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FROM CUSTOMARY LAW TO ENVIRONMENTAL IMPACT ASSESSMENT: A NEW APPROACH TO AVOIDING TRANSBOUNDARY ENVIRONMENTAL DAMAGE BETWEEN CANADA AND THE UNITED STATES

Brian R. Popiel*

I. INTRODUCTION

Canada and the United States share approximately 5,000 miles of border as well as more than 150 rivers and lakes. Each country is the other's largest trading partner. Approximately ninety percent of Canadians live within 100 miles of the U.S. border. Because of their geographic proximity, and their social and economic similarities and interdependence, Canada and the United States share a long history of effective dispute management that often serves as a model for the rest of the international community. The countries' past practices and current approaches toward dispute management evidence a marked preference for cooperative diplomacy over formalized legal resolutions. But, regardless of their codependence, Canada and the United

* Topics Editor, 1994-1995, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
2 Eric Beauchesne, Paycheques Losing To Inflation, OTTAWA CITIZEN, Dec. 24, 1993, at F1 (United States is Canada's largest trading partner); David R. Sands, Japan Dominates U.S. Trade Complaints, WASH. TIMES, Apr. 1, 1994, at B7 (Canada is United States's largest trading partner).
3 Jim Fox, With Canada's Dollar Down, Border Shopping Declines, ST. PETERSBURG TIMES, Dec. 25, 1992, at 23A; Anne Swardson, Canada Backs Off In Magazine Content Dispute, WASH. POST, Apr. 8, 1993, at B11.
4 Cooper, supra note 1, at 253.
5 See id. at 249.
6 Id. at 253.
States are continually involved in disputes over activities affecting the countries' extensive shared natural resources.

The traditional approach to dispute management between nations such as Canada and the United States has been to impose responsibility on the affecting nation after the damage has occurred.\(^7\) This is a reactive approach. Recently, however, affected states have turned to customary international law principles to impose procedural duties on potentially affecting states before damage occurs.\(^8\) This approach, by contrast, is predominantly proactive. Among the procedural obligations employed in the proactive approach is the duty to assess the environmental impact of a potentially harmful activity.\(^9\) In both Canada and the United States, Environmental Impact Assessment (EIA) procedures are widely accepted in domestic practice.\(^10\) Thus, the next logical step is for the two nations to apply EIA procedures as a bilateral international obligation to prevent one country from causing harm to the other.

This Comment proposes that Canada and the United States require international EIAs to prevent transboundary\(^11\) environmental damage between the two nations before such harm occurs. Section II outlines the gradual progression in international law of the *sic utere* principle. *Sic utere* stands for the proposition that a nation is responsible for actions occurring within its territory which adversely affect, or may potentially affect, the territory of other nations. The *sic utere* principle has progressed from use in customary international law, through international agreements, to recent soft-law applications. Section III discusses the modern trend of taking proactive measures, such as requiring preparation of EIAs, to avoid transboundary damage, rather than relying on the traditional method of resolving disputes with reactive procedures. Section IV focuses on the function of the EIA and its domestic implementation in Canada and the United States, as well as the application of EIAs internationally. Finally, section V explores the potential use of the customary international

\(^7\) *Developments in the Law—International Environmental Law*, 104 Harv. L. Rev. 1484, 1493 (1991) [hereinafter *Developments*].

\(^8\) See id.


\(^11\) "Transboundary" is synonymous with "transborder," "transfrontier," "transnational," and "extraterritorial" for purposes of this Comment.
principle of *sic utere* to develop an international EIA plan mandating the assessment of potential transborder environmental damage between Canada and the United States.

II. *Sic Utere*: The Duty to Avoid Harming Others Under International Environmental Law

Though pollution is often perceived as a local or regional concern, much pollution freely passes across national borders, thereby making its occurrence an international problem.\(^\text{12}\) Such transboundary pollution is defined by one commentator as "disturbances that originate in one country, are transmitted through a shared natural resource, and take effect in another [country]."\(^\text{13}\) Even where pollution does not physically move from one country to another, its cumulative effects on individual nations make pollution a global concern, with obvious international repercussions.\(^\text{14}\) Because of pollution's international mobility, pollution protection must derive from international law.\(^\text{15}\) International environmental law takes three basic forms which ultimately reflect its historic progression: customary international law, international agreements, and non-binding soft law.\(^\text{16}\)

International environmental disputes exist when two nations have a "conflict of interest concerning . . . the alteration and condition . . . of the physical environment."\(^\text{17}\) Thus, an international dispute must consider customary principles of international law.\(^\text{18}\) Under accepted principles of international law, the duty to prevent transborder environmental damage lies with the country that causes the damage.\(^\text{19}\)

A. The Sic Utere Principle of Customary International Law

Customary international law principles provide a basis for developing other sources of international law such as international agree-

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\(^\text{12}\) See Developments, supra note 7, at 1492.


\(^\text{14}\) An example of such a cumulative effect is global warming caused by thousands of individual, local sources emitting high levels of chlorofluorocarbons. Though no single source would greatly affect the level of ozone, en mass they affect the whole planet. See Jutta Brunnée, *Beyond Rio? The Evolution of International Environmental Law*, 20 ALTERNATIVES (U. Waterloo (Can.)), Nov./Dec. 1993, at 16, 16.

\(^\text{15}\) Developments, supra note 7, at 1492; see Brunnée, supra note 14, at 16.

\(^\text{16}\) Brunnée, supra note 14, at 16. Soft law is a term used to describe forms of non-binding "international co-operation," such as "codes of conduct." *Id.* at 19.

\(^\text{17}\) Cooper, supra note 1, at 249.

\(^\text{18}\) See Developments, supra note 7, at 1492.

\(^\text{19}\) *Id.*
ments and non-binding soft law. In turn, these sources of international law have laid a foundation for holding nations responsible for causing harm to other nations. Customary international law is created when nations consistently adhere to a legal principle with the belief that they are legally bound by it. For example, a majority of nations have long believed that the territorial waters of a state extend twelve miles from its coastline. This custom has been so widely accepted that, when the custom was codified at the 1974 session of the Third United Nations Conference on the Law of the Sea, no other distances were even mentioned as potential territorial water measures.

Similar progressions have occurred in the international environmental legal context. International environmental law is premised on a belief in international neighborhood law, a concept which developed to remedy the opposing interests of sovereign states. Under established principles of international law, the obligation to prevent transborder pollution is on the state that created the pollution. Unfortunately, the overarching international law principle of sovereignty has caused many problems in the development of customary international environmental law. The problems stem from the fact that different nations vary widely in their commitment to protecting the environment. For instance, in the Nuclear Tests cases, the International Court of Justice (ICJ) issued interim orders requiring France to refrain from nuclear testing in the South Pacific because continued testing would cause radioactive fallout on Australia and New Zealand. Rather than answer for its adverse environmental actions, France refused to appear before the ICJ, apparently believing it had the sovereign right to refuse to do so.

See discussion infra parts II.B. and II.C.

See discussion infra parts II.A.-C.

Brunnée, supra note 14, at 16.


Brunnée, supra note 14, at 16.

Developments, supra note 7, at 1492.

Id.

See id.; Brunnée, supra note 14, at 16.


Developments, supra note 7, at 1500.

See id. France claimed that it could not make an appearance for military reasons. Id. at 1502. The ICJ later reasoned that a final decision would be moot because France pledged to cease testing. Id. at 1500.
In contrast to the notion of state sovereignty, another principle of customary international law mandates a conscious effort to avoid transboundary pollution. This principle is *sic utere tuo ut alienum non laedas.* Translated literally, this common law principle states that one must use one's own property so as not to injure that of another. In the context of customary international law, the principle prescribes that "no state may use its territory, or allow the use of it, in a way that causes serious damage to the territory of another state." This principle has been expounded in a series of international disputes.

The principle was first introduced into international environmental jurisprudence during the *Trail Smelter* arbitration in 1938. In the *Trail Smelter* arbitration, a specially appointed arbitral tribunal held Canada responsible for damages caused to property in the United States by a privately owned smelting plant in British Columbia. In its initial decision, the tribunal drafted a pollution abatement program to reduce pollution emissions until a final decision could be reached on whether to allow the plant to continue operating. In its final decision, the tribunal required that the smelter refrain from causing any future pollution.

The *Trail Smelter* arbitration dealt with damage, in the form of air pollution, caused by a zinc and lead smelting plant privately operated by a Canadian company in Trail, British Columbia. Sulfur, in the form of sulfur dioxide emitted from the plant at a rate of up to ten thousand tons per month, fell on areas of northern Washington State between 1925 and 1937. The tribunal found that these emissions caused substantial harm to forests and farmland in the lumber and agricultural region along Washington's Columbia River. The tribunal stated in dicta that:

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32 *Id.* at 1496.
35 *Trail Smelter Arbitral Tribunal (United States v. Can.),* 33 *Am. J. Int'l L.* 182 (1939) (initial decision) [hereinafter *Trail Smelter (initial decision)* or *Initial Decision*], further proceedings, *Trail Smelter Arbitral Tribunal (U.S. v. Can.),* 35 *Am. J. Int'l L.* 684 (1941) (final decision) [hereinafter *Trail Smelter (final decision)* or *Final Decision*].
37 *See Initial Decision,* 33 *Am. J. Int'l L.* at 209–12.
38 *Final Decision,* 35 *Am. J. Int'l L.* at 717.
39 *Id.* at 688.
40 *Id.* at 692–93.
41 *Initial Decision,* 33 *Am. J. Int'l L.* at 198, 201.
Under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.42

Accordingly, the tribunal held that Canada was responsible under international law for the Trail Smelter, and that it was "the duty of the [Canadian] Government . . . to see to it that this conduct should be in conformity with the obligation of the Dominion [of Canada] under international law."43 The Canadian government agreed and complied with the decisions of the tribunal at a cost to the Canadian smelting company of twenty million dollars.44

The *sic utere* principle of international law surfaced again in the *Corfu Channel* case, which was decided by the ICJ in 1949.45 Under reasoning similar to that used in *Trail Smelter*, although not in an environmental context, the ICJ determined that if a nation knows that harmful effects may befall other nations due to its actions or its failure to act, and it does not disclose this knowledge, then that nation will be responsible to those who suffer damage.46

The *Corfu Channel* dispute arose in 1946 when two British warships were damaged by underwater mines while passing the Corfu Strait off the coast of Albania.47 The strait was determined to be within the territorial waters of Albania.48 The ICJ found that because Albania had knowledge of the mines, Albania failed in its general duty under international law to notify all others of the existence of the minefield, and specifically to warn the British ships of the impending danger.49 The ICJ grounded its decision in the customary international law principle of *sic utere*.50

A third case expounding *sic utere* as a principle of customary international law is the *Lake Lanoux* Arbitration of 1957.51 The dispute in this case arose out of an attempt by France to divert water from Lake Lanoux, a body of water entirely within French territory, situated

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42 Final Decision, 35 Am. J. Int’l L. at 716.
43 Id. at 716–17.
48 Id. at 14.
49 Id. at 22–23.
50 See id. at 22.
51 Lake Lanoux Arbitration (Fr. v. Spain), 24 I.L.R. 101 (1957) [hereinafter Lake Lanoux].
neat the Franco-Spanish border. The diversion of the lake water, which normally flowed into the River Carol and ultimately crossed the border into Spain, had the potential to affect the supply of water to some Spanish towns. Treaties between the two nations required notification of the affected nation by the affecting nation if the natural course of a river was going to be altered. Spain claimed that the proposed French diversion would violate these treaties. The appointed tribunal determined that the treaties, together with customary international law principles, mandated that one state has a duty to notify other states when its actions may impede their environmental enjoyment. Additionally, the tribunal determined that, when planning to take action, one state must take into account the considerations of the other state. Here, the tribunal determined that France had indeed complied with its obligations, and thus had violated neither the treaties nor any international principles of law.

The principle of sic utere again returned to the fore in an international environmental dispute between Canada and the United States in the Gut Dam arbitration of 1968. The arbitration came about after Canada constructed a dam which spanned the international boundary of the St. Lawrence River. The dam apparently caused flooding and erosion damage to property on the American side of the river, resulting in a number of private tort claims. The two countries had entered into an agreement, prior to the construction of the dam, which contained a provision essentially codifying the sic utere principle. The provision imposed responsibility and liability on the Canadian government for any injury to the interests of the United States caused by the Canadian-made dam. Thus, based on this agreement, the appointed tribunal determined that Canada was liable for the damage caused to property in the United States.

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52 See id. at 101-02.
53 Id.
54 Additional Act of May 26, 1866 to the Treaties of Bayonne (Dec. 1, 1856; Apr. 14, 1862; May 26, 1866), art. 11, cited in Lake Lanoux, 24 I.L.R. at 103.
55 Lake Lanoux, 24 I.L.R. at 101.
56 See id. at 138; Palmer, supra note 46, at 265.
57 See Lake Lanoux, 24 I.L.R. at 141.
58 Id. at 119, 138-42.
60 Id.
61 Id.
62 Id. at 119-20.
63 Id.
64 Gut Dam Claims, 8 I.L.M. at 136.
B. The Codification of Sic Utere in International Agreements

Customary principles of law, upon their acceptance in the international community, may be incorporated into international agreements. However, the transposition from customary law principle to inclusion in an international agreement such as a treaty is not always a fluid one. Even though customary international law may recognize a principle because of a general recognition among nations that a certain practice is obligatory, the principle may still be neglected or avoided in practice. Thus, for a customary principle to be included in an international agreement, the principle must be held in high regard by the agreeing nations. The sic utere principle has undergone just such a progression from customary international law principle to codification in international agreements.

The incorporation of a customary principle into an international treaty or agreement often serves to balance the contracting nations' strong desire to protect their sovereignty, and may also serve to fill the gaps left by vague or general customary principles. Some argue that customary law has no teeth without codification, because states can finesse the generalities and vagueness of principles to claim that their actions are within the bounds of the international principles. Thus, commentators believe that codification of customary principles is necessary to delineate the specifics of an international principle and thereby give the customary principle its teeth.

Customary law is difficult to codify, however, because the specificity needed to espouse a rule is often seen as an impingement on the sovereign rights of states. This makes states apprehensive about binding themselves to such a rule. Because states are, at the same time, the maker, subject, and enforcer of a rule, the individual inter-

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65 See Stevenson & Oxman, supra note 24, at 13–14.
66 See Palmer, supra note 46, at 266.
67 See Developments, supra note 7, at 1492. For example, under customary international law, states are obliged to prevent transnational pollution. Id. However, efforts to develop a liability scheme to regulate transboundary pollution have failed because customary international law does not coincide with the interests of individual states. Id.
69 See Brunnée, supra note 14, at 18.
70 Developments, supra note 7, at 1493.
71 See Brunnée, supra note 14, at 18.
72 Developments, supra note 7, at 1492–93.
73 Id.
ests of the member states often significantly mold the content of international rules.\textsuperscript{74} Thus, states will often decide not to invoke customary international environmental principles to protect themselves from the pollution of others, because they fear that a precedent will be created, allowing the same principle to be invoked against them for their own environmental offenses.\textsuperscript{75} Perhaps the most glaring example of this phenomenon is the 1985 Chernobyl disaster, where a nuclear reactor in the Ukraine leaked large amounts of radioactive materials. Although more than twenty nations recorded significant increases of radioactivity, none brought suit against the Soviet Union.\textsuperscript{76} Nations producing nuclear power, or any other form of pollution-producing power, were in no hurry to set an international precedent for the assumption of responsibility for transboundary damages caused by such power plants.\textsuperscript{77}

International agreements, such as treaties, can effectively fill the gaps in customary international law by defining specifics in agreed-upon language within accepted parameters.\textsuperscript{78} An important agreement addressing the welfare of the world environment was reached in Stockholm at the Declaration of the United Nations Conference on the Human Environment\textsuperscript{79} in 1972. The underlying theme of the Declaration asserts that although all nations have a present right of equal enjoyment of the environment, they also have “a solemn responsibility to protect and improve the environment for present and future generations.”\textsuperscript{80} To meet these ends, the Stockholm Declaration adopted Principle 21, which is based on the \textit{sic utere} principle. Principle 21 reads:

\begin{quote}
States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environ-
\end{quote}

\textsuperscript{74} See Brunnée, \textit{supra} note 14, at 16.
\textsuperscript{75} Developments, \textit{supra} note 7, at 1502 n.63.
\textsuperscript{76} Id. at 1499.
\textsuperscript{78} See Brunnée, \textit{supra} note 14, at 18.
\textsuperscript{80} Id. at 4.
ment of other States or of areas beyond the limits of national jurisdiction.\textsuperscript{81}

Although the first clause codifies the customary rule that states have sovereignty over their own territory and affairs, the second clause recognizes \textit{sic utere} as an equally important rule of customary law, one that requires a nation to monitor actions within its borders to ensure environmental protection outside its borders.\textsuperscript{82}

The Declaration further expands on the notion of \textit{sic utere} in Principle 22.\textsuperscript{83} Principle 22 asserts that states must cooperate to further develop the international law of "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."\textsuperscript{84}

The twenty six principles and 109 recommendations which constitute the Stockholm Declaration were signed by 103 nations, with twelve nations abstaining, and no negative votes.\textsuperscript{85} Ratification of the Stockholm Declaration, however, is not binding on its signatories.\textsuperscript{86} Nevertheless, the universal acceptance of \textit{sic utere}, as expounded in the declaration, clearly indicates that compliance with the principle is more than expected in the international environmental context.\textsuperscript{87} In fact, Principle 21 itself is now generally recognized as a rule of international environmental law.\textsuperscript{88}

The Stockholm Declaration is not the only international agreement to embrace the \textit{sic utere} principle. The obligation is also codified in Article 194(2) of the United Nations Convention on the Law of the Sea, a binding treaty which was opened for ratification in 1982.\textsuperscript{89} Article 194(2) provides:

\begin{quote}
States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.\textsuperscript{90}
\end{quote}

\textsuperscript{81} Id. at 7.
\textsuperscript{82} See id.
\textsuperscript{83} Id.
\textsuperscript{84} Stockholm Declaration, supra note 79, at 7.
\textsuperscript{85} See Palmer, supra note 46, at 266.
\textsuperscript{86} Developments, supra note 7, at 1498 n.38.
\textsuperscript{87} See \textsc{Alexandre Kiss} \& \textsc{Dinah Shelton}, \textit{International Environmental Law} 130 (1991).
\textsuperscript{88} See id. The Principle has been reaffirmed in several other United Nations declarations. Id.
\textsuperscript{89} Law of the Sea Convention, supra note 68, at 86.
\textsuperscript{90} Id.
Again, the *sic utere* principle is embraced and codified, making states responsible for actions that occur within their territory and damage the territory of others.

*Sic utere* is also expounded in Article 20 of the Association of South East Asian Nations (ASEAN) Convention on the Conservation of Nature and Natural Resources.\(^91\) Moreover, the principle is included in the 1979 Geneva Convention on Long-Range Transboundary Air Pollution.\(^92\) This Convention is grounded on the belief that the *sic utere* principle is a common conviction among nations as regards transborder air pollution.\(^93\) The *sic utere* principle is also enunciated in the 1987 *Restatement of the Law (Third) The Foreign Relation Law of the United States*,\(^94\) which specifies that a "state is obligated to take such measures as may be necessary . . . , to ensure that activities within its jurisdiction or control . . . [do not] cause significant injury to the environment of another state."\(^95\) The application of *sic utere* in the context of international agreements strongly signals that the principle is of great importance to nations, even where the concept may conflict with notions of sovereignty.\(^96\)

C. The Application of Sic Utene in Non-Binding Soft Law

Aside from customary international law and international agreements, the acceptance of *sic utere* as an international environmental rule can also be expounded through soft-law techniques.\(^97\) Any type of international agreement that is not legally binding is considered soft law.\(^98\) Often, soft law comes in the form of "codes of conduct" or "soft principles."\(^99\) Codes of conduct may follow the terms of binding agreements or treaties, but are permissive in that they allow parties to participate in an international arrangement without the fear of being legally bound.\(^100\) Soft principles appear to be coming to the fore internationally, but they are not yet considered customary interna-

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\(^{91}\) Association of South East Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources, 15 ENVTL. Pol'y. & L. 64, 68 (1985) [hereinafter ASEAN Convention].

\(^{92}\) Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, art. 7(e), 34 U.S.T. 3043, 3047, 1302 U.N.T.S. 217, 220.

\(^{93}\) See Kiss & Shelton, supra note 87, at 131.


\(^{95}\) Id. § 601(1)(b).

\(^{96}\) See, e.g., Stockholm Declaration, supra note 79, at 7.

\(^{97}\) Brunnée, supra note 14, at 16.

\(^{98}\) Id. at 19.

\(^{99}\) Id.

\(^{100}\) Id. at 19-20.
tional law. As is often the case with new developments in international environmental law, the application of soft-law techniques helps to increase international acceptance of those developing principles.

Soft-law applications can work to alter political beliefs that may prevail in an area of international law. These changes can be catalysts in the development of international environmental law. The Helsinki Declaration on the Protection of the Ozone Layer is a prime example. This non-binding international declaration delineated certain environmental soft principles that ultimately were incorporated in "hard amendments" to the legally binding Montreal Protocol on Substances that Deplete the Ozone Layer.

Soft law has advanced the *sic utere* principle through the development of a series of rules called the "Rules of International Law Applicable to Transfrontier Pollution" (hereinafter Transfrontier Pollution Rules). At the Sixtieth Conference of the International Law Association, the meaning of the *sic utere* principle was expounded in the articles of the Transfrontier Pollution Rules:

Article 3 (Prevention and Abatement)

(1) ... States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

(2) Furthermore States shall limit new and increased transfron­tier pollution to the lowest level that may be reached by measures practicable and reasonable under the circumstances.

(3) States should endeavor to reduce existing transfrontier pol-

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101 See *id.* at 21.
102 One such developing principle is the concept of "common concern of humankind," which may afford the protection of the environment beyond current jurisdictional limitations. Brunneé, *supra* note 14, at 21.
103 See *id.* One commentator notes that soft law is a popular tool because it leaves much to the discretion of the parties and is politically convenient. Palmer, *supra* note 46, at 269.
104 Palmer, *supra* note 46, at 270.
105 *Id.* at 269.
Through soft-law techniques, the Transfrontier Pollution Rules have effectively employed the *sic utere* principle, imposing a duty on states to avoid causing extraterritorial injury to others.111

### III. Reactive Measures versus Proactive Measures

There is one glaring problem with the use of the *sic utere* principle as a medium for creating state responsibility: the principle is usually invoked as a reactive measure.112 This backward-looking approach is activated only after the damage has been done to the environment.113 Furthermore, this approach lacks the capability to address irreversible or incompensable environmental problems before such problems arise.114 Therefore, because the imposition of responsibility after the fact fails to prevent the injury in the first place, many commentators posit that the correct approach is to impose procedural obligations on states before the environmental damage occurs.115

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110 *Id.* at 160. The Rules continue to evoke proactive measures in the following articles:

- **Article 7 (Prior Notice)**
  
  (1) States planning to carry out activities which might entail significant risk of transfrontier pollution shall give early notice to States likely to be affected. In particular, they shall on their own initiative or upon request of the potentially affected States, communicate such pertinent information as will permit the recipient to make an assessment of the probable effects of the planned activities.

  (2) In order to appraise whether a planned activity implies a significant risk of transfrontier pollution, States should make environmental assessments before carrying out such activities.

- **Article 8 (Consultation)**
  
  (1) Upon request of a potentially affected State, the State furnishing the information should enter into consultations on transfrontier pollution problems connected with the planned activities and pursue such consultations in good faith and over a reasonable period of time.

  (2) States are under an obligation to enter into consultations whenever transfrontier pollution problems arise in connection with the equitable utilization of a shared natural resource . . . .


112 *See* Brunnée, *supra* note 14, at 18.

113 *See id.*

114 *Id.*

115 *Developments, supra* note 7, at 1493.
Arguably, if procedural requirements are imposed before action is taken, states will be better able to address transborder environmental problems preemptively through cooperative methods.116 The potential for such cooperation, however, is limited. The greater the differences between the cultures and economies of the nations involved in a dispute, the more difficult dispute settlement or avoidance will be because social and economic differences may weaken the understanding between the parties.117 Thus, two nations with varied cultures and economies are not likely to give in to potentially restrictive proactive measures because the nations’ priorities and policies are probably too divergent.118 The opposite, however, may be true of two nations that are similarly situated socially and economically—such as the United States and Canada.119

There are several types of proactive procedures that can be imposed to promote dispute avoidance120 over potential environmental damage.121 Among the options are consent, consultation, notification, and assessment.122 Consent is a dispute avoidance procedure whereby the acting party must obtain the prior consent of the affected party before any action can be taken.123 The consultation procedure obliges the acting party to confer with the potentially affected party before proceeding.124 Notification merely requires the affecting party to inform the potentially affected party so that the potentially affected party has an opportunity to prepare and adapt to the ensuing change.125 Assessment is a procedure requiring the affecting party to evaluate the effects of its proposed action on the potentially affected party.126 Note that assessment entails less involvement by the affected party than notification. In turn, notification involves the affected

116 Id.
117 See Cooper, supra note 1, at 252.
118 Cf. id. at 252, 252 n.21 (differing perceptions and economic objectives between developed and developing states make latter suspicious of relatively strict environmental standards advocated by developed nations).
119 See id. at 298. “In the North American context, Canada and the United States, consistent with their history of co-operation, have a quite extensive practice of carrying out these [proactive] procedures.” Id.
120 Id. at 296.
121 Id.
122 Cooper, supra note 1, at 296.
123 See id. at 298–99. Between Canada and the United States, the procedure of consent is used often to govern actions affecting many of the boundary waters shared by the two nations. Id. at 299.
124 See id. at 299–301.
125 Id. at 301.
126 Cooper, supra note 1, at 302–03.
party less than consultation, and consultation calls for a smaller involvement compared to consent.\textsuperscript{127}

Although each of these procedures is likely to lead to sound planning and mitigation of potential problems, and, therefore, to international dispute avoidance,\textsuperscript{128} the first three procedures—consent, consultation, and notification—are contingent upon the implementation of the fourth—assessment.\textsuperscript{129} A potentially affecting state would probably not ask for the consent of a potentially affected state without first assessing and evaluating the project to determine if any environmental harm might occur.\textsuperscript{130} Accordingly, consultation, or the lesser standard of notification, has little value unless an EIA has been undertaken to provide a basis from which to consult, or notify, the potentially affected state.\textsuperscript{131}

One commentator believes the duty of a state to assess the environmental effects of its projects is the least controversial of the dispute avoidance procedures.\textsuperscript{132} This duty to assess environmental impact is “implicit in the substantive international environmental law doctrine proscribing the causation of serious environmental injury to a neighboring state.”\textsuperscript{133} This doctrine is expressed in the \textit{sic utere} customary law principle and Principle 21 of the Stockholm Declaration.\textsuperscript{134} Indeed, it may well be impossible to comply with the \textit{sic utere} principle and ensure against transboundary harm without evaluating the potential for damage from actions within a state’s territory.\textsuperscript{135} Thus, the technique of environmental impact assessment, usually involving the preparation of a detailed environmental impact statement (EIS), is becoming an increasingly popular decision-making tool.\textsuperscript{136} When read in a proactive rather than a reactive context, the \textit{sic utere} principle can mandate an assessment by the acting nation of potential environmental damage to other nations.\textsuperscript{137}

\begin{itemize}
  \item \textsuperscript{127} Id. at 297–302.
  \item \textsuperscript{128} See \textit{id}.
  \item \textsuperscript{129} See Iwama, \textit{supra} note 111, at 120.
  \item \textsuperscript{130} See \textit{id}.
  \item \textsuperscript{131} Cf. \textit{id} (stating EIA is used to determine whether planned activities breach legal obligations to prevent transborder pollution; notification, exchange of information, and consultation are procedures which employ EIA findings to avoid disputes with affected states).
  \item \textsuperscript{132} \textit{Allen L. Springer, The International Law of Pollution} 145 (1983).
  \item \textsuperscript{133} \textit{Cooper, \textit{supra} note 1}, at 303.
  \item \textsuperscript{134} \textit{See Stockholm Declaration, \textit{supra} note 79}, at 7.
  \item \textsuperscript{135} \textit{Id}.
  \item \textsuperscript{136} \textit{See id.; see also Robinson, \textit{supra} note 9}, at 591 (EIA is employed in more than seventy-five jurisdictions worldwide).
  \item \textsuperscript{137} \textit{See Cooper, \textit{supra} note 1}, at 303.
\end{itemize}
IV. ENVIRONMENTAL IMPACT ASSESSMENT

Environmental impact assessment is essentially a cost-benefit analysis of a planned project.138 EIA is a procedure undertaken to ensure that a proposed action will not adversely affect the environment.139 Although the application of EIA varies greatly from jurisdiction to jurisdiction, the basic steps in the process are the following:

1. Pre-assessment or screening of a proposed undertaking to determine the likelihood of its having a significant adverse effect on the environment;
2. If the potential negative impact is significant, the proponent prepares an assessment;
3. The assessment statement is reviewed by a government department or agency or a board;
4. The public is invited to comment through informal meetings or hearings, and through written or oral submissions;
5. A recommendation concerning the acceptability of the undertaking is made to the relevant political authority which decides whether or not to authorize the undertaking; and
6. If authorized, the undertaking is subjected to detailed regulation which may include conditions imposed as a result of findings in the EIA process.140

The spirit of EIA entails making careful, informed decisions, and taking preventative steps to avoid unnecessary environmental damage.141 EIA and the preparation of an EIS are procedures applied to government, and sometimes to private actions early in the planning stages, long before projects are completed or operational.142 Essentially, the concept of EIA is based on the notion of looking before leaping.143

Environmental assessment is used to determine whether a project will or will not lead to a breach of the legal obligation of the parties to prevent unlawful pollution.144 EIA is practiced in many jurisdictions worldwide, and can be applied in most areas regardless of the level of social, scientific, or economic development.145 No matter what the capabilities of the jurisdiction implementing the EIA, however, several key positive features are always present.146

138 See Developments, supra note 7, at 1515.
139 See Robinson, supra note 9, at 602.
140 Hunt, supra note 10, at 791.
141 Robinson, supra note 9, at 593.
142 Cooper, supra note 1, at 303.
143 Robinson, supra note 9, at 610.
144 Iwama, supra note 111, at 120.
145 See Robinson, supra note 9, at 593.
146 See id. at 593–94.
Because of its adaptability to different forms of government, EIA can function in any political system.\textsuperscript{147} Also, the application and use of EIA is spreading quickly, with new users modifying and improving on the system invoked by others.\textsuperscript{148} EIA systems that require public notice offer average citizens, as potentially affected parties, an opportunity to be heard before their environment is adversely affected.\textsuperscript{149} A successful EIA includes the gathering of data for decisionmakers, often revealing potential environmental problems unanticipated at the outset of project development.\textsuperscript{150}

There are, however, some negative features of EIA.\textsuperscript{151} For instance, the value of EIA is often difficult to establish in a jurisdiction unfamiliar with EIA because of an inherent institutional resistance to change.\textsuperscript{152} Indeed, some have opposed EIA, maintaining that it is an expensive, time-consuming ploy to hinder development.\textsuperscript{153} Furthermore, EIA may pose a risk to governmental authority and fairplay. Because successful opposition to a proposal through EIA procedures may result in the demise of the project, government proponents may try to avoid or circumvent the procedures.\textsuperscript{154}

Traditionally, EIA has been used only in large projects, thus reflecting a desire to achieve administrative efficiency instead of universally applying EIA techniques.\textsuperscript{155} Some United States jurisdictions, however, have evolved to require EIA in all projects, large or small.\textsuperscript{156} These jurisdictions realize that even small projects have the potential to create environmental harm.\textsuperscript{157}

Another common negative feature of EIA is that it is not always successful.\textsuperscript{158} Because post-project monitoring is rare, it is often difficult to determine if an EIA accurately anticipated all the impacts,

\textsuperscript{147} Id.
\textsuperscript{148} Id. at 594.
\textsuperscript{149} Id.
\textsuperscript{150} Robinson, supra note 9, at 594.
\textsuperscript{151} See id. at 594–96.
\textsuperscript{152} Id. at 596. This is especially true in developing countries where EIA is often labeled as an “anti-development” process. Id.
\textsuperscript{153} Id.
\textsuperscript{154} See id. One commentator goes so far as to predict that EIA requirements create “a perverse incentive for [parties] to whitewash environmental dangers in their assessments,” and the requirements even risk frustrating political campaigns, because if the EIA really can trigger resistance to a project, the acting party “will likely minimize in the report the magnitude and risk of harm that such activity might truly threaten.” Developments, supra note 7, at 1516.
\textsuperscript{155} Robinson, supra note 9, at 596.
\textsuperscript{156} See id.
\textsuperscript{157} See id. In California and New York even some small villages must follow EIA procedures. Id.
\textsuperscript{158} Id.
or whether mitigation plans actually were successful.\textsuperscript{159} Thus, it is necessary to measure the accuracy of EIA in order to create a better, more effective process, and to increase the success rate of EIAs in preventing environmental harm.\textsuperscript{160}

The typical EIA both gathers information and suggests remedial measures.\textsuperscript{161} The EIA process is designed to allow authorities to make informed decisions.\textsuperscript{162} One does not have to look too long for an example of what can happen when there is a failure to prepare an environmental impact assessment—Egypt’s High Aswan Dam offers a glaring example. As a result of not conducting proper studies of potential negative environmental impacts, the High Aswan Dam created enormous adverse effects in Egypt.\textsuperscript{163} The construction of the dam led to a variety of problems: the creation of a sharp increase in the incidence of blood disease due to a waterborne parasite; the salination of farming acreage to the extent that the land is now agriculturally useless; the destruction of the area’s entire sardine fisheries; and huge erosion problems in the once fertile and prosperous delta.\textsuperscript{164} Even though the project was undertaken with good economic intentions, the lack of knowledge and concern about the possible environmental consequences resulted in widespread disaster.\textsuperscript{165}

A. EIA in Canada

EIA is broadly accepted in all Canadian jurisdictions.\textsuperscript{166} The procedure has been applied federally, provincially, and territorially in Canada since 1973.\textsuperscript{167} The application of environmental assessment in Canada was largely influenced by the passage of the National Environmental Policy Act of 1969 (NEPA)\textsuperscript{168} in the United States. NEPA contained provisions for EIA.\textsuperscript{169} At different political levels, requirements for EIA may vary, sometimes pursuant to legislation (provin-
cially) and sometimes pursuant to policy directives (federally).\textsuperscript{170} Because Canada is much less litigious than the United States, the courts have played only a modest role in the development of EIA in Canada.\textsuperscript{171}

In the last two decades, Canada has consistently reviewed and refined the EIA process.\textsuperscript{172} Several organizations were developed to partake in this process, and to implement EIAs.\textsuperscript{173} Canada’s Environmental Assessment and Review Process (EARP) was established in 1973\textsuperscript{174} by cabinet directive.\textsuperscript{175} EARP controls all federal proposals.\textsuperscript{176} EARP was an administrative office until the 1979 Government Organization Act\textsuperscript{177} authorized the Minister of the Environment to undertake and coordinate governmental impact assessment programs for new federal projects, programs, and activities.\textsuperscript{178} The Minister was also empowered by legislation to create EIA guidelines for federal departments and agencies.\textsuperscript{179} These guidelines were issued in 1984 as the Environmental Assessment and Review Process Guidelines Order.\textsuperscript{180}

Aside from EARP, several other bodies exist whose function is to further develop the EIA process. In 1984, the Minister of the Environment created the Canadian Environmental Assessment Research Council in order to develop and improve the EIA process in Canada.\textsuperscript{181} The Canadian International Development Agency (CIDA) helps to develop EIA worldwide, especially in developing countries.\textsuperscript{182} Also, the Federal Environmental Assessment and Review Office (FEARO) is an important independent body which approves the EARP rules governing the various departments both internationally and domestically.\textsuperscript{183}

\textsuperscript{170} Hunt, supra note 10, at 790–91.
\textsuperscript{171} Id. at 792.
\textsuperscript{172} Robinson, supra note 9, at 598.
\textsuperscript{173} Hunt, supra note 10, at 793–95; Robinson, supra note 9, at 598–99.
\textsuperscript{174} Hunt, supra note 10, at 793.
\textsuperscript{175} Id.
\textsuperscript{176} Robinson, supra note 9, at 598.
\textsuperscript{177} Government Organization Act, 1979, ch. 13, 1978–1979 S.C. 313 (Can.).
\textsuperscript{181} Robinson, supra note 9, at 598.
\textsuperscript{182} Id. CIDA has been involved in the development plan for marine and coastal resources in Indonesia. Id.
\textsuperscript{183} Id. at 599.
The application of EARP, as delineated in section 3 of the Guidelines Order, calls for a self-assessment process under which the initiating department, early in the planning stages, must fully consider the environmental implications of any project over which it has authority. Where the environmental implications are significant, the proposal must be referred to the Minister for public review by an Environment Assessment Panel. The initiating department is the decision-making authority and is thus required to screen all projects advanced by the project proponents for potential adverse environmental effects, and to make a determination whether the project must be publicly reviewed by the Environment Assessment Panel. The initiating department reports all decisions, whether referred to the Panel or not, to FEARO for publication.

Public review of a proposal may be ordered if the project would create significant environmental harm. Review before the Panel may be ordered if there is high public concern about the proposal, even if the potential harm seems insignificant. If a review is so ordered, the Minister appoints a Panel, usually chaired by the Executive Chairman of FEARO, and made up of three to seven objective, knowledgeable, and credible members. A public review must entail a study of the environmental effects of the project as well as the “directly related social impacts of those effects.”

As the EIA proceeds to a public review, FEARO is responsible for delineating the scope of the EIA in a “terms of reference” document. The document is issued by the Minister of the Environment, and the Panel meets with the proponent of the project and the public to determine the preparation of an EIS. Once the EIS is prepared by the proponent, it is made available to the public by the Panel, and is open for oral or written comment or criticism. The Panel then prepares a report of its findings and recommendations for the Minister.

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184 Guidelines Order, § 3, 118 C. Gaz. Pt. II at 2795.
185 Id.
186 Robinson, supra note 9, at 598-99.
187 Id. at 599.
189 Id.
190 See Guidelines Order, §§ 21–23, 118 C. Gaz. Pt. II at 2798–99; Robinson, supra note 9, at 599.
192 § 26, 118 C. Gaz. Pt. II at 2799.
193 Robinson, supra note 9, at 599.
194 Id.
of the Environment and the head of the initiating department. These parties then make the findings public, and the initiating department makes a decision on the project.

In Canada, private citizens have the right to sue for violations of EIA procedures. There have been two major suits that have had a profound effect on the application of EIA in Canada. The first case, Canadian Wildlife Federation Inc. v. Minister of the Environment (Canadian Wildlife I), was brought by opponents to the Rafferty Alameda Project. The project involved dams to be built by a provincial corporation on the Souris River Basin which is situated at the borders of the provinces of Saskatchewan and Manitoba and the state of North Dakota. Canadian citizens' groups sued, alleging a violation of EIA requirements, because the project was licensed by the federal Minister of the Environment without an EIA being undertaken by EARPM. The court found that the project would affect the environment in areas under federal jurisdiction, and thus the government had to assess the project. Moreover, the court found that the Guidelines Order was not merely a policy, but was in fact an enactment or regulation, thereby equating it to legislation.

The second case, Canadian Wildlife Federation, Inc. v. Minister of the Environment (Canadian Wildlife II), was essentially a further attack on the Rafferty Alameda Project. After the decision in Canadian Wildlife I, the government performed two assessments, but only one allowed public comment as required by EARPM. The second assessment was not open to public comment, and shortly after it was turned over to the Minister of the Environment, he granted the

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196 §§ 31(2), 33, 118 C. Gaz. Pt. II at 2799.
197 Robinson, supra note 9, at 599.
198 See Hunt, supra note 10, at 797, 799.
201 Id.
202 See id. at 313.
203 Id. at 323–25.
204 Id. at 326.
207 Canadian Wildlife II, 6 C.E.L.R. (N.S.) at 94–95.
project a second license. Therefore, the plaintiffs in the second suit again argued that the EIA procedures were not followed.

The Federal Court in Canadian Wildlife II found that the Minister should have allowed public comment on the second assessment. The court ordered this to be done pursuant to EARP, even though the project was now substantially underway, because the license had already been granted. If the Minister failed to comply, the court ordered that the license would be quashed. This second case resulted in the opening of the EIA process to judicial scrutiny, thus ensuring closer compliance with the EARP guidelines, or, upon failure to comply, permitting the actions to be attacked.

B. EIA in the United States

The United States Congress enacted the National Environmental Policy Act of 1969 in response to increasing concern over environmental damage in the United States. NEPA provides that present generations owe a duty to protect the environment for the long-term enjoyment of future generations. To reach this end, Congress made NEPA applicable to the planned projects and activities of all federal agencies. In so doing, Congress also delineated NEPA's broad goals, requiring that: each generation be a trustee of the environment for future generations; that all Americans be assured safe, healthy, enjoyable surroundings; that the broadest spectrum of beneficial uses of the environment be attained, without harm or risk to health or safety; that important aspects of national heritage be preserved; that a high standard of living for all be achieved by balanc-
ing population and resource use; and that the quality of renewable resources and the recycling of depletable resources be enhanced.\textsuperscript{223} 

NEPA's policy considerations aside, the main influence of the Act has been its procedural requirement.\textsuperscript{225} As outlined in § 4332 of the Act, the statute imposes a duty upon federal agencies to account for their implementation of the national policy.\textsuperscript{226} The statute requires the agencies to follow NEPA procedures in all instances, unless the action falls within the categorical exception of having no significant impact on the environment.\textsuperscript{227}

NEPA gets its strength from its "action-forcing" provisions.\textsuperscript{228} The first such requirement of a federal agency under NEPA is the preparation of an environmental assessment (EA) to consider the environmental impact of a proposal.\textsuperscript{229} Generally, an EA involves an overview of the necessity of the project, the impact it may have on the environment, and any possible alternatives to the proposal—and if there are alternatives, their environmental impacts.\textsuperscript{230} Based on the EA, the agency decides whether to prepare an environmental impact statement, or to declare a Finding Of No Significant Impact (FONSI).\textsuperscript{231} If a FONSI is prepared and submitted for evaluation, the agency must make it available to the public for review.\textsuperscript{232}

Agencies must prepare an EIS whenever a major federal project will significantly impact the human environment.\textsuperscript{233} The EIS is meant to provide the public and the decisionmakers with a complete record of the significant environmental impacts of a proposal, as well as any reasonable alternatives.\textsuperscript{234} Moreover, the EIS is meant to ensure that agencies adhere to NEPA policies.\textsuperscript{235} Nevertheless, the EIS requirement is procedural only. Thus, its findings do not force an agency to reach any particular decision as to the continuation or termination of a project.\textsuperscript{236}

\textsuperscript{223} Id. § 4331(b)(5).
\textsuperscript{224} Id. § 4331(b)(6).
\textsuperscript{225} Ernsdorff, \textit{supra} note 165, at 138.
\textsuperscript{226} Holland, \textit{supra} note 216, at 758.
\textsuperscript{227} Council on Environmental Quality, 40 C.F.R. § 1508.4 (1993).
\textsuperscript{228} Garver, \textit{supra} note 216, at 192.
\textsuperscript{229} 40 C.F.R. § 1501.3(a).
\textsuperscript{230} 40 C.F.R. § 1508.9(a)-(b).
\textsuperscript{231} 40 C.F.R. § 1501.4(c)-(e).
\textsuperscript{232} 40 C.F.R. § 1501.4(e)(1)-(2). Unfortunately, significant impacts that may have been revealed by an EIS will remain hidden until the damage actually occurs. Garver, \textit{supra} note 216, at 193.
\textsuperscript{234} Ernsdorff, \textit{supra} note 165, at 138; \textit{see} Holland, \textit{supra} note 216, at 758.
\textsuperscript{235} Ernsdorff, \textit{supra} note 165, at 138.
\textsuperscript{236} Id. at 198-39.
To assist in the development of and compliance with EA procedures NEPA also called for the establishment of the Council on Environmental Quality (CEQ).\textsuperscript{237} Aside from its oversight duties, the CEQ also makes recommendations and evaluations on environmental issues to the Executive Office of the President.\textsuperscript{238} Its main responsibility is to establish regulations that further NEPA's procedural requirements.\textsuperscript{239} The CEQ's interpretation of NEPA is essentially viewed as binding administrative law\textsuperscript{240} following the Supreme Court's statement in \textit{Andrus v. Sierra Club}\textsuperscript{241} that the "CEQ's interpretation . . . is entitled to substantial deference."\textsuperscript{242} In some ways, the CEQ is analogous to Canada's FEARO, in that each of these bodies plays a role in the promulgation of the rules for environmental assessment.\textsuperscript{243} Despite Congress's intended role for the CEQ, however, much of NEPA has been interpreted by the judiciary.\textsuperscript{244}

The EIS requirement carries with it a presumption that, once an agency is faced with all the data, the agency will not partake in any project that will likely cause significant environmental harm.\textsuperscript{245} The public disclosure element furthers this presumption because it essentially opens the agency to public criticism and review, and forces the agency to consider all environmental factors.\textsuperscript{246} Public scrutiny is considered so important\textsuperscript{247} that regulations require agencies to "encourage and facilitate public involvement in decisions."\textsuperscript{248}

The EIS itself must be a "detailed statement"\textsuperscript{249} with enough information to allow for proper evaluation.\textsuperscript{250} The statement must show a good faith effort by the agency to make a full disclosure.\textsuperscript{251} The EIS must be comprehensive in its assessment of environmental impact,
but not conclusory\textsuperscript{252} Also, it must provide any possible alternatives to the proposal,\textsuperscript{253} to promote sensible agency decisionmaking.\textsuperscript{254} The final EIS must be made available to the CEQ and the public.\textsuperscript{255} Once the final EIS is complete, the agency has satisfied NEPA's requirements.\textsuperscript{256}

C. International EIA

The procedure of environmental impact assessment has been prominent in the domestic law of many countries for decades.\textsuperscript{257} At least one commentator feels EIA is also becoming a rule of customary international law as well.\textsuperscript{258} EIA has the ability to enforce the international prohibition against a state acting to harm the environment of another state, as delineated in Principle 21 of the Stockholm Declaration.\textsuperscript{259}

Many international organizations and some nations have taken this into account, and have begun implementing EIA internationally. The Organization for Economic Cooperation & Development (OECD), for example, encourages the use of EIA by states helping developing countries.\textsuperscript{260} The United Nations Environment Programme (UNEP) also adopts EIA as a principle,\textsuperscript{261} and the United Nations General Assembly endorses EIA.\textsuperscript{262}

Transboundary environmental assessment is also developing in international agreements. EIA was established as Article 206 of the United Nations Convention on the Law of the Sea.\textsuperscript{263} Similar provisions also exist in the 1976 Convention on the Protection of Nature in

\textsuperscript{252} Holland, \textit{supra} note 216, at 777.
\textsuperscript{253} Id. at 778. An EIS should include discussion of: (1) a no-action alternative; (2) different methods of reaching the objective; and (3) methods of partial satisfaction of the objective which are less environmentally harmful. NRDC v. Morton, 458 F.2d 827, 834–38 (D.C. Cir. 1972).
\textsuperscript{254} Holland, \textit{supra} note 216, at 781.
\textsuperscript{256} Frank, \textit{supra} note 240, at 86.
\textsuperscript{257} Kiss \& Shelton, \textit{supra} note 87, at 147.
\textsuperscript{258} See Robinson, \textit{supra} note 9, at 602.
\textsuperscript{259} Id. at 603.
\textsuperscript{260} Developments, \textit{supra} note 7, at 1514; see Robinson, \textit{supra} note 9, at 603.
\textsuperscript{261} Kiss \& Shelton, \textit{supra} note 87, at 147. The UNEP Principles of Conduct, relating to shared natural resources, specifically contain EIA provisions in regard to bilateral or regional relations. \textit{Id.}
\textsuperscript{262} Robinson, \textit{supra} note 9, at 603. The use of EIA is expressly called for in \textit{The World Charter of Nature}, which was adopted by the United Nations General Assembly. \textit{Id.}
\textsuperscript{263} \textit{Law of the Sea Convention}, \textit{supra} note 68, at 89.
the South Pacific, and in the 1985 ASEAN Convention on the Conservation of Nature and Natural Resources.

The European Economic Community (EEC) has also acted in favor of environmental assessment. A prior assessment principle has been recognized among EEC members, and EIA, concerning both public and private projects, has been delineated in an EEC Council Directive. All member states are required to follow the Council Directive.

In 1991, the United Nations Economic Commission for Europe negotiated an agreement on international EIA. Under the agreement, the parties must consider a project's size, location, and environmental effects and try to eliminate or limit adverse transboundary impact. There are also provisions for responses from other states, dispute settlement procedures, and post-project monitoring.

Both Canada and the United States have advanced the notion of a duty to assess transboundary environmental impact by requiring domestic EIAs to include assessments of potential extraterritorial harm. In 1983, Canada issued a guidelines order for its Environmental Assessment Review Procedure requiring that the "external" environmental effects of a federal project be fully considered. In 1979, President Carter issued Executive Order No. 12114 which required that an EIS be prepared for all major federal actions that may significantly affect the environment outside United States territory. However, the order's many exemptions and exceptions have allowed agencies to circumvent it.

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264 Kiss & Shelton, supra note 87, at 148.
265 ASEAN Convention, supra note 91, at 64. Article fourteen of the ASEAN Convention states that any proposed activities which may have significant effects on the environment shall be assessed before they are adopted, and the results of this assessment shall be taken into account in the decision-making process. Id. at 67.
266 Kiss & Shelton, supra note 87, at 149.
269 Robinson, supra note 9, at 607. The Convention on Environmental Impact Assessment in a Transboundary Context was signed at Espoo, Finland on February 25, 1991. Id. at 608.
270 Id.
271 Id.
272 Developments, supra note 7, at 1514.
274 § 4(1)(a), 118 C. Gaz. Pt. II at 2796.
276 3 C.F.R. at 357–58.
United States courts have not looked favorably upon extraterritorial EIA. In *Greenpeace USA v. Stone*,278 for example, a federal district court in Hawaii held that the United States Army's role in removing chemical weapons from West Germany did not warrant an EIS.279 The court was influenced by considerations of foreign policy and sovereignty, but stated that other circumstances might produce a different result.280

However, plaintiffs trying to explore these other circumstances have found them to be fruitless as well, as the recent case of *Public Citizen v. Office of the United States Trade Representative*281 attests. The plaintiffs in this case sought a declaration under NEPA requiring the defendant to prepare an EIS for negotiations of the North American Free Trade Agreement (NAFTA).282 The suit initially failed on a standing issue,283 but was brought again after the NAFTA agreement was actually signed.284 The Federal District Court for the District of Columbia found in favor of the plaintiffs,285 but the D.C. Court of Appeals reversed.286 The court held that NAFTA was a direct act of the president, not a final agency action carried out by an arm of the executive branch.287 Therefore, NEPA did not require an EIS.288 Because the signing of NAFTA was a direct act of the president, the court felt that the decision to sign could not be questioned.289

A plan to incorporate EIA to resolve environmental controversies between Canada and the United States is not without precedent. Domestic evaluation of extraterritorial environmental impact already exists under §115 of the United States Clean Air Act,290 the United States Federal Water Pollution Control Act,291 and §23(1) of the Clean

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279 Id. at 761.
280 Id.
282 Id. at 140–41.
283 Id. at 144.
285 Id. at 30.
287 Id. at 553.
288 Id.
289 See id.
Air Act of Canada. These statutes permit the review of "domestic pollution control standards if and when . . . domestic-based pollution" creates a danger to persons in a foreign country. The end result of these statutes is to create more stringent pollution control measures. They have the potential to help create the foundation for an all-encompassing transboundary environmental impact assessment plan between Canada and the United States.

V. APPLYING SIC UTERE PROACTIVELY TO MANDATE INTERNATIONAL EIA BETWEEN CANADA AND THE UNITED STATES

A. Sic Utene as a Proactive Measure

*Sic utere* is a principle of customary international law which, when applied in an environmental context, states that no nation may permit the use of its territory to cause environmental damage to the territory of another state. It is a principle that has been applied many times in cases and arbitration, international agreements, and non-binding, soft-law rules or codes. Most arbitration and case law has expounded the *sic utere* principle as a reactive measure to find state responsibility. However, the Lake Lanoux Arbitration seems to employ *sic utere*, in part, as a proactive measure, by stating that the principle mandates a duty to notify. The principle has also been espoused as a proactive measure in other instances. For instance, the Transfrontier Pollution Rules effectively employ the *sic utere* principle to impose a duty to prevent extraterritorial injury, and to take proactive measures to avoid transboundary pollution. In particular, the rules call for a potentially affecting state to give prior notice to a

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293 Cooper, supra note 1, at 306.
294 Id. at 307.
295 See Brunnee, supra note 14, at 16.
296 See Trail Smelter (final decision), 35 AM. J. INT'L L. at 716.
297 See discussion of Trail Smelter arbitration, Corfu Channel case, and Lake Lanoux arbitration, supra section II.A.
298 See discussion of the Stockholm Declaration, and the Law of the Sea Convention, supra section II.B.
299 See discussion of the Transfrontier Pollution Rules, supra section II.C.
300 See discussion of the Trail Smelter arbitration, Corfu Channel case, Lake Lanoux arbitration, and Gut Dam Claims, supra section II.A.
301 See discussion of the Lake Lanoux arbitration, supra section II.A.
302 See Rauschning, supra note 109, at 158.
303 See id. at 160–68.
potentially affected state, to consult with that state, and to assess the environmental impact in that state, before any environmental harm occurs. 304

The *sic utere* principle can better serve the environment if it is interpreted and applied as a proactive measure. In other words, the principle should be read to require necessary impact assessment, international cooperation, and dispute avoidance rather than dispute resolution. 305 In this light, *sic utere* could be employed to supersede the more frequently used, and inherently confrontational, reactive systems of dispute management and remediation. 306

This application of *sic utere* is logical when one considers the past and present outlook on dispute management between Canada and the United States. The history of this relationship displays a strong preference for a more cooperative and pragmatic approach, rather than the formal and restrictive devices of legal settlement. 307 This preference is understandable given the geographic proximity and the economic and social similarities between the two nations. 308 Thus, two countries on good standing with one another, and with few serious differences between them, have the potential to effectively invoke proactive measures of environmental protection. Canada and the United States can apply such measures without fear of creating misunderstandings or violating protective notions of sovereignty. 309

**B. How Sic Utene Mandates EIA**

When *sic utere* is employed as a proactive measure, the principle asserts that a state should not permit its territory to cause environmental harm to another state. 310 In order to fulfill this mandate, preventable environmental harm must be avoided. It follows then, that to prevent adverse effects, one must anticipate them before they occur. Such foresight can only be realized by assessing the potential environmental impact of a proposal before any action is undertaken. 311
Environmental impact assessment is essentially a procedure which analyzes the costs and benefits of a project, and helps to ensure that an action will not adversely affect the environment. In both Canada and the United States, EIA is a widely accepted domestic practice. The United States pioneered the practice of domestic EIA by including a provision for environmental impact assessment in the National Environmental Policy Act of 1969. Since 1969, more than seventy-five jurisdictions worldwide have required EIA by law. The passage of NEPA and its EIA requirement in 1969 greatly influenced Canada. So swayed was Canada, that today all Canadian jurisdictions, at the federal, provincial, and territorial levels, have imposed EIA requirements.

C. The International EIA Plan

Canada has based its EIA procedures largely on the United States model created by the NEPA legislation. Understandably then, many provisions are similar in both countries’ domestic EIA implementation. Both share several vital EIA provisions including initial assessment by the project proponent; allowance for public scrutiny; and the ability to alter or terminate the project based on the findings. Accordingly, with this similar foundation already in place, the implementation of an international EIA agreement between Canada and the United States is readily attainable.

The *sīc utere* principle, expounded as a proactive measure, can form the customary international law foundation for such a bilateral agreement. Inclusion of the principle within a binding agreement will give *sīc utere* some legal teeth. From there, the countries can establish initial procedures for an international EIA plan. The initial procedures could include the lowest common denominator provisions—those found in both countries’ domestic EIA procedures—of the two systems already in place. From this juncture it will be necessary to

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312 See Developments, supra note 7, at 1515.
313 See Robinson, supra note 9, at 602.
314 Hunt, supra note 10, at 790.
315 Cooper, supra note 1, at 304; Robinson, supra note 9, at 591.
317 Robinson, supra note 9, at 591.
318 Hunt, supra note 10, at 790.
319 See id.
320 See discussion of EIA in Canada, and EIA in the United States, supra section IV.A.-B.
321 Hunt, supra note 10, at 791.
fill in the blanks left by the differing provisions of each country's procedural steps.

A large stumbling block in negotiations over which procedural steps to follow likely will be the provision concerning who makes the determination whether to allow, alter, or terminate a project once the environmental impact statement has been completed and the public has had an opportunity to review the EIS. Determination by an agency from the proponent nation may lead to bias espoused by notions of state sovereignty. However, if the decisionmaker is from the opponent nation, its determination may reflect an over-protective approach favoring its home state. Therefore, it appears that the best choice may be a neutral agency or committee, similar to the International Joint Committee (IJC), which settles boundary water disputes between the two nations, and whose members are appointed by both the Canadian and United States governments.322

An initial EIS could be reviewed by an agency from the proponent nation, through FEARO in Canada and the CEQ in the United States. Then, a committee similar to the IJC could be established to act as the final arbiter in determining whether a project is approved, modified, or rejected. The members of the committee would be appointed in equal numbers by both nations, not as representatives of their governments, but as individuals in a "collegial" body, similar to the IJC.323 Thus, neither country need fear relinquishing its authority to the committee. Like the IJC, the group could have technical experts and advisory boards at its disposal to facilitate its decisionmaking.324 For this system to work, however, both countries' judiciaries must give broad deference to committee decisions. This, along with an appeals process, could be outlined in a bilateral agreement.

Another obvious problem in implementing an international EIA plan is that of jurisdiction. In Canada, both federal and provincial EIA procedures have been developed,325 while the United States must contend with the federal NEPA and state "little NEPAs."326 However, both governments have issued orders applying EIA to actions affect-

322 The International Joint Committee (IJC) was established by the Boundary Waters Treaty of 1909 between Canada and the United States to manage disputes over transboundary waters. Cooper, supra note 1, at 254–55.
323 See id. at 255.
324 See id.
325 Hunt, supra note 10, at 790.
326 Robinson, supra note 9, at 616.
ing territory outside their respective nations. Therefore, both nations could simply designate a single EIA, comparable to those that already exist, to be valid in all jurisdictions. All jurisdictions would be bound by this system concerning international EIAs, but states and provinces would be free to impose varying procedures domestically.

Another important problem to consider involves determining which actions will fall within the scope of the bilateral agreement. The issue of scope has been much litigated in the United States. Rather than being caught up in determinations between whether a project is a federal, state, or provincial action, the agreement could simply define its scope to include any proposed action that may potentially cause extraterritorial environmental damage. The agreement, and later the governing committee, could also delineate minimum thresholds of harm which, if surpassed, would invoke the use of EIA under the agreement. Such a definition would necessarily encompass private as well as public actions, again relying on the \textit{sic utere} principle.

A final factor to consider is the implementation of post-assessment monitoring. Its absence is often considered a main weakness in otherwise effective EIA processes. Post-assessment monitoring ensures that an approved or altered project follows its intended path, or incorporates any changes ordered by the decisionmaker. This process could probably best be administered by agencies designated by the nations, perhaps as satellites to the decision-making committee.

\section*{VI. Conclusion}

With ever increasing populations, vast quantities of shared natural resources, increased production, and reduced trade barriers, Canada and the United States are faced with a multiplicity of environmental concerns both domestically and internationally. Fortunately for these two nations, they also share a long history of cooperation and camaraderie. Therefore, it is in their continued best interests to further

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\footnote{328 See Robinson, supra note 9, at 609.}
\footnote{329 Holland, supra note 216, at 767.}
\footnote{330 See Trail Smelter (final decision), 35 A.M. J. INT'L L. at 716--17. The \textit{sic utere} principle was applied to find state responsibility, even though the polluter was a private entity. See id.}
\footnote{331 See Hunt, supra note 10, at 808.}
\footnote{332 Id.}
\footnote{333 Id.}
\end{footnotesize}
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this friendship, and set an example of teamwork and conviction, by establishing a bilateral agreement to address the problem of extra-territorial environmental damage.

By grounding the agreement on customary international law principles such as *sic utere*, Canada and the United States can develop a plan to avoid environmental harm before it begins. With the implementation of an international environmental impact assessment process, potential damage can be anticipated and addressed before further harm is allowed to deteriorate an already battered ecosystem.

First-world nations must begin to take a forward-looking approach concerning the world environment. If we do not adopt preventative measures, no other nations will. A proactive, cooperative, and even-handed international EIA agreement makes sense because, not only does it help to preserve the health and welfare of the people, it also provides a model that others may follow. Deep-rooted notions of sovereignty must be pushed to the side. In their place must come positive, proactive steps such as the proposal outlined here. Reactive measures may allocate responsibility, but they do not repair the environmental damage. Nations like Canada and the United States must quickly come to the fore in an effort to minimize, if not avoid altogether, environmental harm. Otherwise, it may soon be too late to correct the damage already done.