

Note

Rethinking Transboundary Environmental Impact Assessment

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I. INTRODUCTION

Human beings have struggled with transboundary environmental harm from the dawn of civilization. This is no hyperbole—the earliest recorded treaty resolved a dispute over diversions from a river that ran between two Mesopotamian city-states.¹ Over five thousand years later, countries are still coping with environmental effects that spill across borders. One recent response to this problem is transboundary environmental impact assessment (EIA).

The theory of EIA emerged in the domestic context. National EIA laws have played an integral role in domestic environmental policy ever since the United States passed the National Environmental Policy Act of 1969

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1. STEPHEN McCaffrey, *THE LAW OF INTERNATIONAL WATERCOURSES* 59-60 (2d ed. 2007). The city-state of Umma had diverted waters from the Euphrates for irrigation, depriving downstream Lagesh of sufficient water for its needs. The dispute prompted a war between the two city-states that ended with a treaty allocating the water flow. *Id.*

(NEPA).² Instead of restricting governmental action outright, domestic EIA laws such as NEPA try to reform the decisionmaking process by changing how policymakers think about environmental issues. Their principal means to this end is the environmental impact assessment. Before an agency commits to a particular course of action—such as selling timber from a national forest, extending the highway system, or issuing a permit to a private developer—it must study the ecological consequences of its proposed plan. After considering the full array of costs and benefits, with input from the public, the agency decides whether to proceed with the project or opt for a more environmental alternative.

Transboundary EIA treaties ensure that states give extraterritorial impacts the same scrutiny as domestic impacts. Signatories to these agreements promise that, before undertaking major governmental actions, they will fully analyze the ecological impact on other nations. States have used transboundary EIA to address environmental issues ranging from nuclear waste to intensive poultry rearing.³ For example, one treaty obligated the United Kingdom to conduct a transboundary EIA before allowing a British company to dredge offshore.⁴ The United Kingdom examined whether the operation would have an environmental impact on Belgium, France, Denmark, Germany, and the Netherlands, and it solicited comments from those governments and their citizens.⁵ Only after weighing all the ecological consequences did it decide to issue a permit.

Despite the recent proliferation of transboundary EIA treaties, states and scholars have paid relatively little attention to whether or how these agreements affect proposed projects. Because the treaties themselves prescribe only procedures, jurists tend to focus on whether the parties are conforming to that process instead of substantive compliance.⁶ Furthermore, the success of EIA regimes is inherently difficult to judge; one cannot know whether a state's decision to modify a project resulted from the findings in an EIA or from some exogenous force, such as a change in policy priorities or a budget shortfall.⁷ This difficulty is exacerbated by the lack of systematic record-keeping by states.⁸

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-27 (2000).

3. U.N. Econ. & Soc. Council [ECOSOC], Econ. Comm'n for Eur., Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, *Report of the Second Meeting*, at 38, U.N. Doc. ECE/MP.EIA/4 (Aug. 7, 2001) [hereinafter *Report of the Second Meeting*].

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

5. U.N. Econ. Comm'n for Eur., *Guidance on Public Participation in Environmental Impact Assessment in a Transboundary Context* at 40, U.N. Doc. ECE/MP.EIA/7 (2006).

6. For example, one of the few systematic case studies discusses *whether* the acting state publicized its final decision but never mentions *what* that final decision was. U.N. Econ. Comm'n for Eur., *supra* note 5, at 22-24, 30-40; *see also* Angela Z. Cassar & Carl E. Bruch, *Transboundary Environmental Impact Assessment in International Watercourse Management*, 12 N.Y.U. ENVTL. L.J. 169, 232-37 (2003) (examining three case studies of transboundary EIA "in terms of procedure"). Of the fifty-six questions in the *Espoo Convention's* most recent survey on the treaty's implementation, only one dealt with the actual effect of EIA on the outcome of a project. ECOSOC, Econ. Comm'n for Eur., Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context, *Report of the Fourth Meeting*, Decision IV/1, Annex, U.N. Doc. ECE/MP.EIA/10 (July 28, 2008) [hereinafter *Report of the Fourth Meeting*].

7. *See How Successful Are Member States in Implementing the EIA Directive*, ¶ 6, COM (2003) 334 final (June 23, 2003), available at http://ec.europa.eu/environment/eia/pdf/report_en.pdf

To some extent commentators have ignored the efficacy of transboundary EIA regimes because of the example set by NEPA. In the eyes of many, domestic EIA laws have already proven that information-based rules can prevent environmental harm.⁹ Since transboundary EIA regimes use many of the same mechanisms as NEPA, one might expect that international regimes will be as successful as their American progenitor.¹⁰ Thus the central issue is not whether transboundary EIA treaties are effective, but rather how to encourage more states to form them.¹¹

A careful analysis of NEPA's accomplishments seriously questions this hypothesis.¹² Much of the Act's success derives not from the language of the statute or its supporting regulations, but rather from its interaction with other domestic institutions. Diplomats and international organizations may have transplanted the text of NEPA to the international arena, but they did not bring along the national structures that have been essential to the law's efficacy. Though transboundary EIA regimes are an important step towards a new environmental world order, this Note argues that their institutional setting limits their influence. Instead of focusing exclusively on procedural probity, states and scholars should consider creating international institutions analogous to the domestic ones that empower NEPA.

In Part II of this Note, I discuss the form and substance of transboundary EIA agreements and how they relate to NEPA. In Part III, I briefly review the scholarship on how domestic EIA regimes create environmental change. Though this Part focuses on the operation of NEPA, it has important

[hereinafter European Commission]; cf. Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1704 (1993) ("It is impossible, unfortunately, to do a controlled experiment in which NEPA is isolated from all other influences on decision-making.").

8. See European Commission, *supra* note 7, Annex, ¶ 4.5.6; Rita Albergaria & Teresa Fidelis, *Transboundary EIA: Iberian Experiences*, 26 ENVTL. IMPACT ASSESSMENT REV. 614, 617 (2006) ("Most of the signatory countries referred to the [Espoo] Convention once or twice but few informed their neighbours of potential impacts in any systematic way.").

9. See, e.g., Nicholas A. Robinson, *International Trends in Environmental Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 591 (1992) ("EIA is a proven technique used to ensure that governmental actions avoid or minimize unanticipated adverse effects."); Jameson Tweedie, Note, *Transboundary Environmental Impact Assessment Under the North American Free Trade Agreement*, 63 WASH. & LEE L. REV. 849, 907 (2006) ("[I]nformation disclosure laws are . . . very effective in deterring environmental harm.").

10. See John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 316 (2002) ("If the regional transboundary EIA agreements only require domestic EIA procedures to apply without discrimination to extraterritorial effects . . . then their effectiveness at preventing transboundary environmental harm would seem to depend on how effective domestic EIA is at preventing domestic environmental harm.").

11. See, e.g., Brian R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 B.C. ENVTL. AFF. L. REV. 447, 448 (1995); Wiek Schrage, *The Convention on Environmental Impact Assessment in a Transboundary Context, in THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT* 29, 50 (Kees Bastmeijer & Timo Koivurova eds., 2008); see also Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*, 32 HARV. ENVTL. L. REV. 49 (2008) (advocating an EIA regime for assessing activities whose impacts are wholly within the United States but cross over state boundaries).

12. Though nearly every scholar of transboundary EIA regimes pays homage to NEPA as their progenitor, few have drawn heavily upon the American experience with the Act in evaluating these treaties. The most in-depth analysis is the discussion of standing in Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 404-14 (2003), and it is concerned foremost with other domestic EIA regimes.

repercussions for transboundary EIA regimes as well. In Part IV, which takes up the bulk of the Note, I analyze domestic political and legal institutions that enable or reinforce NEPA's environmental mission: electoral accountability, substantive environmental laws, and judicial review under the Administrative Procedure Act. I argue that the absence of these institutions on the international level hinders the ability of transboundary EIA regimes to improve environmental quality. In Part V, I consider how states could create transnational analogues for these domestic structures. While these institutions may not give transboundary EIA regimes the same traction as their domestic counterparts, they can help these treaties reach their potential.

II. ENVIRONMENTAL IMPACT ASSESSMENT REGIMES

One must first understand the theoretical similarities between transboundary EIA regimes and NEPA before one can appreciate their functional differences. As this Part will demonstrate, the central features in both types of regimes are nearly identical. Using these shared mechanisms as a foundation, states have crafted a diverse assortment of transboundary EIA treaties.

A. *Environmental Impact Assessment in Domestic and Transboundary Regimes*

Today's transboundary assessment regimes descend from NEPA. The Act has proven to be one of the United States' most widely imitated statutes. In addition to inspiring numerous "little NEPAs" within the states of the United States, it has served as a template for domestic EIA legislation in over 130 nations around the globe.¹³ International law is the latest venue for a NEPA-like decisionmaking regime. Most of these transnational regimes emerged from the domestic EIA policies of their members¹⁴ and simply call on nations to consider the transboundary environmental impact of their actions. Though a majority of countries have laws mandating an assessment of the *domestic* consequences of their acts, few national regimes require an equally stringent evaluation of the *foreign* ramifications of their policies.¹⁵ Transboundary EIA regimes try to fill this gap.

EIA laws have propagated around the world, but the basic structure has not changed considerably from the original NEPA. The Act requires an agency to conduct an EIA before undertaking any "major Federal action[] significantly affecting the quality of the human environment,"¹⁶ such as commencing a project, authorizing a general policy, or issuing a permit.¹⁷ An agency usually performs a preliminary environmental assessment to determine whether an action will "significantly affect[]" the environment.¹⁸ If the projected impact is substantial, it composes a draft environmental impact

13. JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 253 (2004).

14. Knox, *supra* note 10, at 301-08.

15. *Id.* at 299.

16. 42 U.S.C. § 4332(2)(C) (2000).

17. 40 C.F.R. § 1508.18 (2007).

18. *Id.* § 1501.4(b).

statement (EIS)¹⁹ and solicits public comment.²⁰ The agency then incorporates those comments into a final version of the EIS.²¹ This document evaluates the purpose of the federal action, its predicted environmental impact, alternatives to the proposed action, and their probable impacts.²² After completing this process, the agency may continue with its original plan or opt for one of the alternatives listed in the EIS.²³

Transboundary EIA regimes have largely retained this form. Granted, states have modified some of the procedures laid out in NEPA. Many treaties omit the initial step of conducting an environmental assessment, for instance, in favor of listing all the projects that will typically require an EIA;²⁴ and some may not mandate an examination of alternatives but require other precautions, such as a discussion of any scientific uncertainties.²⁵ Nevertheless, the underlying principle remains the same: before a state commits to an action with environmental consequences, it must assess those impacts and consult with the affected population. Only then can it decide whether to pursue the original program or a different one.

Both transboundary and domestic EIA regimes are chiefly creatures of procedure. Granted, most embrace an environmentalist agenda in their preambles or declarations of purpose,²⁶ yet this language tends to be too slippery to bind the government.²⁷ Nothing in NEPA or most transboundary EIA treaties forces the government to select the least harmful alternative or mitigate the environmental damage. So long as the decisionmaker complies with these procedural steps in good faith, it has fulfilled its obligations and is free to adopt even the most ecologically unsound plan.²⁸ As one scholar has

19. In this Note, the term “environmental impact statement” (EIS) is reserved for an impact assessment conducted under the auspices of NEPA. This distinctive appellation comes from the text of the statute itself, which specifically refers to the environmental impact assessment (EIA) as a “statement.” 42 U.S.C. § 4332 (2000). The generic term EIA is used more broadly to describe any environmental impact assessment, regardless of which country conducts it, and depending on the context could encompass a domestic American EIS prepared under NEPA.

20. 40 C.F.R. § 1503.10 (2007).

21. *See, e.g., id.* § 1503.4.

22. *Id.* § 1502.10.

23. *See id.* § 1503.4.

24. *See, e.g.,* Espoo Convention, *supra* note 4, app. 1.

25. *Id.* app. 2.

26. *See, e.g.,* 42 U.S.C. § 4321 (2000); Ass’n of S.E. Asian Nations, Agreement on the Conservation of Nature and Natural Resources, *adopted* July 9, 1985, *reprinted in* 1 INTERNATIONAL PROTECTION OF THE ENVIRONMENT—TREATIES AND RELATED DOCUMENTS, BOOKLET 1A, at 41 (Bernd Rüter & Bruno Simma eds., 2d ser., 1991); Espoo Convention, *supra* note 4, art. 2(1).

27. One of NEPA’s many substantive goals, for instance, is “that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” 42 U.S.C. § 4331(b) (2000); *see also* Herz, *supra* note 7, at 1677 (describing the Act’s substantive aims as “noble, vague [sic], aspirational, and unenforceable”). The Espoo Convention employs similarly grandiose language, calling on the parties to “take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.” Espoo Convention, *supra* note 4, art. 2(1); *see also* Knox, *supra* note 10, at 305 (noting that “[a] party could easily argue that it is in compliance with this provision by pointing to its existing antipollution laws and agreements”).

28. *See, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (“[T]he agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”) (citations omitted); Knox, *supra* note 10, at 291 (“[T]hese [transboundary EIA] agreements . . . do not link it to any hard substantive prohibition against transboundary harm.”).

put it, "the theory . . . is that process *substitutes for* standards by ensuring thoughtful and well-informed exercises of discretion."²⁹

B. *Types of Transboundary EIA Regimes*

Today there is no single, unified body of international law governing transboundary EIA.³⁰ Instead, states have dealt with the subject chiefly through a series of treaties. As a result of this ad hoc approach, transboundary EIA regimes vary from region to region and even from resource to resource.

The leading instrument in the field is the Convention on Environmental Impact Assessment in a Transboundary Context.³¹ Commonly referred to as the Espoo Convention (because it was signed in Espoo, Finland), the Treaty has been ratified by forty countries from Europe and Central Asia, as well as Canada and the European Community.³² Russia and the United States have signed the agreement but not yet ratified it.³³ The Espoo Convention not only mandates when a state must perform an EIA but also describes in detail how a nation should fulfill that obligation. In 2003, the parties adopted the Protocol on Strategic Environmental Assessment, which would expand the transboundary EIA obligation to encompass government plans and programs.³⁴

Other parts of the world have tried to mimic the Espoo Convention's broad regional scope, although none has succeeded to date. Canada, Mexico, and the United States drafted a similar Treaty, called the North American Agreement on Transboundary Environmental Impact Assessment,³⁵ though final negotiations have stalled due to disputes over the Treaty's application to state and local governments.³⁶ Another potential EIA regime is the

29. Herz, *supra* note 7, at 1669; see David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 797-98 (1994) (remarking that, in the contentious area of international environmental law, "process-oriented rights are useful for filling substantive gaps").

30. For a discussion of why a global treaty of transboundary EIA remains elusive, see John H. Knox, *Assessing the Candidates for a Global Treaty on Transboundary Environmental Impact Assessment*, 12 N.Y.U. ENVTL. L.J. 153 (2003).

31. Espoo Convention, *supra* note 4.

32. U.N. Econ. Comm'n for Eur., Status of Ratification of the Espoo Convention on Environmental Impact Assessment (EIA) in a Transboundary Context, <http://www.unece.org/env/eia/convratif.html> (last visited Nov. 16, 2008). Currently the Espoo Convention is open only to members of the United Nations Economic Commission for Europe. The parties to the treaty have adopted an amendment that would permit other states to join the Espoo Convention, but it will not enter force until more parties ratify it. *Report of the Second Meeting*, *supra* note 3, at 11, 144.

33. U.N. Econ. Comm'n for Eur., *supra* note 32.

34. U.N. Econ. Comm'n for Eur., *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context*, U.N. Doc. ECE/MP.EIA/2003/2 (May 21, 2003).

35. North American Agreement on Transboundary Environmental Impact Assessment (Oct. 21, 1997) (draft), http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm?varlan=english [hereinafter Draft NAATEIA].

36. The United States and Canada argue that the Treaty should apply only to the federal governments of the signatories. Mexico insists that any final treaty cover the actions of state governments as well. Ignacia S. Moreno et al., *Free Trade and the Environment: The NAFTA, the NAAEC, and Implications for the Future*, 12 TUL. ENVTL. L.J. 405, 430 n.142 (1999). Some speculate that the task of negotiating a continental EIA treaty may have passed to the recently established Security and Prosperity Partnership of North America. Neil Craik, *Transboundary Environmental Impact Assessment in North America: Obstacles and Opportunities*, in THEORY AND PRACTICE OF

Framework Convention for the Protection of the Marine Environment of the Caspian Sea.³⁷ This umbrella agreement promises to be an important forum for environmental discussions among the five nations bordering the Caspian Sea. Presently the Treaty provides only a vague commitment to transboundary EIA,³⁸ but the parties are discussing a more detailed protocol that would govern cross-border EIA in the region.³⁹

The Espoo Convention has also inspired a flurry of bilateral treaty-making among its signatories. Not satisfied by the level of detail contained in the multilateral convention, states have drafted more precise agreements to regulate the practice of transboundary EIA with their neighbors.⁴⁰ For its part, the Espoo Convention condones such treaties⁴¹ and even provides a few recommendations for their contents.⁴² These localized treaties cannot reduce a party's obligations under the Espoo Convention, but they can impose a higher standard on the countries in their conduct vis-à-vis one another.⁴³

A number of treaties simply mandate the performance of a transboundary EIA without providing any firm guidance on how such an assessment is to be conducted. These treaties implicitly look to domestic law (or possibly another international agreement) to supply the specific procedural requirements of the EIA. For example, the United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes merely calls upon states to pass legislation "to ensure . . . that . . . [e]nvironmental impact assessment and other means of assessment are applied."⁴⁴ These rudimentary regimes may govern only particular resources, such as international waterways or the ocean,⁴⁵ or they could apply more generally to all the activities of their member states.⁴⁶ Given the brevity of these transboundary EIA regimes, states typically include them as part of a larger effort to regulate a resource or protect the environment.

Transboundary EIA is not confined to treaties. Supranational and international organizations have also created robust EIA regimes. The European Union has issued directives that require a country to assess a

TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT, *supra* note 11, at 93, 113-14.

37. Framework Convention for the Protection of the Marine Environment of the Caspian Sea, Nov. 4, 2003 (entered into force Aug. 12, 2006), <http://www.caspianenvironment.org/NewSite/Convention-FrameworkConventionText.htm>. The parties to the Convention are Azerbaijan, Iran, Kazakhstan, the Russian Federation, and Turkmenistan.

38. *Id.* art. 17.

39. See Rie Tsutsumi & Kristy Robinson, *Environmental Impact Assessment and the Framework Convention for the Protection of the Marine Environment of the Caspian Sea*, in THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT, *supra* note 11, at 53, 57.

40. For a list of some of these treaties, see European Commission, *supra* note 7, at 80.

41. Espoo Convention, *supra* note 4, art. 8.

42. *Id.* app. VI.

43. *Id.* art. 2, para. 9.

44. U.N. Econ. Comm'n for Eur., *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, art. 3, para. 1(h), U.N. Doc. E/ECE/1267 (Mar. 17, 1992), *reprinted* in 31 I.L.M. 1312 (1992).

45. See United Nations Convention on the Law of the Sea art. 206, Dec. 10, 1982, 1833 U.N.T.S. 397.

46. See Agreement on the Conservation of Nature and Natural Resources, *supra* note 26, art. 14(1).

project's impact on the environment of other member states.⁴⁷ Financial institutions, including the World Bank, often insist that the borrower conduct an EIA as a condition of lending.⁴⁸ States have also promoted the practice through nonbinding "soft law" instruments,⁴⁹ and a number of scholars argue that transboundary EIA has reached the status of customary international law.⁵⁰ However, neither of these two sources has achieved the same respect and authority as treaties.

III. HOW EIA REGIMES WORK

For many, NEPA demonstrated the viability of EIA as an environmental protection regime. Admittedly, no analyst has found quantifiable data to prove its success. "[M]ost proposals are heavily modified by the end of the EIA process,"⁵¹ but one cannot say whether these changes were spurred by the Act or other factors.⁵² Scholars have instead relied on anecdotes and the opinions of administrators, consultants, environmentalists, and the general public.⁵³ The rough consensus of these disparate voices is that the environmental benefits of NEPA outweigh its costs.⁵⁴ Despite this general accord, though, scholars have not always agreed on *how* it protects the environment.

Early proponents of NEPA believed that the information in an EIS would make agencies more environmentally responsible. They attributed ecological degradation to administrators' inability to foresee the consequences of their actions, rather than to agency capture or a conscious sacrifice of environmental values.⁵⁵ Too often agencies develop a tunnel-vision that

47. The original EIA directive required member states to inform each other of potential cross-border impacts, but it did not require a full transboundary EIA. Council Directive 85/337/EEC, art. 7, 1985 O.J. (L 175) 40 (EEC), available at <http://ec.europa.eu/environment/eia/full-legal-text/85337.htm>. However, the European Union amended that directive in 1997 to provide more detailed procedures which generally track the Espoo Convention. Council Directive 97/11/EC, art. 1(9), 1997 O.J. (L 073) 5 (EC), available at <http://ec.europa.eu/environment/eia/full-legal-text/9711.htm>; see European Commission, *supra* note 7, at 78.

48. See WORLD BANK, OPERATIONAL POLICY 4.01, ENVIRONMENTAL ASSESSMENT (1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20064724~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>; see also PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 821-22 (2003).

49. See, e.g., *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, in Report of the International Law Commission to the General Assembly*, 53 U.N. GAOR Supp. (No. 10) at 370-436, U.N. Doc. A/56/10 (2001).

50. See, e.g., Robinson, *supra* note 9, at 602.

51. CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 262 (2d ed. 2003).

52. See, e.g., Herz, *supra* note 7, at 1704. Even if one knew that NEPA improved environmental quality, one would still need to ask whether these gains were worth the costs and delays imposed by EIS—a value-laden question that admits no easy answer. WOOD, *supra* note 51, at 314.

53. WOOD, *supra* note 51, at 315.

54. See, e.g., *id.* at 318-19; COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS iii (1997); Alyson C. Flournoy, Heather Halter & Christina Storz, *Harnessing the Power of Information To Protect Our Public Natural Resource Legacy*, 86 TEX. L. REV. 1575, 1581 & n.25 (2008).

55. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 911-12 (2002) ("This [attitude] reflects the characteristic expectation of the 'comprehensive rationality' model of bureaucratic decisionmaking in vogue at the time of [NEPA's] enactment: that expert agency managers would gather

excludes all considerations outside of their primary mission. By forcing an agency to study the full impact of its plan, NEPA would ensure that the policymaker possessed the necessary data to make an informed decision—presumably one that minimized harm to the environment. The EIS may even suggest an alternative approach to the problem with a smaller impact. “NEPA’s authors apparently expected that the required production of information would lead in this straightforward fashion to better informed, and therefore more rational, agency decisionmaking.”⁵⁶

Over time, though, commentators began to question whether exposing administrators to increased information would inevitably lead to environmentally sound policies. After all, agencies are not wholly neutral to the issues presented in an EIS; they have their own institutional culture and sense of mission, and they typically attract administrators who share those values.⁵⁷ Even if they are not willfully ignoring ecological factors, they may be biased in favor of their own *raison d’être* when forced to decide between defending the environment and furthering their project.⁵⁸ Since NEPA lacks substantive mandates, a determined agency can treat its procedures as an empty formality if it is more interested in expediency than the environment. And indeed, one government report on NEPA warned that “agencies sometimes engage in consultation only after a decision has—for all practical purposes—been made.”⁵⁹ As it stands, there is little oversight to ensure that agencies are not routinely undervaluing environmental impacts or even ignoring them altogether.⁶⁰

One should not interpret these criticisms to reflect a lack of confidence in NEPA altogether. Rather, scholars have concluded that increased information alone cannot explain the Act’s success. They instead look to the vast American politico-legal system in which NEPA interacts. As will be discussed further in Part IV, this conception of NEPA focuses on three prominent domestic institutions: the accountability of administrators to elected officials, nondiscretionary environmental statutes, and judicial review. NEPA

all the information germane to an informed policy decision expeditiously and at little or no cost, and then factor it into their decisionmaking.”); cf. Kevin J. Gray, *International Environmental Assessment*, 11 *COLO. J. INT’L ENVTL. L. & POL’Y* 83, 86 (2000) (“The underlying premise [of EIA] is that ecological crises are evidence of a fundamental omission in the workings of modern societal institutions.”). For more on the comprehensive rationality model that underpins NEPA, see Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 *HARV. L. REV.* 393, 409, 411, 415 (1981).

56. Karkkainen, *supra* note 55, at 911.

57. See ALFRED MARCUS, *PROMISE AND PERFORMANCE* (1980); see also David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 423-24 (1997); cf. HERBERT KAUFMAN, *THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR* 176 (1967) (describing how administrators internalize the agency’s values over time); Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 *MINN. L. REV.* 869, 922 (1997) (“On reflection, Congress took the first wrong turn in assuming, with unrealistic optimism, that the Service could offset decades of timber-first training and continuing pressures to keep the cut high with precatory language about diversity goals and multiple use [in the National Forest Management Act].”).

58. See Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 *OKLA. L. REV.* 239, 245 (1973).

59. COUNCIL ON ENVTL. QUALITY, *supra* note 54, at iii.

60. Courts have been generally unwilling to find that administrators gave insufficient weight to environmental factors. See, e.g., *Strycker’s Bay Neighborhood Council, Inc. v. Karlan*, 444 U.S. 223, 227-28 (1980) (holding that a court “cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken”).

facilitates accountability of agency actors by giving activists the information and time necessary to challenge the action through the political system. The statute itself is procedural, but its provisions reinforce other substantive laws. And environmentalists have become adept at using the Administrative Procedure Act⁶¹ to ensure compliance with NEPA and occasionally to derail destructive government programs. These domestic institutions interact with NEPA in complex ways, both giving the Act teeth and deriving strength themselves from its procedures. Though none of these protections are mentioned (or perhaps even intended) in the Act, they are crucial to NEPA's effectiveness.

This scholarship challenges the prevailing understanding of how transboundary EIA regimes will protect the environment. Current EIA treaties reflect the attitude of early NEPA proponents, that increased information is enough by itself to change government policies. Their provisions merely require that states conduct the proper studies, notify their neighbors of the results, and listen to the feedback of the affected population. Nor have states shown any inclination to venture beyond these information-forcing measures; instead they are directing their energies toward refining the mechanisms by which parties exchange data.⁶² American research into NEPA suggests that, although information production alone has some utility, an EIA regime requires the support of other institutions to achieve maximum effect.

IV. INSTITUTIONAL SUPPORT FOR EIA REGIMES

Given the similarities between NEPA and treaties such as the Espoo Convention, one might naturally think that "the factors that make domestic EIA at least somewhat effective at improving environmental protection seem likely to apply in the transboundary context as well."⁶³ Yet while transboundary EIA agreements copy NEPA's information-forcing provisions, they ignore the domestic institutions that underpin it. These structures, so vital to NEPA's success, are only faintly present in the international scene. Though international EIA regimes can benefit the environment,⁶⁴ the NEPA scholarship suggests that their effectiveness is hampered by the lack of analogous arrangements. Domestic institutions may not account for *all* of NEPA's success, but inasmuch as these structures are responsible for its effectiveness, transboundary EIA regimes will be wanting.

61. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

62. See, e.g., *Report of the Fourth Meeting*, *supra* note 6, dec. IV/1, ¶ 3(e). Much of the scholarship of transboundary EIA regimes displays a similar confidence in the palliative powers of information. See Gray, *supra* note 55, at 88; Erika L. Preiss, *The International Obligation To Conduct an Environmental Impact Assessment: The ICJ Case Concerning the Gabčíkovo-Nagymaros Project*, 7 N.Y.U. ENVTL. L.J. 307, 310 (1999); Tweedie, *supra* note 9, at 860-61.

63. Knox, *supra* note 10, at 318.

64. In response to a questionnaire from the Secretariat of the Espoo Convention, multiple nations reported that the results of an EIA had influenced their final decision on a project. *Report of the Fourth Meeting*, *supra* note 6, dec. IV/1, annex ¶¶ 119-20. At the very least, an EIA could propose Pareto-superior changes to the project that would minimize its environmental impact without increasing its costs.

One should distinguish this analysis of transboundary EIA regimes from other possible critiques of them. I am not arguing that international law is inherently unsuited to the task of ordering global society. The international legal system has matured to a point at which “lawyers need no longer defend the very existence of international law.”⁶⁵ Though in practice states may not always live up to their international obligations, I assume for the purposes of this Note that countries will routinely abide by their transboundary EIA agreements to the same extent that they do their domestic EIA legislation. Additionally, scholars have noted the practical difficulties associated with international EIA, including “increased need for institutional coordination, information exchange, sensitivity to sovereignty, political partnerships, varying cultural approaches, language differences and public participation across borders.”⁶⁶ These increased transaction costs are no doubt important but beyond the general scope of this Note. Instead, my analysis is comparative in nature, juxtaposing the legal setting in which NEPA operates to the institutional environment in which transboundary EIA regimes exist.

A. *Political Accountability*

The political accountability of federal agencies has proven vital to NEPA’s success. Together with the American democratic system, the Act empowers citizens to influence agencies that might otherwise discount the information contained in an EIS. Transboundary EIA regimes, of course, operate in a wholly different political environment. The lines of political accountability may criss-cross a nation, but rarely do they extend to its neighbors. With only tenuous connections between the affected population and the acting state, the former has no reliable way to hold the latter responsible for undervaluing the environmental consequences of its actions. This problem is exacerbated by the issue of externalities. As a result, transboundary EIA regimes are significantly weaker than NEPA and other domestic statutes.

1. *Political Accountability in the Domestic Context*

In the United States, agencies are made answerable to the public through a complex and sometimes contested web of political relationships. Obviously, citizens exert little direct control over administrators. The people do not vote for the Secretary of the Interior, for instance, nor does the Department of Transportation hold referenda on sites for the federal highway. Yet Americans do elect the officials who have power over federal agencies, and they can threaten to vote those politicians out of office if they do not protect the people’s interests. This relationship gives citizens an indirect influence over administrators. The people can voice their concerns regarding a particular project to their elected representatives, who in turn convey those concerns to administrators. Congress possesses a number of tools to rein in overzealous

65. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 6 (1995).

66. Cassar & Bruch, *supra* note 6, at 179.

administrators and to prod idle agencies into action.⁶⁷ The President is not without his own methods of controlling agency action.⁶⁸ Though scholars may debate whether the Congress or the President has the upper hand in running the agencies,⁶⁹ most agree that the bureaucracy is at least theoretically subject to some form of control from elected officials.

NEPA enters into the picture because this model of agency accountability does not necessarily function as smoothly in practice as it does in theory. One might presume that the bonds of accountability would fasten together the citizenry, the elected officials, and the unelected administrators into a responsive, functioning political system. In reality, though, certain factors impede this integration. Foremost among them is informational asymmetry. Sufficient information is imperative for any attempt by the people to hold an agency accountable through their representatives. Without it, concerned citizens will have a harder time attracting others to their cause or lobbying for change; they may not even recognize that a particular project threatens their interests at all. Yet the volume and complexity of agency activity is such that only a few people could hope to keep up with all developments or even try to monitor for projects that might affect them personally.⁷⁰

A second obstruction to the popular accountability of agencies is timing. Even if citizens and nonprofit organizations possessed the necessary data, they would still need time to mount effective political opposition.⁷¹ Lobbying has a much greater chance of success if the agency has not already committed

67. Congress can grill officials about questionable policies during oversight hearings, reduce a recalcitrant agency's overall budget, or deny funding for a particular project. In extreme cases, the legislature can amend an agency's organic statute or pass a law mandating a certain course of action. See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768-70 (1983).

68. The President's most obvious power is the ability to appoint administrators and to dismiss most of them at will. Perhaps even more pervasive, however, is the influence of the Office of Management and Budget. By funneling agency policymaking through this office for regulatory review, the President can modify, delay, or even block agency proposals. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 23-24. For an example of the influence of the Office of Management and Budget, see Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Autumn 1991, at 127. So long as he does not interfere with clear congressional mandates, the President can also control agencies through binding executive orders. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865-66 (1984) (justifying deference to agency interpretations of statutes on the grounds that administrators are indirectly accountable to the people through the President).

69. For an overview of this dispute, see Spence, *supra* note 57.

70. Though the scholarly literature has focused on bureaucrats' informational advantages over elected politicians, see, e.g., *id.*, certainly this imbalance is even more pronounced vis-à-vis ordinary citizens. Even more intimidating than the sheer mass of agency policymaking is the expertise and data needed to process it. Only a handful of Americans have a sufficient level of training in environmental sciences to understand the full consequences of a decision, say, to license the construction of a nuclear power plant adjacent to a local stream. Large nonprofit organizations such as the Sierra Club may have the appropriate technical know-how, but they typically lack the funding and access necessary to generate reliable information. Kenneth M. Murchison, *Does NEPA Matter?—An Analysis of the Historical Development and Contemporary Significance of the National Environmental Policy Act*, 18 U. RICH. L. REV. 557, 612 (1984).

71. *Id.* at 611.

significant resources to a project. Indeed, in some instances the agency may be able to present its would-be opponents with a *fait accompli*. Admittedly, citizens can still vent their frustration to elected officials after the damage is done; the Congress or the President can rebuke the agency, perhaps creating an *ex ante* incentive for the agency to tread more cautiously in the future. But the popular outcry would doubtless be louder if people believed their efforts would improve their own situation.

One way NEPA protects the environment is through facilitating the lines of accountability between the general population and agencies. The Act provides citizens with two essential resources for launching an effective political effort: information and time.⁷² From the very beginning of the EIS process, the acting agency is in constant communication with the American public. NEPA regulations mandate that the agency publish not only notice of the final EIS in the Federal Register,⁷³ but also its initial proposal.⁷⁴ These documents are to be written “in plain language and may use appropriate graphics so that . . . the public can readily understand them.”⁷⁵ Moreover, throughout the process an agency must use more conventional means of communication to notify environmentalist organizations and local communities of its plans.⁷⁶ In this way NEPA ensures that stakeholders (whether by virtue of their ideology or their geographic proximity) are aware that a federal agency is considering a potentially harmful project.

The statute also provides individuals and organizations with time to act. NEPA creates a significant lag-time between the proposal of a federal action and its implementation. An EIS typically takes about eighteen months from the initial scoping process to the issuance of a record of decision.⁷⁷ Indeed, often the span of time between the proposal and record of decision will include an election in which the matter can be debated.⁷⁸ Armed with information and time, citizens can use the political system to achieve their environmental goals instead of relying on the ambitious but vague aims of NEPA’s preamble.⁷⁹ Even if this political mobilization does not occur for every major federal action, the knowledge that an agency’s acts will come under public scrutiny may be enough to deter egregious environmental damage.⁸⁰

The political implications of an EIS were apparent in the debate over basing the intercontinental ballistic MX missile. Throughout the late 1970s and early 1980s, the executive branch sparred with arms-control groups and

72. *Id.* at 611-13.

73. 40 C.F.R. § 1506.10(a) (2005).

74. 40 C.F.R. § 1501.7 (2005).

75. *Id.* § 1502.8.

76. *Id.* § 1506.6(b)(3).

77. Murchison, *supra* note 70, at 611-13.

78. *Id.* at 612.

79. Knox, *supra* note 10, at 298 (“[T]he EIA procedure relies on political and not legal means to reach that end.”).

80. *See, e.g.*, 115 Cong. Rec. 40,416 (1969) (statement of Sen. Jackson) (“The basic principle of the [NEPA] policy is that we must strive . . . to achieve a standard of excellence in man’s relationships to his physical surroundings. If there are to be departures from this standard of excellence they should be exceptions to the rule [that] will have to be justified *in the light of public scrutiny* as required by section 102.”) (emphasis added).

environmentalists to find a location to house the MX missiles.⁸¹ One possibility was underground silos in Nevada and Utah.⁸² Before the Air Force could build the bases, however, it needed to draft an EIS. This document proved instrumental to the plan's undoing.⁸³ The EIS alarmed numerous Native American tribes in the area, who campaigned through the Bureau of Indian Affairs to halt the project.⁸⁴ Opponents of the silo were able to rally others to their cause, pointing to the EIS's comments about the project's adverse effects on the construction industry and population growth.⁸⁵ The ensuing political controversy prevented the base from going forward,⁸⁶ and newly elected President Reagan eventually opposed the idea of underground bases in the two states.⁸⁷ As this case demonstrates, the information and time provided by NEPA's procedures can prove a valuable weapon for those who disagree with the substance of an agency's action.

2. *Political Accountability in the International Context*

Transboundary EIA regimes ostensibly provide the same political assets as NEPA. Most comprehensive assessment treaties require a state to alert other signatories of any policy that might affect them.⁸⁸ This notification usually includes basic information about the proposed project, along with the results of the transboundary impact assessment.⁸⁹ The affected country can then disseminate this information to its population so that they learn about the planned activities and their potential consequences. Some treaties may even require the acting state to provide the information directly to the foreign population.⁹⁰

Furthermore, transboundary EIA treaties give people this information before any final decision has been made. The comprehensive transboundary EIA regimes typically require the acting party to notify the affected country as soon as possible, and in any event no later than when it notifies its own

81. David A. Koplow, *How Do We Get Rid of These Things?: Dismantling Excess Weapons While Protecting the Environment*, 89 NW. U. L. REV. 445, 562 n.619 (1995).

82. See *Effects of MX Will Be Significant, But Manageable, According to Air Force*, 11 Env't Rep. (BNA) No. 35, at 1273 (Dec. 26, 1980).

83. See Murchison, *supra* note 70, at 612-13.

84. Dean B. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 51-52 (1982).

85. Murchison, *supra* note 70, at 612.

86. See Suagee, *supra* note 84, at 51.

87. *Reagan Changes Administration's Plans To Base MX Missile System in Nevada, Utah*, 12 Env't Rep. (BNA) No. 24, at 709 (Oct. 9, 1981).

88. See, e.g., Espoo Convention, *supra* note 4, art. 3(1); Draft NAATEIA, *supra* note 35, art. 2.

89. See, e.g., Espoo Convention, *supra* note 4, art. 3(2); Draft NAATEIA, *supra* note 35, art. 7. For treaties dealing with global commons, such as the ocean, the acting state might file the EIA with an international organization so that all the signatories can peruse it. United Nations Convention on the Law of the Sea, *supra* note 45, arts. 205-06.

90. Espoo Convention, *supra* note 4, art. 3(8). Even the sparser transboundary EIA regimes may require this sort of cross-border exchange of information. Though these treaties do not specifically demand notification of the affected population, this requirement could be inferred from the widespread inclusion of such provisions in domestic EIA legislation.

population.⁹¹ Their provisions ensure that the affected public is given ample time to organize.

Although transboundary EIA regimes provide the same basic resources to people as NEPA, the political context is radically different. The main beneficiaries of NEPA are citizens of the United States, to whom the final decisionmaker is indirectly accountable through the nation's democratic system. The beneficiaries of transboundary EIA regimes are, virtually by definition, people who do not hold citizenship in the acting country.⁹² There are no ties of electoral accountability between them and the officials who decide whether the benefits of a proposal outweigh its environmental side-effects. So while transboundary EIA treaties give the affected public information and time, it is unclear what they can do with these assets. A grassroots political movement is largely out of the question. As foreigners, the people affected by a transboundary project would be hard-pressed even to raise the issue in an election for a national office of the acting state. And they could not vote for a candidate who promised to protect their interests or threaten the current leaders with retribution in the next election.

Affected individuals are not wholly without recourse. A transboundary EIA will, at the very least, alert the affected state to the possibility of environmental harm from its neighbor. Even though these regimes do not give the country a veto over the project, a state may be able to exercise such power through diplomatic means once it is aware of the situation.⁹³ The threat of reciprocity may be enough to influence another country's calculations, and an image-conscious nation may be reluctant to go on the record as a profligate polluter. Moreover, an affected community may be able to find allies in the originating state. Few projects have exclusively transboundary impacts; most enterprises capable of harming the environment of surrounding countries will have at least some effect wherever they are based.⁹⁴

Still, these routes of international accountability tend to be more fickle than the domestic mechanisms of electoral politics.⁹⁵ Affected citizens must first hope they can get their own country motivated to take diplomatic action.

91. See, e.g., *id.* art. 3(1); Draft NAATEIA, *supra* note 35, art. 3.1.

92. Occasionally states will conduct a joint EIA for a project that spans their borders. See Albergeria & Fidelis, *supra* note 8, at 625; Cassar & Bruch, *supra* note 6, at 232-33. In these cases, there is political accountability, because the project requires the approval of both states—indeed, these cases are much closer to domestic EIA in many respects. Other scholars have questioned whether these assessments should be considered transboundary EIA at all. See Schrage, *supra* note 11, at 50-51.

93. Knox, *supra* note 10, at 318.

94. For example, the United Kingdom involved five other nations in its transboundary EIA over whether to permit dredging in the English Channel. U.N. Econ. Comm'n for Eur., *supra* note 5, at 40. Although the United Kingdom stood to gain the most from the operation, a number of its own citizens opposed the project for environmental reasons. See *Dredging It Up*, ROUGH MUSIC (Brighton, U.K.) Jan.-Feb. 2005, at 2, available at <http://www.roughmusic.org.uk/pdf/roughmusic01.pdf>; see also Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 970 (1997) (discussing "partial" transboundary pollution).

95. The field of global administrative law discusses mechanisms for promoting accountability and democratic legitimacy in international organizations. See, e.g., Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006). However, these principles typically seek to connect the public to international decisionmakers who are accountable to no one. In transboundary EIA, however, the decisionmaker is already bound to a constituency—albeit one other than the affected population. This preexisting relationship makes global administrative law solutions more problematic.

A state may be reluctant to protest transboundary harm for fear of jeopardizing relations, setting a precedent, being accused of hypocrisy, or any number of other reasons.⁹⁶ Even if it is not afraid of raising the issue, the country may want to use it as a bargaining chip for another, higher-priority issue with its neighbor. The affected population may clamor for a more vigorous response, but their representatives have the credible excuse that the final decision is beyond their control. Nor is there any guarantee that they will be able to persuade the active country to alter or terminate the project. Their response would probably depend on a range of factors, such as the two nations' levels of development, their geographic relationship, and their brute power. A mismatch between any of these characteristics could lead the party of origin to shrug off threats of reciprocity.⁹⁷

In many ways, this attenuated political accountability is a specific manifestation of the problem of cross-border externalities. Pollution, of course, is the paradigmatic example of a negative externality. From a transnational perspective, though, *domestic* pollution does not create any externalities. A country gains all the benefits of its economic activity and also experiences their ecological costs—these consequences are fully internalized. The citizens who must endure the environmental harm are part of the domestic whole and can voice their dissatisfaction through the electoral process. One purpose of an EIA is to identify all the costs so decisionmakers do not mistakenly underestimate the negative side effects of their decision and engage in suboptimal behavior.

Transboundary pollution, on the other hand, is by definition an externality, since it is borne not by the acting state but by its neighbors.⁹⁸ Though no doubt informative, a transboundary EIA does little to address the underlying problem: the decisionmaker is inherently biased. The acting state must choose either to reap the rewards of a project at the cost of its neighbor, or forego those gains in order to spare that third party. Grandiose statements of international comity aside, most governments would have a hard time resisting the temptation to seize those benefits and let the other state deal with the fallout.⁹⁹

96. Wirth, *supra* note 29, at 779. See generally Philippe Sands, *Enforcing Environmental Security: The Challenges of Compliance with International Obligations*, 46 J. INT'L AFF. 367 (1993).

97. The U.S. plan to line the All-American Canal, for example, enraged Mexico because it would significantly reduce the groundwater in the Mexicali Valley. See, e.g., Manuel Roig-Franzia, *Mexican President Criticizes 'Absurd' U.S. Border Policies*, WASH. POST, Mar. 17, 2007, at A10. Numerous Mexican farmers depended on the canal's seepage for their livelihood. The Bureau of Reclamation consulted with Mexico in drafting its EIS and was aware of these consequences, but it pushed ahead anyway. U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT/FINAL ENVIRONMENTAL IMPACT REPORT: ALL-AMERICAN CANAL LINING PROJECT, IMPERIAL COUNTY, CALIFORNIA (1994). Congress showed its own disregard for the transboundary effects of the lining by passing a statute ordering the project to proceed, "[n]otwithstanding any other provision of law." Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 395, 120 Stat. 2922, 3046 (2006). See generally Erin K. Bradley, *California Draining: Lining the American Canal*, 12 GREAT PLAINS NAT. RESOURCES J. 36 (2007).

98. For further discussion of the problems of these "super-externalities," see ANDRÉ DUA & DANIEL C. ESTY, *SUSTAINING THE ASIA PACIFIC MIRACLE: ENVIRONMENTAL PROTECTION AND ECONOMIC INTEGRATION* 59-60 (1997).

99. See Mikael Hildén & Eeva Rebekka Furman, *Assessment Across Borders: Stumbling Blocks and Options in the Practical Implementation of the Espoo Convention*, 21 ENVTL. IMPACT ASSESSMENT REV. 537, 549 (2001) ("Transboundary EIAs easily run into severe difficulties when

Of course, there is any number of ways to internalize these costs and thus encourage optimal behavior. Yet transboundary EIA treaties take no steps to that end. They do not require countries to compensate other nations for their cross-border pollution, nor do they create a regime that prohibits such environmental damage outright. Rather, they simply make sure that states are aware of their externalities and then leave them to act on these lopsided incentives. The Espoo Convention, for instance, requires that the affected public be permitted to participate in any proceedings on the project,¹⁰⁰ yet it makes no attempt to ensure that the acting state gives their voice the same weight as their own citizens.¹⁰¹ Transboundary EIA regimes may highlight the problem of externalities, but they do little to address them.

The dispute over the Sumas 2 power plant provides a striking example of the challenges posed by externalities and a lack of accountability. An electric company, Sumas Energy 2, Inc., sought a permit for a facility in Washington that would power cities in the United States and Canada. Under the state's EIA law, the permitting agency conducted an EIA to evaluate the proposal's environmental consequences.¹⁰² In addition to considering the plant's impact in Washington, the agency also looked at its transboundary effects.¹⁰³ The EIA referenced Canadian air quality standards and responded to comments from British Columbian officials.¹⁰⁴ Procedurally, the impact assessment went off without a hitch, and at least one commentator has praised it as an example "of the integration of pre-existing standards into international EIA processes . . . in investigating a transboundary impact."¹⁰⁵ After accounting for the various domestic and international ramifications of the project, the agency issued a permit for the facility.

Before Sumas Energy 2 could begin building the power plant, it needed permission from the Canadian National Energy Board to construct a transmission line across the border. This decision also required an EIA. Rather than accept Washington's conclusion that ecological costs of the project were outweighed by its benefits, however, the Board conducted its own EIA and determined that the Sumas 2 plan was not environmentally acceptable.¹⁰⁶ In the litigation that followed, the Supreme Court of Canada rejected the company's contention that the environmental soundness of its power plant had already been vetted by Washington state: "the [American agency] was

differences in material interests are substantial."). Indeed, given that states squabble over who should bear the costs of undertaking the EIA, *see, e.g., id.* at 547, one wonders how often they will volunteer to spend even more money on environmentally friendly alternatives or mitigation measures.

100. Espoo Convention, *supra* note 4, art. 2(6).

101. *See* Knox, *supra* note 10, at 304.

102. WASH. STATE ENERGY FACILITY SITE EVALUATION COUNCIL, SUMAS ENERGY 2 GENERATION FACILITY, FINAL ENVIRONMENTAL IMPACT STATEMENT (2001), <http://www.efsec.wa.gov/Sumas2/eis/feisvoll1.shtml>.

103. Washington and British Columbia have concluded a series of agreements to consider transboundary impacts in their domestic EIA processes. For the latest of these, see Memorandum of Understanding Between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (Nov. 7, 2003), *available at* http://www.eao.gov.bc.ca/pub/MOU-Wash_st-EAO_2004/mou_2003.pdf.

104. Neil Craik, *Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments*, 38 VICT. U. WELLINGTON L. REV. 381, 397-98 (2007).

105. *Id.* at 397.

106. *See* Craik, *supra* note 36, at 101-03.

concerned with the impact of the project from a U.S. perspective, while the Board had to consider the Canadian perspective. Both were seeking to advance their respective public interests, which in this case did not coincide.”¹⁰⁷ Unable to connect the proposed power plant to Canada, Sumas Energy 2 abandoned its plans for construction.

As the Canadian justices noted, the disparate EIAs from Canada and the United States should come as no surprise. The Canadian EIA had to balance the environmental consequences of the project against the production of electricity. The American EIA, on the other hand, considered the primary benefits of the project to be the millions of dollars the project would generate for the state and its citizens.¹⁰⁸ The assessment may have been international in its scope, but the decisionmakers were accountable to their own national constituencies and responded appropriately. Ultimately, the Canadian government was able to thwart the project because the American power plant required a Canadian electrical line. For most projects with transboundary impacts, though, the affected country will not have a veto on the project and must endure whatever consequences the originating nation deems acceptable.¹⁰⁹

B. *Substantive Environmental Law*

Substantive environmental statutes are another source of success for the United States’ domestic EIA regime. Though NEPA itself does not constrain agencies’ discretion, an EIS can reveal violations of other laws whose substantive provisions are mandatory. In tandem, these laws create a comprehensive legal framework with both procedural and substantive components. Transboundary EIA regimes cannot draw upon the same corpus of strong environmental law. International environmental customs and treaties may provide some assistance to these regimes, but they are not nearly as potent or prevalent as their national counterparts. Without complementary substantive mandates, transboundary EIA regimes lack the force possessed by NEPA and other domestic EIA laws.

1. *Substantive Environmental Law in the Domestic Context*

Though the National Environmental Policy Act operates largely through procedural mandates, not all environmental statutes follow the same route. Congress has passed a wide array of substantive laws as well. Instead of trying to reform the decisionmaking process, these statutes simply order administrators to act in a particular way. Some of these command-and-control

107. *Sumas Energy 2, Inc. v. Canada* (National Energy Board) [2006] 1 F.C. 456 (Fed. Ct.).

108. WASH. STATE ENERGY FACILITY SITE EVALUATION COUNCIL, GENERAL RESPONSES TO MAJOR ISSUES 1 (2001), <http://www.efsec.wa.gov/sumas2/eis/feis/vol2/generalresp.pdf> (“The primary benefits of the [Sumas Energy 2] project . . . include \$30.6 million in payroll, fringe benefits, and other labor overhead expenditures. It is anticipated that approximately \$11 million would be spent in Whatcom County. Other economic benefits include local spending on goods and services estimated at \$22 million. Finally, millions of dollars in taxes would be paid to local and state governments.”).

109. Hildén & Furman have also noted that at least one case under the Espoo Convention “was suspended due to the fact that the country of origin and the affected country could not agree on the significance of the negative transboundary impacts.” Hildén & Furman, *supra* note 99, at 540.

laws are binding on all agencies. For example, the Endangered Species Act¹¹⁰ prohibits any agency from killing a member of a threatened or endangered species.¹¹¹ Other statutes affect only a particular agency. The Federal-Aid Highway Act of 1968, for instance, prevents the Department of Transportation from building highways through wildlife refuges unless there is no feasible or prudent alternative.¹¹² In addition to these laws, executive orders can impose environmental constraints on agency policies.¹¹³ Regardless of the scope of these laws and orders, they all limit agency discretion in a way that NEPA does not.

Part of NEPA's effectiveness comes from its interaction with these substantive laws. Though these laws place strict limits on the range of agencies' actions, they rarely specify how an agency ought to police itself to guarantee that it does not accidentally violate them. NEPA fills this gap by forcing agencies to consider the ecological consequences of its actions and to "ascertain[] whether all substantive standards will be met."¹¹⁴ An EIS can detect otherwise unforeseen violations of substantive environmental rules before such transgressions occur. In such a case the agency will have no choice but to conform to the law. As one commentator has put it, "NEPA specifies the process, the other statutes the substance that binds agency decision makers."¹¹⁵ In its EIS of one timber sale, for example, the United States Forest Service noted that its choice of alternatives was constrained by at least seven different statutes and rules.¹¹⁶ In this way "the combination of substantive mandate and NEPA-generated information may compel the agency to modify its course of action"¹¹⁷ under circumstances in which neither law alone would be effective.

In addition to supporting environmental laws, NEPA's information-forcing provisions complement the Administrative Procedures Act (APA). Section 706 of the APA empowers the courts to overturn an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹¹⁸ NEPA cannot set aside an agency's decision for being wantonly destructive, but the APA allows individuals to seek judicial review of agency action on substantive grounds. NEPA reinforces the APA by mandating that agencies disclose the reasoning behind their environmental decisions.¹¹⁹ It

110. 16 U.S.C. §§ 1531-44 (2000).

111. *Id.* § 1538(a)(1)(B).

112. 23 U.S.C. § 138.

113. *See, e.g.*, Exec. Order No. 11,644, 37 Fed. Reg. 2887 (Feb. 9, 1972) (restricting how agencies designate areas and trails for off-road vehicles).

114. Herz, *supra* note 7, at 1683; *see also* Julie Fegley, *The National Environmental Policy Act: The Underused, Much-Abused, Compliance Tool*, 31 A.F. L. REV. 153, 153-54, 161-62 (1989); Scott W. Hardt, *Federal Land Management in the Twenty-first Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 374 (1994); Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225, 273-74 (2002).

115. William H. Rodgers, Jr., *NEPA at Twenty: Mimicry and Recruitment in Environmental Law*, 20 ENVTL. L. 485, 496 (1990).

116. Karkkainen, *supra* note 55, at 911 n.23 (citing USDA FOREST SERV., COEUR D'ALENE RIVER RANGE DISTRICT SMALL SALES PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT III-I (2001)).

117. *Id.* at 911.

118. 5 U.S.C. § 706 (2000).

119. RASBAND ET AL., *supra* note 13, at 255.

exposes to the scrutiny of environmentalist organizations value judgments and logical leaps that might have taken place behind closed doors.¹²⁰ Moreover, NEPA ensures that all of this information is on the record and thus eligible for judicial consideration in suits under the APA. In situations in which an agency has its discretion constrained by other laws, an EIS can provide the necessary data to attack the rationality of that decision.¹²¹

In addition to informing agencies and courts about possible violations of substantive laws, an EIS can also alert environmentalist watchdog organizations. The famous Westway case illustrates this interaction. The Westway was an ambitious proposal to fill in 169 acres of the Hudson River; a six-lane highway would run underneath much of the landfill, while parks, home, and commercial development would occupy the surface.¹²² Before the city and state officials could begin this \$2 billion project, they needed a section 404 dredge permit from the Army Corps of Engineers. That permit, in turn, required an EIS.

Unlike NEPA, section 404 of the Clean Water Act imposes substantive requirements on agencies. The statutory language, implementing regulations, and case law surrounding section 404 create a strong presumption against landfills.¹²³ At the time of the Westway project, this presumption would effectively block any project that threatened an aquatic ecosystem.¹²⁴ According to the EIS, these concerns did not apply to the Westway; the Corps described the landfill area as a “biological wasteland” and claimed that the dredging would have minimal environmental impacts.¹²⁵ When opponents of the Westway examined the underlying data that went into the EIS, however, they discovered that proposed landfill site was a prime spawning ground for

120. In its final record of decision, the agency must “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not,” 40 C.F.R. § 1505.2(c) (2007).

121. *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998), is a prototypical example of the potent interaction between NEPA and the APA. The National Park Service was considering closing down a portion of a road leading to a national monument. It conducted its environmental assessment, evaluating options ranging from closing down the entire road to leaving it completely open to tourists. It determined that there would be no significant impact and opted to keep the entire length of the road open for vehicles. Drawing heavily from the environmental assessment, SUWA challenged the decision under the APA. It argued that, given what the environmental assessment had revealed about the consequences of unimpeded traffic along the trail, the agency action was arbitrary and capricious vis-à-vis the National Park Service Organic Act, 16 U.S.C. §§ 1-4 (2000). The Secretary could not justify the damage within the bounds of his statutory mandate. Though the Tenth Circuit reversed and remanded the decision because the lower court used an improper standard of review, 222 F.3d 819 (10th Cir. 2000), the case demonstrates the synergy of the two laws.

122. For a broader history of the Westway project, its champions, and its foes, see Sam Roberts, *Battle of the Westway: Bitter 10-Year Saga of a Vision on Hold*, N.Y. TIMES, June 4, 1984, at B1.

123. William W. Buzbee, *Adjudicatory Triggers of Enhanced Ambient Environment Information*, 83 IND. L.J. 583, 590 & n.21 (2008). For the rules in effect during Westway’s application, see 40 C.F.R. § 230.10 (1984); 33 C.F.R. § 320.4(b)(1) (1986); and Exec. Order No. 11,990, 42 Fed. Reg. 26961 (May 24, 1977).

124. 40 C.F.R. § 230.10(a)(1984) (“[N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem”); see also Buzbee, *supra* note 123, at 590 (“This presumption becomes a virtual prohibition if such fill will cause significant degradation of an important aquatic habitat.”).

125. Roger Nober, Note, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 255 n.133 (1990).

the striped bass. In the ensuing lawsuit the district court declared the EIS woefully inadequate and enjoined the project until the Corps performed another impact assessment.¹²⁶

The combination of NEPA's procedures and section 404's substance left the agency in a double-bind. If the Corps drafted an accurate EIS, it would have to admit that the Westway would destroy an important aquatic habitat. In that case, section 404's protective measures would probably rule out a dredge permit.¹²⁷ On the other hand, if the agency ignored the project's effect on the striped bass, it risked indefinite delay as it fended off lawsuits over its NEPA compliance. The Corps opted for the latter approach, composing another EIS that minimized the Westway's predicted impact on the Hudson River ecosystem.¹²⁸ The court saw through the shoddy science of the statement and maintained the injunction against the project.¹²⁹ By this time, the political winds had turned against the Westway and its supporters abandoned it.¹³⁰

2. *Substantive Environmental Law in the International Context*

For the most part, transboundary EIA regimes are not complemented by strong, substantive international law. Certainly, there are numerous treaties concerning a broad range of environmental subjects. With some notable exceptions, however, these agreements are marred by vague language and weak enforcement mechanisms.¹³¹ Few contain strong mandates like the

126. *Action for Rational Transit v. W. Side Highway Project*, 536 F. Supp. 1225, 1254 (S.D.N.Y. 1982), *aff'd in part, rev'd in part sub nom. Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011 (2d Cir. 1983) (subsequent history omitted).

127. See William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway, and the Challenges of Regional Growth*, 21 J.L. & POL. 323, 339 (2005) ("Even taking into account deference courts afford agency decision makers, it was doubtful that a [dredge] permit grant could be upheld given the underlying data about the Westway site, striped bass use of the Westway site, and binding regulations."); see also Herz, *supra* note 7, at 1734 ("[The Section 404] decision was not entirely discretionary, and the NEPA procedures accompanied and informed the decision under the Clean Water Act.")

128. See Buzbee, *supra* note 127, at 337.

129. *Sierra Club v. U.S. Army Corps of Eng'rs*, 614 F. Supp. 1475 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 772 F.2d 1043 (2d Cir. 1985).

130. Part of the appeal of the Westway project was that the federal government would cover ninety percent of its costs because it was part of the Federal Interstate Highway System. City and state officials could choose to reallocate these highway funds to improve mass transit, but the deadline for swapping the money was September 30, 1985. Faced with the unfavorable verdict in *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, the mayor and governor decided to apply the funds to public transportation rather than risk losing it all if the court injunction were never lifted.

131. See, e.g., JOSEPH F. DiMENTO, *THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW* (2003) (critically evaluating the effectiveness of five multilateral environmental treaties); Simon SC Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*, 11 GEO. INT'L ENVTL. L. REV. 241, 285 (1999) ("[T]he vast majority of bilateral and multilateral treaties on transboundary pollution are not premised on liability in accordance with Principle 21, nor on specific limits. . . . On balance, these treaties, which emphasize cooperative action without assigning liability or setting specific limits, have been ineffective."). A few substantive environmental treaties appear to have achieved their aims. The most prominent among these is the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3. For theories as to why it succeeded, see the materials reprinted in FOUNDATIONS OF INTERNATIONAL LAW 242-71 (Oona A. Hathaway & Harold Hongju Koh eds., 2005). States have also had some success in confronting acid rain through treaty limitations on emissions. See Merrill, *supra* note 94, at 963. *But see Her Majesty the Queen in Right of Ontario v. U.S. Env'tl. Prot. Agency*, 912 F.2d 1525 (D.C. Cir. 1990) (holding that the EPA was not obligated to prevent pollution that was causing acid rain in Canada).

Endangered Species Act, and none empower tribunals to reverse government action because it is arbitrary or capricious as does the Administrative Procedures Act.

Potent environmental treaties have encountered a number of unique obstacles: states' undervaluing of the damage inflicted on their neighbors, a tendency to discount the long-term effects of pollution, developing nations' wariness of eco-imperialism, the technological difficulties of monitoring compliance, and the fact that most polluters are private nonstate actors.¹³² These challenges are in addition to the traditional covetousness with which states guard their sovereignty. Indeed, states may very well have adopted procedural EIA regimes precisely because they were unable to reach a consensus on substantive pollution restrictions. For resources defended by functional environmental treaties, the American experience suggests that transboundary EIA regimes will contribute significantly to a better environment. The problem is that so much of the world lacks these protections.¹³³

Nor does customary international law do a better job of fortifying transboundary EIA regimes. A number of scholars¹³⁴ have rallied around Principle 21 of the Stockholm Declaration¹³⁵ as a crucial element of customary international environmental law. Principle 21 proclaims that "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."¹³⁶ If this precept had been elevated to the status of binding international custom, it would indeed appear to be the perfect corollary to the transboundary assessment regimes.

Yet outside environmentalist circles, scholars question whether Principle 21—or anything similar to it—can be considered customary law at all. The general prohibition against transborder harm has little state practice to support it,¹³⁷ including only a single case in the past sixty years in which an international tribunal awarded damages for transboundary pollution.¹³⁸ In contrast to this case are countless instances in which egregious ecological harm went unpunished.¹³⁹ Some doubt whether this blanket prohibition on

132. *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1550-51 (1991).

133. Merrill, *supra* note 94, at 967.

134. See, e.g., Robinson, *supra* note 9, at 602 ("EIA is the means of assuring that no state acts so as to harm the environment of another state: a prohibition that exists for all states under international law, as embodied in Principle 21"); David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?* 29 GA. L. REV. 599, 620 & n.56 (1995). For a discussion of this valorization of the Stockholm Convention, see Knox, *supra* note 10.

135. Stockholm Declaration, G.A. Res. 2997, ¶ 21, U.N. GAOR, 27th Sess., U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416, 1420 (1972).

136. *Id.*

137. See, e.g., Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 110-11, 114-15 (1995); Knox, *supra* note 10, at 294; Merrill, *supra* note 94, at 937.

138. Trail Smelter (U.S. v. Can.), 3 R. Int'l. Arb. Awards 1938 (1941).

139. The radiation released from Chernobyl, the Sandoz chemical spill into the Rhine, and France's nuclear testing off the coasts of Australia and New Zealand are just some of the more notable examples. As one author has noted, "transboundary pollution seems much more the rule than the exception in interstate relations." Bodansky, *supra* note 137, at 110-11.

transboundary pollution has ever seriously been applied internationally or even within a federal state.¹⁴⁰ One can see why: if states took Principle 21 at face value, it would shut down all industry that caused *any* transboundary harm, no matter how slight or unavoidable.¹⁴¹ Yet if one subjects Principle 21 to interpretation by states, it loses most of its substance.¹⁴² Given its questionable status as international custom and the inherent difficulties in enforcing it, Principle 21 appears unable to serve as a strong complement to the transboundary EIA regimes.

One final possibility is the extraterritorial application of domestic environmental law. Yet this also proves elusive. Many states are reluctant to apply their statutes abroad¹⁴³ and maintain a presumption against the extraterritorial application that can only be rebutted by a clear showing of the intent of the legislature.¹⁴⁴ Indeed, transboundary EIA treaties are necessary precisely because countries generally do not enforce their domestic environmental assessment laws extraterritorially. In fairness, a country certainly *could* pass a substantive environmental law whose jurisdiction explicitly exceeded the bounds of that state. Such a statute would give a transboundary EIA regime some traction, but only vis-à-vis the actions of a particular state that contravene a specific law. Even under these narrow circumstances, the government can always change its mind on a whim. The United States, for instance, has vacillated over whether it applies the Endangered Species Act (ESA) to its operations overseas.¹⁴⁵ Furthermore, many countries do not have the resources or will to enforce the environmental laws on their books, regardless of their theoretical reach. While extraterritorial environmental law may provide some force to transboundary EIA regimes in limited situations, it remains unreliable.

C. *Judicial Review under the Administrative Procedure Act*

The success of NEPA has been inextricably tied to another important piece of domestic legislation: the Administrative Procedures Act (APA).¹⁴⁶ This statute reinforces the political accountability of agencies with a framework of judicial review to hold them *legally* accountable as well. The

140. Merrill, *supra* note 94, at 957-67.

141. Knox, *supra* note 30, at 155.

142. *Id.* at 156.

143. See, e.g., *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 676 (1991) (declining to apply the Resource Recovery and Conservation Act to a violation that occurred in the United Kingdom); *Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Ass'n of Internet Providers*, [2004] 2 S.C.R. 427, 454 (Can.); Martha E. Candiello, *The Extraterritorial Reach of Environmental Laws*, 70 TEMP. L. REV. 1235, 1236 (1997) (discussing a U.K. court's refusal to hear a case because "the bulk of the activities had occurred in the United States").

144. Paul Boudreaux, *Biodiversity and a New "Best Case" for Applying the Environmental Statutes Extraterritorially*, 37 ENVTL. L. 1107 (2007) (criticizing the United States' presumption against extraterritorial application of laws); João C. J. G. de Medeiros, Note, *How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel*, 92 MINN. L. REV. 529 (2007) (discussing the negative consequences of Canada's and the United States' reluctance to apply their environmental laws abroad).

145. See 43 Fed. Reg. 870 (Jan. 4, 1978) (extending the provisions of the ESA abroad); 50 C.F.R. § 402.01 (1986) (restricting the reach of the ESA to the territorial United States).

146. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

APA gives litigants a cause of action to force agencies to adhere to NEPA's procedural mandates.¹⁴⁷ Presently, there is no equivalent of the APA in the international arena. Indeed, relatively few countries have passed national laws that mimic the APA's sweeping cause of action. Absent such provisions, governments can flout even the procedural requirements of transboundary EIA regimes, to say nothing of their amorphous substantive aspirations.

1. Cause of Action in the Domestic Context

While one cannot overstate the importance of the APA for administrative law in general, its consequences for NEPA are particularly significant. Unlike many other environmental statutes, NEPA does not include a citizen-suit provision that would give individuals a cause of action if an agency neglected its procedural responsibilities.¹⁴⁸ Up until *Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*,¹⁴⁹ it was uncertain whether NEPA's provisions were judicially enforceable at all.¹⁵⁰ The Act itself gives little suggestion that private individuals would have any role to play in its application.

The APA is responsible for giving private parties the ability to sue agencies for failing to prepare a proper EIS.¹⁵¹ Section 702 of the statute creates a general cause of action for any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."¹⁵² Under section 706 such an individual can sue to "compel agency action unlawfully withheld or unreasonably delayed," among other remedies.¹⁵³

These APA suits have become an important means of achieving NEPA's goals.¹⁵⁴ Typically a litigant challenges an agency's finding of no significant impact,¹⁵⁵ the procedural propriety of an EIS, or the analytical adequacy of an EIS.¹⁵⁶ In many instances these suits have been the only thing preventing an

147. NEPA, in turn, provides individuals and organizations with the information necessary to mount a challenge to the substantive policies of agencies under the APA. See *supra* Part IV.A.

148. See, e.g., Clean Water Act, 33 U.S.C. § 1365 (2000); Clean Air Act, 42 U.S.C. § 7604 (2000); Toxic Substances Control Act, 15 U.S.C. § 2619 (2000).

149. 449 F.2d 1109 (D.C. Cir. 1971).

150. David G. Burleson, Note, *NEPA at 21: Over the Hill Already?*, 24 AKRON L. REV. 623, 626-27 (1991). Prior to that case many scholars believed that the Office of Management and Budget or Congress itself would be principally responsible for ensuring that agencies complied with NEPA. See, e.g., *id.* at 626 n.30.

151. See, e.g., Utah Env'tl. Cong. v. Troyer, 479 F.3d 1269, 1280 (10th Cir. 2007); Robinson, *supra* note 12, at 398; Jennifer Wieman, Note, *The Reality of NEPA: Can the Act Realize Its Potential*, 14 MO. ENVTL. L. & POL'Y REV. 393, 399 (2007).

152. 5 U.S.C. § 702 (2000).

153. *Id.* § 706.

154. See William L. Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 IND L.J. 205, 208 (1989); Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 227 (1992) ("[C]itizen suits are the prime mechanism for ensuring that agencies follow NEPA procedures to the letter.").

155. A finding of no significant impact is a pre-EIS determination that the proposed federal action will not have any significant ecological consequences. Under such circumstances the agency does not need to draft a full EIS.

156. Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 B.C. ENVTL. AFF. L. REV. 601, 619 (2006).

agency from conducting an EIS in a flawed manner¹⁵⁷ or conceivably not at all.¹⁵⁸ And without the EIS, of course, NEPA would essentially be a dead letter. Whether one believes that NEPA operates simply by educating administrators or through indirect means, the EIS is the *sine qua non* of the Act's operation.

This general cause of action also furthers NEPA's goals in a more underhanded fashion. Determined organizations can bombard agencies with lawsuits critiquing either the lack of an EIS or its execution. Even if the accusations are minor or unfounded, a suit can derail agency plans by creating interminable litigation, racking up legal expenses, and (if successful) forcing agencies to conduct another EIS to take into account previously ignored factors.

Though critics of this practice decry it as unethical and undemocratic,¹⁵⁹ this harassing function of NEPA has had undeniable results. Through the "tactical application of extreme transaction costs,"¹⁶⁰ activists can delay an undesirable project indefinitely, negotiate an ecological settlement, or perhaps scrap it altogether.¹⁶¹ Nongovernmental organizations do not need to win or even *file* a lawsuit to achieve their goals. The mere threat of litigation may be enough to convince an agency to make environment-friendly concessions.¹⁶² This opportunity for obstructionism is one reason why even cynical environmentalists remain fond of the statute.¹⁶³

2. *Cause of Action in the International Context*

Transnational EIA treaties generally do not include a cause of action for affected individuals who are dissatisfied with the process. Perhaps the only regimes to include an appeal for improper procedure are those implemented by developmental institutions, such as the World Bank,¹⁶⁴ and they limit review to decisions concerning only projects financed by the bank. In most cases, if individuals are to challenge a state for failing to comply with the procedures, they must look beyond the treaty itself.

157. See, e.g., *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (ordering the agency to conduct a new EIS for a forest road to account for the logging that would result from the access road).

158. See, e.g., *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549 (9th Cir. 2006) (invalidating an agency's decision to modify the protected status of a species without first conducting a supplemental EIS).

159. The current chairman of the Council on Environmental Quality, James L. Connaughton, has complained that activists use meritless lawsuits simply to "gum up the works" of any agency. Margaret Kriz, *The Goal Is To Get Faster Decisions*, 34 NAT'L J. 3476, 3476 (2002) (quoting James L. Connaughton).

160. Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 341 (2004).

161. See, e.g., Margaret Kriz, *Bush's Quiet Plan*, 34 NAT'L J. 3472 (2002); Nober, *supra* note 125, at 251-53.

162. Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43, 45 (1990); Nober, *supra* note 125, at 270.

163. Karkkainen, *supra* note 160, at 341.

164. Int'l Bank for Reconstruction and Dev. [IBRD] & Int'l Dev. Ass'n [IDA], World Bank Inspection Panel, Res. No. IBRD 93-10/IDA 93-6, ¶ 12 (Sept. 22, 1993) (granting review of decisions made "as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank"); see SANDS, *supra* note 48, at 211-12.

Moreover, most countries do not have domestic equivalents of the general cause of action granted by section 702 of the APA. Otherwise, national laws might be able to fill this important gap in transboundary EIA regimes. For example, if a country had incorporated a transboundary EIA treaty into its code, theoretically an individual could rely on domestic legislation to supply a cause of action to enforce the agreement's terms. Yet most states do not allow their own citizens to seek judicial review of the national EIA regimes,¹⁶⁵ let alone permit foreigners to challenge their procedural compliance with a treaty. Countries typically use political means, instead of judicial ones, to ensure that the government complies with the proper procedures.¹⁶⁶ Even if a state has a general cause of action similar to that provided by the APA, it may not open up its courts to allow foreign nationals to file administrative suits against the government.¹⁶⁷

The absence of a general or specific citizen-enforcement provision severely undermines the effectiveness of transboundary EIA regimes. Without it, individuals will be unable to call upon the courts to receive a proper EIA. Granted, they can hope that their own country's diplomatic service will insist on procedural conformity, but this avenue is hardly an adequate replacement for a cause of action.¹⁶⁸ In the absence of legal action to prod states into compliance, they have generally been lethargic in implementing domestic and transboundary EIA procedures.¹⁶⁹

The limitations of diplomacy become apparent when one considers the dispute over the Bystroe Canal project—arguably the most successful example of concerted action regarding a transboundary EIA. The Bystroe Canal project was a Ukrainian plan to build a canal through the Danube Delta. Despite the clear environmental consequences of such large-scale dredging,¹⁷⁰ Ukrainian officials steadfastly maintained that the canal would have no significant impacts on the delta's delicate ecosystem¹⁷¹ and consequently never conducted a transboundary EIA. Ukraine commenced operations in

165. See, e.g., Knox, *supra* note 10, at 298 n.45; Robinson, *supra* note 12, at 398.

166. Knox, *supra* note 10, at 298; see *supra* Section IV.A.

167. A number of authors have sought to address this problem of foreign standing by recommending the inclusion of a nondiscrimination principle in transboundary EIA regimes. See, e.g., Org. Econ. Co-operation & Dev. [OECD], *Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution*, Recommendation C(77)28(Final), annex, princ. 3(a) (May 17, 1977), reprinted in OECD, OECD AND THE ENVIRONMENT 150, 152 (1986); Knox, *supra* note 10. Under this principle, states would agree to extend the same participatory rights to nonnationals as they do their own citizens. But since most states do not permit nationals to challenge the sufficiency of EIA, they would be under no obligation to grant such rights to foreigners.

168. Gray, *supra* note 55, at 127 ("The availability of domestic remedies for breaches of international obligations provides a greater opportunity for enforcement than having complaints heard at the international level.").

169. Robinson, *supra* note 12, at 399. For example, neighboring states and independent experts have criticized China's transboundary EIA for underestimating the environmental effects of its Mekong River dam project. Cassar & Bruch, *supra* note 6, at 236-37. Yet China has continued to rely on that flawed study to defend its decision to go forward. L. Waldron Davis, *Reversing the Flow: International Law and Chinese Hydropower Development on the Headwaters of the Mekong River*, 19 N.Y. INT'L L. REV. 1, 20 (2006).

170. Tanya D. Sobol, *An NGO's Fight To Save Ukraine's Danube Delta: The Case for Granting Nongovernmental Organizations Formal Powers of Enforcement*, 17 COLO. J. INT'L ENVTL. L. & POL'Y 123, 147-49 (2006).

171. *Id.*

2004 over the protests of its neighbor Romania and its own environmentalist nongovernmental organizations (NGOs).¹⁷²

Romania made a formal request to the Secretariat of the Espoo Convention in 2004.¹⁷³ Only four years later did the members of the Espoo Convention formally condemn Ukraine's activities.¹⁷⁴ By then, however, the first phase of the project was already complete. Ukraine has since promised to conduct a transboundary EIA before beginning the second phase of the Bystroe Canal,¹⁷⁵ but it has made no efforts to undo its earlier work. Moreover, one could question what weight Ukraine will attribute to the findings of the transboundary EIA since it has already committed considerable resources to the first stage of the project.

The ponderous pace and tepid conclusion of the Bystroe Canal dispute stand in stark contrast to how the case would have been handled under the American domestic EIA regime. An NGO pointed out Ukraine's numerous violations of the Espoo Convention to the Secretariat of the Treaty in 2003, before the country began the first phase of canal construction.¹⁷⁶ Instead of halting the project, the Treaty's Implementation Committee dismissed the complaint because it came from an NGO.¹⁷⁷ Even after Romania made a formal complaint in 2004, the other signatories took four years to build a consensus to censure Ukraine for ignoring the convention's basic mandates. Under the United States' domestic EIA regime, the project would probably never have broke ground in the first place. Given the egregious nature of Ukraine's violation and the serious risk of irreparable harm, the NGO's complaint would probably have qualified for a preliminary injunction.¹⁷⁸

V. SOLUTIONS

The previous Section demonstrated that contemporary transboundary EIA regimes lack certain features that empower their domestic counterparts. The drafters of these treaties drew heavily from the text of their local EIA

172. Daniela Tichel, *Romanians Warn of Danube Delta Ecological Disaster*, ENV'T NEWS SERV., Sept. 28, 2004, <http://www.ens-newswire.com/ens/sep2004/2004-09-28-02.asp>.

173. *Romania Requests International Inquiry into Ukrainian Danube Canal*, BBC MONITORING EUROPEAN, Aug. 24, 2004, at 1, available at Dow Jones Factiva, Document BBCEUP0020040824e08o0018h. Romania did not bring the case before the International Court of Justice because neither it nor Ukraine consented to the Court's jurisdiction when they signed the Espoo Convention. See Espoo Convention, *supra* note 4, art. 15 (allowing parties to accept, ex ante, the Court's jurisdictions in disputes over the treaty). So far only four states have opted for the mandatory jurisdiction of the International Court of Justice. See U.N. Econ. Comm'n for Eur., *supra* note 32; see also David B. Hunter, *Toward Global Citizenship in International Environmental Law*, 28 WILLAMETTE L. REV. 547, 551 (1992) ("[V]irtually no environmental treaty provides for compulsory adjudication or arbitration.").

174. *Report of the Fourth Meeting*, *supra* note 6, at 84-85.

175. *Id.*, pt. 1, at 6-7.

176. See Sobol, *supra* note 170, at 151-52.

177. *Id.* at 153.

178. See *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) ("[A]bsent unusual circumstances, an injunction is the appropriate remedy for a violation of NEPA's procedural requirements.") (internal quotations omitted); DANIEL RIESEL, *PRELIMINARY INJUNCTIONS AND STAYS PENDING APPEAL IN ENVIRONMENTAL LITIGATION* (2008), available at SN085 ALI-ABA 435 (Westlaw); cf. *Portland Audubon Soc'y v. Lujan*, 784 F. Supp. 786 (D. Or. 1992) (granting a preliminary injunction to enjoin timber sale when the agency failed to conduct a supplemental EIS), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

laws but neglected the essential role played by national institutions. Rather than abandoning these transboundary EIA regimes, however, the next generation of diplomats and jurists would do better to finish their predecessors' work.

Currently, the scholarly literature and diplomatic exchanges focus on fine-tuning the mechanisms of these treaties. Commentators¹⁷⁹ and states¹⁸⁰ alike pore over the procedures without considering whether the EIA agreements are doing any good. These aspects of the transboundary EIA regimes are certainly important, but a comparison with NEPA suggests that the global community must look beyond bare procedure to maximize the effectiveness of these treaties.

What follows are a few ways that international lawmakers could apply the lessons from the U.S. experience with NEPA. In keeping with the transboundary regimes themselves, these proposals tend to be more procedural in nature. Hopefully, states will be more accepting of these solutions than other, substantive ones that trespass more blatantly upon their freedom of action. These suggestions might not create the perfect conditions for an effective EIA regime, but what they lack in idealism they make up in pragmatism.

A. *Political Accountability*

Transboundary EIA regimes could try to hold administrators responsible by incorporating nongovernmental organizations into the EIA process. Most regimes require states to inform the government of the affected country or perhaps its population. A minor but important modification to this scheme would be to notify major environmental NGOs within the acting countries at the outset of drafting the EIA.

Ecological organizations would bring a host of benefits to the process. For instance, an NGO might have scientific expertise unavailable to the affected population and could voice a distinctly environmentalist perspective. Most importantly, perhaps, a transnational NGO could communicate the EIA information to its members in order to create a constituency, within the acting state, in favor of more ecological alternatives.¹⁸¹ Even if the affected population has little political sway with the acting state, an NGO like the Nature Conservancy or the Defenders of Wildlife might have some clout. Groups such as these recognize the global interdependence of ecological

179. See, e.g., Cassar & Bruch, *supra* note 6, at 232-37; Gray, *supra* note 55, at 124-28 (calling for a standardized EIA convention); Maki Tanaka, *Lessons from the Protracted MOX Plant Dispute: A Proposed Protocol on Marine Environmental Impact Assessment to the United Nations Convention on the Law of the Sea*, 25 MICH. J. INT'L L. 337 (2004) (recommending more thorough procedures to supplement the treaty's current EIA provisions).

180. For a list of these procedural issues, see, for example, U.N. Econ. Comm'n for Eur., *supra* note 5, at 22-24, 30-40; and European Commission, *supra* note 7, at 6-8, annex I.

181. For example, under this proposed system, if Germany were contemplating an action that would harm a French river, it would not merely be required to notify French citizens. Though these individuals clearly have the most at stake, they also lack any direct power over the German political system that will ultimately decide whether to adopt the project. Germany would also alert German and international environmental NGOs. These organizations could not only monitor the EIA process but also mobilize German voters to pressure their government to seek less harmful alternatives.

issues and are less likely than state officials to discount environmental damage because it occurs in another country. Indeed, transnational environmental organizations already have a proven record of effecting change across borders.¹⁸²

Although the affected population could always try to seek out such organizations, a treaty provision would ensure the early and informed involvement of transnational NGOs by requiring that the acting state alert them. It could prove especially valuable for projects that impact developing nations, which often lack a strong civil society that could rally support in the acting state. It would also remind states that their actions will eventually come under the scrutiny of their own public, even if they are acting extraterritorially.

Admittedly, NGOs are not a perfect substitute for electoral accountability, but they may be the next-best option where true democratic representation is impossible. One common criticism of NGOs is that they suffer from their own democratic deficit.¹⁸³ Although NGOs may be more responsive to their donors than to affected populations, the interests of these two groups will be closely aligned in most cases of transboundary harm. Nor would NGO involvement eliminate the voice of the local population; they would retain their right to comment on the EIA. These environmental organizations would simply send a similar message to their members in the acting state.

Another problem is that an NGO's influence is generally limited to the reach of its membership. Thus, NGO involvement could sway the final decision of a developed country with a robust civil society; presumably it would be less effective if the acting state were an authoritarian state without a strong civil society. This criticism is valid, but it challenges the extent of this solution and not its overall value. Conscripting NGOs may not bring accountability to all EIA processes, but it will help in the significant number of cases in which the acting state has a vigorous civil society. And even if a country had no independent environmental organizations, international NGOs could still pressure it indirectly. One scholar has documented this effect in the area of human rights: transnational networks of activists succeeded in lobbying their own governments to press an authoritarian state to improve its treatment of political opponents.¹⁸⁴

182. Perhaps the most colorful example of recent transboundary mobilization is the disruption of Japan's whaling expedition. Members of two transnational NGOs brought the hunt to a premature end by employing tactics ranging from protesters to stink bombs. Mike Nizza, *Green Pirates Claim Victory on Whaling*, *The Lede*, Apr. 16, 2008, <http://thelede.blogs.nytimes.com/2008/04/16/green-pirates-claim-victory-on-whaling>; see also Peter M. Haas, *Banning Chlorofluorocarbons: Epistemic Community Efforts To Protect Stratospheric Ozone*, 46 INT'L ORG. 187 (1992) (discussing the role of transnational communities of experts in creating an international consensus against CFCs).

183. For criticisms of the undemocratic nature of NGOs, see Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 118 (2000) (describing NGOs as "vehicle[s] for international elites to talk to other international elites about the things . . . that international elites care about"); P.J. Simmons, *Learning To Live with NGOs*, FOREIGN POL'Y, Fall 1998, at 82, 83 (warning that NGOs are "decidedly undemocratic and unaccountable to the people they claim to represent").

184. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998), reprinted in FOUNDATIONS OF INTERNATIONAL LAW, *supra* note 131, at 217.

B. *Substantive Environmental Law*

Historically, however, states have resisted a blanket prohibition against transboundary harm, presumably because of their sovereignty costs.¹⁸⁵ International scholars and politicians should recognize this fact and focus on preexisting principles that do not directly infringe on state sovereignty.

One such principle is due diligence. Commentators have offered due diligence as a more realistic alternative to strict liability for transboundary harm. Under a rule of due diligence, a state is not liable for all the damage it inflicts upon its neighbors. Rather, it is held responsible for harm that it could have reasonably avoided by taking appropriate precautions. This standard is more appealing to sovereign nations than sweeping prohibitions akin to Principle 21. First, it does not impose a bright-line rule against any activity. States are not prohibited from economic development; instead, due diligence regulates the *manner* in which they develop. Second, the rule prevents the state from unwittingly incurring liability. Under a strict liability regime, for instance, a state might bear responsibility for an industrial accident that it could not have possibly foreseen.

Though states pay lip service to their obligation to diligently avoid transboundary pollution, traditionally this standard has faced two obstacles. First, it is extremely difficult to monitor other states' compliance with this standard, much less prove a violation in a particular case. Demonstrating a lack of diligence on the part of a state presents unique evidentiary challenges since due diligence is an obligation of effort and not of effect.¹⁸⁶ Thus the complaining state is in the unenviable position of not only proving that another country damaged its environment, but also that its neighbor did not do enough to prevent that harm. Second, its contents are vague. It has been defined simply as "the diligence to be expected from a 'good government', i.e., from a government mindful of its international obligations."¹⁸⁷ As one might expect, without more specificity this standard is difficult to employ in international law.

International EIA treaties already do much to address this first concern by detailing the precautions that a state has taken in regard to a project. A thorough transboundary EIA can address this second issue by forcing states to consider, in advance, the purpose of the project, its probable side effects, the range of alternative schemes, and possible mitigation measures. By opening up the process to individuals on both sides of the border, environmentalist organizations and other experts will be able to voice their opinions. The result would be a document clearly outlining the harm anticipated by the acting state and the actions it had taken to prevent it. Any tradeoffs between productivity and safety would be made in the open and on the record. An EIA could thus monitor just how diligently a country is acting.

185. See *supra* Subsection IV.B.2.

186. See PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 189 (1992).

187. *Developments in the Law—International Environmental Law*, *supra* note 132, at 1496 n.22 (quoting P.M. Dupuy, *International Liability for Transfrontier Pollution*, in *TRENDS IN ENVIRONMENTAL POLICY AND LAW* 363, 369 (Michael Bothe ed., 1980)).

Yet the evidence gathered in an EIA is useless if states have not agreed on a meaningful standard for due diligence. So long as scholars, leaders, and tribunals define due diligence as simply acting like “a government mindful of its international obligations,” the rule is hopelessly vague. If transboundary EIA regimes are to hold states accountable, then a clearer standard for due diligence is necessary.

One possibility is to lay out a series of bright-line rules that would define due diligence. These regulations would not prohibit any activities outright, but rather ensure that the acting state uses the best available technology, the best possible location, and any appropriate mitigation measures and precautions to minimize the risk of transboundary harm. Although states may disagree whether these flexible standards are met, the EIA process should provide an opportunity for them to resolve these disputes early in the process. In the course of conducting an EIA, the acting country may have considered alternative technologies and locations to use for the project, and explained its reasoning for its preferred option. The affected population and state would have a chance to respond to these arguments and make a case for a better option. This deliberative process could produce something approaching a consensus over whether the project meets the due diligence standard or whether the acting state must make modifications.

If these rules prove too strict, states could employ a more subjective standard to determining how a “good government” ought to act. Though challenging, this task is by no means impossible. For example, despite widely divergent views on the proper method of water allocation, states have reached a rough consensus on a basic principle of international water law.¹⁸⁸ This rule privileges reasonable and equitable utilization of water that does not cause significant harm to other states. The riparian rule looks to a list of factors to determine the legality of a particular use of water from a transboundary river or lake.¹⁸⁹

Admittedly, balancing these factors is no easy feat. Yet an accurate transboundary EIA could greatly aid this process by collecting and publishing the relevant data.¹⁹⁰ Although an EIA cannot balance the myriad factors involved in determining whether a project is rational, it can catalogue precisely what those factors are and then allow the parties to decide whether the scales are lopsided enough to render the proposal illegal. In theory, an EIA would alert states to these issues before the project broke ground or at least help an international tribunal make its finding.¹⁹¹

188. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th plen. mtg., U.N. Doc. A/RES/51/229 (May 21, 1997).

189. *Id.* art. 6(1).

190. For instance, states downstream of Chinese hydroelectric dams cannot prove that China failed to exercise due diligence because of “a lack of solid scientific research and data; the hydrological complexity of the Mekong Basin; the recent droughts; . . . the host of other ill-considered development ventures on the lower stretches of the Mekong . . . [and] China’s secrecy and lack of transparency in its dam-building projects and their post-construction operation.” Davis, *supra* note 169, at 38-39. Yet these problems would be ameliorated, at least in part, if China conducted an EIA in good faith.

191. For example, the International Court of Justice is hearing a heated dispute between Uruguay and Argentina over the former’s construction of pulp mills on a river that runs along the border of the two nations. Uruguay’s EIA could be crucial in showing whether it has complied with the U.N.

Due diligence, customary water law and similarly flexible legal regimes will never make transboundary EIA treaties as potent as NEPA is when combined with, say, the Endangered Species Act. Yet they are a step in the right direction. Perhaps the best comparison is not with hard environmental laws, but rather with the arbitrary and capricious standard of the APA. Its demand that agencies act in a rational manner is also vague, but courts have been able to fashion it into a binding rule of law nonetheless. These fuzzy international laws may similarly provide states with enough of a touchstone to hold parties legally accountable, at least when combined with the information contained in an EIA.

C. *Cause of Action*

Of all the American institutions, the cause of action is perhaps the most easily transported to the international system. As pointed out by Nicholas A. Robinson,¹⁹² the basis for such a system already exists in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention.¹⁹³ The Aarhus Convention does not mandate transboundary EIA; it relies on other agreements to perform that role. Instead, the Convention strengthens these regimes by giving affected populations the right to obtain relevant environmental information, to voice an opinion on major projects, and to challenge the government when it fails to live up to its obligations. Though focused on relations between states and their own citizens, it expressly grants noncitizens the same access to justice as the state's own citizenry.¹⁹⁴

One of the Aarhus Convention's chief accomplishments is providing a cause of action when a state fails to comply with its own environmental laws, including transboundary EIA regimes.¹⁹⁵ Robinson has likened this provision to a miniature APA that gives teeth to the procedural dimensions of EIA regimes.¹⁹⁶ A concerned person can challenge an EIA that does not meet a treaty's standards, forcing states to take those obligations seriously. Granted,

water convention and the local treaty governing the river. See Maria Alejandra del-Cerro, *Paper Battle on the River Uruguay: The International Dispute Surrounding the Construction of Pulp Mills*, 20 GEO. INT'L ENVTL. L. REV. 161, 178 (2007) (arguing that Uruguay demonstrated due diligence by using the best available technology and by conducting a positive EIA).

192. Robinson, *supra* note 12. Although Robinson's primary focus is on how the Aarhus Convention can fortify domestic EIA regimes in countries lacking strong administrative review, he also notes the implications of the treaty for transboundary EIA regimes. *Id.* at 412-14.

193. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]. The Aarhus Convention has been ratified by forty countries, mostly in Europe and Central Asia.

194. *Id.* art. 3(9).

195. The Aarhus Convention, *supra* note 193, art. 9(2), reads:

Each Party shall, within the framework of its national legislation, ensure that members of the public concerned . . . have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 [concerning public participation] and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

196. Robinson, *supra* note 12, at 408.

the Aarhus Convention would not be a panacea to the problem of private enforcement; a person would still need to rely on the neutrality and fairness of the national courts, which are scarce commodities in some legal systems. In nations with independent judiciaries, the widespread ratification of the Aarhus Convention (or a similar agreement) would significantly improve transboundary EIA regimes. In countries lacking impartial courts, a cause of action may be less helpful so long as the legal system remains skewed toward the government.

Though Robinson rightly highlights the utility of the Aarhus Convention's broad cause of action, one must also recognize that the Treaty risks fostering an overenforcement of transboundary EIA regimes. After all, one of the primary uses of NEPA in the United States is to harry federal agencies with questionable lawsuits. Though these courtroom guerrilla tactics contribute to environmental preservation, they do so at a high cost of judicial and administrative resources. Some countries might regard this possibility as a necessary evil to achieve meaningful environmental aims, but others may be reluctant to sign an agreement that opens the door to this litigious form of ecological protection.¹⁹⁷

A treaty could resolve this issue by restricting standing. The Aarhus Convention, for example, contains a broad conception of standing. It grants a cause of action to anyone with "a sufficient interest" or "maintaining an impairment of right,"¹⁹⁸ including virtually any nongovernmental organization "promoting environmental protection."¹⁹⁹ The World Bank's appeals process presents a more restrictive view of standing, requiring that the person seeking review not merely show a sufficient interest but "demonstrate that [the person's] rights or interests have been or are likely to be directly affected by an action or omission of the Bank" which "has had, or threatens to have, a material adverse effect."²⁰⁰ The Canada Environmental Assessment Act²⁰¹ has also engendered less litigation than NEPA,²⁰² perhaps because it denies judicial review "where the sole ground for relief . . . is a defect in form or a technical irregularity."²⁰³

These approaches seem to avoid the procedural standing possible in NEPA suits²⁰⁴ by requiring that the litigant have a more concrete interest at stake. If states find the Aarhus Convention's rules to be too permissive, a

197. Furthermore, if the door to the courtroom is opened too wide, states risk the possibility that private interests will hijack an EIA regime for their own nonenvironmental ends. *See, e.g., Nat'l Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971) (holding that NEPA prevented the Department of Energy from cancelling a contract with a helium vendor until an EIS had been conducted); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 375 (1999) ("The National Environmental Policy Act is notorious for special interest abuse.")

198. Aarhus Convention, *supra* note 193, art. 9(2).

199. *Id.* art. 2(5).

200. IBRD & IDA, *supra* note 164, ¶ 12.

201. Canadian Environmental Assessment Act, R.S.C., ch. 37 (1992).

202. *See Tweedie, supra* note 9, at 882 (citing DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 159 (2003)).

203. Canadian Environmental Assessment Act, *supra* note 201, § 57.

204. Under a theory of informational or procedural injury, a person need not demonstrate that material harm has occurred or is even particularly likely to happen. The deprivation of procedural rights which conceivably *could* avert harm is sufficient. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

conception of standing based on the World Bank or Canadian model—or something even more demanding—could alleviate these concerns. Regardless of the exact form such a treaty would take, it is clear that transboundary EIA regimes would significantly benefit from the existence of a private right to challenge the procedural adequacy of assessments.

VI. CONCLUSION

The form assumed by most EIA regimes is simple. The government must make major environmental decisions in an informed manner, after considering all the consequences and listening to the public. Yet even a cursory examination of domestic and transboundary EIA regimes reveals that their operation is far more complex than this description suggests. Domestic EIA regimes, such as NEPA, protect the environment in large part through their interaction with other political and legal institutions. In some instances NEPA draws on these features, and occasionally those institutions rely on the Act to be more effective themselves. In any case, the domestic EIA regime succeeds because it is part of this interlocking set of legal mechanisms.

These mechanisms are widely recognized in the literature on NEPA's effectiveness. What have gone unnoticed are the implications of these synergies for transboundary EIA regimes, which cannot rely on the same array of domestic institutions. Despite tremendous strides in the past sixty years, international law remains a rugged and sparse landscape relative to the domestic scene. Though similar mechanisms sometimes exist internationally, typically these institutions are weak and inchoate. Absent these features, transboundary EIA regimes can still force governments to consider a broader set of factors in their decisionmaking, but this method alone may be insufficient to achieve substantive environmental change.

This analysis indicates that states can improve the chances of success for these regimes by agreeing to a few modest changes in the current body of international law. Nor is the range of possible solutions limited to those listed here. There are numerous ways that domestic structures could be adapted to the international arena, to say nothing of the possibility of entirely transnational institutions that might fortify EIA regimes. Though these actions may be difficult, they are also important. Judging from the history of NEPA, if nations can craft adequate support these transboundary EIA regimes may become a central pillar in the international effort to create a cleaner, healthier environment.