

12-1-1995

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Recommended Citation

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 (1995), <http://lawdigitalcommons.bc.edu/ealr/vol22/iss2/8>

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

*Brian R. Popiel**

I. INTRODUCTION

Canada and the United States share approximately 5,000 miles of border as well as more than 150 rivers and lakes.¹ Each country is the other's largest trading partner.² Approximately ninety percent of Canadians live within 100 miles of the U.S. border.³ Because of their geographic proximity, and their social and economic similarities and interdependence,⁴ Canada and the United States share a long history of effective dispute management that often serves as a model for the rest of the international community.⁵ The countries' past practices and current approaches toward dispute management evidence a marked preference for cooperative diplomacy over formalized legal resolutions.⁶ But, regardless of their codependence, Canada and the United

* Topics Editor, 1994–1995, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ Catherine A. Cooper, *The Management of International Environmental Disputes in the Context of Canada—United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 1986 CAN. Y.B. INT'L L. 247, 249.

² Eric Beauchesne, *Paycheques Losing To Inflation*, OTTAWA CITIZEN, Dec. 24, 1993, at F1 (United States is Canada's largest trading partner); David R. Sands, *Japan Dominates U.S. Trade Complaints*, WASH. TIMES, Apr. 1, 1994, at B7 (Canada is United States's largest trading partner).

³ Jim Fox, *With Canada's Dollar Down, Border Shopping Declines*, ST. PETERSBURG TIMES, Dec. 25, 1992, at 23A; Anne Swardson, *Canada Backs Off In Magazine Content Dispute*, WASH. POST, Apr. 8, 1993, at B11.

⁴ Cooper, *supra* note 1, at 253.

⁵ See *id.* at 249.

⁶ *Id.* at 253.

States are continually involved in disputes over activities affecting the countries' extensive shared natural resources.

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

This Comment proposes that Canada and the United States require international EIAs to prevent transboundary¹¹ environmental damage between the two nations before such harm occurs. Section II outlines the gradual progression in international law of the *sic utere* principle. *Sic utere* stands for the proposition that a nation is responsible for actions occurring within its territory which adversely affect, or may potentially affect, the territory of other nations. The *sic utere* principle has progressed from use in customary international law, through international agreements, to recent soft-law applications. Section III discusses the modern trend of taking proactive measures, such as requiring preparation of EIAs, to avoid transboundary damage, rather than relying on the traditional method of resolving disputes with reactive procedures. Section IV focuses on the function of the EIA and its domestic implementation in Canada and the United States, as well as the application of EIAs internationally. Finally, section V explores the potential use of the customary international

⁷ *Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484, 1493 (1991) [hereinafter *Developments*].

⁸ *See id.*

⁹ *See* Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 591 (1992).

¹⁰ *See* Constance D. Hunt, *A Note on Environmental Impact Assessment in Canada*, 20 ENVTL. L. 789, 790 (1990). In the United States, provisions for EIAs are found in the 1969 NEPA legislation. The National Environmental Policy Act of 1969 (NEPA) § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1988). In Canada, EIA provisions are found in the Government Organization Act of 1979. Ch. 13, § 6(1)(a)(ii), 1978–1979 S.C. 314 (Can.).

¹¹ “Transboundary” is synonymous with “transborder,” “transfrontier,” “transnational,” and “extraterritorial” for purposes of this Comment.

principle of *sic utere* to develop an international EIA plan mandating the assessment of potential transborder environmental damage between Canada and the United States.

II. *SIC UTERE*: THE DUTY TO AVOID HARMING OTHERS UNDER INTERNATIONAL ENVIRONMENTAL LAW

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

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

A. *The Sic Utere Principle of Customary International Law*

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

¹² See *Developments*, *supra* note 7, at 1492.

¹³ Stephen C. McCaffrey, *Pollution of Shared Natural Resources: Legal and Trade Implications*, in 1977 AM. SOC’Y INT’L L. PROC. OF THE 71ST ANN. MEETING 56, 56.

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

¹⁵ *Developments*, *supra* note 7, at 1492; see Brunnée, *supra* note 14, at 16.

¹⁶ Brunnée, *supra* note 14, at 16. Soft law is a term used to describe forms of non-binding “international co-operation,” such as “codes of conduct.” *Id.* at 19.

¹⁷ Cooper, *supra* note 1, at 249.

¹⁸ See *Developments*, *supra* note 7, at 1492.

¹⁹ *Id.*

ments and non-binding soft law.²⁰ In turn, these sources of international law have laid a foundation for holding nations responsible for causing harm to other nations.²¹ Customary international law is created when nations consistently adhere to a legal principle with the belief that they are legally bound by it.²² For example, a majority of nations have long believed that the territorial waters of a state extend twelve miles from its coastline.²³ This custom has been so widely accepted that, when the custom was codified at the 1974 session of the Third United Nations Conference on the Law of the Sea, no other distances were even mentioned as potential territorial water measures.²⁴

Similar progressions have occurred in the international environmental legal context. International environmental law is premised on a belief in international neighborhood law, a concept which developed to remedy the opposing interests of sovereign states.²⁵ Under established principles of international law, the obligation to prevent transborder pollution is on the state that created the pollution.²⁶ Unfortunately, the overarching international law principle of sovereignty has caused many problems in the development of customary international environmental law.²⁷ The problems stem from the fact that different nations vary widely in their commitment to protecting the environment.²⁸ For instance, in the *Nuclear Tests*²⁹ cases, the International Court of Justice (ICJ) issued interim orders requiring France to refrain from nuclear testing in the South Pacific because continued testing would cause radioactive fallout on Australia and New Zealand.³⁰ Rather than answer for its adverse environmental actions, France refused to appear before the ICJ, apparently believing it had the sovereign right to refuse to do so.³¹

²⁰ See discussion *infra* parts II.B. and II.C.

²¹ See discussion *infra* parts II.A.–C.

²² Brunnée, *supra* note 14, at 16.

²³ See Steven C. Nelson, *Contemporary Practice of the United States Relating to International Law*, 66 AM. J. INT'L L. 133, 133 (1972).

²⁴ John R. Stevenson & Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L L. 1, 13–14 (1975).

²⁵ Brunnée, *supra* note 14, at 16.

²⁶ *Developments*, *supra* note 7, at 1492.

²⁷ *Id.*

²⁸ See *id.*; Brunnée, *supra* note 14, at 16.

²⁹ *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20); (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

³⁰ *Developments*, *supra* note 7, at 1500.

³¹ See *id.* France claimed that it could not make an appearance for military reasons. *Id.* at 1502. The ICJ later reasoned that a final decision would be moot because France pledged to cease testing. *Id.* at 1500.

In contrast to the notion of state sovereignty, another principle of customary international law mandates a conscious effort to avoid transboundary pollution. This principle is *sic utere tuo ut alienum non laedas*.³² Translated literally, this common law principle states that one must use one's own property so as not to injure that of another.³³ In the context of customary international law, the principle prescribes that "no state may use its territory, or allow the use of it, in a way that causes serious damage to the territory of another state."³⁴ This principle has been expounded in a series of international disputes.

The principle was first introduced into international environmental jurisprudence during the *Trail Smelter* arbitration in 1938.³⁵ In the *Trail Smelter* arbitration, a specially appointed arbitral tribunal held Canada responsible for damages caused to property in the United States by a privately owned smelting plant in British Columbia.³⁶ In its initial decision, the tribunal drafted a pollution abatement program to reduce pollution emissions until a final decision could be reached on whether to allow the plant to continue operating.³⁷ In its final decision, the tribunal required that the smelter refrain from causing any future pollution.³⁸

The *Trail Smelter* arbitration dealt with damage, in the form of air pollution, caused by a zinc and lead smelting plant privately operated by a Canadian company in Trail, British Columbia.³⁹ Sulfur, in the form of sulfur dioxide emitted from the plant at a rate of up to ten thousand tons per month, fell on areas of northern Washington State between 1925 and 1937.⁴⁰ The tribunal found that these emissions caused substantial harm to forests and farmland in the lumber and agricultural region along Washington's Columbia River.⁴¹ The tribunal stated in dicta that:

³² *Id.* at 1496.

³³ BALLENTINE'S LAW DICTIONARY 1178 (3d. ed. 1969).

³⁴ Brunnée, *supra* note 14, at 16.

³⁵ Trail Smelter Arbitral Tribunal (United States v. Can.), 33 AM. J. INT'L L. 182 (1939) (initial decision) [hereinafter *Trail Smelter (initial decision)* or (*Initial Decision*)], *further proceedings*, Trail Smelter Arbitral Tribunal (U.S. v. Can.), 35 AM. J. INT'L L. 684 (1941) (final decision) [hereinafter *Trail Smelter (final decision)* or (*Final Decision*)].

³⁶ *Final Decision*, 35 AM. J. INT'L L. at 716-17.

³⁷ See *Initial Decision*, 33 AM. J. INT'L L. at 209-12.

³⁸ *Final Decision*, 35 AM. J. INT'L L. at 717.

³⁹ *Id.* at 688.

⁴⁰ *Id.* at 692-93.

⁴¹ *Initial Decision*, 33 AM. J. INT'L L. at 198, 201.

Under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the case is of serious consequence and the injury is established by clear and convincing evidence.⁴²

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

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

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

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

⁴² *Final Decision*, 35 AM. J. INT'L L. at 716.

⁴³ *Id.* at 716-17.

⁴⁴ Alfred P. Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 50 OR. L. REV. 259, 272 (1971).

⁴⁵ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

⁴⁶ See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 265 (1992).

⁴⁷ *Corfu Channel*, 1949 I.C.J. at 12-13.

⁴⁸ *Id.* at 14.

⁴⁹ *Id.* at 22-23.

⁵⁰ See *id.* at 22.

⁵¹ *Lake Lanoux Arbitration* (Fr. v. Spain), 24 I.L.R. 101 (1957) [hereinafter *Lake Lanoux*].

near the Franco-Spanish border.⁵² The diversion of the lake water, which normally flowed into the River Carol and ultimately crossed the border into Spain, had the potential to affect the supply of water to some Spanish towns.⁵³ Treaties between the two nations required notification of the affected nation by the affecting nation if the natural course of a river was going to be altered.⁵⁴ Spain claimed that the proposed French diversion would violate these treaties.⁵⁵ The appointed tribunal determined that the treaties, together with customary international law principles, mandated that one state has a duty to notify other states when its actions may impede their environmental enjoyment.⁵⁶ Additionally, the tribunal determined that, when planning to take action, one state must take into account the considerations of the other state.⁵⁷ Here, the tribunal determined that France had indeed complied with its obligations, and thus had violated neither the treaties nor any international principles of law.⁵⁸

The principle of *sic utere* again returned to the fore in an international environmental dispute between Canada and the United States in the *Gut Dam* arbitration of 1968.⁵⁹ The arbitration came about after Canada constructed a dam which spanned the international boundary of the St. Lawrence River.⁶⁰ The dam apparently caused flooding and erosion damage to property on the American side of the river, resulting in a number of private tort claims.⁶¹ The two countries had entered into an agreement, prior to the construction of the dam, which contained a provision essentially codifying the *sic utere* principle.⁶² The provision imposed responsibility and liability on the Canadian government for any injury to the interests of the United States caused by the Canadian-made dam.⁶³ Thus, based on this agreement, the appointed tribunal determined that Canada was liable for the damage caused to property in the United States.⁶⁴

⁵² See *id.* at 101–02.

⁵³ *Id.*

⁵⁴ Additional Act of May 26, 1866 to the Treaties of Bayonne (Dec. 1, 1856; Apr. 14, 1862; May 26, 1866), art. 11, cited in *Lake Lanoux*, 24 I.L.R. at 103.

⁵⁵ *Lake Lanoux*, 24 I.L.R. at 101.

⁵⁶ See *id.* at 138; Palmer, *supra* note 46, at 265.

⁵⁷ See *Lake Lanoux*, 24 I.L.R. at 141.

⁵⁸ *Id.* at 119, 138–42.

⁵⁹ Canada-United States Settlement of Gut Dam Claims (Sept. 27, 1968), 8 I.L.M. 118 (1969) [hereinafter *Gut Dam Claims*].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 119–20.

⁶³ *Id.*

⁶⁴ *Gut Dam Claims*, 8 I.L.M. at 136.

B. *The Codification of Sic Utere in International Agreements*

Customary principles of law, upon their acceptance in the international community, may be incorporated into international agreements.⁶⁵ However, the transposition from customary law principle to inclusion in an international agreement such as a treaty is not always a fluid one. Even though customary international law may recognize a principle because of a general recognition among nations that a certain practice is obligatory,⁶⁶ the principle may still be neglected or avoided in practice.⁶⁷ Thus, for a customary principle to be included in an international agreement, the principle must be held in high regard by the agreeing nations. The *sic utere* principle has undergone just such a progression from customary international law principle to codification in international agreements.⁶⁸

The incorporation of a customary principle into an international treaty or agreement often serves to balance the contracting nations' strong desire to protect their sovereignty, and may also serve to fill the gaps left by vague or general customary principles.⁶⁹ Some argue that customary law has no teeth without codification, because states can finesse the generalities and vagueness of principles to claim that their actions are within the bounds of the international principles.⁷⁰ Thus, commentators believe that codification of customary principles is necessary to delineate the specifics of an international principle and thereby give the customary principle its teeth.⁷¹

Customary law is difficult to codify, however, because the specificity needed to espouse a rule is often seen as an impingement on the sovereign rights of states.⁷² This makes states apprehensive about binding themselves to such a rule.⁷³ Because states are, at the same time, the maker, subject, and enforcer of a rule, the individual inter-

⁶⁵ See Stevenson & Oxman, *supra* note 24, at 13-14.

⁶⁶ See Palmer, *supra* note 46, at 266.

⁶⁷ See *Developments*, *supra* note 7, at 1492. For example, under customary international law, states are obliged to prevent transnational pollution. *Id.* However, efforts to develop a liability scheme to regulate transboundary pollution have failed because customary international law does not coincide with the interests of individual states. *Id.*

⁶⁸ See, e.g., *United Nations Convention on the Law of the Sea*, Third United Nations Conference on the Law of the Sea, 11th Sess., at 86, U.N. Doc. A/Conf. 62/122 (1982) [hereinafter *Law of the Sea Convention*].

⁶⁹ See Brunnée, *supra* note 14, at 18.

⁷⁰ *Developments*, *supra* note 7, at 1493.

⁷¹ See Brunnée, *supra* note 14, at 18.

⁷² *Developments*, *supra* note 7, at 1492-93.

⁷³ *Id.*

ests of the member states often significantly mold the content of international rules.⁷⁴ Thus, states will often decide not to invoke customary international environmental principles to protect themselves from the pollution of others, because they fear that a precedent will be created, allowing the same principle to be invoked against them for their own environmental offenses.⁷⁵ Perhaps the most glaring example of this phenomenon is the 1985 Chernobyl disaster, where a nuclear reactor in the Ukraine leaked large amounts of radioactive materials. Although more than twenty nations recorded significant increases of radioactivity, none brought suit against the Soviet Union.⁷⁶ Nations producing nuclear power, or any other form of pollution-producing power, were in no hurry to set an international precedent for the assumption of responsibility for transboundary damages caused by such power plants.⁷⁷

International agreements, such as treaties, can effectively fill the gaps in customary international law by defining specifics in agreed-upon language within accepted parameters.⁷⁸ An important agreement addressing the welfare of the world environment was reached in Stockholm at the Declaration of the United Nations Conference on the Human Environment⁷⁹ in 1972. The underlying theme of the Declaration asserts that although all nations have a present right of equal enjoyment of the environment, they also have "a solemn responsibility to protect and improve the environment for present and future generations."⁸⁰ To meet these ends, the Stockholm Declaration adopted Principle 21, which is based on the *sic utere* principle. Principle 21 reads:

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

⁷⁴ See Brunnée, *supra* note 14, at 16.

⁷⁵ *Developments*, *supra* note 7, at 1502 n.63.

⁷⁶ *Id.* at 1499.

⁷⁷ See ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1008-09 (1992).

⁷⁸ See Brunnée, *supra* note 14, at 18.

⁷⁹ *Report of the United Nations Conference on the Human Environment held at Stockholm, 5-16 June 1972*, U.N. GAOR, 27th Sess., at 2, U.N. Doc. A/Conf. 48/14 (1972), revised by U.N. Doc. A/Conf. 48/14/Corr. 1 (1972) [hereinafter *Stockholm Declaration*].

⁸⁰ *Id.* at 4.

ment of other States or of areas beyond the limits of national jurisdiction.⁸¹

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

The Declaration further expands on the notion of *sic utere* in Principle 22.⁸³ Principle 22 asserts that states must cooperate to further develop the international law of "liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."⁸⁴

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

The Stockholm Declaration is not the only international agreement to embrace the *sic utere* principle. The obligation is also codified in Article 194(2) of the United Nations Convention on the Law of the Sea, a binding treaty which was opened for ratification in 1982.⁸⁹ Article 194(2) provides:

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

⁸¹ *Id.* at 7.

⁸² *See id.*

⁸³ *Id.*

⁸⁴ *Stockholm Declaration, supra* note 79, at 7.

⁸⁵ *See Palmer, supra* note 46, at 266.

⁸⁶ *Developments, supra* note 7, at 1498 n.38.

⁸⁷ *See* ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 130 (1991).

⁸⁸ *See id.* The Principle has been reaffirmed in several other United Nations declarations. *Id.*

⁸⁹ *Law of the Sea Convention, supra* note 68, at 86.

⁹⁰ *Id.*

Again, the *sic utere* principle is embraced and codified, making states responsible for actions that occur within their territory and damage the territory of others.

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

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

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

⁹¹ *Association of South East Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources*, 15 ENVTL. POL'Y. & L. 64, 68 (1985) [hereinafter *ASEAN Convention*].

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

⁹³ See KISS & SHELTON, *supra* note 87, at 131.

⁹⁴ RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 601-04 & introductory note (1987).

⁹⁵ *Id.* § 601(1)(b).

⁹⁶ See, e.g., *Stockholm Declaration*, *supra* note 79, at 7.

⁹⁷ Brunnée, *supra* note 14, at 16.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19-20.

tional law.¹⁰¹ As is often the case with new developments in international environmental law,¹⁰² the application of soft-law techniques helps to increase international acceptance of those developing principles.¹⁰³

Soft-law applications can work to alter political beliefs that may prevail in an area of international law.¹⁰⁴ These changes can be catalysts in the development of international environmental law.¹⁰⁵ The Helsinki Declaration on the Protection of the Ozone Layer is a prime example.¹⁰⁶ This non-binding international declaration delineated certain environmental soft principles that ultimately were incorporated in "hard amendments"¹⁰⁷ to the legally binding Montreal Protocol on Substances that Deplete the Ozone Layer.¹⁰⁸

Soft law has advanced the *sic utere* principle through the development of a series of rules called the "Rules of International Law Applicable to Transfrontier Pollution" [hereinafter Transfrontier Pollution Rules].¹⁰⁹ At the Sixtieth Conference of the International Law Association, the meaning of the *sic utere* principle was expounded in the articles of the Transfrontier Pollution Rules:

Article 3 (Prevention and Abatement)

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

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

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

¹⁰¹ See *id.* at 21.

¹⁰² One such developing principle is the concept of "common concern of humankind," which may afford the protection of the environment beyond current jurisdictional limitations. Brunnée, *supra* note 14, at 21.

¹⁰³ See *id.* One commentator notes that soft law is a popular tool because it leaves much to the discretion of the parties and is politically convenient. Palmer, *supra* note 46, at 269.

¹⁰⁴ Palmer, *supra* note 46, at 270.

¹⁰⁵ *Id.* at 269.

¹⁰⁶ Helsinki Declaration on the Protection of the Ozone Layer, May 2, 1989, 28 I.L.M. 1335 (1989).

¹⁰⁷ Palmer, *supra* note 46, at 269-70.

¹⁰⁸ See Montreal Protocol Parties: Adjustments and Amendments to the Montreal Protocol on Substances That Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 (1991); United Nations: Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. at 1541, 1550 (1987).

¹⁰⁹ See Dietrich Rauschnig, *Legal Aspects of the Conservation of the Environment, Report of the Committee*, in THE INTERNATIONAL LAW ASSOCIATION REPORT OF THE SIXTIETH CONFERENCE 157, 158-77 (1982).

lution, below the requirements of paragraph 1 of this article, to the lowest level that may be reached by measures practicable and reasonable under the circumstances.¹¹⁰

Through soft-law techniques, the Transfrontier Pollution Rules have effectively employed the *sic utere* principle, imposing a duty on states to avoid causing extraterritorial injury to others.¹¹¹

III. REACTIVE MEASURES VERSUS PROACTIVE MEASURES

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

¹¹⁰ *Id.* at 160. The Rules continue to evoke proactive measures in the following articles:
Article 7 (Prior Notice)

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

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

Article 8 (Consultation)

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

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

Id. at 171-76 (emphasis added).

¹¹¹ See Toru Iwama, *Emerging Principles and Rules for the Prevention and Mitigation of Environmental Harm*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 107, 119 (Edith Brown Weiss ed., 1992) (these principles help prevent disputes between an "acting" state and a possible "affected" state).

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

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ *Developments*, *supra* note 7, at 1493.

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

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

¹¹⁶ *Id.*

¹¹⁷ See Cooper, *supra* note 1, at 252.

¹¹⁸ *Cf. id.* at 252, 252 n.21 (differing perceptions and economic objectives between developed and developing states make latter suspicious of relatively strict environmental standards advocated by developed nations).

¹¹⁹ See *id.* at 298. "In the North American context, Canada and the United States, consistent with their history of co-operation, have a quite extensive practice of carrying out these [proactive] procedures." *Id.*

¹²⁰ *Id.* at 296.

¹²¹ *Id.*

¹²² Cooper, *supra* note 1, at 296.

¹²³ See *id.* at 298–99. Between Canada and the United States, the procedure of consent is used often to govern actions affecting many of the boundary waters shared by the two nations. *Id.* at 299.

¹²⁴ See *id.* at 299–301.

¹²⁵ *Id.* at 301.

¹²⁶ Cooper, *supra* note 1, at 302–03.

party less than consultation, and consultation calls for a smaller involvement compared to consent.¹²⁷

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

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

¹²⁷ *Id.* at 297–302.

¹²⁸ *See id.*

¹²⁹ *See Iwama, supra* note 111, at 120.

¹³⁰ *See id.*

¹³¹ *Cf. id.* (stating EIA is used to determine whether planned activities breach legal obligations to prevent transborder pollution; notification, exchange of information, and consultation are procedures which employ EIA findings to avoid disputes with affected states).

¹³² ALLEN L. SPRINGER, *THE INTERNATIONAL LAW OF POLLUTION* 145 (1983).

¹³³ Cooper, *supra* note 1, at 303.

¹³⁴ *See Stockholm Declaration, supra* note 79, at 7.

¹³⁵ *Id.*

¹³⁶ *See id.*; *see also* Robinson, *supra* note 9, at 591 (EIA is employed in more than seventy-five jurisdictions worldwide).

¹³⁷ *See* Cooper, *supra* note 1, at 303.

IV. ENVIRONMENTAL IMPACT ASSESSMENT

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

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

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

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

¹³⁸ See *Developments*, *supra* note 7, at 1515.

¹³⁹ See Robinson, *supra* note 9, at 602.

¹⁴⁰ Hunt, *supra* note 10, at 791.

¹⁴¹ Robinson, *supra* note 9, at 593.

¹⁴² Cooper, *supra* note 1, at 303.

¹⁴³ Robinson, *supra* note 9, at 610.

¹⁴⁴ Iwama, *supra* note 111, at 120.

¹⁴⁵ See Robinson, *supra* note 9, at 593.

¹⁴⁶ See *id.* at 593-94.

Because of its adaptability to different forms of government, EIA can function in any political system.¹⁴⁷ Also, the application and use of EIA is spreading quickly, with new users modifying and improving on the system invoked by others.¹⁴⁸ EIA systems that require public notice offer average citizens, as potentially affected parties, an opportunity to be heard before their environment is adversely affected.¹⁴⁹ A successful EIA includes the gathering of data for decisionmakers, often revealing potential environmental problems unanticipated at the outset of project development.¹⁵⁰

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

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

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

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 594.

¹⁴⁹ *Id.*

¹⁵⁰ Robinson, *supra* note 9, at 594.

¹⁵¹ *See id.* at 594-96.

¹⁵² *Id.* at 595. This is especially true in developing countries where EIA is often labeled as an "anti-development" process. *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.* One commentator goes so far as to predict that EIA requirements create "a perverse incentive for [parties] to whitewash environmental dangers in their assessments," and the requirements even risk frustrating political campaigns, because if the EIA really can trigger resistance to a project, the acting party "will likely minimize in the report the magnitude and risk of harm that such activity might truly threaten." *Developments, supra* note 7, at 1516.

¹⁵⁵ Robinson, *supra* note 9, at 596.

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* In California and New York even some small villages must follow EIA procedures.

Id.

¹⁵⁸ *Id.*

or whether mitigation plans actually were successful.¹⁵⁹ Thus, it is necessary to measure the accuracy of EIA in order to create a better, more effective process, and to increase the success rate of EIAs in preventing environmental harm.¹⁶⁰

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

A. *EIA in Canada*

EIA is broadly accepted in all Canadian jurisdictions.¹⁶⁶ The procedure has been applied federally, provincially, and territorially in Canada since 1973.¹⁶⁷ The application of environmental assessment in Canada was largely influenced by the passage of the National Environmental Policy Act of 1969 (NEPA)¹⁶⁸ in the United States. NEPA contained provisions for EIA.¹⁶⁹ At different political levels, requirements for EIA may vary, sometimes pursuant to legislation (provin-

¹⁵⁹ Robinson, *supra* note 9, at 596.

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 606.

¹⁶² *Id.* at 607.

¹⁶³ *Id.* at 595.

¹⁶⁴ *See* George D. Appelbaum, Comment, *Controlling the Environmental Hazards of International Development*, 5 *ECOLOGY L.Q.* 321, 322-28 (1976).

¹⁶⁵ Gary M. Ernsdorff, Comment, *The Agency for International Development and NEPA: A Duty Unfulfilled*, 67 *WASH. L. REV.* 133, 133 (1992).

¹⁶⁶ Hunt, *supra* note 10, at 790.

¹⁶⁷ *See id.*; Robinson, *supra* note 9, at 598.

¹⁶⁸ The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1992).

¹⁶⁹ *See* Hunt, *supra* note 10, at 790-91. NEPA's EIA provision is 42 U.S.C. § 4332(2)(C) (1988).

cially) and sometimes pursuant to policy directives (federally).¹⁷⁰ Because Canada is much less litigious than the United States, the courts have played only a modest role in the development of EIA in Canada.¹⁷¹

In the last two decades, Canada has consistently reviewed and refined the EIA process.¹⁷² Several organizations were developed to partake in this process, and to implement EIAs.¹⁷³ Canada's Environmental Assessment and Review Process (EARP) was established in 1973¹⁷⁴ by cabinet directive.¹⁷⁵ EARP controls all federal proposals.¹⁷⁶ EARP was an administrative office until the 1979 Government Organization Act¹⁷⁷ authorized the Minister of the Environment to undertake and coordinate governmental impact assessment programs for new federal projects, programs, and activities.¹⁷⁸ The Minister was also empowered by legislation to create EIA guidelines for federal departments and agencies.¹⁷⁹ These guidelines were issued in 1984 as the Environmental Assessment and Review Process Guidelines Order.¹⁸⁰

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

¹⁷⁰ Hunt, *supra* note 10, at 790-91.

¹⁷¹ *Id.* at 792.

¹⁷² Robinson, *supra* note 9, at 598.

¹⁷³ Hunt, *supra* note 10, at 793-95; Robinson, *supra* note 9, at 598-99.

¹⁷⁴ Hunt, *supra* note 10, at 793.

¹⁷⁵ *Id.*

¹⁷⁶ Robinson, *supra* note 9, at 598.

¹⁷⁷ Government Organization Act, 1979, ch. 13, 1978-1979 S.C. 313 (Can.).

¹⁷⁸ Ch. 13, § 14(6)(1)(a)(ii), 1978-1979 S.C. at 314.

¹⁷⁹ Ch. 13, § 14(6)(2), 1978-1979 S.C. at 314-15.

¹⁸⁰ Environmental Assessment and Review Process Guidelines Order, 118 C. Gaz. Pt. II 2794 (1984) (Can.) [hereinafter Guidelines Order].

¹⁸¹ Robinson, *supra* note 9, at 598.

¹⁸² *Id.* CIDA has been involved in the development plan for marine and coastal resources in Indonesia. *Id.*

¹⁸³ *Id.* at 599.

The application of EARP, as delineated in section 3 of the Guidelines Order, calls for a self-assessment process under which the initiating department, early in the planning stages, must fully consider the environmental implications of any project over which it has authority.¹⁸⁴ Where the environmental implications are significant, the proposal must be referred to the Minister for public review by an Environment Assessment Panel.¹⁸⁵ The initiating department is the decision-making authority and is thus required to screen all projects advanced by the project proponents for potential adverse environmental effects, and to make a determination whether the project must be publicly reviewed by the Environment Assessment Panel.¹⁸⁶ The initiating department reports all decisions, whether referred to the Panel or not, to FEARO for publication.¹⁸⁷

Public review of a proposal may be ordered if the project would create significant environmental harm.¹⁸⁸ Review before the Panel may be ordered if there is high public concern about the proposal, even if the potential harm seems insignificant.¹⁸⁹ If a review is so ordered, the Minister appoints a Panel, usually chaired by the Executive Chairman of FEARO, and made up of three to seven objective, knowledgeable, and credible members.¹⁹⁰ A public review must entail a study of the environmental effects of the project as well as the "directly related social impacts of those effects."¹⁹¹

As the EIA proceeds to a public review, FEARO is responsible for delineating the scope of the EIA in a "terms of reference" document.¹⁹² The document is issued by the Minister of the Environment, and the Panel meets with the proponent of the project and the public to determine the preparation of an EIS.¹⁹³ Once the EIS is prepared by the proponent, it is made available to the public by the Panel, and is open for oral or written comment or criticism.¹⁹⁴ The Panel then prepares a report of its findings and recommendations for the Minister

¹⁸⁴ Guidelines Order, § 3, 118 C. Gaz. Pt. II at 2795.

¹⁸⁵ *Id.*

¹⁸⁶ Robinson, *supra* note 9, at 598-99.

¹⁸⁷ *Id.* at 599.

¹⁸⁸ Guidelines Order, §§ 11-13, 118 C. Gaz. Pt. II at 2796-97.

¹⁸⁹ *Id.*

¹⁹⁰ See Guidelines Order, §§ 21-23, 118 C. Gaz. Pt. II at 2798-99; Robinson, *supra* note 9, at 599.

¹⁹¹ Guidelines Order, § 25(1), 118 C. Gaz. Pt. II at 2799.

¹⁹² § 26, 118 C. Gaz. Pt. II at 2799.

¹⁹³ Robinson, *supra* note 9, at 599.

¹⁹⁴ *Id.*

of the Environment and the head of the initiating department.¹⁹⁵ These parties then make the findings public, and the initiating department makes a decision on the project.¹⁹⁶

In Canada, private citizens have the right to sue for violations of EIA procedures.¹⁹⁷ There have been two major suits that have had a profound effect on the application of EIA in Canada.¹⁹⁸ The first case, *Canadian Wildlife Federation Inc. v. Minister of the Environment (Canadian Wildlife I)*,¹⁹⁹ was brought by opponents to the Rafferty Alameda Project.²⁰⁰ The project involved dams to be built by a provincial corporation on the Souris River Basin which is situated at the borders of the provinces of Saskatchewan and Manitoba and the state of North Dakota.²⁰¹ Canadian citizens' groups sued, alleging a violation of EIA requirements, because the project was licensed by the federal Minister of the Environment without an EIA being undertaken by EARP.²⁰² The court found that the project would affect the environment in areas under federal jurisdiction, and thus the government had to assess the project.²⁰³ Moreover, the court found that the Guidelines Order was not merely a policy, but was in fact an enactment or regulation, thereby equating it to legislation.²⁰⁴

The second case, *Canadian Wildlife Federation, Inc. v. Minister of the Environment (Canadian Wildlife II)*,²⁰⁵ was essentially a further attack on the Rafferty Alameda Project.²⁰⁶ After the decision in *Canadian Wildlife I*, the government performed two assessments, but only one allowed public comment as required by EARP.²⁰⁷ The second assessment was not open to public comment, and shortly after it was turned over to the Minister of the Environment, he granted the

¹⁹⁵ Guidelines Order, § 31, 118 C. Gaz. Pt. II at 2800.

¹⁹⁶ §§ 31(2), 33, 118 C. Gaz. Pt. II at 2799.

¹⁹⁷ Robinson, *supra* note 9, at 599.

¹⁹⁸ See Hunt, *supra* note 10, at 797, 799.

¹⁹⁹ *Canadian Wildlife Federation, Inc. v. Minister of the Environment (Canadian Wildlife I)*, 3 F.C. 309 (1989) (Can.), *aff'd*, 4 C.E.L.R. (N.S.) 1 (F.C.A. 1989) (Can.).

²⁰⁰ *Canadian Wildlife I*, 3 F.C. at 312-13 (1989).

²⁰¹ *Id.*

²⁰² See *id.* at 313.

²⁰³ *Id.* at 323-25.

²⁰⁴ *Id.* at 326.

²⁰⁵ *Canadian Wildlife Federation, Inc. v. Minister of the Environment (Canadian Wildlife II)* 1 F.C. 595 (1990) (Can.), *aff'd*, 6 C.E.L.R. (N.S.) 89 (F.C.A. 1990) (Can.).

²⁰⁶ See *Canadian Wildlife II*, 1 F.C. at 596 (1990).

²⁰⁷ *Canadian Wildlife II*, 6 C.E.L.R. (N.S.) at 94-95.

project a second license.²⁰⁸ Therefore, the plaintiffs in the second suit again argued that the EIA procedures were not followed.²⁰⁹

The Federal Court in *Canadian Wildlife II* found that the Minister should have allowed public comment on the second assessment.²¹⁰ The court ordered this to be done pursuant to EARP, even though the project was now substantially underway, because the license had already been granted.²¹¹ If the Minister failed to comply, the court ordered that the license would be quashed.²¹² This second case resulted in the opening of the EIA process to judicial scrutiny,²¹³ thus ensuring closer compliance with the EARP guidelines, or, upon failure to comply, permitting the actions to be attacked.²¹⁴

B. *EIA in the United States*

The United States Congress enacted the National Environmental Policy Act of 1969²¹⁵ in response to increasing concern over environmental damage in the United States.²¹⁶ NEPA provides that present generations owe a duty to protect the environment for the long-term enjoyment of future generations.²¹⁷ To reach this end, Congress made NEPA applicable to the planned projects and activities of all federal agencies.²¹⁸ In so doing, Congress also delineated NEPA's broad goals, requiring that: each generation be a trustee of the environment for future generations;²¹⁹ that all Americans be assured safe, healthy, enjoyable surroundings;²²⁰ that the broadest spectrum of beneficial uses of the environment be attained, without harm or risk to health or safety;²²¹ that important aspects of national heritage be preserved;²²² that a high standard of living for all be achieved by balanc-

²⁰⁸ *See id.*

²⁰⁹ *Id.* at 108.

²¹⁰ *Id.* at 103.

²¹¹ Hunt, *supra* note 10, at 800-01.

²¹² *Canadian Wildlife II*, 6 C.E.L.R. (N.S.) at 98, 115; Hunt, *supra* note 10, at 801.

²¹³ *See* Hunt, *supra* note 10, at 801.

²¹⁴ *Id.*

²¹⁵ 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1992).

²¹⁶ Ernsdorff, *supra* note 165, at 137; Geoffrey Garver, Note, *A New approach to Review of NEPA Findings of No Significant Impact*, 85 MICH. L. REV. 191, 191 (1986); *see* Maria C. Holland, Comment, *Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason*, 12 B.C. ENVTL. AFF. L. REV. 743, 755 (1985).

²¹⁷ 42 U.S.C. § 4331(b)(1) (1988).

²¹⁸ Ernsdorff, *supra* note 165, at 137.

²¹⁹ 42 U.S.C. § 4331(b)(1).

²²⁰ *Id.* § 4331(b)(2).

²²¹ *Id.* § 4331(b)(3).

²²² *Id.* § 4331(b)(4).

ing population and resource use;²²³ and that the quality of renewable resources and the recycling of depletable resources be enhanced.²²⁴

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

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

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

²²³ *Id.* § 4331(b)(5).

²²⁴ *Id.* § 4331(b)(6).

²²⁵ Ernsdorff, *supra* note 165, at 138.

²²⁶ Holland, *supra* note 216, at 758.

²²⁷ Council on Environmental Quality, 40 C.F.R. § 1508.4 (1993).

²²⁸ Garver, *supra* note 216, at 192.

²²⁹ 40 C.F.R. § 1501.3(a).

²³⁰ 40 C.F.R. § 1508.9(a)-(b).

²³¹ 40 C.F.R. § 1501.4(c)-(e).

²³² 40 C.F.R. § 1501.4(e)(1)-(2). Unfortunately, significant impacts that may have been revealed by an EIS will remain hidden until the damage actually occurs. Garver, *supra* note 216, at 193.

²³³ 42 U.S.C. § 4332(2)(C) (1988).

²³⁴ Ernsdorff, *supra* note 165, at 138; *see* Holland, *supra* note 216, at 758.

²³⁵ Ernsdorff, *supra* note 165, at 138.

²³⁶ *Id.* at 138-39.

To assist in the development of and compliance with EA procedures NEPA also called for the establishment of the Council on Environmental Quality (CEQ).²³⁷ Aside from its oversight duties, the CEQ also makes recommendations and evaluations on environmental issues to the Executive Office of the President.²³⁸ Its main responsibility is to establish regulations that further NEPA's procedural requirements.²³⁹ The CEQ's interpretation of NEPA is essentially viewed as binding administrative law²⁴⁰ following the Supreme Court's statement in *Andrus v. Sierra Club*²⁴¹ that the "CEQ's interpretation . . . is entitled to substantial deference."²⁴²

In some ways, the CEQ is analogous to Canada's FEARO, in that each of these bodies plays a role in the promulgation of the rules for environmental assessment.²⁴³ Despite Congress's intended role for the CEQ, however, much of NEPA has been interpreted by the judiciary.²⁴⁴

The EIS requirement carries with it a presumption that, once an agency is faced with all the data, the agency will not partake in any project that will likely cause significant environmental harm.²⁴⁵ The public disclosure element furthers this presumption because it essentially opens the agency to public criticism and review, and forces the agency to consider all environmental factors.²⁴⁶ Public scrutiny is considered so important²⁴⁷ that regulations require agencies to "encourage and facilitate public involvement in decisions."²⁴⁸

The EIS itself must be a "detailed statement"²⁴⁹ with enough information to allow for proper evaluation.²⁵⁰ The statement must show a good faith effort by the agency to make a full disclosure.²⁵¹ The EIS must be comprehensive in its assessment of environmental impact,

²³⁷ Garver, *supra* note 216, at 195.

²³⁸ Holland, *supra* note 216, at 758.

²³⁹ *Id.* at 759.

²⁴⁰ Robert P. Frank, Comment, *Delegation of Environmental Impact Statement Preparation: A Critique of NEPA's Enforcement*, 13 B.C. ENVTL. AFF. L. REV. 79, 87 (1985).

²⁴¹ *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

²⁴² *Id.* at 358.

²⁴³ Robinson, *supra* note 9, at 599.

²⁴⁴ Holland, *supra* note 216, at 759.

²⁴⁵ *Id.* at 769.

²⁴⁶ Robert Orsi, Comment, *Emergency Exceptions From NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 491-92 (1987); see Holland, *supra* note 216, at 770.

²⁴⁷ Ernsdorff, *supra* note 165, at 139.

²⁴⁸ 40 C.F.R. § 1500.2(d) (1993).

²⁴⁹ 42 U.S.C. § 4332(2)(C) (1988).

²⁵⁰ Holland, *supra* note 216, at 777.

²⁵¹ *Massachusetts v. Andrus*, 594 F.2d 872, 893 (1st Cir. 1979); Holland, *supra* note 216, at 777.

but not conclusory.²⁵² Also, it must provide any possible alternatives to the proposal,²⁵³ to promote sensible agency decisionmaking.²⁵⁴ The final EIS must be made available to the CEQ and the public.²⁵⁵ Once the final EIS is complete, the agency has satisfied NEPA's requirements.²⁵⁶

C. *International EIA*

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

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

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

²⁵² Holland, *supra* note 216, at 777.

²⁵³ *Id.* at 778. An EIS should include discussion of: (1) a no-action alternative; (2) different methods of reaching the objective; and (3) methods of partial satisfaction of the objective which are less environmentally harmful. *NRDC v. Morton*, 458 F.2d 827, 834-38 (D.C. Cir. 1972).

²⁵⁴ Holland, *supra* note 216, at 781.

²⁵⁵ 42 U.S.C. § 4332(2)(C) (1988). The same is also true for a Finding of No Significant Impact (FONSI). Holland, *supra* note 216, at 772.

²⁵⁶ Frank, *supra* note 240, at 86.

²⁵⁷ KISS & SHELTON, *supra* note 87, at 147.

²⁵⁸ See Robinson, *supra* note 9, at 602.

²⁵⁹ *Id.* at 603.

²⁶⁰ *Developments*, *supra* note 7, at 1514; see Robinson, *supra* note 9, at 603.

²⁶¹ KISS & SHELTON, *supra* note 87, at 147. The UNEP Principles of Conduct, relating to shared natural resources, specifically contain EIA provisions in regard to bilateral or regional relations. *Id.*

²⁶² Robinson, *supra* note 9, at 603. The use of EIA is expressly called for in *The World Charter of Nature*, which was adopted by the United Nations General Assembly. *Id.*

²⁶³ *Law of the Sea Convention*, *supra* note 68, at 89.

the South Pacific,²⁶⁴ and in the 1985 ASEAN Convention on the Conservation of Nature and Natural Resources.²⁶⁵

The European Economic Community (EEC) has also acted in favor of environmental assessment.²⁶⁶ A prior assessment principle has been recognized among EEC members, and EIA, concerning both public and private projects, has been delineated in an EEC Council Directive.²⁶⁷ All member states are required to follow the Council Directive.²⁶⁸

In 1991, the United Nations Economic Commission for Europe negotiated an agreement on international EIA.²⁶⁹ Under the agreement, the parties must consider a project's size, location, and environmental effects and try to eliminate or limit adverse transboundary impact.²⁷⁰ There are also provisions for responses from other states, dispute settlement procedures, and post-project monitoring.²⁷¹

Both Canada and the United States have advanced the notion of a duty to assess transboundary environmental impact by requiring domestic EIAs to include assessments of potential extraterritorial harm.²⁷² In 1983, Canada issued a guidelines order²⁷³ for its Environmental Assessment Review Procedure requiring that the "external" environmental effects of a federal project be fully considered.²⁷⁴ In 1979, President Carter issued Executive Order No. 12114²⁷⁵ which required that an EIS be prepared for all major federal actions that may significantly affect the environment outside United States territory.²⁷⁶ However, the order's many exemptions and exceptions have allowed agencies to circumvent it.²⁷⁷

²⁶⁴ KISS & SHELTON, *supra* note 87, at 148.

²⁶⁵ ASEAN Convention, *supra* note 91, at 64. Article fourteen of the ASEAN Convention states that any proposed activities which may have significant effects on the environment shall be assessed before they are adopted, and the results of this assessment shall be taken into account in the decision-making process. *Id.* at 67.

²⁶⁶ KISS & SHELTON, *supra* note 87, at 149.

²⁶⁷ Council Directive 85/337 1985 O.J. (L 175) 40.

²⁶⁸ Treaty Establishing The European Economic Community, Mar. 25, 1957, art. 189, 298 U.N.T.S. 11, 78-79.

²⁶⁹ Robinson, *supra* note 9, at 607. The Convention on Environmental Impact Assessment in a Transboundary Context was signed at Espoo, Finland on February 25, 1991. *Id.* at 608.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Developments, supra* note 7, at 1514.

²⁷³ Guidelines Order, 118 C. Gaz. Pt. II at 2794.

²⁷⁴ § 4(1)(a), 118 C. Gaz. Pt. II at 2795.

²⁷⁵ Executive Order No. 12114, 3 C.F.R. 356 (1979).

²⁷⁶ 3 C.F.R. at 357-58.

²⁷⁷ See Sue D. Sheridan, Note, *The Extraterritorial Application of NEPA Under Executive Order 12114*, 13 VAND. J. TRANSNAT. L. 173, 215 (1980).

United States courts have not looked favorably upon extraterritorial EIA. In *Greenpeace USA v. Stone*,²⁷⁸ for example, a federal district court in Hawaii held that the United States Army's role in removing chemical weapons from West Germany did not warrant an EIS.²⁷⁹ The court was influenced by considerations of foreign policy and sovereignty, but stated that other circumstances might produce a different result.²⁸⁰

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

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

²⁷⁸ *Greenpeace USA v. Stone*, 748 F. Supp. 749 (D. Haw. 1990), *appeal dismissed*, 924 F.2d 175 (9th Cir. 1991).

²⁷⁹ *Id.* at 761.

²⁸⁰ *Id.*

²⁸¹ *Public Citizen v. Office of the United States Trade Representative*, 782 F. Supp. 139 (D.D.C.), *aff'd*, 970 F.2d 916 (D.C. Cir. 1992).

²⁸² *Id.* at 140-41.

²⁸³ *Id.* at 144.

²⁸⁴ *Public Citizen v. Office of the United States Trade Representative*, 822 F. Supp. 21 (D.D.C.), *rev'd*, 5 F.3d 549 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

²⁸⁵ *Id.* at 30.

²⁸⁶ *Public Citizen v. Office of the United States Trade Representative*, 5 F.3d 549, 550 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 685 (1994).

²⁸⁷ *Id.* at 553.

²⁸⁸ *Id.*

²⁸⁹ *See id.*

²⁹⁰ 42 U.S.C. § 7415 (1988).

²⁹¹ 33 U.S.C. § 1320(a) (1988).

Air Act of Canada.²⁹² These statutes permit the review of "domestic pollution control standards if and when . . . domestic-based pollution" creates a danger to persons in a foreign country.²⁹³ The end result of these statutes is to create more stringent pollution control measures.²⁹⁴ They have the potential to help create the foundation for an all-encompassing transboundary environmental impact assessment plan between Canada and the United States.

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

A. *Sic Utere as a Proactive Measure*

Sic utere is a principle of customary international law²⁹⁵ which, when applied in an environmental context, states that no nation may permit the use of its territory to cause environmental damage to the territory of another state.²⁹⁶ It is a principle that has been applied many times in cases and arbitration,²⁹⁷ international agreements,²⁹⁸ and non-binding, soft-law rules or codes.²⁹⁹ Most arbitration and case law has expounded the *sic utere* principle as a reactive measure to find state responsibility.³⁰⁰ However, the *Lake Lanoux* Arbitration seems to employ *sic utere*, in part, as a proactive measure, by stating that the principle mandates a duty to notify.³⁰¹ The principle has also been espoused as a proactive measure in other instances. For instance, the Transfrontier Pollution Rules³⁰² effectively employ the *sic utere* principle to impose a duty to prevent extraterritorial injury, and to take proactive measures to avoid transboundary pollution.³⁰³ In particular, the rules call for a potentially affecting state to give prior notice to a

²⁹² Clean Air Act, R.S.C., ch. C-32, § 23(1) (1985) (Can.).

²⁹³ Cooper, *supra* note 1, at 306.

²⁹⁴ *Id.* at 307.

²⁹⁵ See Brunnee, *supra* note 14, at 16.

²⁹⁶ See *Trail Smelter (final decision)*, 35 AM. J. INT'L L. at 716.

²⁹⁷ See discussion of *Trail Smelter* arbitration, *Corfu Channel* case, and *Lake Lanoux* arbitration, *supra* section II.A.

²⁹⁸ See discussion of the *Stockholm Declaration*, and the *Law of the Sea Convention*, *supra* section II.B.

²⁹⁹ See discussion of the Transfrontier Pollution Rules, *supra* section II.C.

³⁰⁰ See discussion of the *Trail Smelter* arbitration, *Corfu Channel* case, *Lake Lanoux* arbitration, and *Gut Dam Claims*, *supra* section II.A.

³⁰¹ See discussion of the *Lake Lanoux* arbitration, *supra* section II.A.

³⁰² See Rauschnig, *supra* note 109, at 158.

³⁰³ See *id.* at 160-68.

potentially affected state, to consult with that state, and to assess the environmental impact in that state, before any environmental harm occurs.³⁰⁴

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

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

B. *How Sic Utere Mandates EIA*

When *sic utere* is employed as a proactive measure, the principle asserts that a state should not permit its territory to cause environmental harm to another state.³¹⁰ In order to fulfill this mandate, preventable environmental harm must be avoided. It follows then, that to prevent adverse effects, one must anticipate them *before* they occur. Such foresight can only be realized by assessing the potential environmental impact of a proposal before any action is undertaken.³¹¹

³⁰⁴ See *id.* at 171–76.

³⁰⁵ See Iwama, *supra* note 111, at 119–20.

³⁰⁶ See *Developments*, *supra* note 7, at 1493; Brunnée, *supra* note 14, at 18.

³⁰⁷ Cooper, *supra* note 1, at 253.

³⁰⁸ *Id.*

³⁰⁹ See *id.* at 298. *But see Developments*, *supra* note 7, at 1501–02 (stating that most nations refuse to submit to any reactive or proactive measures for fear of even partial relinquishment of sovereignty).

³¹⁰ See discussion of the Transfrontier Pollution Rules, *supra* section II.C.

³¹¹ See Robinson, *supra* note 9, at 602.

Environmental impact assessment is essentially a procedure which analyzes the costs and benefits of a project,³¹² and helps to ensure that an action will not adversely affect the environment.³¹³ In both Canada and the United States, EIA is a widely accepted domestic practice.³¹⁴ The United States pioneered the practice of domestic EIA³¹⁵ by including a provision for environmental impact assessment in the National Environmental Policy Act of 1969.³¹⁶ Since 1969, more than seventy-five jurisdictions worldwide have required EIA by law.³¹⁷ The passage of NEPA and its EIA requirement in 1969 greatly influenced Canada. So swayed was Canada, that today all Canadian jurisdictions, at the federal, provincial, and territorial levels, have imposed EIA requirements.³¹⁸

C. *The International EIA Plan*

Canada has based its EIA procedures largely on the United States model created by the NEPA legislation.³¹⁹ Understandably then, many provisions are similar in both countries' domestic EIA implementation.³²⁰ Both share several vital EIA provisions including initial assessment by the project proponent; allowance for public scrutiny; and the ability to alter or terminate the project based on the findings.³²¹ Accordingly, with this similar foundation already in place, the implementation of an international EIA agreement between Canada and the United States is readily attainable.

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

³¹² See *Developments*, *supra* note 7, at 1515.

³¹³ See Robinson, *supra* note 9, at 602.

³¹⁴ Hunt, *supra* note 10, at 790.

³¹⁵ Cooper, *supra* note 1, at 304; Robinson, *supra* note 9, at 591.

³¹⁶ 42 U.S.C. § 4332(2)(C) (1988).

³¹⁷ Robinson, *supra* note 9, at 591.

³¹⁸ Hunt, *supra* note 10, at 790.

³¹⁹ See *id.*

³²⁰ See discussion of EIA in Canada, and EIA in the United States, *supra* section IV.A.-B.

³²¹ Hunt, *supra* note 10, at 791.

fill in the blanks left by the differing provisions of each country's procedural steps.

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

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

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

³²² The International Joint Committee (IJC) was established by the Boundary Waters Treaty of 1909 between Canada and the United States to manage disputes over transboundary waters. Cooper, *supra* note 1, at 254-55.

³²³ *See id.* at 255.

³²⁴ *See id.*

³²⁵ Hunt, *supra* note 10, at 790.

³²⁶ Robinson, *supra* note 9, at 616.

ing territory outside their respective nations.³²⁷ Therefore, both nations could simply designate a single EIA, comparable to those that already exist, to be valid in all jurisdictions.³²⁸ All jurisdictions would be bound by this system concerning international EIAs, but states and provinces would be free to impose varying procedures domestically.

Another important problem to consider involves determining which actions will fall within the scope of the bilateral agreement. The issue of scope has been much litigated in the United States.³²⁹ Rather than being caught up in determinations between whether a project is a federal, state, or provincial action, the agreement could simply define its scope to include any proposed action that may potentially cause extraterritorial environmental damage. The agreement, and later the governing committee, could also delineate minimum thresholds of harm which, if surpassed, would invoke the use of EIA under the agreement. Such a definition would necessarily encompass private as well as public actions, again relying on the *sic utere* principle.³³⁰

A final factor to consider is the implementation of post-assessment monitoring.³³¹ Its absence is often considered a main weakness in otherwise effective EIA processes.³³² Post-assessment monitoring ensures that an approved or altered project follows its intended path, or incorporates any changes ordered by the decisionmaker.³³³ This process could probably best be administered by agencies designated by the nations, perhaps as satellites to the decision-making committee.

VI. CONCLUSION

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

³²⁷ See Environmental Assessment and Review Procedure Guidelines Order, 118 C. Gaz. Pt. II 2794 (1984) (Can.); Executive Order No. 12114, 3 C.F.R. 356 (1979).

³²⁸ See Robinson, *supra* note 9, at 609.

³²⁹ Holland, *supra* note 216, at 767.

³³⁰ See *Trail Smelter (final decision)*, 35 AM. J. INT'L L. at 716-17. The *sic utere* principle was applied to find state responsibility, even though the polluter was a private entity. See *id.*

³³¹ See Hunt, *supra* note 10, at 808.

³³² *Id.*

³³³ *Id.*

this friendship, and set an example of teamwork and conviction, by establishing a bilateral agreement to address the problem of extra-territorial environmental damage.

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

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