaches of Principle 21 would give rise to state responsibility. See Alan Boyle, Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT 61, 76-79 (Alan Boyle & David Freestone eds., 1999).
In contrast, states’ positions sometimes seem to support the idea of responsibility without liability of any kind whatsoever—a non sequitur in international law, although perhaps not in state practice. While paying lip service to Principle 21 in the Stockholm and Rio Declarations, states have avoided saying that violations of that principle necessarily lead to liability of any kind. Principle 22 of the Stockholm Declaration does say that “States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”25 But if Principle 21 is truly part of customary international law, Principle 22 should be unnecessary—violations of the obligation contained in Principle 21 should simply give rise to a secondary obligation on states to make good any resulting harm. And states have not exactly rushed to answer the call of Principle 22; it was adopted again in 1992 as Principle 13 of the Rio Declaration, with little change except for the addition of the encouraging words “in an expeditious and more determined manner” between the words “cooperate” and “to develop further.”26 States are obviously not eager to determine the consequences of failure to comply with Principle 21.

There is no reason to think that the international community is close to reconciling the various versions of Principle 21, either with one another or with state practice. Indeed, how such a reconciliation could take place is hard to see. One might imagine that an authoritative source would be the International Court of Justice or an international conference of states, but the opportunity to clarify Principle 21 has been presented to both without success. In its 1996 advisory opinion in Legality of the Threat or Use of Nuclear Weapons, the ICJ said, “The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”27 Although some authorities have cited this language as conclusive support for the proposition that Principle 21 is part of customary international law,28 the key term “respect” is so vague that it avoids clarifying any of the issues raised above, including which version of Principle 21 the ICJ believes reflects custom. As for states, the Rio Conference had an opportunity to clarify Principle 21 after twenty years of experience with it and settled for adopting it again virtually unchanged.

In contrast to these uncertainties, one area of Principle 21 mythology is relatively certain. Scholars generally agree that Principle 21 should entail three procedural duties. Before undertaking an activity with a risk of (significant) transboundary harm, the state with jurisdiction over the activity should assess its potential transboundary effects, notify any potentially affected states, and consult with them over what to do. Notification and consultation may or may not logically follow from Principle 21. One might imagine that a state could comply with Principle 21 by avoiding all potentially risky activities, and not bother to notify and consult with other states.29

As many scholars have noted, however, Principle 21 does seem logically to require assessment of the potential transboundary effects of activities that might cause transboundary harm—that is, transboundary environmental impact assessment.30 Otherwise, the substantive

25 Stockholm Declaration, supra note 4, princ. 22.
26 Rio Declaration, supra note 4, princ. 13.
28 See ILC Draft Articles, supra note 3, at 378; Report of the Secretary-General, supra note 13, para. 23; Hunter, Salzman, & Zaelke, supra note 6, at 348.
30 See, e.g., André Nollkaemper, The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint 180 (1993); WCED Experts Group, supra note 14, at 103; Catherine A. Cooper, The Management of International Environmental Disputes in the Context of Canada–United States Relations: A Survey and Evalu-
prohibition on transboundary harm would be largely meaningless, except perhaps as a basis for post hoc determination of compensation owed to the affected state. If a state does not know whether an activity might cause transboundary harm, it cannot take steps to avoid the harm. Similarly, assessment is a logical prerequisite for notification and consultation.\(^{31}\)

The precise relationship of transboundary EIA to Principle 21 depends upon which version of Principle 21 one accepts. Transboundary EIA may enable a state to meet a substantive obligation of result, but failure to perform a transboundary EIA for a particular activity does not in itself indicate that the state has violated the substantive obligation—the activity may not in fact cause any transboundary harm. But if the substantive obligation is to take diligent steps to avoid transboundary harm, transboundary EIA is likely to be one of the steps required. In that case, failure to carry out transboundary EIA could conceivably violate the due diligence requirement itself, even if no harm results. Conversely, a good faith transboundary EIA that concludes that no transboundary harm would result from an activity might help a state to meet its due diligence obligation, even if the activity causes unforeseen harm later.\(^{32}\)

Either way, according to the prevalent view, the purpose of transboundary EIA is to prevent transboundary pollution, as a corollary to Principle 21. Phoebe Okowa has put this role very clearly:

The duty to carry out environmental impact assessments, as well as the duties of notification and exchange of information, only make sense if in the end an objection by a notified State is taken into account. In other words, the ultimate goal of such notification and supply of relevant information is to require the State of origin to accommodate the interests of the notified State, and if need be to adopt mitigative strategies for its benefit. The aim in each case is to ensure that the activity is carried out in a manner least harmful to the environment.\(^{33}\)

Transboundary EIA as an Outgrowth of Domestic EIA

Rather than as a corollary to Principle 21, transboundary EIA may be seen as an outgrowth, or special case, of EIA as it has developed in domestic legal systems.\(^{34}\) The United Nations Commission on International Law and the Draft Code of Conduct for States in International Environmental Relations, for example, refer to the notion of transboundary EIA as a means of accommodating the interests of States involved in the activity.\(^{35}\) The advantage of such an approach is that it allows States to take into account the interests of other States affected by an activity, even if those States are not parties to the EIA process. By contrast, the traditional approach of national EIA, in which States are required to assess the impact of activities within their own jurisdiction, is often seen as inadequate for addressing transboundary impacts.\(^{36}\)

Okowa states that it may be argued that [EIAs] may be a relevant factor in determining whether a State has acted with the requisite degree of diligence in discharging its customary law or treaty-based duty to prevent environmental harm. A State that fails to assess the impact of proposed activities on the territories of other States can hardly claim that it has taken all practicable measures with a view to preventing environmental damage.


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\(^{33}\) Id. at 280 (footnote omitted).

\(^{34}\) Id. at 302 (footnote omitted); see also PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 96 (1992) ("The object of prior assessment is to enable 'appropriate' measures to be taken to mitigate or prevent pollution before it occurs."); N. A. Robinson, EIA Abroad: The Comparative and Transnational Experience, in ENVIRONMENTAL ANALYSIS: THE NEPA EXPERIENCE 679, 693 (Stephen G. Hildebrand & Johnnie B. Cannon eds., 1993) ("The EIA is the way to ensure that no state acts in a manner that harms the environment of another state, a guideline that all states are required to adhere to under international law . . .").

\(^{35}\) The following description of domestic EIA draws generally on several sources, including ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES (Norman Lee & Clive George eds., 2000); 2 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT: ENVIRONMENTAL IMPACT ASSESSMENT IN PRACTICE: IMPACT AND LIMITATIONS (Judith Petts ed., 1999); UNEP’S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT (Sun Lin & Lal Kurukulasuriya eds., 1995); CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW (1995).
States was the first country to institute EIA, in the National Environmental Policy Act of 1969 (NEPA). It now forms part of the domestic environmental law of about a hundred nations, including almost all the developed, and many developing, countries. As Nicholas Robinson has noted, domestic EIA has spread among countries primarily on its own merits, rather than pursuant to international law: although EIA was endorsed by the Rio Declaration, international law does not generally purport to require it for projects with solely domestic effects. International institutions, however, have played an important role in promoting its dissemination. In 1985 the European Community issued Directive 85/337, requiring all EC member states to adopt EIA by 1998; in 1987 the United Nations Environment Programme (UNEP) adopted general goals and principles for EIA; and in 1989 the World Bank began to require EIA for projects it finances.

The basic principles of domestic EIA have remained very similar to those first introduced by NEPA. Generally, EIA laws require a government decision maker to consider the environmental consequences of a proposed project before deciding whether to undertake or authorize it. They often give interested members of the public a chance to comment on the proposal at some stage in the EIA process and provide for the final report on the project to be made public. More developed EIA systems tend to broaden the range of proposals subject to EIA, require the decision maker to take into account reasonable alternatives to the

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56 ANNE DONNELLY, BARRY DALAL-CLAYTON, & ROSS HUGHES, A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES (2d ed. 1998) (listing impact assessment guidelines from over ninety countries); BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996) (estimating that more than one hundred countries have national EIA systems); Marcelle Yeter & Lal Kurukulasuriya, Environmental Impact Assessment Legislation in Developing Countries, in UNEP’s NEW WAY FORWARD, supra note 34, at 257, 259 (estimating that about seventy developing countries have EIA legislation of some kind).

57 Rio Declaration, supra note 4, princ. 17.


61 Colin Rees, EA Procedures and Practice in the World Bank, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES, supra note 34, at 243. The World Bank’s current EIA requirements are in OPERATIONAL MANUAL OP 4.01 (1999), at <http://www.worldbank.org>. Other development banks also require EIA for their projects. William V. Kennedy, Environmental Impact Assessment and Multilateral Financial Institutions, in 2 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT, supra note 34, at 98. Since the banks generally require the borrower country to conduct the EIA, the effect has been to encourage developing countries to establish national EIA procedures. Elizabeth Brito & Iara Veroca, Environmental Impact Assessment in South and Central America, in id. at 183; Clive George, Comparative Review of Environmental Assessment Procedures and Practice, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES, supra, at 35, 49.

62 Despite widespread legal provisions for some form of public participation, the degree of actual participation by the public in developing countries and countries in transition is relatively low. Judith Pettis, Public Participation and Environmental Impact Assessment, in 1 HANDBOOK OF ENVIRONMENTAL IMPACT ASSESSMENT, supra note 34, ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, METHODS AND POTENTIAL 145, 153.

63 Many countries require EIA only for certain categories of projects, often according to a list set out in the domestic EIA law. In practice, many least-developed countries conduct EIA for projects only when it is required as a condition of international aid. WOOD, supra note 34, at 303; George, supra note 41, at 49. In higher-income countries, the list of covered projects tends to be more inclusive and to include private as well as public projects. Some countries do not rely on lists, instead requiring EIA for all projects that meet a general standard. NEPA, for example, requires EIA for actions of the federal government that may "significantly" affect the environment. NEPA §102(2)(C), 42 U.S.C. §4332(2)(C) (2000).

In recent years, more countries have begun to consider expanding the scope of assessment to include policies, plans, and programs, rather than only projects. See UNEP, ENVIRONMENTAL IMPACT ASSESSMENT: ISSUES, TRENDS AND PRACTICE 43–60 (1996); THE PRACTICE OF STRATEGIC ENVIRONMENTAL ASSESSMENT (Riki Therivel & Maria Rosário Partidário eds., 1996).
proposed action,\textsuperscript{44} and provide for independent review to ensure that the procedures are followed.\textsuperscript{45} Similarly, advanced EIA systems tend to require greater consideration of measures to mitigate any environmental harms caused by the proposed project.

But EIA systems virtually never require states to adopt mitigative measures, much less to disapprove projects because of their environmental effects.\textsuperscript{46} EIA is designed to provide a decision maker and the public with information about the environmental consequences of a proposal, not to force an environmentally correct decision. This is a crucial difference between EIA as it has developed domestically and transboundary EIA as a corollary to Principle 21—a general prohibition on significant or substantial environmental harm. Instead, domestic EIA law instructs the decision maker to weigh environmental concerns together with, rather than in place of, economic and social concerns in deciding whether to allow a project to go forward.\textsuperscript{47} Often a domestic EIA law will include a hopeful statement about the need to protect the environment,\textsuperscript{48} but the EIA procedure relies on political and not legal means to reach that end.

Transboundary EIA does not necessarily follow from domestic EIA. Many states have enacted EIA laws that have not required them to consider the extraterritorial effects of projects within their jurisdiction.\textsuperscript{49} NEPA is the most notorious example. NEPA does not expressly mention transboundary EIA, and whether it should apply extraterritorially has been the subject of lengthy, inconclusive debate by scholars, courts, and federal agencies.\textsuperscript{50}

\textsuperscript{44} Although it is generally recognized that effective EIA should examine alternatives to the proposed project, EIA laws in many countries do not require the decision maker to consider alternatives. Again, this omission is particularly common in developing countries. WOOD, supra note 34, at 303.

\textsuperscript{45} In the United States, government compliance with NEPA is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§701–706 (2000), and federal courts have the authority to halt projects if NEPA’s procedural requirements have not been met. Most other countries have been reluctant to provide for similar judicial review. Some domestic EIA systems provide for administrative review independent of the decision maker, either by the environmental ministry (e.g., Denmark, Greece, Italy, Portugal, Spain) or by a panel of independent experts (e.g., Canada, the Netherlands). WOOD, supra note 34, at 171–75; R. Coenen, NEPA’s Impact on Environmental Impact Assessment in European Community Member Countries, in ENVIRONMENTAL ANALYSIS, supra note 33, at 703, 709.

\textsuperscript{46} Leonard Ortolano & Anne Shepherd, Environmental Impact Assessment, in ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT 3, 10 (Frank Vanclay & Daniel A. Bronstein eds., 1995).

\textsuperscript{47} According to WOOD, supra note 34, at 2–3:

It should be emphasised that EIA is not a procedure for preventing actions with significant environmental impacts from being implemented. Rather the intention is that actions are authorised in the full knowledge of their environmental consequences. EIA takes place in a political context: it is therefore inevitable that economic, social or political factors will outweigh environmental factors in many instances.


\textsuperscript{49} See Clive George, Environmental Impact Prediction and Evaluation, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES, supra note 34, at 85, 91 ("normal decision-making processes do not cater for" transboundary impacts); see also 1 UNEP/UNEP JOINT PROJECT ON ENVIRONMENTAL LAW AND INSTITUTIONS IN AFRICA, COMPENDIUM OF ENVIRONMENTAL LAWS OF AFRICAN COUNTRIES: FRAMEWORK LAWS AND EIA REGULATIONS (1996) (of twenty African countries with EIA laws or EIA provisions in framework laws included in the compendium, only Burkina Faso, the Gambia, Malawi, and Nigeria had provisions on transboundary EIA); EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION (1994) (of seven central and eastern European countries that had adopted EIA laws as of 1993, only the Czech Republic and Slovenia had provisions on transboundary EIA). France and the Netherlands were two of the first European countries to enact EIA laws, but neither provided for transboundary EIA until the early 1990s, when they did so pursuant to Directive 85/337. 7 EC Commission, Implementation of Directive 85/337/ECC, Member State Annexes 81, 197–98, COM(93)28 final. But see REHBINDER & STEWART, supra note 99, at 169–70 (stating as of 1985 that French courts had taken the view that domestic administrative decisions must consider transboundary environmental effects, and that a similar view was “gaining ground” in the Netherlands). EIA laws that do not provide for transboundary EIA typically do not expressly exclude transboundary effects from consideration, and so leave open at least a theoretical possibility that general references in the law to environmental effects might be construed to include transboundary effects.

\textsuperscript{50} For scholarly views, see, for example, DANIEL R. MANDELMAN, NEPA LAW AND LITIGATION §§5.04 (2d ed. 2000); Joan R. Goldfarb, Extraterritorial Compliance with NEPA amid the Current Wave of Environmental Alarms, 18 B.C. ENVTL. AFF. L. REV. 543 (1991); Jeffrey E. González-Pérez & Douglas A. Klein, The International Reach of the Environmental Impact Statement Requirement of the National Environmental Policy Act, 62 GEO. WASH. L. REV. 757 (1994).
Some EIA laws do include provisions addressing extraterritorial concerns, but those provisions are often quite weak. For example, Directive 85/337 requires each EC member state to forward an EIA on a project to another member state if the state of origin is aware that the project is likely to have significant effects on the environment of another member state, or if a member state likely to be significantly affected so requests. But the directive does not clearly require the EIA to include information on transboundary effects. It also envisages the possibility of consultations between the concerned states and directs that information gathered pursuant to those consultations "must be taken into consideration in the development consent procedure." But the directive does not specify how much weight should be given to the information and, in particular, does not establish that the state of origin must give the information the same weight it assigns to information from domestic sources. Moreover, a report by the EC Commission found that as of 1991, three years after the deadline for implementing the directive, most EC members had made no formal effort to put even these limited requirements in place.


As for the executive branch, in 1979 President Carter issued an executive order requiring assessment of extraterritorial impacts of certain types of actions with extraterritorial effects. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 4, 1979), reprinted in 18 ILM 154 (1979). The order was intended to resolve a dispute between the Council on Environmental Quality (the federal agency responsible for overseeing implementation of NEPA), which has championed the extraterritorial application of NEPA, and the Departments of State and Defense, which have opposed it. Sanford E. Gaines, "Environmental Effects Abroad of Major Federal Actions": An Executive Order Ordains a National Policy, 3 HARV. ENVTL. L. REV. 136 (1979). The order has been criticized as having a limited, unclear scope, failing to provide for judicial review, and failing to resolve the agencies’ dispute. General Accounting Office, International Environment: Improved Procedures Needed for Environmental Assessments of U.S. Actions Abroad, GAO/RCED-94-55 (Feb. 1994); Karen A. Klick, The Extraterritorial Reach of NEPA’s EIS Requirement After Environmental Defense Fund v. Massey, 44 AM. U. L. REV. 291, 301-03 (1994).

In 1997 the Council on Environmental Quality issued "guidance" stating that whenever federal agencies prepare an EIA for a proposed action in the United States, they must analyze the action’s reasonably foreseeable transboundary effects. Despite limiting its scope to EIA of domestic actions’ extraterritorial effects, which presumably raise fewer foreign-policy concerns than EIA of extraterritorial actions, the guidance did not receive the concurrence of the State and Defense Departments. Its legal effect is therefore doubtful, since those departments do not believe that the CEQ has unilateral authority to decide whether NEPA applies extraterritorially. See Karen V. Fair, Environmental Compliance in Contingency Operations: In Search of a Standard? 157 MIL. L. REV. 112, 146 n.136 (1998).

1 Directive 85/337, supra note 39, Art. 7. The UNEP Guidelines for EIA contain a similar provision, as does the EIA law of Slovenia. See UNEP Guidelines, supra note 40, para. 12; Slovenia Environmental Protection Act, Law No. 80/91/90-2/107, June 2, 1993, Art. 63, reprinted in EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, supra note 49, at 229, 238.

2 See NULLKAEMPER, supra note 30, at 193. Nollkaemper notes that some scholars have argued that the obligation to forward EIAs to possibly affected states implies a duty to gather information on transboundary effects, but says, “This conclusion requires a very extensive interpretation of article 7 . . . for which there is little support.” Id.


4 Thus, Nollkaemper states:

In the Netherlands, the results of the exchange of information and the consultations are treated on a par with the views of concerned citizens, in particular as regards the motivation of the final decision and the possibility of judicial review of the adequacy of the decision in view of the information that has been obtained. However, this is not mandated by the Directive.

NULLKAEMPER, supra note 30, at 195 (footnote omitted).

5 Implementation of Directive 85/337/EEC, supra note 49, at 29 ("Only a minority of Member States (Denmark, Germany, Greece, Ireland, Spain) appear, as at July 1991, to have made some formal provision for consultation of other Member States over trans-frontier impacts. . . . This is one of the least satisfactory areas of transposition of the Directive . . .").
Canadian law includes provisions that go farther to ensure that EIAs examine the transboundary effects of projects. These provisions do not change Canada’s basic approach to EIA. They do not, in other words, create new procedural requirements for projects with transboundary effects or require Canada to avoid such effects. Instead, they provide that projects with significant transboundary effects may be included among projects subject to assessment under the domestic EIA law, and that EIA of all projects subject to the law is to cover transboundary effects. Transboundary EIA of this type is not required by domestic EIA in the same way that Principle 21 logically requires transboundary EIA. But it may be compelled by basic ideas of fairness. For a state to ignore the transboundary effects of activities within its jurisdiction, while subjecting the domestic effects of those activities to EIA, is to discriminate against other countries and the people who live in them. Transboundary EIA that assesses foreign effects in the same way as domestic effects would eliminate this discrimination.

There is a principle that calls for exactly this result. In the 1970s, the Organisation for Economic Co-operation and Development (OECD) developed a “non-discrimination principle” that would require “each Country [to] ensure that its regime of environmental protection does not discriminate between pollution originating from it which affects or is likely to affect the area under its national jurisdiction and pollution originating from it which affects or is likely to affect an exposed Country.” As applied to domestic EIA laws, the non-discrimination principle would require states to assess the extraterritorial effects of actions within their jurisdiction just as they assess their domestic effects. It would also require states to offer nonresidents the same right to participate in the EIA procedure as the states provide to their own resident nationals. More generally, the nondiscrimination principle would require states to give nonresidents “equal access” to all administrative and judicial procedures concerning environmental harm, not just EIA procedures.

Transboundary EIA provisions that require states to consider extraterritorial effects in the same way that they consider domestic effects of projects within their jurisdiction would comply with this principle. Canadian law appears to have moved in that direction—although it does not necessarily ensure full nondiscrimination with respect to the participation of nonresidents or the consideration of extraterritorial effects. But the many laws such as NEPA that

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56 EIAs for projects subject to assessment under Canadian law are required to address transboundary as well as domestic effects, since the law defines “environmental effect” to include “any change that the project may cause in the environment... whether any such change occurs within or outside Canada.” Canadian Environmental Assessment Act, ch. 37, §2(1), 1992 S.C. 938 [hereinafter CEAA]. Moreover, Canadian law gives the ministers of environment and foreign affairs the discretionary power to require assessment of projects that may cause significant transboundary effects, even if the projects do not otherwise fall within the scope of the EIA law. Id. §§47, 49, at 966, 971.

57 See E. D. Smith, Future Challenges of NEPA: A Panel Discussion, in ENVIRONMENTAL ANALYSIS, supra note 33, at 81, 84 (quoting Dinah Bear, general counsel of the Council on Environmental Quality, as saying, “[I]t is environmental imperialism for us to undertake actions in other countries and not use the same degree of care on analyzing the environmental impacts as we do at home.”).

58 OECD Council, Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, Recommendation C(77)28(Final), annex, princ. 3(a) (May 17, 1977), reprinted in OECD, OECD AND THE ENVIRONMENT 150, 152 (1986); see also OECD Council, Principles Concerning Transfrontier Pollution, Recommendation C(74)24 (Nov. 14, 1974), reprinted in id. at 142.


Although the introduction of equal right of access is mainly a procedural matter, it is a necessary element for the implementation of the substantive principle of non-discrimination. It would serve no purpose if “foreign persons” are given equal treatment in substantive law if they are not also given equal right of access. And vice versa, it would serve no purpose if “foreign persons” had the benefit of the same legal channels as “nationals” if the actual treatment in substantive law which they subsequently received remained discriminatory in character.
provide for less or no consideration of transboundary effects are far from satisfying the principle of nondiscrimination, and even farther, of course, from complying with the mythic view of transboundary EIA.

II. AGREEMENTS ON TRANSBOUNDARY EIA

In 1991 member states of the UN Economic Commission for Europe signed the Convention on Environmental Impact in a Transboundary Context, known as the Espoo Convention, and in 1997 the North American Commission for Environmental Cooperation published a draft North American agreement on transboundary EIA. In 2001 the ILC finished drafting a framework convention on prevention of transboundary environmental harm, which would also require transboundary EIA. The drafters of these agreements faced a choice between codifying the link between transboundary EIA and Principle 21, as the mythic view of transboundary EIA would require, and merely requiring states to extend domestic EIA requirements to transboundary effects, as some domestic laws have already begun to do.

The two regional EIA agreements follow the second path. They do not prohibit significant transboundary environmental harm and do not require EIA for all projects that might cause it, as would Principle 21. Instead, the agreements require only that states take into account the extraterritorial effects of limited types of projects already subject to domestic EIA. At the same time, they instruct the parties to allow affected states and individuals to participate in their EIA procedures to the same degree as their own residents. In effect, the agreements require the parties to bring their existing domestic EIA systems into compliance with the principle of nondiscrimination.

In contrast, the ILC draft agreement does try to codify the myth. Its relatively broad scope and strong substantive prohibitions reflect the mythic conception of transboundary EIA as a corollary to Principle 21 and highlight the absence of similar provisions in the regional agreements. However, as the ILC draft receives more attention from states, it is likely to reflect domestic EIA laws more closely. As a result, its scope and substantive provisions are likely to be limited in ways that will bring it more in line with the principle of nondiscrimination.

The Espoo Convention

The Espoo Convention, which entered into force in 1997, is open to UNECE member states and the European Union. As of August 1, 2001, thirty-eight parties had joined the Convention: the European Union, thirteen EU member states, and twenty-four other states,

60 See supra note 2.
62 Espoo Convention, supra note 2, Arts. 16, 17.
including Armenia, Bulgaria, Canada, the Czech Republic, Hungary, Norway, Poland, Switzerland, and Ukraine. The most important countries eligible to join the Convention that have not done so are Germany, Russia, and the United States, all of which have signed but not ratified it.63

The Espoo Convention requires its parties to assess the transboundary environmental effects of certain actions within their jurisdiction and to notify and consult with potentially affected states about those effects. It may therefore appear to provide the procedural corollaries to Principle 21, and it has been cited in support of the mythic view of transboundary EIA.64 But its limited coverage and lack of a substantive prohibition against transboundary harm are inconsistent with the myth. Instead, in these respects and in its procedural provisions, the Espoo Convention reflects and extends its signatories’ preexisting EIA laws.65

Scope. The Espoo Convention applies only to proposed projects that are likely to cause a significant transboundary impact, are listed in an appendix to the Convention, and are “subject to a decision of a competent [i.e., governmental] authority.”66 The latter two limitations do not accord with the mythic view of transboundary EIA, which would require EIA for all activities that might cause significant transboundary harm, whether or not they were included on a list or subject to government authorization.67 But the limitations follow naturally from the signatories’ domestic EIA laws. Many European countries, including all EU members, require EIA only for categories of projects specifically listed in their domestic legislation.68 And the national EIA laws of the United States and Canada require EIA only for projects that involve the federal government.69

Procedural requirements. In many ways, the Espoo Convention’s procedural requirements simply reflect preexisting domestic EIA procedures. For example, all of the elements Espoo requires an EIA to include (e.g., a description of the activity and its effects on the environment) were already required by Directive 85/337.70 Where the Convention mentions elements

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64 Birnie & Boyle, supra note 33, at 96; Nollkaemper, supra note 30, at 192; see also Jonas Ebbesson, Innovative Elements and Expected Effectiveness of the 1991 EIA Convention, 19 ENVT. IMPACT ASSESSMENT REV. 47, 49–50 (1999) (stating that the Convention brings EIA into the due diligence obligation to prevent significant transboundary harm, but also noting that the Convention draws on the principle of nondiscrimination).
66 Espoo Convention, supra note 2, Art. 1(v). The Convention requires EIA, notification, consultation, and public participation only for “a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.” Id., Art. 2(3) (assessment); Arts. 2(4), 3(1) (notification); Arts. 3(1), 5 (consultation); Arts. 2(6), 3(8), 4(2) (public participation). The Convention defines “proposed activity” as “any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure.” Id., Art. 1(v). “Competent authority” 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(ix).
67 Principle 21 would make states responsible for the transboundary environmental effects of all “activities within their jurisdiction and control,” language that by its terms would include private actions within the states’ territory. Stockholm Declaration, supra note 4, princl. 21.
68 UNECE, CURRENT POLICIES, STRATEGIES AND ASPECTS OF ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT 8-9, 26–35, UN Doc. ECE/CEP/9, UN Sales No. E.96.II.E.11 (1996). Directive 85/337 requires EIA only for nine listed categories of projects. See Directive 85/337, supra note 39, Annex I. The Espoo Convention includes each of those categories, often in exactly the same language as the directive, and adds several more categories. Espoo Convention, supra note 2, app. I.
69 NEPA requires EIA for proposals for “major Federal actions significantly affecting the quality of the human environment,” NEPA §102(a)(C), 42 U.S.C. §4332(2)(C) (2000), that is, actions conducted, financed, regulated, or approved by federal agencies. See 40 C.F.R. §1508.18(a) (2001). The Environmental Assessment and Review Process Guidelines Order (EARP), 188 C. Gaz. 2794 (Nov. 7, 1984), Canada’s EIA law at the time of the Espoo negotiations, similarly applied only to projects with federal government involvement. William A. Tillelman, Public Participation in the Environmental Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community, 33 Colum. J. Transnat’l L. 337, 372–75, 422–23 (1995). CEAA, which replaced EARP in 1995, continues to require environmental assessments only for projects in which a federal authority is involved, either by carrying out the project or enabling it to be carried out. CEAA, supra note 56, §5(1).
70 Compare Espoo Convention, supra note 2, app. II, with Directive 85/337, supra note 39, app. III.
an EIA might include that are not required by the directive, such as consideration of alternatives, it avoids using binding language.\textsuperscript{71} Similarly, the general requirement of the Convention that "the public in the areas likely to be affected" have an opportunity to participate in EIA procedures\textsuperscript{72} reflects an option that developed EIA systems already provide to the affected public of the state of origin.

The principal innovation of the Convention—the way it goes beyond preexisting domestic EIA law—is to ensure that domestic EIA procedures apply without discrimination to transboundary impacts. As noted in the previous section, transboundary EIA provisions in domestic law are often limited, unclear, or incompletely implemented, where they exist at all. The provision on transboundary EIA in Directive 85/337, for example, does not apply with respect to effects in non-EC members, does not give even EC members or their publics any right to participate in the EIA procedure of the state of origin, does not state that EIA should include transboundary impacts, is silent on how the state of origin should obtain information on the extraterritorial effects of a project, and is unclear about the weight to be given transboundary impacts in the decision on whether to go ahead with the proposed project.\textsuperscript{73} Moreover, even these weak provisions were far from completely implemented by the EC countries when the Espoo Convention was signed.\textsuperscript{74}

The Convention addresses these deficiencies by requiring states to consider transboundary effects in their domestic EIA procedures and to open those procedures to full participation by affected states and their publics.\textsuperscript{75} The Convention directs a state of origin to notify affected states of a proposed project, let them participate in its EIA procedure, and take "due account" of their views in its final decision on the proposed activity.\textsuperscript{76} It also requires that the public of the affected party receive notice of, and an opportunity to comment on, the proposed activity and the EIA documentation prepared by the party of origin,\textsuperscript{77} and that the final decision take due account of their comments.\textsuperscript{78}

The Convention and the UNECE commentary on it make clear that in all these respects the affected states and their publics are to be treated equivalently to the authorities and public of the state of origin. For example, the Convention requires the state of origin to notify affected states of proposed projects "no later than when informing its own public."\textsuperscript{79} The UNECE has stated that officials of the affected state should be given the same amount of time to comment as the public of the state of origin.\textsuperscript{80} More generally, the Convention requires the state of origin to "ensure that the opportunity [to participate in EIA procedures] provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin."\textsuperscript{81} And while the state of origin has some discretion in deciding how to take due account of the views of the affected state and its public, "[a]t least [this

\textsuperscript{71} Compare Espoo Convention, supra note 2, app. II (requiring a "description, where appropriate, of reasonable alternatives . . . to the proposed activity"), with Directive 85/337, supra note 39, Annex III, para. 2 (requiring, "[w]here appropriate, an outline of the main alternatives studied by the developer"). Similarly, Article 2(7) of the Convention encourages, but does not require, strategic environmental assessment, which most UNECE countries had not adopted at the time the Convention was negotiated. See UNECE, APPLICATION OF ENVIRONMENTAL IMPACT ASSESSMENT PRINCIPLES TO POLICIES, PLANS AND PROGRAMMES 1, 44–48, UN Sales No. E.92.I.E.28 (1992).

\textsuperscript{72} Espoo Convention, supra note 2, Art. 2(6).

\textsuperscript{73} Directive 85/337, supra note 39, Art. 7.

\textsuperscript{74} See text at notes 51–55 supra. Other EIA laws, such as NEPA, are often even less clear on whether and how they apply to transboundary effects. See text at note 50 supra.

\textsuperscript{75} UNECE, supra note 68, at 45 ("[T]he EIA will, in practice, follow the domestic procedures of the Party of origin; and transboundary cooperation under Articles 2 to 7 of the Convention will take place within the framework of those procedures.").

\textsuperscript{76} Espoo Convention, supra note 2, Arts. 3(1), (2), (3), & 6(1).

\textsuperscript{77} Id., Arts. 3(8), 4(2).

\textsuperscript{78} Id., Art. 6(1).

\textsuperscript{79} Id., Art. 3(1).

\textsuperscript{80} UNECE, supra note 68, at 43.

\textsuperscript{81} Espoo Convention, supra note 2, Art. 2(6).
requirement] means that the comments of the authorities and the public of the affected country and the outcome of the consultations are taken into consideration in the same way as the comments from the authorities and the public of the Party of origin. In short, the Convention requires the state of origin to bring its domestic EIA procedure into compliance with the principle of nondiscrimination.

The Convention may appear to give affected states two procedural rights that go beyond nondiscrimination—that is, beyond the rights developed domestic EIA procedures already afford interested parties—but in both cases the effect may be merely to ensure that the EIA system of the state of origin takes transboundary effects as seriously as domestic effects. First, an affected state may request that the state of origin conduct an EIA for projects that do not appear on the list of covered projects, and for projects that appear on the list but have not been the subject of notification under the Convention because the state of origin does not believe that they are likely to have a significant transboundary effect. In the latter case, if the parties cannot agree on the likely transboundary effect of the project, the affected state may invoke an "inquiry commission" to give a nonbinding opinion on the question. Second, after the completion of the EIA, the interested states are to enter into consultations "concerning, inter alia, the potential transboundary impact of the proposed activity and measures to reduce or eliminate its impact."

To the extent that the public of the state of origin cannot invoke an inquiry commission or engage in direct consultations with the state of origin, these rights seem to go beyond nondiscrimination. But their effect is only to put increased pressure on the state of origin to follow its procedural requirements with respect to transboundary EIA—to conduct an EIA for a project that may have significant transboundary effects and to give serious consideration to the EIA in deciding whether to authorize the project. In that sense, the rights serve as an equivalent to domestic review mechanisms designed to ensure that decision makers follow domestic EIA procedures. Indeed, they may often be less effective than domestic review procedures, since the Convention gives affected states an opportunity only to encourage the state of origin to follow the applicable procedure, while domestic mechanisms may be able to require it to do so.

Substantive obligations. The Espoo Convention directs the state of origin to take due account of the EIA, as well as the comments received from the public and the affected state. But nothing in the Convention obliges the state of origin to prohibit a proposed activity or even to minimize its adverse transboundary effects. Thus, the decision on a project is left to political considerations as informed by the EIA, just as in domestic EIA law, rather than being subject to a prohibition on significant harm. This is the most important inconsistency between the Espoo Convention and the myth of transboundary EIA.

Article 2(1) of the Convention does state: "The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant ad-

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82 UNECE, supra note 68, at 68.
83 The Convention also imposes one additional obligation on affected states—to provide information about their environment to the state of origin when necessary for the preparation of the EIA. Espoo Convention, supra note 2, Art. 3(6).
84 Id., Arts. 2(5), 3(7).
85 Id., Art. 3(7).
86 Id., Art. 5. The Convention also requires states to enter into such consultations if "post-project analysis" indicates that a project appears to have a significant adverse transboundary impact. Id., Art. 7(2).
87 See text at note 45 supra.
88 Espoo Convention, supra note 2, Art. 6(1).
89 Kevin R. Gray, International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement, 11 Colo. J. Int'l Envt'l L. & Pol'y 83, 103 (2000) ("The outcome of an EIA must be taken into account ... [but] the wording falls short of mandating action recommended in the EIA."); Okowa, supra note 31, at 288 (the Espoo Convention does not "require[] a State to refrain from the conduct of an activity should the consultations or conciliation prove unsuccessful").
verse transboundary environmental impact from proposed activities." At first sight, this language might seem to be a substantive version of Principle 21, albeit one that adopts both the significant and the due diligence limitations. But Article 2(1) contains soft and ambiguous terms (either individually or jointly, appropriate, reduce and control) that empty the language of any substantive meaning. A party could easily argue that it is in compliance with this provision by pointing to its existing antipollution laws and agreements, no matter how far they might be from preventing all significant transboundary harm. Since objective means of interpretation can give substance to ambiguous language, an independent body could be charged with resolving or providing advice on disputes over how these terms apply to a particular project. But the Convention does not provide for such a mechanism. As a result, it leaves interpretation of the provision completely to the discretion of the state of origin.

One might argue that the parties did not need to elaborate on, or even include, Principle 21 because customary international law so clearly requires the prohibition of significant transboundary environmental harm. In support, one could cite Article 2(10) of the Convention, which states: "The provisions of this Convention shall not prejudice any obligations of the Parties under international law with regard to activities having or likely to have a transboundary impact." But if the negotiators of the Convention believed that Principle 21 was customary law, why would they not have taken the opportunity to clarify issues such as the meaning of the significant threshold, whether the obligation is of result or of due diligence, and what kind of liability should result from a violation? Moreover, if Principle 21 was understood to be the backdrop of the agreement, why would they have included Article 2(1), which suggests a much lower standard?

Although the failure of the Espoo Convention to include a clear, binding prohibition on transboundary pollution is inexplicable according to the mythic view of transboundary EIA, it follows naturally from the domestic EIA procedures of the states that negotiated the Convention. As explained above, domestic EIA laws virtually never require prevention of significant environmental harm. Both Directive 85/337 and NEPA, in particular, allow environmentally harmful projects to be approved. In this respect, as in others, the Espoo Convention extends rather than rewrites domestic EIA law.

Draft North American Agreement on Transboundary EIA

Since the mid-1990s, Canada, Mexico, and the United States have pursued negotiations toward a North American agreement on transboundary EIA, under the auspices of the North American Commission for Environmental Cooperation (NACEC). As of April 1, 2002, the negotiations had not been concluded, but the NACEC did publish a draft of the agree-

\footnote{The Convention contains only a standard, noncompulsory provision for the settlement of disputes. Espoo Convention, supra note 2, Art. 15. The nonbinding inquiry commission established by Article 3(7) can address only whether projects fall within the scope of the Convention, not the parties' obligations, if any, under Article 2(1) with respect to such projects.}

\footnote{See text at notes 46-48 supra.}

\footnote{Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. . . . If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." (citation omitted)); Malcolm Grant, Implementation of the EC Directive on Environmental Impact Assessment, 4 CONN. J. INT'L L. 463, 467 (1989) (stating that projects "with significant environmentally harmful effects may still be granted consent. The EC Directive does not cut across the right of Member States to exercise political, social and economic judgments in their broadest sense; its effect is limited to increasing the significance of environmental effects in the decision-making process.").}

\footnote{The NACEC was created by the North American Agreement on Environmental Cooperation (the environmental side agreement to NAFTA), which envisages that the parties would negotiate an agreement on transboundary EIA by 1997. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., Art. 10(7), 32 ILM 1480 (1993) [hereinafter NAAEC].}
ment.84 The draft suggests that the negotiators intend to extend their existing domestic EIA procedures to transboundary effects in a nondiscriminatory way, as the Espoo Convention does, rather than to codify the myth of transboundary EIA.85

Scope. The scope of the North American agreement is still unclear. The draft provides that the party of origin shall notify any party potentially affected by proposed projects that are listed in an appendix to the agreement, as long as they are located within one hundred kilometers of a border between the parties.86 But the draft does not define "proposed project" and so does not make clear whether such projects will require governmental involvement.87 The original mandate for the negotiations, contained in the NAFTA environmental side agreement, contemplated that the agreement would apply only to "proposed projects subject to decisions by a competent government authority," but did not specify the level of governmental involvement required.88 The reference in the draft agreement to a list of projects in an appendix appears to reflect Mexican EIA law, which, like European EIA laws, requires EIA for listed categories of projects, whether private or public.89 But the national EIA laws of Canada and the United States apply only to proposed actions of the federal government, as noted above.90 One might therefore expect the parties to include both limitations.

Mexico, however, has been troubled by recent proposals by the state of Texas to build waste facilities near its border with Mexico, which proposals are not subject to EIA under NEPA.91 Mexico has therefore insisted that the agreement include projects with involvement by U.S. border states.92 Mexico also argues that such an agreement is necessary for reciprocity

84 Draft North American Agreement, supra note 2. The draft, which was published in 1997, was prepared by an "experts group" before negotiations officially commenced. But the experts group was composed of representatives of the parties and the draft has been the basis for subsequent negotiations. Cheryl Hogue, NAFTA: Canada, Mexico, United States Finishing Pact on Transboundary Impact Assessment, Int'l Env't Daily (BNA), Feb. 25, 1999, available in WL, BNA-IED.
85 The parties have made explicit their intent to extend their domestic EIA laws rather than create new rules for transboundary harm. Cheryl Hogue, NAFTA: Nations Developing Process for Assessing Environmental Impacts That Cross Borders, Int'l Env't Daily (BNA), Oct. 27, 1995, available in WL, BNA-IED (quoting Greg Block, an official of the NACEC Secretariat, as saying, "The NAFTA nations are committed to working through their existing federal laws requiring environmental impact assessment—rather than creating new ones for transboundary pollution or other environmental harm that crosses borders."); see also NACEC Council Res. 95-7 (Oct. 13, 1995), at <http://www.cce.org/who_we_are/council/resolutions> (setting out guidelines for negotiations, which include "maximizing whatever possible the utilization of existing processes, structures or mechanisms," and "building on successful procedures or mechanisms in place at various levels of government"). The parties' national EIA laws are NEPA, supra note 35, CEAA, supra note 56, and Mexico's Ley General del Equilibrio Ecológico y la Protección al Ambiente, Arts. 28–35, D.O., 28 de enero de 1988, as amended, D.O., 13 de diciembre de 1996 [hereinafter LGEPPA]. For a comparative overview of the three EIA laws, see NACEC Secretariat, Environmental Impact Assessment: Law and Practice in North America, in 3 N. Am. Env'tl. L. & Pol'y 3 (1999). The NACEC Secretariat prepared this study as background information for the negotiations.
86 Draft North American Agreement, supra note 2, Art. 2.1(a). The party of origin would also be required to provide notifications of additional projects if it determines that they "have the potential to cause significant adverse transboundary environmental impacts." Id., Art. 2.1(b).
87 Id., Art. 1 (stating that definition of "proposed project" is "to be elaborated").
88 NAAEC, supra note 93, Art. 10(7)(a).
89 LGEPPA, supra note 95, Art. 28; see also NACEC Secretariat, supra note 95, at 28. The Mexican list also includes a catch-all category—"[w]orks or activities under federal jurisdiction that may cause serious and irreplaceable ecological imbalances, [or] damage to public health or ecosystems"—with respect to which the federal government has discretion to decide whether the EIA procedures should apply. Id. at 29.
90 See note 69 supra.
92 NAFTA: Mexico Denounces U.S. Position on NAFTA Impact Assessment Guidelines, Int'l Env't Daily (BNA), May 21, 1998, available in WL, BNA-IED (Mexican officials "criticized U.S. environmental authorities for refusing to include state projects . . ., saying that this could then facilitate the establishment of environmentally harmful projects on the U.S.-Mexican border,", and citing the "approval process for the Sierra Blanca radioactive confinement site in
between it and the United States, since Mexican law apparently requires EIA for similar facilities, with or without federal involvement. The United States has refused to accept the Mexican position. While the U.S. government could seek an agreement requiring EIA for state-authorized or -funded projects with international effects, such an agreement would lack the necessary political support. This deadlock between Mexico and the United States over the scope of the agreement has caused the delay in completing the negotiations. Nevertheless, under either approach, the agreement would employ a list of covered projects and be limited to projects that have some type of governmental involvement—limitations that are inconsistent with the mythic view of transboundary EIA, but that follow directly from similar limitations in the countries’ domestic EIA laws.

Procedural requirements. Like the Espoo Convention, the main way the North American agreement would surpass preexisting domestic EIA laws would be by bringing them into accord with the principle of nondiscrimination. The elements of an EIA specified by the draft agreement appear to include nothing not already required by the parties’ domestic laws. But the agreement would require each party of origin to ensure that an EIA is undertaken if a proposed project within the scope of the agreement is likely to cause significant adverse transboundary environmental impacts on the environment of another party. Like Espoo, the draft agreement would direct the party of origin to notify potentially affected parties of proposed projects no later than when informing its own public, allow them to participate in the EIA procedure, and ensure that it would consider relevant information provided by them. Similarly, the agreement would require the party of origin to allow the public of a potentially affected party to submit comments in the EIA process and to participate in any public hearing relating to the EIA, “to the same extent accorded to the public of the Party of Origin.”

Texas [as one recent example of the lack of effective Mexican participation in state-generated projects in the United States]; NAFTA: U.S., Mexico Still Need to Resolve Reciprocity Issues in Transboundary EIAs, id., July 2, 1998 [hereinafter Reciprocity Issues] (reporting statement by a Mexican official “that Mexico will refuse to enforce the agreement unless all the states along the U.S. border commit to signing a formal accord in which they agree to subscribe to the [transboundary EIA agreement]”).

120 TCEQ, supra note 95, Art. 28(IV) (requiring EIA for hazardous waste facilities): Reciprocity Issues, supra note 102 (quoting Mexican official as saying, “What is clear is that if we don’t have the correct levels of reciprocity, the agreement should not enter into effect.”).

121 It is questionable whether the federal government could constitutionally require state governments to carry out such EIAs, see New York v. United States, 504 U.S. 144 (1992), but an international agreement could provide a constitutional basis for legislation enabling the federal government itself to conduct the EIAs. See Missouri v. Holland, 252 U.S. 416 (1920).

122 See Letter to Warren Christopher and Carol Browner from Directors of State Environmental Agencies in Alaska, Arizona, California, Idaho, Montana, New Mexico, North Dakota, Texas, and Washington (Aug. 29, 1996) (on file with author) [hereinafter Letter from Border Environmental Agencies] (“[T]he states believe the recommendations from the current [NA]CEC process should be limited to federal activities. . . . Federally imposed mandates for TEIA will not lead to the level of subnational transboundary cooperation needed to prevent or resolve cross-border environmental problems.”).

123 Compare Draft North American Agreement, supra note 2, Art. 10.1(a) & app. IV, with 40 C.F.R. pt. 1502 (2001) (setting out requirements for EIA under NEPA), NACEC Secretariat, supra note 95, at 12-15 (describing CEAA requirements), and id. at 30-33 (describing LGEPA requirements).


125 Id., Arts. 3.1, 11.1.

126 NEPA regulations and CEAA provide substantial opportunities for public comment throughout the EIA process, see 40 C.F.R. §§1501.7(a)(1), 1503.1(a) (2001); CEAA, supra note 56, §§18(3), 19(2), 22, 34, at 951, 951, 954, 999, and require the government to take the public comments into consideration. See 40 C.F.R. §1503.4; CEAA, supra, §16.1, at 949. In Mexico, the provisions for public participation are less extensive. LGEPA requires the federal government to publish a developer’s request for an environmental impact authorization. If a citizen requests that the federal government publish the environmental impact statement, the government may (but apparently is not required to) organize a public hearing at which the developer shall explain the project. Any interested party may make comments, which the federal government will record in its decision about the proposed project. LGEPA, supra note 95, Art. 34; NACEC Secretariat, supra note 95, at 32-33. See also Heather N. Stevenson, Comment, Environmental Impact Assessment Laws in the Nineties: Can the United States and Mexico Learn from Each Other? 32 U. RICH. L. REV. 1675, 1697-98 (1999), where states:

In preparing its resolution on the project, [the Mexican environmental agency] must address the public comments and any mitigation measures for environmental impacts proposed by members of the public. Draft
Therefore, the effect of the agreement would not be to create a new system of EIA for transboundary effects, but to require that such effects be taken into account under the parties' existing domestic EIA procedures. This requirement would have the greatest effect on the United States, since current domestic law does not clearly provide for transboundary EIA of projects within U.S. territory. But even though Canadian EIA law already provides for transboundary EIA, the agreement would restrict Canada's current discretion in deciding whether to conduct it, and would ensure that affected states and their publics could participate fully in the EIA process.

Substantive obligations. The draft North American agreement places even less emphasis on substantive requirements than the Espoo Convention. It contains no language equivalent to Espoo Article 2(1). The objectives of the draft agreement, as described by the Canadian and U.S. governments, do not mention preventing transboundary harm; instead, they are to provide decision makers with information on transboundary environmental impacts so that they can be taken into account, and "to provide a mechanism for potentially affected people and governments to participate in the process leading to a decision on the project." These goals are in accord with goals of domestic EIA laws, including in particular those of the three North American countries, all of which use EIA as an informational tool rather than a substantive bar to environmentally harmful projects. Again, the only effect of the agreement would be to require the parties to consider the transboundary as well as the domestic impacts of their projects—a result that falls short of satisfying Principle 21 but is completely in accord with the principle of nondiscrimination.

ILC Draft Articles on Prevention of Transboundary Harm

Since 1978, the International Law Commission has considered the topic of transboundary environmental harm under the awkward title "International liability for injurious consequences arising out of acts not prohibited by international law." The ILC had difficulty coming to grips with the topic until 1997, when it decided to divide the subject into two parts, one on prevention of transboundary harm and one on liability for transboundary harm, and to address prevention first. This decision enabled it to proceed much more quickly. In 1998 environmental documents are published infrequently and only then on a voluntary basis. The public is invited to comment on an environmental impact assessment in Mexico at the end of the process, rather than being allowed to participate in the development of the impact analysis.

None of the countries' provisions formally discriminate against foreign residents, but neither do they ensure that foreign residents may have equal access to the EIA procedures. The agreement would still not resolve the entire "NEPA abroad" issue, see text at note 50 supra, both because the agreement might be implemented through a revised version of Executive Order 12,114, supra note 50, rather than NEPA and because the agreement would not require the United States to conduct EIA for projects located outside its territory. See Draft North American Agreement, supra note 2, Art. 1 (definition of "transboundary environmental impact").

110 See note 56 supra; NACEC Secretariat, supra note 95, at 13-14. The degree to which the agreement would change Mexican EIA practice is less clear. LGEEPA does not include projects that might cause transboundary environmental harm on its list of projects that require EIA. LGEEPA, supra note 95, Art. 28. A 1988 regulation implementing LGEEPA did include such projects on a list of those requiring EIA. Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental, Art. 5, §XIII, D.O., 7 de junio de 1988; NACEC Secretariat, supra, at 27. But a regulation promulgated in 2000, which replaced the 1988 regulation, appears to omit such projects. Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Evaluación del Impacto Ambiental, Art. 5, D.O., 30 de mayo de 2000.

111 Draft North American Agreement, supra note 2, explanatory page.

112 As noted above, NEPA contains no substantive prohibition. See note 92 supra. In Canada, "[t]he results [of the EIA procedures] are advisory in nature, with the final decision on projects made by the federal department or agency with authority to undertake or provide support to the project." NACEC Secretariat, supra note 95, at 8. And in Mexico, LGEEPA gives the federal government the power to deny an authorization on the basis of the environmental impacts of the project, but leaves the decision as to whether to do so within the government's discretion. LGEEPA, supra note 95, Art. 35; NACEC Secretariat, supra, at 31; Stevenson, supra note 109, at 1696 n.114.
it adopted on first reading a set of articles in the form of a framework convention on “preven-
tion of transboundary damage from hazardous activities.” The ILC draft articles resem-
ble the Espoo Convention and the draft North American agreement in that they require assess-
ment, notification, and consultation for activities with potential transboundary environmental effects. But unlike the regional EIA agreements, the ILC draft is based primarily on the mythic connection between transboundary EIA and Principle 21, rather than on a nondiscriminatory extension of domestic EIA laws. The ILC’s greater respect for the mythic view of Principle 21 may reflect the fact that its members serve as inde-
pendent legal experts rather than government representatives. If the ILC articles become the subject of a diplomatic conference aimed at negotiating a global agreement, states may be inclined to soften the connection with Principle 21 and, instead, build on and extend their domestic EIA laws as they have in the regional agreements.

Scope. Unlike the regional agreements, the ILC draft articles are not limited in scope to projects on a set list or to those already subject to government authorization. Instead, the ILC draft would apply to all activities “which involve a risk of causing significant transboundary harm through their physical consequences,” except for activities prohibited by interna-
tional law. By including all activities that might cause significant transboundary harm, the ILC draft articles would apply to all activities that might conflict with Principle 21. This scope accords with the mythic view of transboundary EIA, but it may be limited if the articles move closer to adoption by governments. A final agreement seems likely to reflect domestic EIA laws by limiting its scope to listed projects and to projects with governmental involvement, as the regional agreements do. Some ILC members have already said that a list of covered projects should be added “by the relevant technical experts in the context of a diplomatic conference considering the adoption of the articles as a convention.”

Procedural requirements. The procedural requirements of the ILC draft articles are vaguer and in some ways weaker than those of the two regional EIA agreements. The ILC draft would require assessment of the possible transboundary harm caused by activities within the scope of the articles, but would leave the content of the assessment largely to the discretion of the state conducting it, rather than specifying its elements as the regional agreements do. And, unlike the regional agreements, the ILC draft would require notification only of the results of the assessment, rather than of the project before the assessment is com-

115 ILC Draft Articles, supra note 3.
116 Id., Art. 1.
117 The focus of the provision on “risk” and its limitation to activities not prohibited by international law might appear to exclude activities certain to cause significant transboundary harm. See P. S. Rao, First Report on Prevention of Transboundary Damage from Hazardous Activities, UN Doc. A/CN.4/487, para. 83 (1998). This exclusion is consistent with the view of Principle 21 as an obligation of result. Assessment and notification of activities certain to cause significant transboundary harm would be pointless if the activities are simply prohibited by Principle 21; instead, the activities would give rise to state responsibility. See id., para. 78. It is less clear, however, how this exclusion comports with Principle 21 as an obligation of due diligence, which is the interpretation that the ILC has adopted. See ILC Draft Articles, supra note 3, at 380-96.
118 1998 ILC Report, supra note 114, Art. 1 commentary, para. 1, at 24-25. The ILC rejected including a list in its final reading, pointing out that any list would be underinclusive and could quickly become outdated. ILC Draft Articles, supra note 3, at 381. It also noted, however, that states might include such a list in regional agreements or national legislation “implementing obligations of prevention.” Id.
119 ILC Draft Articles, supra note 3, Art. 7. The ILC commentary on the article says that 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.” Beyond those minimum requirements, “[t]he 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.
pleted. The ILC articles would thus not ensure that an affected state could participate in the preparation of an EIA, as both regional agreements contemplate. Similarly, the ILC draft would require states to “provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result” and to “ascertain their views.” But the ILC draft does not specify that the public may participate in the EIA process or that the state of origin must take its views into account in deciding whether to authorize the proposed project. On the other hand, the ILC draft does include a strong equal access provision, which would ensure that nonresidents exposed to the risk of significant transboundary harm enjoy the same procedural rights as the public of the state of origin, whatever those rights might be.

Substantive obligations. The biggest difference between the ILC draft and the regional agreements is that the ILC draft includes a relatively clear version of Principle 21—“The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof” and presents its procedural obligations as though their primary purpose was to facilitate compliance with this obligation. The ILC draft is thus fundamentally consistent with the myth of transboundary EIA in a way that the regional agreements are not.

The ILC draft takes a step away from the myth, however, in the way it suggests that states resolve disputes over potential transboundary harm. The potentially affected state does not have a right of veto under any circumstances, even if the state of origin has completely failed to comply with its procedural obligations. Instead, the states are supposed to consult with one another and to “seek solutions based on an equitable balance of interests.” To that end, the draft articles provide a list of relevant factors, which include the degree of risk of significant transboundary harm, but also the availability of means of preventing such harm, the importance of the activity to the state of origin, the degree to which the state of origin and the affected state are prepared to pay for prevention, and the economic viability of the

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120 Id., Art. 8(1) (the state of origin must provide the state likely to be affected by a project “timely notification of the risk and the assessment,” including the information on which the assessment is based, but the requirement is triggered only if the assessment itself “indicates a risk of causing significant transboundary harm”).
121 Id., Art. 13. The commentary on Article 13 makes clear that the term “public” as used in the article includes not only the public of the state of origin, but also “that of other States.” Id. at 422.
122 Id., Art. 15 (“[A State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to [persons exposed to the risk of significant transboundary harm as a result of an activity within the scope of the draft articles], in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.”). This provision is stronger than the equivalent language in the regional agreements because it appears to prohibit discrimination against foreign residents or nationals with respect to any legal procedure that might provide “protection or other appropriate redress,” while the regional agreements provide only for nondiscriminatory access to the EIA procedure itself.
123 Id., Art. 3. The ILC commentary on the article indicates that a state’s primary obligation is to prevent all significant transboundary harm; “only in case this is not fully possible it should exert its best efforts to minimize the risk thereof.” Id. at 390–91.
124 For example, the ILC commentary on the article on assessment says: “This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take.” Id. at 402. In addition, the ILC would require prior state authorization for all activities within the scope of the articles, for the logical reason that such authorization is necessary to comply with the duty not to allow significant transboundary harm. See id., Art. 6; Rao, supra note 117, Part Two, UN Doc. A/CN.4/487/Add.1, para. 2.
125 See ILC Draft Articles, supra note 3, at 412 (commentary on Art. 9) (the state of origin is obligated to “take into account the interests of the States likely to be affected,” but is nevertheless “permitted to go ahead with the activity”). The lack of an obligation to cease the activity may be consistent with Principle 21, but only if the principle is viewed as giving rise to an obligation of due diligence rather than of result. See Boyle, supra note 24, at 78 (failure to carry out due diligence should require full compliance with that obligation, rather than cessation of otherwise lawful activity): Report of the International Law Commission on the Work of Its Fifty-second Session, UN GAOR, 55th Sess., Supp. No. 10, at 275, UN Doc. A/55/10 (2000) (“[T]he Special Rapporteur noted that none of the authorities he had surveyed had indicated that non-compliance with the obligation of due diligence made the activity itself prohibited.”).
126 ILC Draft Articles, supra note 3, Art. 9.
activity.\textsuperscript{127} The result may be to weaken the Principle 21 standard considerably.\textsuperscript{128} Interestingly, the final factors listed include "[t]he standards of prevention which the State likely to be affected applies to the same or comparable activities."\textsuperscript{129} In stepping away from Principle 21, the ILC draft thus embraces a small movement toward a kind of reverse image of the nondiscrimination principle.\textsuperscript{130}

III. DEFENDING TRANSBOUNDARY EIA AGREEMENTS AGAINST THE MYTH

In the mythic view of transboundary EIA, its usefulness is obvious: it allows states to comply with their obligation to prevent significant transboundary harm, in accordance with Principle 21. In comparison, the reliance of the regional agreements on nondiscrimination rather than Principle 21 may appear to be a fundamental weakness. How useful is a principle that requires a state to protect the environment of other states only to the same extent as it protects its own environment? More specifically, what is the point of transboundary EIA if states are not required to prevent the harm it identifies?

The Usefulness of Nondiscrimination

The principle of nondiscrimination in transboundary environmental protection has generally been overshadowed by Principle 21.\textsuperscript{131} The Rio Declaration, for example, which promotes Principle 21 to Principle 2, ignores the nondiscrimination principle entirely.\textsuperscript{132} The disregard is easy to understand. It may seem self-evident that transboundary environmental protection cannot be left entirely to the discretion of the state of origin because it will undervalue extraterritorial harm caused by activities within its jurisdiction.\textsuperscript{133} Within the United States, the inability of states of origin to regulate transboundary pollution satisfactorily is cited as a principal justification for federal environmental regulation, even by those other-

\textsuperscript{127} Id., Art. 10.

\textsuperscript{128} Alan Boyle suggests that the equitable balancing provision in the ILC draft may actually strengthen the protections of potentially affected states against transboundary pollution, but only if it is considered to be a new obligation in addition to "the existing obligation of due diligence." Boyle, supra note 24, at 82. The more natural reading of the ILC draft, however, is that the equitable balancing process set out in Articles 9 and 10 would largely determine the content of the obligation to prevent transboundary harm in Article 3. Article 9 says that the states concerned must enter into consultations "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 thereof," and requires the parties to seek those solutions "based on an equitable balance of interests" in light of the factors listed in Article 10. ILC Draft Articles, supra note 3, Art. 9. The italicized language is identical to the due diligence version of Principle 21 contained in Article 3. Moreover, the ILC commentary says that the measures to be taken to comply with Article 3 are the actions specified in the ILC Draft Articles. Id. at 391. Apart from procedural steps such as EIA, notification, and equal access, the only such actions are those required by Articles 9 and 10.

\textsuperscript{130} ILC Draft Articles, supra note 3, Art. 10(f).

\textsuperscript{131} The ILC commentary on this provision at first reading suggested a more traditional version of the nondiscrimination principle, by stating that the states concerned might take into account the domestic environmental standards of the state of origin, as well as of the affected state, and that if the standards of the state of origin were higher, the state of origin might have to apply those standards to the potential transboundary harm. 1998 ILC Report, supra note 114, Art. 12 commentary, para. 11, at 59.

\textsuperscript{133} See Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 DUKE L.J. 931, 954 (1997) ("The alternative approach reflected in the OECD Principles . . . has been largely drowned out in the chorus of approval for the strict liability approach of the Trail Smelter arbitration and the Stockholm Declaration.").

\textsuperscript{132} See Merrill, supra note 131, at 980–81.
wise suspicious of federal involvement.\textsuperscript{134} A uniform standard of general application, not subject to control by any particular state of origin, may appear preferable to a nondiscrimination principle that obligates the state of origin to protect the extraterritorial environment only to the same degree that it chooses to protect its own.\textsuperscript{135} Within the United States, a standard akin to Principle 21, of strict liability for significant transboundary harm, purportedly governs interstate pollution.\textsuperscript{136} Similarly, in areas of international law such as human rights, investment, and trade, principles of nondiscrimination have not been thought adequate to protect the interests of non-nationals and therefore have been supplemented by standards of general application.\textsuperscript{137}

Nevertheless, Thomas Merrill has recently argued that the nondiscrimination principle is preferable to Principle 21 as a standard for resolving disputes over transboundary pollution, at both the international and the federal levels.\textsuperscript{138} He emphasizes that whatever its attractions in theory, the Principle 21 standard is not enforced in practice, at either the international or the federal level.\textsuperscript{139} By referring to norms already applied by the parties internally, rather than to a "no significant harm" standard never actually imposed, he argues, the nondiscrimination principle would be more predictable, less conducive to extreme bargaining positions, and more likely to encourage disclosure of information than Principle 21.\textsuperscript{140} Merrill concludes that the nondiscrimination principle would therefore better facilitate contractual bargaining between states over transboundary pollution, which is "where progress is most likely to be achieved."\textsuperscript{141} It may seem counterintuitive to think that a principle that varies according to the practice of the parties would be more predictable and less controversial than a single standard of general application. But Merrill argues that the enormous difference between the purported rule on the books for transboundary harm and the inadequate enforcement of that rule in practice leads to unpredictability and controversy, since states can argue for either the strict rule on the books or the lax rule actually practiced, depending on which better suits their interests at the moment.\textsuperscript{142} In contrast, the nondiscrimination principle would refer to norms already applied by the relevant states internally and hence readily ascertainable.

Emphasizing the lack of adherence to Principle 21 in practice does make the nondiscrimination principle seem more attractive. Linking transboundary to domestic levels of protection


\textsuperscript{135} BERNIE & BOYLE, supra note 33, at 111–12.

\textsuperscript{136} The standard was initially developed as a matter of federal common law by the Supreme Court in Missouri v. Illinois, 200 U.S. 496 (1906), and Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)—decisions that were relied upon in the Trail Smelter arbitration, the direct precursor of Principle 21. Merrill, supra note 131, at 942–45, 949. Within the United States, the cases have been largely superseded by federal statutory law, which Professor Merrill argues continues to adhere to the same general standard. Id. at 954–57. Merrill also makes the interesting argument that the Supreme Court cases include unrecognized support for the nondiscrimination principle. Id. at 997–1004.

\textsuperscript{137} Human rights agreements set standards that go far beyond just prohibiting discrimination against foreigners; the Calvo Clause has long been rejected as adequate protection for investors' rights; and national treatment, while still an integral part of trade agreements, is supplemented in some areas by absolute standards.

\textsuperscript{138} Merrill's version of the nondiscrimination principle actually restricts the state of origin less than the OECD approach, since he would allow the state of origin (and the affected state) to argue that the applicable standard for transboundary harm is the domestic standard of the state of origin of the affected state. Merrill, supra note 131, at 1008. Although he optimistically believes that states would agree on which standard to apply through an appellate-dialogue designed to determine which of the standards is most closely on point, id. at 1008–09, it seems likely that in practice the state of origin would always choose to apply whichever standard is weaker.

\textsuperscript{139} Id. at 958–61 (describing lack of international adjudications after Trail Smelter and failure of the Environmental Protection Agency to enforce federal statutory provisions against transboundary pollution); see also Revesz, supra note 134, at 2346–74 (describing failure of federal government to respond effectively to interstate air pollution).

\textsuperscript{140} Merrill, supra note 131, at 1007–13.

\textsuperscript{141} Id. at 1019.

\textsuperscript{142} Id. at 995–96.
would constrain the discretion of the state of origin to some degree, which would improve on a standard that, however attractive in theory, is not enforced.

But the nondiscrimination principle has problems of its own. Merrill emphasizes its potential role in setting a substantive standard for transboundary pollution. Using the principle as a substantive standard, however, means that the state of origin will usually be able to meet the standard simply by doing what it is already doing. As Merrill recognizes, the adverse effects of pollution tend to decrease with distance. In most cases, therefore, the domestic environmental standard of the state of origin, whatever it is, will necessarily provide at least as much protection extraterritorially as it does domestically. In other words, the nondiscrimination principle would normally not entail an extension of the domestic law.

Procedural laws, however, are quite a different story. As this article explains, many domestic EIA laws, such as NEPA, make no provision at all for considering transboundary effects, while others, such as Directive 85/337, afford only incomplete protections that fail to rise to the level of nondiscrimination. By calling for compliance with the nondiscrimination principle, the regional EIA agreements would require the United States to assess the extraterritorial effects of its actions for the first time and would improve transboundary EIA even among EU countries. More generally, foreign residence and nationality can create legal as well as practical obstacles to full participation in domestic legal procedures. The requirement of equal access to domestic EIA procedures in the draft North American agreement would mark the first undertaking by the North American countries to offer even a limited form of equal access as an international obligation.

Even where it provides more protection than existing domestic laws, the nondiscrimination principle may not prevent unpredictable backsliding, since it enables a state of origin to weaken the protection it gives other states at any time by weakening its domestic protections. Moreover, it creates problems of reciprocity, since it would require states with strong domestic environmental protections to provide more extraterritorial protection than states whose domestic protections are weak. To a large extent, however, these problems

143 Id. at 977.
144 Of course, there would be situations in which the principle would impose additional constraints. For example, when an area affected by transboundary pollution is of a type that would require additional limitations on the source of pollution under the law of the state of origin if it were within the territory of the state of origin (such as a national park), the nondiscrimination principle might require the additional limitations to be imposed. More generally, one might argue that the principle should preclude decisions to carry out harmful activities in locations under circumstances in which most of their harm (that is, their harm subject to domestic regulation) would be transboundary rather than domestic. See Rest, supra note 134, at 2550–54 (discussing possibility that sources of air pollution in U.S. states may export much of their pollution by using tall stacks and choosing locations near borders).
145 See text at notes 49–59 supra.
146 See pt. II supra.
147 For a description of the obstacles to equal access in North America, see NACEC secretariat, Background Paper on Access to Courts and Administrative Agencies in Transboundary Pollution Matters, 4 N. Am. Envtl. L. & Pol’y 205 (2000). Equal access is more developed in Europe, although far from complete. It appears to be available to a greater degree in civil actions than in administrative proceedings. See BIRNIE & BOYLE, supra note 33, at 198, 294; REHINDER & STEWART, supra note 39, at 166–75.
148 Equal access in North America has been proposed but never adopted, at least at the federal level. In 1979 a joint working group of the American and Canadian Bar Associations prepared a draft treaty, based on the work of the OECD, which would provide for equal access in the two countries to judicial and administrative procedures for prevention of, and compensation for, harm caused by transboundary pollution. Despite endorses by the bar associations, the governments ignored it. At the suggestion of the joint working group, the U.S. and Canadian institutions dedicated to the promotion of uniform laws drafted a Uniform Transboundary Pollution Reciprocal Access Act, which has been enacted by seven U.S. states and four Canadian provinces. NACEC secretariat, supra note 147, at 301–06; Joel A. Gallob, Birth of the North American Transboundary Environmental Plaintiffs: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy, 15 HARV. ENVTL. L. REV. 85 (1991). The NAFTA environmental side agreement calls on the parties to consider equal access again, see NACEC, supra note 93, Art. 10(9), but to date they have taken no action beyond authorizing the secretariat’s “Background Paper” referred to in note 147 supra.
149 For this reason, the OECD Secretariat suggested that a nondiscrimination regime “might, at any rate initially, be put into effect between countries with broadly similar environmental policies.” OECD Secretary-General, Report on the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, para. 9, reprinted in LEGAL ASPECTS OF TRANSFRONTIER POLLUTION, supra note 93, at 37, 39.
may be resolved by using the nondiscrimination principle as a template for detailed international agreements in advance of particular disputes. Under this approach, states would have recourse to the principle as a basis for agreeing on specific obligations—but once agreed upon, the obligations, not the principle, would become the standard that the parties would have to meet. The effect would be to create a kind of ratchet, which would provide uniform standards resistant to backsliding.

The EIA agreements show how this nondiscrimination ratchet might work. For example, the Espoo Convention includes a general equal access provision, but it also sets out specific, detailed rights of the public of the affected party to receive notice of, and to comment on, proposed activities with potential transboundary effects and to have the state of origin take due account of its views. These rights coincide with what members of the state of origin already enjoy in EU states, so in that sense they are simply expressions of the nondiscrimination principle. But once written into the agreement they become a floor, protected from later backsliding. At the same time, the inclusion of an equal access provision ensures that if the European Union increases the rights of its own nationals to participate in the EIA process, other parties’ nationals’ rights under the agreement will increase to the same degree. The result is a ratchet, in which the protections can rise above a basic minimum but not fall back from it. Agreements applying the nondiscrimination principle may also help to prevent backsliding of the related domestic standards, since states will hesitate to offer their own public less protection than the agreement requires them to give to others. For example, the European Union would probably not consider decreasing the entitlement of its nationals to participate in the EIA process below the degree of participation guaranteed by the Espoo Convention to other nationals.

Agreeing to specific obligations based on the nondiscrimination principle also addresses the problem of reciprocity, by binding all parties to the same minimum standard. Unfortunately, the result may be an agreement based on the lowest common denominator of the countries’ domestic standards. For example, although the laws of some signatories to Espoo, notably the United States, require EIA to consider alternatives to the proposed project, the laws of other signatories, such as the EU countries, do not. Espoo adopts the lower standard by encouraging, but not requiring, the consideration of alternatives. Worse, if two standards differ not just in degree, but in kind, the lowest-common-denominator approach may result in a new standard lower than either. By combining the European approach of limiting EIA to a set list of projects with the U.S./Canadian approach of covering only projects with government involvement, the scope of the Espoo Convention is narrower than that of either set of domestic EIA laws.

An agreement based on the lowest common denominator of the parties’ procedural laws may still be stronger than it first appears if the procedural laws are relatively well developed, as they are in North America and Europe. International environmental law generally pro-

\textsuperscript{151} Espoo Convention, supra note 2, Art. 2(6).

\textsuperscript{152} Id., Arts. 3(8), 4(2), 6(1).

\textsuperscript{153} Although both elements of the ratchet—the specific standard based on existing domestic standards and the general requirement of nondiscrimination—seem highly useful, most protections in the EIA agreements include only one or the other. For example, the Espoo Convention includes specific requirements for the elements of an EIA, see id., Art. 4(1) & Annex II, but does not include a general requirement that EIAs must include the same requirements for transboundary as for domestic EIAs. Conversely, the North American draft agreement would require a state of origin to provide equal access to its EIA procedure to the public of affected states, see Draft North American Agreement, supra note 2, Art. 12.1, but does not include specific requirements concerning the degree of public participation.


\textsuperscript{155} Espoo Convention, supra note 2, app. II.

\textsuperscript{156} See text at notes 66-69 supra.
vides for very weak procedural requirements, so much so that even an agreement that extends a lowest-common-denominator version of developed domestic procedures to transboundary effects will be stronger than most international agreements. Despite the ways that the Espoo Convention may water down the procedural requirements of domestic EIA laws, it creates far more detailed, specific procedural obligations than any other multilateral agreement on transboundary harm.

Even in North America and Western Europe, however, procedural protections, and EIA laws in particular, could be improved in many ways. And in many other countries, EIA procedures are at a much lower level of development. An obvious criticism of the nondiscrimination principle is that it does nothing to improve upon domestic levels of protection, whatever they may be. In theory, agreements based on the principle might address this criticism by harmonizing laws at higher levels than the lowest common denominator. In the regional EIA negotiations, some countries did propose their own standard as the international standard, in the hope that countries with lower, or different, domestic standards would agree. For example, the Espoo Convention does not limit its coverage only to projects subject to a decision by the competent federal authority, as Canadian and U.S. law does. Similarly, Mexico has insisted that the North American agreement should cover projects with state, not just federal, government involvement. The reaction to these efforts is not encouraging, however. The North American negotiations are deadlocked over the issue, the United States has not ratified Espoo, and Canada has ratified Espoo with a reservation that limits its obligation to projects that are subject to exercised federal jurisdiction. On the other hand, it seems possible that the North American negotiators will find a formula that addresses Mexico's concerns without subjecting U.S. border states to new federal requirements. Many U.S. states have already adopted EIA procedures that apply to projects authorized or funded by the state government, and several border states have welcomed the idea of building transboundary EIA into those procedures as long as it does not result from a binding federal mandate.


Many bedrock principles of domestic environmental and administrative law—including notice to the public, an opportunity to be heard, and judicial review to assure reasoned decision-making—are reflected poorly, if at all, in the international legal system. Indeed, the notion that any of these components might be essential to the integrity of international legal processes, including international environmental decision-making, borders on heresy.

157 BIRNIE & BOYLE, supra note 33, at 105; Okowa, supra note 31, at 285, 286, 293.

158 See generally WOOD, supra note 34, at 289–300 (summarizing weaknesses of EIA laws of the United States, the United Kingdom, the Netherlands, Canada, Australia, and New Zealand).

159 See id. at 301–08 (describing EIA in developing countries).

160 BIRNIE & BOYLE, supra note 33, at 200 (equal access "does not compel states to create for their own nationals any of the procedural rights to which it refers. . . . If no relevant rights exist for the state's own citizens. . . . or if they are narrowly prescribed, the same limitations will affect transboundary claimants.

161 See text at notes 66–69 supra.

162 See text at notes 96–105 supra.

163 Canada ratified Espoo subject to a reservation "in respect of proposed activities (as defined in this Convention) that fall outside of federal legislative jurisdiction exercised in respect of environmental assessment." The reservation attracted objections from Finland, France, Italy, Luxembourg, Norway, Spain, and Sweden. See Status of Multilateral Treaties Deposited with the Secretary-General, ch. XXVII(4), at <http://untreaty.un.org/English/access.aspx> (visited Oct. 12, 2001). Although the United States has not publicly explained its reasons for not ratifying Espoo, one possibility is that it wishes to avoid having to make a similar reservation and receiving a similar set of objections.

164 See Letter from Border Environmental Agencies, supra note 105 (making recommendations for notification and assessment at the subfederal level of projects with potential transboundary effects, and expressing the hope that "the United States leads the effort to strengthen existing subnational processes while generating the impetus necessary for the creation of new subnational assessment mechanisms").
One source of U.S. and Canadian resistance to broadening the range of projects subject to EIA may be reluctance to amend their relatively detailed domestic EIA systems. Countries that do not already maintain detailed domestic standards may be more open to the idea of adopting international standards derived from other domestic laws. Indeed, they may see those standards as potential models for their own domestic laws. For example, the Eastern European countries emerging from the Soviet bloc at the time of the Espoo negotiations were interested in adopting EIA laws along Western lines and, with the encouragement of Western European countries, have used the Espoo Convention as a model. Consequently, nondiscrimination agreements may sometimes be particularly useful when they are between countries at different levels of development, insofar as they constitute a means for the lesser-developed country to learn more about potential models for development.

Nondiscrimination agreements may also increase pressure on states to raise their domestic standards by focusing international attention on them, although that effect is likely to be indirect and hard to measure. When countries negotiate and implement an agreement based on the nondiscrimination principle, they must exchange information about their preexisting domestic laws. In preparation for the negotiation of the regional EIA agreements, the UNECE and the NACC published reports on their members’ domestic EIA laws, and the UNECE has continued to issue such reports since Espoo was signed. As a result of this attention, states may feel pressured to raise standards or to ensure that they are better observed in practice. For example, the UNECE has highlighted the lack of strategic environmental assessment in member countries and has considered drafting a protocol to provide for such assessment in a transboundary context, which may increase pressure on the Espoo parties to institute it domestically. The focus in the North American draft agreement on public participation in transboundary EIA may push Mexico to increase permissible public participation in its domestic EIA procedures, just as the Mexican emphasis on transboundary EIA for state-level projects may increase pressure on some U.S. border states to adopt domestic EIA.

The Effectiveness of Environmental Impact Assessment

The most fundamental objection to the usefulness of nondiscrimination as an international standard for procedural agreements is that procedures may seem empty without some connection to substantive requirements. How useful is a requirement of nondiscrimination in EIA if the EIA does not necessarily lead to the prevention of transboundary harm?

If the regional transboundary EIA agreements only require domestic EIA procedures to apply without discrimination to extraterritorial effects, as this article has argued, then their effectiveness at preventing transboundary environmental harm would seem to depend on how effective domestic EIA is at preventing domestic environmental harm. But the effectiveness of domestic EIA is far from clear. As adherents of Principle 21 would expect, many scholars have criticized domestic EIA for lacking a connection to a general prohibition on environmental harm—a domestic equivalent of Principle 21—and have argued that without

106 Rees, supra note 39, at 127, observes:

The role of the UNECE convention in introducing EIA in the region has to be underlined. In many countries it was the means of drawing the attention of politicians and high-level decision makers to EIA. For 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.

107 NACC Secretariat, supra note 95; UNECE, POLICIES AND SYSTEMS OF ENVIRONMENTAL IMPACT ASSESSMENT, UN Doc. ECE/ENVWA/11, UN Sales No. E.91.II.E.6 (1991); UNECE, POST-PROJECT ANALYSIS IN ENVIRONMENTAL IMPACT ASSESSMENT, UN Doc. ECE/ENVWA/15, UN Sales No. E.90.II.E.36 (1990).

108 See UNECE, supra note 68; UNECE, supra note 71.

109 See UNECE, supra note 71.
it EIA is pointless. Writing shortly after the enactment of NEPA, Joseph Sax, the leading environmental law professor in the United States, denounced the idea that "requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of the administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil."109 Scholars in the United States have often called for NEPA to be interpreted or amended to include a substantive prohibition on environmental harm.170

The many national and comparative studies of EIA have failed to establish just how effective it is.171 Indeed, some scholars have suggested that the nature of EIA may preclude accurate measurement of its effectiveness.172 For example, it may not be possible to know how many potentially harmful proposals are withdrawn because their proponents want to avoid the attention of an EIA,173 or the degree to which a decision on a project is based on an EIA as opposed to other factors.174 With these caveats, the studies reach some general conclusions. On the one hand, they indicate that EIA often leads proponents to modify proposed projects in ways that should reduce their environmental impact; on the other, they indicate that EIA results in very few decisions to halt projects.175 Moreover, the degree to which the modifications actually reduce impacts remains unclear, since very few EIA systems, even in developed countries, monitor projects after approval.176

Given its lack of clear effectiveness at preventing environmental harm, why does EIA continue to be so popular throughout the world? One reason is a widespread belief that EIA does increase environmental protection—that the resulting modifications to projects, even if not adequately monitored, together amount to greater protection than would otherwise occur.177 While the decision whether to authorize a project remains a political one, EIA laws can open the political process to a wider range of influences than just the proponents of a project. By requiring governments to consider and publicize the environmental effects of actions and by giving the public a voice in the process, EIA increases the likelihood that the decisions will be more protective of the environment.178 Studies have indicated that EIA may increase the influence of proenvironment agencies, or even change the institutional focus

171 The most important comparative study is SADLER, supra note 36, which was carried out under the auspices of the International Association for Impact Assessment and the Canadian Environmental Assessment Agency and published in 1996. For an overview of studies of the effectiveness of NEPA, see MANDELKER, supra note 36, ch. 11.
172 WOOD, supra note 34, at 9.
173 Ortoloano & Shepherd, supra note 46, at 9.
174 SADLER, supra note 36, at 52 (“In many cases, other factors also play a role, such as economic cycles, political events, etc. With few exceptions, it is very difficult to unambiguously ascribe influence to the EA process.”).
175 Id. at 58; Ortoloano & Shepherd, supra note 46, at 9–10; see also WOOD, supra note 34, at 213 (noting that in the "United States, and in many other jurisdictions where widespread opportunities for public participation exist ... a very high proportion (over 95 per cent) of actions which reach the 'final' EA report stage are approved, but nearly all of these are substantially modified to mitigate impacts during the ... EIA process.")
176 WOOD, supra note 34, at 224 (“Mitigation of environmental impacts is frequently a prime consideration in the EIA systems in many developing countries but the implementation of proposed mitigation measures is often weak ...”).
177 SADLER, supra note 36, at 53 (“[T]he net direct benefit [of such modifications] to environmental protection and community welfare is considerable and possibly underrated by many.”).
178 See Betty Gebers, Preface to INTERNATIONAL ENVIRONMENTAL IMPACT ASSESSMENT: EUROPEAN AND COMPARATIVE: LAW AND PRACTICAL EXPERIENCE 8, 9 (1997) (Public participation "enables the public to review the proposed projects critically and to open up the public debate on benefits and losses. This debate will in many cases force authorities to produce more balanced, better decisions—or at least prepare a good justification if they go ahead anyway ... ").
of normally prodevelopment agencies so that they take environmental concerns into account as a matter of course.\(^{179}\) Increased institutional and public attention to projects may reveal that they must be modified or abandoned so as to comply with specific substantive requirements contained in other laws.\(^{180}\) Even in the absence of such requirements, the sunshine effect of public attention may result in greater environmental protection.\(^{181}\) Professor Sax has said that "legitimating public participation, and demanding openness in planning and decision-making, has been indispensable to a permanent and powerful increase in environmental protection," and on that basis has reconsidered his dismissal of NEPA.\(^{182}\)

Another reason for the popularity of EIA despite its lack of proven effectiveness at preventing environmentally harmful projects is that it aims not so much at increasing environmental protection as at improving decision making with environmental effects—that is, it seeks not to foreclose trade-offs between environmental protection and other societal goals but, rather, to ensure that those trade-offs are made more intelligently. In that sense, the effectiveness of EIA should be measured not by whether decisions are always made in ways that protect the environment, but whether decisions are made in full awareness of their environmental consequences. A country may decide to allow environmental harm in order to obtain social and economic development in other ways. By requiring that decisions be made on the basis of full information, but not prohibiting all significant environmental harm, EIA allows the political process to decide how best to make the trade-off between environmental harm and other interests in a particular case. The effectiveness of EIA in this sense could often be increased by improving its procedures—requiring decision makers to consider alternatives and mitigation, to conduct postapproval monitoring, and to allow meaningful public participation. But adding a general prohibition on all significant environmental harm would preclude such trade-offs.\(^{183}\)

It is too early for studies to have addressed the effectiveness of transboundary EIA—the Espoo Convention has been in force only since 1997. But the factors that make domestic EIA at least somewhat effective at improving environmental protection seem likely to apply in the transboundary context as well. Giving information about transboundary effects to the government and public of the affected state, allowing them to submit their views on the project and EIA, and requiring the state of origin to take their views into account will probably reduce the amount of transboundary harm, even without a hard obligation to comply with Principle 21. Foreign residents and their governments have less political clout than resident nationals in some ways, but they may also be able to mobilize the attention of political actors not normally involved in EIA processes, such as ministries of foreign affairs.


\(^{180}\) William H. Rodgers, Jr., Environmental Law 869–70 (2d ed. 1994).

\(^{181}\) See Zigmunt J. B. Plater, Robert H. Abrams, William Goldfarb, & Robert L. Graham, Environmental Law and Policy: Nature, Law, and Society 665 (2d ed. 1998) ("[I]nformation has a power of its own, even in the absence of substantive review mechanisms. Human beings and their institutions are averse to being embarrassed by public exposure of their nonconformity with generally accepted behavioral norms."). As Plater and his coauthors note, this is a phenomenon with which international law is particularly familiar. Id. In recent years, a large body of scholarly work has examined the role of sunshine in promoting compliance with international agreements. See, e.g., Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995); Engaging Countries: Strengthening Compliance with International Environmental Agreements (Edith Brown Weiss & Harold K. Jacobson eds., 1998).


At the end of the process, the EIA agreements still leave the decision on whether to cause transboundary harm to the discretion of the state of origin. And, like domestic EIA, transboundary EIA seems unlikely to end all transboundary harm or even stop many harmful projects. The agreements will increase the number of factors to be considered in the EIA process, but the process will remain political rather than legal, with the likely result that projects will go forward with modifications that reduce, but do not prevent, their transboundary effect. That result may be welcome to those who believe that trade-offs between environmental protection and other goals are inevitable even in the transboundary context. But even those whose goal is to establish uniform standards in transboundary protection can acknowledge the usefulness of agreements that require states to consider the transboundary environmental effects of proposed activities in the same way that they consider their domestic effects.

Nevertheless, many will find the agreements unsatisfactory because they do not ensure compliance with the mythic view of Principle 21 and transboundary EIA. The regional EIA agreements have one indisputable advantage over the myth, however: they actually exist. A myth can be a kind of collective ideal, as Bodansky suggests, and the collective ideal of an international environmental law that reduces and prevents transboundary environmental harm is a powerful one. But myths can also obscure reality. Most references to Principle 21 treat it as customary law rather than collective ideal, as truth rather than as half-truth. The danger is that characterizing Principle 21 and its purported procedural corollaries as law, with all that the word normally entails, discredits international law generally.

This danger extends far beyond Principle 21, or even international environmental law. The scope of customary international law as it has traditionally been conceived has shrunk in recent decades, whittled away by the increasing number and scope of multilateral agreements. But academics and others have been reluctant to accept that customary international law is increasingly unnecessary in an age with few logistical barriers to the negotiation of treaties. Instead, they regularly propose new elements of, and roles for, customary law, most of which are based, like Principle 21, more on wishful thinking than on evidence of custom or opinio juris. As a result, the ideals on which the proposals are based are confused with the law itself, to the benefit of neither. The time has come to recognize that customary international law is nearing the end of its useful life. It should be allowed to pass into history, rather than forced to become a myth.

184 The ILC draft articles are evidence that it may be difficult, if not impossible, to exclude such trade-offs, even in good faith efforts to implement Principle 21. See ILC Draft Articles, supra note 3, Art. 10 (listing factors to be taken into account in reaching "an equitable balance of interests").

185 Bodansky, supra note 1, at 116.