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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue being a source of future life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of fifteen citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico, and the United States.

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PRESENTATION AND ACKNOWLEDGEMENTS

In 1993, in the context of the negotiations of the North American Free Trade Agreement (NAFTA), the governments of Canada, Mexico and the United States agreed on a framework for environmental cooperation in North America: the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC provides for the establishment of the Commission for Environmental Cooperation (CEC), responsible for the implementation of the NAAEC.

The CEC's mission statement builds on the preamble and objectives of the NAAEC by stating: "The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links between Canada, Mexico and the United States."

The background papers contained in this volume were prepared by the CEC Secretariat to foster and support governmental discussions and negotiations on the development of two intertwined transboundary issues: a Transboundary Environmental Impact Assessment (TEIA) regime for North America and recommendations for the removal of barriers limiting access to courts and administrative agencies in transboundary environmental matters. These initiatives fall within the ambit of the CEC Council's functions, as provided in NAAEC Articles 10(7) and 10(9).

The first section of this volume contains a series of background papers prepared for discussions held under the auspices of the CEC by North American governmental experts on EIA, with a view to developing a North American TEIA regime. These papers provide a survey and critical review of the realm of existing legal instruments (formal and informal) containing provisions, the consideration of which may be rele-

vant to the development of a TEIA regime. Each of these background papers focuses on one of the commonly found components of existing TEIA regimes: notification, assessment, mitigation, and dispute resolution. These components, as described and summarized by the Secretariat, are included at the beginning of Part I of this volume. It must be noted that the description of commonly found TEIA components, as well as the content of the background papers contained in this volume, do not necessarily reflect the views of any of the governments of Canada, Mexico or the United States.

The second part of this volume consists of a single background paper prepared by the Secretariat to provide the governments and the North American public-at-large, with baseline information on existing domestic recourses and remedies generally available to citizens seeking environmental redress. The paper also evaluates the potential barriers that North American citizens seeking such redress may face as a result of their living on the "wrong side of the border."

It is hoped that the publication of these background papers will assist individuals and organizations – in North America and beyond – interested in the development and promotion of EIA in a transboundary context, and in the removal of barriers to transboundary access to courts and administrative agencies.

The CEC is indebted to a number of experts who have contributed to the drafting and revision of the various background papers. In particular, the CEC would like to acknowledge the contribution of Mr. Howard Mann in the preparation of the background papers contained in Part I. Mr. Mann also coordinated the review of the final draft of the background paper on access to courts. In addition to the other contributors acknowledged in the Part II paper itself, the CEC wishes to acknowledge the following for their work in the preparation and editing of this compendium: Greg Block, CEC Director of Programs, Stéphanie Johnson, legal consultant, and Nathalie Herren and Julie-Anne Bellefleur, program assistants. The CEC is also grateful for the help and courtesy of Mr. Louis Bossé, Publications Director, Les Éditions Yvon Blais, Inc.

Please note that the background papers contained in Part I were not initially intended for wide distribution and as a result, the various drafts (and translations) have not been the subject of a review and clearance process as thorough as might otherwise have been the case. Although every effort has been made to ensure the accuracy of the various background papers, the Commission for Environmental Coopera-

tion, and the governments of Canada, Mexico and the United States assume no responsibility for the contents of this publication. Readers are always advised to consult the original sources referred to in the papers.

Marc Paquin
Editor, North American Environmental Law and Policy
CEC Council Secretary and Program Manager for TEIA and RAC

PART I

Transboundary Environmental Impact Assessment

COMMONLY FOUND COMPONENTS IN TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT[1] ARRANGEMENTS

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

COMPONENT I

Notification of a Proposed Project with the potential to cause significant adverse transboundary environmental impacts

1. A Party that, prior to its implementation, determines that a Proposed Project[2] under its jurisdiction ("Party of Origin") has the potential to cause significant adverse transboundary environmental impacts ("transboundary impacts") should provide early notification to other Parties which may be affected by that Proposed Project ("Potentially Affected Parties");

2. The Party of Origin should notify the Potentially Affected Parties, as early as possible, but, in ordinary circumstances, no later than when informing its own public about a Proposed Project described in paragraph 1 in order to provide the Potentially Affected Parties and their public a meaningful opportunity to have their comments considered;

3. In their response to the notification of a Proposed Project, the Potentially Affected Parties should indicate whether or not they intend to provide comments, or to participate in an environmental impact assessment if one is undertaken.

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1. In this document, the term "environmental impact assessment" refers to either a formal EIA procedure, or a project approval procedure (such as a permitting procedure) providing for the consideration of the environmental impacts of Proposed Projects.
2. The definition of the term "Proposed Project" is critical to the scope of TEIA arrangements. Entities entering into TEIA arrangements need to carefully consider what activities are included and excluded from the scope of this term.

COMPONENT II

Provision of relevant information and consultation between Parties with respect to a Proposed Project with the potential to cause significant adverse transboundary environmental impacts

1. The Party of Origin should provide the Potentially Affected Parties with relevant information sufficient to apprise the Potentially Affected Parties of the nature of the Proposed Project;

2. If, prior to the implementation of the Proposed Project, the Party of Origin becomes aware of new and material information relating to the potential for significant adverse transboundary environmental impacts of a Proposed Project, it should promptly transmit such information to the Potentially Affected Parties;

3. The Party of Origin should promptly provide available information on an existing or potential transboundary impact from a Proposed Project at the request of a Potentially Affected Party which is or may be affected, whether or not notification was given in accordance with Component I;

4. The Parties should enter into consultation on an existing or potential transboundary impact from a proposed project at the request of a Potentially Affected party which is or may be affected and should pursue such consultations over a reasonable period of time.

COMPONENT III

Assessment of the impact of a Proposed Project with the potential to cause significant adverse transboundary environmental impacts, including full evaluation of comments provided by Potentially Affected Parties and the public of such Parties

1. The Party of Origin should assess the transboundary impact of a Proposed Project with the potential to cause significant adverse transboundary effects and ensure that the Potentially Affected Parties and their public have a meaningful opportunity to participate in the assessment process;

2. The Party of Origin should fully evaluate comments provided by Potentially Affected Parties and their public;

3. The Party of Origin should promptly transmit to the Potentially Affected Parties the written documentation of any completed environmental impact assessment and communicate to them whether or not the Proposed Project will proceed.

COMPONENT IV

Consideration of mitigation of the potential significant adverse transboundary impacts

1. The Party of Origin should consider mitigation measures as early as possible during the environmental impact assessment of a Proposed Project;

2. In deciding which, if any, mitigation measures to adopt, the Party of Origin should consider relevant comments provided on the matter by the Potentially Affected Parties or their public.

COMPONENT V

On-going cooperation

1. The Parties should cooperate on an on-going basis in the sharing of experiences and information to promote the improvement of methods and techniques for conducting transboundary environmental impact assessment, mitigating environmental impacts and conducting post-project monitoring.

Commission for Environmental Cooperation

Secretariat

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TERM OF ART DEFINITIONS CONTAINED IN INTERNATIONAL AGREEMENTS

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

At the February 1996 meeting of the Parties on transboundary environmental impact assessment, the Parties requested that the Secretariat prepare a list of definitions already found in existing agreements and documents dealing with transboundary environmental assessment issues. This list is presented below.

To prepare this list, the documents and treaties noted in the attached list of sources were each reviewed. All definitions per se that are the same or similar in intent to the list of terms set out by the Parties in February are reprinted below, with the specific source. In some cases, the definitions are quite specific, for example to air or oil pollution issues, reflecting the scope of the document quoted. In addition to definition sections, other sections that set out definition-like language are included. These were distinguished from operational and standard setting provisions found in these agreements. Those terms identified by the Parties, but for which no definitions were found, are set out at the end of the material.

In all cases, the documents reviewed contained very few definitions. There appears, rather, to be a general understanding of many of the terms of art associated with Environmental Impact Assessments that the Parties to these instruments have relied upon. In addition, the more detailed operational and standard setting provisions have provided contextualized applications of the various terms that go beyond any traditional notion of a definition. These types of provisions are considered in other material the Secretariat has prepared for the Parties on this project.

DEFINITIONS

Transboundary

- "Border area": refers to the area situated 100 kilometers on either side of the inland and maritime boundaries between the Parties. (La Paz Agreement, Art. 4, 1983; see also the US-Mexico BECC, Part I, Art. VII)

Impacts, Adverse effects

- "Polluting incident": a discharge or the threat of a discharge of any hazardous substance on one side of the inland international boundary of a magnitude which causes, or threatens to cause, imminent and substantial adverse effects on the public health, welfare, or the environment. (Annex II to the La Paz Agreement, Art. 1, 1985)

- "*Pollution* of an international watercourse": any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct. (I.L.C. Draft Articles, Art. 21.1, 1994)

- "Air pollution": the introduction by man, directly or indirectly, of substances into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and "air pollutants" shall be construed accordingly. (Air Quality Accord, Art. 1, 1991)

- "Impact" means any effect caused by a proposed activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical

structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors. (Espoo, Art. 1(vii), 1991)

- "Effects": ...particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment. (Espoo, Appendix III, Art. 1(c), 1991)

- "Effects": means any direct or indirect, immediate or delayed adverse consequences caused by an industrial accident on, *inter alia*,

  (i) human beings, flora and fauna;

  (ii) soil, water, air and landscape;

  (iii) the interaction between factors in (i) and (ii);

  (iv) material assets and cultural heritage, including historical monuments.

  (ECE Transboundary Accidents, Art. 1, 1992)

- "Adverse effects of climate change": means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare. (Climate Change Convention, Art. 1.1, 1992)

- "Harm": ...including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. (I.L.C. Draft Articles, Art. 21.2, 1994)

Transboundary effects

- "Transboundary air pollution": air pollution whose physical origin is situated wholly or in part within the area under the jurisdiction of one Party and which has adverse effects, other than effects of a global nature, in the area under the jurisdiction of the other Party. (Air Quality Accord, Art. 1, 1991)

- "Transboundary impact" means any impact, not exclusively of a global nature, within an area under the jurisdiction of a Party caused by a proposed activity the physical origin of which is situated wholly or in part within the jurisdiction of another Party. (Espoo, Art. 1(viii), 1991)

- "Transboundary impact" means any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party, within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors. (ECE Transboundary Watercourses, Art. 1(2), 1992)

- "Transboundary effects" means serious effects within the jurisdiction of a Party as a result of an industrial accident occurring within the jurisdiction of another Party. (UNECE Transboundary Accidents, Art. 1, 1992)

- "Transboundary impacts": any significant adverse effect on the riverine environment resulting from a change in the conditions of the waters caused by human activity and stretching out beyond an area under the jurisdiction of a Contracting Party. Such changes may affect life and property, safety of facilities and the aquatic ecosystems concerned. (Danube River Convention, 1994, Art. 1(c))

Mitigation

- "Response measures": to eliminate to the extent possible the threat posed by such incidents and to minimize any adverse effects on the environment and the public health and welfare. (Annex II to the La Paz Agreement, Art. III, 1985)

- ...providing adequate means within their power to eliminate the threat posed by such incidents and to minimize the adverse effects to the marine environment and the public health and welfare. (Mexico-US Marine Pollution Agreement, Art. III, 1980)

- ...the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects. (EU Directive, Art. 5(2), 1985)

Significant

- "*Of a magnitude or significance*" that requires an immediate response in order to contain, recover or destroy the substance for the purpose of eliminating the threat or of minimizing its effects on the marine flora and fauna and on the public health and welfare. (Mexico-US Marine Pollution Agreement, Art. II(a), 1980)

- ...according to whether those activities are identified as having:

  (a) less than a minor or transitory impact;

  (b) a minor or transitory impact; or

  (c) more than a minor or transitory impact.

  (Antarctic Treaty Protocol, Art. 8, 1991)

Competent government authority

- "Competent authority" means 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. (Espoo, Art. 1(ix), 1991)

- "Competent authority or authorities": that or those which the Member States designate as responsible for performing the duties arising from this Directive. (EU Directive, Art. 1(3), 1985)

Project

- "Project": the execution of construction works or of other installations or schemes; other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. (EU Directive, Art. 1(2), 1985)

- "Proposed activity": any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure. (Espoo, Art. 1(v), 1991)

Environment

- "Environment" means the atmosphere, land, and surface and ground water, including the natural resources therein, such as fish, wildlife, forests, crop and rangeland, rivers, streams, aquifers and all other components of the ecosystem. (Annex II to the La Paz Agreement, Art. 1(b), 1985)

- ..."the environment", including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors. (Espoo, Art. 1(vii), 1991)

- Such effects on the "*environment*" include effects on human health and safety, flora, fauna, soil, air, water, climate landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors. (ECE Transboundary Watercourses, Art. 1(2), 1992)

- ...the aspects of the "*environment*" likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archeological heritage, landscape and the interrelationship between the above factors. (EU Directive, Annex III, Art. 3, 1985)

Environmental impact assessment

- "Environmental Impact Assessment" means a national procedure for evaluating the likely impact of a proposed activity on the environment. (Espoo, Art. 1(vi), 1991)

- ...comprehensive analytical procedures for prior and simultaneous assessment of the impacts of decisions, including the impacts within and among the economic, social and environmental spheres ... analysis should also include assessment of costs, benefits and risks. (Agenda 21, Ch. 8, Par. 8.5(b)

- "EIA" means an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development. (UNEP, 1987, Preliminary Notes)

Monitoring

- Regular and effective "*monitoring*" shall take place to allow assessment of the impacts of ongoing activities, including the verification of predicted impacts;

- ...to facilitate early detection of the possible unforeseen effects of activities carried on both within and outside the Antarctic Treaty area on the Antarctic environment and dependent and associated ecosystems. (Antarctic Treaty Protocol, Art. 3.2(d) and (e), 1991)

- "Monitoring": to assess and verify the impact of any activity that proceeds ... to provide a regular and verifiable record of the impacts of the activity. (Antarctic Treaty Protocol, Annex I, Art. 5)

Decision

- "Development consent": the *decision* of the competent authority or authorities which entitles the developer to proceed with the project. (EU Directive, Art. 1(2), 1985)

Statement

- "An initial environmental evaluation": a quick and informal assessment of the proposed activity to determine whether its effects are likely to be significant. (UNEP, Prin. 2, footnote (d), 1987)

- "Initial Environmental Evaluation": ...assess whether a proposed activity may have more than a minor or transitory impact. (Antarctic Treaty Protocol, Annex I, Art. 2(1), 1991)

Terms for which no definitions were found

- Notification; Environmental damage; Public consultation; Responsibility; List of documents.

SOURCES REVIEWED

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United Nations Environment Programme (UNEP), Goals and Principles of Environmental Impact Assessment, June 17, 1987.

US-Mexico Border Environment Cooperation Commission (BECC) Agreement: Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, 6 November 1993.

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ISSUES UNDER ARTICLE 10(7) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

INTRODUCTION

As a follow-up to the meeting of the Parties of February 1-2, 1996, the Secretariat was requested to prepare a brief description of the issues identified by the Parties as relevant to the transboundary environmental impact assessment (TEIA) project, and an indication of the associated options. This document provides these two elements. The issues raised by the Parties are each found in separate sections. In some cases, however, issues have been joined or moved where it was considered that a more logical flow to the document would emerge from this editorial step.

The document is set out in four main parts, corresponding to the issues identified by the Parties:

- notification;
- exchange of information and assessment;

- mitigation;
- consultation and dispute resolution.

PART ONE: NOTIFICATION

1. Trigger for notification

In this context, the trigger is not for the conduct of a TEIA, but for notification to another jurisdiction that there may be a need to consider potential transboundary impacts of a proposed project in an assessment process. The possible triggers below show that the primary responsibility lies with the jurisdiction of origin, but that a triggering role can also be played by the potentially affected jurisdiction. One trigger or a combination of triggers are possible.

1.1 List of possible projects

A list of public and private sectors projects that would trigger a notification could be prepared and included in an Annex. The projects would include those expected to have a potential significant transboundary environmental impact due to their nature and/or size.

1.2 Proximity to border

Any project or a listed project within a fixed distance from a border can be made subject to notification. Used alone, this provides certainty that all projects within this distance will be notified. Attached to a list of projects, this approach limits the projects to be notified to those that meet both criteria (on the list *and* within the distance).

1.3 Potential significance of impact

An initial determination in the jurisdiction of origin that a proposed project may have a significant transboundary impact can be used as a stand-alone trigger for notification covering any project proposal. This would cover any type of project at any distance from the border. This test can also be combined with one or both of the previous tests either:

- as a second or third condition on when to notify (project list and/or distance from border *and* a possible significant impact); or

- as a residual test to be applied when other triggers do not capture a proposed project that has a potential significant transboundary impact.

Determining a potential "significant" impact can itself present difficulties. One approach is to set out initial criteria to guide such a determination in an Annex. The application of a precautionary principle approach to this determination could be included either as part of the determination or as a separate element. The essence here would be, simply, when in doubt – notify. This part of the process can be connected to a consultation and/or dispute resolution process (see sections 12 and 13 below).

1.4 Discretionary notification / Awareness of available information

A further option is to leave notification fully to the discretion of the jurisdiction of origin of a project. This approach would rely on principles of good neighborliness and reciprocity as the basis for its implementation, with none of the additional guidance found in the previous options. As an additional rather than sole trigger, this could be similar to the "significant impact" trigger being applied as a residual test as per section 1.3.

1.5 Domestic regulatory obligations / Pro-active domestic measures

Domestic environmental assessment or related legislation may require an assessment of any potential transboundary impacts, even in the absence of an internationally adopted trigger for this, or in the absence of an assessment of domestic impacts by the same or any authority. Where there is such a requirement, the Parties may wish to apply the notification process developed here.

1.6 Request by potentially affected jurisdiction

Where a proposed project for which no notification is given comes to the attention of another jurisdiction, and it believes that the project may significantly affect its environment, information and "notification" may be requested by that jurisdiction. As the primary responsibility for notification lies with the jurisdiction of origin, this would normally be a residual means for gaining notification. This might be coupled with a process for formal or informal consultations. (See section 12 on consultations below.) Criteria for such a request can be developed.

1.7 Public request (formal or informal)

In the absence of a formal notification between governments, or a request by a potentially affected Party, a process for notification could be initiated by the public of either jurisdiction. One might consider imposing some conditions on this approach, most notably the reasons leading to the request, including an indication of the anticipated impacts.

1.8 Exemptions from TEIA process

In some circumstances an exemption from a TEIA may be necessary. These circumstances could include necessary and immediate actions related to national security, responses to natural disasters or other emergency situations.

2. Content: Information contained in the notification

As noted above, the initial notification is about possible transboundary impacts that may be included in a project assessment. Thus, the information included would be preliminary in nature, designed to provide sufficient information for the jurisdictions involved (potentially more than just two) to consider in an informed way whether significant transboundary impacts are likely and should, therefore, be fully assessed.

2.1 Minimum information requirements

Minimum information requirements would be designed to meet this sufficiency threshold. This information could include:

- type of project and the rationale for the project;
- location, design and size of the project;
- date of proposal and planned start of work or operation;
- designated responsible authority, with contact information;
- potential transboundary impacts of the project and any contemplated mitigation measures; and
- a time frame for responding to notification (if not dealt with elsewhere).

Where a minimum requirement is set out in this way, each jurisdiction would have the liberty to provide additional information. Where the location and nature of a proposed project make it reasonable to presume a TEIA will be required, it may be desirable to include any additional available information as early as possible in the process, including with the notification.

2.2 Alternative formulations

An alternative to minimum information requirements could be a more generalized requirement to submit to the other jurisdiction(s):

- all available public information related to the proposal, or
- all information made available to the public by the responsible authority in the jurisdiction of origin of the project.

These or a similar alternative could be combined with the previous alternative to supplement the minimum required information. This approach might, however, be less standardized, particularly if several jurisdictions are involved.

2.3 Standardized formats and protocols

A standard form (format or protocol) on which to supply the notification information could be seen as a means to assist the jurisdiction of origin to ensure consistency and completeness in their notification information. If a form is adopted, it should reflect the information that has to be included, as determined by the Parties or the jurisdictions involved, rather than become a second source of a different requirement. A standardized form could be set out in a technical Annex.

2.4 Protected information / Trade secrets / Confidential information

This issue relates to both information provided in a notification and information required for the purposes of conducting a TEIA (and perhaps follow-up reviews). It is generally understood that some constraints on the provision of information are appropriate, as they are under domestic laws. Reference to these domestic laws provides one option for indicating the constraints to be adopted. Alternatively, customized criteria or guidance can be set out. Such a list might include confidential personal information protected by law, trade secrets and/or information related to national security.

If protected or confidential information is provided, either at the notification stage or later, a condition can be adopted that would require the receiving jurisdiction to treat the information in the same confidential/protected manner as the jurisdiction of origin. If this could not be done, one would expect the receiving jurisdiction not to receive the information in question.

3. Notification logistics: When, how and who

This section looks at four basic logistical issues for notification: when should it be provided, by what means, by whom and to whom.

3.1 When to notify

Once again, notification as used here is for the purposes of determining the need for a TEIA, not for any subsequent stages of the process. Options for the timing of this notification include:

- "As early as possible": this ensures a very early time line, and may require a jurisdiction to actively pursue information beyond its normal process for receiving and processing such information in the context of its administrative operations.

- "As early as practical": this can be seen as somewhat less demanding, allowing the notification to fit into the other administrative processes more easily while still requiring an early notification to be given.

- "At the same time as the local public": this requires knowledge of the domestic law which sets the timing for this notice to the public in the jurisdiction of origin. This option can also be combined with one of the above options to set a maximum time frame for their application: i.e., as early as possible/practical but no later than when the public in the jurisdiction of origin is notified of the proposed project. One might note here that local public involvement sometimes arises only after an assessment has been completed, and is for the purposes of public comment.

3.2 How: By what means should a notification be sent

Today's technologies provide options for the transmission of information. Possible means for notification to other government authorities include:

- electronic means: e-mail, Internet, computer disk;
- facsimile;
- mail or registered mail; or
- phone.

Presumably, a written form to ensure accurate transmission of the information included is necessary. A combination of means, for example a brief facsimile notice that a fuller notification has been prepared and is available by electronic means could also be considered. This approach might have particular relevance where a broad distribution is required. (See sections 3.3 and 3.4)

The above choices presume a non-diplomatic approach to notification. If a diplomatic route is chosen, the Parties may wish to select a more formal means for transmission of the notification. (See sections 3.3 and 3.4)

3.3 Sender: By whom should a notification be sent

The issue of who should provide notice raises the question of the role of the central federal authorities and of state and provincial authorities. The Parties have signaled this issue through several references to the roles of federal, state and provincial entities in their list of issues.

In all three jurisdictions, environmental assessment responsibility as well as other licensing and permitting responsibilities are shared between federal and non-federal jurisdictions. In some cases, responsible authorities at both levels of government will have permit, license or assessment responsibilities in relation to the same proposed project.

These factors highlight the issue of the role of the different authorities. In the present context, notification can be made by the authority initially seized of the conduct of an assessment of the project in question. This could be a federal, state or provincial authority. Notification can also be made by a designated "notification authority" for a region in each transboundary area. Thirdly, notification can be made at the central levels, by environmental assessment authorities. Fourthly, notification can be made through diplomatic channels at the central levels.

3.4 Recipient: To whom should a notification be sent

The same questions discussed above apply to the issue of to whom notification should be sent. Presumably, the principle that is applied to

the question of who gives the notification will apply to the recipient. If the notifier is defined as the authority responsible for the conduct of the assessment in the jurisdiction of origin, whether a central, state or provincial authority, the recipient would logically be the authorities responsible in the potentially affected jurisdiction. This could be more than one authority (and more than one jurisdiction).

If central authority notification is adopted, appropriate authorities can be identified at this level to receive the original information from its own authorities and transmit it to counterparts in the affected jurisdiction. This would apply equally where environmental assessment authorities or diplomatic channels are chosen as the appropriate route. Where centralized notification is adopted, the central authorities could be expected to take on the function of retransmitting the received notification to the local authorities in its territory. This would ensure the appropriate involvement in the TEIA process in accordance with administrative and jurisdictional divisions within the respective Parties.

Notification can also be made to a central repository of the two Parties on each border at a regional or national level, or to a tri-lateral central repository. This can be in addition to the notification processes described above, or as an alternative to them. A central repository might assist in improving access to the notification information by government authorities as well as interested members of the public.

3.5 Need for coordination

Irrespective of which notification formula is adopted, coordination of the process and the responses of the notified authorities will be important for an effective and efficient operation of the TEIA process. Some options can be loosely described.

Where centralized notification is adopted, internal processes for local authorities of the originating jurisdiction to inform the responsible "notification authority" would need to be established. The reverse process of sending the information to the local authorities involved would be required following receipt of a notification by the national notification authority of the potentially affected jurisdiction. An additional process for coordinating the conduct of the TEIA may be required here.

Where notification is not centralized at the federal level but left with the authorities directly implicated, regional notification points can be established to facilitate access to and diffusion of the required infor-

mation. Circulation of a brief facsimile or other written notice of the inclusion of a proposed project on a registry could be used to initiate the process.

One or several regional committees for each bilateral border area could also be established to facilitate this aspect of the process, as well as later stages of the TEIA. Such a committee structure might also increase the relevance of the TEIA process to the local communities. This approach would have to ensure respect for local processes, and would seek to ensure maximum efficiency and effectiveness in the TEIA process, as per the Overarching Principles (Transboundary Impact Assessment Overarching Principles adopted by the Council of the CEC, October, 1995).

The Parties could, perhaps more simply, choose to set out an information flow chart that could be adapted for the different projects to facilitate the notification process. These charts could be regionalized for increased accuracy and relevance.

Most of the above approaches would require some preliminary work by the local federal and non-federal authorities in a region to identify their roles and responsibilities. One can anticipate this leading to efficiencies in the process later on.

3.6 Language (Responsibility for translation)

The issue of language is one the Parties may wish to address, in particular whether information should be sent in the official language(s) of the receiving jurisdiction.

3.7 Notification to the public

In addition to notification to other government authorities, the responsibility for notification to the public in the potentially affected jurisdiction is also a subject for consideration. This includes the same issues of timing and language as seen above, but also raises the issue of whether the jurisdiction of origin or the local authorities should undertake this aspect of the process. Generally, responsibility for notification lies with the jurisdiction of origin. However, in the case of the public, familiarity with the appropriate means for public notice and involvement, as well as the familiarity of the public with the local process, may suggest the alternative of local agencies taking on this function, or of some form of shared responsibility.

3.8 Costs

The Parties may also have to address the issue of who pays for a notification, most notably in the event of a translation requirement and/or widespread agency or public distribution. The Parties may consider whether the application of the "polluter pays principle" may be appropriate here. Costs for notification should be distinguished from the costs of participation of notified authorities or members of the public in the review of the information and any TEIA process.

4. Issues regarding the notified jurisdiction/country

The notified jurisdiction must, if the TEIA process is to succeed, accept the responsibility to review the information and respond in an appropriate period of time.

4.1 Response

A set period of time for a response, or a more flexible period can be identified. Recalling again that the response at this time *is on the need* for a TEIA, the efficiency and effectiveness of the process, as noted in the Overarching Principles, should be enhanced by the response time frame. Options can be:

- a fixed (thirty, sixty, ninety day) period;
- a notion of "as soon as possible/practicable";
- a combination of the above, e.g. as soon as possible/practicable, but no later than 60 days; or
- a time period set by the notifying Party, perhaps with a minimum period of thirty to sixty days.

A provision for exceptional circumstances requiring an extension of the time period could be included. Such a provision might require an explanation of the circumstances leading to the delay.

4.2 What to do if there is no response

Following the expiry of the response period, a situation of no response can lead to the termination of the TEIA process. Subsequent reconsideration might be provided for, perhaps subject to the ability to adjust the process accordingly.

In the spirit of good neighborliness highlighted by the Overarching Principles, a notification by the jurisdiction of origin of the pending expiry of the response period might be desirable.

4.3 Request for additional information

Following a notification, the receiving jurisdiction might wish to receive further information to allow for a more informed decision. A provision on this might be included here or in the section on consultations. Informal contacts for clarification of information or further details could facilitate the process. Where additional information is provided, and where several jurisdictions or agencies are involved in a notification, the Parties may wish to ensure that all originally notified jurisdictions receive the additional information through the same means as the original.

Where this new information is significant, an extension of the original response period may be required. This could be at the request of the notified jurisdictions or be seen as a factor that might lead to an extension of the response time under section 4.1.

4.4 Opportunities in light of new information

Following the end of the response period or a decision not to have a TEIA, additional information might come to the attention of any of the involved jurisdictions that calls this decision into question. In such circumstances, it should be incumbent on the jurisdiction that becomes aware of the information to share it as quickly as possible, with a view to further consultations to consider the facts as they then are. Again, informal contacts could facilitate an early resolution of possible difficulties that could arise in such circumstances.

5. Responsibilities of notifying jurisdiction/country following a response

In the event of a response indicating a desire to initiate a TEIA, the notifying jurisdiction and responding jurisdiction(s) would move to the processes and options set out in the following Parts. In the event that two or more jurisdictions did not agree on the need for a TEIA, further consideration through consultations or possibly dispute resolution could be warranted. This is addressed in Part Four below.

PART TWO: EXCHANGE OF INFORMATION AND ASSESSMENT

This Part looks at the issues identified by the Parties that relate to the information needed for an effective TEIA and the assessment itself. This is the second stage of the process, and flows from the notification stage.

The concept of exchange of information here would relate to a more extensive range of information than in the notification stage. Further, one can anticipate mutual responsibilities for the jurisdiction of origin and the jurisdiction(s) potentially affected. It may also be necessary to envisage a continuous flow of the necessary information as opposed to simply a one step exchange of documents.

The issues relating to the assessment follow a consideration of the exchange of information issues. These issues include what is being assessed, who does it, how the assessment is reported, and any supplemental information. This in turn is followed by a consideration of issues relating to public participation.

6. Exchange of information

6.1 Supplemental information that might be needed

The type of information that might be required to supplement the original notification information includes information relating to the procedure to be followed in the assessment, and the subsequent review and decision-making processes. This would support the transparency of the overall process and its timely and effective implementation.

Additional substantive information might also be required. This could include:

- further details on the nature of the project and possible alternatives to the project;
- information on the local geography, weather, etc.;
- environmental attributes and capacities (waterways, air sheds, biodiversity, etc.);
- types of land uses (agricultural, urban, industrial);

- socio-economic information;
- specially protected areas in the regions involved;
- relevant historical and cultural sites;
- possible mitigation measures;
- methodologies for the assessment, including underlying assumptions and predictive methods;
- etc.

Information on the first item would likely come from the jurisdiction of origin. Information on the subsequent issues could be equally relevant from all involved jurisdictions.

Information at this point can be seen as baseline information against which an assessment of impacts would take place. A time frame for the provision of this baseline information might be designated by the Parties. Information in the hands of the potentially affected jurisdictions may be provided at the time of response to the notification, or within a designated period afterwards. Where complete information is not readily available, the nature and extent of information to follow might be identified.

A time frame for providing the additional information in the hands of the proponent jurisdiction may be provided for as well.

6.2 Ongoing exchange of information

As the process of assessment unfolds, cooperation between the authorities involved will undoubtedly require clarification of some of the information provided, supplementary information, or different types of information as progress in the assessment indicates different issues should be studied. A provision highlighting the need for this type of ongoing cooperation might, therefore, be foreseen.

6.3 Mechanism for exchange of information

The issues here are similar to those noted in sections 3.3, 3.4, and 3.5, concerning notification by whom and to whom, and coordination. If the TEIA process is to be run as a diplomatic process, more formal approaches and mechanisms will be adopted. This will necessitate

proper coordination between diplomatic personnel and EIA professionals. If national environmental authorities control the process, similar mechanisms will be needed, adapted to these offices.

Where the process is one that relies on the local EIA authorities to undertake the TEIA, coordination for the exchange of information by the local agencies can be achieved directly between these agencies. This may occur in any event, at least in an informal way, where either of the previous alternatives are adopted. (We note again here that local EIA authorities, as used here, includes the relevant federal, state and provincial authorities that might be involved with the assessment of any given proposed project.)

The technological medium for the exchange of information, i.e., mail, fax, electronic form, etc., can be adapted to the local capacities, but should reflect the type and sources of information that are being exchanged. For example, it may be difficult to put some information that is only available in hard copy into electronic form, making fax or mail a more effective alternative in these cases. The Parties may, therefore, wish to focus on the identification of the information being exchanged and confirmation of its receipt as parts of the more formal process here.

7. Assessment

Article 2(1)(e) of the NAAEC creates the general obligation of each Party to "assess, as appropriate, environmental impacts" with respect to its territory. Article 10(7) concerns the assessment of likely significant transboundary impacts of a proposed project, not the domestic assessment issues. Although one might anticipate significant overlap in the informational and procedural aspects of implementing these two Articles, and many of the issues identified by the Parties show this, the comments below (as well as above) are restricted to the implementation of Article 10(7) and the review of potential significant transboundary impacts.

7.1 Determination of significant impacts (Initial determination – Phased approach)

The initial (or preliminary) determination that a proposed project may have significant transboundary impacts is an important aspect of the discussion on notification as it may constitute one of the triggers for such notification (see section 1.3) whereas the full determination (or assessment) of these potential significant impacts is at the core of the TEIA process.

7.2 Scope of the project

Among the various factors involved, the scope of the assessment will relate first and foremost to the nature and size of the project being assessed. The definition of the project will, therefore, be critical. For example, an airport project might be defined to include the runways, terminal, cargo and repair facilities. It might also be defined to include all related road or rail links, hotels, and other associated infrastructure. Similarly, a project for pre-construction access roads to a possible new facility might be associated with the main project or be evaluated as a separate project. The Parties may wish to consider what role, if any, potentially affected jurisdictions should play in this area.

7.3 Scoping the assessment

The scope of the assessment is also related to the potential impacts of a project. Conceptually, environmental, socio-economic (including development), historical and cultural factors will be included. The scoping process should identify with precision the areas to be studied. Where project alternatives are being considered, the Parties may wish to consider a weighting process for these areas to allow a comparison to be based on the relative values of the areas identified. The Parties may wish to consider what role, if any, potentially affected jurisdictions should play in this process in relation to the potential transboundary impacts.

The potential environmental impacts of a project, and thus the elements to be assessed, will vary with every project. Thus, identifying a definitive list of factors to include in an assessment might prove to be an impossible task. The Parties may wish to consider two more general options as a result:

- a general statement that all potentially affected environmental, socio-economic (including development), historical and cultural factors will be included;

- a general statement of this type that is developed through an illustrative list that the involved jurisdictions can refer to while recognizing that a) all the factors may not be relevant to each project and b) in some cases additional factors may be added.

This latter type of list could be drawn from an array of actual assessments that represent different sectors or types of projects that EIA authorities have been involved with.

The Parties may consider an express reference to the cumulative impacts of the proposed project in the areas potentially affected, as well as the interaction between possible impacts.

7.4 Who conducts the assessment and what process is applied: Government participation

A critical issue in the TEIA context is who conducts the assessment and under what process. The Overarching Principles put a focus on existing practices and procedures as a preference for this, as well as the need for effective and efficient conduct of a TEIA. They also note the important role of the affected jurisdiction in this area. The NAAEC also provides some guidance in that regard.

Three primary options may be seen here, each based on the assumption of involvement of the potentially affected jurisdiction(s) prior to the assessment being prepared:

- the TEIA is conducted by the jurisdiction of origin based on the information supplied by the other jurisdictions (and the public);
- the TEIA is conducted by the potentially affected jurisdiction(s) based on information provided by the jurisdiction of origin;
- the TEIA is conducted in a more integrated manner by authorities from both the jurisdiction of origin and potentially affected jurisdictions.

Each of these can be paired with one of three process alternatives for assessing the transboundary impacts:

- the process of the jurisdiction of origin is deemed to apply;
- the process of the potentially affected jurisdiction(s) is deemed to apply; or
- a special process is agreed to in advance (a mandatory basis) or on an ad hoc basis (a discretionary basis).

This last alternative can be developed by the Parties in the Recommendation to be developed pursuant to NAAEC Article 10(7) or the Parties can call for local authorities on a regional basis to adopt their own processes for this purpose. Bearing in mind the Overarching Principles,

one might anticipate the use of the existing processes, adapted as necessary for the specific transboundary work, rather than the full development of a new process.

If the Parties identify a post-assessment commentary role as more appropriate, these issues will be less central to the process.

Another factor to consider in identifying a process for the assessment is the role of the public. While this issue is addressed more fully below, the Parties may wish to consider the impact of the choice of process on the ability of the local public in the potentially affected jurisdiction to participate in a meaningful manner, including the familiarity with the local process and ease of access to administrative mechanisms and officials. The Parties may also wish to consider holding Government to Government consultations prior to public consultations.

7.5 Costs

An additional issue that the Parties may want to consider in this context is the costs associated with undertaking the TEIA. Depending on the type of process that is considered most appropriate, the Parties may wish to consider this issue, perhaps based on the "polluter pays principle".

8. Public participation opportunities

The general structure and intent of the NAAEC supports a high level of public involvement in environmental issues under the Agreement. Specifically in relation to Article 10(7), the "full evaluation of comments provided by other Parties and persons of other Parties" is called for. The Overarching Principles call for adequate information and opportunities for the public to be able to "participate in a meaningful manner" in the TEIA process that results from the current work of the Parties, consistent with national and sub-national regimes. The general issues of what authorities are best suited to be responsible for public participation as well as the efficiency of the process are also important factors to consider here.

8.1 Opportunity for public of potentially affected jurisdiction(s) to participate

Placing the public of the potentially affected jurisdiction(s) at par with the public of the jurisdiction of origin or the government authorities of the affected jurisdiction, subject to confidentiality or privacy considerations, are two options that set minimum standards here.

8.2 Involvement of non governmental organizations

The Parties may wish to consider whether the public involvement should be distinguished from the involvement of local, national or international non governmental organizations.

8.3 Timeliness and effective provision of information

Ensuring meaningful participation requires the provision of sufficient information. The issues include the timing and responsibility for this, and the mechanism for doing so. Timing and responsibility options to provide the information will be affected by the choices, as per section 7.4, of how the TEIA process will be undertaken by governmental authorities. Some options include:

- local potentially affected jurisdiction authorities providing the information received from the jurisdiction of origin to its public as soon as it is received, subject to any specific confidentiality or privacy requirements attached to the information (as per section 2.4);

- providing the information to the public in the potentially affected jurisdiction when it is provided to the public in the jurisdiction of origin, either directly by the jurisdiction of origin or by the jurisdiction potentially affected.

The mechanism for providing the information is also important. A broader form of notice to the public may be required to alert as many persons as possible of the availability of the information and where it can be accessed. Electronic and hard copy sources may be envisaged. Notice through local newspapers may be appropriate, and/or local television or radio stations.

Issues relating to the limitation of the type or quality of information to be made available apply, *mutatis mutandis*, from section 2.4. Language and translation issues apply as per section 3.6. The Parties may also wish to consider a vehicle for public requests of additional information during the assessment process.

8.4 Credibility of the process

A number of the other issues identified by the Parties can be grouped under the notion of meaningful participation, identified by the

Parties as the critical goal in this area in the Overarching Principles. For many observers today, effective public participation processes are a litmus test for the credibility of the EIA process.

Previously, issues such as the rationale for the project and alternatives to the project have been identified as subjects for the exchange of information and thus possible governmental comment. These, as well as issues relating to the scope of the project to be assessed, the scoping of the TEIA itself, weighting of the factors assessed, etc., may be areas that the Parties wish to expressly consider as appropriate for public comment.

One alternative the Parties may wish to consider to ensure meaningful participation is to expressly identify the stages requiring public involvement. Alternatively, the Parties may wish to suggest a minimum standard of equal treatment of the public of the jurisdiction of origin and the jurisdiction potentially affected. This alternative could be made subject to the exclusion from certain legal processes or remedies available to the local public to challenge the process or information provided or not provided. If this approach is taken, the Parties may wish to provide alternative processes to address these issues, perhaps through a consultation or dispute resolution mechanism.

8.5 Involvement of affected native peoples

An issue the Parties may wish to address as a separate consideration for participation in the TEIA process is the role of native or indigenous peoples. This can be in a more formal governmental sense where such bodies are concerned with a project, or a less formal sense of special consideration and input for cultural/historical issues of particular significance to indigenous peoples where these may be known to be a factor to assess or these issues are brought to the attention of the authorities involved.

8.6 Costs and public interest support

Beyond translation costs, other costs may be associated with a public participation process. This includes dissemination of information to the public and costs of public participation fora, hearings, presentations, etc. Costs here may include both those of government officials and of the public participants. The Parties may wish to consider, in this context, the issue of public interest involvement and intervenor funding for this purpose, as provided for in many EIA laws.

8.7 Incorporating results of public participation in the TEIA report

This issue raises questions of what is to be included, the responsibility for doing this and its presentation. The information and analysis provided by public participants on the merits of the issues (the project, the environmental impacts, mitigation, etc.) and a full reflection of the scope and nature of public concern with the potential impacts of the proposed project itself could be considered for inclusion.

Options for the presentation of this information can include being part of the main report on the project itself if an assessment is also being done in the affected jurisdiction, being part of a specific TEIA report, or as a separate report on the public participation process. Direct comments from the public may also be considered for inclusion as an Annex.

Responsibility for this aspect of the report could fall to the authorities responsible for the public participation element of the TEIA. This will be a function of the decisions made on the issues under sections 7.4 and 8.3.

9. TEIA Report

9.1 Content of report

The report on the TEIA can be part of the main report on the EIA of the proposed project or an Annex or separate report looking only at this issue. The Parties may wish to develop a draft outline of such an annex or report to provide a standard format and a checklist of elements that should be included. These might include, *inter alia*:

- a description and rationale of the project;
- its location and start-up time;
- a description of the review process, assessment methodology and the factors assessed;
- the likely transboundary impacts and an assessment of their significance;
- a plain language (or languages) summary of the findings;
- any recommendations to decision-makers on a project or the decisions themselves, as appropriate to the reporting process of the jurisdiction in question;

- the results of government consultations.

Technical annexes might be included, as required.

9.2 Possible phases of a report

The Parties may consider whether a report on the transboundary impacts should be submitted for governmental and/or public comment in draft form before being made final. This might be a means to facilitate public participation as well as final governmental review by concerned agencies. A time limit for comments or a public meeting on the report might be considered here.

10. Decision

"Decision" as used here, refers to the decision on whether to proceed with a proposed project and, if so, subject to what conditions. The first issue that arises here is whether any particular type of finding of an impact will have a fully determinative effect on the decision, i.e., become binding on a project decision-maker. Can an outcome of a TEIA bind the decision-maker or does it act as essential information to guide and inform the decision-maker? The processes and issues discussed above can be developed to support either approach.

10.1 Transmission to government authorities

The decision in relation to a project should be transmitted to all interested jurisdictions. This could include any conditions to mitigate the likely impacts of the project as originally designed, and any associated follow-up programs or measures that will be applied to ensure compliance with these conditions. The Parties may wish to identify a time frame for this transmission.

10.2 Public release of the decision

The Overarching Principles support the view that the decision should be issued publicly. The issues that arise here are: by which authorities should the decision be released and when should it be released. The issues raised in section 8.3 will be critical here, and one might consider the desirability of paralleling the responsibilities under that section with the transmission of this information to the public. Timing can include when the governmental authorities are informed or when the public of the party of origin is informed.

10.3 Reasons for the decision

Release of the decision by the decision-maker should be accompanied by appropriate reasons.

10.4 Additional information

The Parties may wish to consider the possible situation of where another jurisdiction or member of the public wishes to bring additional information to the attention of the decision-maker after the decision has been taken.

PART THREE: MITIGATION

11. Definition and application

11.1 Definition

Notionally, the discussion below includes any measure that eliminates, reduces or compensates for likely environmental damage from a project, including design and process modifications or alternatives to the project.

11.2 Substantive requirement to mitigate transboundary impacts

The Parties may wish to consider establishing a substantive requirement for the mitigation of likely significant effects of a proposed project. Arguably, this could be seen as consistent with existing international law and consistent with the spirit and goals of the NAAEC. An alternative approach could be to ensure that each Party (including non-federal jurisdictions) considers the mitigation of transboundary impacts in the same way as mitigation of domestic impacts.

These approaches, at a minimum, could eliminate the ability to treat foreign environments as a free cost and is thus consistent with the "polluter pays principle". It may be noted here that this issue is linked to the role of a finding of a significant impact seen in section 10.

11.3 Selection criteria of projects requiring mitigation

Determining when mitigation is required is a function of the assessment process combined with the role of the decision-maker on a

project. (These functions may be performed by the same or different officials.) A finding of likely significant transboundary impacts may be seen as creating a *prima facie* case for considering mitigation measures for these impacts, or for triggering mitigation requirements if the Parties choose this option. A project proponent may also wish to consider, in the course of an assessment, alterations or alternatives to the proposal that would prevent a finding of likely significant impacts in the first place.

11.4 Types of corrective or preventive measures

In keeping with the previous paragraphs, mitigation measures could include, *inter alia*:

- design and operational/process changes to avoid or address a specific finding of a significant impact based on pollution prevention approaches;
- application of cleaner production technologies;
- alternative locations;
- pollution control technologies;
- reclamation or preservation of alternative environmental sites to balance losses in any given area of impact;
- financial or other compensation for losses of private environmental property, benefits or amenities (this could include economic losses associated with the damage foreseen); and
- financial or other compensation for losses of public environmental property, benefits or amenities (this could include economic loss associated with the damage foreseen).

11.5 International technical cooperation for environmental technologies and management

The Parties may wish to consider whether international technical cooperation should be encouraged in this context. Such cooperation can include information exchanges, technology transfer, training and education, etc., as part of the process of mitigating potential likely effects of a project. Such a provision might address requirements for consistency with the NAAEC and the NAFTA.

In addition to the technical capacities of proponents, best environmental management practices might also be considered as a factor or a condition in mitigation measures. Application and enhancement of these practices may also be supportable through outside technical cooperation.

11.6 Follow-up of mitigation activities

Where mitigation measures for likely transboundary impacts are required, the Parties may wish to address the issue of follow-up monitoring and assessment. Because the issues being addressed here remain transboundary in nature, follow-up measures should be conceived of as part of the cooperative process while respecting, as per the Overarching Principles and the provisions of the NAAEC, the sovereignty and jurisdiction of each Party. Such steps could include:

- post-project analysis of actual impacts;
- monitoring of mitigation steps for compliance and for their effectiveness;
- obligations in case of a failure to mitigate due to non-compliance or non-effectiveness;
- "lessons learned" analysis; and
- project abandonment and reclamation.

The Parties may wish to consider what would be the obligations of the originating jurisdiction in case of failure of the mitigation measures.

11.7 National and international financing mechanisms

The Parties may wish to consider the issue of financial support through national or international mechanisms to assist in undertaking any mitigation measures to reduce or eliminate the likely significant transboundary environmental impacts of a proposed project.

PART FOUR: CONSULTATION AND DISPUTE RESOLUTION

Transboundary environmental assessment is, by its nature, a process of ongoing interaction and exchange of information and views. This will be particularly the case for the professional interaction of those

involved in the assessment process. This may be considered as a less formal type of consultation than is generally associated with the term when used at the international level. The issues identified by the Parties relate to both this informal process and a more formal one. Dispute resolution generally implies a more formal process, and this is seen below.

12. Consultation

12.1 Consultation between which authorities

If the Parties adopt an approach which centers on diplomatic processes, this will encourage more formal types of consultations. The same will apply if central environmental agencies are identified as the key actors in the process. By contrast, if local authorities in the area affected are identified as the key actors, a wider range of informal contact can be anticipated.

If the focus is placed on the interaction of locally-based authorities, the Parties may wish to consider a general principle of having an initial consultation process at this level prior to consultations at the national levels. This type of option would, in essence, seek to have all issues resolved at the local levels, and hence the levels closest to where the more technical work is going on, before recourse to diplomatic intervention.

12.2 Issues for consultation

Stages or issues where formal or informal consultation may be foreseen include:

- pre-determination
- trigger;
- notification;
- assessment;
- determining significant impacts;
- report;
- mitigation measures;
- public participation;
- decision; and
- post project review and monitoring.

The Parties may wish to identify such stages or, alternatively, to encourage consultations as needed on any issue arising out of the process. Depending on views on the above noted possible general principle, the Parties may identify both a local and national level for these consultations, as needed.

13. Dispute resolution

13.1 Recognition of bilateral negotiation or other steps taken / Exhaust bilateral mechanisms

A final stage of dispute resolution may be required from time to time. If the Parties have adopted the general principle option noted for consultations, they may wish to consider the same principle for dispute resolution. Diplomatic approaches would then only be used when the local level efforts to address and resolve disputes had not been successful.

Additionally, a general principle of seeking cooperative, bilateral means of dispute resolution prior to having recourse to formal dispute settlement processes can be considered in this regard.

The Parties may wish to consider a variety of approaches to dispute resolution, such as the use of good offices, mediation, arbitration, or judicial processes. Of these, all but the last could be equally applicable at the local level or the diplomatic level. The range of issues suitable for dispute resolution may be considered in light of the list found in section 12.2.

ANNEX

NOTIFICATION

1) Trigger – Prompt for the country to notify:

- At what stage should the TEIA process be triggered
- List of possible triggers:
  - List of projects
  - Proximity to border
  - Potential significance of impact
  - Request by potentially affected country
  - Domestic regulatory obligations
  - Awareness of available information
  - Discretionary notification
  - Over-notification: when in doubt notify
  - Pro-active domestic measures
  - Public request (formal or informal)
- Exemptions from TEIA process

2) Content – Information contained in the notice

- Minimum information requirements
  - all available public information
  - type of project, location, date of proposal
  - common reporting format
- Protected information / Trade secrets / Confidential information
- Standardized formats and protocols

3) Logistics – When, how and who

- When?
  - Possible two or multi-stage process
  - As early as practicable or possible
  - At the same time as the local public
- How?
  - Medium
  - Who pays?
    - Distribution
    - Responsibility for translation
  - Need for coordination
- Who does notification go to?
  - Centralized federal, state, provincial entity (list)
  - Information flow-chart
  - Competent authority
  - Local counterpart
  - Coordination of response if multiple authorities notified
- Who is responsible for notifying?
  - Who is responsible for multiple copies
  - Responsibility for informing the public of the potentially affected Party

4) Issues regarding the notified country

- Response
  - Response timing
- What to do if there is no response
  - Termination of process
  - Continuation of process

- Request for additional information
- Opportunities in light of new information

5) Responsibilities of notifying country

- Following a response

EXCHANGE OF INFORMATION

1) Supplemental information that might be needed

2) Ongoing exchange

3) Mechanism for exchange

ASSESSMENT

1) Determination of significant impacts

- Scope of the assessment of the project (factors taken into account)
  - Evaluation of social, economic and environmental damage
- Who conducts the assessment
  - Regulatory authority
- Who provides data and detailed information
- Scope of the project covered by TEIA process
- Initial determination – Phased approach
- Costs

2) Public participation opportunities

- Timeliness
- Sufficient information

- Credibility of the process
- Opportunity for debate
- Opportunity for citizens of Parties to be involved
  - Equal opportunity
- Involvement of non governmental organizations
- Incorporating results of public consultation in report
- Involvement of affected native peoples
- Costs and Public interest support

3) Government participation opportunity

- Incorporating results of government consultation in report
- Involvement of state, provincial and local authorities
- Mechanisms
- Government to government consultation prior to public consultations

4) Report

- Content of report
- Possible phases of a report

5) Existing practices and procedures currently in operation

- Priority to local framework
- Consistency with the NAAEC

6) Possibility of parallel or joint assessment

7) Decision

- Provide reasons
- Transmission
- Additional information that could affect the decision

MITIGATION

1) Definition of mitigation

2) Selection criteria of projects requiring mitigation

- Mitigation avoiding finding of significance

3) Type of corrective or preventive measures

4) International technical cooperation

5) National and international financing mechanisms

6) Follow-up of mitigation activities

- Post-project analysis, monitoring of mitigation, lessons learned
- Project abandonment and reclamation
- Obligations in case of failure to mitigate

7) Recognizing country's best management practices in the determination of mitigation

8) Substantive requirement to mitigate transboundary impacts?

CONSULTATION AND DISPUTE RESOLUTION

1) Consultation

- Consultation between which authorities
- Pre-determination consultation
- Encourage consultations as needed
- Consultation on
  - any issue arising out of the process
  - trigger
  - notification
  - significant impacts
  - assessment
  - report
  - mitigation
  - public participation
  - decision
  - post project

2) Dispute resolution

- Recognition of bilateral negotiation or other steps taken
- Exhaust bilateral mechanisms

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THE PROCESS OF "NOTIFICATION" IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

SCOPE

Under Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC), the Parties undertook to develop Recommendations, "with a view to agreement between the Parties pursuant to this Article within three years on obligations", on the transboundary environmental impact assessment of proposed projects. This discussion paper looks at the issues and models associated with environmental impact assessment notification in a transboundary context, pursuant to Article 10(7) of the NAAEC. It focuses on the singular reference to "notification" in Art. 10(7)(b) as its subject matter, exploring a range of issues that are involved in building a transboundary environmental impact assessment system in the NAAEC context. The paper also takes into account the Transboundary Impact Assessment Overarching Principles adopted by the Council of the CEC in October, 1995.

As a document looking exclusively at the notification issues, other issues that may be closely related are not included here. Most notably, the threshold or trigger issue for notification is not covered here. Thus, the parameters for determining this, such as the application of the terms "project", "decision", "likely" and "significant" found in paragraph (a) are not considered. Essentially, the subject matter of this paper presupposes that the threshold for notification has been met, or is believed by a Party to have been met. It is, therefore, without prejudice to any application of the provisions of paragraph (a).

Still, for some issues it will be necessary to either deal with or raise points associated with other paragraphs or elements of Art. 10(7). This is particularly the case for the identification of the "competent government authority" referred to paragraph (a). This issue relates to the question of who is to notify and to whom a notification is to be given, as seen below. In other cases, a reference is made to a possibly more appropriate place to consider an issue than under the notion of notification in paragraph (b). All paragraph numbers or letters refer to Art. 10(7) unless specifically noted otherwise.

One important factor should be noted here. The primary focus of this paper assumes that a government or private sector proposal that will trigger a domestic environmental assessment process is involved. Different issues arise where no such process is triggered. This is raised specifically in the discussion on the absence of notification issue found below. This may, however, be an equally relevant issue in the context of discussions on the trigger for notification, in particular whether a special trigger should be established to ensure notification and a possible environmental assessment because of the potential for significant transboundary impacts where there is no other trigger. This issue is beyond the scope of the present paper.

FORMAT

The central purposes of notification are twofold:

- to ensure that the notified governments or persons are aware of a proposed project and its possible significant transboundary impacts, and

- to provide a timely opportunity to said governments or persons to participate in an assessment process to ensure such impacts are appropriately considered and addressed.

This discussion paper identifies several issues that require consideration in achieving these purposes. These issues are:

- Notification by whom and to whom
- When to notify
- What information should be included in a notification
- The decision to participate
- Absence of notification
- Notification to the public

The discussion of each issue includes a general analysis of its place in the development of a Council Recommendation under Art. 10(7), a brief description of how other agreements, legally binding and otherwise, have looked at the issue, and how these precedents might relate to the present context.

The agreements considered include formal treaties under international law and less formal agreements involving jurisdictions other than States. North American, other regional instruments and more global instruments are included. These texts are used to reflect, as best as possible, existing practice in the area. No priority or preferred option should be implied from the discussion.

One might note here that there are relatively few agreements between Mexico and the United States and Canada and the United States dealing with the specific details of EIA in a transboundary context. For example, while the 1983 La Paz Agreement does call for the assessment of projects that may have significant impacts in the border area[1], neither it nor any of its related Annexes include specific details on how to do this. Annex II does have notification provisions relating to actual or likely inland incidents in the border area, and these are considered as an analogy for present purposes. But the provisions of the other Annexes or the La Paz Agreement itself are not reviewed here. The same holds for the Mexico-US and Canada-US agreements that govern the Interna-

1. Art. 7, La Paz Agreement, 1983. The border area is defined as the area within 100 kilometers on either side of the inland and maritime boundaries between the Parties (Art. 4).

tional Boundary Waters Commission and International Joint Commission, respectively.[2]

Of the agreements that do develop the issues, the Espoo Convention of 1991, which Canada and the US have both signed,[3] is the most developed regime, being specifically devoted to the issue of transboundary environmental assessment. It provides, therefore, an ongoing reference point in this review. In addition, the signatories to the Convention have developed several documents that explore the questions raised in the implementation of the Convention. Two of these documents are particularly relevant here, and will be drawn on appropriately.[4]

Literature on the issues relating to notification in the transboundary context is, at best, scarce. There is considerable writing on the general international law requirement for assessment of the potential transboundary impacts of proposed projects (and policies).[5] There is also copious amounts of literature on the extra-territorial jurisdiction issues associated with the US National Environmental Protection Act (NEPA). Very little of this literature, however, goes beyond the larger issues encompassed by these themes to actually address the issue of notification. We have tried to capture only such literature in the present document, leaving consideration of the more general material to other occasions when necessary.

This discussion paper is accompanied by a separate chart which summarizes the precedents and options found in the agreements reviewed. As with the present review, these should not be seen as "pre-

2. These are primarily the 1944 United States-Mexico Treaty Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, 3 UNTS 313; and the 1909 Treaty between the United States and Great Britain Respecting Boundary Waters between the United States and Canada, 4 American Journal of International Law (Supp.) 239, 1909.
3. The Convention originates in the UN Economic Commission for Europe regional grouping, to which Mexico does not belong.
4. These are the *Bilateral and Multilateral Cooperation on Environmental Impact Assessment in Transboundary Context*, Report submitted by the delegation of the Netherlands for a meeting of the Signatories to the Convention, CEP/WG.3/R.4, 11 January, 1995, hereinafter the Netherlands Report; and the *Final Report of the Task Force on Legal and Administrative Aspects of the Practical Application of the Relevant Provisions of the Convention*, ENVWA/WG.3/R.12, 31 August 1993, hereinafter the ECE Task Force Report.
5. For a recent review of the development of international law in this area, including an analysis of the three major instruments adopted in recent years, the European Union Directive on Environmental Assessment, the Espoo Convention and the Antarctic Treaty Protocol, see Philippe Sands, *Principles of International Environmental Law I*, (Manchester University Press, 1995), Ch. 15, Environmental Impact Assessment.

ferred" options, merely variations or alternatives that may assist the Parties in their discussions. These are drawn from the existing agreements, and include language from those, where it was reasonable to do so in light of the space available. The charts can be used as a separate background document.

To assist the flow of the paper, and considering the high level of awareness of the Parties and Secretariat of the issues, every effort has been made to avoid detailed footnotes and references. A full list of sources and references follows the text. A separate list of the sources used in the charts follows that part of the report.

ISSUES

Notification by whom and to whom

The issue of notification by whom and to whom focuses on the official governmental involvement by competent government authorities in a transboundary EIA process. A separate question of public notice, whether or not there is official governmental participation, is raised below under the issue of notification to the public.

Notification by whom and to whom raises directly the question of which authorities are included in the phrase "competent government authority" in paragraph (a). This issue is particularly relevant to the CEC context, where environmental assessment jurisdiction is shared between the federal and state/provincial[6] levels of government for all three Parties. Thus, what role should be played by the sub-national authorities in the process set out in a Council Recommendation is directly raised by this issue. The issue is also raised by the several references in the Transboundary Impact Assessment Overarching Principles adopted by the Council in October, 1995, to both national and sub-national environmental assessment processes.

Most international law agreements on this issue have not included sub-national authorities in the notification process. Under the Espoo Convention, for example, notification is between national level authorities, with the responsibility given to the foreign affairs departments of the Parties. This reflects the notion of state-to-state diplomacy as central to transboundary environmental issues, a notion given much support in the origins of international environmental law.

6. In keeping with the NAAEC, "provincial" includes territorial governments in this paper.

This historical sense of transboundary environmental questions being a state-to-state "issue" requiring diplomatic involvement and resolution is supported in no small measure by the Canada-US Trail Smelter Arbitration of 1941, one of the first examples of how international law has dealt with environmental issues. It is also found in other bilateral agreements on the Mexico-US and Canada-US borders, agreements developed in the traditional mold of international law. It will be noted below, however, that in practice this approach is now expanding to include the non-federal jurisdictions as well.[7]

The federal-to-federal level of Espoo appears to be the operational model that has been applied to the Canada-US Air Quality Accord. This Accord has no mandatory involvement of sub-federal level governments set out within the Accord, but rather an obligation to make best efforts to ensure that these governments participate in meeting its objectives and obligations. Notification, as dealt with in Art. V of the Accord, has been pursued on a state to state basis, with input from the provincial/state jurisdictions on a less formal basis. Formal arrangements to expand on the use of the term notification in the Accord have not been arrived at as yet.[8]

The framework 1983 La Paz Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area contains a direct reference in Art. 7 to assessing transboundary impacts of proposed projects, "as appropriate, in accordance with their respective national laws, regulations and policies." The Agreement calls for the elaboration of more detailed agreements on specific issues. Five have been developed to date, none dealing with transboundary impact assessment in a general way.

Annex II to the La Paz Agreement concerns the protection of the inland border area from hazardous substances. It is focused on spills or similar incidents. This agreement does include notification provisions

7. The La Paz Agreement, Art. 9, for example, allows the Parties to invite local state and municipal participation in the meetings of the National Coordinators, as well as other governmental and non-governmental organizations. Local state participation in the four working groups established under the Agreement now takes place. See Stephen P. Mumme, "New Directions in United States-Mexican Transboundary Environmental Management: A Critique of Current Proposals", 32 *Nat. Res. J.* 539 (1993) at 558-559.
8. The *Canada-United States Air Quality Accord: 1994 Progress Report*, notes that efforts to develop a joint notification procedure proved impractical in the short term. Less formalized procedures have been adopted as a result. P. 17.

that begin with an "on-scene coordinator" designated by each party on a regional basis in the border area. This coordinator is given the initial responsibility to notify the two national chairs of a bi-national joint response team, established by the agreement, of an incident or the imminent danger of an incident that could lead to transboundary damage. This process closely follows a previous 1980 Mexico-US agreement on the protection of the marine environment. It appears to be the most developed example of environmental notification analogous to an EIA context.

The US-Mexico Border Environment Cooperation Commission Agreement of November, 1993, established the Border Environment Cooperation Commission (BECC) and the North American Development Bank (NADBANK). It includes a requirement for all projects that it certifies for financing as an environmental infrastructure project to have an EIA done prior to the application process. This must include consideration of any significant transboundary environmental effects. The Agreement requires the Board of the BECC to determine that the project meets necessary conditions to achieve high levels of environmental protection "in consultation with affected states and localities".[9] In this way, the Agreement signals the relevance and role of state and local authorities in the evaluation of a project prior to a decision on certification for financing being made by the BECC. While this is not made expressly applicable to the conduct of the required EIA, it acts as a supplement to any such processes where they may not be included. The Agreement goes on to provide the public with an opportunity to comment on the projects in question. This aspect is reviewed below. The BECC is limited in its actions to environmental infrastructure projects that it is approached to become involved with.

While these prior agreements do not fully include non-federal jurisdictions in the scope of their obligations, the NAAEC does do so for Mexico and the United States, and provides a mechanism for doing so for Canada. This creates an opportunity to further consider the role of all the jurisdictions that share the responsibility for environmental assessment in North America. This includes both the questions of notification by whom and to whom which has motivated this discussion.

On the Canada-US border, several agreements that are not part of the body of international law have been signed between state and

9. Art. II, Sec. 3(c)(2) of the US-Mexico Agreement, 1993.

provincial governments to encourage and support transboundary approaches to environmental issues. These include:

- the British Columbia/Washington State Environmental Cooperation Agreement, which has no specific reference to transboundary EIA, but has established a local mechanism, the Environmental Cooperation Council, that has fostered local level notice and interaction for that purpose;

- the New York State-Québec Memorandum of Understanding on Environment Cooperation, which includes an express reference to notification between the parties of a proposed project, prior to carrying it out, that may impact the environment of the other; and

- the draft Gulf of Maine Protocol on Transboundary Environmental Impact Assessment, (Maine, New Hampshire, Massachusetts, New Brunswick and Nova Scotia) which calls for notification, information sharing, and goes so far as to suggest consideration of the harmonization of the various EIA processes and the use of each others processes for information gathering in the jurisdictions of the other parties.[10]

We are not aware of any similar agreements on the Mexico-US border.[11]

In Europe, where the Espoo Convention and the European Union Directive on Environmental Assessment both create obligations for States, there are now indications that sub-national level interaction is developing.[12] The Yearbook of International Environmental Law, 1992, reports that the German Federal State of North Rhine-Westphalia and the Dutch Provinces of Gelderland, Limburg and Overijssel signed an

10. In addition to the state and provincial participants in the Gulf of Maine Council on the Marine Environment, the regional offices of federal agencies are represented on the Council.
11. Some legal impediments on state extra-territorial activity are seen by one analyst as a reason for this. He notes that such impediments can be overcome through existing application of American law. Thomas Lundmark, "Local US Agencies and Mexican Infrastructure", 25 *Env't Pol. & L.* 103 (1995) at 104.
12. The ECE Task Force Report suggests that, for reasons of expediency, the notification and assessment tasks should be divided between the Parties, unless otherwise agreed. The party of origin would conduct its process for domestic impacts, while the party affected would apply its process for the study of impacts in its jurisdiction. The information would then be integrated into a single report. Proper notification and exchange of information underlies this approach. *Supra*, note 4, p. 7, par. 28.

agreement that included the exchange of information on environmental assessment. The scope of this agreement is not, however, made clear in the report.[13]

The Accord sur L'Escaut, 1994, does specifically include two federal and three sub-federal jurisdictions in a Commission established to protect the Escaut River.[14] Its function includes serving as a centre for the exchange of information, including information on the assessment of environmental impacts.

In this context, the state-to-state "top down" notification approach may be evolving towards a less centralized model or mechanism which includes a greater role for subnational and/or local entities. A decentralized process may leave more operational authority at the local level in all three Parties. This could include both the state/provincial and local levels and the regional offices of the federal agencies.[15]

A second element for consideration is the question of whether there is an "issue" to be resolved or dealt with through traditional state-to-state international law mechanisms when a project is being notified for the purpose of reviewing its possible transboundary environmental impacts. An alternative approach might focus more on the development of cooperative mechanisms for the professionals (and public) directly involved in the identification and assessment of the environmental issues. Under this conception, an international "issue" only arises when the cooperative processes established are seen to break down by one of the involved agencies or a Party.[16]

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13. Ulrich Beyerlin and Torsten Bartsch, "Transboundary Environmental Cooperation: Prior Information/Consultation/Environmental Impact Assessment", 3 *Yb. Int'l Env't L.* 185 (1992).
14. These jurisdictions are France, the Netherlands and three Belgian jurisdictions: the Bruxelles-Capitale Region, the Flamande Region and the Wallonne Region.
15. A fuller discussion of this precise trend in the context of transboundary environmental assessment of projects proposed in Canada is found in Steven Kennett, "The *Canadian Environmental Assessment Act*'s Transboundary Provisions: Trojan Horse or Paper Tiger?", 5 *J.E.L.P.* 263 (1995). Lundmark, *supra*, note 11, at 105, argues it is preferable to "funnel responsibility and funds to existing local agencies. They have the expertise. They have the experience. And they have a stake in the outcome."
16. One recent analysis of the link between trade agreements and environmental cooperation argues that "Ideally, the perfect solution for regions which share a single ecosystem rests with cooperative agreements which make the border irrelevant in terms of environment-related costs of production." The author advocates *ex ante* approaches to cost internalization in this cooperative context. See Nick Johnstone, "International Trade, Transfrontier Pollution, and Environmental Cooperation: A Case Study of the Mexican-American Border Region", 35 *Nat. Res. J.* 33 (1995) at 61. A different starting point for analysis, one of environmental security, has led other

The most advanced implementation of this latter type of approach is found in two agreements far removed from the North American environment, but not necessarily the three Parties. One is the 1991 Antarctic Treaty Protocol, Annex I on Environmental Impact Assessment. Under the Agreement, each Party conducting an activity in the Antarctic area must perform an environmental assessment prior to a decision to go ahead. Where an Initial Assessment shows the likelihood of significant impacts, a Comprehensive Environmental Assessment is required under Annex I. This Assessment must then be provided to the Committee for Environmental Protection established by the Protocol, to all other Parties, and made available to the public in all Parties. Project approval must then await comments and a review by the Antarctic Treaty Consultative Committee after receiving the advice of the Environment Committee. While notification comes after the completion of a draft assessment here, the context of performing an assessment for projects in the region make this more feasible when combined with the extensive breadth of notification and involvement of the organizational structure of the Parties. Of course, the unique circumstances of the Antarctic area and its governance raise questions as to the full applicability of this model in the immediate context. Nonetheless, it may provide some insights into the development of a broader approach pursuant to Art. 10(7).

The second example is the 1994 Danube River Protection Convention. This Convention establishes the Danube River International Commission. Among its functions is the collection of information for the purpose of the assessment of environmental impacts of proposed projects throughout the Danube River catchment area. Notification and information is to go from the Party of origin, through the Commission to the other Parties. The additional ability to help determine what information is required only adds to the cooperative structure encouraged by the use of the Commission.

The Netherlands Report on the Espoo Convention also suggests that a joint body, either new or existing, could be useful in fulfilling the functions under its general regime in the context of bilateral or regional agreements to implement the Convention.[17] Each of these examples

analysts to the same conclusion, under the notion of "emerging international ecosystem law": "The central hypothesis of this paper is that efforts to promote and ensure environmental security require that international environmental law shift emphasis from its territorial focus to a more ecosystem-oriented approach." Jutta Brunnée and Stephen Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law", 5 *Yb. Int'l Env't L.* 41 (1994) at 55.

17. *Supra*, note 4, p. 9, par. 29.

would have the tendency to make the transboundary EIA process more of a routine professional activity than a diplomatic activity.

In summary, three models can be suggested for the issue of notification by whom and to whom:

- The Party-Party model, which requires the local or national agencies that may be first informed of a project that is subject to a decision to notify their designated federal authority. Notification would then be transmitted to the designated federal authority of the affected Party. This Party would then be responsible for providing the information to its own appropriate agencies at the various levels to assess whether they or the national authority wished to participate in the EIA;

- Ad hoc notification by the agency responsible for the government decision or the assessment of the proposed project to the other government agencies on both sides of the border in question responsible for environmental assessment or protection issues of the proposed project and assessment plans. A separate notification to a designated federal authority for additional state-to-state notification could be added here;

- A regional grouping of agencies can be pre-identified, each of which is responsible for certain areas of environmental protection or certain EIA activities within the identified region. Under such a structure, when a project is proposed that meets the threshold for notification, all the regional agencies, including state/provincial agencies and federal agencies operating through regional or central offices, would be notified of the project. Again, notification at the state-to-state level through diplomatic channels could also be done in conjunction with this approach. Regional groupings could reflect administrative as well as jurisdictional divisions prevailing in the designated area. This could be done directly or via a more structured organization.

Each of these approaches is compatible with the NAAEC and the Overarching Principles previously agreed by the Council. The last two may, however, provide a greater reflection of those Principles that refer to the existing range of procedures that collectively make up the continental system for EIA. These approaches are also likely more consistent with what is already happening on the ground between non-federal jurisdictions, at least on the Canada-US border.

One might note here that the Netherlands Report on the Espoo Convention suggests that for an effective application of that Convention it would be useful for the Parties to be informed of the authorities responsible for EIA, the authorities that will be responsible for the various stages of the EIA, and a flow chart describing the process and time frames. This may provide a more familiar alternative for consideration by the parties to the NAAEC.[18]

Having considered the major issue of the role of the non-federal authorities in this context, the elaboration of the remaining issues will be significantly briefer than this section.

When to notify

Three orientations appear from the existing agreements:

- *Notification that is done so as to support participation of the potentially affected jurisdiction or its public in the process being initiated by the proponent jurisdiction.*

The guiding principle that consistently emerges in relation to this orientation is to notify as early as possible in the process. The Air Quality Accord, Art. V, refers to notification as early as practicable in advance of a decision. The Espoo Convention, Art. 3, requires notification as early as possible and no later than when informing its own public. The EU Directive, Art. 7, requires Party-Party notification at the same time information is made available to a Party's own nationals. In all cases, it is clear that notification must be timely to allow the development and exchange of information required to perform a proper assessment of the impacts under these agreements.

Existing processes between states and provinces on the Canada-US border all reflect this approach.

- *Notice after a draft assessment is complete, including the transboundary impacts, but in time for comments to be fully considered prior to a final decision on the project.*

This is the approach that is applied in the Antarctic Treaty Protocol, as well as in the case of the US-Mexico BECC Agreement. In the former case, the circumstances are fairly unique in terms of geography and

18. *Supra*, note 4, p. 4, par. 10.

environmental factors, as already noted. Specified time delays prior to a decision on the project being permitted accompany this approach.

In the BECC Agreement, the purpose is to decide on funding for a project, not to issue a governmental permit on whether the project can proceed. The BECC does not undertake the assessment, but only ensures its review by governmental authorities and the public.

This approach does not appear to have been used in more general transboundary EIA agreements.

- *Notification timely for the potentially affected jurisdiction to assess the impacts in its own territory and report on these to the Party of origin.*

This last orientation is reflected in the proposals of the International Law Commission on the Non-Navigational Use of International Watercourses. Its approach has as its central feature a very traditional approach to territorial sovereignty, whereby the affected Party undertakes its own assessment and reports back in a separate report. Time limits and the requirement to provide information on the project and subsequently on the potential impacts provide the two-way support for this approach. "Timely notification" is what the I.L.C. suggests for this purpose (Art. 12). The process is also supported by a traditional consultation between the States following the report phase.

A much less traditional variation appears to be signaled in the Draft Bay of Fundy Protocol. Seen in its full context, this Draft Protocol appears to suggest that the affected jurisdiction in essence "lend" its process to the proponent jurisdiction to study the transboundary impacts, but as part of the proponents EIA report. This would allow a familiar process and mechanism to be used in the potentially impacted jurisdiction while still producing an integrated report.

The Netherlands Report seems to indicate that when notification is made dependent on a specific part of the process of the Party of origin, in its case the time of notification of its public, this can lead to significant divergences if the processes involved differ.[19] A careful understanding of all the involved processes is therefore required to ensure consistent applications if such an approach is used.

19. *Supra*, note 4, p. 9. This point is reviewed in a little more detail in the Task Force Report, *supra*, note 4, p. 3, par. 8.

What information should be included in a notification[20]

The key differences that emerge in the agreements that have considered this issue in detail relate to whether the notification precedes or follows the assessment. In the latter situation, the notification provides at the same time for an opportunity to comment on the findings of the assessment. If notification is tied to a specific step of the EIA process in the country of origin, and the order of occurrence of this step varies, the content of the notification will also vary.[21]

For those applying the approach of participation in the assessment process prior to its completion, the existing agreements do provide a guiding theme for this issue. They suggest that the critical element is to ensure that sufficient information is included with the initial notification to allow the notified authorities (or public) to make an informed decision on participation in the EIA. The Espoo Convention, for example, sets out a two step process for providing information. The first is for the decision on participation and is less detailed, covering information on the proposed activity, any information available on impacts it might have, and the nature of the possible decision. The second is more detailed and supportive of the actual informed participation in an assessment process. It includes information on the EIA procedure, time frames for transmitting information and the relevant information on the project and its potential impacts.

Signatories to Espoo have been reviewing these provisions for both their substance and for the issue of the form in which the notice is to be made. Work is continuing on both these aspects, with a focus on developing a standard form for notification.[22]

The EU Directive also has a hierarchy, but one less expressly tied to a decision to participate. Under its terms, a proponent must provide a minimum set of information for each project. Such information can in turn be included in the notification process. This includes:

- a description of the project site, design and size,
- the measures envisaged to avoid, reduce and remedy significant effects,

20. Note: The exchange and provision of information after the notification phase is not considered here. This may be more appropriately dealt with under the subject of exchange of information, also found in paragraph 10(7)(b).
21. See the ECE Task Force Report, *supra*, note 4, p. 6, par 25.
22. This was suggested in the ECE Task Force Report, *ibid.*, p. 11, par. 44.

- the data required to assess the main effects the project is likely to have, and
- a non-technical summary of these items.

The following additional information may also be required from the proponent and therefore be included in the notification process:

- further details of the project, such as the production process, nature of materials to be used, etc.,
- an outline of the main alternatives,
- the rationale for the choice,
- a description of the aspects of the environment likely to be affected and the causes of these likely impacts, such as the use of resources, emissions or wastes,
- measures to prevent or offset impacts, and
- a description of the forecasting methods used and any difficulties encountered in the assessment.

The European Commission is reviewing these information requirements as part of the process of suggesting amendments to the Directive, with a view to making them more consistent among the EU members.[23]

The institutional mechanism associated with the Danube River Protection Convention supports a much more abbreviated approach, calling for an exchange of information "as determined by the International Commission" (Art. 12). Whether this will be sufficient in the longer term is difficult to tell. The directions of both the EU and the Espoo Convention suggest it will not be effective.

Where the notification is of the actual completed draft assessment, as in the Antarctic case, the draft report itself is included as part of the notification.

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23. See the Proposal for a Council Directive amending Directive 85/337/EEC, 1985, adopted March 16, 1994 by the Commission, Bulletin of the European Union No. 3, 1994.

This is also found in the BECC Agreement, where the requirement for the EIA itself is supplemented by the requirement for the BECC Board to examine the potential environmental benefits, environmental risks, costs and available alternatives in the context of the environmental standards and objectives for the affected area (Art. II, sec. 3(c)(1)). This provides, at least by implication, a minimum level of required information which the BECC must receive in the assessment or in associated documents, and which it must also make available for comment.

An issue closely associated with the inclusion of information in a notice is the exclusion of information protected by applicable laws from public release. The Espoo Convention (Art. 2.8) excludes from notification information identified by national laws, regulations, administrative provisions or accepted legal practice as prejudicial to industrial or commercial secrecy or national security. The EU Directive references limits imposed by national law and administrative provisions with regard to safeguarding the public interest, and industrial and commercial secrecy in the state of origin of the project. The Air Quality Accord does not reference what information should be included in a notification, but does require in a separate reference that any information identified as proprietary by the owner under the laws of the place where such information has been acquired not be released without the consent of the owner (Art. VII.2).

The Danube River Protection Convention adds a provision to these types of exclusions that any protected information that is transferred shall be treated in the same confidential manner by the recipient. It also notes that personal privacy is a basis for non-release of information (Art. 13).

A related issue is addressed by several instruments, including the International Law Commission Draft Articles: Utmost urgency situations which vitiate the need for the notification itself (Art. 19).

A further issue of relevance in the present context is the language of the notification and the information included: Should the materials be made available in the language of the affected party and public? If so, who should be responsible for the costs and preparation of translations? The ECE Task Force Report suggests that these be borne by the Party of origin.[24]

24. ECE Task Force Report, *supra*, note 4, p. 10, par. 40-41. The Report also includes a consideration of what types of material should be translated.

Finally, a question may be raised here as to whether the party of origin should use the occasion of the notice to request information it may require to fully assess potential transboundary impacts. This question may be considered under this issue or under the rubric of exchange of information.

The decision to participate

Here again the focus is placed on the official participation of government authorities in the assessment of the possible transboundary impacts. Public participation is considered below, under a separate heading.

Two distinct items are considered here:

- the time frame for a response on participation, and
- the information to be included with an affirmative response to participate.

These issues are not treated extensively in the existing agreements.

The Espoo Convention is the only one to deal fully with this issue in the context of a notification to participate in an assessment process. It puts the burden on the notifying party to identify a "reasonable" time period for a response, "taking into account the nature of the proposed activity" (Art. 3.2). The notified party is to respond within this time frame, including an acknowledgement of receipt of the notification and its decision on participation in the review.

Both the Task Force Report and the Netherlands Report for the Espoo Convention have suggested that a period of one to four months would be reasonable in most cases.[25]

The International Law Commission Draft Articles regarding international watercourses is based on each party doing its own assessment of the impacts in its territory. Here, a six month evaluation period is provided to do the study and communicate the findings. This delay is extendable where the evaluation poses special difficulties. The responding party must then provide its findings and the reasons for them (Part III).

25. *Supra*, note 4, p. 4, par. 15 and p. 10, par. 37 respectively.

The Antarctic Treaty Protocol provides only for a review of the completed evaluation. A 90-day period is provided for comments from other parties and the public, but at least 120 days are required for comments from the Antarctic Treaty Consultative Meeting. This is a minimum period. A maximum response period from the Consultative Meeting is set at fifteen months before the project can proceed in the absence of such comments (Annex I, Art. 3).

Implicit in the absence of defined schedules for responses would appear to be the *de facto* time frames set by the actual processes involved at the domestic level. One would expect the time frame required by the Espoo Convention to be reasonably tied to this as well.

Related to this issue is the question of what information should be provided to the party of origin for the purposes of making the assessment. This issue might be more suitably addressed in the context of an examination of the exchange of information requirement of Art. 10(7)(b).

Absence of notification

An absence of notification can occur for two main reasons. First, the party of origin does not have, under its legislation or policy, a government decision to make. This can be at the national level only, or at the national and sub-national levels where both are included in the agreement. Second, where such a decision is required, the party of origin does not believe that significant transboundary impacts are likely to occur.

The first case raises the question of requiring, through an international agreement, an assessment of the likely transboundary impacts to be a domestic trigger for environmental assessment or a government decision in its own right. The general transboundary assessment agreements to date have not done this. Sectoral or regional agreements, such as transboundary watercourse agreements have put such requirements in place, however, in so far as the impacts on the watercourse are concerned. This is seen in the Danube River Protection Agreement and the International Law Commission Draft Articles, as well as such agreements as the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992.[26]

The BECC Agreement requires an assessment of the transboundary impacts of a proposed project for which a proponent is

26. This text can be found at 3 *Yb. Int. Env't L.* 703 (1992).

seeking NADBANK financing. This requirement may be in addition to the domestic requirements for EIA in the jurisdiction of origin of the project.

According to the 1994 Progress Report on the Air Quality Accord, implementation of the provisions on notification has been impacted by a "fundamental disagreement" as to whether paragraph 1 of Article V of the Accord created an obligation to assess potential transboundary air impacts or deferred such an obligation to existing laws, regulations and policies in the respective countries.[27] This disagreement remains today.

The Antarctic Treaty Protocol requires an assessment to be conducted for all projects in that area, notwithstanding domestic law requirements.

While general developments in international law may support the articulation of an obligation to assess transboundary impacts irrespective of domestic requirements, it remains clear that its articulation in the present circumstances will remain difficult. Implementation would also remain difficult. The language of Art. 10(7)(a) reflects this in speaking of "projects subject to decisions by a competent government authority." The Parties may wish to consider this issue further in a discussion of that paragraph.

The more often raised concern relates to the situation where the party of origin does not believe that significant transboundary impacts are likely to occur. The options for the other parties in this circumstance are considered by some of the agreements in this area. The Espoo Convention requires the parties to enter into discussions at the request of any concerned party as to whether a project may cause significant transboundary effects. When a party alleges an impact from a project for which an assessment is mandatory under the Convention[28], and for which no notice has been given, the parties are required to exchange sufficient information to hold such discussions. If agreement is not reached, a special inquiry procedure is established by the Convention (Appendix IV).

Article 7 of the EU Directive more simply invites a state that has not received notice to request information from the state of origin. The International Law Commission Draft Articles (Art. 18) require a state to have "serious reason to believe" a significant impact will be likely from a

27. *Canada-United States Air Quality Agreement, 1994 Progress Report*, at p. 16.
28. The Convention provides for both mandatory assessment of projects listed in its Appendix I and discretionary assessment when designated criteria are met (Art. 3).

planned measure before making such a request, and it must provide documented reasons for this belief. Consultations and negotiations are called for in the event of further disagreement.

The Air Quality Accord places the matter into the context of notifying and consulting in the event of an air pollution problem that is of joint concern. Dispute resolution procedures, including a possible reference to the International Joint Commission when agreed by both parties, are options that emerge generally from the agreement (Art. XIII.2). A formal dispute resolution option is also found in most other agreements.

What is generally signaled by the existing texts is a two stage process where notification is absent but a party believes a significant transboundary impact will occur. The first stage is notification and consultation. The second is a more formal entry into dispute resolution processes.

Notification to the public

The issue of notification to the public is raised directly by the principle on Public Participation in the Overarching Principles adopted by the Council of the CEC in October, 1995.

Notification to the public can be an issue both when there is official notice and participation by government agencies, and where there is no such notice and/or participation. A critical conceptual question is whether to apply the same rights and process as exist in the party of origin for public participation, as exist in the party being notified, or to create a minimum international right for public notification and participation.[29]

Many agreements have simply not addressed this issue. Of those that have, most existing agreements have chosen the first route. This is seen in the EU Directive, which provides equal rights to the public in the impacted state. The result of this choice is that the rights and roles of the public differ from jurisdiction to jurisdiction under these instruments.[30]

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29. A recent review of the EU Directive, for example, shows that some commentators criticized the Directive for "not bringing to the Community the beginning of a new kind of community-wide participatory public decision making, but merely a rehashing of existing administrative procedures." Paul McHugh, "The European Community Directive – An Alternative Environmental Impact Assessment Procedure", 34 *Nat. Res. J.* 589 (1994) at 614.
30. See, e.g., Gisèle Bakkenist, "Notification of Transnational Environmental Impacts", 3 *Rev. E. C. Int'l . Env't. L.* 7 (1994).

No instruments appear to take the approach of providing the public the same rights as in the impacted state. The relevant Overarching Principle adopted by the CEC Council holds that public participation should be consistent with national and sub-national regimes, but does not identify of which party.

The BECC Agreement and the Antarctic Treaty Protocol both create rights of review and comment on completed draft assessments before their respective decision-making bodies can consider a decision. The former requires all documentary material to be available to the public on all the implicated projects. The latter requires the draft assessment to be made available to the public by the proponent state as well as by all parties when they receive a copy for their own comments. Additional information is to be made available by the proponent party on request.

The Netherlands Report argues that detailed arrangements are needed in bilateral or regional agreements to address this issue. It suggests three alternatives:

- the party of origin be responsible for all public notification,
- the party affected notify its own public,
- a shared responsibility between these two parties that ensures both the speed of the first option and the effectiveness of the second.[31]

While the issues are not clearly broken down in the comparatively few instances they are treated in existing agreements, the Parties may wish to consider the following circumstances and questions in their work on this issue:

- notification to the public when there is official participation by a notified government authority,
- notification to the public where there is notification to the government authorities but a decision not to participate in the EIA,
- notification to the public in the absence of any other official notification or participation,

31. Netherlands Report, *supra*, note 4, p. 11-12.

- contents of a notification to the public, and
- a public registry of information.

Other elements, such as the actual participation of the public in an assessment process, public hearings and the treatment of comments from the public, may be more appropriately considered in relation to the exchange of information, consultations, and the conduct of the assessment.

The goal identified in the Overarching Principles, of ensuring "that the public has adequate information and the opportunity to participate in a meaningful manner in such mechanisms or procedures" may require provisions to address each of these aspects.

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THE PROCESS OF "NOTIFICATION" IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

Annex: Tables

This brief background paper provides, in chart form, a review of selected agreements that have considered issues relating to the process of "notification" of potential transboundary environmental impacts of a proposed project with a view to assessing those impacts. These agreements include some that are full treaties under international law, others that are treaties not yet in force, and still others that are agreements not captured by international law. They have been included here not because of their legal status, but as examples the Parties may wish to consider in developing recommendations pursuant to Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC).

The order of presentation implies no choice or priority of the approach set out in the agreements. Generally, North American agreements are cited first, other agreements or documents in which the Parties have a role are looked at next, and agreements in which the parties do not have any role are considered last.

The agreements listed here include detailed references to at least one aspect of the notification process:

- Notification by whom and to whom
- When to notify
- What information should be included in a notification
- The decision to participate
- Absence of notification
- Notification to the public

Not every agreement covers each of these points.

Readers may notice some agreements relating specifically to one or other of the borders to be absent from this review. These include the 1983 La Paz Agreement itself (Annex II of that Agreement is included below as an example of a notification regime in the area even though it does not deal expressly with prior impact assessment), and the agreements concerning the International Boundary Waters Commission between Mexico and the United States and the International Joint Commission between Canada and the United States. While all these agreements may have some relevance to transboundary assessment issues (La Paz, for example, specifically calls for the assessment of all impacts in the border area), none of them provide any detail on how to go about implementing the process. The scope of this review is limited to agreements that include details specifically on notification.

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation.

ISSUE: NOTIFICATION BY WHOM AND TO WHOM

Agreement	Notification by whom	Notification to whom	Notes
Air Quality Accord, Canada-US	Art. V.2: National government.	National government.	- "party" is defined as being the national governments; - Under Art. XIV.2, the parties shall seek the cooperation of provincial and state governments in the implementation of the agreement.
Bay of Fundy Protocol, (Draft only)	Provincial/state authority and/or regional national authority.	Provincial/state authority and/or regional national authority.	The Protocol operates on a regional ecosystem basis, including the land and water components of the Bay of Fundy basin. State, provincial and regional offices of national authorities are all participants in the Bay of Fundy Council process. The draft protocol has not yet been endorsed by the Council or its Working Group.

ISSUE: NOTIFICATION BY WHOM AND TO WHOM (continued)

Agreement	Notification by whom	Notification to whom	Notes
US-Mexico BECC Agreement			The approach here is not one of notification to a government authority, but provision of the EIA to the BECC. It must then review all the information in consultation with state and local authorities as part of the certification for financing process. (Part I, Art. II, sec. 3 (c)(1))
Annex II to the La Paz Agreement, 1985 (Pollution of inland international boundary)	Notification by a designated "on-scene coordinator". Each country has on-scene coordinators designated by distinct regions in the border area. (Appendix I, Art. 1)	Notification is sent to both Chairmen of the Joint Response Team established to deal with actual or likely transboundary impacts. Following notification to the designated local officials, an additional notification is sent at the diplomatic level. (Appendix I, Art. 1.2(f) and 2.5)	This is not directly on EIA notification, but on the notification of an actual or likely hazardous substance incident impacting the border area waters. It is included here as an example of a highly developed notification regime on the Mexico-US border, and as an application of La Paz. Notification is for consultation purposes, and does not mean a joint response is necessary. (Appendix I, Art. 2.5)

ISSUE: NOTIFICATION BY WHOM AND TO WHOM (continued)

Agreement	Notification by whom	Notification to whom	Notes
Mexico-US Marine Pollution Agreement, 1980 (on marine accidents with a transboundary aspect)	Notification by a designated "on scene coordinator" to his/her own Joint Response Team Chairman. (Annex I)	One chair notifies the other. Following notification to the designated local officials, an additional notification is sent at the diplomatic level. (Annex II)	This is not directly on EIA notification, but for notification of an actual or likely marine oil incident. This was the forerunner agreement that provided the model copied almost exactly for the Annex II Agreement to La Paz.
Espoo Convention	National government. (Art. 3.1)	National government (Art. 3.1).	Espoo defines Parties as the states Party, and extends recognition to other levels of government where they are designated by the Party as a competent authority or entrusted by the Party with decision-making powers regarding a proposed activity (Art. 1(ix)).

ISSUE: NOTIFICATION BY WHOM AND TO WHOM (continued)

Agreement	Notification by whom	Notification to whom	Notes
Antarctic Treaty Protocol, Annex I, 1991	The Protocol is silent in this regard. Notification could potentially be by the Party involved in the project or the person or organization which prepared a draft comprehensive Environmental Evaluation (CEE) (Annex I, art. 3.2(l)). The process itself is coordinated either by the Party involved or, if more than one Party is involved, the said Parties shall nominate one of their own to coordinate it (Art. 8).	The draft CEE must be made available to all Parties, the public and to the Committee for Environmental Protection established by the Protocol (Annex I, Art. 3.3 and 3.4)	This Protocol concerns assessment of an area of the global commons by states undertaking activities in the area, as opposed to transborder issues. All parties "share" responsibility for protection of the environment. Notification is of a draft CEE, prepared only after an "Initial EE indicates or it is otherwise determined that a proposed activity is likely to have more than a minor or transitory impact" (Annex I, Art 3.1).
Accord sur l'Escaut, 1994	Art. 5: Does not deal with notification per se, but uses its Commission as a centre for the exchange of information submitted by the Parties or observers on projects submitted to an assessment that have a transboundary impact on the Escaut River. (Art. 5 and 7)	Information would be shared by all the contracting parties.	The Commission is composed of France, the Netherlands and three sub-federal level governments in Belgium. (The Accord also includes a definition of the precautionary principle in a transboundary context.)

ISSUE: NOTIFICATION BY WHOM AND TO WHOM (continued)

Agreement	Notification by whom	Notification to whom	Notes
Danube River Convention, 1994	By the Party. (Art. 10)	To the Danube River International Commission. (Art. 10)	The Convention is a specific application of the UNECE Agreement on Transboundary Watercourses. It deals with transboundary environmental assessment for the Danube River catchment area.

ISSUE: WHEN TO NOTIFY

Agreement	Timing	Notes
Air Quality Accord, US-Canada	Art. V.2: "As early as practicable in advance of a decision concerning such action, activity or project."	The actions, activities or projects contemplated are proposed ones subject to the trigger identified for notification in Art. V.1, i.e., would be likely to cause significant transboundary air pollution.
New York State/ Québec MOU	Sect. 5: "Before any major action or project in an area under their respective jurisdictions..." is carried out.	The section does not specify EIA processes, but it applies in that context.
Bay of Fundy Protocol	"at an early stage in the decision-making process" and "prior to any decision being made to authorize a proposed activity."	Also includes a reference to consulting early in the process to provide a cooperative determination of the extent and scope of the EIA.
US-Mexico BECC Agreement	Prior to a decision on certification for financing being made by the BECC. (section 3)	The EIA must be presented as part of the application for financial certification process.
Annex II to the La Paz Agreement, 1985	Notification by the on scene coordinator "immediately" about any polluting incident that has occurred or is in imminent danger of occurring and which may require a joint response. (Appendix I, Art. 1.2(f))	This is not on EIA, but provides a basis for a joint response to an actual or imminent incident impacting the inland border area. The Mexico-US marine agreement of 1980 provides a similar structure.

ISSUE: WHEN TO NOTIFY (continued)

Agreement	Timing	Notes
Espoo Convention	Art. 3: "As early as possible and no later than when informing its own public about the proposed activity."	
I.L.C. Draft Articles, 1994	Art. 12: "Timely notification."	
EU Directive, 1985	Art. 7: at the same time as it makes [the information] available to its own nationals.	
Antarctic Treaty Protocol, Annex I, 1991	At least a ninety day comment period; and to the Committee for Environmental Protection at least 120 days before the next Antarctic Treaty Consultative Meeting. (Art. 3.3 and 3.4)	

ISSUE: WHAT INFORMATION SHOULD BE INCLUDED IN A NOTIFICATION

Agreement	Basic provisions: content/form	Exceptions	Notes
Air Quality Accord		Art. VII.2: the Committees "shall not release, without the consent of the owner, any information identified to them as proprietary information under the laws of the place where such information has been acquired."	
Bay of Fundy Protocol			The Protocol is not specific on this but calls for the use of another jurisdiction's EIA process as the information gathering mechanism where appropriate.
New York State/Québec MOU	S. 5: Special mention is made of "appropriate mitigation measures."		The section is not specific to EIA notification.

ISSUE: WHAT INFORMATION SHOULD BE INCLUDED IN A NOTIFICATION (continued)

Agreement	Basic provisions: content/form	Exceptions	Notes
Espoo Convention	Art. 3.2: information on the proposed activity; including any available information on its possible transboundary impact; the nature of the possible decision; time frame for a response by the Party to the notification. Must also include, initially or after a decision by the affected Party to participate: relevant information on the EIA procedure; time schedule for the transmittal of comments; relevant information on the proposed activity and its possible significant transboundary impact.	Art. 2.8: The Parties retain the right to implement national laws, regulations, administrative provisions or accepted legal practices protecting information the supply of which would be prejudicial to industrial and commercial secrecy or national security.	Technical reviews by the Parties have identified gaps in the notification process. These are still being addressed. Espoo has a two-stage information providing approach, with significantly more details required after a decision to participate.

ISSUE: WHAT INFORMATION SHOULD BE INCLUDED IN A NOTIFICATION (continued)

Agreement	Basic provisions: content/form	Exceptions	Notes
I.L.C. Draft Articles	Art. 12: "available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures." Art. 14: obligation to provide notified state with additional data and information available on request that is necessary for an accurate evaluation.	Art. 14: data that is available and necessary for an evaluation. Art. 19: exception for planned measures that are "of utmost urgency in order to protect public health, public safety or other equally important interests." Art. 31: exception for information vital to a state's national defense or security.	The provisions apply for planned measures that could impact on watercourses. The provisions set out a one stage process rather than a two stage one. They support a non-integrated assessment process, each party assessing the impacts within its own jurisdiction.
Danube River Convention, 1994	Art. 12(1) calls for an exchange of available information "as determined by the International Commission."	- subject to reasonable charges for information requested that is not readily available (Art. 12(3)) - subject to domestic laws on personal data, intellectual property rights or national security (Art. 12(5)) - protected information provided shall be treated the same way by the recipient. (Art. 12(6))	

Agreement	Basic provisions: content/form	Exceptions	Notes
EU Directive, 1985	Art. 5: Minimum: a description of the project site, design and size; the measures envisaged to avoid, reduce and remedy significant effects; the data required to assess the main effects the project is likely to have; a non-technical summary of the above. Annex III: Additional information as considered relevant by the party: further details of the project, such as the production process, nature of materials to be used, etc.; outline of the main alternatives; rationale for the choice; description of the aspects of the environment likely to be affected; the causes of the likely impacts of the project, such as the use of resources, emissions, wastes; measures to prevent or offset impacts; a summary of the above information; any difficulties encountered in the assessment.	Limitations imposed by national regulations, administrative provisions and accepted legal practice with regard to safeguarding the public interest, and industrial and commercial secrecy in the state of origin of the project. (Art. 10)	Two tier system of minimum information and more detailed information.

ISSUE: RESPONSE/DECISION TO PARTICIPATE

Agreement	Timing	Information to include	Notes
Espoo Convention	Art. 3.3: "within the time period specified in the notification."	Art. 3.3: acknowledge receipt of notification; indicate its decision to participate in the EIA procedure.	Art. 3.2 requires the notifying party to include an indication of a reasonable time frame for responding, "taking into account the nature of the proposed activity."
I.L.C. Draft Articles, 1994	Art. 13: six months in which to evaluate and study the possible effects of the planned measure and communicate its findings. Art. 15: Reply as early as possible with findings.	Findings, together with the documented reasons setting forth the findings. (Art. 15)	These provisions apply "unless otherwise agreed" by the parties. (Art. 13) The provisions set out a one stage process rather than a two stage one. They also reflect a non-integrated assessment process, each party assessing the impacts within its own jurisdiction. A consultation and negotiation process to resolve different views is provided for.

ISSUE: RESPONSE/DECISION TO PARTICIPATE (continued)

Agreement	Timing	Information to include	Notes
Antarctic Treaty Protocol, Annex I, 1991	No decision can be taken on a proposed project until after the Antarctic Consultative Committee has had a chance to consider the draft assessment on the advice of the Committee; subject to a maximum of 15 months delay from the circulation of the draft assessment. (Art. 3(5))		There is no specific requirement for responses.

ISSUE: ABSENCE OF NOTIFICATION

Agreement	Process	Notes
Air Quality Accord, Art. V.6 Art. IX, XI, XII	Notify of and consult on a problem that is of joint concern; Possible joint reference to the International Joint Commission; Consultations and formal dispute resolution.	
Espoo Convention	Art. 2.5: Enter into discussions at the request of any concerned Party as to whether a project is likely to cause significant transboundary impacts. Art. 3.7: where a party considers that it would be affected by a proposed project for which an assessment is mandatory under Appendix 1, and for which no notice has been given, the parties shall exchange "sufficient information for the purposes of holding discussions on whether there is likely to be a significant adverse transboundary impact." An inquiry process is established in the event of continued disagreement.	Espoo has a list of mandatory projects for assessment based on defined conditions, and discretionary transboundary assessments for projects not on this list likely to cause a significant impact. It also includes a guidance annex for the purpose of determining this.
I.L.C. Draft Articles, 1994	Art. 18: In absence of notification, request for the application of the notification provisions may be made where a state "has serious reason to believe" planned measures will have a significant adverse effect on it. Art. 16: Allows a notifying party to proceed with a notified measure after the expiry of the response period if no response is given.	Documented reasons must be provided. (Art. 18.1) Consultations and negotiations are called for if there is continued disagreement. (Art. 17.2, 17.3, 18.2)
EU Directive, 1985	Art. 7: A state likely in its view to be impacted can request information.	

ISSUE: NOTIFICATION TO THE PUBLIC

Agreement	Who/Timing	Information to include	Notes
US-Mexico BECC Agreement	Part I, Art. II, sec. 4: Make available information on all projects, prior to a decision on certification; give written notice of and a reasonable opportunity to comment on all general guidelines and on all applications for certification.	No specific details: refers to "documentary information on all projects" for which assistance or certification is requested. (Part I, Art. II, sec. 4) There is a limitation on disclosure of information that would impede law enforcement, business or propriety information, violate personal privacy or breach the confidentiality of government decision-making; and any other information that the Commission agrees, on request, to keep confidential. (Part I, Art. III, sec. 10)	The BECC does not undertake an assessment, but requires one as part of the certification process where there might be significant transboundary impacts. Certification is required for NADBANK financing.
Espoo Convention	Art. 3.8: By the concerned parties; to the public of the affected Party in the areas likely to be affected; provide an opportunity to make comments or objections on the proposed activity.	No details provided.	Under Art. 2.6, the Convention provides equal rights of comments and participation to the public in all affected parties and the party of origin.

ISSUE: NOTIFICATION TO THE PUBLIC (continued)

Agreement	Who/Timing	Information to include	Notes
EU Directive, 1985	Does not specifically identify notice to the public in the affected country, but does speak of acting on a reciprocal and equivalent basis. The public in the Party of origin has access to all the information required by the local authority.	Same as state to state. (Art. 5, 6, 7)	

ISSUE: NOTIFICATION TO THE PUBLIC (continued)

Agreement	Who/Timing	Information to include	Notes
Antarctic Treaty Protocol, Annex I, 1991	Public release of the draft Comprehensive Environmental Evaluation by the state of origin.	The draft Comprehensive Environmental Evaluation (Art. 3(3). Other information to be made publicly available includes the description of the procedures, an annual list of any initial evaluations and related decisions, the initial evaluations (upon request), information obtained from monitoring the projects implemented pursuant to an Initial or Comprehensive Evaluation and any action taken in consequence thereof, and Final Comprehensive Evaluations with notice of related decisions and related impact evaluations (Art. 6).	This is not notice for participation in its drafting, but for comments on the draft assessment. Any interested member of the public in any Party can comment. (Art. 3(3))

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ASSESSING TRANSBOUNDARY ENVIRONMENTAL IMPACTS UNDER ARTICLE 10(7)(a) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

INTRODUCTION

Under Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC), the Council is required to consider and develop recommendations regarding the transboundary environmental impact assessment (EIA) of proposed projects, with a view to agreement between the Parties within three years. This discussion paper is one of a series that examine the various components of Article 10(7) in light of other existing and proposed international agreements related to transboundary EIA.

This discussion paper addresses the issues raised by Article 10(7)(a) of the NAAEC, which reads:

> (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;

This paper is based on an evaluation of a number of bilateral and multilateral agreements, as well as several "soft law" instruments, relating to transboundary EIA.[1] Although many bilateral and multilateral agreements refer to environmental assessment generally, only a few provide any significant detail regarding the process or content of an EIA. These more detailed agreements include the Espoo Convention on Environmental Impact Assessment in a Transboundary Context of 1991, the European Union Directive on Environmental Assessment of 1985, and the Antarctic Treaty Protocol on Environmental Protection of 1991. Although this paper necessarily depends most on these three agreements, the paper refers to other agreements, guidelines or principles that can illuminate a particular issue. The paper was also written in light of the Council's *Transboundary Impact Assessment Overarching Principles* adopted in October 1995 (the "Council's *Overarching Principles*").

The paper is based primarily on an analysis of the text of the agreements and instruments considered. It does not reflect domestic EIA law and practice of the NAAEC Parties or any other countries. This is particularly important, because most international instruments relating to EIA rely heavily on domestic EIA law and practice to provide the details of implementation. This deference to established domestic EIA regimes is also reflected in the Council's *Overarching Principles* on complementarity and respect for national and subnational processes. For the most part, we do not highlight instances where interpretation of specific projects is left to domestic law, although this is always an option available in any treaty negotiation.

This discussion paper considers a number of issues raised by Article 10(7)(a) in light of three generally accepted objectives of transboundary EIA:

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1. The agreements and other instruments examined while preparing this paper and the accompanying charts are listed at the end of this paper. For more information regarding transboundary EIA in international law, see P. Sands, *Principles of International Environmental Law I*, ch. 15 (Manchester Univ. Press, 1995); D. Hunter et al., *International Environmental Law Concepts and Principles* (UNEP Trade and Environment Series, No. 2) (1994); N. Robinson, "International Trends in Environmental Impact Assessment", 19 *B.C. Envtl. Aff. L. Rev.* 591 (1992).

- to provide decision-makers with reliable and timely information on the environmental consequences of proposed projects, regardless of whether the consequences are located inside or outside a particular State's jurisdiction,

- to ensure that decisions on such projects take into account such consequences, and

- to provide a mechanism for potentially affected people and institutions in other jurisdictions to learn how a proposed project in a neighboring jurisdiction will affect their environment and to participate in the process leading to a decision on the proposed activity.

The paper is divided into three parts. Part I addresses the threshold "screening" requirements that must be met to trigger the obligation to conduct an EIA. Specific triggering issues raised by Article 10(7)(a) include:

(i) what is a "proposed project";

(ii) how is "subject to decisions by a competent government authority" defined; and

(iii) how is "likely to cause significant adverse transboundary environmental impacts" defined.

Part II relates to the process and contents of actual EIAs. Specific issues raised by Article 10(7)(a) include:

(i) what type of impacts must be assessed,

(ii) what information, at a minimum, should the assessment contain, and

(iii) who conducts the assessment.

Part III addresses those issues raised by the requirement in Article 10(7)(a) to evaluate fully comments provided by other parties and persons of other parties. These issues include:

(i) what is the role of the public in the EIA process;

(ii) how to elicit comments from other parties; and

(iii) how should the comments be integrated into the final assessment.

I. ISSUES RELATED TO SCREENING REQUIREMENTS

Every environmental assessment regime must establish a standard for when and how its assessment obligations are triggered. Article 10(7)(a) contemplates EIAs for any "proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects." Article 10(7)(a) requires at least three "screening" criteria be met. First, the proposed activity must be a "project." Second, the project must be "subject to decisions by a competent government authority." Third, the project must be "likely to cause significant adverse transboundary effects." These three criteria are discussed below.

A. "Proposed Projects"

Projects v. Activities. Transboundary EIA regimes generally apply either to "projects" or "activities." The EU Directive, for example, applies to "projects," while more recent agreements, including the Espoo Convention and the Antarctic Protocol, refer to the potentially broader term "activities."[2]

Where the term project has been used, it has not appeared to be defined substantially more narrowly than the term "activities."[3] Regardless of the term used, it appears that most EIA requirements extend beyond narrow definitions of "projects," such as basic construction and infrastructure projects, and are designed to capture a broader range of human activity. The EU Directive, for example, defines "project" to include "the execution of construction works or of other installations or schemes" *and* "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."[4] In addition to mining operations, other activities are also included among the "projects" listed in the EU Directive, including agriculture, aquaculture, and forestry activities.[5]

2. The Rio Declaration, the Bay of Fundy Draft Protocol and the Cuixmala Model Treaty also refer to "activities." For simplicity, abbreviated references to international agreements and other instruments are used throughout the text and footnotes. Full titles of the relevant documents are listed in the bibliography appended hereto.
3. The US-Mexico BECC Agreement also applies EIAs to "projects." The BECC may not provide a good example in this context, however, because the agreement's scope is limited by the BECC's narrow mandate to review environmental infrastructure projects near the US-Mexico border.
4. EU Directive, Art. 1(2).
5. See EU Directive, Annex II.

Lists of Projects. Rather than defining the term "projects" or "activities," several international instruments as well as many national laws provide lists of specific project categories that are covered by the EIA obligations. For example, the Espoo Convention lists activities that trigger the assessment obligations of the convention in Appendix I, assuming the listed activity is likely to cause significant adverse transboundary impact.[6] Similarly, the EU Directive relies heavily on lists. Annex I and II of the Directive respectively list those projects subject to mandatory assessment requirements and those projects that are subject to assessment obligations "where Member States consider that their characteristics so require."[7]

Although the use of lists lends clarity to EIA regimes, allowing the project proponents to know more easily whether they must conduct an EIA, the provisions may not provide sufficient flexibility to cover all types of projects that can threaten the environment. For that reason, most international instruments and domestic laws, in practice, have combined lists of certain projects with some more flexible standard relating to the significance of the environmental threat. For the most part, the regimes rightly interpret activity or project broadly thereby making the "significance of environmental harm" the threshold question.

Specific Exemptions. Among the agreements examined, only the EU Directive explicitly exempts certain classes of activities from EIA obligations. Projects that serve national defense purposes and projects adopted by a specific act of the national legislature are not covered by the EU Directive.[8]

Projects v. Policies, Programs or Plans. To date, transboundary EIA agreements have only imposed formal assessment obligations at the project or activity level, and not at the more general level of policies, programs, or plans. There is a trend, however, toward imposing some level of assessment obligation, short of a formal EIA, on the broader policy level. For example, during the NAFTA process all three of the parties conducted some form of EIA on the broad impacts of North American economic integration. Similarly, the Espoo Convention provides that "to the extent appropriate, the Parties shall endeavor to apply the principles of environmental impact assessment to policies, plans and

6. Espoo Convention, Art. 2.2.
7. EU Directive, Art. 4.2. Except for the general obligation on Member States to ensure that "projects likely to have significant effects on the environment" are properly assessed, the Directive provides no further guidance for making the determination as to whether an Annex II project requires an EIA. *Ibid.* at Art. 2.1.
8. EU Directive, Art. 1(4) and (5).

programmes."[9] Many national laws also apply some form of environmental assessment to policies and programs, and many commentators believe it should be included in international treaties.[10]

Public v. Private Projects. The existing transboundary EIA agreements apply equally to activities undertaken by national governments and by private parties or subnational governments acting with the approval of the national government. The EU Directive specifically refers to "public and private projects," although the EIA obligations fall only on those developers that must apply for authorization of a project.[11] The formulation used in the Espoo Convention implicitly provides that private activities "subject to a decision of a competent authority in accordance with an applicable national procedure"[12] would be subject to the assessment requirements. This is consistent with Article 10(7)(a)'s requirement that the projects be subject to a decision of a competent government authority. This provision is analyzed further in the next section.

B. "Decisions by Competent Government Authorities"

Article 10(7)(a) of the NAAEC only applies to those projects subject to a "decision by a competent government authority."

Types of Decisions. This provision in the NAAEC is similar to many others in international EIA instruments designed primarily to restrict the application of EIA to decisions involving some public authority. Thus government decisions to fund or conduct a project are clearly covered by all EIA regimes.[13] As well, most recent international instruments tend to apply EIA to private projects that require government approval. Thus, for example, EIA obligations under the Espoo Convention apply to decisions to "authorize" or undertake a covered activity, and the EU Directive requires Member States to ensure EIAs are conducted before giving consent to private projects. The Rio Declaration also calls for EIAs for activities that are "subject to a decision of a competent national authority."[14] In this way, these and other EIA regimes cover most private activities that are likely to have significant

9. Espoo Convention, Art. 2.7.
10. See, e.g., Cuixmala Model Treaty, Art. 31(5) requiring the parties to "take appropriate measures to ensure that before they adopt policies, programmes, and plans that are likely to have a significant transboundary adverse effect on the environment, the environmental consequences of such actions are duly taken into account."
11. EU Directive, Art. 1(2).
12. Espoo Convention, Art. 1(v), refers to any activity or major change.
13. See, e.g., EU Directive, Art. 1(2) (which explicitly makes a public authority that initiates a project meet the obligations of a project "developer").
14. Rio Declaration, Principle 17.

transboundary impact, because most countries employ some form of permitting process to regulate potentially environmentally damaging activities.

Timing of Decisions. Given that the primary goal of an EIA is to provide information to decision-makers, all international instruments that address the issue clarify that the EIA should be conducted before final decisions are made. For example, both the Espoo Convention and the EU Directive are explicit that the EIA must be conducted *before* the relevant decision or approval is made. Similarly, the Antarctic Protocol applies to "planned" activities, implying that the EIA must be done before an activity begins.

Competent Government Authority. Like Article 10(7), the agreements examined in the preparation of this paper refer to decisions by the "competent authority" as part of the operative language of environmental assessment obligations. For the most part, this language refers to government agencies that have been provided with the decision-making authority over the proposed project and/or government agencies specifically delegated to conduct EIAs. The Espoo Convention, for example, defines the "competent authority" 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."[15] In essence this provision is usually interpreted to complement domestic environmental laws, allowing countries maximum flexibility for differences in national EIA systems.

National v. Subnational Authority. The "competent government authority" formulation in international EIA agreements raises an important issue of the extent to which decisions of subnational government authorities are covered. Because transboundary EIA agreements have followed the traditional "federal-to-federal" model of international agreements, they typically operate to bind national governments and not subnational governments. This distinction is particularly important when dealing with federal systems, such as the US, Canada, and Mexico, which reserve significant authority for state or provincial governments.

The discussion paper on notification issues (The Process of "Notification" in the context of Transboundary Environmental Impact Assessment: A Comparative Review of Selected Bilateral and Multicultural

15. Espoo Convention, Art. 1(ix). The EU Directive, Art. 1(3), refers to those authorities "which the Member States designate as responsible for performing the duties arising out of this Directive."

Agreements, TEIA/96.02.05/S/1.) includes an extended discussion of the relationship between federal and state/provincial governments in the context of the "competent government authority." That discussion will not be repeated here, however, several points are worth emphasizing. First, existing agreements such as the Canada-US Air Quality Accord, while only binding federal governments, may obligate those governments to seek the cooperation of state and provincial governments to implement the agreement.[16] Second, particularly along the Canada-US border, neighboring states and provinces have already entered into agreements to cooperate on environmental issues and have set up institutional arrangements to enhance such cooperation.[17] These existing arrangements provide an important basis for involving state and provincial authorities in transborder EIA. Building on these existing mechanisms would be consistent with the Council's *Overarching Principles* relating to respect for national and subnational processes and ensuring cost effectiveness and efficiency.

The same three models identified in the notification context to address the national/subnational issue can be utilized in the context of EIAs:

- The Party-Party model requires designated federal authorities to oversee assessment activities in their respective jurisdictions and coordinate such activities with the federal authority in neighboring nations;

- The *ad hoc* model requires grouping concerned authorities on both sides of the border in response to a particular situation;

- The regional grouping model pre-identifies authorities on both sides of the border and establishes specific procedures for assessing transboundary environmental impacts.

The experience of the parties to the Espoo Convention, as expressed in a report prepared pursuant to a workshop of the parties, suggests that assessment in the transboundary context would be enhanced by adopting the regional grouping model. The report highlights the importance of "good working relations on a subregional level between government authorities," and notes that the implementation of transboundary EIA obligations would be enhanced by the establish-

16. Canada-US Air Quality Accord, Art. XIV.
17. See, e.g., British Colombia/Washington State Environmental Cooperation Agreement; New York State-Québec MOU on Environment Cooperation; Bay of Fundy Draft Protocol.

ment of a joint body.[18] The regional grouping model would help build good working relations and could incorporate some form of joint body to facilitate the transboundary EIA process.

C. Projects "Likely to Cause Significant Adverse Transboundary Effects"

While virtually all existing transboundary EIA agreements require assessment where a proposed activity is "likely to have significant adverse effects" on the environment, the agreements themselves provide little guidance as to how the terms "likely" and "significant" are to be applied.[19] As noted above, the EU Directive includes a list of projects for which EIA is mandatory and a list of projects that may require EIA depending on the likelihood of significant adverse effects. The Espoo Convention also lists types of activities that will trigger assessment obligations, but they are still subject to the "likely to cause significant harm" qualification. Thus, for the most part, even where lists are used to help define the coverage of the agreement, the parties must nevertheless make a determination of the likelihood of significant adverse effects.

Likelihood of Impact. Most international instruments that use the term "likely" to have significant impacts do not clarify what degree of probability is required to meet the "likelihood" standard. Other international instruments that use triggers other than the "likely" standard, provide some guidance in interpreting this standard. Thus, for example, UNEP's Guidelines on Shared Natural Resources suggest that EIAs be adopted for any activity that "may create a risk of" significant impacts (Principle 4). In a slightly different context, the Convention on Transboundary Effects of Industrial Accidents focuses on those activities that are "reasonably capable" of causing transboundary effects (Art. 4(2)). Some commentators support a sliding standard: the level of probability of an impact needed to trigger an EIA should vary depending on the significance of the potential harm. For example, the Cuixmala

18. *Bilateral and Multilateral Cooperation on Environmental Impact Assessment in A Transboundary Context*, Report prepared by the delegation of the Netherlands, CEP/WG.3/R.4, p. 4 par. 8 and p. 9 par. 29, 30, January 1995, hereinafter the Netherlands Report. The report uses the example of a joint EIA expert group, but does not otherwise suggest how such a group should operate.
19. This approach is also reflected in the New York-Québec MOU on Environmental Cooperation. Section 5 of the MOU provides that notice and consultation obligations are triggered by actions or projects "likely to adversely affect the environmental quality of the other Party's territory." Similarly, the US-Mexico BECC Agreement requires an environmental assessment for border region projects "having significant transboundary environmental effects." US-Mexico BECC Agreement, Part I, Art. II, sec. 3(c)(1).

Draft Model Treaty defines "risk of significant transboundary harm" to include both "a low probability of causing disastrous harm and a high probability of causing other significant harm."[20]

Significance of Impact. Although many international instruments do not define "significant," it is generally considered to be a non-negligible impact or more than a *de minimis* effect.[21] The Espoo Convention does provide the parties with general criteria to assist in the determination of significance. The criteria are designed to be applied to both proposed activities located close to an international frontier and those that are more remote if they could give rise to transboundary effects far removed from the site of development. The parties to the Espoo Convention are instructed to consider the following:

> (a) *Size*: proposed activities which are large for the type of the activity;
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> (b) *Location*: proposed activities which are located in or close to an area of special environmental sensitivity or importance (such as wetlands designated under the Ramsar convention, national parks, nature reserves, sites of special scientific interest, or sites of archaeological, cultural or historical importance); also, proposed activities in location where the characteristics of proposed development would be likely to have significant effects on the population;
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> (c) *Effects*: proposed activities with particularly complex and potentially adverse effects, including those giving rise to serious effects on humans or on valued species or organisms, those which threaten the existing or potential use of an affected area and those causing additional loading which cannot be sustained by the carrying capacity of the environment.[22]

The Espoo Convention also provides a dispute resolution mechanism if the parties are unable to agree on whether a particular activity will have significant effects. Appendix IV of the Convention creates an inquiry procedure under which a panel of three experts determines the likely significance of a disputed proposed activity.

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20. Cuixmala Model Treaty, Art. 2(8).
21. See, e.g., UNEP Guidelines on Shared Natural Resources ("'Significantly affect' refers to any appreciable effects on a shared natural resource and excludes *de minimis* effects" (Definition section)). The Cuixmala Model Treaty defines "significant harm" as "an adverse effect that 1) can be established by objective evidence, 2) is not trivial in nature, and 3) is more than measurable and entails a) some degree of importance without need to rise to the level of being of serious importance or to the level of substantial harm, and b) real impairment of use" (Art. 2 (7)).
22. Espoo Convention, Appendix III.

Several instruments or national laws take a tiered approach to the issue of the magnitude or significance of the potential environmental impacts. Usually three or more categories of projects or activities are identified depending on their potential impact on the environment. The Antarctic Protocol, for example, divides proposed activities into three tiers and uses a screening step to determine when a comprehensive EIA is required. The three tiers correspond to whether the activity is expected to have a) less than a minor or transitory impact, b) a minor or transitory impact, or c) more than a minor or transitory impact. If, in accordance with national procedures, an activity is determined to have less than a minor or transitory impact, the activity may proceed. All other activities must undergo an "initial" EIA, which must include sufficient information to determine if the impact will be more than minor or transitory. If so, then a full scale impact assessment is required.[23]

II. ISSUES RELATING TO THE ASSESSMENT OF IMPACTS

Article 10(7)(a) states that the Council should make recommendations for "assessing the environmental impact" of proposed projects.

Definition of Environmental Impacts. To ensure consistency across jurisdictions as to what impacts require analysis in the EIA process, a number of agreements have provided additional guidance on the types of effects that must be covered by an EIA. All three of the major multilateral EIA instruments reviewed here require assessment of impacts beyond those that are strictly environmental. The EU Directive defines impact to include effects on "material assets and cultural heritage"(Art. 3). The Espoo Convention is typical of the trend to define environment broadly as it specifically includes "human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures."[24] Finally, although it relates to an extranational area and has no permanent human inhabitants, the Antarctic Protocol requires examination of impacts on scientific and other existing activities in the area (Art. 3).

Cumulative, Indirect and Long-term Impacts. The trend among international EIA agreements, and national laws for that matter, is to

23. These requirements are spelled out in the Antarctic Protocol, Art. 8 and Annex I. A similar tiered approach is used in the World Bank's Operational Directive on Environmental Assessment. World Bank, Op. Dir. 4.01 (Oct. 1991).
24. Espoo Convention, Art. 1(vii), defining "Impact."

ensure that EIAs cover all reasonably foreseeable impacts. These include direct and indirect impacts, cumulative impacts of small projects, distant or global impacts, as well as short-term and long-term impacts.[25]

What Is Included In the Assessment. Both the EU Directive and the Espoo Convention provide a list of elements that must, at a minimum, be included in the EIA documentation.[26]

The Espoo Convention is the most detailed; in addition to a description of the proposed project or activity and a discussion of the impacts, the Espoo Convention requires EIAs to include the following:

- an examination of reasonable alternatives to the proposed activity, including the "no-action" alternative,
- a discussion of measures designed to mitigate the adverse consequences of the activity,
- a description of predictive methods, underlying assumptions and relevant environmental data used,
- a discussion of any uncertainties or data gaps involved in the preparation of the assessment,
- where appropriate, an outline of plans for management, monitoring and post-project analysis, and
- a non-technical summary of the assessment.

Each of these elements of an assessment is important. Indeed, mitigation is the focus of Article 10(7)(c) of the NAAEC, and is thus covered by another discussion paper. Just as important is the requirement that EIA involves an analysis of alternatives to the proposed project or activity. Alternatives have been explicitly included in both the EU Directive and the Espoo Convention primarily because they are considered critical to providing necessary information to the decision-maker.

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25. See, e.g., Antarctic Protocol, Annex I, Art. 3.2. This is further supported by soft law instruments and by many analysts. See, e.g., UNEP Goals and Principles of Environmental Impact Assessment, Princ. 4(d); IUCN Draft Covenant, Art. 37(2); Cuixmala Model Treaty, Art. 31.2.
26. Espoo Convention, Appendix II; EU Directive, Art. 5 and Annex III.

Who Conducts the Assessment. The obligation for conducting an assessment of the transboundary impacts of proposed activities or projects typically falls on the party within whose territory or under whose control the proposed activity or project falls (usually referred to as the "Party of origin").[27]

The Antarctic Protocol and the Espoo Convention provide for the preparation of joint impact assessments where appropriate. For joint activities in the Antarctic Treaty area, the parties may work together to develop the required EIA; however, they must appoint one party as primarily responsible for meeting the requirements of the Protocol.[28] The Espoo Convention explicitly provides for the use of multilateral or bilateral agreements or arrangements among the parties to implement the obligations of the Convention,[29] and lays out guidelines for such arrangements in Appendix VI. In addition, a working group under the Espoo Convention has focused on ways to improve multilateral and bilateral cooperation under the Convention and has published additional guidance.[30]

While still in a preliminary form, the draft Bay of Fundy Protocol raises the possibility that the EIA process of one jurisdiction could be used as an information gathering mechanism to assist another jurisdiction to analyze fully the effects of a proposed activity.[31] In this way two separate EIAs can be coordinated, with one Party (probably the Party of Origin) taking the lead.

Process for Impact Assessment. The EIA process of the party of origin is typically relied upon when conducting transboundary EIAs. The agreements examined in the preparing of this report universally refer the parties to their own laws and procedures for conducting EIAs while generally imposing certain minimum criteria on such domestic systems.[32]

Distinct from the assessment process, notification and consultation obligations are likely to be controlled by relevant international agreements.

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27. See, e.g., Espoo Convention, Arts. 1(ii) and 2(3); Convention on the Transboundary Effects of Industrial Accidents, Arts. 1(g) and 4(1).
28. Antarctic Protocol, Art. 8.4.
29. Espoo Convention, Art. 8.
30. The Netherlands Report, *supra,* note 18, p. 11.
31. Bay of Fundy Draft Protocol, Implementation.
32. The exception to this statement may be the EU Directive, which under certain circumstances unique to the European Union may be directly applicable in the Member States in the absence of domestic legislation.

III. ISSUES RELATING TO THE INTEGRATION OF COMMENTS INTO THE FINAL ASSESSMENT

Article 10(7)(a) requires that an EIA include "a full evaluation of comments provided by other Parties and persons of other Parties." All three of the major transboundary EIA agreements examined in the preparation of this paper impose explicit public participation obligations on the parties. At a minimum, potentially affected persons are to be informed of proposed activities that may have environmental impacts and provided with an opportunity to comment on the proposed activity before a final decision is made concerning that activity. The Council's *Overarching Principles* echo this concern by calling for "meaningful participation" of those who may be subject to adverse environmental effects in the decision to authorize proposed activities.[33]

A. The Role of the Public

Which Party is Responsible for Ensuring Public Participation. While the party of origin has primary responsibility for preparation of the EIA, the obligation to ensure public participation is generally shared by the party of origin and the affected parties. This approach reflects the fact that although environmental consequences may not respect geo-political borders, institutional responses to such consequences must be consistent with long established notions of national sovereignty.

The Espoo Convention, for example, provides that the concerned parties (which include the party of origin and any affected parties) shall ensure that the public in areas likely to be affected be informed of and have the opportunity to comment on the relevant proposed activity.[34] As noted in the Netherlands Report, there are a number of ways to implement this obligation: a) communication directly between the proper authority in the party of origin and the affected public, b) communication through an authority of the affected party, or c) a combination of the first two options.[35] While the first option is most direct and less subject to delay, the second option takes advantage of the fact the authority in the affected party is more familiar with existing mechanisms of eliciting public comment in that country. A combination of the two options could reap the benefits of both.

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33. See also Rio Declaration, Principle 10.
34. Espoo Convention, Art. 3(8).
35. The Netherlands Report, *supra,* note 18, p. 11, par. 42.

Similarly, under the Antarctic Protocol, the party conducting an EIA must submit a draft EIA to all other parties for review. Each party is then responsible for making the draft EIA publicly available for comment in their own country.[36] While not directly relating to EIA, the La Paz Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area provides that technical information is to be available to both parties, who then decide by mutual agreement whether to distribute it more broadly.[37]

Notice and Comment Procedures. The procedures for ensuring public participation under the treaties reviewed for this paper are largely left to the parties to determine. Nonetheless, several agreements provide important baseline criteria for implementing transboundary public participation. One of the most common criteria is one of non-discrimination, requiring parties to provide equal access to participate to the public of neighboring states. Under the Espoo Convention, the party of origin is required to grant to the public in affected areas of foreign jurisdictions the same level of participation as it grants to its own nationals.[38] In a slightly different context, the Convention on Transboundary Effects of Industrial Accidents also requires that foreign nationals be granted the same opportunity to participate as those of the party of origin and explicitly requires that foreign nationals be granted equal access to and treatment in relevant administrative and judicial proceedings.[39]

An important issue relevant to ensuring cross border public participation that is generally not addressed in the agreements reviewed concerns translations. To ensure meaningful public participation, information and materials must be made available in accessible form to the potentially affected public. The responsibility for providing translations when necessary could fall on either the party of origin or the affected party, or on both parties jointly.

Timing. The Antarctic Protocol is the only agreement that imposes specific time periods for public comment. The public of each Party must be given at least 90 days to comment on a draft EIA, and at least 60 days to review the final EIA before the activity can begin.[40] By contrast, the Espoo Convention provides only that the public must be given "reason-

36. Antarctic Protocol, Annex I, Art. 3(3).
37. La Paz Agreement, Art. 16.
38. Espoo Convention, Art. 2(6).
39. Convention on Transboundary Effects of Industrial Accidents, Art. 9(2) and (3).
40. Antarctic Protocol, Annex I, Art. 3(3) and 3(6) respectively.

able time" to comment.[41] Otherwise, provisions of national law relevant to the timing of public notice and comment will likely be determinative.

B. Procedures for Receiving Comments from Other Parties

The separate paper prepared on notification issues deals with the mechanisms created to ensure that the national governments whose territory may be affected by a proposed activity in another jurisdiction have the opportunity to comment or consult regarding the proposed activity. Depending on how the parties decide to implement the public participation requirements discussed above, these country-to-country notice and consultation provisions may also provide the mechanism for the transmittal of comments between the parties.

The coordinating bodies established under most international EIA agreements may also serve a vital information sharing role and serve as a communication conduit. The institutions and processes of the European Union, for example, allow the Member States ample opportunity to consult on both a formal and informal basis concerning their respective obligations under the EU Directive. Similarly, the Antarctic Protocol and the Treaty of which it forms a part create a standing Environmental Committee and an annual "consultative" meeting of the Parties.[42] The existing cross border cooperative arrangements already in existence (such as the New York State-Québec MOU, a similar cooperative effort between Washington State and British Columbia, and the BECC) provide a solid base for building border institutions and processes to facilitate party-to-party notice, comment, and consultation.

C. Evaluation and Integration of Comments

The Antarctic Protocol has the most specific requirements for incorporating comments from the public and other parties into the final EIA.[43] The final draft of a comprehensive assessment must include or summarize and address all such comments received. Moreover, the final EIA and notice of any decisions relating thereto must be made publicly available within each party's territory for 60 days before the proposed activity may commence.

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41. Espoo Convention, Art. 4.2.
42. Antarctic Protocol, Art. 1 and 10; Antarctic Treaty, Art. IX. The Antarctic Protocol is unique in that it requires the approval of draft EIAs at the annual meeting of the Parties following a review by the Committee for Environmental Protection. Antarctic Protocol, Annex I, Art. 3(5). This provision granting approval authority to the parties is unique in international EIA agreements and no doubt reflects the Antarctic's unique status as a global commons.
43. Antarctic Protocol, Annex I, Art. 3(6).

The Espoo Convention is less specific, but nevertheless mandates that all comments be considered in making a final decision on the proposed activity.[44] The Espoo Convention also requires that the final decision must be made available to affected parties as well as the reasons and considerations upon which the decision was made.[45] However, there is no requirement that the final decision (and relevant reasons and considerations) be made publicly available. By contrast, the EU Directive also requires that comments from the affected public and any other Member States be taken into consideration during the consent procedure.[46] But the final decision, including conditions thereto and the reasons and consideration on which it is based, must be made available to the concerned public and other Member States that are likely to be affected.[47]

44. Espoo Convention, Art. 6(1) (requiring that parties take "due account" of comments received).
45. Espoo Convention, Art. 6(2).
46. EU Directive, Art. 8.
47. EU Directive, Art. 9.

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IUCN Draft Covenant, Draft International Covenant on Environment and Development, Commission on Environmental Law of IUCN. The World Conservation Union in cooperation with International Council of Environmental Law, Environmental Policy and Law Paper No. 31, IUCN Environmental Law Centre, 1995.

I.L.C. Draft Articles, 1994: International Law Commission, Draft Articles on the Non-Navigational Uses of International Watercourses, as submitted to the Sixth Committee of the United Nations General Assembly, 1994.

La Paz Agreement: Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, 1983.

Mexico-US Marine Pollution Agreement: Agreement of Cooperation between the United States of America and the United Mexican States Regarding Pollution of the Marine Environment by Discharges of Hydrocarbons and other Hazardous Substances, 1980.

New York State-Québec MOU: Memorandum of Understanding on Environment Cooperation between the Government of the State of New York and the Gouvernement du Québec, May 10, 1993.

Overarching Principles: Transboundary Impact Assessment Overarching Principles, adopted by the Council of the Commission for Environmental Cooperation, October 1995.

Rio Declaration: Rio Declaration of the UN Conference on Environment and Development, Rio de Janeiro, 1992.

UNEP Goals and Principles of Environmental Impact Assessment, June 17, 1987.

United Nations Environment Programme (UNEP) Governing Council Decision: Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 1978.

US-Mexico Border Environment Cooperation Commission (BECC) Agreement: Agreement Between the Government of the United States of America and the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, 1993.

World Bank, Operational Directive 4.01: Environmental Assessment, October, 1991.

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ASSESSING TRANSBOUNDARY ENVIRONMENTAL IMPACTS UNDER ARTICLE 10(7)(a) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

Annex: Tables

This annex is a series of charts, which provide comparative excerpts from several bilateral and multilateral treaties, declarations or guidelines relating to those issues raised by Article 10(7)(a) of the North American Agreement on Environmental Cooperation (NAAEC). Article 10(7)(a) provides that the Council shall consider and develop recommendations with respect to:

> (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties[...].

The charts are organized according to the major issues raised by this section. Thus, Tables 1 – 3 address those threshold requirements in Section (a) that must be met to trigger the need to conduct an environ-

mental impact assessment (i.e. the screening requirements), including that there be (i) a "proposed project" (ii) "subject to decisions by a competent government authority" and that are (iii) "likely to cause significant adverse transboundary environmental impacts". Tables 4 and 5 relate to the process and contents of the actual assessment of environmental impacts, including what type of impacts must be assessed (Table 4) and who conducts the assessment (Table 5). Tables 6 and 7 relate to those issues raised by the requirement to evaluate fully comments provided by other Parties and persons of other Parties. These issues include: who should evaluate the comments and how should comments be integrated into the Final Assessment (Table 6) and how to solicit comments from "other Parties" and "persons of other Parties" (Table 7).

The instruments reviewed here include treaties that are fully in force and some that are not yet in force, as well as some that reflect "soft law" principles or concepts helpful in understanding the current international practice and law relating to transboundary environmental impact assessment. The instruments have been selected not because of their legal status, but because they offer illustrative examples for the Parties to consider in developing recommendations pursuant to Article 10(7).

The order of presentation of the instruments implies no preference or priority of the approach reflected in the agreements. Generally, North American treaties are presented first, followed by other treaties in which the Parties have a role, treaties not involving any of the Parties, and then soft law documents.

Not every instrument reviewed was relevant to every issue, and thus not every instrument is included in every Table. In addition, instruments that provide only general statements about the need to conduct an environmental impact assessment were typically not included in the chart. Only those instruments having language that could help in further defining or understanding the issue presented by the NAAEC were included.

TABLE 1

WHAT TYPE OF "PROJECTS" REQUIRE AN IMPACT ASSESSMENT?

AGREEMENT	DEFINITION OF PROJECT/ FORM OF DEFINITION	EXCLUSIONS	NOTES
Air Quality Accord, Canada-US	Not specified in agreement.	None specified.	Art. V indicates that the Parties shall conduct EIAs in accordance with domestic law. Each Party's domestic EIA law thus determines which projects trigger EIA requirements.
US-Mexico BECC Agreement	Applies to environmental infrastructure projects in the border area, defined as "a project that will prevent, control or reduce environmental pollutants or contaminants, improve the drinking water supply, or protect flora and fauna so as to improve human health, promote sustainable development, or contribute to a higher quality of life." Part I, Art. VII.	None specified.	Commission's purpose is to facilitate funding for environmental infrastructure projects in the border region.
Espoo Convention	- Appendix I lists specific categories of activities that require EIA under the Convention. - In addition, Appendix III enumerates criteria to be used to determine if a proposed activity not listed in Appendix I may have a significant adverse environmental impact and thus fall within the purview of the Convention.	For some of the listed activities, those that are smaller or for research purposes are excepted. (Appendices I and III)	In addition to requiring EIAs for projects, the Convention also urges the Parties to apply EIA principles to policies, plans, and programmes. Art. 2.7.

TABLE 1

WHAT TYPE OF "PROJECTS" REQUIRE AN IMPACT ASSESSMENT?

AGREEMENT	DEFINITION OF PROJECT/ FORM OF DEFINITION	EXCLUSIONS	NOTES
Antarctic Protocol	Covered activities include any activities pursuant to scientific research programmes, tourism, expeditions, and operation of the stations, or introduction of military personnel including associated logistic support activities. Changes to existing activities, whether they increase or decrease the intensity of the activity, must meet EIA requirements. Protocol Art. 8(2) and Treaty Art. VII(5).	Activities that are identified as having less than a minor or transitory impact are excluded from any assessment obligation. (Annex I, Art. 1(2)).	Some of the covered activities are defined by reference to the notification provision of the Antarctic Treaty (Art. VII.5).
EU Directive	Assessment required for all "public and private" projects listed in Annex I and for those projects listed in Annex II that are likely to have a significant impact (Art. 4).	Projects serving national defense purposes and those approved by a specific act of the national legislature are exempt. Art. 1.	In "exceptional cases" Member States may exempt a specific project from the Directive's requirements; however, in such cases the Member state must consider an alternative form of assessment and make information available to the concerned public and the Commission concerning the exemptions and the reasons for using it. Art. 2.3.
Convention on Transboundary Effects of Industrial Accidents	Hazardous activities that are reasonably capable of causing transboundary effects are covered Art. 4(2).		Hazardous activities are defined as those at which a hazardous substance is present in excess of amounts specified in Annex I, Art. 1(b).

TABLE 1

WHAT TYPE OF "PROJECTS" REQUIRE AN IMPACT ASSESSMENT?

AGREEMENT	DEFINITION OF PROJECT/ FORM OF DEFINITION	EXCLUSIONS	NOTES
IUCN Draft Covenant on Environment and Development	Proposed "activities" likely to have a significant environmental effect require an EIA. Art. 37. Activities include public or private activities requiring governmental approval, whether on the territory of a State or outside the territory. Implicit from Arts. 11(1) and 37.		"Activities" are essentially projects and do not include "policies, programmes, and plans," which are covered by another provision. Art. 37(5).
UNEP Guidelines on Shared Natural Resources	The guidelines apply to "activities" with respect to a shared natural resource that may significantly affect the environment of another state. "Activities" is not further defined. (Principle 4.)		
UNEP Principles on Environmental Impact Assessment	Assessments should be undertaken where the extent, nature, or location of a proposed activity is likely to significantly affect the environment. "Activity" is not further defined. (Principle 1.)		These principles are intended largely to provide guidance for domestic EIA regimes, but where transboundary effects are likely, a party should notify, inform, and consult with affected parties. (Principles 11 and 12.)

TABLE 2

WHAT TYPES OF "DECISIONS" BY WHICH "COMPETENT GOVERNMENT AUTHORITIES"

AGREEMENT	WHAT TYPE OF DECISION	COMPETENT GOVERNMENT AUTHORITY	NOTES
Air Quality Accord, Canada-US	Not specified in agreement.	Not specified in agreement.	- Art. V indicates that the Parties shall conduct EIAs in accordance with domestic law. - Art. XIV requires the Parties to seek the cooperation of provincial and state governments to implement the Accord.
Espoo Convention	Decisions to "undertake" or "authorize" projects that involve a listed activity must be preceded by an EIA. (Art. 2(3))	Convention defines "competent authority" 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." (Art. 1(ix))	
Antarctic Protocol	EIA must be implemented in the "planning processes leading to decisions" about any covered activity. (Art. 8(2))	The Protocol applies to all decisions about planned activities including activities by both governments and non-governmental entities. Application of the EIA requirement does not depend on who makes the decision. (Art. 8(2))	"Decision" is not defined or qualified in the Protocol.

TABLE 2

WHAT TYPES OF "DECISIONS" BY WHICH "COMPETENT GOVERNMENT AUTHORITIES"

AGREEMENT	WHAT TYPE OF DECISION	COMPETENT GOVERNMENT AUTHORITY	NOTES
EU Directive	Assessment is required before "consent" is given (Art. 2(1)); "development consent" is defined as the decision of the competent authority or authorities which entitles the developer of a project to proceed (Art. 1(2)).	The competent authority is that which the Member State designates as responsible for performing the duties under the Directive (Art. 1(3)).	
Convention on Transboundary Effects of Industrial Accidents	Parties are to adopt policies that require an analysis and evaluation of hazardous activities and their potential impacts on health and the environment before making decisions on siting. Art. 7, Annex V.	Not defined in the treaty.	The Convention does not require an EIA, but does require the adoption of certain policies similar to EIA for siting of hazardous activities.

TABLE 3

DEFINING "LIKELY TO CAUSE SIGNIFICANT ADVERSE EFFECTS"

AGREEMENT	DEFINING "LIKELY"	NOTES
Air Quality Accord, Canada-US	Not specified in agreement.	Under Art. V each Party must conduct EIAs in accordance with their own domestic law.
Antarctic Protocol	Not defined in Protocol.	The Protocol's three tier approach (Art. 8(1)) is different than that used in other agreements; however, "likelihood" of the magnitude of the impact is still a key to determining the level of analysis required (Annex I, Arts. 2 and 3).
EU Directive	Not defined in Directive; however, assessment of projects listed in Annex I are mandatory (Art. 4 (1)).	Other projects require an EIA if they are "likely to have significant effects on the environment." With respect to those listed in Annex II more particularly, they are subject to an EIA only "where Member States consider their characteristics so require" (Art. 4(2)).
Convention on Transboundary Effects of Industrial Accidents	Convention uses alternative wording, focusing on those activities that are "reasonably capable of causing transboundary effects." Art. 4(2).	"Reasonably capable" is not defined.
UNEP Guidelines on Shared Natural Resources	Guidelines use an alternative formulation, suggesting that EIAs be adopted for any activity "which may create a risk of "significantly affecting the environment" of other States sharing that resource." (Principle 4.)	

TABLE 3

DEFINING "LIKELY TO CAUSE SIGNIFICANT ADVERSE EFFECTS"

AGREEMENT	DEFINING "LIKELY"	NOTES
Air Quality Accord, Canada-US	Not specified in agreement.	Under Art. V each Party must conduct EIAs in accordance with their own domestic law.
Espoo Convention	Criteria in Appendix III include size, location, and effects of proposed activities.	Criteria are to be used by both Party of origin and Parties affected to determine if Convention's EIA requirements are triggered (Art. 2(5)). Failing agreement among the concerned Parties, the Convention provides for a determination of significance to be made by panel of three experts pursuant to Appendix IV (Art. 3(7)).
Antarctic Protocol	The Protocol adopts a slightly different approach by dividing the possible impacts into three tiers and requiring different levels of assessment for each. The three tiers are 1) less than a minor or transitory impact; 2) a minor or transitory impact; and 3) more than a minor or transitory impact. (Art. 8 and Annex I, Arts. 1 to 3) The Protocol does not provide detailed guidance for determining the application of the three tiers.	Only the latter two categories require detailed environmental assessments, and only those activities that are likely to have more than a minor or transitory impact are subject to the comprehensive evaluation procedures of Annex I to the Protocol.
EU Directive	Not defined in Directive; however, assessment of projects listed in Annex I are mandatory. (Art. 4(1))	Other projects, including those listed in Annex II, are subject to "likely to have significant effects on the environment" language. (Art. 2(1))

TABLE 3

DEFINING "LIKELY TO CAUSE SIGNIFICANT ADVERSE EFFECTS"

AGREEMENT	DEFINING "LIKELY"	NOTES
UNEP Guidelines on Shared Natural Resources	"Significantly affect" refers to "any appreciable effects on a shared natural resource and excludes "*de minimis*" effects." (Definition section)	

TABLE 4

ASSESSING WHAT TYPES OF IMPACTS

AGREEMENT	TYPES OF IMPACTS COVERED	NOTES
Air Quality Accord, Canada-US	Not specified in agreement.	Art. V indicates that the Parties shall conduct EIAs in accord with domestic law.
Bay of Fundy Protocol, Draft	Scope includes both environmental and socio-economic effects within the coastal area of the Gulf of Maine.	The Protocol takes an ecosystem approach to the Bay of Fundy basin. State, provincial, and regional national authorities participate in the Bay of Fundy Council process. The draft protocol has not yet been formally endorsed.
US-Mexico BECC Agreement	In order to certify a border area project for funding, under Part I, Art. II, sec. 3, the Commission must examine an environmental assessment that includes "environmental benefits, environmental risks, costs, as well as available alternatives and the environmental standards and objectives of the affected area." (subsec. (c)(1))	Further definition of impacts is not spelled out in the BECC Agreement.
La Paz Agreement, US-Mexico	Potentially significant impacts. Art. 7.	Art. 7 is a general statement, depending on each country's laws for implementation.

TABLE 4

ASSESSING WHAT TYPES OF IMPACTS

AGREEMENT	TYPES OF IMPACTS COVERED	NOTES
Espoo Convention	The Convention defines "impact" to include "any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors." (Art. 1(vii))	
Antarctic Protocol	The assessment must include, *inter alia*, direct, indirect, and cumulative effects of the project, mitigation measures, and impacts on scientific and other existing activities in the area. Annex I, Art. 3.2.	The particular status of the Antarctic obviates the need for assessment of socio-economic impacts.
EU Directive	The assessment must address the direct and indirect effects on 1) human beings, fauna and flora, 2) soil, water, air, climate, and the landscape, 3) the interaction between the above factors, and 4) material assets and the cultural heritage. (Art. 3.)	
Convention on Transboundary Effects of Industrial Accidents	Defines "effects" as "any direct or indirect, immediate or delayed adverse consequences caused by an industrial accident on, *inter alia*: (i) human beings, flora and fauna; (ii) soil, water, air and landscape; (iii) the interaction between the factors in (i) and (ii); and (iv) material assets and cultural heritage, including historical monuments." Art. 1(c).	This definition mirrors that in the EU Directive.

TABLE 4

ASSESSING WHAT TYPES OF IMPACTS

AGREEMENT	TYPES OF IMPACTS COVERED	NOTES
Convention on Transboundary Watercourses	Transboundary impact means "any significant adverse transboundary effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity. [Such effects] include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors." Art. 1(2).	The Convention provides for the development of bilateral and multilateral agencies or institutions that can, among other things, participate in the implementation of environmental impact assessments relating to transboundary waters. Art. 9(2)(j).
UNEP Principles on Environmental Impact Assessment	EIA should include, at a minimum, "an assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short-term and long-term effects." (Principle 4(d))	
IUCN Draft Covenant on Environment and Development	Assessment must cover "cumulative, long-term, indirect, long-distance, and transboundary effects." Art. 37(2)(a).	

TABLE 5

WHO ASSESSES THE IMPACT AND BY WHAT PROCESS?

AGREEMENT	WHICH PARTY CONDUCTS EIA	WHAT PROCESS USED	NOTES
Air Quality Accord, Canada-US	Each Party is responsible for assessing projects within its jurisdiction. (Art. V.1)	Laws of jurisdiction in which project is sited control EIA process. (Art. V.1)	"Party" is defined as being the national governments. (Preamble)
US-Mexico BECC Agreement	Project sponsor is responsible for making submission to the Commission (i.e.: states, localities and private entities and public investors) (Part I, Art. II, sec. 3).	Process is not specified in Agreement.	The unstated implication is that the processes of the jurisdiction in which the project is to be sited would govern the preparation of the environmental assessment.
La Paz Agreement, US-Mexico	Each party is responsible for costs of implementing the Agreement, unless otherwise agreed (Art. 14).	Each party uses its own national laws, regulations and policies (Art. 7).	
Espoo Convention	Party of origin is required to conduct EIA. (Art. 2(3))	Party of origin is to use own EIA process which must meet standards set in Convention. (Art. 2)	The Convention provides that Parties may undertake joint EIAs. (Appendix VI, Arts. 2(1) and 8)

TABLE 5

WHO ASSESSES THE IMPACT AND BY WHAT PROCESS?

AGREEMENT	WHICH PARTY CONDUCTS EIA	WHAT PROCESS USED	NOTES
Antarctic Protocol	Each Party is responsible for ensuring that EIA procedures are applied in the planning process leading to decisions about activities undertaken in the Antarctic Treaty area. (Art. 8(2))	Each Party must use "appropriate national procedures"; however, Annex I to the Protocol specifies a number of necessary requirements. (Annex I, Art. 1(1))	For joint activities, the Parties involved shall designate one Party to coordinate EIA implementation. (Art. 8(4))
EU Directive	Each Member State shall ensure EIAs are conducted. (Arts. 2(1) and 5(1))	Each Member State applies own EIA procedures, coupled with minimum requirements set forth in the Directive (Arts. 2, 5, 12 and 13).	Directive intended to strengthen and harmonize Member State's own EIA regimes.
IUCN Draft Convention of Environment and Development	A Party under whose jurisdiction a proposed activity will be conducted is responsible for the EIA. (Arts. 33 and 37).		

TABLE 6

THE ROLE OF THE PUBLIC

AGREEMENT	ROLE OF THE PUBLIC	NOTES
Air Quality Accord, Canada-US	Art. V indicates that the Parties shall conduct EIAs in accord with domestic law.	The public is involved at the more general level of ensuring the proper implementation of the Accord via consultation and comment processes (Arts. IX(1) and XIV(3))
Bay of Fundy Protocol, Draft	Calls for development of mechanisms to ensure public involvement in early planning stages of the assessment process.	
US-Mexico BECC Agreement	The Commission must establish procedures to provide public access to documentary information on proposed projects and to provide public with "reasonable opportunity to comment." Part I, Art. II, sec. 4.	
La Paz Agreement, US-Mexico	Technical information under treaty given to Parties; up to the Parties, by mutual agreement, to decide whether to give it to public (Art. 16).	
Espoo Convention	The concerned parties are jointly responsible for ensuring that the public in areas likely to be affected are informed of and have the opportunity to comment or object to the proposed activity and to review and comment within a "reasonable time" on the documentation required by the Convention. Arts. 2(6), 3(8) and 4(2).	

TABLE 6

THE ROLE OF THE PUBLIC

AGREEMENT	ROLE OF THE PUBLIC	NOTES
Antarctic Protocol	All parties must provide 90-day period for public comment. Party of origin must make draft assessment available to all Parties, who, in turn, must make it publicly available. Final draft must address all comments and be made publicly available by all Parties 60 days prior to commencement of activity. (Annex I, Arts. 3(3) and 3(6))	
EU Directive	The Directive requires that information be made available to the public and that the "public concerned" be given the opportunity to comment. Art. 6(2).	Detailed arrangements, including determining who is the "public concerned," for public participation are left to the Member States (Art. 6(3)). It is unclear from the Directive whether citizens of other countries have the right to participate directly.
Convention on Transboundary Effects of Industrial Accidents	The Parties have joint obligation to provide information to the public in areas potentially affected by an industrial accident. Party of Origin must grant to potentially affected public of other countries the same opportunity to participate as it does to its own public, including access to administrative and judicial proceedings. Art. 9.	Annex III provides notification and consultation procedures for the parties to follow. Although EIAs per se are not required under the Convention, Annex V lists certain information about potential impacts of industrial accidents that must be provided to the public.
IUCN Draft Convention of Environment and Development	The Draft Convention generally gives all persons, without being required to prove an interest, the right to information on activities likely to adversely affect the environment and the right to participate in the decision-making process. Art. 12(3).	Article 33(c) requires that affected persons in other States be granted access to and due process in all administrative and judicial proceedings in the country of origin.

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MITIGATION OF TRANSBOUNDARY ENVIRONMENTAL IMPACTS UNDER ARTICLE 10(7)(c) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

INTRODUCTION

Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC) requires the Council to consider and develop recommendations regarding the transboundary environmental impact assessment (TEIA) of proposed projects. This discussion paper considers the issues relating to the "mitigation of the potential adverse effects of such projects," as per Art. 10(7)(c) of the NAAEC.

The paper reviews, primarily, bilateral and multilateral agreements that provide relevant examples of the application of mitigation objectives and strategies for the work of the Council in this area. In addition, some recent publications are considered for their insights into the progressive development of international instruments in this area.

This paper starts from the view that Art. 10(7)(c) concerns mitigation measures in a transboundary environmental impact assessment (TEIA) context. This is indicated in the language of mitigating "potential" adverse effects, as well as the general context of the subparagraph. This paper also takes into account that reviews of the issues relating to paragraphs 10(7)(a) and (b) have previously been completed (TEIA/96.02.05/S/1 and /3).

This paper discusses only the issues related to "mitigation" in the TEIA context. These include:

- the general requirement to mitigate in a TEIA context;
- prioritizing mitigation measures; and
- verification of the mitigation measures and their effectiveness.

1. The general requirement to mitigate in a TEIA context

The language of Art. 10(7)(c) itself tends towards the notion of an obligation to mitigate potential transboundary environmental impacts of a project in development. This is drawn from the chapeau of Art. 10(7), as well as the broader context of the NAAEC as a whole. This broader context includes, *inter alia*, the preambular reference to the Stockholm Declaration of 1972 and the Rio Declaration of 1992. Both of these Declarations recognize the sovereign right of States to develop their own resources according to their environmental policies, with the Rio Declaration adding "developmental" policies as well. In both cases, however, this right is balanced with the principle of international environmental law that states have the "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[1]

Seen within this context, the role of a TEIA process, it may be suggested, is to allow the sovereign rights to exploit ones' resources to be exercised in a manner that takes full cognizance of the responsibility that is attached to the right. Indeed, analysts such as Professors Sands and Robinson have noted the close relationship between Principle 21 of

1. This same language appears in both Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. This is widely considered to reflect a principle of customary international law today.

Stockholm (and Principle 2 of Rio) with the obligation to prevent, reduce, limit, or mitigate transboundary environmental harm.[2]

Other elements of the NAAEC are relevant to mitigation in a TEIA context. These include the objectives of promoting sustainable development based on cooperation and mutually supportive environmental and economic policies (Art. 1(b)), increasing cooperation between the Parties to better conserve, protect, and enhance the environment (Art. 1(c)), and promoting pollution prevention policies and practices (Art. 1(j)).

At the multilateral level, the general duty to mitigate is recognized in several existing agreements, most notably since 1990. Specific details on its application are only found, however, in regional agreements.

The UNEP Goals and Principles of Impact Assessment (1987) include only a general reference to identifying and describing the measures available to mitigate adverse impacts.

The Climate Change Convention of 1992 calls for the parties to take precautionary measures to anticipate, prevent, or minimize the causes of climate change and limit its adverse effects (Art. 3.3). The operative commitments in relation to environmental assessment remain very general, however, and are addressed more directly as measures taken to mitigate or adapt to climate change, rather than proposed projects that might contribute to climate change.

The Convention on Biological Diversity contains a fairly weak form of obligation in this area : it requires parties to introduce appropriate procedures to assess the impacts of proposed projects on biological diversity with a view to avoiding or minimizing such effects; it further requires the parties to promote, on the basis of reciprocity, bilateral or regional processes for the transboundary impacts (Art. 14(1)).

The IUCN Draft International Covenant on Environment and Development, while not a binding international agreement, can be seen as reflective of the general trends in international environmental law.[3] It

2. Philippe Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles", pp. 53-66 in Winfried Lang, ed., *Sustainable Development and International Law*, Graham & Trotman/Martinus Nijhoff, London, 1995; and Nicholas Robinson, "International Trends in Environmental Impact Assessment", 19 *Boston College Environmental Affairs Law Review* 591-621 (1992).
3. The Draft Covenant was prepared over several years by the IUCN – World Conservation Union. Its members include both governmental and non-governmental lawyers,

identifies environmental impact assessment as a primary requirement and basic tool to prevent transboundary harm from occurring (Art. 33). Art. 37.3 of the Draft requires that measures to avert or minimize such harm be included as part of the TEIA process.

The International Law Commission has also enunciated this general duty to mitigate in a shared watercourse context.[4] This duty is to be exercised by states sharing a watercourse, either "individually or jointly," as set out in its Draft Articles on the Law of the Non-Navigational Uses of International Watercourses (ILC Draft Articles, Art. 24).

Mitigation is treated in more detail at the regional level. Two agreements in particular show this development: one is the Espoo Convention of 1991, to which the US and Canada are signatories,[5] and the Antarctic Treaty Protocol of 1991 which includes a detailed annex on environmental assessment (Annex I).

The Espoo Convention is directly concerned with environmental assessment in a transboundary context, and is the most developed international agreement on this issue. Art. 5 of Espoo calls for consultations between the parties affected by a proposed project. These consultations are to include possible alternatives to the project, including a no-action alternative, and possible measures to mitigate and monitor the impacts. This general duty in a consultation context is further supported by a requirement to consult on other forms of possible mutual assistance in reducing any transboundary impacts of a proposed project. The exchange of information obligations in the Espoo agreement also support this general requirement, and the cooperative approach to minimizing and mitigating potential impacts, set out in Art. 8 and Appendix VI.

The obligations of Espoo are themselves embellished by two agreements concluded in 1992 by the United Nations Economic Commission for Europe (UNECE). These are the UNECE Convention on Transboundary Watercourses and the UNECE Convention on Industrial Accidents. Each provides additional specific details for preventing and mitigating transboundary environmental impacts within their sphere

much as the broader membership of the IUCN includes both governmental and non-governmental agencies. The Draft Covenant was completed in 1995.

4. Other work in progress in the International Law Commission, for example on the consequences of acts not prohibited by international law and on state responsibility, also support the duty to mitigate through prevention and other means. These works have not been concluded as yet, and are not referenced here.
5. The Espoo Convention is not yet in force. Neither Canada nor the US has ratified it to date. See Art. 5 and Appendix II.

of coverage. The Convention on Industrial Accidents, for example, focuses on siting and emergency preparedness as key issues for the prevention of transboundary harm from the hazardous activities that are included within its scope (Arts. 7, 8, and Annex VI, VII).[6] Art. 6 and Annex IV of the agreement concern specific accident prevention measures that would be appropriate for these activities, and their application in a transboundary context. Many of these measures would also fit into the context of monitoring and verification, as used below. This agreement applies for both existing and proposed activities, with Art. 4.4 expressly requiring TEIAs for hazardous activities conducted pursuant to the Espoo Convention to also meet its own requirements.

The UNECE Convention on Transboundary Watercourses is dedicated to the prevention of environmental impacts in that context. It, too, places its emphasis expressly on the prevention of pollution, including through bilateral and multilateral agreements to implement effective TEIA procedures (Art. 9(2)(j)).

The Antarctic Treaty Protocol, with its Annex on environmental assessment, provides a very developed framework for environmental assessment. It directly articulates the duty to mitigate through preventive steps as a first choice, and through other steps such as the subsequent review of the projects undertaken. The details on these issues are considered in the two sections that follow. Although the Protocol is concerned with the unique environmental and jurisdictional circumstances of the Antarctic region, its provisions extend to activities and impacts both within and outside the region. This, combined with its scope and completeness, make the protocol a useful precedent to consider.

Annex II to the La Paz Agreement, concerning environmental incidents in the US-Mexico border area, requires the joint response team established by the Agreement to recommend the measures necessary to mitigate the adverse effects of such an incident (Appendix II). Annex III to the La Paz Agreement, regarding the Transboundary Shipments of Hazardous Wastes, also contains a similar general commitment (Art. X.1).

6. These Annexes are fairly lengthy. They are not reprinted in the attached charts both for this reason and their limited application to hazardous activities as defined by the Convention. Nonetheless, they can provide valuable detail in terms of the types of measures that can be considered in a TEIA process, and adopted and monitored to help prevent accidents with local and transboundary impacts. Technical working groups may, therefore, wish to make reference to them.

The Air Quality Accord between Canada and the United States calls for the parties to include consideration of appropriate mitigation measures in environmental assessments of transboundary impacts under the Accord. Paragraph V.4 ensures that such mitigation measures will be the subject of consultations between the parties. Paragraph V.5 goes on to require the parties to take measures to avoid or mitigate the potential risk posed by actions, activities, or projects likely to cause significant transboundary air pollution.

The New York State-Québec MOU requires giving prior notice and consultation among the two parties concerning appropriate mitigation measures as a statement of its general obligation in this area (sec. 5).

The Cuixmala Draft Model Treaty for the Protection of the Environment and the Natural Resources of North America is a private initiative of Dr. Alberto Székely, J. Alan Beesley, and Albert E. Utton, through the International Transboundary Resources Centre, University of New Mexico Law School in 1995. It is not a governmental document, and is referenced for its contribution to the analysis of international law in the areas relevant to this paper. However, its contemporaneous nature, along with the eminence of the authors, make it an important contribution in this respect. The Cuixmala Draft Model Treaty also expressly supports the duty to mitigate.

The structure of some international environmental agreements draw linkages between undertaking mitigation measures and accessing financial and technological support for doing so. This is seen, for example, in the obligations for developing countries in the Climate Change and Biodiversity Conventions, and the related developments in relation to the Global Environment Facility of the World Bank. However, the agreements that adopt this approach do not appear to directly link access to financial and technological support to the mitigation of specific project-related impacts in an environmental assessment context. Still, a general notion of mutual assistance in taking mitigation measures can be seen in some cases, as was already seen in the Espoo Convention.

2. Prioritizing mitigation measures

In prioritizing mitigation measures, notional choices must be made between targeting the source of the environmental impacts, the impacts themselves, or a form of compensation for the impacts that may be equitable in the circumstances. Within this broad context, possible approaches for mitigation include:

- design and operational/process changes to avoid or address a specific finding of a significant impact based on pollution prevention approaches;
- application of cleaner production technologies;
- alternative locations or projects;
- pollution control technologies;
- reclamation or preservation of alternative environmental sites to balance losses in any given area of impact;
- financial or other compensation for losses of private environmental property, benefits, or amenities (this could include economic losses associated with the damage foreseen); and
- financial or other compensation for losses of public environmental property, benefits, or amenities (this could include economic losses associated with the damage foreseen).

The objective of promoting pollution prevention found in Art.1 of the NAAEC could be read to highlight the priority to be given to preventing environmental damage at the source. In the present context, this would imply that mitigation measures should first be considered at the source of the potential impacts, through design or process changes, location changes, or alternatives to the project. This could include a "do nothing" option.

The priority for prevention at source is expressly noted in Art. 26 of the Cuixmala Draft Model Treaty prepared by Székely, Beesley and Utton. They state that priority should be given to "prevention obligations, rather than merely relying on remedies or compensating for environmental harm." This same notion is also expressed in Art. 6 of the IUCN Draft International Covenant on Environment and Development, which states that environmental protection "is best achieved by preventing environmental harm rather than by attempting to remedy or compensate for such harm."

Prevention is also recognized as necessary in a recent empirical study by Johnstone, based on an analysis of environmental agreements in the North American context. He draws the conclusion that it is important to distinguish between cooperative agreements that constitute *ex post* attempts to clean up the environment and those that constitute *ex ante* attempts to prevent degradation by attaching an appropriate price

to the environmental dimensions of a project. It is the latter type that relate directly to the means by which pollution is addressed in the emitting country, and are seen as more effective.[7]

The few international instruments that actually address the issue also recognize this priority. As importantly, no agreements appear to adopt a different hierarchy.

The Espoo Convention sets out in several places the need for prevention, including through an assessment of alternatives to the project, as the basis for approaching a proposal, with mitigation measures being designed to keep adverse effects to a minimum rather than compensate for them. Most directly, Art. 2.1 requires the Parties to take all appropriate measures to prevent, reduce and control significant adverse impacts of proposed projects. No reference to compensation is found in the Espoo Convention. Once again, the Conventions on Transboundary Watercourses and on Industrial Accidents adopt this same approach in their more sectoral contexts.

The Antarctic Treaty Protocol sets a general requirement to limit impacts of activities in the Antarctic area as a priority in planning activities or operations (Art. 3(2)). This is made applicable to the Annex dealing with environmental assessment, and is further supplemented with the specific attribution to the Environmental Committee set up by the Protocol of a role in advising on means of minimizing or mitigating environmental impacts of activities in the area (Art. 12(1)(e)).

The EU Directive on Environmental Assessment sets out a notional order of mitigation as measures envisaged to avoid, reduce, and, if possible, remedy significant adverse effects. However, as this order is in the context of a description of the information required of a project proponent, it does not prescribe a priority for action (Art. 5). Similarly, a subsequent provision requires a description of the measures proposed to prevent, reduce, and, where possible, offset any significant adverse effects, but does not mandate this as a prioritized order (Annex III, Art. 5).

The draft Bay of Fundy Protocol notes that environmental assessment processes must be applied early in the decision-making process so that adjustments to a proposal, or the consideration of alternatives, can

7. Nick Johnstone, "International Trade, Transfrontier Pollution, and Environmental Cooperation: A Case Study of the Mexican-American Border Region", 35 *Natural Resources Journal* 33-62 (1995), at p. 61.

be undertaken to prevent or minimize environmental impacts prior to any decision being made. Thus, prevention at source is again highlighted.

The Accord sur l'Escaut focuses on the four principles of precaution, prevention, reduction at source, and "polluter pays" as the foundation of its principles of cooperation (Art. 3.2). This also supports the general priority of mitigation through prevention.

Compensation for environmental damages implies a recognition that certain impacts will not be mitigated. As an environmental matter, this is the least favorable approach to addressing potential impacts. However, compensation may be the only alternative where the development objectives of a project override the environmental losses. In this case, compensation may be seen as an application of the polluter-pays principle, and a means of internalizing some of the environmental costs of a project. No agreements appear to reflect this approach.

3. Monitoring of the mitigation measures and their effectiveness

Many international agreements include references to monitoring the environment in a general context. While such agreements can have a relevance to specific project-related circumstances, they are not considered here. Rather, only such project-related obligations are noted.

The IUCN Draft Covenant includes a specific call for post-project periodic reviews to determine whether activities are carried out in compliance with any required measures, and whether these measures have been effective. (Art. 37.4) The IUCN commentary to this article notes two different purposes here. The first is to follow-up with enforcement activities to ensure compliance. The second is seen as more forward-looking, designed to instruct future decision-makers which mitigation measures are likely to be most effective.

The Espoo Convention employs the concept of post-project analysis to refer to the post-authorization phase of a project in a TEIA context. Art. 7 sets out a general requirement for a cooperative process to review the actual impacts of a project. The agreement of the parties is foreseen, with each case reflecting the specific projected impacts of the project in question. Art. 7 further provides that where a significant impact occurs or may occur, the parties should consult on additional measures needed to reduce or eliminate the impact. Briefly put, Art. 7 sets out a supplementary obligation on the Parties in the post-project phase.

Art. 7 of the Espoo Convention is supplemented with prescribed objectives for the post-project analysis phase in Appendix V. These include monitoring compliance with permit conditions, reviewing the actual impacts to ensure proper management and coping with uncertainties, and verifying past predictions in order to transfer the experience to future projects.[8]

The UNECE Convention on Transboundary Watercourses also places a strong emphasis on monitoring and verification. Art. 11.3 calls for joint or coordinated assessments, at regular intervals, of the effectiveness of measures taken to prevent, control, and reduce transboundary impacts. The results of these assessments are to be made public. This public component is further supported and detailed by Art. 16 of the Agreement.

The emergency preparedness provisions of the UNECE Convention on Industrial Accidents provide additional detail on the types of follow-up measures that could be considered for hazardous activities that might cause a transboundary impact in the event of an incident. These measures work, in many ways, to address and reduce the risk of such an incident occurring. This Convention also notes the need for, where appropriate, joint contingency planning to reduce the risks of widespread harm in the event of an incident (Art. 8).

Annex III to the La Paz Agreement requires the parties to work together to enforce the obligations and national laws on the transboundary movement of hazardous wastes or other substances. It further requires parties to ensure legal action is taken and that mitigation measures, in the form of a return as far as possible to the *status quo ante* or compensation, are taken in the event of damage resulting from any illegal movements. These provisions are at least partly analogous to a post-project obligation of verification and follow-up action (Arts. XII, XIV).

The Antarctic Treaty Protocol requires "regular and effective" monitoring to assess the impacts of activities in the region, including the verification of predicted impacts of ongoing activities, and to facilitate the early detection of unforeseen impacts (Art. 3(2)(d) and (e)). Annex I on the environmental assessment process further develops the commitment to monitoring the implementation of projects following an EA pro-

8. A Canadian paper on implementing the Espoo Convention re-iterates the cooperative approach to post-project analysis set out in the Convention, as well as the objectives of this phase. Federal Environmental Assessment Review Office (now Canadian Environmental Assessment Agency), "Implementing the Convention on Environmental Impact Assessment in a Transboundary Context: Proposed Procedures", March 16, 1994.

cess and this is made clear on several occasions. Art. 3(2)(g) requires an early identification of the measures to be taken for this purpose. Art. 5 is dedicated to the monitoring issue, requiring procedures to be put in place to assess the impacts of projects, including key environmental indicators. These procedures must be designed to provide a "regular and verifiable record of the impacts."

The Antarctic Treaty Protocol associates some precise objectives to this monitoring procedure. These are to enable an assessment of the extent to which the impacts are consistent with the Protocol, which itself has several environmental performance standards; to provide information useful to minimizing or mitigating impacts; and to assess the need to suspend, cancel or modify an activity (Art. 5(2)). Annual release of any "significant" information obtained by the monitoring measures, along with any resulting actions, is required by Art. 6 of Annex I, as well as the public availability of this information.

The Antarctic Treaty Protocol operates in a unique environmental and organizational context, including the absence of traditional sovereign rights over the area. This both allows and requires more internationalization of procedures than is evident in other agreements. Despite these circumstances, the nature, objectives, and procedures associated with the monitoring requirements can be considered as a relevant model for North America.

The Cuixmala Draft Model Treaty also refers to the need for states to periodically review whether the approved projects are carried out in accordance with any conditions set out with the approval, and the effectiveness of the prescribed mitigation measures. It also argues that the results of these reviews should be made public. The Draft goes on to suggest strong enforcement measures be linked to failures either to comply or in the effectiveness of the measures taken (Art. 31).

A related issue goes beyond national review of compliance with the conditions and effectiveness of the mitigation measures to consider the role of judicial oversight. The EU Directive, for example, fits into the context of the full EU treaty system, in particular the Treaty of Rome. Arts. 155 and 169 provide a basis for action by the European Commission and for proceedings before the European Court of Justice. Much of this process is based on citizen complaints.[9] No other process reviewed established this type of judicial review system.

9. For a description of the process see Paul McHugh, "The European Community Directive – An Alternative Environmental Impact Assessment Procedure?", 34 *Natural Resources Journal* 589-625 (1994), at 615 *et seq.* See also Philippe Sands, *Principles of International Environmental Law I*, Manchester, Manchester University Press, 1995, at 583-588.

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MITIGATION OF TRANSBOUNDARY ENVIRONMENTAL IMPACTS UNDER ARTICLE 10(7)(c) OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

Annex: Tables

TABLE 1

GENERAL REQUIREMENT TO MITIGATE

AGREEMENT	GENERAL OBLIGATION	NOTES
Espoo Convention, 1991	Art. 2.1: "The parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities." Art. 5 requires consultations between the parties on (a) possible alternatives; (b) "other forms of possible mutual assistance in reducing any significant adverse transboundary impact of the proposed activity."	This sets a general context for the obligations and cooperative focus of the agreement, which is solely dedicated to ensuring TEIA processes between the parties. It also indicates the priority for actions in this context. This article further develops the cooperative nature of the process.
Air Quality Accord, 1991	Art. V.1: "Each Party shall, as appropriate and as required by its laws, regulations and policies, assess those proposed actions, activities and projects ... including consideration of appropriate mitigation measures." Art. V.4: "Consultations...shall include consideration of appropriate mitigation measures." Art. V.5: "Each Party shall, as appropriate, take measures to avoid or mitigate the potential risk..."	The Accord deals with air pollution, actual and potential, between Canada and the US. By placing the obligation to mitigate within the consultative process, it ensures a right of input from the potentially impacted state.
Annex II to the La Paz Agreement, 1985	Appendix II requires the joint response team composed of representatives of the two parties to recommend the mitigation measures needed following an incident. (Art. 2.6 (e))	The agreement addresses hazardous substances incidents in the border area.

TABLE 1

GENERAL REQUIREMENT TO MITIGATE

AGREEMENT	GENERAL OBLIGATION	NOTES
New York-Québec MOU, 1993	Sec. 5: The Parties further agree to give prior notice and to consult one another before any major action is carried out, ... appropriate mitigation measures must be indicated.	The MOU does not specify any further details. Rather, its focus is on promoting cooperative actions.
IUCN Draft Covenant, 1995	Art. 37: "(1) Parties shall establish or strengthen environmental impact assessment procedures to ensure that all activities which are likely to have a significant adverse effect on the environment are evaluated before approval. (2) The assessment shall include evaluation of ... (c) measures to avert or minimize the potential adverse effects."	This is a non-governmental document, but is widely seen as indicative of the current trends in international environmental law.
UNEP Goals and Principles, 1987	Principle 4(e): "... an identification and description of measures available to mitigate adverse environmental impacts of the proposed activity and alternatives, and an assessment of those measures."	This is in the context of what an EIA should include.
IUCN Draft Covenant, 1995	Art. 6: "Protection of the environment is best achieved by preventing environmental harm rather than by attempting to remedy or compensate for such harm."	This general statement provides a clear setting for the balance of the IUCN draft articles. It can be seen as both preambular and substantive in nature, though it is clearly used as a substantive element in the IUCN text.

TABLE 1

GENERAL REQUIREMENT TO MITIGATE

AGREEMENT	GENERAL OBLIGATION	NOTES
UNEP Goals and Principles, 1987	Principle 9: "The decision [should] ... include the provisions, if any, to prevent, reduce or mitigate damage to the environment."	This is in the context of what the decision on any proposed activity subject to an EIA should include. The non-mandatory language also reflects the soft-law nature of the document.

TABLE 2

MITIGATING AT SOURCE, AT THE IMPACTS, AND COMPENSATION

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
Espoo Convention, 1991	Art. 2.1: "The parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities." Appendix II requires certain information in the EIA documentation: par. (e): "A description of mitigation measures to keep adverse environmental impact to a minimum."	This sets out a general priority for the Convention, though it is not articulated as a mandatory prioritization. There is no mention in the Convention of compensation as an approach.
UNECE Transboundary Watercourses, 1992	Art. 2.3: "Measures for the prevention, control and reduction of water pollution shall be taken, where possible, at source."	This sets out a clear priority for actions. This is further supported by a repetition of the precautionary principle later in the article, as well as the polluter pays principle.
UNECE Industrial Accidents, 1992	Art. 7: Sets out an obligation for risk evaluation in the siting of new hazardous activities, in order to reduce the risk of transboundary harm. Art. 8: This article is on emergency preparedness as a basis for risk reduction planning and management, with an emphasis on cooperative actions. Art. 8.3 references expressly "off-site contingency plans covering measures to be taken within its territory to prevent and minimize transboundary effects.... Where appropriate, joint off-site contingency plans shall be drawn up in order to facilitate the adoption of adequate response measures."	These articles are accompanied by annexes which include detail beyond what can be usefully accommodated in these charts. The emphasis on risk assessment, siting, and emergency preparedness is specific to the defined hazardous activities, but can be considered for possible wider applications.

TABLE 2

MITIGATING AT SOURCE, AT THE IMPACTS, AND COMPENSATION

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
Antarctic Treaty Protocol, 1991	Art. 3(2)(a): Activities in the area "shall be planned and conducted so as to limit adverse impacts on the Antarctic environment and dependent and associated ecosystems."	The Protocol is applicable only to activities planned or conducted in or near the Antarctic area. Art. 3(2)(a) sets a general obligation to limit impacts as a first objective.
EU Directive, 1985	Art. 5: "...a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects." Annex III, Art. 5: "A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment."	The listing is descriptive of the information to be provided by a project proponent, not prescriptive of priorities.
Bay of Fundy Protocol, Draft, 1994	"... to permit adjustments to a proposal/consideration of alternatives to minimize impact, prior to any decision being made to authorize a proposed activity."	This sets a priority on preventive mitigative steps at source, while the Draft as a whole also notes the need for adaptive measures to be considered in the long-term life of the ecosystem of the region.
Accord sur l'Escaut, 1994	Art. 3(2): Sets out four primary principles of precaution, prevention, reduction at source, and polluter pays as the basis for its obligations on cooperation.	These support the priority of mitigation at source prior to recourse to other approaches.

TABLE 3

MONITORING OF THE MITIGATION MEASURES AND THEIR EFFECTS

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
Espoo Convention, 1991	Art. 7: "Post-project analysis": (1) "The concerned Parties, at the request of any such Party, shall determine whether, and if so to what extent, a post-project analysis shall be carried out, taking into account the likely significant adverse transboundary impact of the activity for which an [EIA] has been undertaken ... Any post-project analysis undertaken shall include, in particular, the surveillance of the activity and the determination of any adverse transboundary impact. Such surveillance and determination may be undertaken with a view to achieving the objectives listed in Appendix V.	This paragraph highlight the cooperative nature of the post-project phase under the Convention. Appendix V notes three objectives specifically: "(a) Monitoring compliance with the conditions as set out in the authorization or approval ... and the effectiveness of mitigation measures; (b) Review of an impact for proper management and in order to cope with uncertainties; (c) Verification of past predictions in order to transfer experience to future activities of the same type."
	(2) "When, as a result of post-project analysis, the Party of origin or the affected Party has reasonable grounds for concluding that there is a significant adverse transboundary impact or factors have been discovered which may result in such an impact, it shall immediately inform the other Party. The concerned Parties shall then consult on necessary measures to reduce or eliminate the impact."	This paragraph sets out a continuing obligation on the Parties to address the situation where an unanticipated impact occurs or may occur, and is found in the post-project phase.

TABLE 3

MONITORING OF THE MITIGATION MEASURES AND THEIR EFFECTS

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
IUCN Draft Covenant, 1995	Art. 37.4: "Parties shall conduct periodic reviews both to determine whether activities approved by them are carried out in compliance with the conditions set out in the approval and to evaluate the effectiveness of the prescribed mitigation measures. The results of such reviews shall be made public."	The purpose of the evaluation is identified as to inform future decision-makers about the most effective mitigation measures.

TABLE 3

MONITORING OF THE MITIGATION MEASURES AND THEIR EFFECTS

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
Antarctic Treaty Protocol, 1991	Art. 3(2): "(d) regular and effective monitoring shall take place to allow assessment of the impacts of ongoing activities, including the verification of predicted impacts; (e) regular and effective monitoring shall take place to facilitate early detection of the possible unforeseen effects of activities carried on both within and outside the Antarctic Treaty area on the Antarctic environment and dependent and associated ecosystems." Annex 1, Art. 3: requires an identification, in the information to be provided by the proponent, of the monitoring programmes and measures "that could be taken to minimize or mitigate impacts of the proposed activity and to detect unforeseen impacts and that could provide early warning of any adverse effects of the activity as well as to deal promptly and effectively with accidents." Annex 1, Art. 5: "(1) Procedures shall be put in place, including appropriate monitoring of key environmental indicators, to assess and verify the impact of any activity that proceeds following the completion of a Comprehensive Environmental Evaluation. (2) The procedures referred to in paragraph 1 above ... shall be designed to provide a regular and verifiable record of	This is a general obligation imposed on the parties. The Protocol provides probably the highest level of focus on monitoring of all existing agreements. The unique and fragile nature of the environment it deals with, in part, accounts for this.

TABLE 3

MONITORING OF THE MITIGATION MEASURES AND THEIR EFFECTS

AGREEMENT	PRIORITY FOR MITIGATION EFFORT	NOTES
Antarctic Treaty Protocol, 1991	the impacts of the activity in order, *inter alia*, to: (a) enable assessments to be made of the extent to which such impacts are consistent with the Protocol; and (b) provide information useful for minimizing or mitigating impacts, and, where appropriate, information on the need for suspension, cancellation or modification of the activity." Art. 6: 1. "The following information shall be circulated to the Parties, forwarded to the Committee and made publicly available: ... (c) significant information obtained, and any action taken in consequence thereof, from procedures put in place in accordance with... [Art.] 5."	The requirement to circulate and make publicly available the monitoring information is made clear here, though "significant" is not defined.

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DISPUTE RESOLUTION IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Background Paper

This document does not necessarily reflect the views of the Commission for Environmental Cooperation or of the Parties to the North American Agreement on Environmental Cooperation

I. BACKGROUND: DISPUTES IN THE CONTEXT OF A TRANSBOUNDARY EIA REGIME

Under Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC), the Parties agreed to develop recommendations "with a view to agreement between the Parties pursuant to this Article within three years on obligations" relating to the transboundary impact assessment of proposed activities. This discussion paper analyzes different dispute avoidance and resolution mechanisms, particularly as they relate to transboundary environmental impact assessment (TEIA). The paper aims at assisting the Commission for Environmental Cooperation (CEC) and the NAAEC Parties in the development of such provisions for TEIA.

This paper is based on a survey of dispute avoidance and resolution approaches found in select environmental instruments. Of the instruments examined, the Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) is the most analogous to the current task of defining a TEIA regime for the NAAEC Parties. The paper addresses the Espoo Convention in detail. Nonetheless, a survey of other environmental instruments does provide a broader understanding of potential approaches for dispute avoidance and resolution.

For purposes of this paper, dispute avoidance mechanisms include those mechanisms such as information exchange, monitoring, and capacity building, that are designed to increase cooperation generally, identify potential conflicts as they are emerging, build confidence between parties, or otherwise assist in allowing the parties to avoid and prevent disputes before they arise. Dispute resolution generally speaking implies the informal and formal methods for settling or resolving disputes after such disputes have emerged. The terms "dispute resolution" and "dispute settlement" are used interchangeably in this paper. For obvious reasons, avoiding disputes can be more effective and less costly than resolving disputes after they have arisen.

The entire process of TEIA can be seen as a dispute avoidance mechanism. It is designed to allow neighboring States to assess cooperatively the likely environmental effects of projects or other activities with transboundary impact, before such projects or activities are commenced. Successful use of the TEIA process should minimize the potential for conflict by giving all concerned parties – including private individuals and non governmental organizations – the opportunity to participate in the environmental evaluation of the proposed activity. The TEIA process also results in more complete information about the likelihood of damage, thus allowing the Parties to understand better the nature of any potential dispute. Even with a perfect TEIA regime, however, some environmental disputes may still arise, including on the interpretation, implementation, or application of the regime.

The nature of potential disputes under the TEIA regime will be determined to some degree by the provisions of the regime itself. Because those provisions are not yet available, this paper cannot address with specificity the particular situations that could arise under its provisions. Nevertheless, the types of disputes inherent to TEIA can be identified and, for purposes of this general discussion of dispute avoidance and resolution mechanisms, divided into the following categories:

- The Threshold/Trigger Issue: When do the obligations of the TEIA agreement attach? A typical formulation of the trigger is when a proposed activity is "likely to have a significant adverse transboundary impact." Differences of opinion over what is "likely" or "significant," for example, may present a potential point of dispute. Recognizing the need for an efficient way to resolve such differences, the Espoo Convention provides the parties with an independent inquiry procedure to resolve questions concerning the applicability of the EIA requirements (Appendix IV).

- Procedural Issues: Challenges to the process of conducting the EIA. Examples of such disputes might be disagreements over whether the notice and opportunity to comment were adequate or whether the project proponent disclosed all the information on possible adverse effects.

- Substantive Issues: Challenges to the substantive conclusions of the EIA process and the decision to authorize a controversial project. This substantive decision may not be within the jurisdiction of the TEIA regime, as such a regime may only focus on the decision-making process with little or no substantive oversight on the particular project. In that case, resolving disputes that have not been avoided through the TEIA process may need to be resolved in other ways outside the reach of the agreement (and thus outside the scope of this paper).

A number of options are available to address these potential areas of conflict. A complete menu of basic dispute resolution and settlement procedures have become more or less routine in international environmental agreements. This basic model of dispute resolution and settlement is described in Part II. Part III is a discussion of dispute avoidance or prevention which has recently become a preferred method for resolving conflict through information sharing and cooperative approaches before the conflict has a chance to develop fully. Part IV addresses the institutional arrangements that could accompany a dispute avoidance/settlement process. Finally, in Part V we examine additional issues posed by potential conflicts that involve non-State actors.

II. THE BASIC MODEL FOR DISPUTE RESOLUTION

The obligation of States to settle disputes in a peaceful manner is well established in international law, and is enshrined in Article 33 of the United Nations Charter. Article 33 sets out a menu of dispute settlement mechanisms that are available to States including "negotiation, inquiry,

mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." These mechanisms and other closely related measures are familiar provisions of most international agreements, including those relating to the environment. Collectively, they represent the basic model for settling disputes between parties once they arise. The basic model involves a progressive process that facilitates dispute resolution by subjecting the dispute to gradually more intrusive and formal mechanisms. Initially, notification and information exchange requirements allow the parties to understand the factual basis for the other side's position. Consultation and negotiation requirements give the parties the opportunity to resolve the dispute among themselves in a mutually satisfactory way. Non-binding third party mechanisms (such as conciliation, fact-finding, use of good offices, or mediation) allow disputing parties to obtain an impartial perspective on the dispute. Finally, if all else fails, the parties may submit the dispute to binding procedures such as arbitration or judicial settlement.

This model of dispute resolution follows a logical progression and is included in many environmental and other agreements. In practice environmental disputes rarely, if ever, reach the point of binding settlement.[1] Nonetheless, detailed dispute settlement procedures must lurk in the background to ensure the effectiveness of dispute avoidance mechanisms or less intrusive dispute settlement mechanisms. This section will briefly describe the basic model of dispute settlement found in existing international agreements. Appendices I and II summarize the salient dispute avoidance and resolution mechanisms of select international environmental instruments and provide more detail on these largely familiar mechanisms.[2]

A. Preliminary Obligations: Cooperation, Notification, Information Exchange

Parties to international environmental agreements are usually required to cooperate to ensure that the agreement operates effectively.[3] A subset of this obligation is a general duty to exchange information

1. In fact, the Gabcikovo Dam Case currently before the International Court of Justice (ICJ) is widely considered the first major environmental case before that tribunal.
2. Appendix I contains three tables that briefly summarize the dispute avoidance and settlement mechanisms of selected international environmental agreements organized by type of mechanism. Appendix II provides a more detailed summary of each agreement's dispute avoidance and settlement provisions.
3. See, e.g., *United Nations Convention on the Law of the Sea,* Art. 197 *ff., reprinted in* 21 I.L.M. 1261 (1982) [hereinafter *LOS Convention*].

with other parties regarding circumstances that may lead to a dispute over compliance with the obligations of the agreement or issues of interpretation or application of the agreement.[4] Some agreements require the parties to exchange information concerning progress towards implementing their obligations on an ongoing basis or through annual reports.[5] These obligations are particularly relevant where two or more parties share a common resource.[6] The purpose of these provisions is to foster a general atmosphere of cooperation that will allow parties to identify potential areas of conflict early and begin to develop methods for minimizing or resolving potential conflicts.

In addition to general obligations to exchange information, States are also frequently required to provide prior notification regarding specific activities that might cause environmental damage in neighboring States. For example, under Article 19 of the Rio Declaration: "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect [...]."[7] Because the TEIA regime itself will focus on issues such as notification and information exchange, these provisions may not need to be addressed separately in the context of establishing adequate dispute resolution provisions.

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4. See, e.g., *ibid*. at Art. 200 (requiring exchange of data regarding marine pollution); *Vienna Convention for the Protection of the Ozone Layer,* Art. 4, *reprinted in* 26 I.L.M. 1529 (1987) [hereinafter *Vienna Convention*] (facilitating the exchange of scientific, technical, socio-economic, and commercial data relating to ozone depletion); *Convention on Biological Diversity, reprinted in* 31 I.L.M. 818, at Art. 17 [hereinafter *Biodiversity Convention*] (requiring exchange of information relating to the conservation and sustainable use of biological diversity).
5. US/Canada Air Quality Accord, Art. VIII; see also, e.g., *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Article VIII(7), *done* March 3, 1973, 993 U.N.T.S. 243, *reprinted in* 12 I.L.M. 1085 (1973) [hereinafter *CITES*] (reporting on efforts to curb wildlife trade); *Framework Convention on Climate Change, reprinted* in 31 I.L.M. 849, at Art. 12 (reporting on greenhouse gas emissions); *Montreal Protocol on Substances that Deplete the Ozone Layer*, *reprinted in* 26 I.L.M. 1550 (1986) at Art. 7 (reporting on reduction of ozone destroying substances); *Biodiversity Convention, supra,* note 5, at Art. 26 (reporting on the conservation of biological diversity).
6. See World Commission on Environment and Development, Experts Working Group on Environmental Law, Environmental Protection and Sustainable Development: Legal Principles and Recommendations, Art. 15 and comment (citing the principle of providing relevant and reasonably available information upon request regarding the use or interference with a shared resource or transboundary environmental effects); *U.N. Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes, reprinted in* 31 I.L.M. 1312, at Art. 6 (1992).
7. *Rio Declaration on Environment and Development* [hereinafter *Rio Declaration*], Principle 19; see also, e.g., *Montreal Rules of International Law Applicable to Transfrontier Pollution* (International Law Association, 1982) [hereinafter *Montreal Rules for Transfrontier Pollution*]; *UNEP Governing Council Decision: Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared By Two or More States*, Principle 6 [hereinafter

B. Measures between Parties: Consultations and Negotiations

When a dispute arises and throughout the life of the dispute, the disputing parties are often in the best position to reach an accommodation. Most dispute settlement regimes reflect this dynamic by creating a clear preference in favor of negotiated settlements between the parties. The potential for subsequent binding arbitration or judicial settlement also puts pressure on the parties to settle their dispute before they lose some measure of control over the process.

The measures typically included in most international environmental instruments are consultation and/or negotiation.[8] As a practical matter, consultation and negotiation tend to be closely linked. Generally consultation involves discussions between States that elaborate the positions and justifications of each side, whereas negotiations require a good faith effort to reach agreement based on a compromise between the positions elaborated during consultations. Many instruments may require that consultation or mediation be "in good faith and over a reasonable period of time."[9] Otherwise, the mechanics of consultations and negotiations are frequently left up to the States, who typically conduct them in private, through diplomatic channels.

C. Non-binding Third-party Measures: Good Offices, Fact-finding, Conciliation, and Mediation

Where consultation and negotiation fail to produce a resolution of a dispute, many agreements refer the parties to one (or more) of several measures involving the participation of a third party.[10] Under each of

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UNEP Principles on Shared Natural Resources]. Emergency notification is the after-the-fact version of prior notice, but can still be important for mitigating potential damage and for limiting any dispute. See, e.g., *London International Convention for the Prevention of Pollution From Ships, reprinted in* 12 I.L.M. 1319 (1973), *as modified by the Protocol of 1978 relating thereto*, *done* February 17, 1978, *reprinted in* 17 I.L.M. 546 (1978); Council of European Communities, *Council Directive on the Major Accident Hazards of Certain Industrial Activities,* O.J. Comm. Eur. (No. L23.0/1) Art. 11 (June 24, 1982); *International Atomic Energy Agency Convention on Early Notification of a Nuclear Accident*, *done on* September 26, 1986, *reprinted in* 25 I.L.M. 1370 (1986). See generally *UNEP Principles on Shared Natural Resources,* Principle 9(1).

8. See, e.g., *Espoo Convention,* Art. 15(1); *UNEP Principles on Shared Natural Resources, supra,* note 7, at Principle 6.

9. See, e.g., *Montreal Rules for Transfrontier Pollution, supra,* note 7, Art. 8; see also, e.g., *UNEP Principles on Shared Natural Resources, supra,* note 7, at Principles 6-7; *OECD Principles on Transfrontier Pollution*, Principle 7; *Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden* [hereinafter *Nordic Convention*] *done* February 19, 1974, 1092 U.N.T.S. 279 (1974), *reprinted in* 13 I.L.M. 591 (1974) [hereinafter *Nordic Convention for Protecting the Environment*].

10. See, e.g., North American Agreement on Environmental Cooperation, *reprinted in* 32 I.L.M. 1480 (1994), at Art. 23 (where consultations fail to resolve dispute in 60

these methods, the third party attempts to assist the parties to reach an agreement that ends the dispute, although the level of involvement varies. Typically third party intervention attempts to clarify the facts underlying the dispute, facilitate communication between the disputants, encourage disputants to reevaluate their positions, and offer compromise suggestions or solutions. None of these methods can present a binding decision that would resolve the dispute, but they nonetheless can be very effective in moving entrenched disputants closer to a mutually acceptable resolution. Obviously the choice of the intervening third party is crucial. The third party could be another party to the agreement, one of any number of ad hoc or permanent bodies organized under the relevant agreement (ranging from a governing council to an ad hoc technical panel), an external body or organization, or even a professional mediator or conciliator. Some of these institutional issues are discussed further below.

D. Binding Third-party Measures: Arbitral Tribunals and Judicial Bodies

The final step in most dispute settlement procedures is reference of the dispute to a binding arbitral or judicial process. Some environmental agreements, such as the Law of the Sea (LOS) Convention or the Espoo Convention, contain detailed provisions for the constitution of an arbitral panel to resolve disputes.[11] Typically, the parties select equal numbers of panelists from a roster and those panelists select another to serve as the head of the panel. The panels are typically empowered to establish their own rules of procedure, take whatever steps are necessary to gather all relevant information, and render a decision based on a majority vote. The decision is final and may or may not be made public.

Reference to the International Court of Justice (ICJ) is a common provision of last resort in many environmental agreements. Reliance on the ICJ is problematic, however, as ICJ jurisdiction will depend on agreement of the parties since relatively few countries have accepted compul-

days, any party may refer the matter to the CEC Council which may "a) call on such technical advisers or create such working groups or expert groups as it deems necessary, b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or c) make recommendations...") [hereinafter NAAEC].

11. See, e.g., *LOS Convention, supra*, note 3, at Arts. 286-296 (parties have four choices of fora, the ICJ, the LOS Tribunal, or one of two types of arbitral tribunals). The LOS regime is unique in that its process is compulsory: whereas most international agreements require the parties to agree to submit the dispute to a binding process, the LOS allows any one party unilaterally to trigger such a process. In essence, the parties have agreed in advance (by ratification) to submit to this compulsory process.

sory ICJ jurisdiction. Parties may be wary accepting the jurisdiction of the ICJ for fear of establishing a negative precedent. Where the parties reach a settlement on their own, they will not necessarily be bound by that agreement in another circumstance in the future, whereas they might be if an ICJ decision were rendered. In addition, reference to the ICJ is likely to be costly and time consuming, and thus not suited to expeditious resolution of the dispute. Moreover, the confrontational model of judicial settlement may be better suited to cases where the parties are trying to assign liability and determine compensation for environmental damage than it is to cases involving prevention of future harm or steps necessary to achieve sustainable use of natural resources.

E. Dispute Resolution under the Espoo Convention

Except for the creation of an inquiry commission for determining threshold questions of whether the treaty applies, the basic model of dispute resolution is followed generally in the Espoo Convention where the interpretation or application of the Convention is at issue.[12] Article 15 and Appendix VII set forth these dispute resolution mechanisms. The initial obligation of disputing parties is to settle the dispute through "negotiation or by any other method of dispute settlement acceptable to the Parties to the dispute" (Art. 15(1)). If negotiations fail, Article 15 provides two subsequent methods to resolve the dispute: reference to the ICJ or to arbitration in accordance with Appendix VII to the Convention (Art. 15(2)). The choice of venues will depend on which option the disputing parties have declared their willingness to accept as compulsory or on the agreement of the parties (Art. 15(3)). The ICJ has been discussed above.

Arbitration under the Espoo Convention is before a tribunal of three individuals: one appointed by each party and the third selected by those two to serve as the president of the tribunal. In the event that a party does not select an arbitrator, the Convention delegates the responsibility to appoint one to the Executive Secretary of the Economic Commission for Europe. Moreover, the tribunal is empowered to proceed with its functions even where a party refuses to participate. Other parties to the Convention having a legal interest in the dispute may intervene with the permission of the tribunal. The tribunal shall determine its own rules of procedure and may obtain relevant documents from the

12. The Espoo Convention's "inquiry" procedure relates to the threshold question of the applicability of the Convention and is discussed below in the dispute avoidance section. The dispute mechanisms discussed here are in addition to the inquiry process.

parties, call witnesses or experts, and recommend interim measures of protection while the case is pending. It must render a decision, which is binding on the parties, within five months, subject to an additional five-month extension if necessary. Questions regarding the implementation or execution of the tribunal's decision may be submitted to the same tribunal, or an entirely new tribunal may be formed. Unless the tribunal determines otherwise, the costs are to be divided equally between the parties.

III. DISPUTE AVOIDANCE MEASURES: THE NEW APPROACH

With the growing recognition that it is typically far less expensive and more effective to prevent the occurrence of environmental disputes than it is to resolve them, international environmental regimes increasingly emphasize dispute avoidance or dispute prevention. Part of dispute avoidance is ensuring that parties are in compliance with the obligations of the relevant agreement, and, where a party is not in compliance, searching in a non-confrontational manner for ways to bring that party into compliance. While the emphasis on dispute avoidance is relatively new, it is not occurring in a vacuum, but rather within the context of the basic dispute settlement regime described above. As a consequence, no bright line separates dispute avoidance and settlement procedures. Some of the institutional dispute resolution mechanisms described above may also serve as dispute avoidance mechanisms. For example a recent UNEP's Expert Group Workshop on International Environmental Law Aiming at Sustainable Development noted that dispute avoidance and confidence-building mechanisms and procedures include "exchange of available information; the use of independent scientific and technical experts and panels; national reporting; notification and consultation procedures; prior informed consent; and transboundary environmental impact assessment."[13]

A. Information Exchange, Reporting and Fact-finding Inquiry

As mentioned above, the information exchange and notification obligations that have traditionally been included in environmental agreements provide the basis for dispute avoidance mechanisms. Where, as in the US-Canada Air Quality Accord, the parties are required

13. Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development, UNEP/IEL/WS/3/2, 4 October 1996, par. 23; see also Experts Working Group on Environmental law of the World Commission on Environment and Development, *supra,* note 6, at Arts. 17 and 18 and comments (regarding obligations of States to consult and exchange information to avoid or reduce adverse environmental effects).

to provide periodic implementation progress reports to the secretariat or governing body, each other, and the public, there is increased pressure on the parties to ensure that they are in compliance (Art. VIII). Where parties are in compliance with their obligations under an agreement, disputes are far less likely to develop.[14] In addition, where the parties are able to clearly understand the basis for another party's position, disputes are less likely to develop.

As a complement to information exchange, some have suggested standing inquiry mechanisms that can be called upon to help parties come to a common understanding of the facts relevant to a particular situation that has the potential for evolving into a dispute. A common understanding of the relevant facts would provide a good basis for parties to avoid a developing dispute.

B. Compliance Committees – The Montreal Protocol Model

The parties to the Montreal Protocol have developed a compliance procedure that has become a model for other treaty regimes.[15] The procedure is a flexible mechanism adopted at the Fourth Meeting of the Parties pursuant to Article 8 of the Montreal Protocol.[16] The non-compliance provisions of the Montreal Protocol are triggered when a party reports itself or is reported by another party or the secretariat as not being able to meet its commitments under the protocol. Following an inquiry process by the Secretariat that includes an opportunity for the non-complying party to respond, a report is submitted to a standing Implementation Committee comprised of ten parties elected at the meeting of the parties. The composition of the Committee is required to reflect the geographic diversity of the parties to the protocol. The Imple-

14. Even where parties are "in compliance" however, there may still be disputes over interpretation or application of provisions of the agreement and thus there may be disagreement as to the precise nature of a party's obligations thereunder.
15. Protocols adopted under the UN-ECE Convention on Long-Range Transboundary Air Pollution have called for compliance provisions similar to the Montreal Protocol. See *Protocol on Further Reductions of Sulphur Emissions*, *reprinted in* 33 I.L.M. 1540 (1994) at Art. 7; *Protocol Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes*, *reprinted in* 31 I.L.M. 568 (1992), at Art. 3.3 (directs the parties to establish a compliance monitoring mechanism once the protocol enters into force). The legal drafting group of the Sulphur Protocol has proposed a compliance regime that follows closely the Montreal Protocol model. See UN Doc. EB.AIR/WG.5/24 of 10 March, 1994, Annex I.
16. Article 8 directs the parties to "consider and approve procedures and institutional mechanisms" for determining non-compliance with the protocol's requirements and dealing with parties found to be in non-compliance. The non-compliance procedure was adopted at the Fourth Meeting of the Parties held in Copenhagen, 23-25 December, 1992, Decision IV/5, Annex IV.

mentation Committee reviews the situation, conducts any additional information gathering it deems necessary and reports (with recommendations) to the meeting of the parties. In addressing issues of non-compliance, the Implementation Committee is directed to coordinate closely with the Multilateral Fund set up under the protocol to provide financial and technical support to developing country parties. The meeting of the parties will then vote on appropriate measures to ensure compliance.

The non-compliance procedure has been widely praised, and thus far it has been used primarily to address failures in compliance that have been self-reported by a party. The true test of the Committee may be yet to come, however, as the Committee thus far has dealt largely with issues of failure to report adequately rather than with issues relating to the substantive obligations of the protocol, which may pose more difficult and controversial issues.

C. Capacity Building to Avoid Disputes over Compliance

The compliance-based approach to dispute avoidance raises the larger issue of ensuring that all parties, particularly developing countries, have the institutional, technical, and financial capacity to fulfill their obligations under environmental agreements. This is particularly relevant for agreements like the Montreal Protocol or Climate Change Convention where the parties must implement new technologies or make fundamental institutional commitments in order to meet their obligations under the agreement. Clearly, traditional dispute settlement mechanisms will not help a country develop the capacity to reduce emissions of a particular substance or train a new generation of civil servants. However, the compliance enhancing mechanism of the Montreal Protocol, linked as it is to the financial assistance mechanism, can assist in the progressive development necessary to ensure that all parties are able to fully meet their commitments. This approach can be important where a lack of capacity, as opposed to a lack of political will, is the reason for a failure to fully comply with the environmental instrument.

Compliance/dispute avoidance mechanisms like the Montreal Protocol's Implementation Committee are not without their drawbacks. Some countries fear the mechanisms threaten their sovereignty, by allowing external reviews of a country's performance and the reasons for inadequate performance. These concerns highlight why a compliance review procedure should be sensitive, non-confrontational, and linked to the provision of concrete compliance assistance.

D. Dispute Avoidance under the Espoo Convention.

As mentioned in the introduction, the Espoo Convention contains an inquiry procedure to assist parties when they are unable to agree as to the applicability of the Convention to a particular proposed activity. The inquiry procedure, which is set out in Appendix IV to the Convention, mirrors the arbitral tribunal procedure pursuant to Article 15 as described above. The inquiry commission is to be composed of three scientific or technical experts, one is selected by each of the parties to the dispute and those two experts agree on the third member of the commission. The major differences between the two procedures are: the inquiry procedure may be triggered unilaterally by a party; it focuses on the relatively narrow question of whether a proposed project is likely to cause significant adverse transboundary impact; and the commission has just two months to render its non-binding decision. The potential disputes here will likely revolve around specific technical questions regarding the possible impacts of the proposed project.

If, following the inquiry commission's report, the parties are still unable to resolve the issue of applicability of the Convention, they may still refer the matter to the binding settlement provisions of Article 15 (described above). The inquiry commission is important because it provides a technical and less formal mechanism for obtaining recommendations regarding a critical aspect of any TEIA regime: the threshold question of whether the regime applies at all.

IV. INSTITUTIONAL ISSUES

Dispute avoidance and settlement systems, particularly with respect to the compliance measures described above, can depend substantially on the implementing institutions created or endorsed by the particular instrument. Both ad hoc and permanent institutions can provide familiar and consistent methods for exchanging information, for monitoring or enforcing compliance, for holding consultations or negotiations, and/or for fact-finding. Below we discuss the potential role of secretariats, bi-lateral institutions, and technical subsidiary bodies in helping to avoid or resolve disputes.

A. Role of Secretariat

The role of the secretariat in any environmental regime can be very important for facilitating the avoidance or settlement of disputes. The secretariat could play a critical role in ensuring that information is trans-

ferred in a timely and effective manner. Depending on the precise dispute avoidance and settlement mechanisms chosen for the TEIA regime, the secretariat could play a number of additional roles: from conducting independent fact-findings to providing conciliation or mediation services. Depending on the role for non-State actors adopted in the TEIA regime, the secretariat could also have an important role in coordinating such participation.

B. Reference to Existing Bilateral Institutions

For disputes that arise or could arise along the two relevant international borders, existing bi-lateral institutions could play an important role in TEIA dispute avoidance or settlement. For example, the US-Canada International Joint Commission (which already has similar functions conferred upon it by the US-Canada Air Quality Accord) could serve as a body to which a potential or actual dispute could be referred for fact-finding, conciliation, mediation, or arbitration.

C. Technical Subsidiary Bodies

Recent environmental conventions have institutionalized the collection and distribution of information by creating separate international bodies with explicit information generating and distribution functions. For example, Article 9 of the Climate Change Convention created a subsidiary body to provide the Conference of the Parties information and advice on scientific and technological matters relating to the Convention. Other instruments have created ad hoc or standing bodies to monitor compliance or to examine particular technical questions regarding implementation. The Montreal Protocol Implementation Committee is one such model. The Inquiry Procedure under the Espoo Convention also allows for the creation of ad hoc technical bodies that could support better implementation of the convention.

V. DISPUTES INVOLVING NON-STATE ACTORS

As the Rio Declaration clarified, "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[17] The UNEP working group recently highlighted the potential

17. *Rio Declaration, supra,* note 7, at Principle 10; see also *Biodiversity Convention, supra,* note 4, Preamble; *OECD Council Recommendation Concerning the Provision of Information to the Public and Public Participation in Decision-Making Processes Related to the Prevention of, and Responses to, Accidents Involving Hazardous Substances,* July 8, 1982, C(88)85 (Final) (1988); *World Charter for Nature,* Arts. 23-24.

role for non-State actors to help avoid and resolve disputes and called for affected persons and their representatives to have "access to administrative and judicial proceedings in the country where the alleged harm originated without discrimination on the basis of their residence or nationality," particularly within the context of regional economic integration.[18]

Such a focus on public participation seems particularly important for environmental impact assessments. Any TEIA regime will presumably aim at ensuring that potentially affected individuals at least receive notice of and information regarding proposed activities and provide an opportunity to participate in certain phases of the EIA process. These procedural rights are a significant component of any EIA regime, and some consideration could be given to providing mechanisms within the regime for avoiding or resolving disputes between parties and non-State actors.

The environmental agreements reviewed in the preparation of this report typically do not provide for public participation in dispute resolution processes-with two notable exceptions: the NAAEC and the Nordic Convention (art. 3).[19] Typically dispute avoidance and settlement procedures apply only to States and the only recourse for individuals is to persuade their government to promote their claim before the relevant body. These two agreements could provide some guidance in designing a dispute avoidance and settlement procedure for the TEIA agreement that ensures some ability of the public to participate in dispute resolution and avoidance.

For example, the Montreal Protocol Implementation Committee permits issues of compliance to be raised by the secretariat, a party implicating another party, or a party admitting its own difficulties in complying. There is no provision for individuals or non governmental organizations, however, who may be uniquely qualified to raise such issues, to trigger the compliance review and remediation process. It is not difficult to envision a mechanism, perhaps modeled on Article 14 of the NAAEC, that would allow the public to raise such issues with the secretariat which would then investigate and decide whether or not to refer the matter to the compliance committee.

18. *Supra,* note 13, at par. 28.
19. The *LOS Convention* provides for the participation of certain individual or other private entities, but only to the extent that they are involved in a contractual capacity with seabed exploration and exploitation. *LOS Convention, supra*, note 3, at Arts. 187(d) and (e).

A. NAAEC Model: Flag Non-compliance

Under the NAAEC, members of the public or non governmental organizations may bring matters concerning a party's failure to enforce its environmental laws to the attention of the Secretariat of the CEC.[20] The Secretariat will determine if the matter so raised merits further inquiry, including requesting a response from the party alleged to be in non-compliance. Where certain conditions are met, the Secretariat informs the CEC Council of the situation, and when requested to do so by two-thirds vote of the CEC Council, will prepare a factual record for the CEC Council. The factual record may be made publicly available by vote of the CEC Council. This process is without prejudice to the other dispute resolution provisions that operate between the parties.

Presumably, this model could also be explored in the TEIA context. Private parties and non governmental organizations would be able to raise potential issues concerning applicability of the regime as well as issues relevant to the implementation of the procedural obligations imposed thereunder. The chief benefit of such an arrangement is that it would allow the parties to rely in part on local interested parties to ensure that the obligations of the TEIA agreement were being met, without expending additional government resources to constantly monitor situations that could trigger the TEIA obligations. In addition, it would provide the concerned public with an opportunity to present their own issues for dispute resolution.

B. Nordic Convention Model: Reciprocal Access to National Remedies

The Nordic Convention provides another unique approach to ensure public participation in transboundary environmental matters. It provides reciprocal access to administrative and judicial authorities of each party for the citizens of each participating nation. The purpose is to provide affected individuals the ability to bring an action against the source of an environmental "nuisance" located in another State in that State's tribunals. Under the Nordic Convention, the complaining foreign national must be accorded the same treatment that a host country national would have under purely domestic circumstances.[21] An affected individual may seek both to prevent environmental harm and to recover compensation for damages already suffered.

20. NAAEC, *supra*, note 10, at Art. 14.
21. *Nordic Convention, supra,* note 9, at Art. 3.

The Nordic Convention thus provides another model for improving the opportunities of non-State actors to bring directly actions to protect their interests. Non-discrimination in providing access to judicial and administrative oversight in the TEIA context could provide strong opportunities for non-State actors to have their disputes resolved.

DISPUTE RESOLUTION IN THE CONTEXT OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW OF SELECTED BILATERAL AND MULTILATERAL AGREEMENTS

Appendices

The two appendices present largely the same information organized in different ways. Appendix I includes three charts that are designed to facilitate examination of a particular dispute avoidance or settlement mechanism across all the agreements analyzed. Essentially, the three charts can be viewed as continuous: there are only three charts because the amount of information would not fit easily into a single chart. By contrast, Appendix II is organized by agreement which allows the reader to get a complete picture of that agreement's dispute, avoidance and settlement provisions. This Appendix includes slightly more information than the charts, which have been edited slightly to fit the available space.

The appendices are designed to supplement the information presented in the accompanying discussion paper. The agreements or instruments summarized in these appendices are:

- Charter of the United Nations
- Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)
- United Nations Convention on the Law of the Sea (LOS Convention)
- Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer (Vienna Convention and Montreal Protocol)
- Agreement Between the Government of Canada and the Government of the United States of America on Air Quality (Canada-US Air Quality Accord)
- North American Agreement on Environmental Cooperation (NAAEC)
- IUCN Draft Convention on Environment and Development (IUCN Draft Convention)
- International Law Commission, Draft Articles on the Law of Non-Navigational Uses of International Watercourses (ILC Draft Articles)
- Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden (Nordic Convention)
- Gulf of Maine Council on the Marine Environment, Draft Protocol on Transboundary Environmental Impact Assessment (Gulf of Maine Protocol)

APPENDIX I

Charts of Dispute Avoidance and Settlement Mechanisms of Select International Environmental Agreements

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
Charter of the United Nations	Where continuance of any dispute likely to endanger international peace and security, Parties required to settle peacefully. Art. 33. Security Council has power to investigate any situation that may endanger international peace and security. Art. 34.	Security Council authorized to recommend measures to resolve impending disputes. Art. 36.	N/A
Espoo Convention	Two triggers. Inquiry procedure triggered where parties cannot agree on threshold question of likelihood of significant adverse transboundary impact and thus whether convention's provisions are applicable. Art. 3(7) and Appendix IV. Dispute Settlement provisions (Art. 15 and Appendix VII) triggered when parties unable to agree on interpretation or application of Convention.	Parties are bound to exchange information, and have discussions regarding applicability of EIA requirements. Arts. 2(5) and 3(7). Guidance in Appendix III provided to help make determination of significant adverse impact. Where no agreement, 3 person inquiry panel will make non-binding determination of applicability of Convention. Art. 3(7) and Appendix IV.	Notification of likely significant adverse transboundary impact required–including sufficient information to evaluate. Art. 3. Information exchange also required where parties disagree over likelihood or significance of impact. Art. 3(7).

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
LOS Convention	Parties directed to resolve disputes between themselves in accordance with Art. 33 of the UN Charter. Art. 279. Failing to reach an accommodation, one party may invite the other(s) to submit dispute to LOS Convention's non-binding conciliation procedure. Art. 284 and Annex V. If that fails, any one of the disputing parties can trigger the compulsory and binding resolution procedures. Arts. 286 and 287.	The Convention contains provisions for scientific and technical assistance to developing States to assist them in meeting their obligations with respect to the marine environment. Arts. 202 and 203.	Parties are required to notify potentially affected States where the marine environment is in imminent danger of harm or where harm has already occurred. Art. 198. Parties are also required to cooperate in conducting studies and exchanging information on pollution of the marine environment. Art. 200.
Vienna Convention and Montreal Protocol	Non-compliance provision of Montreal Protocol triggered when party reports itself or is reported by another party or the Secretariat as not being able to meet its commitments under the protocol. Fourth Meeting of the Parties, Annex VII. The dispute settlement provisions of the Vienna Convention are triggered when a dispute arises. Art. 11.	Standing Implementation committee comprised of 10 parties elected by meeting of parties (MOP). Following notification on non-compliance, Secretariat solicits information and prepares report for the Implementation committee. Committee examines situation and reports (with recommendations) to MOP. Implementation Committee directed to coordinate with Multilateral Fund on availability of financial and technical assistance to assist in promoting compliance. MOP will vote on appropriate measures to ensure compliance. Fourth MOP, Annex VII.	Non-compliance procedure contemplates that interested parties will provide information to Secretariat for its report to the Implementation Commission. Provisions exist to protect confidential information. Fourth MOP, Annex VII, par. 16.

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
Canada-US Air Quality Accord	A party may request consultation on any matter within scope of agreement. (Art. XI)	Periodic review and assessment (every 5 years) of the agreement and implementation. Art. X. International Joint Commission (established by Boundary Waters Treaty) acts as sounding board for parties and implementation of agreement. Art. IX. Article VIII creates the Air Quality Committee which is charged with reviewing implementation and preparing periodic progress reports for submission to the parties, the IJC, and the public. Art. VIII (2).	Detailed and ongoing information exchange required for broad range of air quality issues. Art. VIII.

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
NAAEC	A party may request consultations with another party regarding persistent pattern of non-enforcement of environmental laws. If consultations fail to resolve matter within 60 days, any party may request special session of the CEC Council. If that fails to resolve the matter within another 60 days, the CEC Council may convene an arbitral panel. (Arts. 22-24)	Art. 20 requires the parties to endeavor to agree on the interpretation and application of the agreement and cooperate to resolve matters affecting its operation. Art. 10(6) states that the CEC Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by: "(c) contributing to the prevention or resolution of environment-related trade disputes by: (i) seeking to avoid disputes between Parties, (ii) making recommendations to the Free Trade Commission with respect to the avoidance of such disputes, and (iii) identifying experts able to provide information or technical advice to NAFTA committees, working groups and other NAFTA bodies."	Parties required to notify and on request provide information on any actual or proposed measure that might materially affect operation of agreement or the other party's interests. Parties may notify and inform another party of possible violations of its environmental laws. Art. 20(2-4). Parties must provide information to the CEC Council or Secretariat as requested. Art. 21. Under Art. 12(2), the Secretariat shall prepare an annual report covering, *inter alia*, "(c) the actions taken by each Party in connection with its obligations under [the] Agreement, including data on the Party's environmental enforcement activities."

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
IUCN Draft Convention	Reporting and implementation obligations are ongoing. Parties required to pursue efforts among themselves to resolve disputes, but if resolution not reached within one year, any party can trigger a binding arbitral or judicial process. Art. 62.	Parties directed to promote and utilize compliance and dispute avoidance mechanisms in their participation in environmental treaties. Preference is for simple, transparent, and non-confrontational measures. Art. 61. Comment to Art. 61 reviews trend toward compliance enhancement mechanism rather than traditional dispute settlement particularly where lack of compliance is caused by lack of national capacity. Compliance and dispute avoidance mechanisms often adopted informally by parties to an agreement rather than in the agreement itself, although institutional arrangements (such as implementation or technical bodies) can facilitate dispute avoidance.	Parties required to submit periodic reports on steps taken and problems encountered implementing obligations under the convention. Art. 60. Reports submitted to ECOSOC, but follow-up is not specified.

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
ILC Draft Articles	When dispute arises, parties must enter consultations/negotiations for 6 months, at which time a party may request appointment of a fact-finding commission. If fact-finding commission fails to resolve the dispute within 12 months, parties may refer the dispute to a permanent or ad hoc tribunal or to the ICJ. Art. 33.	Parties must cooperate (Art. 8) and regular information/data exchange designed to promote cooperation and implementation. Art. 9.	Data and information exchange is to be conducted on a regular basis. Art. 9. In addition, parties are required to exchange information and consult on effect of planned measures on the shared watercourse. Art. 11. Where a planned measure is likely to have adverse effects on other parties, notification is required, Art. 12. Notified states have the opportunity to respond. Arts. 13 and 15
Nordic Convention	Any person who is or may be affected by an environmental "nuisance," has opportunity to bring administrative or judicial action. Art. 3.	N/A	Parties have obligation to notify other potentially affected parties when examining the permissibility of environmentally harmful activities. Art. 5. The parties reviewing such notice shall inform the public if necessary. Art. 7.

Chart 1: Trigger/Timing, Compliance/Avoidance, and Notification/Information Exchange Provisions

	Trigger/Timing	Compliance/Avoidance	Notification/Information Exchange
Gulf of Maine Protocol	The protocol calls upon the parties–New Brunswick, Nova Scotia, Maine, New Hampshire, and Massachusetts–to take actions to implement the goals and objectives of the protocol which are directed at promoting sustainable development by improving transboundary impact assessment. It does not contain any directly enforceable specific TEIA obligations, although it does set out a roadmap for the individual parties to follow.	Creates Marine Environmental Assessment Committee to develop cooperative regional approaches to managing environmental conditions in the Gulf of Maine including "preventative, mitigative and/or adaptive strategies to deal with marine degradation." Encourages parties to develop specific principles and methods for cooperation on general and project specific basis.	Contemplates "systematic observation systems" to monitor marine environmental conditions and an efficient mechanism of regular information exchange among parties. In addition, parties are directed to designate environmental assessment offices as contact points, to adopt procedures for information sharing of project specific information, and to ensure other parties are notified of any proposed activity likely to have a significant adverse transboundary impact.

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
Charter of the United Nations	Suggested, without elaboration, as a means of peaceful settlement. Art. 33.	Suggested, without elaboration, as a means of peaceful settlement. Art. 33.	Encourages reference by parties to ICJ. Art. 36. Security Council may act as tribunal of last resort if parties so agree. Art. 38.
Espoo Convention	Discussion/Negotiation required as first step under both dispute resolution provisions. Arts. 3(7) and 15(1).	Parties free to pursue other mutually acceptable dispute resolution mechanisms which could include, for example, third party mediation or inquiry. Arts. 3(7) and 15(1). Inquiry commission under Art. 3(7) and Appendix IV provides non-binding resolution on threshold applicability questions.	Full dispute resolution provision (Art. 15), provides for alternate binding fora for settlement: ICJ or arbitration in accordance with Appendix VII. Arbitration mechanism: 3 member panel with each side appointing one member with those two choosing the third member to serve as head panel and may not be national of nor resident in a disputing party. If party refuses to designate a panelist, Convention provides that Executive Secretary of the Economic Commission for Europe shall make the appointment. Panel adopts rules of procedure and all decisions by majority vote. It may request documents and call witnesses or experts, and all parties are required to comply/facilitate. Absence or failure of party to participate does not bar proceedings. Decision due within five months of date panel established with option to extend for additional five months. Appendix VII.

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
LOS Convention	Parties required to exchange views regarding the settlement by negotiation or other peaceful means. Art. 283.	Art. 284 contains conciliation procedure that may voluntarily be used by parties following failure to resolve dispute by other means. Procedure for conciliation (not binding) set out in Annex V. Conciliation commission chosen from list of conciliators maintained by UN Secretary General–two chosen by each side, fifth chosen as chairman by the other four. Commission establishes own procedure, hears views of parties, and reports within 12 months (if no resolutions reached sooner) on conclusions and recommendations for amiable settlement. Conciliation process ends when settlement reached, all parties accept or one rejects the commission's findings, or three months following release of final report.	If conciliation fails to resolve dispute, any party can trigger compulsory and binding dispute resolution process. Art. 286. Compulsory reference to one of four fora based on relevant parties' declaration of acceptance of dispute forum as part of ratification: 1) International Tribunal for the Law of the Sea, established under Annex VI; 2) ICJ; 3) arbitral tribunal constituted under Annex VII; and 4) for certain disputes, the special arbitral tribunal constituted in accordance with Annex VIII. Art. 287. Arbitration under Annex VII is default forum. Art. 287(5). These tribunals have jurisdiction over any dispute concerning the application or interpretation of not only LOS Convention but any international agreement related to purposes of LOS Convention. Art. 288. Tribunals may engage experts to sit as non-voting members. Art. 289.

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
Vienna Convention and Montreal Protocol	Vienna Convention requires parties in dispute to seek solution through negotiation. Art. 11.	If negotiation fails, Vienna Convention encourages, but does not require, disputing parties to seek good offices of or mediation by a third party. Art. 11(2).	If parties have accepted compulsory jurisdiction, unresolved dispute goes to ICJ or arbitration; if not, then conciliation commission may be formed to render a non-binding resolution which parties must consider in good faith. Art. 11.
Canada-US Air Quality Accord	Upon request, consultations on any matter within scope of agreement to take place within 30 days. Art. XI. Negotiations also required. Art. XIII(1).	Following consultations, if outstanding dispute not subject to Art. XIII remains, the Parties must refer the matter to an appropriate third party under agreed terms of reference. Art. XII.	If consultations and negotiations fail, the parties may submit dispute to the International Joint Commission in accordance with Article IX or X of the Boundary Waters Treaty. Parties may agree to an alternate form of dispute resolution. Art. XIII(2).

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
NAAEC	Consultations required if dispute develops regarding enforcement of a Party's environmental laws. Art. 22.	If consultations fail, matter referred to CEC Council which may 1) enlist technical advisors or working groups; 2) refer parties to mediation, good offices, or other dispute resolution procedures; or 3) make its own recommendations. Art. 23.	If CEC Council's efforts unsuccessful, upon request of a party and a 2/3 vote of CEC Council, CEC Council shall convene an arbitral panel. Art. 24. Chairman of five-member panel chosen jointly by parties from roster of prospective panelists, then each party chooses two panelists who are citizens of other disputing party. Art. 27. Panel must follow rules of procedure adopted by CEC Council. Art. 28. It may seek technical advice from any person or body subject to approval of disputing parties. Art. 30. Following comment period (disputing parties only) on an initial report, panel presents final report to disputing Parties which in turn transmit report to CEC Council with views appended. Report made public five days following transmittal to CEC Council. Arts. 31-32.

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
IUCN Draft Convention	If dispute arises, parties required to exercise peaceful means to resolve, including "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or by any other peaceful mean of their own choice." Art. 62(1). Convention thus defers to other existing environmental treaties' dispute settlement procedures when applicable.	See previous box.	If measures identified in Article 62(1) fail to resolve matters within one year, any disputant can submit dispute to binding arbitration or judicial settlement. Precise forum left to parties to determine, but requires that they exercise good faith in negotiating an acceptable venue. Art. 62(2) and related commentary.
ILC Draft Articles	Following notification of planned measures, parties must enter into consultation or negotiations while implementation of planned measure may be suspended for 6 months. Art. 17. Where dispute arises between parties concerning question of fact or interpretation or application of agreement, they are required to enter into consultation and negotiations using any existing joint watercourse institutions. Art. 33(a).	If negotiation/consultation fails to resolve dispute within 6 months, a party can trigger an impartial fact-finding commission comprised of one member nominated by each party and a chairman chosen by those members. Art. 33(b). Fact-finding commission may also provide mediation and conciliation functions if so requested by parties. Commission has access to any information or facilities necessary to inquiry and shall prepare a report setting forth findings and making recommendations. Cost of inquiry to be shared by parties and report not binding. Art. 33(b).	If commission fails to resolve conflict within 12 months and a party so requests, parties shall submit dispute to unspecified arbitral tribunal or ICJ for binding resolution of dispute. Art. 33(c).

Chart 2: Consultation/Negotiation, Conciliation/Mediation, and Arbitration/Adjudication Provisions

	Consultation/Negotiation	Conciliation/Mediation	Arbitration/Adjudication
Nordic Convention	At the request of a potentially affected party, consultations are required. Art. 11.	N/A	N/A
Gulf of Maine Protocol	Consultation among the parties is implicit in the draft protocol.	N/A	N/A

Chart 3: Implementation/Enforcement, Third Party Participation, and Non-State Participation

	Implementation/Enforcement	Third Party Participation	Non-State Participation
Charter of the United Nations	N/A	N/A	N/A
Espoo Convention	Arbitral panel may recommend interim measures of protection. Appendix VII, par. 11. Disputes over interpretation or execution of arbitral panel's decision may be submitted to same panel or new panel constituted in same manner. Appendix VII, par. 18.	Any party to the convention "having an interest of a legal nature" in the dispute may intervene with consent of arbitral panel or inquiry commission. Appendix VII, par. 15. Appendix IV, par. 11.	Although public is granted broad participatory rights in conduct of EIA under convention, public has no specified role in inquiry or arbitral process.
LOS Convention	Tribunals or courts with compulsory and binding jurisdiction may prescribe provisional measures to protect rights of disputant. Art. 290. Decisions of tribunal/court are final and arbitral awards may only be appealed if disputants agreed at outset to process for appeal. Annex VI, Art. 33. Annex VII, Art. 11. Clarification or interpretation of final decision may be sought from tribunal that made decision. Annex VI, Art. 33. Annex VII, Art. 12.	Other parties have right to intervene in cases before LOS Tribunal when interpretation or application of Convention is concerned, Art. 32, and may request intervention for other matters. Art. 31. Intervenors are bound by decision of the court. Art. 32(3).	Convention and dispute resolution mechanisms apply only to State Parties, except for disputes under deep seabed provisions which may involve states, the Seabed Authority, and/or private contractors involved in mining operations. Arts. 187(d) and (e). General public has no participatory rights in dispute settlement.

Chart 3: Implementation/Enforcement, Third Party Participation, and Non-State Participation

	Implementation/Enforcement	Third Party Participation	Non-State Participation
Vienna Convention and Montreal Protocol	Non-compliance procedure of Montreal Protocol designed to provide constructive assistance to parties, where appropriate, to encourage effective implementation.	Non-compliance mechanism designed to involve all parties in implementation/compliance process.	N/A
Canada-US Air Quality Accord	N/A	N/A	Annual reports to be made available to public and IJC holds public hearings on progress in resolving transboundary air pollution problems, but no provision for formal public role in dispute resolution. Arts. VIII(2) and IX(1).
NAAEC	Following panel report, disputing parties may agree on action plan to remedy conditions cited by the panel. Art. 33. If parties unable to agree on a plan or disagree as to whether an agreed plan is being fully implemented, panel may be reconvened to establish a plan or examine implementation of existing plan. Art. 34. In either case, a panel may impose a monetary enforcement assessment against a disputing party. Arts. 34(4)(5) and (6). Failure to pay an assessment may lead to suspension of NAFTA benefits in amount of assessment. Art. 36.	An intermediate third party may intervene in panel process as a complaining party at outset. Art. 24(2). In any event, a third party may attend panel meetings, make written or oral submissions, and receive written submissions of disputing parties. Art. 29.	Other than panel's report being released to public and option for use of experts, there is no public participation in the panel process. NAAEC does contain mechanism for individuals and non governmental organizations to bring a potential violation of Agreement to attention of Secretariat which may then decide to pursue matter further. Art. 14. If warranted and requested by CEC Council, Secretariat will prepare factual record for CEC Council. Art. 15.

Chart 3: Implementation/Enforcement, Third Party Participation, and Non-State Participation

	Implementation/Enforcement	Third Party Participation	Non-State Participation
IUCN Draft Convention	N/A	N/A	N/A
ILC Draft Articles	N/A	N/A	N/A
Nordic Convention	N/A	Each party designates a "Supervisory Authority" which will have an opportunity to bring an administrative or judicial action in another party's jurisdiction relating to an environmental "nuisance." Art. 4.	Any affected or potentially affected person may bring an action in the State in which the environmentally harmful activity is being carried out. Art. 3. When such an action is brought, foreign nationals must be afforded the same treatment as host country nationals. Art. 3.
Gulf of Maine Protocol	N/A	One main purpose of protocol is to enhance open communication and cooperation among governments of the parties in matters relating to transboundary environmental impact assessment.	Parties are directed to build mechanisms for public involvement in early planning phases of the assessment process.

APPENDIX II

Summary of Dispute Avoidance and Settlement Mechanisms of Select International Environmental Agreements by Agreement

Charter of the United Nation

Trigger/Timing. Where continuance of any dispute likely to endanger international peace and security. Parties required to settle peacefully. Art. 33. Security Council has power to investigate any situation that may endanger international peace and security. Art. 34.

Compliance/Avoidance. Security Council authorized to recommend measures to resolve impending disputes. Art. 36. Not generally exercised as an avoidance mechanism for environmental disputes.

Notification/Information Exchange. N/A

Consultation/Negotiation. Suggested, without elaboration, as a means of peaceful settlement. Art. 33.

Conciliation/Mediation. Suggested, without elaboration, as a means of peaceful settlement. Art. 33.

Arbitration/Adjudication. Encourages reference by parties to ICJ. Art. 36. Security Council may act as tribunal of last resort if parties so agree. Art. 38.

Implementation/Enforcement. N/A

Third Party Participation. N/A

Non-State Participation. N/A

Espoo Convention – Convention on Environmental Impact Assessment in a Transboundary Context

Trigger/Timing. Two triggers. Inquiry procedure triggered where parties cannot agree on threshold question of likelihood of significant adverse transboundary impact and thus whether convention's provisions are applicable. Art. 3(7) and Appendix IV. Dispute Settlement provisions (Art. 15 and Appendix VII) triggered when parties unable to agree on interpretation or application of Convention.

Compliance/Avoidance. Parties are bound to exchange information, and have discussions regarding applicability of EIA requirements. Arts. 2(5) and 3(7). Guidance in Appendix III provided to help make determination of significant adverse impact. In the absence of agreement, 3-person inquiry panel will make determination of applicability of Convention. Art. 3(7) and Appendix IV. EIA process itself designed to avoid conflict by involving concerned parties in decision process. Art. 5.

Notification/Information Exchange. Notification of likely significant adverse transboundary impact required–including sufficient information to evaluate. Art. 3. Information exchange also required where parties disagree over likelihood or significance of impact. Art. 3(7).

Consultation/Negotiation. Discussion/Negotiation required as first step under both dispute resolution provisions. Arts. 3(7) and 15(1).

Conciliation/Mediation. Parties are free to pursue other mutually acceptable dispute resolution mechanisms which could include, for example, third party mediation or inquiry. Arts. 3(7) and 15(1). Inquiry commission under Art. 3(7) and Appendix IV provides non-binding resolution.

Arbitration/Adjudication. Full dispute resolution provision (Art. 15), provided for alternate binding fora for settlement: International Court of Justice or arbitration in accordance with Appendix VII. Arbitration mechanism: 3-member panel with each side appointing one member with those two choosing the third member who serves as president of the panel and may not be a national of nor a resident in a disputing party. If one or another party refuses to designate a panelist, the Convention provides that the Executive Secretary of the Economic Commission for Europe shall make the appointment. The panel shall adopt its own rules of procedure and all decisions are by majority vote. It may request documents and call witnesses or experts, and all parties are required to comply/facilitate. Absence or failure of a party to participate does not bar the proceedings. A decision is due within five months of date panel was established with option to extend by an additional five months. Appendix VII.

Implementation/Enforcement. Arbitral panel may recommend interim measures of protection. Appendix VII, par. 11. Disputes over interpretation or execution or arbitral panel's decision may be submitted to same panel or new panel constituted in same manner. Appendix VII, par. 18.

Third Party Participation. Any party to the convention "having an interest of a legal nature" in the dispute may intervene with consent of the arbitral panel or inquiry commission. Appendix VII, par. 15. Appendix IV, par. 11.

Non-State Participation. Although public is granted broad participatory rights in conduct of EIA under the convention, public has no specified role in inquiry or arbitral process.

LOS: United Nations Convention on the Law of the Sea

Trigger/Timing. Parties are directed to resolve disputes between themselves in accordance with Art. 33 of the UN Charter. Art. 279. Failing to reach an accommodation, one party to the dispute may invite the other(s) to submit the dispute to the LOS Convention's non-binding conciliation procedure. Art. 284 and Annex V. If that fails, any one of the disputing parties can trigger the compulsory and binding resolution procedures. Arts. 286 and 287.

Compliance/Avoidance. The Convention contains provisions for scientific and technical assistance to developing States to assist them in meeting their obligations with respect to the marine environment. Arts. 202 and 203.

Notification/Information Exchange. Parties are required to notify potentially affected States where the marine environment is in imminent danger of harm or where harm has already occurred. Art. 198. Parties are also required to cooperate in conducting studies and exchanging information on pollution of the marine environment. Art. 200.

Consultation/Negotiation. Parties required to exchange views regarding the settlement by negotiation or other peaceful means. Art. 283.

Conciliation/Mediation. Art. 284 contains conciliation procedure that may voluntarily be used by parties following their failure to resolve a dispute by other means. Procedure for conciliation (not binding) set out in Annex V. Conciliation commission chosen from list of conciliators maintained by US Secretary General–two chosen by each side, fifth chosen as chairman by the other four. Commission establishes own procedure, hears views of parties, and reports within 12 months (if no resolutions reached sooner) on its conclusions and recommendations for amiable settlement. Conciliation process ends when settlement reached, all parties accept, or one of the parties rejects the commission's findings, or three months following release of the final report.

Arbitration/Adjudication. If conciliation is rejected or fails to resolve the dispute, any party to the dispute can trigger the Convention's compulsory and binding dispute resolution process. Art. 286. Compulsory reference to one of four fora based on relevant parties' declaration of acceptance of dispute fora as part of ratification. Four choices are 1) International Tribunal for the Law of the Sea, established under Annex VI; 2) International Court of Justice; 3) arbitral tribunal constituted under Annex VII; and 4) for certain disputes, the special arbitral tribunal constituted in accordance with Annex VIII. Art. 287. Arbitration under Annex VII is the default forum Art. 287(5). These courts or tribunals have jurisdiction over any dispute concerning the application or interpretation of not only the LOS Convention but any international agreement related to the purposes of the LOS Convention. Art. 288. Tribunals or courts may engage experts to sit as non-voting members. Art. 289.

Implementation/Enforcement. Tribunals or courts with compulsory and binding jurisdiction may prescribe provisional measures to protect rights of disputant. Art. 290. Decisions of tribunal/court are final and arbitral awards may only be appended if disputants agreed at outset to process for appeal. Annex VI, Art. 33. Annex VII, Art. 11. Clarification or interpretation of the final decision may be sought from the court or tribunal that made the decision. Annex VI, Art. 33. Annex VII, Art. 12.

Third Party Participation. Other parties have right to intervene in cases before the LOS Tribunal when interpretation or application of the Convention is concerned, Art. 32, and may request intervention for other matters. Art. 31. Intervenors are bound by the decision of the court. Art. 32(3).

Non-State Participation. Convention and dispute resolution mechanisms apply only to State Parties, except for disputes under deep seabed provisions which may involve States, the Seabed Authority, and/or private contractors involved in mining operations. Art. 187(d) and (e). General public has no participatory rights in dispute settlement.

Vienna Convention for Protection of the Ozone Layer and the Montreal Protocol

Trigger/Timing. Non-compliance provision of the Montreal Protocol triggered when a party reports itself or is reported by another party or the secretariat as not being able to meet its commitments under the protocol. Fourth Meeting of the Parties, Annex VII. The dispute settlement provisions of the Vienna Convention are triggered when a dispute arises. Art. 11.

Compliance/Avoidance. The Montreal Protocol non-compliance provisions are a unique attempt to avoid disputes and assist parties to comply with their obligations. Standing Implementation committee comprised of 10 parties elected by meeting of parties (MOP). Following notification on non-compliance, secretariat solicits information and prepares report for the Implementation committee. Committee examines situation and reports (with recommendations) to the MOP. Implementation Committee is directed to coordinate with Executive Committee of the Multilateral Fund on availability of financial and technical assistance to assist in promoting compliance. MOP will vote on appropriate measures to ensure compliance. Fourth MOP, Annex VII.

Notification/Information Exchange. Non-compliance procedure contemplate that interested parties will provide information to secretariat for its report to the Implementation Commission. Provisions exist to protect confidential information. Fourth MOP, Annex VII, par. 16.

Consultation/Negotiation. Vienna Convention requires parties in dispute to seek solution through negotiation. Art. 11.

Conciliation/Mediation. If negotiation fails, Vienna Convention encourages but does not require disputing parties to seek good offices of or mediation by a third party. Art. 11(2).

Arbitration/Adjudication. If parties have accepted compulsory jurisdiction, unresolved dispute goes to ICJ or arbitration; if not, then conciliation commission may be formed to render a non-binding resolution which parties must consider in good faith. Art. 11.

Implementation/Enforcement. Non-compliance procedure of Montreal Protocol designed to provide constructive assistance to parties, where appropriate, to encourage effective implementation.

Third Party Participation. Non-compliance mechanism designed to involve all parties in implementation/compliance process.

Non-State Participation. N/A

Canada-US Air Quality Accord

Trigger/Timing. A party may request consultation on any matter within scope of agreement. Art. XI.

Compliance/Avoidance. Agreement includes periodic review and assessment (every 5 years) of the grant and implementation. Art. X. International Joint Commission (established by Boundary Waters Treaty) acts as sounding board for parties and implementation of agreement. Art. IX. Article VIII creates the Air Quality Committee which is charged with reviewing implementation and preparing periodic progress reports for submission to the parties, the International Joint Commission, and the public. Art. VIII(2).

Notification/Information Exchange. Detailed and ongoing information exchange required for broad range of air quality issues. Art. VIII.

Consultation/Negotiation. Upon request of either party, consultations on any matter within scope of the agreement to take place within 30 days. Art. XI. Negotiations also required Art. XIII(1).

Conciliation/Mediation. Following consultations, if outstanding dispute not subject to Art. XIII remains, the parties must refer the matter to an appropriate third party under agreed terms of reference. Art. XII.

Arbitration/Adjudication. If consultations and negotiations fail, the parties may submit dispute to the International Joint Commission in accordance with Article IX or X of the Boundary Waters Treaty. Parties may agree to an alternate form of dispute resolution. Art. XIII(2).

Implementation/Enforcement. N/A

Third Party Participation. N/A

Non-State Participation. Annual reports are to be made available to the public and International Joint Commission holds public hearings on progress in resolving transboundary air pollution problems, but no provision for formal public role in dispute resolution. (Art. VIII(2) and IX(1))

North American Agreement on Environmental Cooperation

Trigger/Timing. A party may request consultations with another party regarding a persistent pattern of non-enforcement of environmental laws. If consultations fail to resolve the matter within 60 days, any party may request a special session of the CEC Council. If that fails to resolve the affair within another 60 days, the CEC Council may convene an arbitral panel. (Arts. 22-24)

Compliance/Avoidance. Article 20 requires the parties to endeavor to agree on the interpretation and application of the agreement and cooperate to resolve matters affecting its operation.

Notification/Information Exchange. Parties required to notify and on request provide information on any actual or proposed measure that might materially affect operation of agreement or the other party's interests. Parties may notify and inform another party of possible violations of its environmental laws. Art. 20 (2-4). Moreover parties must provide information to the CEC Council or Secretariat as requested. Art. 21.

Consultation/Negotiation. Consultations are required if a dispute develops regarding enforcement of a party's environmental laws. Art. 22.

Conciliation/Mediation. If consultations fail, the matter is referred to the CEC Council which may 1) enlist technical advisors or working groups; 2) refer the parties to mediation, good offices, or other dispute resolution procedures; or 3) make its own recommendations. Art. 23.

Arbitration/Adjudication. If the CEC Council's efforts are unsuccessful, upon request of a party and a 2/3 vote of the CEC Council, the CEC Council shall convene an arbitral panel. Art. 24. The chairman of the five-member panel is to be chosen jointly by the parties from a roster of prospective panelists, then each party chooses two panelists who are citizens of the other disputing party. Art. 27. The panel must follow rules of procedure adopted buy the CEC Council. Art. 28. The panel may seek technical advice from any person or body subject to approval of the disputing parties. Art. 30. Following a comment period (disputing parties only) on an initial report, the panel presents a final report to the disputing parties which in turn transmit the report to the CEC Council with its views appended. The report is made public five days following transmittal to the CEC Council. Arts. 31-32.

Implementation/Enforcement. Following the panel report, the disputing parties may agree on an action plan to remedy any conditions cited by the panel. Art. 33. If the parties are unable to agree on a plan or there is disagreement as to whether an agreed solution plan is being fully implemented, the panel may be reconvened to establish a plan or examine implementation of an existing plan. Art. 34. In either case, a panel may impose a monetary enforcement assessment against a disputing party. Arts. 34(4), (5) and 5(6). Failure to pay such an assessment may lead to suspension of NAFTA benefits in the amount of the assessment. Art. 36.

Third Party Participation. An intermediate third party may intervene in the panel process as a complaining party at the outset. Art. 24 (2). In any event, a third party may attend panel meetings, make written or oral submissions, and receive written submissions of the disputing parties. Art. 29.

Non-State Participation. Other than the panel's report being released to the public and the option for use of experts, there is no public participation in the panel process. The Agreement does however contain a mechanism for individuals and non gouvernmental organizations to bring a potential violation of the Agreement to the attention of the Secretariat which may then decide to pursue the matter further. Art. 14. If warranted and requested by the CEC Council the Secretariat will propose a factual record for the CEC Council. Art. 15.

IUCN: Draft Convention on Environment and Development

Trigger/Timing. Reporting and implementation obligations are ongoing. Parties required to pursue efforts among themselves to resolve disputes, but if resolution not reached within one year, any party can trigger a binding arbitral or judicial process. Art. 62.

Compliance/Avoidance. Parties directed to promote and utilize compliance and dispute avoidance mechanisms in their participation in environmental treaties. Preference is for simple, transparent, and non-confrontational measures. Art. 61. Comment to Article 61 reviews trend toward compliance enhancement mechanism rather than traditional dispute settlement particularly where lack of compliance is caused by lack of national capacity. Compliance and dispute avoidance mechanisms are often adopted informally by parties to an agreement rather than in the agreement itself, although institutional arrangements (such as implementation or technical bodies) can facilitate dispute avoidance.

Notification/Information Exchange. Parties are required to submit periodic reports on steps taken and problems encountered implementing their obligations under the convention. Art. 60. Reports submitted to ECOSOC, but follow-up is not specified.

Consultation/Negotiation. If dispute arises, parties required to exercise peaceful means to resolve, including "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or by any other peaceful mean of their own choice."

Art. 62(1). The Convention thus defers to other existing environmental treaties' dispute settlement procedures when applicable.

Conciliation/Mediation. See above.

Arbitration/Adjudication. If the measures identified in Article 62(1) fail to resolve matters within one year, any disputant can submit the dispute to binding arbitration or judicial settlement. The precise forum is left to the parties to determine, but requires that they exercise good faith in negotiating an acceptable venue. Art. 62(2) and related commentary.

Implementation/Enforcement. N/A

Third Party Participation. N/A

Non-State Participation. N/A

ILC: Draft Articles on Law of Non-Navigational Uses of International Watercourses

Trigger/Timing. When dispute arises, parties must enter consultations/negotiations for 6 months, at which time a party may request appointment of a fact-finding commission. If that fact-finding commission fails to resolve the dispute within 12 months, the parties may refer the dispute to a permanent or ad hoc tribunal or to the ICJ. Art. 33.

Compliance/Avoidance. Parties must cooperate, Art. 8, and regular information/data exchange designed to promote cooperation and implementation. Art. 9.

Notification/Information Exchange. Data and information exchange is to be conducted on a regular basis. Art. 9. In addition, parties are required to exchange information and consult on effect of planned measures on the shared watercourse. Art. 11. Where a planned measure is likely to have adverse effects on other parties, notification is required, Art. 12. Notified States have the opportunity to respond. Arts. 13 and 15.

Consultation/Negotiation. Following notification regarding planned measures, the parties must enter into consultation or negotiations while implementation of the planned measure may be suspended for 6 months. Art. 17. In addition, where a dispute arises between parties concerning a question of fact or the interpretation or application of the agreement, they are required to enter into consultation and negotiations using any existing joint watercourse institutions. Art. 33(a).

Conciliation/Mediation. If negotiation/consultation fails to resolve a dispute within 6 months, a party can trigger an impartial fact-finding commission comprised of one member nominated by each party and a chairman chosen by those members. Art. 33(b). The fact-finding commission may also provide mediation and conciliation functions if so requested by the parties. The commission has access to any information or facilities necessary to the inquiry and shall prepare a report setting forth its findings and making its recommendations. The cost of the inquiry is to be shared by the parties and the report is not binding. Art. 33(b).

Arbitration/Adjudication. If the commission fails to resolve the conflict within 12 months and a party so requests the parties shall submit the dispute to an unspecified arbitral tribunal or the ICJ for binding resolution of the dispute. Art. 33(c).

Implementation/Enforcement. N/A

Third Party Participation. N/A

Non-State Participation. N/A

Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden

Trigger/Timing. Any person who is or may be affected by an environmental "nuisance," has opportunity to bring administrative or judicial action. Art. 3.

Compliance/Avoidance. N/A

Notification/Information Exchange. Parties must notify other potentially affected parties when examining the permissibility of environmentally harmful activities. Art. 5. The parties reviewing such notice shall inform the public if necessary. Art. 7.

Consultation/Negotiation. At the request of a potentially affected party, consultations are required. Art. 11.

Conciliation/Mediation. N/A

Arbitration/Adjudication. N/A

Implementation/Enforcement. N/A

Third Party Participation. Each party designates a "Supervisory Authority" which will have an opportunity to bring an administrative or judicial action in another party's jurisdiction relating to an environmental "nuisance." Art. 4.

Non-State Participation. Any affected or potentially affected person may bring an action in the State in which the environmentally harmful activity is being carried out. Art. 3. When such an action is brought, foreign nationals must be afforded the same treatment as host country nationals. Art. 3.

Gulf of Maine CEC Council on the Marine Environment: Protocol on Transboundary Environmental Impact Assessment

Trigger/Timing. The protocol calls upon the parties–New Brunswick, Nova Scotia, Maine, New Hampshire, and Massachusetts–to take actions to implement the goals and objectives of the protocol which are directed at promoting sustainable development by improving transboundary impact assessment. It thus does not contain any directly enforceable specific TEIA obligations, although it does set out a roadmap for the individual parties to follow.

Compliance/Avoidance. Creates Marine Environmental Assessment Committee to develop cooperative regional approaches to managing environmental coalitions in the Gulf of Maine including "preventative, mitigative and/or adaptive strategies to deal with marine degradation." Encourages parties to develop specific principles and methods for cooperation on general and project specific basis.

Notification/Information Exchange. Contemplates "systematic observation systems" to monitor marine environmental conditions and an efficient mechanism of regular information exchange among parties. In addition, parties are directed to designate environmental assessment offices as contact points, to adopt procedures for information sharing of project specific information, and to ensure other parties are notified of any proposed activity likely to have a significant adverse transboundary impact.

Consultation/Negotiation. Consultation among the parties is implicit in the draft protocol.

Conciliation/Mediation. N/A

Arbitration/Adjudication. N/A

Implementation/Enforcement. N/A

Third Party Participation. One main purpose of protocol is to enhance open communication and cooperation among governments of the parties in matters relating to transboundary environmental impact assessment.

Non-State Participation. Parties are directed to build mechanisms for public involvement in early planning phases of the assessment process.

PART II

Access to Courts and Administrative Agencies in Transboundary Pollution Matters

SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION

BACKGROUND PAPER ON

ACCESS TO COURTS AND ADMINISTRATIVE AGENCIES IN TRANSBOUNDARY POLLUTION MATTERS

A survey of available rights and remedies before courts and administrative agencies for persons who have suffered or are likely to suffer damage or injury caused by pollution and of barriers to equal access by foreigners

Prepared pursuant to Article 10(9) of the North American Agreement on Environmental Cooperation

FINAL DRAFT
MAY 1999

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FOREWORD

The Commission for Environmental Cooperation (CEC) is the only international organization with the mandate to foster dialogue among the North American governments with a view to developing recommendations on access to courts and administrative agencies in transboundary pollution matters.

The CEC's work in this area is governed by Article 10(9) of the *North American Agreement on Environmental Cooperation* (NAAEC), which directs the CEC Council to address transboundary access to environmental recourses and remedies. This specific provision of the NAAEC builds on a number of key objectives of the NAAEC, including strengthening cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practice, and enhancing compliance with–and enforcement of–environmental laws and regulations.

To assist the Council of the CEC to fulfill its obligations under Article 10(9) of the NAAEC, the Secretariat of the CEC has engaged a number of North American experts to prepare this background report, designed to provide the governments and the North American public at large with baseline information on existing domestic recourses and remedies generally available to citizens seeking environmental redress. The report also evaluates the potential barriers that some North American citizens seeking such redress may face as a result of their living on the "wrong side of the border."

In the end, reciprocal access to courts seeks to improve environmental justice in North America by ensuring that no citizen is left without a remedy for environmental harm for the sole reason that he or she lives in a neighboring country and not in the country where the harm for which redress is sought originates.

The CEC is indebted to the several individuals and organizations in the three countries who have contributed to this background paper, including Greg Block, Director, CEC; Linda Duncan and Darlene

Pearson, Heads, Environmental Law and Enforcement, CEC; Professors Victor Blanco, Patrick Borchers, Lorne Giroux, John Knox, Alastair Lucas, and Steve McCaffrey; Wilehaldo Cruz Bressant, Howard Mann, Claudia Saladin, Alberto Székely, Esqs., and; the Joint Working Group of the American Bar Association, Canadian Bar Association and Barra Mexicana.

Although every effort has been made to ensure the accuracy of this report, the Commission for Environmental Cooperation, the Government of Canada, the Government of Mexico and the Government of the United States assume no responsibility for the accuracy or reliability of the contents of this document. This document is designed to inform participants at a consultative meeting. It does not, and is not intended to, constitute a legal opinion and should not serve as a basis for any decision related to any specific lawsuit. Appropriate legal counseling should be sought in any such circumstance. The views expressed in this report do not necessarily reflect those of the governments of Canada, Mexico, or the United States.

The Secretariat of the CEC welcomes comments on this document.

Marc Paquin
Council Secretary and
Program Manager Special Legal Projects

EXECUTIVE SUMMARY

The *North American Agreement on Environmental Cooperation* (the "Agreement" or NAAEC) provides that the Commission for Environmental Cooperation (CEC) shall examine the issue of access to courts and administrative agencies in other jurisdictions in transboundary pollution matters. Article 10(9) of the Agreement states that the CEC:

> *shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.*

This paper provides a survey and background information for the Parties and the public on the range of issues and concerns associated with the implementation of Article 10(9) of the Agreement. It describes a range of situations in which transboundary access might be sought. These include:

- access to courts to remedy or prevent environmental harm through civil and common law actions, or based on remedies provided in environmental laws. This includes actions for damages and actions to prevent harm occurring;

- access to the administrative actions of governments regarding the administration and implementation of environmental laws; and

- access to the judicial review of administrative actions in the environmental area.

The paper briefly describes the various domestic recourses and remedies generally available to citizens seeking environmental redress under these categories. Their relevance to the different Parties is seen to vary, depending on legal tradition and, in some cases, the manner in which environmental laws are set out and applied.

Each description of the identified action or remedy is followed by a presentation of the potential barriers for transboundary access. These are categorized under three main themes:

– the local action rule;

– the territorial scope of laws; and

– the residency requirements.

The paper concludes that existing barriers do indeed diminish or eliminate transboundary access to courts or administrative recourses, particularly in Canada and the United States. Some of these barriers arise from common law jurisprudence, such as the local access rule. The interpretation of federal, state and provincial statutes that address a range of environmental issues also raises concerns for transboundary access to courts. These barriers either eliminate or, in some cases, reduce the access of citizens in the other country to domestic legal and administrative processes.

Although the relatively small number of published decisions on transboundary environmental harm defy easy characterization, few jurisdictions appear to provide unrestricted access to all their legal remedies. The paper also shows that several states and provinces have taken important steps to reduce barriers to equal access in specific areas.

The situation in Mexico is, in some ways, different. Mexico has few legal obstacles to equal access. Some result from the "legal interest" rule, upon which Amparo proceedings are based, which implies a degree of specificity such that in many cases the remedy is inaccessible to potential claimants. There are also some administrative proceedings and remedies for which it is necessary to be domiciled in the corresponding jurisdiction to be party to legal proceedings. In such cases, the members of transboundary communities would, in principle, be unable to have access.

The Annex to the paper describes a number of previous international initiatives aimed at improving transboundary access to remedy or prevent environmental harm. The potential effectiveness of these examples for the three Parties to the Agreement is then assessed.

1.0 INTRODUCTION

Pollution knows no boundaries. It can and does cross international borders, causing harm to the environment as well as to human health and property.

Although national boundaries do not detain pollution, they do affect the ability of individuals and governments to address the problems pollution causes. In particular, international boundaries can limit the domestic laws that protect against environmental harm or provide for remedies where such harm occurs. While these laws often provide remedies to persons affected by pollution or other environmental degradation, the remedies may be available only to residents of the country in which the environmental harm originates, but not to residents of the country where the impacts are felt. In addition, residents in an affected country may not be able to pursue remedies in their own country because it may not have jurisdiction over the polluter. In practice, residents of an affected country may often have no recourse to any domestic remedies for transboundary environmental harm.

Harm occasioned by cross-border pollution may become the subject of an international claim brought by the government of the affected country on its citizens' behalf, in accordance with principles of customary international law. In that case, the governments may agree to resolve the claim through negotiations or arbitration. The *Trail Smelter Arbitration*[1] is a well-known example of one such resolution of a claim arising from transboundary pollution between Canada and the United States. However, international arbitration is expensive, slow, and uncertain. In addition, transforming an issue between private parties into an international dispute between governments is an inefficient way to address the issue because, by nature, such disputes are more complex and may be more difficult to resolve.

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1. (1938/1941) 3 U.N.R.I.A.A. 1905. The *Trail Smelter Arbitration* was necessary because of certain barriers to private actions from transboundary damage. See J.E. Read, "The Trail Smelter Dispute", (1963) 1 *Canadian Y.B. of International Law* 213. As such, if there had been no barrier to resolution of the problem on the private level, the *Trail Smelter Arbitration* would not have occurred.

A number of attempts have been made, by private and intergovernmental organizations and by state and provincial governments, to allow residents of affected states to enjoy the same legal remedies available to residents of the originating state. These attempts have not led to the creation of new substantive causes of action. Rather, they have been designed to provide new procedural rights: to give residents of an affected country access to whatever remedies the originating country already makes available to its own residents.

1.1 Purpose of the paper

The *North American Agreement on Environmental Cooperation* provides, in Article 10(9), that the Commission for Environmental Cooperation (CEC):

> *shall consider and, as appropriate, develop recommendations on the provision by a Party, on a reciprocal basis, of access to and rights and remedies before its courts and administrative agencies for persons in another Party's territory who have suffered or are likely to suffer damage or injury caused by pollution originating in its territory as if the damage or injury were suffered in its territory.*

This paper provides background information for the Parties and the public on the range of issues and concerns associated with the implementation of Article 10(9) of the Agreement.

1.2 Structure of the paper

This paper focuses on private access to rights and remedies before courts and administrative agencies in order to prevent or remedy transboundary environmental harm, i.e., where the cause of harm originates from one State (the "country of origin") and the damage is suffered by residents of another State (the "affected country"). More precisely, this paper looks at the locally available remedies for environmental harm and at the potential barriers to their use by residents of one state–the affected country–when seeking redress in a different state, the country of origin.[2]

However, this paper does not examine the reverse issue: the ability to seek remedies in the affected country against a polluter located in a different country of origin. This approach further raises a number of

2. While governments may often exercise similar rights to remedy or prevent environmental harm, this paper focuses on the actions that can be initiated by private persons or groups. The discussion is limited to the private initiation of such actions.

significant issues, from the original jurisdiction of the courts to the ability to enforce possible awards.[3] Given that such actions do not raise questions of reciprocal access *per se*, and are not referred to in Article 10(9) of the Agreement, they are not included here. However, many experts and commentators believe that this issue is growing in potential importance and would merit thorough discussion in a separate, but related, paper.

Following this Introduction, the paper is divided into three main sections devoted to an analysis of the current situation as it pertains to:

2.0 access to courts;

3.0 access to administrative actions; and

4.0 access to judicial review of administrative actions.

Each section presents the various recourses and remedies generally available to citizens seeking environmental redress, indicating their relevance to each of the Parties.[4]

Each description of the identified action or remedy is followed by an indication of the potential barriers for transboundary access. In gaining access to the courts or administrative agencies of a foreign jurisdiction, non-resident plaintiffs will have to establish jurisdiction in the court where they plan to bring suit. The fact that a plaintiff is a non-resident may raise special barriers to the jurisdiction of the courts. These potential barriers are categorized under three main themes: the local action rule, territorial scope of laws, and residency requirements. The actual application of these barriers in each of the three Parties–Canada, Mexico, and the United States–is then considered.

The main text is supplemented by an Annex that provides a review of past international efforts to develop transboundary access regimes to redress or prevent environmental damages. This Annex includes a consideration of the relevance of the different approaches to the prevailing North American context.

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3. Such issues may include personal jurisdiction, service of process, choice of law, obtaining evidence abroad, and enforcing judgments.
4. For Canada, the analysis is generally limited to the federal level and to two provinces, Ontario and Québec. While the variety of environmental law is much greater than this in Canada, Ontario and Québec provide a general indication of several different approaches to addressing transboundary environmental damage issues and cover common law and civil law regimes.

The first draft of this paper was prepared and reviewed by practicing lawyers in the three Parties, and further reviewed by a Joint Working Group of the Canadian Bar Association, the American Bar Association and the Mexican Bar, academics, senior international lawyers, environmental law groups, and representatives of the Parties. It is hoped that this final version is reflective of this considerable input and of the interest this topic continues to generate.

2.0 ACCESS TO COURTS

This section on access to courts highlights four types of proceedings that might be commenced by a private person or group to either remedy or prevent environmental harm arising from different types of pollutants. These are:

2.1 Common law/civil law actions for environmental damages;

2.2 Statute-based civil actions for environmental damages;

2.3 Injunctive relief; and

2.4 Private prosecutions and enforcement actions in courts.

Each of these types of actions will be briefly described in separate subsections below.

As already noted, this report focuses on the access of private persons or groups to different actions and remedies. The discussion deals with the initiation of these actions by a private person or group in a court of competent jurisdiction in order to address a specific pollution situation. In the first three cases, litigation would be directed against the person or facility alleged to have caused environmental damage, or that is thought likely to be about to cause environmental damage. In the last case, it might be directed against the private "polluter" or, in some cases, against the government agency responsible for the enforcement of a given environmental law.

2.1 Common Law/Civil Law Actions for Environmental Damages

2.1.1 Description

The common law is applicable in the United States, except Louisiana, and in all the Canadian provinces, except Québec. The civil law system applies in Mexico, the province of Québec and the State of

Louisiana. Both the common law and civil law systems provide for recourse to the courts in the event of damage to real or personal property, or injury to an individual.

In an environmental context, common law and civil law actions can be brought for damages to the physical environment as well as damages to a person's health and economic damages. Injunctive relief is also available at common law.[5] In the next subsections, a brief description of the main types of actions applicable to environmental harm in both the common law and civil law systems is provided.

Canada. In Canada, common law and civil law are matters of provincial, as opposed to federal, jurisdiction.

Mexico. In Mexico, environmental law is a matter of both federal and state jurisdiction. At the federal level, the *Ley General del Equilibrio Ecológico y Protección al Ambiente* (LGEEPA) provides that anyone who pollutes or degrades the environment, or adversely affects natural resources or biodiversity, is liable for the damage caused. The LGEEPA also provides that anyone who misuses environmental information obtained from the authorities or fails to take proper precautions in the production, handling, and ultimate disposal of hazardous wastes resulting in soil contamination, is liable for any damage caused. These provisions are complemented by the civil law liability regime, which is by definition local in nature.[6] The *Ley de Responsabilidad Civil por Daños Nucleares* provides that civil liability arising from atomic energy use is a matter of federal jurisdiction, and is governed by the Federal Code of Civil Procedure. The environmental laws of the various states, replicate the liability provisions of the LGEEPA, and also rely on the civil law general liability regime, more specifically on the strict liability and civil liability provisions of the civil codes of the state and of the Federal District to complement their provisions.

United States. In the United States, the common law is primarily found at the state level, though federal common law does exist in a few areas, including cases involving interstate or international disputes.[7] The US Supreme Court, for example, has long applied the federal com-

5. For a general description of these rights and remedies in Canada, see Roger Cotton and Robert Mansell, "Civil Liability for Environmental Damage," Ch. 18 in Roger Cotton and Alastair Lucas, eds., *Canadian Environmental Law, Second Edition* (Butterworths, loose-leaf edition). For the United States, see William H. Rodgers, Jr., *Environmental Law*, Vol. 1, Ch. 2 (West Publishing, 1986) [hereinafter 1 Rodgers, *Environmental Law*].
6. Articles 151, 152*bis*, 159*bis*(6) and 203 of the LGEEPA.
7. *Texas Industries Inc.* v. *Radcliff Materials Inc.*, 451 U.S. 630 at 640 (1980).

mon law of interstate nuisance to cases involving transboundary air or water pollution.[8] More recently, however, it has held that the *Clean Water Act* displaces the federal common law of nuisance in the area of water pollution.[9] That decision suggests that the other federal environmental statutes probably also displace federal common law. In any event, if federal common law is available, it would probably not provide causes of action that are substantially different from the state common law causes of action.[10]

2.1.1.1 Common law remedies for damages in Canada and the United States

Nuisance. The law of nuisance is probably the most important of the common law causes of action. Traditionally, nuisances have been private, defined as an unreasonable interference with the use and enjoyment of land. The most common causes of this tort in an environmental context are air and water pollution, but noise and visual pollution can also provide the basis for a claim.[11]

Liability can be created whether or not the person responsible for the activity was acting lawfully and was taking reasonable care to prevent the harm from occurring.[12] The outcome of the case will typically

8. *Georgia* v. *Tennessee Copper*, 206 U.S. 230 (1906); *Missouri* v. *Illinois*, 200 U.S. 496 (1906); *New York* v. *New Jersey*, 256 U.S. 296 (1920); *New Jersey* v. *New York*, 283 U.S. 473 (1930); *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972).
9. *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (ruling that statutory law had eliminated any federal common law remedies for sewerage over-flows from municipal treatment plants that contaminated the Illinois waters of lake Michigan); *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n,* 453 U.S. 1 at 21-22 (1981). In *Middlesex County,* the US Supreme Court held that the citizen suit provisions of the *Clean Water Act* (CWA) and the *Marine Protection, Research and Sanctuaries Act* (MPRSA) preempted the federal common law of nuisance with regard to water pollution and pollution of the ocean. The holding was based on the more comprehensive scope of the regulatory scheme laid out in the CWA and the MPRSA. It seems likely that in the field of air pollution, which has a similarly comprehensive federal regulatory structure, federal common law would also be preempted. The *Safe Drinking Water Act* has also been held to preempt the federal common law of nuisance; *Mattoon* v. *Pittsfield*, 980 F.2d 1 (1st Cir. 1992).
10. Federal courts may also hear "diversity" cases between citizens of different states or between US and foreign citizens; *Judiciary Code*, 28 U.S.C. § 1332. In those cases, the federal courts hear causes of action based on state law, which may include state common law. The "state law" applied by federal courts sitting in diversity includes state choice-of-law rules; *Klaxon* v. *Stentor,* 313 U.S. 487 (1941). Thus, the federal court could potentially apply the law of another country, if that law would govern the issue in question under the state conflicts rule.
11. See, generally, 1 Rodgers, *Environmental Law*, *supra*, note 5, §§ 2.1-2.14; Cotton and Mansell, *supra*, note 5.
12. *Canada (A.G.)* v. *Ottawa-Carleton (Regional Municipality)* (1991), 5 O.R. (3d) 11 (C.A.).

depend on the reasonableness of the pollution, whether it has caused damage, and the extent of damage. Still, actual damage is not required: it is sufficient for the plaintiff to have suffered some form of substantial discomfort or inconvenience.

A public nuisance is created when there is an unreasonable and substantial interference with a right common to the general public. Nuisance is deemed public when it is so widespread in nature and effect that it would not be reasonable to expect one person to take proceedings against those responsible, or in situations where no one individual can claim to be specially harmed in a manner different from any other person affected. Such actions, because of their public nature, can generally only be brought by a government authority. An individual affected by a public nuisance may bring independent action only if he or she suffered special damage (such as personal injury or property damage) in addition to the damage suffered by the public at large.[13] The differences between these two types of nuisance are narrowing, and it is possible today for some actions to mix both the private and public components of nuisance.

Trespass. Trespass may be defined as "any intentional invasion of the plaintiff's interest in the exclusive possession of property." Although closely related to nuisance, trespass is available only in response to a direct and immediate physical invasion of property, while nuisance is available for the indirect effects of pollution as well. As a result, trespass does not include indirect damage that may arise from the release of contaminants onto a neighbor's land as a result of the activities underway on the defendant's land. This is often the case of pollutants carried onto property by air or water, or of interference caused by noise or vibrations.[14] Nevertheless, to a large extent, trespass and nuisance are coextensive, and courts often apply them together.[15]

Negligence. The common law doctrine of negligence allows remedies against defendants that have not acted with the degree of care that a reasonable person of ordinary prudence would exercise in similar circumstances. It covers actions that, while not intentional, violate this standard of care. To prove liability, a plaintiff must show that the defendant owed a duty of care to the plaintiff and that the defendant's actions were the proximate cause of the harm in question. Plaintiffs who can

13. Ontario recently removed procedural barriers to bringing public nuisance actions by allowing actions based on common issues of fact and law to be brought by a group of plaintiffs under the *Class Proceedings Act, 1992*.
14. *Phillips* v. *California Standard* (1960), 31 W.W.R. 331 (Alta. S.C.).
15. See, generally, 1 Rodgers, *Environmental Law*, *supra*, note 5, §§ 2.15-2.16.

show, for example, that the defendant's careless and improper disposal or handling of hazardous waste harmed them may recover under a negligence cause of action.[16]

Strict Liability or the Rule in *Rylands* v. *Fletcher*. The common law also provides that those who carry out abnormally dangerous activities on the property are "strictly liable" for any harm that results from that activity. This rule is founded on the English case of *Rylands* v. *Fletcher*,[17] where it was held that a person who brings onto his land anything likely to do damage to his neighbor if it escapes, is liable for all damage that is the natural consequence of that escape.

Under strict liability rules, the degree of care taken by the defendant is irrelevant; if the activity causes harmful effects, the defendant is liable. To date, courts have not established a clear principle to explain what activities fall within the scope of this rule. However, it is usually applied only to ultra-hazardous activities with large-scale or catastrophic risks, such as impounding large amounts of water, burning fields, blasting, and the disposing of toxic wastes.[18] The scope of this rule has also been limited by requiring that the defendant's use of his land must have been "non-natural."[19] Again, there is no clear judicial pronouncement on what constitutes a non-natural use of land. A further qualification added by recent jurisprudence requires that the damage caused by the activity must have been foreseeable.[20]

Public Trust Doctrine. Although the public trust doctrine has been described as "resoundingly vague, obscure in origin and uncertain of purpose,"[21] it enjoys considerable usage in the United States. In general, the doctrine assumes that the government holds some natural resources in trust for the benefit of the public and must therefore protect the resources against "unfair dealing and dissipation." The courts have never clearly delineated its scope, but usually confine the doctrine to submerged lands and navigable waters. Still, some state courts have long since defined the doctrine to cover a wide range of resources.[22] The

16. See *Environmental Law Handbook* 13-15 (13th ed., 1995).
17. *Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265 at 279, aff'd (1868), L.R. 3 H.L. 330.
18. See generally, 1 Rodgers, *Environmental Law*, *supra*, note 5, § 2.18.
19. *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 at 339.
20. *Cambridge Water Co.* v. *Eastern County's Leather* (1994), 1 All E.R. 53 (C.A. and H.L.). For a case comment see P. Bowal and N. Koroluk, "Closing the Floodgates: Environmental Implications of Revisiting *Rylands* v. *Fletcher*", 4 *J.E.L.P.* 311 (1995).
21. 1 Rodgers, *Environmental Law*, *supra*, note 5, § 2.20 at 156.
22. See J.L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", (1970) 68 *Mich. L.R.* 471.

doctrine allows only certain "public uses" of the natural resources to which it applies. The traditional three uses, other than conservation, are navigation, commerce, and fishing.[23]

The common law public trust doctrine is not recognized in Canada. However, a similar concept has been created by statute under the Yukon *Environment Act*[24] and the *Environmental Rights Act* of the Northwest Territories.[25] It is defined to mean the collective interest of the people of such territory in the quality of the environment and the protection of the environment for future generations. However, the public trust will extend only to the environment of the territory enacting such legislation, leaving it questionable whether it would extend to considering transboundary pollution effects.

Riparian Rights. Owners of land bordering on or containing a water source are entitled to a series of rights known as riparian rights, which include the right to the natural state of the water flow, a right of access to the water, and a right to use the water for domestic and certain secondary purposes, such as industrial purposes. The possessor of these riparian rights is entitled to bring an action in damages or an application for an injunction against anyone who unreasonably alters the natural flow, quantity, or quality of the water.[26]

In Canada, several provinces have either eliminated these rights or restricted them to the domestic use of water.[27]

In practice, riparian rights are similar to the general right to be free from a nuisance.[28]

2.1.1.2 Civil law remedies for damages in Mexico and the Province of Québec[29]

Civil law regimes in Mexico and the province of Québec also recognize an array of actions that can be applied to environmental damages,

23. See, generally, 1 Rodgers, *Environmental Law*, *supra*, note 5, § 2.20.
24. Yukon *Environment Act*, S.Y. 1991, c. 5, s. 2.
25. Northwest Territories, *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83 (Supp.), s. 1.
26. *Scarborough Golf & Country Club Ltd.* v. *Scarborough (City)* (1988), 66 O.R. (2d) 257 (C.A.).
27. These provinces include Alberta, British Columbia, Manitoba, Newfoundland, and Saskatchewan.
28. See generally, 1 Rodgers, *Environmental Law*, *supra*, note 5, § 2.19.
29. Generally, the same concepts apply in the state of Louisiana, but the law of that state has not been reviewed for the purposes of this report.

broadly based on principles of servitude and fault or delict.[30] These actions can include:

Servitudes. The *Civil Code of Québec* has a recourse based on servitude (or easement) similar to the common law notion of riparian rights. Owners of land bordering on watercourses or containing surface or underground water sources cannot impede the natural flow of water or substantially change the quantity or quality of the water.[31] A recourse based on servitude rights is generally restricted to landowners whose rights are affected by the activities of an upstream landowner, though some authors suggest a broader use of public interest rights in maintaining clean water is possible under the new *Civil Code of Québec* provisions.[32]

The civil codes of the various states and of the Federal District of Mexico have a "servitude of drainage" provision which makes the owner of a dominant tenement responsible for restoring the quality of water made unsafe, prior to passing it on to the servient estate. As to other laws governing this resource, flowing bodies of water and the discovery of subterranean sources of water fall within federal jurisdiction and are subject to certain restrictions.[33]

Fault or Delict. In Quebec, most of those provisions are found in the *Civil Code of Québec*. In broad terms, these impose a duty to act so as not to cause injury (whether corporeal or material) to another.[34] The

30. For a general review of the law in this area in Québec, see Odette Nadon, "La responsabilité du pollueur et l'évolution de la notion de faute", in *Développements récents en droit de l'environnement (1996)*, Service de la formation permanente du Barreau du Québec (Cowansville, Éditions Yvon Blais, 1996) at 141-185. For an overview of the law in this area in Québec under the *Civil Code of Lower Canada* (now replaced by the *Civil Code of Québec*), see Marc Paquin, *Le droit de l'environnement et les administrateurs d'entreprises*, Cowansville, Éditions Yvon Blais, 1992, 96 p.
31. *Civil Code of Québec*, Arts. 979-982; Mexico, *Código Civil para el Distrito Federal en Materia del Fuero Común y para toda la República en Materia del Fuero Federal* (or *Civil Code for the Federal District*), Arts. 1071-1096.
32. E.g., Anne-Marie Sheahan, "Le nouveau Code civil du Québec et l'environnement", in *Développements récents en droit de l'environnement (1994)*, Service de la formation permanente du Barreau du Québec (Cowansville, Éditions Yvon Blais, 1994) at 1-28.
33. For example, Article 17 of the *Ley de Aguas Nacionales* states as follows: In accordance with these regulations, national surface waters shall be freely available for exploitation and utilization by manual means for household purposes and watering of animals, provided that the course of the respective waterway is not altered and there is no deterioration in water quality nor any significant reduction in its rate of flow.
34. *Civil Code of Québec,* Art. 1457; Art. 16, 837, 840, 1910, and 1915 of the *Civil Code for the Federal District*, Diario Oficial, 1 de septiembre de 1932; and, Baja California: Arts. 1979, 1788; Chihuahua: Arts. 1987, 1795; Coahuila: Arts. 1998, 1807; Nuevo León: Arts. 1779, 1807, 1998; Sonora: Arts. 2284, 2109, 2081; and Tamaulipas: Art. 746.

traditional basis for civil responsibility has been a combination of three elements: fault, damages suffered, and a causal link between the fault and the damages. More recently, however, the new *Civil Code of Québec* provides that the contravention of normal rules of conduct generally applicable in the circumstances, as seen in common usage or the law, constitutes the fault required. Hence, negligence *per se* may not be required in such cases.[35] In addition, the guardian of a thing is presumed responsible for any damages caused by that thing, unless he or she can establish that they acted with all the necessary precautions in the circumstances and was thus not at fault.[36]

The general notion of civil responsibility also covers cases of the abuse of rights of ownership with intent to harm others or in a manner that is excessive or unreasonable,[37] as well as cases of negligence where someone fails to meet the reasonable expectations and standards that society has set for ownership and use of property.[38] It also extends to situations where there is an undue interference with the use and enjoyment of property, similar to nuisance or trespass under the common law.[39] In Québec, these areas have been largely codified in the new *Civil Code of Québec*. In particular, Articles 7 and 976 of the Civil Code provide rights that are increasingly similar to those of nuisance and trespass under the common law. The historic reliance on fault as the basis for such actions is significantly diminished, if not altogether removed from the circumstances a plaintiff must show.[40]

In Mexico, most civil actions for environmental harm fall under the general provision of civil liability contained in the civil codes of the states and Federal District of Mexico, the federal *Ley de Responsabilidad por Daños Nucleares*. The *Civil Code for the Federal District* (which includes a number of provisions applicable not only to the federal District but to the entire federation), contains general rules governing the applicability of Mexican civil law to persons and actions carried out within Mexican territory. There are provisions in the civil codes of the states and Federal District which establish a duty to act and use property in a manner which is not abusive, nor solely designed to cause harm to individuals, nor harmful to the interests of society. Other provisions provide a right

35. *Civil Code of Québec,* Art. 1457. See Nadon, *supra*, note 30, at 141-158. See also *Laferrière* v. *Lawson*, [1991] 1 S.C.R. 541.
36. This is derived from Art. 1465 of the *Civil Code of Québec.*
37. *Air Rimouski* v. *Gagnon*, [1952] C.S. 149.
38. *Drysdale* v. *Dugas* (1896), 26 S.C.R. 20.
39. *Canada Paper* v. *Brown* (1921), 63 S.C.R. 243; *Lessard* v. *Bernard*, [1996] R.D.I. 210 (C.S.).
40. See the commentary in Nadon, *supra*, note 30, at 165-175.

of action to obtain reparation for harm caused by actions contrary to law or accepted custom or due to negligence.[41] Such reparation is in keeping with the damage caused and consists of restoration to the prior state or, where this is impossible, providing compensation for an injury or damage. The various provisions set out the parameters and procedures for determining the amount of same.[42]

Strict Liability. Mexican civil law, as set out in the civil codes of the states and Federal District, creates a regime called "strict liability" under which persons (owners or operators, as the case may be) are liable for harm caused, whether willfully or otherwise, through the use of hazardous goods or the performance of dangerous activities, or resulting from explosions, the production of fumes or gases, the falling of trees, the emission of sewage or infectious materials, the impounding of water causing dampness or leakage, or the movement or weight of machinery. In the first case (implied risk), civil law makes explicit provision for only one exemption from liability: namely, in the case where the damage is due to a fault or inexcusable negligence on the part of the victim. There are no explicit exclusions for the second case, although the wording of constitutional provisions on the enforcement of civil law can be construed as allowing the above-mentioned exemption in this case as well.

The new Civil Code in Québec has also moved closer to a direct expression of a strict liability regime. In particular, Article 7 indicates that acts done in accordance with statutory or civil rights can still provide a basis for an action in damages when the consequences of the activity lead to damages.[43]

2.1.1.3 Conclusion

Common law and civil law actions for damages are instigated by the person suffering the damages, directly against the person alleged to

41. See Article 12 of the *Civil Code for the Federal District*; and the indicated articles in the following state Civil Codes: Baja California (821, 1788, and 1979), Chihuahua (800, 1795 and 1987), Coahuila (830, 1807, and 1998), Nuevo León (830, 1799, 1807, and 1998), Sonoro (1001, 2081, 2109, and 2284) and Tamaulipas (743, 746, 1158, 1159, and 1388).
42. See for example: Articles 14, 17, and 18 of the *Ley de Responsabilidad Civil por Daños Nucleares*, as well as the indicated articles in the Civil Codes of Baja California (1793), Chihuahua (1800), Coahuila (1812), Sonora (2086), and Tamaulipas (1166).
43. Article 7 of the *Civil Code of Québec* more expressly invokes a regime preventing the abuse of rights. In an environmental context, this is not identical to a strict liability regime but has aspects that are similar to it and that may have analogous impacts.

have caused the damage. In general, the remedies available can include damages and injunctive relief, as well as restoring the situation to its previous state. In some jurisdictions, punitive damages are also available if the court finds the defendant has committed deliberate wrongdoing. Under both common law and civil law, the person alleging damage must be able to link the damage caused with the alleged source of the damage. The burden of proving the facts on a balance of probabilities is generally applicable in this context.

In the following subsections, we discuss the potential barriers to the initiation of common and civil law remedies for damages resulting from transboundary environmental harm.

2.1.2 Potential barriers to transboundary access to common law and civil law remedies

Perhaps the most noted common law barrier to actions concerning environmental damage to land in another jurisdiction is the local action rule. (It can be noted here that the local action rule does not apply, at least not with the same vigor, in civil law jurisdictions.) Given the frequency with which the rule is noted, added detail on it is perhaps warranted.

The local action rule, where it is applied, requires plaintiffs to bring actions concerning real property only where the land is located. Therefore, an owner of land located in a foreign jurisdiction may have to overcome the local action rule in order to bring an action in the country where the activity causing harm originates.

The rule originated as a common law doctrine in England, probably in the fourteenth century, on the assumption that questions relating to title to or possession of land could only be adjudicated in the jurisdiction where the land was located. However, English courts also applied the rule to actions for damages to real property, even where the central issue was not related to title or possession.

Courts and commentators have criticized the broad application of the rule to such actions because it allows a defendant that causes damage to land to escape liability if the defendant is not in the jurisdiction where the land is located.

Nevertheless, common law jurisdictions in the United States and Canada adopted the local action rule. Although the trend in the United States is to limit the rule to actions involving title to or possession of

property, many US states and all Canadian common law provinces still apply the rule to actions for harm to real property.[44]

The English common law recognized that the local action rule is particularly inequitable when an action in one jurisdiction injures land located in another. Therefore, for those cases, English courts created an exception to the rule under which the injured person may bring a cause of action in either of the two jurisdictions.[45] If North American courts were to uniformly follow this exception, the local action rule would not bar actions for international transboundary environmental harm.

In Mexico, the rules for establishing which court has jurisdiction to hear a given case depend, in the case of so-called real actions (involving property, possession, servitudes, and damage to real assets), on the place where the property is located. In the case of "personal" actions involving credit instruments and rights with respect to personal property, however, the link is to the place in which the complainant is domiciled. The extent to which the local action rule applies in the United States and areas of Canada outside Québec varies between the different states and provinces.

In addition to the local action rule, some jurisdictions require plaintiffs in a suit to be residents of the jurisdiction where they bring a suit. Whereas the local action rule applies to the geographic location of the property that is damaged, any residency requirements would apply to the geographic location of the person bringing the legal action.

A related issue is the doctrine of *forum non conveniens*, which is the right of the court to decline jurisdiction, even when venue is proper, if it appears that for the convenience of the litigants and witnesses, and in the interests of justice, the action should be instituted in another jurisdiction. Thus, where an injury occurs in one jurisdiction as a result of activities in another, the court where the activity occurred could conceivably dismiss

44. The strict Canadian interpretation of the rule differs from the situation in Great Britain, where the rule is no longer applied to such actions. See J.G. Collier, *Conflict of Laws*, 2nd ed. (Cambridge: Cambridge University Press, 1994) at 261, where the author cites section 30 of the *Civil Jurisdiction and Judgments Act* of 1982, which allows British courts to entertain jurisdiction in proceedings in trespass or other tort to real property situated outside Great Britain in cases where no questions of title to or possession of that property arise. In the United States, however, the willingness of courts to exercise jurisdiction beyond the territorial boundaries of the state where they are located–so called "Long-arm" jurisdiction–has expanded, and US plaintiffs have been increasingly able to avoid much of the apparent inequity of the rule by establishing jurisdiction over an absent defendant in the place where the harm occurred. Friedenthal, Kane & Miller, *Civil Procedure*, § 2.16 (1985).

45. *Bulwer's Case* (1584), 7 Coke 1a, 77 E.R. 411 (Lord Coke).

for *forum non conveniens* if it feels that convenience or the interests of justice would be better served by bringing the suit where the injury was sustained. *Forum non conveniens* assumes there are at least two courts with potential jurisdiction.

2.1.3 Application in Canada

Local Action Rule. Canadian courts in the common law provinces have to date strictly adhered to the local action rule by relying on the leading British case[46] from the nineteenth century on jurisdiction with respect to actions for injury to foreign real property.[47] Although the British case applied to a fact situation that involved both trespass and questions of title to the foreign land, Canadian courts have adopted and applied the rule even in situations where no such issues arose.[48] The rule under this broad application arguably applies to any tort situation where there is injury to foreign realty. The exception adopted by English courts in *Bulwer's Case* has been specifically rejected by Canadian courts.[49] In addition, Canadian courts will also decline to exercise jurisdiction in cases involving damage to personal property if such damages were caused indirectly through damages to the real property on the basis that lack of jurisdiction over the damages to realty excludes jurisdiction over consequential damages to personal property.[50] Only if injuries to a person's health are a direct consequence of the polluting action will the courts entertain jurisdiction.[51]

Four provinces (Manitoba, Nova Scotia, Ontario, and Prince Edward Island) have removed the local action rule by enacting the Uniform Transboundary Pollution Reciprocal Access law into their jurisdic-

46. *British South Africa Co*. v. *Companhia de Mocambique*, [1893] A.C. 602 (H.L.).
47. *Godley* v. *Coles* (1988), 39 C.P.C. (2d) 162 (Ont. Dist. Ct.).
48. *Albert* v. *Fraser Cos.* (1936), [1937] 1 D.L.R. 39 (N.B. C.A.). In this case, a Québec plaintiff sued in a New Brunswick court for damage resulting from flooding to his land and personal property in Québec. The damage was allegedly caused by the defendant's negligence in allowing logs to dam a river in New Brunswick. The court declined to exercise jurisdiction stating that "the moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded." In the court's view, the local action rule applies irrespective of whether title to land is in question.
49. *Ibid*. The judgement specifically rejects the exception propounded by *Bulwer's Case.*
50. *Albert* v. *Fraser Cos.*, *supra*, note 48. See also *Brereton* v. *Canadian Pacific Railway* (1898) 29 O.R. 57 (H.C.). In this case, sparks from one of the railroad company's engines caused damage, in another province, to the plaintiff's house and its contents. The principal complaint being about the house, the court refused to sever and entertain the action.
51. See *Boslund* v. *Abbotsford Lumber, Mining & Development Co.*, [1925] 1 D.L.R. 978 (B.C. S.C.).

tions. Under this legislation, persons of a foreign jurisdiction can sue in the court where the damage originates even if the damage is to property in another jurisdiction, as long as the foreign jurisdiction provides similar rights of access in the reverse circumstances.[52]

The province of Québec, as a civil law jurisdiction, is not bound by the common law local action rule. Québec courts have jurisdiction over immovable property situated within provincial territorial limits. This principle, as well as its corollary that immovable property situated outside Québec is governed by the law of the country in which it is located, was previously codified in the *Civil Code of Lower Canada* at Article 3097. Thus, this article recognized the reluctance of Québec courts to adjudicate matters relating to land in foreign jurisdictions, and acted as a near equivalent to the local action rule.[53]

However, recent changes brought about in the new *Civil Code of Québec* have broadened the jurisdiction of the province's courts. The new Civil Code grants jurisdiction to its courts in personal actions for damages under any one of four circumstances:

- a fault was committed in Québec;
- damage was suffered in Québec;
- an injurious act was committed in Québec; or
- the defendant is domiciled or resident in Québec.[54]

This alters the former restrictive rule that required that the "whole cause of action" (i.e., all elements of fault, damage, and causality) arise in the judicial district where the action is brought.[55] The new Civil Code considerably broadens the Québec courts' competence in transboundary matters by requiring that only one of the elements of the cause of action be in Québec. Therefore, an injurious act committed outside Québec, which causes harm in Québec and thus giving rise to a personal action for damages to land, would be sufficient to give the Québec courts jurisdiction, making previous Québec law equivalent to the local action rule no longer applicable.

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52. The nature and origin of the Uniform Transboundary Pollution Reciprocal Access statutes is reviewed in Annex I to this paper.
53. W.S. Johnson, *Conflict of Laws*, 2nd ed. (Montreal: Wilson & Lafleur, 1962) at 485-487.
54. *Civil Code of Québec*, Art. 3148(3); *Morissette* v. *Entreprises de systèmes Fujitsu du Canada Inc.*, [1994] R.J.Q. 976 (S.C.).
55. *Code of Civil Procedure*, R.S.Q., c. C-25, art. 68(2) [hereinafter "C.C.P."].

Residency Requirements. With regard to residency requirements, both residents and non-residents are equally entitled to sue and be sued under the laws of Canada. Traditional common law rules, reflected in procedural statutes, have held that nationality or residency of a plaintiff is irrelevant when the courts otherwise have jurisdiction.[56] It has been argued that this principle has been incorporated into the *Canadian Charter of Rights and Freedoms*,[57] which applies throughout Canada. Section 15(1) of the Charter provides that every individual "is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based upon ... national or ethnic origin." Although dealing with notions of citizenship rather than residency, the Charter, it is argued, would grant to foreign plaintiffs (who may be non-residents) the same rights of access to Canadian courts and Canadian law as Canadian citizens (who may be residents) have.[58]

In the province of Québec, Article 57 of the *Code of Civil Procedure* provides that any person or corporation domiciled outside Québec, who is authorized by the law of his domicile to appear in judicial proceedings, may do so before the courts of Québec.[59] The capacity to appear is the rule, and incapacity the exception.[60] The foreign plaintiff may be required, however, to furnish security for the costs resulting from suit.[61]

In Ontario, the Rules of Civil Procedure do not explicitly mention the right to access of a foreign plaintiff. However, Rule 56.01(1), which deals with security for costs, states that the court may make an order for security where "the plaintiff or applicant is ordinarily resident outside Ontario."[62] This implies that a non-resident and/or a foreign plaintiff has the legal capacity to appear in judicial proceedings in Ontario.

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56. See the discussion in Paul Muldoon, *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto, Carswell, 1986) at 37-38.
57. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "Charter"].
58. Muldoon, *supra,* note 56, at 37.
59. For commentary see, J.-G. Castel, *Droit international privé québécois* (Toronto, Butterworths, 1980) at 765-766; D. Ferland and B. Émery, *Précis de procédure civile du Québec*, 2 volumes, 2nd ed. (Cowansville, Éditions Yvon Blais, 1994), vol. 1 at 69.
60. *Montana* v. *Développements du Saguenay,* [1977] 1 S.C.R. 32 at 36; see Ferland and Emery, *supra*, note 59, *Ibid*.
61. Article 65 *Code of Civil Procedure*.
62. See the case law reported in G.D. Watson and M. McGowan, *Ontario Civil Practice 1996* (Toronto, Carswell, 1996) at 809-811. See also the two following cases concerning the examination of non-resident plaintiffs (Rule 34.07): *Groner* v. *Lake Ontario Portland Cement Co.* [1958] O.W.N. 469 (H.C.); *Dow* v. *Brady*, [1944] O.W.N. 633 (H.C.).

Common law and procedural legislation relating to judicial proceedings do generally allow for the application of the *forum non conveniens* doctrine. Québec, for example, does allow for the discretion of the court to be exercised on this basis as a codified exception to the requirement to accept jurisdiction where it is otherwise available.[63]

2.1.4 Application in Mexico

Local Action Rule. In the case of Mexico, a distinction must be made based on the type of action. If the action relates to real property, judicial competence is determined on the basis of the place in which the property is located.[64] In all other civil liability actions, the courts wherein the defendant is domiciled have jurisdiction.

Residency Requirements. There are no residency requirements under Mexican legislation that might discriminate against foreigners seeking redress through appropriate civil actions for damage relating to the environment.[65]

There is no equivalent in Mexico to *forum non conveniens*. According to the Federal Code of Civil Procedure (Article 14) and corresponding provisions of the Codes of Civil Procedure of the states, no tribunal may deny to adjudicate a case if it has jurisdiction under the applicable laws.

2.1.5 Application in the United States

Local Action Rule. Common law states of the United States[66] may have initially adopted the local action rule as part of their common law,[67]

63. *Civil Code of Québec*, Art. 3135.
64. Art. 13(III) of the *Civil Code for the Federal District*; Art. 24 of the Federal Civil Code of Procedures; Art. 1576 of the Civil Code of Procedures of Baja California; Art. 155 of the Civil Code of Procedures of Chihuahua; Art. 156 of the Civil Code of Procedures of Coahuila; Art. 111 of the Civil Code of Procedures of Nuevo León; Art. 109 of the Civil Code of Procedures of Sonora; Art. 192 of the Civil Code of Procedures of Tamaulipas.
65. Art. 44 of the Civil Code of Procedures for Baja California; Art. 60 of the Civil Code of Procedures for Chihuahua; Art. 44 of the Civil Code of Procedures for Coahuila; Art. 9 of the Civil Code of Procedures for Nuevo León; Art. 41 of the Civil Code of Procedures for Tamaulipas.
66. Every state but Louisiana.
67. See. e.g., *Livingston* v. *Jefferson*, 15 Fed. Cas. 660, No. 8411 (C.C.D.Va. 1811) in which Chief Justice Marshall, sitting at circuit, applied the local action rule to bar an action in Virginia for trespass to land in Louisiana, even though questions of title were not involved.

but most states long ago incorporated it into their venue statutes.[68] Virtually all state venue statutes still require actions concerning title to land to be brought in the jurisdiction in which the land is located. The statutes vary, however, in whether they apply the local action rule to claims for trespass or other harm to land located in another jurisdiction.

Of the US states bordering Canada or Mexico, eight have venue statutes that require actions for injuries to land to be brought in the jurisdiction (usually, the "county") where the land is located: Arizona, California, Idaho, Montana, North Dakota, Texas, Vermont, and Washington.[69] The other ten border states[70] do not retain this requirement for actions for injuries to land. In those states, such actions are usually subject to the general venue rules, which typically allow actions to be brought where the defendant resides or the cause of action arose.[71] New York is the only border state that expressly provides for jurisdiction over injuries to land outside the state.[72] In addition, Montana has enacted the *Uniform Transboundary Pollution Reciprocal Access Act*, which would appear to allow non-residents access to Montana courts despite the Montana venue statute.[73]

The local action rule has been widely criticized in the United States.[74] In general, courts in the twentieth century have been reluctant to apply the local action rule to actions that are not directly related to title to property, even when interpreting venue statutes that provide that injuries to land must be brought in the county where the land is located. Many state courts have been quite willing to interpret "injury to land" cases as either tort or contract as a way of avoiding unjust application of the local action rule.[75] In the only reported court case where the local

68. Venue statutes determine where within a state a case should be heard. Usually the same venue statute will designate a particular county within the state. More than one county within a state may have jurisdiction, but generally only one will have venue.
69. Ariz. Rev. Stat. § 12-401(12); Cal. Civ. Proc. Code § 392(1)(a); Idaho Code § 5-401; Mont. Code § 25-2-123; N.D. Cent. Code § 28-04-01; Tex. Civ. Prac. & Rem. Code § 15.011; 12 Vt. Stat. § 402(a); Wash. Rev. Code § 4.12.010(1).
70. These are Alaska, Maine, Michigan, Minnesota, New Hampshire, New Mexico, New York, Ohio, Pennsylvania, and Wisconsin.
71. See, e.g., Alaska Stat. § 09.05.015; Wis. Stat. § 801.50(2). New Mexico expressly allows suits for trespass to land to be brought where either the plaintiff or defendant resides, or the cause originated; N.M. Stat. § 38-3-1(E).
72. N.Y. Civ. Prac. L. & R. § 302.
73. Mont. Code §§ 75-16-101 to 75-16-109. See Annex I, Section C, for a discussion of the *Uniform Transboundary Pollution Reciprocal Access Act*.
74. See, e.g., *Restatement (Second) of the Law, Conflict of Laws (1969)* § 87, comment a.
75. See, e.g., *North Valley Water Association* v. *Northern Improvement Company and Fireman's Association*, 415 N.W.2d 492 (1987) (North Dakota venue statute provided that actions for injuries to real property must be brought in the county where the

action rule is discussed in connection with a transboundary action, the court did not use the rule to bar the non-resident plaintiff's claim.[76]

State courts have developed three possible exceptions that a plaintiff might invoke to avoid the application of the local action rule. First, some courts have held that when an action for injury to land is combined with another action to which the local action rule would not apply, the rule does not apply to the combined actions (e.g., where questions of injury to land are also combined with questions of tort or contract).[77]

Second, two often-cited decisions[78] have held that the local action rule, even when contained in the state's venue statute, should only apply to injuries to land within the state. In other words, an action for injury to land located in a county of the state would have to be brought in that county, but an action for injury to land located outside the state could be brought in any county of the state. These decisions, however, have not been universally followed. More importantly, neither of the decisions concerns injury to land outside the United States, and one of the decisions strongly suggests that the local action rule should apply to such cases.[79]

Third, plaintiffs might try to invoke the exception to the local action rule set out in *Bulwer's Case*. As noted above, this exception allows

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property is located; the case involved a dispute over damage that had occurred in the construction and installation of an underground water pipeline; the court found the dispute to be one over breach of contract and not damages to real property and allowed suit in the county where defendant had its principle place of business, which was not where the pipeline was buried); *Mueller* v. *Brunn*, 105 Wis. 2d 171, 313 N.W.2d 790 (1982) (Wisconsin venue statute provided that civil actions for injury to real property were to be brought in the county where the land was situated; court found contamination of a well on the property was not "injury to property," but rather an action in tort, and the court did not require the suit to be brought in the county where the property was located); *Silver Surprize* v. *Sunshine Mining Company,* 74 Wash. 2d 519; 445 P.2d 334 (1968) (Washington courts found to have jurisdiction over a mine in Idaho, because the relief that plaintiff sought was related to recovery for breach of contract; the court did not find the fact that defendant's answer placed the question of title incidentally into issue was sufficient to displace the court's jurisdiction pursuant to the local action rule, as codified in the venue statute)*; In re School Asbestos Litigation*, 921 F.2d 1310 (3d. Cir. 1990) (Federal appeals court rejected defendant's claim that the local action rule applied to asbestos damage to property because it raised only issues of tort and did not put the question of title to the property in issue).

76. *Armendiaz* v. *Stillman,* 54 Tex. 623 (1881).
77. See, e.g., *Raphael J. Musicus Inc.* v. *Safeway Stores Inc*., 743 F.2d 503 (7th Cir. 1984), in which the Court construes Illinois law.
78. *Reasor-Hill Corp.* v. *Harrison*, 249 S.W.2d 994 (Ark. 1952*); Little* v. *Chicago, St.P., M. & O.R.R.*, 67 N.W. 846 (Minn. 1896).
79. *Reasor-Hill Corp.* v. *Harrison*, 249 S.W.2d 994 (Ark. 1952).

victims of transboundary harm to bring an action in the jurisdiction where the harm originated as well as in the jurisdiction where the land is located. Some state courts incorporated the exception into their common law.[80] Furthermore, in an important nineteenth century case, the Texas Supreme Court said that the *Bulwer's Case* exception would allow a plaintiff whose land in Mexico was harmed by an action in Texas to bring suit in Texas.[81]

Unfortunately, it is not clear whether the *Bulwer's Case* common law exception is relevant to the local action rule as it is now codified in states' venue statutes. None of the border states' venue statutes explicitly provides an exception to the local action rule for transboundary harm. One might argue that the venue statutes were intended to incorporate the existing common law exceptions to the local action rule but, in the absence of any reported cases, it is unclear whether this argument would succeed.

However, even in the border states with venue statutes that seem to fix venue in the county of the injured real property, serious questions might be raised as to the applicability of these venue statutes to transboundary pollution cases. California's statute, for instance, provides that in cases involving "injuries to real property" the "county in which the real property is situated, is the proper county for trial."[82] Such a provision seems to assume that there *is* some California county that contains the real estate in question. If no California real estate is injured, the action might well be covered by the more typical, general venue provisions that allow for venue, *inter alia*, in the place of the defendant's residence,[83] which in the case of a corporation is its principal office.[84] Moreover, even in states with apparently strict venue statutes, courts have allowed plaintiffs to choose between counties if realty in more than one county is injured.[85] In the case of transboundary air pollution, for example, realty in both the source and affected nations would surely be injured, and this principle of plaintiff choice should allow for the venuing of such an action at its source.

80. See *Restatement (Second) of the Law, Conflict of Laws (1969)* § 87 comment c, *Bulwer's Case*, *supra*, note 45; *Thayer* v. *Brooks,* 17 Ohio 489 (1848).
81. *Armendiaz* v. *Stillman,* 54 Tex. 623 (1881). The Court's discussion of this point was dicta, however, because the Court based its decision on the Texas venue statute, which the Court held did not apply the local action rule to a cause of action for trespass.
82. Cal. Code Civ. Proc. § 392(1)(a).
83. Cal. Code Civ. Proc. § 395(a).
84. See, e.g., *Jenkins* v. *California Stage Co.*, 22 Cal. 537.
85. See, e.g., *McClatchy* v. *Laguna Lands Ltd.*, 32 Cal.App. 718, 164 P. 41 (1917).

It is also important to note that state court litigation is likely to be the exception, not the rule, in the United States. In most cases of a foreign national suing in the United States on a transborder pollution action, the federal courts will have concurrent jurisdiction either because federal law provides the right of action[86] or because the foreign nationality of the plaintiff creates alienage jurisdiction.[87] In cases that proceed in federal court, state venue statutes are irrelevant, as federal courts are governed by their own venue laws.[88] One federal venue statute does make reference to the local action rule by providing that "[a]ny civil action, of a local nature, involving property located in different districts in the same state, may be brought in any of such districts."[89] It is clear, however, that whatever vestiges of the local action rule might exist for federal court litigation, the rule does not apply to actions for injury to real property.[90] Thus, for cases in federal court–surely the majority of transboundary pollution cases likely to be pursued in the United States–the local action rule is no limitation on venue.

In summary, the local action rule survives in a limited form in the United States, and might be an occasional obstacle to the pursuit in state court of a transboundary pollution case by a foreign plaintiff. However, even in those states with strict venue statutes that appear to codify the local action rule, it is likely that plaintiffs will be able to venue cases at the source of the pollution. For federal court actions–the more likely forum for such cases–the local action rule is no obstacle, as it does not apply to property damage claims.

Residency Requirements. There are no particular residency requirements for a plaintiff to bring suit under the common law in the United States. Non-resident plaintiffs may actually have greater access to the federal courts in common law causes of action because, under the courts' federal diversity jurisdiction, the federal district courts have original jurisdiction in cases between citizens of a state of the United States and citizens or subjects of a foreign state, provided the amount in controversy exceeds $ 75,000.[91]

86. 28 U.S.C. § 1331 (giving federal court jurisdiction in all cases "arising under" federal law).
87. 28 U.S.C. § 1332(a)(2),(3).
88. See, e.g., 28 U.S.C. §§ 1391, 1392.
89. 28 U.S.C. § 1392.
90. See, e.g., *In re School Asbestos Litigation*, 921 F.2d 1310, 1319 (3d Cir. 1990), *cert. denied* 111 S.Ct. 1623 (1991) (property damage actions are transitory and not limited by the local action rule); *Central Wesleyan College* v. *W.R. Grace & Co.*, 143 F.R.D. 628 at 639 (D.S.C. 1992) (same).
91. 28 U.S.C. § 1332. Typically the federal courts in the United States hear issues of federal law. However, federal courts also have what is called diversity jurisdiction.

In general a resident plaintiff's choice of forum is given great deference by US courts. In the case of a non-resident plaintiff, however, the US Supreme Court has held that their choice of the United States as a forum is not given the same deference to which it would be entitled if they were US residents.[92] In *In re Union Carbide Corporation*, the court dismissed the case of a group of Indian plaintiffs bringing suit against a US corporation in federal district court for harm occurring in India on *forum non conveniens* grounds. Likewise, in *Piper Aircraft Co.* v. *Reyno*, the court dismissed on *forum non conveniens* grounds in a product liability suit involving Scottish plaintiffs (real parties in interest) for wrongful death against US defendant manufacturers. Although these cases indicate that the courts can treat non-resident plaintiffs differently from a resident plaintiff in deciding motions to dismiss on the basis of *forum non conveniens*, they do not directly address the issue of transboundary harm. This is because each of these cases addresses damage whose immediate cause and effect were both in a foreign jurisdiction. Presumably, where the United States is the origin of the harm that is the subject of the suit, plaintiffs would be on stronger grounds to contest a defendant's motion to dismiss on *forum non conveniens* grounds.[93]

2.2 Statute-based Civil Actions for Environmental Damages

2.2.1 Description

Canada. At the federal level, creating civil causes of action is mainly outside the scope of federal jurisdiction. It is, therefore, only by way of exception that statute-based actions for environmental damage

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The basis for the court's jurisdiction in a diversity case is the fact that the parties are either citizens of different states, for example, New York and Connecticut, or one of the parties is a citizen of the United States and the other is the citizen or subject of a foreign state. Diversity suits, as they are called, need not deal with any issues of federal law. The federal court will apply the law of the state where they are located, including choice of law rules. In order to bring a case under federal diversity jurisdiction there must also be at least $ 75,000 in controversy. This jurisdictional amount is periodically amended upwards by Congress.

92. *In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195 at 198 (2nd Cir. 1987, cert. denied), citing *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 at 256. For surveys of US law on this point as it applies to environmental actions, see Clagett, Comment, "Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs", 9 *Tul. Envtl. L.J.* 513 (1996); White, Comment, "Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and its Effects on International Environmental Litigation", 26 *Loy. L.A. L. Rev.* 491 (1993).

93. Cases in which the *only* environmental harm is alleged to have occurred outside the United States, and in which plaintiffs are all foreign, are very likely to be dismissed on forum non conveniens grounds. See, e.g., *Sequihua* v. *Texaco Inc.*, 847 F.Supp. 61 (S.D. Tex. 1994) (case dismissed on *forum non conveniens* grounds where all harm

can be created federally. The primary basis for this exception would be that the damages provisions are ancillary to the substantive prohibitions and limitations in the statute and act as a means to support their effective operation.

The *Canadian Environmental Protection Act* (CEPA) establishes a civil cause of action for losses or damage suffered as a result of conduct contrary to the Act or its regulations.[94] The defendant must be the person responsible for the conduct. The claim that can be recognized by the court is for the amount of loss or damage actually suffered, an amount to compensate for the costs of an investigation of the matter and costs in the legal proceedings under this provision. There is no recorded case of this provision having been used to date.

The *Fisheries Act* also sets out a more limited civil liability provision.[95] Section 42(3) of the Act establishes the civil liability on the part of any person who illegally deposits a deleterious substance in water frequented by fish that subsequently causes economic harm to fishermen. The plaintiff under this section must be a licensed fisherman and must establish that the loss was a result of the deposit of the substance or of a closure of the fishery by the authorities as a result of the deposit. Costs for the action to recover damages are also recoverable.

The *International Boundary Waters Treaty Act* appears to include a very broad federal cause of action for damages caused in the United States by changes in water quality or quantity originating in Canadian waters.[96] Stemming from the 1909 Boundary Waters Treaty between Canada and the United States, section 3 of this Act incorporates the provisions of the treaty into Canadian law. Section 4 then makes remedies available in the Federal Court of Canada for damages suffered in the United States that originate in Canada on the same basis that they would otherwise be available for a purely domestic damage claim under provincial laws. There is little doubt that changes in water quantity leading to damages, including environmental damages from changes in water flow, are a basis for a cause of action before the Federal Court of Canada under this statute. Doubt remains as to whether damages resulting from

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alleged to have occurred in Ecuador, all plaintiffs Ecuadorian, and court found that attempting to hear the case would interfere with Ecuador's jurisdiction to enforce its own environmental laws).

94. *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), as amended, Art. 136(1). Art. 137 provides that the inclusion of this civil remedy provision shall have no effect on any other civil rights or remedies under any other statute, common law or civil law.
95. R.S.C. 1985, c. F-14, as amended.
96. R.S.C. 1985, c. I-17. The Treaty itself is appended as a schedule to the Act.

pollution emanating in Canada can also found a cause of action.[97] As no cases have been reported in Canada on the use of this remedy, its full scope remains unclear. What *is* clear, however, is that for an action within its proper scope, the legislation ensures equal treatment for a foreign and domestic plaintiff. The Act does not remove other possible remedies at common or civil law, or pursuant to statutes.

The *Canada Shipping Act* has a limited field of operation as it relates to environmental damages.[98] It incorporates the provisions of the *International Convention on Civil Liability for Oil Pollution Damage* of 1969 and the *Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* of 1971. The Act establishes an exclusive set of remedies against shipowners for oil pollution. The liability of the ship owner for oil-pollution damage extends to oil pollution damage from the ship, all costs for cleanup, prevention, repair, etc. of oil pollution damage, and related monitoring or other costs. The liability is strict liability under the Act.[99] However, shipowners can avoid direct liability by participating in the fund mechanism set up by the International Fund for Compensation for Oil Pollution Damage, which then takes on the liability pursuant to the Act.

Some environmental legislation creates causes of action for environmental damage resulting from conduct that is in breach of the legislation or otherwise impacts on the environmental quality of others' property or rights. This differs from a traditional common law or civil law remedy for environmental damages in that the statute provides a specific basis for the action, as well as the limitations of when the action can be used.

One might also note here that many jurisdictions now provide, in their environmental statutes, for the repayment of cleanup costs to government agencies following a spill, in particular as part of the sentencing process after a prosecution. These types of awards are based on the public duties of the government to respond to a dangerous situation. They are beyond the type of private, statutory-based cause of action for damages discussed here.

Where a statutory right of action is found, one must look at the statute carefully to establish whether it covers, in particular, plaintiffs from

97. These issues are more fully addressed in Muldoon, *supra*, note 56, at 118-122, and the sources cited therein.
98. *Canada Shipping Act*, R.S.C. 1985, c. S-9, as amended. See Part XVI.
99. See s. 677 of the Act.

outside the jurisdiction and the environment outside the legislating jurisdiction.

Provincial environmental statutes are increasingly including civil causes of action for environmental damages. In Ontario, for example, the *Environmental Bill of Rights* provides individuals a right of action to protect public resources from damage resulting from the breach of environmental protection laws.[100] This essentially expands the role of the provincial Attorney General under common law public nuisance rules by allowing individuals to sue to protect or for damages to public resources.[101]

For its part, Ontario's *Environmental Protection Act* includes provisions for private civil damage actions resulting from an environmental contaminant spill. The damages allowed for here were among the first to include economic losses as well as direct property or personal damages.[102]

Québec's *Environmental Quality Act* does not, however, contain a similar type of civil liability regime, relying instead on the continued role of the *Civil Code of Québec* for civil actions for damages. (The Act does, however, set out a special regime for injunctive relief, which is discussed below.)

Mexico. In Mexico, environmental civil liability provisions are found in federal laws as well as in the laws of each state and of the Federal District. At the federal level, a distinction is made between civil liability actions that are heard before federal courts, those that are referred to the jurisdiction of courts in the states and the Federal District (based on where the property is located or where the defendant is domiciled, according to the type of action brought), and those arising under the *Ley de Responsabilidad Civil por Daños Nucleares*, which fall within federal jurisdiction and are subject to the Federal Code of Civil Procedure. In the case of civil liability falling under the LGEEPA and referred to the civil codes of the states and Federal District, there are three main statutory causes of action for such liability: a generic provision (Art. 203 of the LGEEPA) concerning pollution, environmental degradation, and harm to natural resources or biodiversity; and two specific causes of action, one relating to environmental information provided by the authority to

100. *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, s. 84.
101. A fuller description can be found, *inter alia*, in Dianne Saxe, ed., *Ontario Environmental Protection Act Annotated*, Vol. 3 (Canada Law Book, loose-leaf edition), pp. EBR 62 *ff*.
102. *Environmental Protection Act*, R.S.O. 1990, c. E-19, as amended, s. 99.

private parties (Art. 159*bis* of the LGEEPA), and the other concerning hazardous waste (Arts. 151 and 151*bis* of the LGEEPA). At the local level, the environmental laws of the states and Federal District, complemented by the civil codes, regulate civil liability in environmental matters.

Therefore, civil liability with respect to environmental questions are handled at two levels. At the federal level there are, on the one hand, provisions for referring matters to the civil legislation of the states and Federal District, and on the other hand the *Ley de Responsabilidad Civil por Daños Nucleares*. Civil liability actions brought at the federal level and governed by the civil law of the states and Federal District, may arise from:

– improper use of information which the environmental authority has provided on request under the *Sistema Nacional de Información Ambiental* [National Environmental Data System] (Art. 159*bis*6 of the LGEEPA);

– the production, handling or ultimate disposal of hazardous wastes, or contamination of soil due to such wastes (Arts. 151 and 152*bis* of the LGEEPA);

– acts of pollution, environmental degradation, or impairment of natural resources or biodiversity (Art. 203 of the LGEEPA).

The competent jurisdiction is that of a state or the Federal District, and actions are prosecuted in accordance with the applicable Code of Civil Procedure of the state or Federal District. The *Ley de Responsabilidad Civil por Daños Nucleares* establishes a regime of strict liability with regard to harm resulting from nuclear energy,[103] the only exemption being cases where the victim causes or contributes to such injury through inexcusable negligence or a willful act or omission. The competent jurisdiction is federal district courts, and actions are prosecuted in accordance with the Federal Code of Civil Procedure.

At the local level, the environmental laws of the states and Federal District, complemented by the general civil law liability regime, provide for environmental liability. The civil codes of the states and Federal District also contain strict liability provisions. The states and the Federal

103. The legislation is intended to regulate civil liability arising from the employment of nuclear reactors and the use of nuclear fuels and substances, as well as their waste products (Art. 1 of the *Ley de Responsabilidad por Daños Nucleares*).

District are competent to hear these actions which are governed by the appropriate state or federal District Code of Civil Procedure.

United States. In the United States, the general trend in statutory environmental law has been to include citizen suit provisions that allow private "attorneys general" to enforce the specific regulatory framework. There are now some fifteen such statutes that include citizen suit provisions.[104] While citizen suit provisions in US environmental statutes generally preserve other remedies (typically common law remedies), they do not generally create additional rights to recover damages.[105]

The courts have tended to be conservative in implying rights of action for damages under statutes that do not expressly provide for them. The Supreme Court has held, for example, that neither the *Clean Water Act* nor the *Marine Protection, Research and Sanctuary Act* created an implied right of action for individuals to recover damages for violations of the act, as such relief is not expressly authorized by the acts.[106] In reaching this conclusion they relied on the elaborate enforcement provisions created by Congress in the acts, which the court assumed were the exclusive remedies Congress intended to create for individuals. Recently, the Supreme Court also held that the *Resource Conservation and Recovery Act*'s citizen suit provision does not authorize a private cause of action to recover damages or prior clean-up costs.[107]

Of the citizen suit provisions, only the *Surface Mining Control and Reclamation Act* explicitly provides for recovery of monetary damages.[108] In addition, the *Comprehensive Environmental Compensation and Liability Act* (CERCLA) and the *Oil Pollution Act* (OPA) provide explicitly for recovery of environmental cleanup costs. Under CERCLA, a private plaintiff can sue a generator, transporter, owner, or operator of hazardous waste for response costs that are consistent with the National

104. These include, for example, the *Clean Air Act, Clean Water Act, RCRA, CERCLA, OWA*, and others.
105. *Clean Air Act* § 304 does not allow for the recovery of money judgements, but at the same time, compliance with the Act is not a defense to nuisances, 1 Rodgers, *Environmental Law , supra,* note 5, at § 3.4, or under *Clean Water Act* § 505, William H. Rodgers, Jr., *Envcironmental Law*, vol. 2 (1986) at § 4.5.
106. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 451 U.S. 1 at 11-21 (1981).
107. *Meghrig* v. *KFC Western Inc.*, 516 U.S. 479 (1996).
108. 33 U.S.C. 1270(f) ("any person who is injured in his person or property through the violation by any operator of any rule, regulations, order, or permit issued pursuant to this act may bring an action for damages...").

Contingency Plan (NCP).[109] The *Oil Pollution Act* of 1990 also allows the recovery of removal costs consistent with the NCP.[110]

2.2.2 Potential barriers to transboundary access to statutory recourses for damages

One of the two main potential barriers to transboundary access to statutory remedies, where they exist, are residency requirements that might be included in the terms of the statute. Residency requirements would operate similarly to those that might restrict access to courts for civil or common law actions for damages. They would be either expressed in the text of the statute, or otherwise inferred from other statutory provisions.

The second major potential barrier to statutory recourses for damages being available in a foreign jurisdiction arises from the limitations derived from the territorial scope of a statute. A basic tenet of international law is the sovereignty and equality of states. The principal corollaries of the notion of the sovereignty of states are that each state has exclusive jurisdiction over its own territory and should recognize and refrain from interfering in the area of exclusive jurisdiction of other states.[111]

This limit on the extraterritorial application of laws does not, however, restrict countries from regulating activities in their own territory that have effects on the territory and people of other countries. On the contrary, the international community has recognized that each state should ensure that activities within its jurisdiction do not damage the environment of other states.[112]

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109. 42 U.S.C. § 9607(a). The National Contingency Plan establishes the procedures and standards for responding to releases of hazardous substances under CERCLA, discharges of oil under the OPA, and discharges of oil and hazardous substances under the *Clean Water Act*. It establishes responsibilities among various federal, state, and local authorities that respond to releases, sets criteria for prioritizing federal responses, identifies acceptable methods of identifying and remediating contamination, and sets standards for testing alternative technologies for remediating releases of hazardous substances. 33 U.S.C. § 1321(d), 42 U.S.C. § 9605. The Plan applies only within the United States.
110. 33 U.S.C. § 2707(a).
111. I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979) at 287; *Iles de Palmas* (1928), II R.S.A. 829.
112. *Rio Declaration on Environment and Development*, adopted 13 June 1992, U.N. Doc. A/Conf.151/5/Rev.1, reprinted in 31 *International Legal Materials* 874 (1992), Principle 2.

However, the usual emphasis on territorial application of laws may cause environmental laws to be written and/or interpreted with a focus on the internal, rather than foreign, effects of the activities regulated by the laws. As a result, statute-based actions for environmental damage may be restricted, by the language or intent of the statute, to property or residents of the jurisdiction enacting the statute.

2.2.3 Application in Canada

Generally, any civil actions for environmental damages to private property included in provincial and federal environmental law are not exclusive to residents of Canada. The rights are often expressed as being open to "any person," an expression that in its broadest application would extend to anyone, including non-residents. In the absence of explicit restrictions, the more generic wording found in many statutes arguably does not exclude non-residents.[113]

Recourses under federal legislation are generally available to residents and non-residents alike. This is clearly the intent of the *International Boundary Waters Treaty Act* and the special provisions of the *Canada Shipping Act*. Both of these expressly include persons outside Canada, the latter as long as they are resident in a state that is party to the *International Convention on Civil Liability for Oil Pollution Damage*.[114]

The *Canadian Environmental Protection Act*, in its civil liability provision, establishes no limitation based on residency, referring simply to "any person" who suffers damage as a result of a breach of the Act or its regulations.[115]

The *Fisheries Act* provisions on civil liability for loss of commercial fisheries are directed to licensed commercial fishermen.[116] As the Act elsewhere includes some references to such licenses, one might presume this means those licensed under Canadian federal or provincial law. However, there are no instances where this has been tested in court. As noted below, the Act only applies following deposits in Canadian waters of deleterious substances.

In Ontario, the right to sue for harm to a public resource under the *Environmental Bill of Rights*[117] is restricted to residents of Ontario. It must,

113. Muldoon, *supra*, note 56, at 123.
114. *Canada Shipping Act*, *supra*, note 98, s. 677(1)(iv).
115. Canadian Environmental Protection Act, *supra*, note 94, s. 136(1).
116. *Fisheries Act*, *supra*, note 95, s. 42(3).
117. *Environmental Bill of Rights, 1993*, *supra*, note 100, ss. 82ff.

however, be noted that section 89 authorizes the court to permit any person to participate in the action as a party or otherwise. Hence, non-residents may have standing as intervenors but cannot initiate the lawsuit. However, this restriction does not apply to the general right to sue for compensation for harm to a private resource caused by the owner or person having control of the pollutant, or from the person causing the release of the pollutant, as set out in the *Environmental Protection Act*.

For those federal laws that include a civil cause of action, there are generally no territorial limits applicable. Both the *Canada Shipping Act* and the *International Boundary Waters Treaty Act* expressly address damage outside Canada from a source inside Canada. The CEPA does not include any terms restricting the application of its civil law provisions. Only the *Fisheries Act,* through its definition of "waters frequented by fish" as Canadian waters,[118] places a territorial limit on damages that would appear to exclude foreign waters from the scope of its civil liability provisions. These provisions, however, deal only with damages suffered by commercial fishermen due to lost fishing opportunities.

Provincial statutes have tended to be drafted with more of a view to the internal effects of the activities they purport to regulate. With respect to environmental protection statutes, this can mean that the subject matter of the law is expressly restricted to the protection of the "environment" of the province.

Ontario's *Environmental Protection Act* defines "natural environment" in section 1(k) as the "air, land and water, or any combination or part thereof, of the Province of Ontario."[119] Arguably, at least for those sections where an offense under the Act is created by the harm done as opposed to the fact of an act contrary to another type of emissions or waste limitation or prohibition, only those actions having an adverse effect on the Ontario environment will constitute such an offense. However, section 3(2) of this Act states that "no action taken under this Act is invalid by reason only that the action was taken for the purpose of the protection, conservation or management of the environment outside Ontario's border."[120] This raises a question as to whether foreign damage can also be a basis for a statute-based damages action.[121]

Alberta, by way of contrast, includes civil liability provisions in its *Environmental Protection and Enhancement Act* comparable to Ontario's,

118. *Fisheries Act*, *supra*, note 95, s. 34(1).
119. *Environmental Protection Act*, *supra*, note 102, s. 1.
120. *Ibid.*, s. 3(2).
121. There are no reported cases on this point.

but its definition of environment is not expressly limited to Alberta.[122] Thus, these provisions would appear to be more readily available to non-resident persons damaged by transboundary pollution.

As there is no right to sue for damages in the Québec *Environmental Quality Act*, there are no potential barriers to the exercise of such a recourse.

2.2.4 Application in Mexico

To the extent that in Mexico the competent authority for cases of environmental harm, except that originating from nuclear sources, is the local authority of each State, the issue must be referred to local legislation.

2.2.5 Application in the United States

CERCLA provisions on cost-recovery actions merely provide that "any person" may recover costs consistent with the National Contingency Plan but do not specify that that person must be a resident of the United States.[123] The *Oil Pollution Act* (OPA) specifically allows foreign claimants to recover removal costs or damages resulting from oil discharges.[124] However, the OPA requires foreign claimants to demonstrate, in addition to the showings required of domestic claimants, that they have not been otherwise compensated, that the recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or that the US Secretary of State has certified that the claimants country provides a comparable remedy.[125]

Among the border states, North Dakota's *Environmental Law Enforcement Act* provides, *inter alia*, that "any person ... aggrieved by the violation of any environmental statute, rule or regulation of this state may bring an action ... to recover any damages that have occurred as a result of the violation."[126] This appears to be the only border state with an explicitly broad approach. But, the general assumption among United States courts is that foreign plaintiffs aggrieved by violations of

122. *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3, as amended. See sections 1 and 207.
123. 42 U.S.C. § 9607(a)(4)(B).
124. 33 U.S.C. § 2707.
125. *Ibid*.
126. N.D. Cent. Code § 32-40-06.

United States environmental laws are free to pursue those claims in United States courts.[127]

The territorial scope of laws is also an issue in the United States. Under general US law, there is a presumption that domestic laws do not apply extraterritorially. This presumption can be overcome by a clear expression of legislative intent to have the law apply extraterritorially.[128] Although in close cases US courts will generally not interpret statutes to apply extraterritorially,[129] recent authority from the US Supreme Court applied a US federal statute to foreign conduct, without express indication of legislative intent to do so, because that foreign conduct caused direct effects within the United States.[130] Although some commentators have argued that the United States' environmental laws should apply to certain actions by US agencies or persons outside the territory of the United States,[131] in view of the mixed guidance provided by the US Supreme Court on the question of extraterritoriality, lower US courts have come to inconsistent conclusions as to the extraterritorial application of US environmental laws.[132]

In at least some kinds of transboundary pollution cases, however, United States courts are likely not to view the problem as one of extraterritoriality. United States courts, as noted above, have been reluctant to

127. See, e.g., *Beanal* v. *Freeport-McMoran Inc.*, 969 F.Supp. 362 (E.D. La. 1997) (Indonesian plaintiff injured by mining activities of an American company in Indonesia may sue company in federal court for environmental violations).

128. *E.E.O.C.* v. *Arabian American Oil Co.*, 499 U.S. 244 at 248 (1991); *Foley Bros.* v. *Filardo,* 336 U.S. 281 at 285 (1949). This presumption applies to state as well as federal laws. See, e.g., *Marmon* v. *Mustang Aviation Inc.*, 430 S.W.2d 182 at 186-87 (Tex. 1968).

129. *Smith* v. *United States,* 507 U.S. 197 at 203-204 (1993) (holding that the *Federal Tort Claims Act* did not apply to tortious acts committed by the United States in Antarctica).

130. See *Hartford Fire Ins. Co.* v. *California*, 113 S.Ct. 2891 (1993).

131. See "Developments in the Law: International Environmental Law", (1991) 104 *Harv. L. Rev.* 1484 at 1610, in which several such papers are cited.

132. See, e.g., *Amlon Metals Inc.* v. *FMC Corp.*, 775 F. Supp. 668 at 672-76 (S.D.N.Y. 1991) (holding that the *Resource Conservation and Recovery Act*, 42 U.S.C.A. § 6901 *et seq.*, does not apply extraterritorially); *Greenpeace USA* v. *Stone*, 748 F. Supp. 749 at 759-76 (D. Haw. 1990) (holding that NEPA does not apply to transport of munitions by the US Army within Germany). The court of appeals for the District of Columbia Circuit has held that the *National Environmental Policy Act* of 1969, 42 U.S.C. § 4321, requires an environmental impact statement with respect to federal agency activities in Antarctica. *Environmental Defense Fund Inc.* v. *Massey*, 986 F.2d 528 at 531 (D.C. Cir. 1993). In a subsequent case, however, the district court in the same circuit refused to apply the rationale in *Massey* to US military bases in Japan, *NEPA Coalition of Japan* v. *Aspin*, 837 F. Supp. 466 (D.D.C. 1993) (NEPA does not require the Defense Department to prepare an environmental impact study for military installations in Japan). Finally, see *Beneal* v. *Freeport-McMoran Inc., supra*, note 127 (foreign plaintiff injured abroad may sue American company in federal court under US environmental laws).

apply United States law to foreign *conduct*,[133] although the most recent United States Supreme Court case on the question of extraterritoriality did apply US law to foreign conduct because of that conduct's direct effect within the United States.[134] But many transboundary pollution cases, including the kind addressed most directly by this paper, will involve conduct within the United States that has effects outside the United States. In one such case, a US court concluded that no significant question of extraterritoriality was involved, and applied US law.[135]

A related barrier to seeking relief in US courts is that of standing. In most environmental cases, a plaintiff in a US action must show an injury in fact and that the relief sought is likely to redress the injury.[136] Additionally, in cases in which review of an agency decision is sought, the plaintiff must also generally show that he is within the "zone of interests" sought to be protected by the statutes under which the action is brought.[137] The standing doctrine presents challenges to both domestic and foreign plaintiffs in seeking relief in US courts. The Supreme Court has consistently ruled that a plaintiff's injury must be a special one, well beyond a generalized injury suffered by the public at large.[138]

The standing requirement does not make any formal distinction between foreign and domestic plaintiffs. However, foreign plaintiffs must show that their injuries can be redressed by application of US law, which turns on the question of whether US law applies to them. In practice, therefore, the question of whether a foreign plaintiff has standing in a transboundary pollution case is likely to turn entirely upon the question of whether US law applies. If US law applies and the foreign plaintiff is injured, US courts have found that foreign plaintiffs have standing.[139]

133. See, e.g., *E.E.O.C.* v. *Arabian American Oil Co.*, *supra*, note 128.
134. See *Hartford Fire Ins. Co.* v. *California*, *supra*, note 130 (conspiracy in the United Kingdom to fix prices in the United States primary insurance market allows US court to apply US antitrust law); see also *Defenders of Wildlife* v. *Lujan*, 911 F.2d 117 (8th Cir. 1990) (holding that the *Endangered Species Act* applies to actions that threaten species outside the United States), rev'd on other grounds at 504 U.S. 555 (1992).
135. See *Environmental Defense Fund Inc.* v. *Massey*, *supra*, note 132, at 529 (decision made in the United States to allow burning of wastes in Antarctica is subject to US *National Environmental Policy Act* because "the conduct regulated by the statute occurs primarily, if not exclusively, in the United States. . . .").
136. See, e.g., *Lujan* v. *Defenders of the Wildlife*, 504 U.S. 555 at 560 (1992).
137. See, e.g., *Corrosion Proof Fittings* v. *Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991).
138. See, e.g., *Lujan*, *supra*, note 136, at 563 (plaintiff's assertions that she intended to return to Egypt to view the habitat of the Nile crocodile is insufficient to show an injury protected by the *Endangered Species Act*).
139. See, e.g., *Beanal* v. *Freeport-McMoran Inc.*, *supra*, note 127.

2.3 Injunctive Relief

2.3.1 Description

Injunctive relief is granted to prevent pollution from causing damage in the first place, or stopping an activity that would make the damages worse after they have begun to materialize. Injunctions are, therefore, intended to be preventive in nature. In Canada and the United States, all of the common law/civil law actions discussed above in section 2.1 can result in both damages and injunctive relief.

Injunctive relief is also an increasingly prominent feature of statutory regimes. In most cases, where relief for damages is provided for, injunction is also a remedy set out in the act. In some cases, an injunction may be the primary or only civil cause of action found in the environmental statute.

In Canada, at the federal level, injunctive relief against an actual or potential polluter is specifically provided for where there is actual damage or likely damage as a result of a breach of *Canadian Environmental Protection Act* (CEPA) or its regulations.[140] The *Fisheries Act* provides for a civil cause of action to private parties, but injunctive actions are only made available to the government.

The *International Boundary Waters Treaty Act* makes all remedies otherwise available at the provincial level available to transboundary litigants at the federal level.[141] Thus, injunction being a traditional remedy, it would be available through the Federal Court under this statute, subject to the open question described earlier as to whether water-quality issues are included within its scope as well as the water-quantity issues.

The *Canada Shipping Act* includes prevention in its listing of objectives for a civil action that could be initiated by any person.[142] Thus, pursuant to this statute, injunction would also appear to be a possible remedy when a breach of the Act has occurred or is imminent.

At the provincial level, both Ontario and Québec have instituted civil causes of action for injunctive relief. In Ontario, the *Environmental Bill of Rights* contains provisions that allow injunctive relief for actual or possible harm to a public resource to be initiated by a private citizen, where there is an actual or imminent breach of an environmental law.

140. CEPA, s. 136(2).
141. *International Boundary Waters Treaty Act*, *supra*, note 96, ss. 3-4.
142. *Canada Shipping Act*, *supra*, note 98, s. 677(1).

This would include injunctive relief.[143] Common law remedies for actual or potential private harm are not altered by this legislation.

In Québec, the *Environmental Quality Act* (EQA) establishes a very similar provision to that of Ontario's *Environmental Bill of Rights*. Section 19.2 of the EQA provides that a judge can issue an injunction to protect the quality of the natural environmental from the consequences of actions in breach of the Act or its regulations. Again, private interest remedies under the *Civil Code of Québec*, which include injunctive relief, are not altered by this legislation.

In the United States, many "citizen suit" provisions of environmental statutes allow private individuals to sue to enjoin violation of the respective act. For example, under the *Clean Air Act*, a person can bring a suit to stop construction or modification of a source in violation of the act.

In Mexico, the *Ley General del Equilibrio Ecológico y Protección al Ambiente* (LGEEPA), the federal environmental law provides that safety measures may be taken by the environmental authorities (Article 170), and that physical or corporate persons "from the affected communities" have the right to challenge acts by the authorities, as well as to demand that action be taken to ensure due compliance with the law (Article 180). In both instances, actions take the form of an application for judicial review [*recurso de revisión*] and is clearly limited to persons domiciled in "affected communities." However, this will not necessarily have the effect of excluding foreign nationals since the affected community may be a transboundary one. The requirement is the demonstration of a causal relation between the source works or activities and the damage done to natural resources, wildlife, human health, or quality of life.[144]

The environmental laws or civil codes in Mexico do not contain injunctive relief provisions in the sense of a preventive and protective remedy granted by a court and aimed at future acts.

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143. *Environmental Bill of Rights, 1993*, *supra*, note 100, s. 84.

144. Article 180. In the event of works or activities which contravene the provisions of this law, environmental management programs, edicts declaring protected natural areas, or the official Mexican regulations or standards governing same, physical or corporate persons from the affected communities shall have the right to challenge the administrative acts in question, and to demand that the necessary actions be taken to ensure compliance with the applicable legal provisions, provided they demonstrate in the proceedings that such works or activities damage or may cause damage to natural resources, wild flora and fauna, human health, or quality of life. To exercise this right, such persons must file an application for administrative review under the procedures set out in that chapter of the LGEEPA.

Article 4(IV) of the LGEEPA gives the Mexican federal authority jurisdiction over matters which arise within Mexican territory and affect ecological balance in territories or zones subject to the sovereignty or jurisdiction of another state. This does not mean however that the competent jurisdiction for hearing cases involving liability for damages and injuries ceases to be the courts of the respective state; rather, it means that the competent administrative authority for this type of case is the federal authority, which results in a homogenous and centralized administrative level for dealing with transboundary issues.

2.3.2 Potential barriers to transboundary access to injunctive relief

Local Action Rule. As discussed in section 2.1.2, the local action rule is a concern in some jurisdictions for common law actions for damages to land. To the same extent that the rule is applicable in actions for damages, it would be applied to actions for injunctive relief. This is the case both in Canada and the United States. Again, we recall here that neither Mexico nor the province of Québec apply the local action rule. Where injunctive relief is derived from an environmental statute, the local action rule is not applicable. The application of the local action rule is discussed in the above-noted sections, and is not repeated here.

Residency Requirements. The second significant potential barrier to injunctive relief is residency requirements. These can apply to common law and civil law actions, or to statutory-based actions.

Territorial Scope of Statutes. The third potential barrier is the territorial scope of a statute, the essence and application of which is described in relevant subsections of section 2.2 above. This discussion will not be repeated here, except for some additional approaches to this issue in the United States.

2.3.3 Application in Canada

At the federal level, no residency requirements are found for using the injunctive remedy provided in environmental statutes.

At the provincial level, the residency issues raised for common law and civil law actions for damages would apply equally to actions for injunctive relief. Where a statute provides an expanded or alternative basis for injunctions, the statute must be looked at to establish any residency requirements. In this regard, both Ontario and Québec have a similar type of limitation on their injunctive action to protect a public

resource. In both cases, the person taking the action must be a resident of the province in question. In the province of Québec, the limitation goes further than provincial residency to include a requirement that the person bringing the action must also frequent either the place in question where the harm will occur, or its immediate vicinity.[145]

2.3.4 Application in Mexico

In Mexico, transboundary environmental harm falls within the competence of the federal authorities. The LGEEPA addresses two situations: one relates to administrative acts that relate to works or activities which do not meet with environmental regulations, or that authorize works or activities in contravention of these same environmental provisions; while the other consists in the failure of the federal authority to comply with the applicable legal provisions.

In the first case, an application for judicial review may be filed in order to nullify the government's action in contravention of legal provisions, or reverse its approval of works or activities which contravene the applicable environmental laws. In either case, the immediate or eventual effect will be to halt the act which is damaging or may cause damage to natural resources, wild flora and fauna, human health, or quality of life. Thus, the action is intended to remedy existing damage, or prevent the effects that would otherwise arise.

In the second case, a judicial review may be sought for the purpose of requiring that authorities take the necessary steps to ensure compliance with environmental provisions, thus serving as a remedy for official inaction and a means by which citizens can demand effective enforcement. Once again, this recourse applies to damage which has already arisen, or which may take place in the future.

In both of these cases, the right to challenge administrative acts or to demand the actions necessary for enforcement of environmental provisions is available to "physical and corporate persons in the affected communities," which means that there is a direct relationship between this right and the domicile of the person exercising it. Yet this is not discriminatory vis-à-vis physical and corporate persons located in cross-border communities. In both the first and the second cases, it is necessary to demonstrate that the works or activities are causing or may cause damage, i.e., to show a causal relationship between the work or activity and actual or potential damage.

145. *Environmental Bill of Rights* (Ontario), *supra*, note 100, s. 84; *Environmental Quality Act* (Québec), s. 19(2), (3).

Since the action refers to a government authority and its actions, persons exercising the rights conferred by Article 180 of the LGEEPA may get standing to bring an action for amparo, if they feel that their constitutional guarantees have been violated, once appeals has been exhausted and the sequence of procedures required under the Amparo Act have been complied with.

Reference has already been made to actions for remedying environmental damage regulated by the Code of Civil Procedure of the states and federal district and those related to environmental damage arising from nuclear energy which fall under the Federal Civil Code of Procedure. Neither of these is subject to any restriction based on domicile or nationality.

2.3.5 Application in the United States

In the United States, there is no residency requirement *per se* to bring an action for injunctive relief. See section 2.1 above for a discussion of residency requirement as they apply to all common law actions. See section 2.4 below for a discussion of residency requirements as they apply to "citizen" suits.

Where the issue of the territorial scope of laws has been the most important, the courts have not addressed the application of US law to enjoin activities in the United States that have transboundary effects. Where a non-resident plaintiff is seeking to enjoin activity in the United States that is causing harmful transboundary effects, the arguments against giving extraterritorial effect to the statute seems less applicable and the policy consideration dictating against such application less persuasive. On the other hand, the application of the "zone of interest" test to non-resident plaintiffs may keep courts from applying statutory provisions to enjoin activities in the United States that are having harmful transboundary effects. In *Detroit Audubon Society* v. *City of Detroit*, for example, the federal district court, sitting in diversity, held that the Province of Ontario lacked standing to bring suit under the *Michigan Environmental Protection Act*, because the act was concerned with protecting Michigan's natural resources and therefore the Province of Ontario was not within the "zone of interest" protected by the statute. [146] However, it appears that the federal courts have not yet addressed this issue vis-à-vis federal law.

146. *Detroit Audubon Society* v. *City of Detroit*, 696 F. Supp. 249 at 253 (E.D. Mich. 1988), rev'd on other grounds in *Her Majesty the Queen in Right of the Province of Ontario* v. *City of Detroit*, 874 F.2d 332 (6th Cir. 1989).

2.4 Private Prosecutions and Enforcement Actions in Court

2.4.1 Description

Private prosecutions refer to the ability of private individuals to go to court to enforce an environmental law against a violator (usually also a private entity). In essence, these cases allow a private citizen to act as a prosecutor or attorney general. Private enforcement actions refer to the ability of private citizens to sue the government to force it to take a required action.

Canada. In Canada, private individuals may, subject to certain exceptions, initiate criminal proceedings on their own initiative.[147] This is known as a "private prosecution" and reflects the general principle of common law that any person has the right to institute a criminal prosecution. This process applies to all federal laws containing environmental protection provisions that create criminal or quasi-criminal offenses. One should note, however, that these proceedings are subject to the overriding right of the Attorney General to intervene at any time to either stay the proceedings or continue them as a Crown prosecution.

While convictions can result in the imposition of a fine or prison term, private prosecutors cannot generally recover damages for any prejudice they may have suffered personally. Any fines recovered are paid to the government. Thus, if the intent is to obtain redress for harm caused (damages) or to prevent the occurrence or reoccurrence of a harm, this avenue is of little interest to a potential plaintiff. Only the *Fisheries Act* provides a monetary incentive for private prosecutions, namely that the person who commences a private prosecution is entitled to one half of any fine imposed.[148]

The CEPA provides an alternative to this approach. Following a successful prosecution by the Crown for an offense under the CEPA, any person who has suffered damages as a result of the violation of the Act may apply to the Court at the time of sentencing for an award in respect of those damages to be included as part of the sentence itself.[149]

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147. Sections 504 and 788 of the *Criminal Code*, R.S.C. 1985, c. C-46, as am. by R.S.C. 1985, c. 2 (1st Supp.), allow anyone who believes on reasonable and probable grounds that an offence has occurred to commence a prosecution. See P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change", (1975) 21 *McGill L.J.* 269. See also Muldoon, *supra*, note 56, at 87-88.
148. *Penalties and Forfeiture Proceeds Regulations*, C.R.C., c. 827, s. 5. However, as the cost of a private prosecution will often well exceed the fine imposed, the incentive here is marginal, at best.
149. CEPA, s. 131.

With respect to private prosecutions for violations of provincial statutes, these same basic considerations apply.[150] In addition, certain statutes impose limitations, such as requiring the consent of the Attorney General or a judge before commencing a prosecution.[151] These proceedings are also subject to the overriding right of the Attorney General to intervene at any time to either stay the proceedings or continue them as a Crown prosecution.

Mexico. In Mexico, Article 182(2) of the LGEEPA provides that "anyone" may file a complaint alleging environmental crimes under the applicable legislation. The actual prosecution of such crimes, from the instituting of criminal action onwards, is carried out by the Ministerio Público, a government department and the only authority empowered to represent the state in criminal trials.

United States. In the United States, in addition to providing for enforcement by the federal government,[152] federal environmental statutes nearly all provide for private enforcement through so-called "citizen suits."[153] Most federal environmental laws specifically empower individuals to bring a civil action to enforce compliance with the statute. They typically allow actions against both private violators of the act and government agencies who have failed to meet duties that are mandatory under the act ("non-discretionary duties"). A plaintiff must usually first provide sixty days' notice to the defendant and a suit cannot be brought if the responsible government agency or a state is already "diligently prosecuting" a civil action. Penalties received through citizen suits go to the government and are usually earmarked for compliance and enforcement activities or for projects designed to protect public health.

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150. Muldoon, *supra,* note 56 at 300-303.

151. *Code of Penal Procedure*, R.S.Q., c. C-25.1, s. 9(3); *R.* v. *Schwerdt* (1957), 27 C.R. 35. See also R. Cotton and R. Mansell, "Role of the Public", in A.R. Lucas and R. Cotton, eds., *Canadian Environmental Law*, vol. 1 (Toronto: Butterworths, 1994) Ch. 19, paras. 19.16-19.23.

152. Most of the statutes provide civil and criminal penalties for violations of their standards. They may be enforced either through administrative proceedings initiated by the federal agency responsible for their implementation or through judicial proceedings initiated by the Attorney General.

153. See, e.g., *Toxic Substances Control Act* § 20, 15 U.S.C. § 2619; *Endangered Species Act* § 11(g), 16 U.S.C. § 1540(g); *Surface Mining Control and Reclamation Act* § 520, 30 U.S.C. § 1270; *Clean Water Act* § 505, 33 U.S.C. § 1365; *Marine Protection, Research, and Sanctuaries Act* § 105, 33 U.S.C. § 1415(g); *Act to Prevent Pollution from Ships* § 11, 33 U.S.C. § 1910; *Safe Drinking Water Act* § 1449, 42 U.S.C. § 300j-8; *Noise Control Act* § 12, 42 U.S.C. § 4911; *Solid Waste Disposal Act* § 7002, 42 U.S.C. § 6972; *Clean Air Act* § 304, 42 U.S.C. § 7604; CERCLA, *supra*, note 109, § 310, 42 U.S.C. § 9659; *Emergency Planning and Community Right-to-Know Act* § 326, 42 U.S.C. § 11046.

Some states provide that private persons may enforce state environmental laws through "citizen suits" or their equivalents. State citizen suits sometimes allow private persons to sue violators directly. They may also allow private persons to sue a state agency to require it to take a non-discretionary action. Border states that provide for private enforcement action with respect to at least some of the state's environmental prohibitions include Arizona,[154] California,[155] Michigan,[156] Minnesota,[157] New York,[158] North Dakota,[159] and Pennsylvania.[160] State law private enforcement actions may usually obtain only declaratory and injunctive relief.[161]

2.4.2 Potential barriers to transboundary access to private prosecutions and enforcement actions

Residency Requirements. Residency requirements may limit the ability of non-resident persons to use private prosecutions or citizen suits for enforcement purposes. Such requirements would come either from the general rules applicable to court proceedings under procedural laws or the specific statute that authorized the private enforcement action.

Territorial Scope of Laws. The issues relating to the territorial scope of laws have been canvassed previously. They generally apply in the same manner to private prosecution actions as to civil actions for damages or injunctive relief under environmental statutes. But one additional element may be noted. There may be territorial constraints on the ability to initiate a private prosecution if the pollution emanating from one country has effects only in a foreign territory.[162] This could raise a question as to whether the elements of the offense have taken place in the jurisdiction where the prosecution might be launched. The issue here would be whether the statute requires that all the elements of an offense–the discharge, emission or other causal activity, and the dam-

154. Ariz. Rev. Stat. Ann. § 49-407.
155. Cal. Health & Safety Code § 25249.7 (Deering 1996).
156. *Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. § 324.1701.
157. *Minnesota Environmental Rights Act*, Minn. Stat. § 116B.03.
158. N.Y. Envt'l. Conserv. Law § 71-1715.
159. *Environmental Law Enforcement Act*, N.D. Cent. Code § 32-40-06.
160. 35 Pa. Cons. Stat. § 691.601(c) (water pollution); § 4013.6(c) (air pollution).
161. One exception is the *North Dakota Environmental Law Enforcement Act*, which provides that a plaintiff may also recover damages; N.D. Cent. Code § 32-40-06. *New Jersey's Environmental Rights Act* allows "any person to sue for injunctive relief or civil penalties for violation of any provision designed to prevent or minimize pollution, impairment or destruction of the environment." N.J. Stat. Ann. § 2A:35A-4a.
162. Muldoon, *supra*, note 56, at 153-154.

age – be suffered in the jurisdiction in question. In Ontario, for example, the natural environment is defined as the environment in Ontario only. Here, the injury must be in Ontario for an offense to be established. Otherwise, a prosecution will likely fail.

2.4.3 Application in Canada

Non-residents appear to have the same rights as Canadians to institute private prosecutions, as there are no apparent statutory limits on this right.

2.4.4 Application in Mexico

Under Article 182(2) of the LGEEPA everyone has the ability to lodge a complaint regarding environmental crimes:

> [TRANSLATION] Where the [Environment] Department, in the exercise of its functions, discovers acts or omissions which may constitute crimes under the applicable legislation, it shall file a complaint to that effect before the Ministerio Público.
>
> Anyone may directly lodge a complaint alleging environmental crimes under the applicable legislation.
>
> The [Environment] Department shall provide technical or expert opinions on matters that fall within its purview, when requested to do so by the Ministerio Público or judicial authorities in connection with accusations alleging the commission of environmental crimes.

Thus, provision is made for private reporting of environmental crimes to the office of the Ministerio Público, independently of any action undertaken by the federal environmental authority which in this case is the Federal Prosecutor for the Protection of the Environment (Procuraduría Federal de Protección al Ambiente or "PROFEPA"). This provision may well be considered a check on the environment authority since it allows private parties to trigger the state's prosecutorial mechanism in the event that PROFEPA, for whatever reason, fails to do so. There are no domicile or nationality limits on the exercise of this right.

Otherwise, and except for the possibility set out in Article 180 of the LGEEPA and commented on earlier, there is no private enforcement mechanism similar to those available in Canada and the United States.

2.4.5 Application in the United States

Although the private enforcement mechanisms in the United States are often called "citizen suits," they do not explicitly limit potential plaintiffs to citizens or residents of the United States. The statutes provide that "any person" may bring a civil action to enforce them, and "person" is not defined to exclude non-citizens or non-residents.[163] Of the border states that provide for private enforcement actions, however, Minnesota and New York explicitly limit the persons who may bring private enforcement actions to residents of the state.[164]

Although "citizen suits" are not restricted by their terms to citizens, it does not necessarily mean that courts will interpret the term "any person" broadly. The phrase "any person" must be read together with the presumption against extraterritorial application of laws and the "zone of interest" component of standing. In *United States* v. *Hooker Chemical*,[165] Ontario sought to intervene in a case involving the dumping of chemicals in a landfill in Niagara Falls, New York, that involved both state common law claims and claims under the *Clean Water Act* and *Resource Conservation and Recovery Act*. The court allowed Ontario to intervene, but only with regard to state common law actions. Although the court explicitly refused to address the issue of whether the Province of Ontario was a "citizen" within the meaning of the *Clean Water Act's* citizen suit provision, or a "person" within the meaning of the *Resource Conservation and Recovery Act* citizen suit provision, it nonetheless refused to exercise jurisdiction over those claims.[166]

3.0 ACCESS TO ADMINISTRATIVE ACTIONS

In environmental issues, the preference is to prevent damage before it occurs, rather than to provide for damages after the fact. Much of this preventive work occurs in the context of administrative decision-making on permits, authorizations, licenses, etc. Therefore, access to administrative procedures is an important avenue for potentially affected persons to act to prevent transboundary environmental harm before it occurs.

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163. The *Clean Water Act* uses the phrase "any citizen," but it defines "citizen" as "a person or persons having an interest which is or may be adversely affected"; 33 U.S.C. § 1365(a), (g).
164. See *Minnesota Environmental Rights Act*, Minn. Stat. § 116B.03; N.Y. Envtl. Conserv. Law § 71-1715.
165. 101 F.R.D. 444 (W.D.N.Y. 1984).
166. In a related decision in the same case, the same court ruled that Canadian environmental groups could not intervene because their interests were already being represented by the Province of Ontario. 101 F.R.D. 450 (W.D.N.Y. 1984).

As between residents and non-residents, effective access to administrative procedures can encounter both legal and practical barriers. For example, although non-residents may be able to participate in the consultation process related to the development of policies and legislation, they may not be among the groups receiving notification of this process, thereby posing a practical barrier to participation. The present analysis only focuses on the legal issues involved in transboundary access to administrative actions.

In this section, we look at four types of administrative actions for which transboundary access might be sought:

3.1 Administrative actions for enforcement;

3.2 Administrative actions in environmental assessment;

3.3 Participation in permitting and siting decisions; and

3.4 Participation in regulation and rule-making.

As in section 2, each category of action is described, followed by a note on potential barriers to transboundary access and a discussion of their application in each of the three NAAEC Parties.

3.1 Administrative Actions for Enforcement

3.1.1 Description

Historically, enforcement was seen as a judicial process requiring prosecutions to be initiated. Increasingly, however, actions for enforcement are administrative in nature, including fines, compliance schedules and agreements, tickets, and other techniques. In addition, actions to initiate investigations or enforcement activities are also an important part of public participation in the administrative enforcement process.

Canada. In Canada, there is an increased movement to provide greater flexibility to enforcement officers to assess compliance and impose sanctions or compliance programs. This can be seen in the proposed revisions to the CEPA that were tabled in Parliament in 1998.[167] The proposed new Act included environmental protection alternative measures (EPAMs), such as compliance agreements and ticketing as

167. Bill C-32, introduced 12 March 1988.

alternatives to prosecutions, in addition to the type of warning letters and compliance orders that were previously available. Much of the enforcement mechanism is predicated on the ability of enforcement officers to launch investigations and inspections in order to verify compliance and investigate possible non-compliance.

The *Fisheries Act*, following its recent amendments, provides an array of compliance mechanisms that includes warning letters, orders for compliance, tickets and, finally, prosecutions. All these are in addition to the general provisions in the Act that also provide for rights of inspection and sampling in order to establish whether an offense took place.[168]

At the provincial level, this same trend is only slowly beginning to emerge. Québec's *Environmental Quality Act* allows enforcement officers to ticket offenders in lower-risk cases associated with unauthorized waste disposal sites.[169] It also allows any person who believes that he or she can attribute damage to their health or property to the presence or release of a contaminant to call for an inquiry by the government within thirty days after ascertaining the damage.[170] This is a much more limited form of public access to instigate an inquiry than under the CEPA. Administrative orders requiring a facility to stop polluting are also available to the government.[171]

In Ontario, both remediation and preventive orders are available to the government in response to actual or likely releases of contaminants.[172] However, public participation in relation to such orders is not found in the *Environment Protection Act*, but rather in the *Environmental Bill of Rights*. Part V of the Bill of Rights allows any two persons resident in Ontario to request an investigation of a possible offense under an environmental law in Ontario.[173]

Mexico. Mexican environmental laws at both federal and state level impose administrative sanctions, which are usually fines but may

168. *Fisheries Act*, *supra*, note 95, s. 37(2), 4055, 4978-79.6, 79.7.
169. *Environmental Quality Act,* ss. 66, 108.1.
170. *Ibid.*, s. 117. This section also makes attributing damage to their health or property a precondition to the exercise of this right. Under s. 118, the person exercising this right is entitled to receive the Minister's report.
171. *Ibid.*, s. 25. See the commentary in Lorne Giroux, "La loi sur la qualité de l'environnement: grands mécanismes et recours civils", in *Développements récents en droit de l'environnement (1996)*, Service de la formation permanente du Barreau du Québec (Cowansville, Éditions Yvon Blais, 1996), pp. 263-349, at pp. 318-323.
172. *Environmental Protection Act*, *supra*, note 102, ss. 17, 18, 94, 97, and Part XI.
173. *Environmental Bill of Rights*, *supra*, note 100, ss. 74-81.

include orders to close down facilities or seize assets. In addition, federal or local environmental authorities may order gradual "safety measures" ranging from the closing down of facilities and seizure of assets, to actions designed to neutralize waste products damaging to the environment. As well, both federal legislation and the environmental regulations in the states and Federal District make provision for the filing of "popular complaints" *(denuncia popular)* a process by which citizens may help to protect the environment. Finally, Article 180 of the LGEEPA gives private parties the right to demand that the authorities implement environmental provisions.[174]

Mexican environmental laws, both at the federal level and those of the states and Federal District, include procedures by which cooperation agreements may be sought with private parties to ensure their compli-

174. The LGEEPA has a chapter specifying administrative sanctions, another establishing safety measures, and one setting out the procedures for popular complaints. The laws in all of Mexico's northern border states contain equivalent provisions:
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Baja California* (or Environmental Protection Law of the State of Baja California) of 29 February, 1992, provides for administrative infractions (Arts. 230 and 238), revocation and dissent actions (Arts. 239-247) and popular complaints (Arts. 248-255). Articles 253-255 also set out provisions on civil liability for environmental harm.
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Chihuahua* (or Environmental Protection Law of the State of Chihuahua) of 26 October, 1991, creates administrative infractions (Arts. 130-135) and crimes (Arts. 142-147), provides for dissent actions (Arts. 135-141) and popular complaints (Arts. 148-152), and cover civil liability for environmental harm under Article 152. This Law includes, in Article 153, a specific provision on "civil actions," available through the State's Civil Code to a victim whenever a finding of environmental harm has been issued by an authority, independently of the sanctions imposed in accordance with the Law.
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Coahuila de Zaragoza* (or Environmental Protection Law of the State of Coahuila) of 30 January, 1990, provides for administrative infractions (Arts. 154-157) and crimes (Arts. 165-169), dissent actions (Arts. 159-164), and popular complaints (Arts. 148-153). Article 152 of this Law also specifies that a finding by the environmental authority may be used as evidence in legal proceedings.
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Nuevo León* (or Environmental Protection Law of the State of Nuevo Leon) of 26 June, 1989, creates administrative infractions (Arts. 131-134) and crimes (Arts. 142-147), provides for dissent actions (Arts. 135-141) and popular complaints (Arts. 148-153), and covers civil liability for environmental harm under Article 152.
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Sonora* (or Environmental Protection Law of the State of Sonora) of 3 January, 1991, provides for administrative infractions (Arts. 152-156), dissent actions (Arts. 157-162) and popular complaints (Arts. 163-168), and covers civil liability for environmental harm under Article 168.
The *Ley de Equilibrio Ecológico y Protección del Ambiente del Estado de Tamaulipas* (or Environmental Protection Law of the State of Tamaulipas) of 1 February, 1992, defines administrative infractions (Arts. 153-158) and crimes (Arts. 164-168), and provides for popular complaints (Arts. 159-163).

ance with environmental obligations. The LGEEPA also provides for environmental audits as another means of ensuring environmental compliance.[175]

There are certain mechanisms available to the public for ensuring enforcement of environmental laws and regulations. They are (1) the Review Action; (2) the Popular Complaint; (3) the request for a technical report as evidence in a civil liability suit; and (4) the Amparo proceeding. Of these, the Review Action and Amparo proceeding are primarily associated with the administrative or judicial review of government decisions, and are considered below.

Popular Complaint. The Popular Complaint is an administrative remedy available under the LGEEPA to "any person." This remedy does not require the complainant to meet any specific legal interest, domicile, or nationality requirements. The complaint need only to be submitted in writing (or by phone followed by a written ratification), provide the name and address of the complainant, and identify the source of the environmental harm.

A Popular Complaint may be submitted with respect to any illegal act of an authority or private person that causes environmental harm. This includes a governmental decision illegally authorizing an environmentally harmful activity, as well as the undertaking of activities by any person in violation of the law or of the terms of the government decision that authorized it.

Once a Popular Complaint is received by the Federal Prosecutor for the Protection of the Environment (PROFEPA), that authority shall notify the person identified as the violator,[176] verify the alleged facts, evaluate the Popular Complaint,[177] and, within fifteen working days of its submission, report to the complainant regarding any action taken. The PROFEPA must then notify the complainant of the result of its verification of the alleged facts and the action taken with respect to the information supplied by the complainant.[178]

175. For example, Article 38 of the LGEEPA provides for "self-regulation in environmental matters," Articles 38*bis* and 38*bis*1 describe environmental audits, and Article 158 establishes the cooperation agreement as one of the means for ensuring public participation in environmental protection.
176. LGEEPA, Art. 191.
177. *Ibid.*, Art. 192.
178. *Ibid.*, Art. 193.

Although controversy exists as to the exact scope and legal status of this remedy and the obligations it imposes on the government, there is judicial precedent to the effect that the Popular Complaint constitutes an administrative remedy.[179]

The environmental laws of Mexico's northern border states also make provision for the popular complaint as a recourse for private parties. Access to this remedy appears to be available to all without restriction as to domicile or nationality.

Request for technical report. Article 204 of the LGEEPA states:

> [TRANSLATION] Where contravention of this Law causes damage or injury, interested parties may request that the Semarnap prepare a technical report on such damage or injury, which shall constitute evidence in the event the matter is litigated in court.

Equivalent provisions are made in state laws. A technical report carries much weight since it must be given full probative value in any civil action brought by victims of environmental harm. It thus falls within what Mexican procedural law classifies as a "public document," giving it added legal authority.

United States. Environmental enforcement in the United States can be either administrative or judicial. The Environmental Protection Agency (EPA) is primarily responsible for administrative enforcement procedures. Judicial enforcement cases are referred to the Department of Justice. The vast majority of environmental enforcement cases in the United States, however, are administrative.[180]

Minor violations can be handled by sending an administrative notice of violation that requires correction of the violation without assessment of a penalty. In the case of more serious violations, administrative enforcement actions can include the use of administrative orders and the assessment of civil penalties. Administrative orders give officials the flexibility to specify remedial action[181] and can be enforced in

179. See Tercero Ajeno al Procedimiento, No Existe Cuando la Ley Concede "Denuncia Popular" para Intervenir en El. Tribunales Colegiados de Circuito/Semanario Judicial de la Federación/8A/XII-Octubre/pág. 497/Amparo en Revisión 110/93. Distribuidora de Gas Noel, S.A. de C.V./24 de agosto de 1993.

180. Percival *et al.*, *Environmental Regulation: Law, Science and Policy* (2nd ed. 1996) at 1051-1052. Roughly 90 percent of environmental enforcement cases are handled administratively.

181. See, e.g., *Clean Air Act* § 113(a), 42 U.S.C. § 7413(a); *Clean Water Act* § 309(g), 33 U.S.C. § 1319; *Resources Conservation and Recovery Act* § 3008(a), 42 U.S.C. § 6928(a).

court after notice and an opportunity for a hearing. Civil penalties may be contested before an administrative law judge whose decisions are subject to judicial review. The adjudication provisions of the *Administrative Procedures Act* govern hearings before an administrative law judge.[182] Most administrative cases, like most judicial cases, are settled. Administrative enforcement decisions can be appealed to the EPA's Environmental Appeals Board.[183] Government Enforcement authorities have considerable discretion in deciding whether to initiate enforcement proceedings and in choosing the type of action to pursue.

The issue of primary relevance to the present analysis is to what extent individuals may have recourse to promote the effective implementation of these different types of administrative mechanisms for enforcement purposes.

3.1.2 Potential barriers to access to administrative actions for enforcement

Residency Requirements. The main barrier for transboundary access to administrative actions for enforcement is likely to be residency requirements in the environmental statutes. This is seen to some extent in Canada and the United States.

Territorial Scope of Laws. The potential barrier of the territorial scope of laws has been dealt with previously. No further issues arise specifically relating to access to enforcement. Hence, this issue is not dealt with below.

3.1.3 Application in Canada

Section 108 of the *Canadian Environmental Protection Act* (CEPA) allows Canadian residents to petition the Minister of the Environment to investigate possible non-compliance by a person or facility with the requirements of the CEPA and its regulations. This section is, on its face, limited to persons residing in Canada.

In Québec, as already noted (see subsection 3.1.1), residency is not required with respect to the right to request an investigation under the *Environmental Quality Act*, but having suffered some personal or property damage is.

182. 5 U.S.C. §§ 554, 556, 557.
183. Percival, *supra,* note 180, at 1052.

Under Ontario's *Environmental Bill of Rights,* an application to the Minister for investigation where a person believes that certain acts, regulations, or instruments have been contravened can only be made by a resident of Ontario.[184]

3.1.4 Application in Mexico

Except as provided under Article 180 of the LGEEPA, there are no residency requirements in the environmental statute for enforcement actions. Thus, foreigners affected by transboundary harm originating in Mexico enjoy the same access to remedies in Mexico in this regard as Mexican nationals have.

3.1.5 Application in the United States

In general, the opportunity for the public to participate in the enforcement process in the United States is limited. Any administrative enforcement order or notice of violation will be available under the *Freedom of Information Act* (FOIA).[185] At this point, it is relatively non-controversial that non-residents are able to request information under the FOIA.[186] Citizen suit provisions in environmental statutes also allow individuals to bring actions against persons for violation of an administrative order.[187] Neither the FOIA nor the citizen suit provision contain residency restrictions *per se*. Notices of proposed settlements are published in the Federal Register and are thus available to the public. Settlement documents and court decisions are published and available to the public. Both court proceedings and formal administrative hearings are open to the public. The notice and publications, however, are designed to reach the public in the United States, and will be more available there than abroad.

3.2 Administrative Action in Environmental Assessment

3.2.1 Description

Environmental assessment (EA) is one of the most important tools available for the prevention of environmental harm. As such, the public consultation and public hearing components of many modern EA statutes are often seen as important parts of a strategy of public access to

184. *Environmental Bill of Rights*, *supra*, note 100, ss. 74-81.
185. 5 U.S.C. § 552.
186. See subsection 3.4.5, *infra*, and cases cited there, for more discussion on this point.
187. See, e.g., *Clean Air Act*, 42 USC § 7604(a)(1)(B), *Resource Conservation and Recovery Act* 42 USC 6972 (a)(1)(A), *Clean Water Act*, 33 USC 1365(a)(1)(B).

environmental rights and remedies. In this section, we will review, generally, both the types of public rights available through the administrative processes attached to EA laws and any barriers to their use by non-residents arising from these statutes.

Canada. In Canada, environmental assessment is one of the most developed areas of environmental law. All provinces and the federal government have adopted environmental assessment laws in the last ten years or so. The key areas of concern here are the rights of public involvement in the processes and whether these rights are equally available to non-residents.

Under the *Canadian Environmental Assessment Act* (CEAA),[188] public involvement can arise in different ways. The process involves a preliminary determination by the responsible federal authority of the level of EA that is required for each project decision. This includes one of four levels: a screening, a comprehensive study, a public review by a panel, or a mediation.

Public involvement in screening is at the discretion of the responsible authority. Where public participation in screening is considered to be appropriate, an opportunity for public review and comment on the screening report will be provided prior to a decision on the project. In addition, the screening report must be included in the public registry established for the project.[189]

A comprehensive study report must be submitted to the minister and to the Canadian Environmental Assessment Agency. The Agency is then required to facilitate public access to the report by publishing a notice stating when the report will be available to the public, how copies may be obtained, and the deadline for filing comments. These factors may vary depending on the extent of public involvement in the issue. The comprehensive study report and any public comments will be filed in the public registry for the project.

If the project is referred to mediation between a project proponent and other individuals or groups, the mediator submits a final report to the responsible authority and the minister whether or not an agreement has been reached. Confidentiality must be respected and the report should be limited to a brief account of any agreements and unresolved issues. An analysis of the differences among the parties should be included only if it has been reviewed and approved by the parties.

188. S.C. 1992, c. 37, as amended.
189. *Ibid.*, s. 18(3).

The most extensive provisions for public involvement under the CEAA relate to panel reviews for major projects.[190] Panel reviews are conducted by persons independent of the project proponent and the government department responsible for the review. CEAA specifies that review panels shall ensure that information required for the assessment is available to the public and shall hold public hearings. Furthermore, the panel report must include a summary of public comments.

Access to information is also an important component of effective public participation. The CEAA provides for a public registry to ensure access to information relating to projects for which an EA is conducted.[191] To facilitate access to the registry, document indexes and, to some extent, the actual documents are available on the Internet at the following address: <http://www.ceaa.gc.ca/index_e.htm>.

At the provincial level, EA processes apply to both private and public-sector projects, except in Ontario, where only public sector projects are automatically included. Private-sector projects may be designated as subject to EA in Ontario. Ontario's *Environmental Assessment Act* requires a project proponent to consult with interested persons when they are preparing proposed terms of reference for an EA and the EA itself.[192] The results of this consultation must accompany the proposed terms of reference sent to the ministry for approval.[193] When the assessment is completed by the proponent, it must provide public notice of the results and announce where the report can be seen. Public comments can then be made to the ministry on the assessment.[194] In addition, the public may comment on the review of the assessment conducted by the ministry itself.

Where a mediation is ordered by the minister, members of the public may be identified as participants. The mediation would not otherwise generally be open to public viewing.[195]

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190. *Ibid.*, ss. 33-35.
191. *Ibid.*, s. 55(1), (2). The responsible authority must keep a registry for its own screenings, comprehensive studies, and decisions, and all associated EA documents. The Canadian Environmental Assessment Agency keeps a public registry of all public panel and mediation processes and associated documents and reports. The proposals for the amendment of the CEPA, in Bill C-32, Part 2, also include greater access to environmental information related to the Act via an environmental registry.
192. *Environmental Assessment Act*, R.S.O. 1990, c. E-18, as amended, s. 5.1.
193. *Ibid.*, s. 6(3).
194. *Ibid.*, ss. 6.3, 6.4.
195. *Ibid.*, s. 8. The mediation can be made open to the general public by decision of the mediators.

Any person may also request the referral of a proposed project to the Environmental Assessment Board for an independent hearing.[196] Board hearings are to be public unless decided otherwise by way of exception.[197] Public notice of the time and place of Board hearings must also be given, in accordance with the regulations governing Board procedures.[198]

In Québec, EA law is governed by Division IV.1 of the *Environmental Quality Act*, and the *Environmental Impact and Assessment and Review Regulation*.[199]

Section 31.3 of the Act sets out the minimum public consultation rights in the process. When an environmental assessment is required under the law and regulation, the minister is responsible for setting its scope and content. The proponent of the project is then responsible for preparing the environmental impact assessment statement required by the Act. [200] The minister must make the statement public when it is received, at which point the proponent must initiate the public consultation phase of the EA process by publishing a notice in newspapers of the municipality where the project would be located. Any person, group or municipality may then request the minister to hold public hearings on the project.[201]

These requirements are further detailed in the Regulation, Division IV. Public notice of the right to consult the EA report must be provided in newspapers in the municipality where the project would be located, as well as in Montréal and Québec City. A 45-day period is provided for public comments to be received.

The public consultation procedure in Québec is qualitatively different from that in Ontario, where the public hearing allows for witnesses, summonses, testimony, etc., in a quasi-judicial setting. A decision of the Board in Ontario is binding unless overturned by special decisions of the government. In Québec, the process is one where the *Bureau d'audiences publiques sur l'environnement* facilitates public consul-

196. *Ibid.*, s. 7.2.
197. *Ibid.*, s. 19.
198. *Rules of Practice – Environmental Assessment Board*, R.R.O. 1990, Reg. 335.
199. *Environmental Quality Act*, R.S.Q., c. Q-2, as amended; *Environmental Assessment and Review Regulation*, R.R.Q. 1981, c. Q-2, r. 9, as amended. There are also individual Acts and regulations applicable to the northernmost region of Québec. For a general overview of these regimes, see L. Giroux, *supra,* note 171, at 299 *ff*.
200. *Environmental Quality Act*, s. 31.2.
201. *Ibid.*, s. 31.3.

tation and can make recommendations to the Minister of the Environment, but has no further authority.[202]

Mexico. Subject to appropriate safeguards for the protection of industrial and intellectual property rights, environmental impact statement received by the environmental authorities must be made public. However, it is unclear what the immediate effect of making this document available to the public is. As indicated below, the LGEEPA provides the possibility of holding public consultations.

It is worth noting the provision made under Article 59 of the *Ley Ambiental de Baja California*:

> [TRANSLATION] Environmental impact studies may also be conducted at the request of any group affected by the proposed work or activity, provided the request is accompanied by a technical report or represents a consensus representative of the local community. The Department may request technical assistance from the federal government in assessing the environmental impact statement.

Neither the LGEEPA nor any of the laws of Mexico's other northern border states grant individuals the right to request an environmental impact study.

Under the LGEEPA's federal environmental impact provisions, any member of a community may request that a public consultation be held. The granting of such requests is at the discretion of the environmental authority. Article 34 of the LGEEPA establishes the procedure for conducting these consultations.

With regard to "protected natural areas," the legal regime, both at the federal level and at the states and Federal District levels, encourages the participation of local inhabitants, indigenous communities and social groups, etc., for example by requiring that their opinions be heard prior to the issuance of a permit.

United States. In the United States, environmental assessment is governed at the federal level by the *National Environmental Policy Act* (NEPA). The NEPA requires the preparation of an environmental impact statement (EIS) for any major federal action that significantly affects the quality of the human environment,[203] including projects with

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202. See L. Giroux, *supra,* note 171, at 306-307. See also *Bellefleur* v. *Québec (P.G.)*, [1993] R.J.Q. 2320 at 2332 (C.A.).
203. 42 U.S.C. § 4332(2)(C).

federal financing, assistance, or approval of a project, as well as the adoption of most official policies, formal plans, or programs.[204] There are three types of documents that can be prepared during the environmental assessment process in the United States: an environmental assessment (EA); a "finding of no significant impact" (FONSI); and an EIS. An agency will often prepare an EA when it is considering whether to prepare a full Environmental Impact Statement (EIS). If the EA indicates that there will be no significant environmental impacts, the agency will issue a FONSI. If the agency determines that there will be a significant impact then a full EIS will be prepared. Many states, having adopted statutes similar to the NEPA, also require environmental impact assessments.[205]

Some efforts to address the practical issue of the notification of transboundary pollution in an environmental assessment context have taken place bilaterally between Canada and the United States and trilaterally between Canada, Mexico, and the United States. These efforts are noted in the annex to this paper.

3.2.2 Potential barriers to transboundary access to administrative actions for environmental assessment

As in other areas of law, EA statutes may establish specific residency requirements for participation in public consultation processes or for any other form of public recourse or review. The often intensive participatory nature of some EA processes makes this an important issue.

The second major potential barrier is the territorial scope of EA laws. Given the investigative nature of most EA processes, territorial scope can be a larger issue than in many other types of environmental protection statutes.

3.2.3 Application in Canada

The *Canadian Environmental Assessment Act* (CEAA) does not distinguish between domestic and foreign interventions by the public in an

204. 40 C.F.R. § 1508.18.

205. See, e.g., Cal. Pub. Res. Code §§ 21000-21178, Conn. Gen. Stat. Ann. §§ 22a-1 to 22a-1h, Haw. Rev. Stat. §§ 343-1 to 343-8, Ind. Code Ann. §§ 13-12-4-1 to 13-12-4-10, Md. Nat. Res. Code Ann. §§ 1-301 to 1-305, Mass. Gen Laws Ann. ch. 30, § 61, Minn. Stat. Ann. §§ 116D.01 to 116D.11, Mont. Code Ann. §§ 75-1-101 to 75-1-324, N.Y. Envtl. Conserv. Law §§ 8-0101 to 8-0117, N.C. Gen. Stat. §§ 113A-1 to 113A-13, S.D. Codified Laws Ann. §§ 34A-9-1 to 34A-9-13, Va. Code Ann. §§ 10.1-1182 to 10.1-1192, Wash. Rev. Code Ann. §§43.21C.010 to 43.21C.500, 43.21C.900 to 43.21C.914, and Wis. Stat. Ann. §1.11.

environmental assessment process. Section 2 of the CEAA simply defines "interested party" as being "any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious." However, access by non-residents to certain recourses may encounter problems on a practical level with respect to notification.

Although the Act provides for the establishment of joint review panels with governments of foreign states in the event that projects carried out in Canada may have significant adverse environmental effects outside Canada, notification is left to the Minister of the Environment.[206] The identification of interested non-resident parties and the timeliness of the notice to such non-resident parties remain practical obstacles. To some extent, these obstacles are addressed by the public registry system established pursuant to the Act. This registry contains key documents concerning projects undergoing an assessment; it can be accessed through the Internet, at the following address: <http://www.ceaa.gc.ca/index_e.htm>.

As regards territorial scope, the CEAA expressly includes the environment outside Canada as part of the scope of an assessment, unlike most of its provincial counterparts.[207] It also contains additional express provisions dealing with extraterritorial effects. Section 47 allows the Minister of the Environment and the Minister of Foreign Affairs to refer to a mediator or a review panel any assessment on projects that may cause significant adverse environmental effects outside Canada. This would support the potential access by non-residents concerned with possible environmental impacts of a proposed project, to the EA process.

At the provincial level, there is nothing in environmental assessment legislation to exclude non-residents from the assessment process. However, there may be jurisdictional constraints on the ability of the relevant agency to consider extraterritorial impacts in the assessment process.

In Ontario, the *Environmental Assessment Act* limits the definition of environment to "in or of Ontario." This is further emphasized by the Purpose clause of the Act, which identifies the purpose as for "the betterment of the people of the whole or any part of Ontario by providing for

206. *Canadian Environmental Assessment Act*, *supra*, note 188, s. 48. For a discussion of the transboundary sections of the CEAA, see S.A. Kennett, "The Canadian Environmental Assessment Act's Transboundary Provisions: Trojan Horse or Paper Tiger?", (1995) 5 *J. Env. L. & Prac.* 263.

207. CEAA, s. 2(1).

the protection, conservation and wise management in Ontario of the environment."[208] These provisions raise the question as to whether any impacts outside Ontario can be considered in the EA process. To date, it does not appear that this issue has been ruled on by the courts. Hence, it is not clear whether any non-resident would have a legal interest that would sustain participation in the public consultation process.

In Québec, there is no similar limitation in the *Environmental Quality Act* on the definition of environment. However, the applicable regulation does state expressly that it applies to the whole of the territory of Québec, except for specific areas covered by other EA processes under Québec law.[209] Thus, the same concerns as in Ontario arise over the scope of an assessment and the ability of non-residents to sustain a legal interest in the process based on concerns over foreign impacts.

3.2.4 Application in Mexico

Article 34 of the LGEEPA lays out the procedure to be followed where the environmental authority agrees to conduct a public consultation on environmental impacts of a proposed project. In its third paragraph, the article states that only members of the affected community may request a public hearing. The requirement that interested parties belong to the affected community thereby excludes persons who do not form part of that community, whether they are Mexican citizens or foreign nationals.

Provision is made for cooperation between federal and local authorities in cases where activities will impact the environment of any given state.

Under article 34(IV), any interested party may propose measures for the prevention and mitigation of environmental damage, in addition to those imposed by the environmental authority.

Federal and local provisions governing protected natural areas also provide the right to those living in the respective community to participate at the various stages of the process, from the creation to the management or administration (as the case may be) of such areas.

It is worth noting as well that Mexico's environmental legislation establishes the principle of "public disclosure," under which actions

208. *Environmental Assessment Act*, *supra*, note 192, ss. 1 and 2.
209. *Environmental Assessment and Review Regulation*, *supra,* note 199, s. 17.

taken by environmental authorities must be published in official journals at both the federal and local levels. Although this measure is limited in scope, it is a step forward toward greater transparency in environmental management by the authorities.

3.2.5 Application in the United States

Under federal law, affected federal, state and local agencies, Indian tribes, the proponent of the action, and other interested persons (including those who might oppose the action on environmental grounds) must be invited to participate in the process of determining the scope of the EA ("scoping").[210] The public must be given access to a broad range of information–including background information considered during scoping–any comments, and the record of decision.[211] Any interested person or organization must be allowed to submit comments on a draft EIS.[212]

Neither the NEPA itself nor the implementing regulations would seem to exclude non-residents. Where a proposed action has transboundary effect, the courts have allowed non-residents to intervene in the EA process. In *Swinomish Tribal Community* v. *Federal Energy Regulatory Commission*,[213] Canadian intervenors were allowed to challenge the adequacy of an EIS prepared by the Federal Energy Regulatory Commission (FERC) in connection with its approval of an amendment to the City of Seattle's license that permitted raising the height of the Ross Dam on the Skagit River in Washington state. Canadian intervenors also participated in the hearings held in association with approval of the license (which were held in the United States). In *Wilderness Society* v. *Morton*,[214] a non-resident Canadian citizen and a Canadian environmental organization were permitted to intervene in litigation testing whether the Secretary of the Interior had complied with the procedures of the NEPA in issuing a permit for the trans-Alaska pipeline. Canadian petitioners were permitted to intervene because their interests might diverge from those of the existing American parties.

Although the NEPA seems to make no distinction between potential environmental effects that are within the United States and those

210. 40 C.F.R. § 1501.7.
211. 40 C.F.R. §§ 1506.6 (public involvement) and 1505.2 (record of decision in cases requiring EISs).
212. 40 C.F.R. § 1503.1(a)(4) (inviting comments).
213. 627 F.2d 499 (D.C. Cir. 1980).
214. 464 F.2d 1261 (D.C. Cir. 1972).

that may have transboundary effects, there is a general presumption, as already noted, that United States laws do not apply extraterritorially, absent an express statement of legislative intent or the existence of foreign conduct that causes direct effects in the United States. One court has held that the NEPA of 1969[215] requires an environmental impact statement with respect to federal agency activities in Antarctica, but it is unclear whether that holding would extend to actions in other contexts.[216]

In the case of proposed actions within the United States that have potential transboundary effects, it now seems fairly clear that these effects are to be taken into account in the NEPA analysis. The US courts have recognized the interest of non-residents to participate in the NEPA process where there are transboundary effects.[217] Recently, the Council on Environmental Quality–the agency charged with implementing the NEPA–issued a guidance memorandum for the application of the NEPA analysis to potential transboundary effects. This memorandum purports only to clarify the existing policy, rather than creating new policy, and states that it does not expand the range of actions to which the NEPA currently applies. The guidelines apply only to actions that take place within the United States and its territories and not to actions outside the jurisdiction of the United States. The guidance directs agencies "to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States."[218] The guidance further states that federal agencies should use the scoping process to identify actions with potential transboundary effects. The guidance states that the analysis with regard to transboundary effects should be included in the EA or EIS prepared for the proposed action.[219]

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215. 42 U.S.C. § 4331 *ff*.
216. See *Environmental Defense Fund Inc.* v. *Massey*, *supra*, note 132, at 531 (the NEPA requires the National Science Foundation to prepare an EIS for agency actions to be taken in Antarctica); *NEPA Coalition of Japan* v. *Aspin*, *supra*, note 132 (the NEPA does not require the Defense Department to prepare an environmental impact study for military installations in Japan). See also *Defenders of Wildlife* v. *Lujan*, *supra*, note 134 (holding that the *Endangered Species Act* applies to actions that threaten species outside the United States), rev'd on other grounds at 504 U.S. 555 (1992).
217. *Wilderness Society* v. *Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (Canadian environmental groups allowed to intervene in litigation testing whether the Secretary of Interior had complied with the requirements of the *National Environmental Policy Act* in issuing a permit for the trans-Alaska pipeline), *Swinomish Tribal Community* v. *Federal Energy Regulatory Commission*, *supra*, note 213 (Canadian intervenors allowed to challenge the adequacy of an EIS prepared by the FERC, where proposed agency action would have impacts in Canada).
218. *Council on Environmental Quality Guidance on NEPA Analyses for Transboundary Impacts*, 1 July, 1997.
219. *Ibid*.

In *Swinomish Tribal Community* v. *Federal Energy Regulatory Commission*, discussed above, one of the issues the court addressed was whether the FERC, in approving the license for an increase in the height of the Ross Dam, complied with the NEPA by adequately considering the environmental impact on lands in Canada.[220] The International Joint Commission (IJC) had investigated the environmental effects in Canada resulting from raising the dam. The IJC report was then incorporated as part of the EIS. The court concluded that careful consideration had been given to the effects in Canada and that the record showed these effects had been adequately evaluated in compliance with the NEPA.[221]

Consequently, there is no longer any reason to suggest, at least under federal EA law in the United States, that there is a territorial restriction in the legislation to including transboundary impacts, and hence persons capable of representing them effectively, in the EA process.

3.3 Participation in Permitting and Siting Decisions

3.3.1 Description

Permitting and siting decisions take place routinely, at both the federal and state/provincial level, for all three Parties. Permitting and siting decisions can include not only approval of the location of a facility or activity that can, by its nature, have some environmental impacts, but can also include express conditions on the construction, operation, safety, or other aspects of the facility as part of the permit decision. Hence, these types of decision are an important feature of many environmental control and management regimes.

Public participation in the elaboration, administrative review or implementation of permitting and siting decisions can be an important aspect of seeking to prevent environmental damage before it occurs. Such participation varies from place to place and legislation to legislation.

220. 627 F.2d 499 at 505 (D.C. Cir. 1980).

221. *Ibid*. at 512. The IJC report was initiated pursuant to the International Boundary Waters Treaty between Canada and the United States, which established the IJC. The report is entitled "Environmental and Ecological Consequences in Canada of raising the Ross Lake in the Skagit Valley to Elevation 1725." It is discussed at pp. 510-512 of the case report.

The critical issue for this section is whether, to the extent that public participation in permitting or siting decisions or similar types of authorizations is available in a jurisdiction, those from outside that jurisdiction who might be affected by the decision can participate in the process.

In Canada, federal law requires permits for activities that may cause environmental damage, such as ocean dumping, transboundary movements of hazardous wastes, or alterations to fish habitats.[222] However, there are no specific rights of public comment provided for in the legislation for such permits.[223]

There are also other sectoral acts, such as those relating to oil, gas and electricity export facilities, that require the consideration of environmental impacts before a permit can be issued.[224] Where such acts are involved, they would determine the specific rights of public involvement in relation to the consideration of the environmental impacts. In addition, decisions of specialized agencies established by these types of acts may also be subject to the CEAA and whatever public review processes would be applicable under its terms.

Provincial laws, by contrast, can be heavily focused on permitting decisions, often allowing only very minor activities to take place without a permit being obtained. Public participation, however, is still often limited. In Québec, for example, there are no provisions for public input into these types of decisions under the *Environmental Quality Act*.[225]

In Ontario, the *Environmental Bill of Rights* does establish a set of public participation rights for different types of siting or permitting decisions. The scheme is detailed, and can only be outlined here.[226]

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222. CEPA, *supra*, note 94, ss. 45(3), 71; *Fisheries Act*, *supra*, note 95, s. 35(2).
223. Note, however, that several types of permit are subject to assessment under the CEAA prior to being issued. Hence, opportunities for public comment could arise in this way. The permit and similar decisions that are subject to the CEAA are set out in the *Law List Regulations*, SOR/94-636. This is the most critical of the regulations here. But see also the *Inclusion List Regulations*, SOR/94-637 and the *Comprehensive Study List Regulations*, SOR/94-638.
224. E.g., *National Energy Board Act*, R.S.C. 1985, c. N-7, ss. 34, 35, 36.
225. See the discussion and cases cited in L. Giroux, *supra*, note 171, at 289. Unofficially, a directive exists that allows a person seeking a permit or authorization thirty days' notice to comment in the event it is going to be refused. No similar directive exists for other public input.
226. The scheme is developed in ss. 3-48 of the *Environmental Bill of Rights*. For a full review and discussion, see Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide*, (Emond Montgomery Publications, 1995). The summary description that follows draws from the Bill, as well as the description provided by Muldoon and Lindgren. Note that environmental assessment decisions are exempted from this process as they undergo a substantially equivalent process.

Essentially, a wide variety of government decisions are intended to be set out in a regulation on a minister-by-minister basis. (To date, only the Ministry of Environment and Energy has done this.) All permitting, siting, and other decisions listed in the regulation are then grouped into Class I, II, or III decisions by the responsible ministry for public input purposes.[227] The primary guiding factors are the anticipated environmental impact of the decision and the amount of public interest. Public consultation is then scaled according to the class of each individual decision. Class I instruments are subject to very limited public input rights. Class III decisions are subject to full public hearings. The public is notified of all pending decisions via a public registry located in each municipality; the registry is also available through the Internet, at the following address: <http://www.ene.gov.on.ca/envision/env_reg/ea/English/index.htm>. A minimum thirty-day comment period applies to all decisions covered by the process.

Following public notification of the decision being made, there is an appeal process to the Environmental Appeal Board. This right of appeal must be exercised by someone with "an interest" in the decision, though how narrowly or broadly such an interest is to be defined is not clear in the Bill.[228] There is also a right to seek a review by the responsible minister of any permit, authorization, etc., if two persons resident in Ontario believe that the failure to do so would harm the environment.[229]

Mexican laws do not generally establish a right for the public to comment on permitting decisions. There are no means allowing interested persons to comment on draft permits or participate in public hearings on permits.

The one exception, as noted earlier, is Article 59 of the *Ley de Equilibrio Ecológico y Protección al Ambiente del Estado de Baja California*, which grants communities the right to request an environmental impact study.

Nevertheless, the LGEEPA and the environmental laws of the northern border states allow individuals to file objections to permits and other decisions through the Review Action.

At the federal level, the Review Action superseded the Dissent Action, which was abrogated by the 1994 *Ley Federal de Procedimiento*

227. *Classification of Proposals for Instruments Regulation*, O. Reg. 681/94.
228. See Muldoon and Lindgren, *supra,* note 226, at 96-102.
229. *Environmental Bill of Rights*, *supra*, note 100, ss. 71-73.

Administrativo (Federal Administrative Procedure Act).[230] This remedy is available against acts or decisions that are, *inter alia*, illegal because they have been issued by an authority acting without jurisdiction, without respecting legally required formalities, or without sufficient legal basis.[231]

The Review Action must be submitted in writing by "interested persons aggrieved by final acts or decisions of administrative authorities"[232] within fifteen days of the date on which notification of such acts or decisions has been made.[233] This remedy is therefore not open to any interested party, but only to those with a direct interest as a result of the harm suffered from the act or decision.

The review action must specify the "prejudice" caused to the interested person, and it will be dismissed if no legal interests are affected by the act or decision in dispute.[234] However, the authority that issues a finding on the contested act or decision must annul such act or decision if a "manifest illegality is evident even if no sufficient prejudice is identified."[235]

Execution of the act being challenged is suspended pending the outcome of an action, if the petitioner so requests, the appeal is in order, and the public interest is not affected. In addition, if the rights of third parties may be affected, the posting of a bond is required to cover possible damage to them.[236] "Security measures" may also be requested in order to protect public health or safety.[237] No time limit is imposed on the authorities for issuing their decision pursuant to a Review Action.

The states and Federal District have laws governing administrative procedures which specify their elements, requirements, and effects. The Federal Administrative Procedure Act is not applicable to cases which fall within local jurisdiction. The right to file a Review Action is subject to the claimant's legal interest in the matter.

Although the Federal Administrative Procedure Act does not contain any specific residence or nationality requirements for seeking an administrative review (instead requiring only that the claimant have a

230. Diario Oficial (Official Gazette), 4 August, 1994.
231. *Ibid.*, Art. 3.
232. *Ibid.*, Art. 83.
233. *Ibid.*, Art. 85.
234. *Ibid.*, Art. 89(II).
235. *Ibid.*, Art. 92.
236. *Ibid.*, Art. 87.
237. *Ibid.*, Art. 81.

legal interest in the matter), it must be noted that Article 180 of the LGEEPA–which establishes the right to request a review of acts of the authority that are deemed to violate environmental regulations, or to demand effective enforcement of these same regulations–limits this right to those who form part of the affected community.

There is, finally, the case of interested parties residing within natural protected areas, who have the right to participate in the creation, management, and administration of these areas.

In the United States, many federal laws rely on permits by which agencies authorize activities that are otherwise prohibited.[238] Federal laws also often provide for states to establish or administer permitting programs. A final permit is a final agency action subject to judicial review under the *Administrative Procedures Act* (APA).[239]

Federal statutes that include permits generally allow "interested" persons to comment on draft permits and, under certain conditions, to request and participate in public hearings on the permits.[240] The *Clean Air Act*, for example, sets out the minimum elements of a permit program to be administered by any air pollution control agency. These minimum elements include procedures for public notice and opportunity for public comment and a hearing as well as the opportunity for judicial review in state court of the final permit action by any person who participated in the public comment process.[241] The *Clean Water Act* requires that all permit applications and permits issued under the national pollutant discharge elimination system (NPDES) be available to the public,[242] that there be an opportunity for public hearing,[243] and that state permit programs approved under the NPDES insure the public receives notice of each application for a permit and provide an opportunity for hearing.[244] Similarly, state laws that use a permit system generally give individuals an opportunity to comment on proposed permits before they are issued.

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238. See, e.g., *Clean Air Act* §§ 501-507, 42 U.S.C. §§ 7661-7661f; *Clean Water Act* § 402, 33 U.S.C. § 1342; *Endangered Species Act* § 10(a), 16 U.S.C. § 1539(a).
239. See section 4, *infra*, for a discussion of judicial review of agency action.
240. See, e.g., *Clean Air Act* § 502 (b)(6), 42 U.S.C. § 7661a (b)(6); 40 C.F.R. §§ 124.11, 124.12 (permits under *Clean Water Act*, *Resource Conservation and Recovery Act* (RCRA).
241. 42 U.S.C. § 7661a(b)(6). EPA has interpreted this to require states to grant standing for review to participants in the public comment process who meet the Article III elements of standing. *Virginia* v. *Browner*, 80 F.3d 869 (4th Cir. 1996), cert. denied, 117 S. Ct. 764 (1997).
242. 33 U.S.C. § 1342(j).
243. 33 U.S.C. § 1342(a)(1).
244. 33 U.S.C. § 1342(b)(3).

3.3.2 Potential barriers to transboundary access to permit and siting decisions

Once again, residency requirements and the territorial scope of the relevant statutes pose the largest potential barriers to transboundary access to permit and siting decisions.

The issue of the territorial scope of laws as it relates to permitting and siting decisions concerns the inclusion of environmental impacts and input from outside the local jurisdiction, but does not include the question of permitting facilities outside that jurisdiction.

There is also the question of implicit territorial limitation for those statutes that do not expressly limit the scope of the act to the territory of the enacting legislative authority. Judicial and administrative bodies may very well consider that the purpose of environmental protection statutes is to protect the environment within the territorial boundaries of the province or territory. Statutory recourses for effects outside those boundaries may be deemed to exceed the scope of legislative intent and ability. As pointed out by one author, "territorial limitations imposed by legislation may limit the range of ... inquiry"[245] in a policy-setting consultation (i.e., if the consultation is with respect to activities and effects within provincial boundaries, non-residents may not be able to bring up concerns regarding effects outside provincial boundaries).

3.3.3 Application in Canada

Federally, significant participatory rights are limited to specialized statutes. The *National Energy Board Act*, for example, provides for those whose lands might be directly affected by a proposed pipeline or power line to make an objection to the proposal. This would trigger a public hearing in the area where the land is located. Beyond that, other "interested" persons may file objections to a proposal or appear before the Board in a public hearing process. The Board is given the discretion to determine who is an interested person for this purpose.[246]

As noted above, of the provincial jurisdictions being examined in detail here, only Ontario provides significant rights for public input into permits and similar types of authorizations or decisions. Under the *Environmental Bill of Rights*, however, these rights are only available to

245. Muldoon, *supra,* note 56, at 187.
246. *National Energy Board Act*, *supra*, note 224, ss. 34(4), 35, 52-53.

Ontario citizens. This appears to be the case as a result of the purpose section, which references access to participation in government decisions impacting the environment for Ontario residents.[247] Similarly, an application for review of a policy, statute, regulation or instrument can only be made by no fewer than two residents of Ontario.[248]

There are also examples in Canada of explicit territorial scope limitations in provincial legislation that impact on permitting or siting decision-making. For example, we have already noted that Ontario's *Environmental Protection Act* defines "natural environment" in section 1(k) as the "air, land and water, or any combination or part thereof, of the Province of Ontario."[249] Presumably, this would exclude foreign environmental considerations and would diminish, if not eliminate, the role of foreign input into decision-making. However, section 3(2) of this Act states that "no action taken under this Act is invalid by reason only that the action was taken for the purpose of the protection, conservation or management of the environment outside Ontario's border."[250] Although this would seem to contradict the territorial limitations of the definition of "natural environment," it would appear to prevent the rejection of governmental actions that factor in environmental harm that affects people and property outside Ontario borders.

The same restrictive definitions of "environment" are found in the environmental bill-of-rights type of provincial statute.[251] In Ontario, public participation in the environmental decision-making process is limited to residents, but is also likely to be limited by the territorial scope attributed to the *Environmental Bill of Rights*.

At the federal level, neither the *Canadian Environmental Protection Act* (CEPA) nor the *Canadian Environmental Assessment Act* restrict the definition of "environment" to the Canadian environment. Nothing in these Acts would limit a foreign resident who suffers, or who may suffer, damage in a foreign jurisdiction from the release of a toxic substance in Canada, from seeking to use this legislation on the basis of an explicit limitation to the territory of Canada. However, there are few permitting

247. *Environmental Bill of Rights*, *supra*, note 100, s. 2(3)(a). And see the commentary in Saxe, *supra*, note 101, p. EBR-16 concerning the controlling nature of section 2(3).
248. *Ibid.*, s. 61. However, section 66 provides that the minister shall give a notice of the application for review to any person the minister considers ought to get a notice because that person may have a direct interest in the matters raised in the application. The term "person" could include non-residents. Here a non-resident could intervene in the process but could not initiate the application.
249. *Environmental Protection Act*, *supra*, note 102, s. 1.
250. *Ibid.*, s. 3(2).
251. Ontario's *Environmental Bill of Rights, supra*, note 100, s. 1.

powers under the CEPA, and these have an even more limited relationship to siting of facilities.[252]

The *Fisheries Act* does appear to have a territorial limitation, as already noted. However, as there are no public input processes, this would be of little impact for present purposes.

More specific sectoral statutes would have to be looked at for their possible limitations. The *National Energy Board Act*, for example, in dealing with international pipelines and power lines, would include the consideration of impacts in the partner country within its scope of study. This would suggest that persons in such jurisdictions would also have an interest that supports their input into the process as interested persons under the Act.

3.3.4 Application in Mexico

A Review Action under Article 180 of the LGEEPA can only be filed by persons from the affected community. Therefore, only residents of communities where impacts of activities from a facility operating with a permit granted in violation of the LGEEPA are suffered may file an action to nullify the permit. Despite the fact that this right is subject to a person's domicile (by requiring that the claimant in a review action be a member of the affected community), the provision does not necessarily exclude cross-border communities. This interpretation has not yet been tested and it remains to be seen in practice what consideration, if any, the federal environmental authority will give to actions for reversal filed by cross-border communities.

Article 59 of the *Ley de Equilibrio Ecológico y Protección al Ambiente del Estado de Baja California* (at least part one of that article) could be interpreted in the same way as Article 180 of the LGEEPA, leading to the conclusion that affected groups on any side of the border would be entitled to request an environmental impact study. On the other hand, an interpretation based on the reference to "society" could lead to the opposite conclusion. Part two of Article 59 refers to the "community" as the one in which the work or activity for which the environmental impact study has been requested is to take place. Consequently, the reference in that section that a complainant be a group "representing a substantial con-

252. The main permitting functions are for ocean dumping, certain imports or exports of ozone depleting substances, and the export or import of hazardous waste. The latter is not a permit, but requires the issuance of a letter of consent by the federal government.

sensus of the local community" indicates that domicile within the territory of Baja California is a requirement for standing.

With regard to protected natural areas, the right to participate is likewise linked to domicile, in this case domicile in a protected natural area, which therefore excludes persons and communities from abroad since the "protected natural areas" referred to in the law are those established on Mexican territory.

3.3.5 Application in the United States

The provisions for public participation in the permitting process generally do not explicitly restrict the public to residents in the United States. There has been little case law on this point. In an October, 1996, unpublished opinion, a Texas administrative law judge allowed the city of Juarez, Mexico, and Greenpeace Mexico to intervene in an administrative proceeding on whether to issue a permit for a low-level radioactive waste disposal facility in Texas. It is unclear whether intervention would be permitted in other cases, particularly given that an unpublished case has little value as precedent. The fact that the proposed location of the facility is near the Texas-Mexico border was enough to support their intervention.

As noted previously, there is a general presumption against the extraterritorial application of US laws, absent an express statement of legislative intent or the existence of foreign conduct that causes direct effects in the United States. The extent to which a statute or regulation providing for permitting will be deemed to be concerned with the extraterritorial or transboundary effects of the facility being permitted will depend on the scope of the statute. A federal appeals court has found that the Environmental Protection Agency is not required to take into account effects outside the United States when issuing regulations under the *Toxic Substances Control Act* because it is concerned exclusively with domestic issues.[253]

3.4 Participation in Regulation and Rule-making

3.4.1 Description

Many environmental statutes provide substantive content as well as directions to administrative officials to develop further rules in the

253. *Corrosion Proof Fittings* v. *Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991).

form of regulations.[254] To what extent is the public able to participate in this process? Do these opportunities extend to non-residents? This section looks at express provisions that go beyond a general right of any person to send in comments to a minister, legislature, or government department concerning their activities.

Canada. In Canada, the making of regulations is generally governed by the *Statutory Instruments Act*.[255] Under this Act, regulations must be published in draft form in the Canada Gazette Part I, usually 30 days prior to the intended date of finalization. In some circumstances, this period can be extended to 60 days, while in others it can be eliminated altogether. The 30 to 60-day period is a public comment period for all interested persons.

The *Canadian Environmental Protection Act* (CEPA) includes a requirement for the publication of some regulations at least 60 days prior to their being finalized.[256] In addition to this, the CEPA has put in place several provisions that allow public involvement in regulatory processes. These include the right to ask that a substance be placed on the Priority Substance List for in-depth assessment as to whether it qualifies as a toxic substance under the Act;[257] objections to decisions not to place a substance on the Toxic Substance List;[258] seeking to ensure regulatory action is taken after a delay of five years from when a substance is placed on the Toxic Substance List; and requesting a board of review to consider proposed regulations.[259] The board of review, when requested, can be convened to determine the toxic or other harmful nature of the substance at issue and the degree of danger posed by that substance. These are best described as technically oriented functions, and do not carry a regulation-making power *per se.* The establishment of the board is generally a discretionary act for the minister. The exception to this is for proposed international air pollution regulations. In that case, when a notice of objection is received from any person or from a foreign government that might be impacted by or benefit from such a regulation requesting a board, it must be established.[260] When a board of review is convened, it shall give any person an opportunity to appear before it.

254. These are often referred to as "technical regulations" in Mexico and are legally binding.
255. R.S.C. 1985, c. S-22.
256. *Canadian Environmental Protection Act, supra*, note 94, s. 88, dealing with ocean dumping issues.
257. *Ibid.*, s. 12(4).
258. *Ibid.*, s. 13(2).
259. *Ibid.*, ss. 48(2), 51(2), 55(2), 62(2), 86(4), and 89.
260. *Ibid.*, ss. 89(2) and 62(2). While the scope for access is large here, it might be noted that the international air pollution regulation-making power has not to date been used by the Government of Canada.

Beyond these legislative requirements, Environment Canada also has adopted a public consultation strategy that is applied to each regulation-making process. It involves the use of consultations with stakeholders from early in the regulation-making process until its final completion.[261]

In Québec, the *Regulations Act* requires a 45-day public comment period after a proposed regulation is published and before it can be finalized. Any "interested person" can submit comments during this period.[262] The *Environmental Quality Act* adds little in the way of further public participation rights in the regulation-making process.

In Ontario, participation in environmental rule-making is primarily governed by the *Environmental Bill of Rights*. The process here is very similar to that described in relation to permitting and siting decisions (see section 3.3 above), with the operative language for inclusion of rule-making activities being policies, Acts, and regulations. All new acts and regulations are subject to public input for a minimum 30-day period, though more is generally allocated.

Mexico. The *Ley Federal de Procedimiento Administrativo* (Federal Administrative Procedure Act) provides that draft administrative regulations may be submitted to the parties concerned for observations and comments. The conditions for these procedures are the following: a Congressional Law shall provide that administrative regulations for its branch shall be subject to the process of public hearings; the public interest is affected; and the draft regulations shall previously be published in the Official Gazette of the Mexican Federation[263]. For the environment, the Congressional Law providing for the consultation process is the *Ley de Metrología y Normalización* (Metrology and Standardization Act), which regulates the entire process for setting Normas Oficiales Mexicanas (Mexican Official Standards), among which environmental standards are included. Article 47 of this Act provides for the process of consultation in the establishment of NOMs, while Article 51 of the same Act provides for the consultation process for amendments to NOMs.

United States. In the United States, federal environmental laws often set standards that are elaborated and implemented by federal

261. Environment Canada, "Our Commitment to Effective Consultations," 27 May 1996. Available on the Internet at <http://www.doe.ca/consult/policy_e.html>.
262. *Regulations Act*, R.S.Q., c. R-18.1, s. 11.
263. These procedures will not be observed in situations of emergency, where the administrative authority may issue a standard without public consultations (Article 48). Such standards may only be in force for a period of six months.

agencies through binding regulations. For the most part, the Department of the Interior implements conservation laws, and the Environmental Protection Agency (EPA) implements the others, including the *Clean Air Act*, *Clean Water Act*, *TOSCA*, *CERCLA*, *RCRA*, etc. Implementation is carried out through the rule-making process, governed at the federal level by the *Administrative Procedures Act* (APA).[264] In addition, many federal laws rely on the states for their implementation. The *Clean Air Act*, for example, establishes air quality standards that are met through implementation plans devised by the states and approved by the EPA.

The *Administrative Procedures Act* (APA) sets the procedural floor for federal agency rule-making. It provides for both formal and informal rule-making, although as a practical matter the formal rule-making requirements are rarely triggered. Informal rule-making–also referred to as "notice-and-comment" rule-making–requires publication of proposed rule-making in the *Federal Register*, an opportunity for public participation by the submission of written comments, and publication of a final rule and accompanying statement of basis and purpose at least 30 days prior to the rule's effective date. The statement of basis and purpose must include a reaction to all comments received. If the agency has rejected an issue raised by the comments, they must state why. Although the statute says this is to be a "concise" statement, it is often hundreds of pages long; the requirements have been developed by the courts.[265] The *Negotiated Rulemaking Act* of 1990 supplemented the APA's rule-making provisions, allowing the agency to bring together representatives of affected interest groups to negotiate the text of a proposed rule.[266] Once a final rule is promulgated, it is subject to challenge and review in the court (see subsection 3.4.5 below).

Federal environmental statutes sometimes add to the APA's basic "notice-and-comment" requirements. For example, the *Toxic Substances Control Act* (TSCA) requires a hearing on proposed regulations,[267] and the *Clean Air Act* requires the agency to provide specific information in support of the proposed rule and allows interested persons an opportunity for oral as well as written presentations.[268]

State laws require state agencies to provide notice of proposed regulations and an opportunity for private persons to comment on the pro-

264. 5 U.S.C. § 553 (also permits certain exemptions, including the exercise of the foreign affairs function).
265. Davis and Pierce, *Administrative Law Treatise* § 7.4 (3rd ed., 1994).
266. 5 U.S.C. §§ 581-590.
267. TSCA § 6(c), 15 U.S.C. § 2605(c).
268. *Clean Air Act* § 307(d), 42 U.S.C. § 7607(d)(5).

posals before the agency finalizes them. These requirements are often contained in a state *Administrative Procedure Act*,[269] which state environmental laws may supplement.

3.4.2 Potential barriers to transboundary access to regulation and rule-making

Once again, the main potential barriers to transboundary access to regulation and rule-making are whether there are any residency requirements that impact on the ability of non-residents to participate in the process, and whether there are territorial limitations that would eliminate or reduce the need for any transboundary input.

As a practical matter, there is currently no means of notifying potentially affected persons across borders of proposed regulations or projects, except for the formal diplomatic channels.

3.4.3 Application in Canada

The *Statutory Instruments Act* contains no residency requirements for any public comment purposes, and we have already noted that there are generally no residency requirements in the CEPA. This applies to the sections that impact on the ability to participate in requesting a public review board or providing input into the work of such a board. Indeed, the nature of the regulations that are the potential object of such a request for a board–which include transboundary movement of hazardous wastes, ocean dumping, and international air pollution–would militate against any residency requirement being employed during the operation of a board of review, at least in these areas.

The CEPA clearly includes no territorial limitations as to the consideration of environmental impacts, or for the purposes of allowing public input. As noted above, the aim of several of the sections that are open to the board of review process are transboundary or international

269. See, e.g., Alaska Stat. §§ 44.62.190 & 44.62.210; Ariz. Rev. Stat. Ann. §§41-1022 to 41-1023; Cal. Gov't Code §§ 11346.4 to 11346.7; Idaho Code § 67-5221 to 67-5222; Me. Rev. Stat. Ann. tit. 5, §§8051-8059; Mich. Comp. Laws Ann. § 24.241; Minn. Stat. Ann. §§ 14.13-14.28; Mont. Code Ann. § 2-4-302; N.H. Rev. Stat. Ann. §§541-A:6 & 541-A:11; N.M. Stat. Ann. § 12-8-4; N.Y. A.P.A. Law § 202; N.D. Cent. Code § 28-32-02; Ohio Rev. Code Ann. § 119.03; Pa. Stat. Ann. tit. 71, §745.5; Tex. Gov't Code Ann. § 2001.029; Vt. Stat. Ann. tit. 3, §§ 836-843; Wash. Rev. Code Ann. §§ 34.05.320-34.05.325; Wis. Stat. Ann. §§ 227.16-227.17.

in nature. Hence, it would be reasonable to assume an openness to the inclusion of input from persons outside Canada in these circumstances.

In Ontario, where special provisions are set out in the *Environmental Bill of Rights*, these provisions are open only to residents of Ontario. This issue has been discussed previously.

The *Regulations Act* in Québec, s. 11, refers only to "interested persons." This could be interpreted broadly or narrowly by different authorities, but an expectation of environmental impact resulting from a particular pending decision on a regulation would be a significant factor.

As regards Ontario, the previous comments on the territorial limitation of the *Environmental Protection Act* and the *Environmental Bill of Rights* apply in this present context as well.

3.4.4 Application in Mexico

The Federal Metrology and Standardization Act establishes no residency requirement to comment on draft environmental standards. It requires only that the "interested" persons present their comments to the *ad hoc* committees, which will review and respond to them.

Mexican environmental standards have no extraterritorial effects. Nevertheless, if a facility located in Mexico causes or may cause transboundary environmental impacts, and that a Mexican Official Standard is being considered to regulate the activities carried out by that facility, then members of cross-border communities are allowed to submit comments on the proposed standard.

3.4.5 Application in the United States

The *Administrative Procedures Act* (APA) allows "interested persons" to comment on proposed rules.[270] "Person" is not defined by reference to citizenship or residency. The APA defines "person" as "an individual, partnership, corporation, association or public or private organization other than an agency."[271] To the extent that there is case law fleshing out this definition with respect to non-residents, it has involved the *Freedom of Information Act* (FOIA).[272] Both the FOIA and the

270. 5 U.S.C. § 553(c).
271. 5 U.S.C. § 551(2).
272. 5 U.S.C. § 552.

rule-making provisions of the APA,[273] however, are governed by the same set of definitions.[274] In interpreting the definition of "person" the courts have found that a foreign government or instrumentality is a "public or private organization"[275] and that an alien is a "person" and therefore entitled to government records under the FOIA.[276]

However, in *Corrosion Proof Fittings* v. *Environmental Protection Agency*, the courts found that the TSCA section granting judicial review of regulations issued under TSCA to "any person" was not sufficient to grant standing to Canadian petitioners to challenge the rule, since the TSCA was concerned primarily with domestic issues.[277] In this case, however, the court was dealing with the question of a non-resident seeking judicial review of agency action, and therefore had to inquire whether the plaintiff's interests were within the zone of interests regulated by the statute (prudential standing).[278] While this case does not bode well for non-residents, the threshold for participation in the rule-making process may arguably be lower than the threshold for standing in court to challenge the action. In fact, foreign governments and organizations often submit comments in EPA rule-makings.

In negotiated rule-making, where the agency convenes representatives of interested parties to negotiate a proposed rule, non-residents are typically not directly included as negotiators. However, an industry association whose members include non-US companies may, for example, be included as one of the interested parties in the negotiation, and non-US companies do attend negotiated rule-makings as observers in these situations.

Some statutes do provide limited rights to participate in administrative rule-making to foreign governments in connection with international environmental harm. The *Clean Air Act* and *Clean Water Act* create procedures through which the EPA may determine that pollution origi-

273. 5 U.S.C. § 553.
274. 5 U.S.C. § 551.
275. *Neal Cooper-Grain Co.* v. *Kissinger*, 385 F.Supp. 769 (D.D.C. 1974). This case dealt with a request for information under the *Freedom of Information Act*, 5 U.S.C. § 551, by the Mexican government.
276. *O'Rourke* v. *Department of Justice*, 684 F.Supp. 716 (D.D.C. 1988). This was an immigration case, which makes it unique in some ways.
277. *Corrosion Proof Fittings* v. *Environmental Protection Agency*, *supra*, note 253, at 1211. In this case the Canadian petitioners were producers and manufacturers of asbestos challenging an EPA regulation that prohibited future manufacturing, importation, processing and distribution of asbestos. It is fairly clear that had the petitioners been US producers and manufacturers of asbestos they could have challenged the rule.
278. See section 4, *infra* for a discussion of judicial review of agency action.

nating in the United States endangers public health or welfare in a foreign country and may take actions to stop the pollution.[279] The foreign country that might be affected may participate in hearings on the issue. The procedures only apply, however, if the foreign country gives the United States essentially the same rights. In practice, the EPA has never triggered either law's procedure.[280]

As discussed previously, there is a general presumption that US law does not apply extraterritorially, absent an express statement of legislative intent or the existence of foreign conduct that causes directs effects in the United States. The territorial scope of the rule-making process will probably depend upon the scope of the statute under which a given rule is issued. In *Corrosion Proof Fittings* v. *Environmental Protection Agency*, Canadian plaintiffs unsuccessfully argued that the EPA should have taken into account the effects of a rule issued under the TSCA outside the country.[281] The court ruled that the TSCA does not require the EPA to consider effects outside the United States. Generally, federal environmental law (and state environmental law) is concerned primarily with the national (or state) environment.

4.0 ACCESS TO JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

4.1 Description

The principle object of judicial review is to have the courts review the legality of a governmental action or decision. The role of the court in judicial review is to examine whether the act is or would be legal, and provide an appropriate remedy if it is not. This can include injunctions to prevent certain acts, remedies quashing the decisions in question, or orders for the government agency to perform certain functions. Damages are not generally awarded in judicial review cases.

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279. *Clean Air Act* § 115, 42 U.S.C. § 7415; *Clean Water Act* § 310, 33 U.S.C. § 1320.
280. See *Her Majesty the Queen in Right of Ontario* v. *US E.P.A.*, 912 F.2d 1525 (D.C. Cir. 1990), in which the Court rejected Ontario's argument that the EPA's failure to make finding under *Clean Air Act* § 115 violated its obligations under the *Administrative Procedures Act*. While pollution originating in the United States was harming Canada in the form of acid precipitation and Canada provided a reciprocal right, the EPA had refused to make the required endangerment finding because it could not identify a particular source. Since the statute required the EPA to take action to abate the pollution, the EPA had interpreted the statute to mean that they were not required to make the endangerment finding unless they could identify the specific source of the harm. The court deferred to the EPA's interpretation of the statute.
281. 947 F.2d 1201 (5th Cir. 1991).

Judicial review can apply to the legality of a governmental decision on a new regulation, a permit or other authorization, an environmental impact assessment review, and many other types of environment-related government decisions.

Canada. The Canadian legal system allows judicial review of government action or inaction. This extends to reviewing whether a government agency, administrative body or tribunal, or a public official has acted (or failed to act) fairly, reasonably, impartially, and within its authority. A precondition to this review is sometimes the exhaustion of all administrative rights of appeal from the decision of the administrative body.

At the federal level, judicial review of decisions by ministers, departments, boards, commissions or tribunals must be brought pursuant to the *Federal Court Act*.[282] The remedies include the traditional prerogative remedies of certiorari, prohibition and mandamus as well as injunctions and declaratory relief. One of the most active areas of judicial review over the past eight or nine years has, in fact, been environmental assessment law, with some hundred cases filed before the courts on the federal law alone in this period.[283]

Provincial courts have supervisory jurisdiction over the administrative actions of provincial government authorities, agencies, boards, tribunals, and commissions. In some cases, appeals regarding the decisions, recommendations, acts, or omissions of provincial authorities are made to administrative boards or tribunals prior to judicial review being available[284]; in other cases, appeals are made to the appropriate court in the province.[285] The applicable statute must be consulted to ascertain the type of appeal mechanism available. The types of relief the court may order include mandamus, prohibition, certiorari, declaration, and relief.

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282. R.S.C. 1985, c. F-7, ss. 18, 18.1, 28.

283. A comprehensive review of this body of litigation is found in Beverly Hobby *et al.*, *Canadian Environmental Assessment Act: An Annotated Guide* (Canada Law Books, 1997).

284. In Ontario, the Environmental Appeal Board hears appeals from orders under the *Environmental Protection Act*, *supra*, note 102, ss. 137-145, including appeals regarding applications for licenses, permits, and authorizations. Section 38 of Ontario's *Environmental Bill of Rights, supra*, note 100, allows any citizen "with an interest" leave to appeal. More broadly, the Ontario *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1, confirms the broad basis for making applications for judicial review.

285. In Québec, appeals from orders of the minister are made to the Commission municipale du Québec; *Environment Quality Act*, s. 96.

Mexico. The Amparo procedure is the legal proceeding by means of which a judicial review of administrative acts is carried. Given the nature of the procedure, it is an effective means for reviewing actions taken by both federal and local authorities.

The Amparo procedure is a Constitutional remedy of last resort, the purpose of which is, *inter alia,* settling disputes arising from a governmental "law or act" that violates the guaranteed Constitutional rights of individuals.[286] This proceeding extends to federal and local laws, international treaties, and administrative and other regulations and decrees or agreements of general compliance that, by virtue of their entry into force, or as a result of their first act of implementation, cause harm to a person.[287] The Amparo procedure can also be used to contest both final judicial acts or decisions when violations committed during trial render a person defenseless or deprive a person of the rights granted by law.[288] The Amparo procedure may also be used against judicial acts or decisions, the execution of which may cause irreparable harm.[289]

The Amparo remedy may only be initiated by the party "injured" by the law or act in question, either directly or through legal counsel. The Amparo remedy can only be used to redress a prejudice suffered contrary to a right explicitly granted by the law.[290]

The Amparo procedure allows judges to "suspend the act objected to" (prohibiting execution of the act pending an Amparo hearing), either at the court's initiative or in response to a petition from a complainant. Where the act in dispute would cause irreparable damage, making it physically impossible to restore the violated constitutional rights of the aggrieved person, the court is justified in acting on its own to order such suspension.[291] Suspension of the act objected to consists of ordering the maintenance of the *status quo* and preventing the commission of the act.[292]

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286. *Ley de Amparo,* Reglamentario de los Articulos 103 y 107 de la Constitución Politica de los Estados Unidos Mexicanos." *Official Gazette of the Federation*, 10 January, 1936, Article 1(I).
287. *Ibid.*, Art. 114(I).
288. *Ibid.*, Art. 114(II).
289. *Ibid.*, Art. 114(IV).
290. *Ibid.*, Art. 4.
291. *Ibid.*, Art. 123(II).
292. *Ibid.*, Art. 123.

In the case of a suspension requested by the aggrieved party, an order to this effect may be issued by the judge provided it is not contrary to the interest of society or violate provisions of public order,[293] and the damage or injury to the aggrieved person cannot be repaired easily.[294]

The notion of "legal interest" is central to Mexico's Amparo procedure.[295] Based on Articles 4, 73(V) and 114(I) of the *Ley de Amparo*, the federal courts have determined that there is a legal interest wherever the act objected to (a law or regulation, or the act of a judicial or government authority) is in direct violation of a right expressly granted to the complainant under the laws of Mexico.

The court decisions and the jurisprudence of the nation's courts have delineated with great precision the concepts of "legal interest," "injury," and "act objected to." The Supreme Court of Justice has used certain provisions set out in the environmental laws to establish the existence of collective rights which meet the "legal interest" requirements.[296]

Where an Amparo procedure is sought against acts of the environmental authorities, one must take into account the analysis presented earlier with respect to Article 180 of the LGEEPA[297] for acts carried out by the federal authority. In this case, the possibility of obtaining a successful result by means of an Amparo procedure is tied to the question of domicile, since complainant's "legal interest" is based upon explicit provisions granting the right to request judicial review of the act of an authority to persons who form part of the affected community. Nevertheless and as noted earlier, this could include members of an affected community located outside of Mexico's borders.

Private parties must exhaust review procedures before being granted standing to file an Amparo procedure as a means of opposing acts by a government authority which are deemed to contravene environmental laws.

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293. *Ibid*., Art. 124(II).
294. *Ibid*., Art. 124(III).
295. There are innumerable citations in the jurisprudence and legal theses handed down by the Supreme Court, either sitting en banc or its separate Divisions, and the appellate courts of Mexico, referring to this issue–all of which are consistent with respect to the need for and conceptual design of this law.
296. *Amparo en Revisión* 435/96. *Novena Epoca. Pleno, Semanario Judicial de la Federación y su Gaceta*. Volume V, June 1977, Thesis P, CXI/97.
297. Article 180 of the LGEEPA grants to members of the affected community the right to initiate legal action corresponding to the Review Action.

United States. In the United States, judicial review of final federal agency action is governed by the *Administrative Procedures Act* (APA).[298] After an agency makes any type of final decision, including issuing a permit, a final regulation, an administrative order, or an environmental impact statement, private persons may challenge that decision in court. The APA provides that a person "adversely affected or aggrieved by agency action" is entitled to judicial review of that action.[299] The federal court in which review is sought may set aside agency action it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or in excess of statutory authority.[300] The court may award only declaratory and injunctive relief, not damages.

Many federal environmental statutes add to these basic APA provisions. For example, they often require challenges to be brought within a certain period of time and to be filed in a federal court of appeals rather than a district court.[301] The statutes generally do not change the APA standard of review. The citizen suit provisions of environmental statutes that allow review of agency action (or inaction) are also discussed above.

Like federal environmental law, state law generally provides for judicial review of state agency regulations or other final agency decisions, either through a state administrative procedures act or provisions in specific statutes. Judicial review is usually available at the request of persons "adversely affected" or "aggrieved" by the agency action.

4.2 Potential barriers to transboundary access to judicial review

We have already noted that there are few residency requirements for access to the courts for civil or common law actions today, or for actions under specific environmental statutes. Here, we will find the same general situation with respect to legal actions for judicial review.

As in the previous sections, the second main potential barrier is the territorial scope of the relevant laws. Again, there are some variations in the application of this potential barrier.

298. 5 U.S.C. §§ 701-706.
299. 5 U.S.C. § 702.
300. 5 U.S.C. § 706.
301. See, e.g., TSCA § 19, 15 U.S.C. § 2618; *Clean Water Act* § 509, 33 U.S.C. § 1369; *Solid Waste Disposal Act* § 7006, 42 U.S.C. § 6976; *Clean Air Act* § 307, 42 U.S.C. § 7607; CERCLA § 113, 42 U.S.C. § 9613.

4.3 Application in Canada

The application for judicial review of federal acts or decisions can be made by "anyone directly affected by the matter in respect of which relief is sought."[302] Over the years, the courts have established broad rules of standing to determine who qualifies as "directly affected."[303] Arguably, non-residents have the same access to the federal judicial review process, provided that their interests are "directly affected."

However, if the territorial scope of the application of a law is limited to Canada, a foreign resident may then lack an interest in the substantive issue against which a claim for judicial review could be made. This is the case, for example, with some of the *Fisheries Act* provisions, as already noted. This would be the major factor in considering whether there is a territorial scope to the substantive issue being raised in the application for judicial review. This question has been canvassed in previous sections, for both federal and provincial laws.

Article 57 of Québec's *Code of Civil Procedure* expressly authorizes persons from outside the province, who are authorized by the laws of their own jurisdiction to appear in court, to initiate an action in Québec. In Ontario, there is an implied right of non-residents stemming from the provisions on posting a bond for costs.[304]

4.4 Application in Mexico

There are no residency requirements to file an Amparo suit, the Mexican action equivalent to judicial review. An aggrieved person who resides outside of Mexico has the right to sue for an Amparo remedy against a final judicial sentence or administrative decision within 180 days from the date such person acquires knowledge of the said sentence or decision.

The Amparo remedy is also not restricted by the territorial scope of Mexican environmental laws. As already noted on several occasions, Mexican law generally rules all the persons within its boundaries, as well as the acts or events occurring in its territory or jurisdiction. There-

302. *Federal Court Act*, *supra*, note 282, s. 18.1.
303. *Friends of the Island Inc.* v. *Canada (Min. of Public Works)*, [1993] 2 F.C. 229 at 235 (T.D.). See also D. Sgayias *et al.*, *Federal Court Practice 1996* (Scarborough, Carswell, 1996) at 763-767. In fact, in *Energy Probe* v. *(Canada) Atomic Energy Control Board*, [1985] 1 F.C. 563 (C.A.), it was held that issues should not be immune to review by the application of overly stringent rules of standing.
304. Ontario Rules of Procedure, s. 56.01(1).

fore, if a foreigner is injured by an act of the Mexican authorities, he can seek to have his rights enforced or have a violation of a right prevented, redressed, or compensated, whether he is in Mexican territory or not. This is because the link to make Mexican law applicable is either the personal presence in Mexican territory, or the occurrence of the acts or events in Mexican territory or jurisdiction. The Amparo remedy should therefore be available in cases of transboundary damages originating in Mexico.

4.5 Application in the United States

The federal laws allowing private persons to bring challenges to final agency actions do not explicitly exclude persons on the basis of residency or citizenship. Nevertheless, two environmental statutes may have *de facto* residency requirements. The *Clean Water Act* requires a plaintiff to seek judicial review of an agency action in the federal court of appeals for the judicial district in which such person resides or transacts business which is directly affected by "the challenged action."[305] As a practical matter, this language would appear to impose a residency requirement that would exclude residents of Canada or Mexico from bringing suits for judicial review of agency actions under the *Clear Water Act*. The *Solid Waste Disposal Act* contains similar language.[306]

In general, state administrative procedures acts that provide that interested persons may seek judicial review of agency decisions do not explicitly limit their scope to residents of the state.

In terms of the territorial scope issue, the general presumption in US law that domestic laws do not apply extraterritorially, absent clear evidence of contrary legislative intent or direct US effects, has been previously noted. In *Corrosion Proof Fittings* v. *Environmental Protection Agency*,[307] Canadian plaintiffs unsuccessfully argued that the EPA should have taken into account the impact on Canadian workers and the Canadian economy of a rule banning the sale of asbestos products.

In that case, the US Court of Appeals for the Fifth Circuit applied the "zone of interests" test, originally designed as a limit on suits seeking

305. *Clean Water Act* § 509(b)(1), 33 U.S.C. § 1369(b)(1).
306. *Solid Waste Disposal Act* § 7006(b), 42 U.S.C. § 6976(b). This language applies only to certain permit and authorization decisions under the Act, not to every agency decision.
307. *Supra*, note 253.

judicial review of agency actions pursuant to the APA.[308] The APA grants standing to a person "aggrieved by agency action within the meaning of a relevant statute."[309] The Supreme Court has interpreted this to mean that the complainant must be "adversely affected or aggrieved, i.e., injured in fact," and that the interest sought to be protected by the complainant be arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.[310]

Corrosion Proof Fittings is the only case that has discussed the application of the "zone of interests" test to a non-resident plaintiff in the context of judicial review. Both US and Canadian entities challenged an EPA rule issued under the *Toxic Substances Control Act*. The Canadian parties argued that the EPA had erred by not considering the economic effects of its rule banning asbestos products on foreign workers and countries. A federal court of appeals held that the Canadian parties were not within the TSCA's zone of interests because the statute does not require the EPA to consider the economic effects of its actions outside the United States. The court's discussion also might imply that the EPA is not generally required to consider the extraterritorial environmental effects of its actions. For instance, the court noted that the statute "speaks of the necessity of cleaning up the national environment and protecting United States workers but largely is silent concerning the international effects of agency action."[311] If other courts follow this analysis, non-resident plaintiffs will have a difficult time establishing standing to review agency rules under the federal environmental statutes because they tend to emphasize national rather than international concerns.

5.0 CONCLUSION

A number of potential barriers continue to hinder access to the courts and administrative agencies in North America. Some of these are based on traditional common law issues, such as the local access rule, though perhaps to a lesser extent than the fame of the rule might suggest. But the interpretation of federal, state, and provincial statutes that address a range of environmental issues also raises some concerns for transboundary access to the courts. As the source of legal and administrative recourses has moved from the generally applicable common and

308. See *Clarke* v. *Securities Industry Association,* 479 U.S. 388 at 400 n.16 (1986).
309. 5 U.S.C. § 702.
310. *Clarke* v. *Securities Industry Association*, *supra*, note 308, at 395-396 (1986), citing *Association of Data Processing Service Organizations Inc.* v. *Camp,* 397 U.S 150, 153 (1970).
311. Corrosion Proof Fittings, *supra*, note 253, at 1209.

civil law regimes to a mix of these and statutory recourses, these statutory barriers either eliminate or, in some cases, reduce the effective access of citizens in the other country to domestic legal and administrative processes. While the relatively small number of published decisions on transboundary environmental harm make easy characterizations difficult, few jurisdictions appear to provide unrestricted access to all their legal remedies.

The paper demonstrates that several governments have taken important steps to reduce barriers to equal access in some areas. However, these important steps do not yet apply to all the potential barriers.

Barriers in Mexico appear to be of a different nature, with few or no legal barriers to transboundary access. In general, non-residents may have access to the remedies for environmental harm that it makes available to its residents. But those remedies do not have the same scope as the remedies available in Canada and the United States.

The Annex that follows this conclusion describes a number of previous international initiatives aimed at improving transboundary access to remedy or prevent environmental harm. The potential effectiveness of these examples for the three NAAEC Parties is then assessed. This provides some ideas that may be useful in further reducing the existing barriers.

ANNEX I

Previous Attempts to Overcome Potential Barriers to Access to Courts and Administrative Agencies in Transboundary Pollution Matters

Over the years, efforts have been made both in Europe and in North America to devise legal solutions to recognize access to courts and administrative processes in transboundary pollution problems. Three of these attempts to overcome potential procedural barriers are discussed below.

A. OECD RECOMMENDATIONS

1. Description

The first international organization to identify and elaborate the concept of access to courts and non-discrimination in matters of transboundary pollution was the Organization for Economic Cooperation and Development (OECD).[312] In 1974, it adopted non-binding "Recommendations on Principles Concerning Transfrontier Pollution," which state, *inter alia*, that countries should make "every effort" to provide persons affected by transboundary pollution "the same rights of standing in judicial or administrative proceedings in the country where [the pollution] originates as those [persons] of that country."[313] In 1976, it adopted a more detailed version of this principle:

312. The OECD consists primarily of industrialized countries in Western Europe, but its members also include Canada, the United States and, since 1994, Mexico.

313. OECD Doc. C(74)224 (1974), reprinted in 14 *International Legal Materials* 242 (1975). In general, the OECD Recommendation was inspired by Principle 22 of the *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF. 48/14, at 2-65, and Corr. 1 (1974), reprinted in 11 *International Legal Materials* 1416 (1972), which provides: "States shall cooperate 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." More particularly, the OECD Recommendation follows the *Nordic Convention on the Protection of the Environment*, done at Stockholm on 19 February, 1974, reprinted in 13 *International Legal Materials* 591 (1974) [hereinafter "*Nordic Convention*"], which contains the principle of equal access in its Article 3: "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out." Parties to the *Nordic Convention* include Denmark, Norway, Sweden, and Finland.

The rights accorded to persons affected by transfrontier pollution should be equivalent to those accorded to persons whose personal and/or proprietary interest within the territory of the country where the transfrontier pollution originates are or may be affected under similar conditions by a same pollution, as regards:

a) information concerning projects, new activities and courses of conduct which may give rise to a significant risk of pollution;

b) access to information which the competent authorities make available to persons concerned;

c) the participation in hearings and preliminary inquiries and the making of objections in respect to proposed decisions by the public authorities which could directly or indirectly lead to pollution;

d) recourse to and standing in administrative and judicial procedures (including emergency procedures);

in order to prevent pollution, or to have it abated and/or obtain compensation for the damage caused.[314]

The OECD Recommendation, in its final form, expands the concept of transboundary access to courts to include the notion that persons should have access to information about, and an opportunity to provide comments on, a project or activity that may cause transboundary pollution. This idea has since been included in a number of international agreements, notably the 1991 *Convention on Environmental Impact Assessment in a Transboundary Context*.[315]

314. Recommendation of the Council on Equal Right of Access in Relation to Transfrontier Pollution, OECD Doc. C(76)55 (1976), reprinted in OECD, *Legal Aspects of Transfrontier Pollution* 19 (1977); 15 *International Legal Materials* 1218 (1976). The next year, the OECD adopted a Recommendation for the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, OECD Doc. C(77)28 (1977), reprinted in 16 *International Legal Materials* 977 (1977), which further describes how member governments should implement the principle of equal access.

315. Done at Espoo, Finland, on 25 February, 1991, reprinted in 30 *International Legal Materials* 800 (1991). The Convention was negotiated under the auspices of the U.N. Economic Commission for Europe, to which Canada and the United States belong. It provides, *inter alia*, that with respect to activities covered by the Convention that have the potential to cause an adverse transboundary impact the "concerned Parties shall ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity," and that "due account" shall be taken of these comments before a final decision is taken on the proposed activity (Arts. 3(8), 6(1)). Furthermore, Article 2(6) states that "[t]he Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact

2. Implementation in Each Country

To date, progress has been slow at the governmental level in Canada, Mexico, and the United States towards implementing the OECD Recommendation. Instead, the principal initiatives in furthering this Recommendation were undertaken by private organizations, specifically, the American and Canadian Bar Associations, discussed in Section B below.

However, it should be noted that in the case of Mexico, it may not be necessary to take any specific steps in this matter to amend Mexican legislation to ensure equal access since none of the barriers identified restrict access to Mexican courts by foreign plaintiffs. Practical barriers to access in Mexico persist, however.

As regards the environmental assessment process component of the OECD recommendations, Canada, Mexico, and the United States are currently endeavoring, under the auspices of the Commission for Environmental Cooperation, to implement Article 10(7) and of the North American Agreement on Environmental Cooperation, which calls on the Parties to said agreement to consider and develop recommendations with respect to transboundary environmental impact assessment.

3. Potential or Actual Effectiveness at Overcoming Barriers

If adopted and made effective at the state or provincial as well as the federal levels, the OECD Recommendation, with its principles of equal access and non-discrimination, would eliminate all legal barriers posed by the local action rule, residency requirements, and territorial scope limitations.

B. ABA/CBA DRAFT TREATY

1. Description

In the mid-1970s, representatives of the American Bar Association (ABA) and the Canadian Bar Association (CBA) created a Joint Working Group on Settlement of International Disputes (Joint Working Group),

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assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin." Canada and the United States both signed the Convention but only Canada has ratified it thus far. Mexico not being a member of the UN-ECE did not participate in the negotiations. The Convention went into force on 10 September, 1997.

with a mandate to research methods of resolving public and private disputes between the two countries. One of the Joint Working Group's first projects was to examine the issue of equal access to domestic legal remedies for harm caused by transboundary pollution.[316]

Drawing on the work of the OECD, the Joint Working Group agreed that persons in Canada and the United States should have equal access to judicial and administrative procedures for prevention of and compensation for pollution damage.

Consistent with the OECD Recommendations, the Joint Working Group did not suggest creating any new substantive remedies to address harm caused by transboundary pollution. Rather, it proposed that the two countries ensure that each country's existing domestic remedies are available to residents of the other country for claims arising from such harm by doing away with the local action rule.

To that end, the Joint Working Group prepared a Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution (the "Draft Treaty") for consideration by Canada and the United States. The Draft Treaty contains only five articles. Its core provision is Article 2(a), which provides:

> *The Country of origin shall ensure that any natural or legal person resident in the exposed Country, who has suffered transfrontier pollution, shall at least receive equivalent treatment to that afforded in the Country of origin, in cases of domestic pollution or the risk thereof and in comparable circumstances, to persons of equivalent condition or status in the Country of origin.*[317]

Article 2(b) clarifies this language as follows:

> *From a procedural standpoint, this treatment shall include but shall not be limited to the right to take part, or have resort to, all administrative and judicial procedures existing within the Country of origin, in order to prevent domestic pollution, to have it abated, and/or to obtain compensation for the damage caused.*

316. See Report of the Joint Working Group to the 1979 Annual Meeting of the Canadian Bar Association, reprinted in *Settlement of International Disputes Between Canada and the USA: Resolutions Adopted by the American Bar Association and the Canadian Bar Association with Accompanying Reports and Recommendation* xxxiv (1979) [hereinafter "Settlement of International Disputes"].

317. "Exposed country" is defined as "the Country affected by transfrontier pollution or exposed to a significant risk of transfrontier pollution"; Draft Treaty, Art. 1(e). "Transfrontier pollution" is defined as "any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under the jurisdiction of one Party and which has effect in the area under the jurisdiction of the other Party"; Art. 1(c).

The Joint Working Group made clear that it expected this language to apply to state and provincial courts as well as federal courts.[318]

The Draft Treaty also requires the "country of origin" to take appropriate measures to give notice to persons exposed to a "significant" risk of transboundary pollution, so that they may be able to exercise the rights provided in the Treaty.[319]

2. Implementation in Each Country

In 1979, the ABA and CBA adopted resolutions urging the governments of the United States and Canada to negotiate a treaty on equal access, based on the draft prepared by the Joint Working Group. The governments took note of the recommendations, but never entered into negotiations aimed at drafting a treaty.[320] Although this treaty was not designed at the time to include Mexico, its extension to Mexico may not be necessary since none of the barriers identified seem to restrict access to Mexican courts by foreign plaintiffs.

3. Potential or Actual Effectiveness at Overcoming Barriers

The wording in Article 2 of the Draft Treaty is arguably not as broad as the wording in the OECD Recommendation. It grants rights of access to all administrative and judicial proceedings to prevent, abate, or obtain compensation for pollution damage. The OECD Recommendation specifically sets out rights of access to information and participation in hearings and preliminary inquiries with respect to public decisions and policies. Non-residents, therefore, may not have equal access under the Draft Treaty with respect to input into decision-making and/or policy-making or environmental assessment hearings.

The Draft Treaty does eliminate the restriction imposed by the local action rule. Although it is unclear whether the Draft Treaty also does away with the residency and territorial limitations, arguably such limitations would cease to apply if the purpose of Article 2 of the Draft Treaty is held to ensure that non-residents are to receive "at least equivalent treatment" as residents and that non-domestic pollution is to be equated with domestic pollution.

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318. Settlement of International Disputes, *supra*, note 316 at 50.
319. Draft Treaty, Art. 4(a).
320. Gallob, "Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy", (1991) 15 *Harvard Environmental Law Review* 85 at 92.

C. UNIFORM TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT

1. Description

At the suggestion of the ABA/CBA Joint Working Group, the Canadian and US institutions dedicated to the promotion of uniform laws (the Uniform Law Conference of Canada and the US National Conference of Commissioners on Uniform State Laws) established a liaison committee to discuss drafting uniform legislation for both countries.

The liaison committee drafted a *Uniform Transboundary Pollution Reciprocal Access Act* that could be enacted as an alternative to a treaty. Like the Draft Treaty, the statute overrides the local action rule and provides victims of transboundary pollution equal access to the courts of the jurisdiction where the pollution originated. It provides:

> *A person who suffers, or is threatened with, injury to his person or property in a reciprocating jurisdiction caused by pollution originating, or that may originate, in this jurisdiction has the same rights to relief with respect to the injury or threatened injury, and may enforce those rights in this jurisdiction as if the injury or threatened injury occurred in this jurisdiction.*[321]

The statute defines "reciprocating jurisdiction" as a state of the United States of America or a province or territory of Canada "which has enacted this [Act] or provides substantially equivalent access to its courts and administrative agencies."[322] The commentary to the statute explains that the reference to "substantially equivalent access" is intended to cover jurisdictions that already provide access to their courts for non-resident victims of pollution. The commentary also says that "[t]he Act does not apply to US/Mexico transboundary pollution or to pollution from any other nation."[323]

The statute also explicitly resolves "choice of law" questions by stating that "[t]he law to be applied in an action or other proceeding brought pursuant to this [Act], including what constitutes 'pollution,' is the law of this jurisdiction [i.e., the jurisdiction in which the action is brought] excluding choice of law rules."[324]

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321. *Uniform Transboundary Pollution Reciprocal Access Act* (ABA/CBA Joint Working Group), s. 3.
322. *Ibid.*, s. 1(1).
323. *Ibid.*, comment.
324. *Ibid.*, s. 4.

In 1982, the US and Canadian uniform law organizations approved the draft legislation and recommended it for enactment.

2. Implementation in Each Country

In Canada, four provinces have enacted the statute: Ontario, Manitoba, Nova Scotia, and Prince Edward Island.[325] In the United States, three states on the Canadian border (Michigan, Montana, and Wisconsin[326]) and four other states[327] have enacted the statute. Somewhat surprisingly, there are no reported court decisions under any of the enacted statutes.

Mexico has not adopted this statute. However, Mexico may not need to do so given the fact that none of the barriers identified seem to restrict access to Mexican courts by foreign plaintiffs.

3. Potential or Actual Effectiveness at Overcoming Barriers

As with the ABA/CBA Draft Treaty, *The Uniform Transboundary Pollution Reciprocal Access Act* removes the barrier imposed by the local action rule. It also goes further than the Draft Treaty with an added provision dealing with the choice of law issue. It provides that the law to be applied is the law of the state where the proceeding is brought.

However, as with the Draft Treaty, it is unclear whether it eliminates the residency or territorial barriers. Arguably the wording in section 3 of the Act should be interpreted as also eliminating such barriers to give full effect to the wording "same rights to relief ... as if the injury or threatened injury incurred in this jurisdiction." Allowing statutory residency or territory restrictions to prevail would nullify the intent of the Act.

It is also questionable whether the Act is worded broadly enough to include the broad range of rights of access recommended in the OECD Recommendation, particularly with respect to access to information and access to permitting and environmental assessment hearings.

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325. R.S.O. 1990, c. T-18; S.M. 1985-86, c. 11; S.N.S. 1994-95, c. 1, part XVI; R.S.P.E.I. 1988, c. T-5.
326. Mich. Comp. Laws §§ 324.1801 to 324.1807; Mont. Code §§ 75-16-101 to 75-16-109; Wisc. Stat. §144.995.
327. Colorado, Col. Rev. Stat. §§ 13-1.5-101 to 13.1.5-109; Connecticut, Conn. Gen. Stat. § 51-351b; New Jersey, N.J. Stat. §§ 2A:58A-1 to 2A:58A-8; and Oregon, Ore. Rev. Stat. §§ 468.076 to 468.089.

The Act also incorporates two further restrictions. It will only operate between reciprocating jurisdictions. This means that equal access is granted only to those citizens of states or provinces who adopt this or equivalent legislation. Furthermore, it only affects laws on a state/provincial level and excludes federal laws. This means than an important area of environmental legislation is not open to equal access.

Unfortunately, the small number of states and provinces that have adopted this legislation limit its usefulness to a relatively small territory. There is no case law interpreting this statute in any of the jurisdictions where it has been enacted, so the scope of its application remains unclear.

D. OTHER INTERNATIONAL APPROACHES

The Commission for Environmental Cooperation is currently endeavoring to implement Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC). Under this article, the three North American countries agreed to consider and develop recommendations on transboundary environmental impact assessment recognizing the significant bilateral nature of many transboundary environmental issues.

In October of 1997, the three parties to the NAAEC, through the Commission, released a draft agreement for discussion and public comment.[328] The objective of the process is now to complete an international agreement for signing by the three Parties by June, 1999.

Under the 1991 Air Quality Accord, Canada and the United States established a system of notification of proposed projects in either country that might have an impact in the other country.[329] This notification system has now led to some ten notifications between the parties, which are posted on the Internet for public access.[330]

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328. Commission for Environmental Cooperation, TEIA/97.02.04, 21 October 1997, Draft North American Agreement on Transboundary Environmental Impact Assessment. The text was developed by an intergovernmental group of experts convened by the CEC and is available on the Internet at <www.cec.org>.
329. *Agreement between the Government of the United States of America and the Government of Canada on Air Quality*, 2 *Yearbook of International Environmental Law* 679 (1991), Art. V(1).
330. See C*anada-United States Air Quality Agreement, Progress Report, 1996*, p. 19, 61. Available on the Internet at the following address: <http://www.ec.gc.ca/special/airqual.html>.

A different and more comprehensive approach has been used in certain recent multilateral conventions. The conventions discussed below require the parties to make substantive changes to their laws, or, in some cases, to accept the changes the conventions make to their existing legal regimes.

The UN Economic Commission for Europe has recently concluded, in June 1998, the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.[331] The Convention directly or indirectly addresses the full range of issues considered in this paper, providing detailed standards to be achieved to ensure effective public participation and awareness for environmental matters, including access to information, access to decision-making and access to justice. In doing so, it seeks to ensure the broadest public access for the public, as long as they may be affected by, or have an interest in, the environmental issue being addressed.[332] Further, such access is to be on a non-discriminatory basis as between the public in different countries. Article 3.9 of the Convention states:

> *Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities.*

For access to information, the Convention requires that no interest need be stated in a public request for access to environmental information.[333]

A full legal assessment of this new Convention has not been undertaken. At first blush, however, its broad provisions appear to address the problems of access or standing for non-residents or non-nationals as they relate to most, if not all, of the barriers existing today.

The international community has created several liability regimes for certain types of environmental harm. These regimes generally go beyond the concept of "equal access," by creating new substantive rights

331. The Convention was opened for signature on 25 June, 1998, and signed by thirty-five countries and the European Union. Canada and the United States were not among the initial signatories. Mexico is not part of the UN-ECE and hence did not participate in the elaboration of the Convention. The text of the Convention can be found at the Web site of the UN-ECE at the following address: <www.unece.org>.

332. *Ibid.,* Art. 2.5. These standing requirements are intended to be liberally interpreted in favor of the public.

and remedies for environmental harm. For example, the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*,[334] an initiative of the Council of Europe, creates a liability regime to ensure adequate compensation for damages resulting from activities dangerous to the environment. It establishes liability rules for those persons engaged in what the convention defines as a "dangerous activity," which includes the production, handling, storage, use and discharge of dangerous substances, and the operation of sites for the incineration, treatment, or ultimate disposal of waste.[335] The liability regime created recognizes common principles of liability, establishes the jurisdictions where actions can be brought for transboundary harm, and provides for the mutual recognition and enforcement of judgments among the various countries party to the convention. The convention also provides for access to information held by public bodies.[336] Neither Canada nor the United States have become participants in the Council of Europe Convention regime, and Mexico is not eligible to do so.

A similar regime-building approach is presently being taken with respect to the *Draft Protocol on Liability and Compensation for Damages Resulting from Transboundary Movements of Hazardous Wastes and their Disposal*.[337] This Protocol is being prepared in furtherance of obligations under Article 12 of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*.[338] The Draft Protocol has provisions providing for a liability regime for those in control of hazardous waste,[339] jurisdiction of courts with respect to claims,[340] choice of law issues,[341] and mutual recognition and enforcement of judgments.[342]

This type of regime-building approach attempts to deal with many procedural issues at once. It goes much farther than the general principle of equal access and non-discrimination originally proposed by the

333. *Ibid.,* Art. 4.1(a).
334. Done at Lugano on 21 July, 1993, reprinted in 32 *International Legal Materials* 1228 (1993) at 1230.
335. *Ibid.*, Art. 2.
336. *Ibid.*, Art. 14.
337. Report of the Ad Hoc Working Group, Third Session, 3 March, 1995. The issue here is somewhat different, however. The Protocol, if completed and in force, would not cover transboundary harm, but rather harm in one jurisdiction caused by hazardous waste originating in another jurisdiction and legally transferred between them.
338. Done at Basel on 22 March, 1989, U.N. Doc. UNEP/WG.190/4, UNEP/IG.80/3 (1989), reprinted in 28 *International Legal Materials* 657 (1989) [hereinafter "Basel Convention"].
339. *Supra*, note 337, art. 4.
340. *Ibid.*, art. 10.
341. *Ibid.*, art. 11.
342. *Ibid.*, art. 12.

OECD. In particular, with respect to the adoption of a liability regime, it proposes to alter the legal regimes in the contracting states with respect to subject matters falling within the purview of the convention. The narrowly defined subject matter of the Basel Convention no doubt contributes to making this approach more acceptable to those states who are parties to the Convention, though there is no guarantee they will also become party to the Protocol.[343]

343. The United States, it should be noted, is not a party to the Basel Convention, but does participate as an active observer in the Protocol negotiations.