

Transboundary Environmental Assessment in North America: Obstacles and Opportunities

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1. Introduction

When the governments of Canada, Mexico and the United States entered into the North American Agreement on Environmental Cooperation in 1993 they made a firm commitment to “consider and develop” recommendations with respect to an agreement on transboundary environmental impact assessment (TEIA).¹ After thirteen years, there remain few concrete signs of a TEIA agreement being negotiated under the auspices of the Commission for Environmental Cooperation (CEC). Indeed, on August 31, 2005, the Council of the CEC rejected a proposal for the CEC Secretariat to prepare Case Studies on Transboundary Environmental Impact Assessment on the basis that the parties were seeking to negotiate a TEIA agreement through the Security and Prosperity Partnership of North America.² To date no information on the status of these negotiations has been released by the parties.

The inability of Canada, Mexico and the United States to achieve an agreement on TEIA is surprising in a number of ways. Firstly, each of the parties has a well-developed federal EIA system. Indeed, the United States was an early proponent of TEIA and has actively encouraged other countries to adopt EIA legislation.³ In addition, both Canada and the United States are members of the UNECE, under which the preeminent international treaty on TEIA was negotiated,⁴ (although the United States has not become

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¹ *North American Agreement on Environmental Cooperation*, (1993) 32 ILM 1480, in force 14 September 1993, Article 10(7).

² Council Resolution 05-07, online: CEC <http://cec.org/files/PDF/COUNCIL/Res-05-07_en.pdf>.

³ See, for example, U.S., *Senate Resolution 49*, 95th Congress., 2d Sess. (Congressional Record, v.124, No.111 (July 21, 1978), pp. S 11523-24, reprinted in 17 ILM 1082 (1978) (calling for the creation of a treaty on “international environmental assessment”).

⁴ *Convention on Environmental Impact Assessment in a Transboundary Context*, (1991) 30 ILM 802, in force 14 January 1998 [*Espoo Convention*].

a party to the treaty). The existence of a robust and comprehensive agreement on TEIA suggests international cooperation on TEIA is achievable. Finally, notwithstanding the absence of a comprehensive TEIA regime in North America, environmental policy makers in Canada, Mexico and the United States have incorporated TEIA requirements in a variety of domestic and bi-lateral regulatory instruments.

In light of the lack of success in developing a tri-lateral approach to TEIA, this chapter has several objectives. Firstly, I seek to simply take stock of the current approaches to TEIA that are being employed in North America. Given the varying mechanisms used to implement TEIA, the approach taken is to look at TEIA from domestic, as well as from bi-lateral and tri-lateral perspectives. The intention here is not to be exhaustive, but rather it is to provide a sense of the broad range of approaches to TEIA that exist within the region, as well as to provide some insight into the reasons why TEIA has developed in a more decentralized, demand driven manner in North America than in Europe. Out of this analysis, I make some further observations respecting approaches to negotiating a comprehensive North American TEIA agreement that are more likely to meet with success.

Underlying any inter-state system of TEIA is the international legal rule that requires states to “ensure that activities within their jurisdiction or control do not cause damage to the environment of other States”.⁵ This principle, referred to as the ‘harm principle’, is not absolute, but is qualified in two important ways. Firstly, the harm principle operates only to prevent ‘significant’ transboundary environmental damage, and secondly, the obligation to prevent harm is an obligation of conduct not result; meaning that a state is required to exercise due diligence, but is not liable for unforeseen transboundary environmental harm.⁶ This obligation, which is recognized as a customary rule of international law,⁷ has influenced the development of domestic EIA rules

⁵ United Nations Conference on the Human Environment, Stockholm Declaration, June 16, 1972, UN Doc. A/conf.48/14, reprinted in (1972) 11 I.L.M. 1416, Principle 21.

⁶ See International Law Commission, “Commentaries to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities”, in *Report of the International Law Commission, Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) 377

⁷ Advisory Opinion of 8 July 1996, 1996 *I.C.J. Rep.* 15 at para. 29.

respecting TEIA quite independently of treaty obligations respecting TEIA. However, the harm principle says very little about the modalities of its implementation. For example, the harm principle may require a state to inform itself about the environmental consequences of its activities and, in conjunction with a corollary duty to cooperate,⁸ it may also require source states to notify and consult with affected states in respect of likely sources of transboundary environmental harm. However, important procedural questions regarding what activities are subject to this obligation, which agency or official within a state is to be notified, the content of the notification, the amount of consultation required, and the remedies available where these obligations are not met, are left principally to the discretion of individual states. In the absence of clarity on these issues, the customary rules lose their effectiveness.

In the North American context, each state has a well developed domestic EIA regime which addresses transboundary impacts. If domestic EIA requirements on their own were able to satisfy the legal and policy requirements respecting transboundary impacts, there would likely be less demand for distinct international rules respecting TEIA. Conversely, gaps in the domestic regimes give rise to the need for international cooperation at bi-lateral and tri-lateral levels. Because the requirements for TEIA will be implemented within the framework of the existing domestic EIA requirements of each state, the differences, or lack of reciprocity, between the domestic regimes also point to obstacles to the development of a comprehensive TEIA regime in North America. The review of the domestic EA regimes that follows is necessarily brief, and focuses on the extent to which these systems incorporate TEIA requirements.⁹

2. Domestic Approaches to TEIA

In the United States, the jurisdiction over EIA is shared between the federal and state governments. The federal government, under the *National Environmental Policy*

⁸ *Stockholm Declaration, supra* n.5, Principle 24

⁹ Detailed discussions of comparative aspects of the respective domestic EIA systems of the three North American states can be found in Commission for Environmental Cooperation, “Environmental Impact Assessment: Law and Practice in North America” in *North American Environmental Law and Policy*, v.3 (Cowansville, Quebec: Editions Yvon Blais, 1999).

Act, requires federal agencies to undertake EIAs where a federal action is likely to have a significant environmental impact.¹⁰ Purely private activities, or activities that do not trigger a federal action, are not subject to the requirements of *NEPA*, but these may be caught by state EIA legislation where it exists. A determination of whether an action is subject to an EIA under *NEPA* is made in the discretion of the lead agency, based on a screening process that makes an initial determination of whether there is a likely to be a significant environmental impact. Individual agencies may have more specific, category based screening criteria that automatically exclude and include certain projects from the requirement to produce a full EIA. While there is no jurisdictional restriction under *NEPA* preventing agencies from assessing transboundary environmental impacts, there was some early confusion whether transboundary assessments were beyond the competence of domestic agencies.¹¹ The requirement to assess transboundary impacts was made explicit in a 1979 Executive Order, which required agencies to consider the extra-territorial effects of their actions where the federal action significantly affected the environment of another state.¹²

The transboundary requirements under *NEPA* were further clarified in a 1997 Council of Environmental Quality Guidance statement.¹³ The guidance document expressly recognizes that the assessment of transboundary impacts is consistent with, and in fact implements, the customary international obligation to prevent harm to the territory of another state. However, it provides no details on how to implement this requirement. The practical difficulty is that there is no central agency that is responsible for the preparation or dissemination of EIA information, but rather the assumption is that individual agencies will have the capacity to identify relevant foreign agencies and officials on an *ad hoc* basis. A further concern is the difficulty that agencies may have in obtaining adequate environmental information from foreign jurisdiction in order to

¹⁰ *NEPA*, 42 USCS § 4332

¹¹ This was a matter of some controversy because questions regarding the application of *NEPA* to projects carried out outside of the United States were not properly distinguished from internal projects with transboundary impacts, see Karen Klick, “The Extraterritorial Reach of *NEPA*’s EIS Requirement after *Environmental Defense Fund v. Massey*” (1994) 44 Am. U. L. Rev. 291 at 301-03.

¹² Executive Order 12114, # C.F.R. 356 (1980), reprinted in 18 ILM 154 (1979).

¹³ *Council on Environmental Quality Guidance on NEPA Analyses For Transboundary Impacts*, issued July 1, 1997, online: CEQ NEPANET <<http://ceq.eh.doe.gov/nepa/regs/transguide.html>>.

determine whether there is likely to be a significance impact. The guidance document acknowledges this latter concern, but provides little assistance.

At the state level, the presence of EIA legislation varies from state to state, and coverage of state EA regimes, where they do exist, is variable.¹⁴ The federal structure of the United States constitution hinders the ability of the federal government to fill in gaps in state EIA legislation. As a result, activities having a significant transboundary impact may not be subject to domestic EIA requirements at all.

In Canada's federalist system, the authority to conduct EIAs is similarly split between the central and provincial governments, although in Canada there are no provinces without EIA legislation. At the federal level, the *Canadian Environmental Assessment Act (CEAA)* applies to projects that include some federal government involvement, such as an approval from a federal department, use of federal funds, or more directly, where an arm of the federal government is the proponent.¹⁵ As with *NEPA*, in the absence of a federal trigger under *CEAA*, the authority to conduct EIAs resides with provincial governments. The screening criteria under *CEAA* also utilize a general threshold of significant environmental effect, supplemented by specific exclusions and inclusions. The various provincial EIA processes apply to both public and private sector projects.

The need for TEIA was explicitly recognized under the *Environmental Assessment and Review Process (EARP) Guidelines Order*, the predecessor to *CEAA*, under which the responsible authority was required as part of the assessment process to consider "any effects that are external to Canadian territory".¹⁶ However, the *EARP Guidelines*, like *NEPA*, provided few details on how to implement this requirement. Despite, the lack of detail, consultation with other countries has occurred under the *EARP*

¹⁴ Some state systems described in Commission for Environmental Cooperation, *supra* n.9 at 51-54.

¹⁵ *Canadian Environmental Assessment Act*, S.C. 1992, c.37, as amended, [*CEAA*], s.5.

¹⁶ SOR/84-467, s.4(1)(a).

Guidelines in a number of large-scale projects.¹⁷ When the *EARP Guidelines* were replaced by *CEAA* in 1995, more extensive provisions regarding transboundary impacts were included. Firstly, the definition of “environmental effect” used in *CEAA* explicitly includes effects occurring outside of Canada.¹⁸ In addition, section 47 of *CEAA* allows the Minister of the Environment in his or her discretion to require a federal EIA under *CEAA* where the proposal may cause significant adverse environmental effects outside of Canada’s territorial jurisdiction and the project is not otherwise subject to the federal EIA process.¹⁹ Thus, the presence or likelihood of a transboundary impact allows the federal government to assert jurisdiction over a provincial matter for EIA purposes. This provision is best understood in light of Canada’s obligations under the *Espoo Convention*, which require implementation by both the federal and provincial governments. Section 47 allows the federal government to act in the event that a province fails to consider transboundary impacts.²⁰

The difficulty with *CEAA* is that, like *NEPA*, it provides few details respecting the implementation of transboundary EIA requirements. A determination of whether a transboundary impact exists will be the responsibility of individual agencies or the project proponent and will involve similar challenges in identifying appropriate foreign agencies, notifying affected persons in foreign jurisdictions and obtaining adequate environmental information, to those identified in connection with *NEPA*. Moreover, the ability to petition the minister to initiate a transboundary proceeding under s.47 of *CEAA* is limited to government agencies, and excludes matters being petitioned by non-governmental organizations and affected individuals. The result of this limitation is that members of the public located outside of Canada must in effect have their concerns taken up, at least on a formal level, by their government. A second shortcoming is that the

¹⁷ UNECE, “Current Strategies in Transboundary EIA” (Geneva: UNECE, 1996) at 19, (noting that, prior to the coming into force of the *Espoo Convention*, consultation with foreign states occurred in the Beaufort Sea; Rafferty-Alameda Dam and Eastern Arctic Offshore Drilling public reviews).

¹⁸ *CEAA*, s.2(1).

¹⁹ *Ibid*, s.47.

²⁰ At the time of Canada’s ratification of the *Espoo Convention*, it did so with a reservation limiting its obligations to areas under federal jurisdiction. A number of states objected to the reservation’s broad language, but the reservation remains in place. The reservation and objections can be found online: United Nations Economic Commission for Europe <<http://www.unece.org/env/eia/convratif.html>>.

determination as to whether the impacts in question warrant an assessment under the transboundary provisions is a matter wholly within the Minister's discretion. There are no objective criteria for determining whether such an assessment should be carried out and there is no forum for resolving disputes that arise respecting whether a project should be subject to the transboundary EIA provisions of *CEAA*.²¹ The political costs of exercising this authority are quite high since the federal government is effectively exercising authority in an area of provincial competence.²² To date no project has been referred by the Minister to mediation or a review panel under s.47 of *CEAA*.²³

Mexico, too, has a federal constitutional structure, with environmental jurisdiction being shared between the federal and state governments. At the federal level, the EIA process is governed under the *General Law of Ecological Equilibrium and Environmental Protection (LGEEPA)*²⁴ and a regulation enacted under *LGEEPA* specifically addressing EIA (EIA Regulation).²⁵ The EIA process in Mexico is overseen by the Secretariat on Environment and Natural Resources (SEMERNAT). The application of the federal EIA process is not restricted to projects with federal government involvement, but rather the *LGEEPA* identifies 23 sectors that are subject to the EIA process. The EIA Regulation enumerates in greater detail the precise activities in each sector that are included and excluded from the EIA requirements.²⁶ The trigger for carrying out an EIA relates to the nature of the activity, as opposed to an initial assessment of its potential impact. The federal EIA process supersedes state laws in

²¹ See Steven Kennett, "The *Canadian Environmental Assessment Act's* Transboundary Provisions: Trojan Horse or Paper Tiger?" (1995) 5 J. Env'tl. L. & Prac. 263, (discussing the breadth of ministerial discretion respecting transboundary EIA).

²² Coordination of federal-provincial EIA responsibilities is addressed in cooperation agreements that exist between the federal government and some provinces, including questions respecting international transboundary impacts. See e.g. CCME Sub-Agreement on Environmental Assessment, online: CCME <<http://www.ccme.ca>>. For a specific agreement, see Canada – Manitoba Agreement on Environmental Assessment Cooperation, online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/010/0001/0003/0001/0003/manitoba_agr_e.htm>.

²³ David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 154.

²⁴ Published in the *Official Gazette of the Federation*, January 29 1988 and amended by Decree published 13 December 1996, reprinted online: Westlaw ENFLEX 000449 [*LGEEPA*].

²⁵ *Regulation to the General Law of Ecological Equilibrium and Environmental Protection in Matters Pertaining to Environmental Impact Evaluation*, issued 23 May, 2000, reprinted online Westlaw ENFLEX 000463 [*EIA Regulation*].

²⁶ *Ibid*, Article 5.

respect of the identified activities. As a result, states have only the residual jurisdiction to establish EIA requirements for those matters not addressed in *LGEEPA*. In a number of ways the Mexican EIA process is more centralized than either the process in the United States or Canada. For example, the consultation process is controlled by SEMARNAT, not by the proponent, with SEMARNAT being responsible for providing notice and determining in its discretion whether any public consultation will occur and its extent. Any public consultation occurs after the EIA report has been prepared and submitted to SEMARNAT.

Transboundary impacts under *LGEEPA* are only indirectly addressed. *LGEEPA* itself recognizes the importance of transboundary impacts:

It is in the interest of the nation that activities which are carried out within national territory and in those zones where the nation exercises its sovereignty and jurisdiction do not affect the ecological equilibrium of other nations or zones under international jurisdiction.²⁷

However beyond this general recognition, the EIA regime provides no special rules in relation to transboundary impacts.

In all three jurisdictions, TEIA is conceived of as an extension of the domestic EIA process so as to include the consideration of impacts beyond the boundaries of the state. The likelihood that an activity may result in significant transboundary harm does not in itself trigger an EIA, but rather in all three cases the activity must fall within the parameters of the statutory scheme. In those cases, where an activity subject to a domestic EIA has transboundary impacts, there are no special rules or procedures to be followed. Except for the location of the potential impact itself, the assumption is that domestic and TEIA processes need not be differentiated. However, this assumption does not withstand closer scrutiny. Firstly, the harm principle suggests some differentiation between transboundary impacts and purely internal impacts on the basis that the former triggers international legal obligations. This point appears to be conceded by all three jurisdictions in that their statutory schemes acknowledge the importance of preventing

²⁷ *LGEEPA*, *supra* note 24, Article 15 (XVII).

transboundary harm, but each also leave open the possibility that activities that cause transboundary harm will not be subject to EA requirements; for example, due to the activity falling outside jurisdictional competence of the federal authority. Secondly, on a practical level, TEIA raises unique issues concerning access to information, notice and consultation and the availability of remedies to affected persons. In particular, domestic regulators require the capacity to determine relevant foreign agencies for the purposes of accessing and disseminating environmental information and identifying other affected persons in the impacted jurisdiction. In the absence of clearly identified points of contact, effective notice and consultation is highly dependant upon the expertise of the consultants and source state agency officials involved. By way of comparison, the *Espoo Convention* provides for specific procedural avenues for notification and consultation, including the identification of specific points of contact for each party.²⁸ As well, the *Espoo Convention* provides a mechanism for the exchange of environmental information, including an obligation for the affected state to provide “reasonably obtainable information” concerning environmental conditions in the affected state. Most importantly, while the *Espoo Convention* still relies on the threshold of “significant harm” to trigger an EIA, the Convention elaborates on this standard through the inclusion of a list of activities potentially subject to TEIA requirements and a further list of general criteria to assist in determining significance.²⁹ In respect to the determination of ‘significance’, the presence of a dispute resolution mechanism under *Espoo* provides a further element of certainty into the TEIA process.³⁰

Notwithstanding these shortcomings, there numerous examples of domestic EIA processes accounting for transboundary impacts. Two early disputes under *NEPA* involved the consideration of impacts from projects located in the United States on the natural environment in Canada.³¹ A more recent example is an EIA conducted in respect of a proposed electrical power generating station, the Sumas 2 Generating Station, in

²⁸ *Espoo Convention*, *supra* note 4, Arts.3, 5.

²⁹ *Ibid*, Appendices I & III, note that the formulation requires that a project must be both listed and likely to cause a significant adverse impact before the obligation to assess is engaged.

³⁰ *Ibid*, Art. 2(7), Appendix IV.

³¹ *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972), *Swinomish Tribal Community v. Federal Energy Regulation Commission*, 627 F.2d 499 (D.C. Cir. 1980).

Washington State that involved extensive consultation with the Canadian, British Columbian and local governments in Canada in respect of air quality impacts.³² There are fewer indications of assessment of transboundary impacts across the U.S.-Mexican border. One area where there have been examples of consideration of transboundary impacts is with respect to approvals of infrastructure projects in border communities.³³ A study of the consultation process regarding a U.S. canal project that had clear potential to impact shared groundwater resources indicated a degree of cooperation in assessing the impacts of the proposal, but the study also indicated that consultation with Mexican authorities lacked transparency and consistency, and there was a lack of clarity regarding the extent of the lead agency's obligation to consult Mexican authorities.³⁴ Similarly, the failure of Mexican officials to require EIAs of *maquiladora* plants (industrial facilities located in Mexican border area principally producing goods for export into the United States) has been a longstanding source of concern for U.S. officials.³⁵

Some recent events in Canada-U.S. transboundary assessment also point to difficulties with a purely domestic approach to transboundary EIA. In the Sumas 2 Generating Station process, the project was approved by Washington State officials; however the transmission lines connecting the proposed power station to the distribution network were to be located in Canada and required the approval of Canadian regulatory officials. In the hearing which considered the transmission lines, the Canadian officials (the National Energy Board), determined that the assessment of the project should include a consideration of the generating station itself, and in particular the air quality impacts of the generating station on Canadian residents, notwithstanding that this issue had been given a full airing in the U.S. proceedings. In the Canadian proceedings, the

³² See *In re: Sumas 2 Generating Facility PSD Permit No. EFSEC/2001-2, PSD Appeal Nos. 02-10 & -2-11*, Environmental Appeal Board, U.S. Environmental Protection Agency, decision issued March 25, 2003, online: EPA <<http://www.epa.gov/eab/orders/sumas.pdf>>. See also the projects listed in *UNECE*, *supra* n.17.

³³ See, for example, Nogales International Wastewater Treatment Plant approval, online: EPA <<http://www.epa.gov/region09/water/nogales/wastefnsi.html>>.

³⁴ Lilius Jones, Pamela Duncan and Stephen Mumme, "Assessing Transboundary Environmental Impacts on the U.S.-Mexican and U.S.-Canadian Borders" (1997) 12 *J. Borderland Studies* 73.

³⁵ Discussed in United States General Accounting Office, *Report to Chairman, Committee on Commerce, Science and Transportation, U.S. Senate: Assessment of Mexico's Environmental Controls for New Companies*, August, 1992, GAO/GGD -92-113 [USGAO].

project was not approved. In upholding the National Energy Board decision, the (Canadian) Federal Court of Appeal made the following observation about the respective approval processes:

Suffice it to say that the EFSEC [the Washington State approval authority] was 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. In that context, the Board was not obliged to defer to the EFSEC or to alter in any way its assessment of the factors which it considered relevant.³⁶

While the facts of this particular approval are unique, the existence of two conflicting assessment decisions relating to the same project suggests the potential for improved coordination of transboundary decision-making processes. In particular, if the aim of the EIA process is to enhance the legitimacy of decisions taken, then transboundary processes need to demonstrate that the public interest of all affected parties is accounted for, which may require institutional structures that consider activities from a less parochial perspective than that suggested by the Federal Court of Appeal.

The difficulty with a purely domestic (unilateral) approach is that, in the absence of clear rules respecting the procedures to be followed where transboundary impacts are likely to occur, the application of EIA processes to transboundary impacts is not going to proceed on a principled basis. This is not to suggest that agency discretion to conduct transboundary EIAs will be exercised in bad faith, rather the concern is that the discretion itself is not constrained by clear rules and thus how that discretion will be exercised will be difficult to predict. Importantly, because each country, and each sub-state unit within each country, applies its own rules to transboundary EIA, there is no reciprocity of treatment between countries. The result has been a number of significant inter-state disputes regarding the application and adequacy of domestic EA processes to projects with transboundary impacts. For example, proposals by North Dakota to divert water from the Missouri/Mississippi water basin into the Hudson's Bay water basin, which flows into Manitoba, has led to Canadian concerns and cross-border litigation respecting

³⁶ Sumas Energy 2, Inc. v. Canada (National Energy Board), [2005] F.C.J. No. 1895 at para. 27.

the adequacy of the U.S. environmental review process.³⁷ Similar controversies have arisen between the U.S. and Mexico.³⁸ It is, to a large degree, these shortcomings that the more cooperative bi-lateral and tri-lateral approaches to transboundary EIA sought to ameliorate.

3. Bi-lateral Approaches

a) Canada - U.S.

The 1991 *U.S. – Canada Air Quality Agreement* contains a detailed, but qualified obligation to undertake TEIA.³⁹ In this instrument, the parties agree to assess those projects which would likely result in “significant transboundary air pollution”, but only “as appropriate and as required by its laws, regulations and policies”.⁴⁰ Consequently, the agreement does not require the parties to extend their existing domestic EIA laws. The weak formulation here can be attributed, in part, to the fact that jurisdiction over air quality is split in both countries between the federal and state or provincial governments. However, the *U.S. – Canada Air Quality Agreement* has resulted in some innovative approaches to the assessment to transboundary impacts in its implementation. The *Agreement* explicitly requires notification “as early as practicable” and consultation, at the request of the other party.⁴¹ The duty to consult extends to continuing actions and activities that may cause significant transboundary air pollution, including changes to another countries laws, regulations and policies. The consultations themselves are to include consideration of appropriate mitigation measures, in addition to a more general

³⁷ [*Gov’t of the Province of Manitoba v. Norton*, 398 F. Supp. 2d 41 \(D.D.C. 2005\)](#) (Challenge to EIS of Garrison Diversion); Manitoba also joined U.S. environmental groups in challenging the North Dakota state government’s decision to move ahead with diversion of Devil’s Lake without an adequate EA, *People to Save the Sheyenne River v. North Dakota*, [2005] ND 104 (N.D.S.C.).

³⁸ See, for example, discussion of proposed low level radio-active waste facility in Sierra Blanca, Texas in John Knox, “The CEC and transboundary Air Pollution” in Markell and Knox, eds. *Greening NAFTA: The North American Commission for Environmental Cooperation* (Stanford, Ca.: Stanford University Press, 2003) 80 at 86; see also USGAO, *supra* n.35.

³⁹ *Agreement between the United States and Canada on Air Quality* (1991) Can. T.S. No.3 (in force March 13 1991), reprinted 30 I.L.M. (1991) 676.

⁴⁰ *Ibid*, Art. V(1).

⁴¹ *Ibid*, Art V(3).

obligation to, “as appropriate, take measures to avoid or mitigate the potential risk posed by actions, activities or projects that would be likely to cause or may be causing significant transboundary impact”.⁴²

The notification procedures require that each party provide notification of new sources of air pollution located within 100 kilometres of the U.S./Canada border and sources are identified by reference to quantified emission limits.⁴³ By identifying those projects that require notification through geographic and emission quantity criteria, the *U.S. – Canada Air Quality Agreement* process provides greater certainty with respect to identifying those projects that will require transboundary cooperation. Moreover, the process created uses the Air Quality Committee, a bi-lateral committee made up of environmental officials from lead agencies, representing both the federal and sub-state governments, as the forum for consultation. This system has led to a large number of notifications between the parties,⁴⁴ which in turn have resulted in transboundary consultations. The make-up of the committee allows for direct agency to agency consultations and provides a degree of coordination between the federal and sub-state regulators. The results of an EIA may be incorporated within the notification and consultation processes, but this depends upon the particular regulatory framework into which the planned activity falls. The *U.S. – Canada Air Quality Agreement* notification process is principally oriented towards new sources and major modifications and does not expressly address cumulative impacts of planned activities. Although, given that notification and consultation occur through the Air Quality Committee, officials are better able to consider and co-ordinate impacts from a variety of sources. The approach under the *Air Quality Agreement* is not to impose additional EIA requirements, but to provide procedures that improve the functioning of domestic EIA processes by providing an institutional structure for cooperation.

⁴² *Ibid*, Art. V(5).

⁴³ Discussed in the *U.S. – Canada Air Quality Agreement 2002 Progress Report* prepared by the bilateral Air Quality Committee, online : <http://www.ec.gc.ca/pdb/can_us/qual/2002/index_e.html>.

⁴⁴ The notifications are online: <http://www.ec.gc.ca/pdb/can_us/canus_applic_e.cfm>, (for Canadian) and at <<http://www.epa.gov/ttn/gei/uscadata.html>>, (for U.S.). The notification tables indicate in excess of 75 notifications between the parties.

A second bi-lateral commitment addressing wildlife protection takes a similar approach. The *Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd* (the “*Porcupine Caribou Agreement*”) has as its purpose the protection of a large population of caribou that migrate between Alaska and the Yukon and Northwest Territories.⁴⁵ The Porcupine Caribou Agreement requires that activities “having a potential impact on the conservation of the Porcupine Caribou Herd or its habitat will be subject to impact assessment and review consistent with domestic laws, regulations and processes”.⁴⁶ There are also notification and consultation requirements under the agreement, as well as a requirement to assess cumulative impacts.⁴⁷ The Agreement itself places a positive obligation on the parties to avoid or mitigate “activities that would significantly disrupt migration or other important behavior patterns of the Porcupine Caribou Herd or that would otherwise lessen the ability of users of Porcupine Caribou to use the Herd”.⁴⁸ In this regard, the *Porcupine Caribou Agreement* goes further than other international EIA commitments, such as the *Espoo Convention*, which contain only highly qualified obligations on states to prevent environmental harm.⁴⁹ Having said that the agreement requires that “[a]ll questions related to the interpretation or application of the Agreement will be settled by consultation between the Parties”,⁵⁰ leaving the parties free to seek negotiated settlement of disputes but without recourse to binding dispute resolution mechanisms. The *Porcupine Caribou Agreement* also provides for a bi-lateral institution to better co-ordinate activities with transboundary impacts through the creation of the International Porcupine Caribou Board, an advisory board made up of appointees from each state.⁵¹ It is contemplated that notification of activities that have potential impacts on the Porcupine Caribou Herd would be made to the Board. The other essential dimension to this agreement is its explicit recognition of the vital role that the Porcupine Caribou herd plays in the lives of indigenous groups in both Canada and the U.S., and the

⁴⁵ (1987) Can. T.S. 31, in force 17 July 1987, online: < http://www.lexum.umontreal.ca/ca_us/en/cts.1987.31.en.html#Section_1 >.

⁴⁶ *Ibid*, Art.3(c).

⁴⁷ *Ibid*, Art.3(d),(g).

⁴⁸ *Ibid*, Art. 3(f).

⁴⁹ See, for example, *Espoo Convention*, *supra* note 4, Art. 2(1).

⁵⁰ *Ibid* Art. 7.

⁵¹ *Ibid* Art. 4.

recognition of the right of indigenous groups to participate in the international co-ordination of the resource.⁵²

Like the *Air Quality Agreement*, the TEIA obligation under the *Porcupine Caribou Agreement* does not require alteration of existing domestic EA requirements, but recognizes EIA as an important tool in inter-state resource co-ordination. In practice, the success of this regime and the role of EIA in it are untested because both countries have maintained much of the herd's range as a wilderness area.⁵³ However, the U. S. debate regarding resource exploration in the Arctic National Wildlife Refuge, a development that would have potentially devastating consequences for the calving grounds of the Porcupine Caribou, has proceeded with little participation by affected persons in Canada nor has the International Porcupine Caribou Board played any appreciable role. In fact the Board itself has been inactive due to the failure of the U.S. to make appointments to it.⁵⁴

Another prominent bi-lateral instrument that bears on transboundary EIA between the U.S. and Canada is the 1909 *Boundary Waters Treaty*.⁵⁵ This agreement addresses fresh water resource management issues along the Canada-U.S. border, and seeks to preserve free navigation in boundary waters and to prevent the use, obstruction or diversion of boundary waters without the approval of a bi-lateral commission, the International Joint Commission (IJC). The agreement also contains a prohibition against transboundary pollution.⁵⁶ While the *Boundary Waters Treaty* does not expressly provide for EIA procedures, the process by which the IJC approves activities respecting the use, obstruction and diversion of boundary waters has been noted to include many of the features of EIA, in that the application will usually address environmental impacts

⁵² *Ibid*, Art. 2.

⁵³ Oran Young, "North American Resource Regimes: Institutionalized Cooperation in Canadian-American Relations" (1998) 15 *Ariz. J. Int'l & Comp. L.* 47 at 54.

⁵⁴ See Porcupine Caribou Management Board, online at < <http://www.taiga.net/pcmb/pcmb.html> >.

⁵⁵ *Treaty between the United States and Great Britain Respecting Boundary Waters Between the United States and Canada*, (1909) 4 *A.J.I.L. (Supp.)* 239, in force 5 May 1910.

⁵⁶ *Ibid* Art. IV.

and has requirements for public notification and consultation.⁵⁷ However, the jurisdiction of the IJC to consider the environmental impacts of proposed activities is restricted to works affecting water levels and cannot independently assess activities affecting water quality without further political direction. Water quality matters are only referred to the IJC at the request of the state parties, and in this regard Canada and the U.S. have been reluctant to allow the IJC to take on an independent role.⁵⁸ In instances where the IJC has been given authority to consider environmental matters, such as the High Ross Dam in Washington State, it has been effective in promoting transboundary cooperation.⁵⁹

More recently, the IJC was asked to consider the environmental impacts of a causeway and bridge proposal on Lake Champlain in the State of Vermont.⁶⁰ In this case Vermont had conducted an environmental assessment showing that the proposal would not have a significant environmental impact on the water quality of Lake Champlain. Despite this finding, there remain high levels of public scepticism respecting the proposal. In essence, it was believed (by Canadian residents) that the presence of the existing causeway was a significant contributing factor to the very poor water quality (high phosphorus levels) in the Missisquoi Bay. The proposal was for the replacement of the causeway with a bridge, but did not call for the removal of the causeway in its entirety. The matter was referred to the IJC in order for the IJC to review the environmental assessment and related materials and to conduct an independent consideration of the environmental impacts of the proposal and its impact on water levels in accordance with Article IX of the *Boundary Waters Treaty*. The independent review was conducted by an appointed task force consisting of federal and provincial (Quebec) and state (Vermont) environmental officials. One way to interpret the reference, which

⁵⁷ Angela Cassar and Carl Bruch, “Transboundary Environmental Impact Assessment in International Watercourse Management” (2005) 12 N.Y.U. J. Env’tl L. J. 169 at 210.

⁵⁸ See Jutta Brunnée and Stephen Toope, “Freshwater Regimes: The Mandate of the International Joint Commission” (1998) 15 Ariz. J. Int’l & Comp. L. 273 at 280.

⁵⁹ Discussed in Cassar and Bruch, *supra* n.57.

⁶⁰ See International Joint Commission, *Transboundary Impacts of the Missisquoi Bay Causeway and the Missisquoi Bay Bridge Project: Final Report and Recommendations of the International Joint Commission* (released March 31, 2005), online: <

http://www.ijc.org/conseil_board/missisquoi_bay/missbay_pub.php?language=english >

was made jointly by both Canada and the U.S., is to view the recourse to the IJC as a means to promote the legitimacy of the environmental decision-making process to affected persons in both states. The bi-lateral and independent nature of the IJC allows it to view project proposals from a perspective that transcends local interests. This ability is illustrated in the Missisquoi Bay proposal in that the task force confirmed the findings in the original EA that the causeway's presence would not affect phosphorus levels in Lake Champlain, but nevertheless recommending that the causeway be removed in an effort to promote better environmental controls in Quebec.⁶¹ The inclusion of both federal and sub-state environmental officials in the composition of the task force also provides opportunity for greater cooperation between levels of government.⁶²

The virtue of the IJC as a forum for bi-lateral cooperation is perhaps also viewed by the federal governments of Canada and the U.S., as a vice. The independence of the IJC reduces the discretion of the governments to pursue their own policies. It is perhaps for this reason the IJC has never been called upon to use its binding arbitral powers, and it is not called upon to exercise its reference powers, which are advisory in nature, unilaterally.⁶³ Consequently, in the dispute between Canada and the U.S. respecting the Devil's Lake diversion in North Dakota, Canada sought to have the United States join it in a reference of the matter to the IJC on the principal justification that a "credible" assessment of environmental impacts needed to be undertaken.⁶⁴ The U.S. administration, despite the strong lobbying efforts of Canada, refused to make such a reference.

One final area of bi-lateral cooperation respecting EIAs between Canada and the U.S. is the emergence of state/provincial environmental cooperation agreements that

⁶¹ The IJC recommended that the Canadian and Quebec government spend amounts equal to the cost of the removal of the causeway on reducing phosphorus loads to Lake Champlain from Canadian sources.

⁶² Other task forces and boards created under the *Boundary Waters Treaty* have included officials from sub-state governments where the interests of a state or province are implicated.

⁶³ Brunnée and Toope, *supra* n.58 at 283.

⁶⁴ See Letter from Ontario Premier Dalton McGinty, dated 24 February 2005 and Statement of Canadian Embassy to International Joint Commission, April 14, 2005, both documents online: Canadian Embassy < http://www.dfait-maeci.gc.ca/can-am/washington/shared_env/ >.

address EIA.⁶⁵ The most developed agreement in terms of coordination of EIA processes is a Memorandum of Understanding between the Washington State Department of Ecology and the British Columbia Environmental Assessment Office (MOU).⁶⁶ Under this agreement, the parties agreed to exchange information on projects located within defined areas (generally within 100 kilometres of the border). The MOU explicitly indicates that notice is to be given to the respective environmental agencies and specifies the timeframe for giving notice, and requires an opportunities for consultation. The parties also exchanged information describing their respective EIA processes. This arrangement recognizes the importance of coordinating EIA processes at the sub-state level since a significant number of projects will not be subject to a federal assessment process. In addition, by facilitating direct agency to agency cooperation, the MOU provides a more direct approach to transborder cooperation.

b) Mexico – U.S.

There have been a number of different bi-lateral mechanisms promoting environmental cooperation between the U.S. and Mexico, most prominently the International Boundary and Water Commission, which performs a similar function to the IJC in respect of U.S. Mexican boundary waters, the 1983 La Paz Agreement,⁶⁷ and the Border Environmental Cooperation Commission (BECC).⁶⁸ Of these only the BECC directly addresses transboundary EA processes. The La Paz Agreement recognizes the importance of EA for transboundary cooperation, but none of the implementation plans, including the most recent plan, Border 2012, provide guidance for the conduct of

⁶⁵ Both British Columbia and Quebec have entered into environmental cooperation agreements with neighbouring U.S. states. Quebec has agreements with Vermont, New York, New Hampshire and Maine, while British Columbia has agreement with Washington and Idaho.

⁶⁶ Online: British Columbia Environmental assessment Office, < http://www.eao.gov.bc.ca/publicat/MOU-Wash_st-EAO_2004/mou-2003.pdf >.

⁶⁷ *Agreement Between the United States and Mexico on Cooperation for the Protection and Improvement of the Environmental in the Border Area*, (1983), 22 I.L.M. 1025, entered into force 16 February 1984.

⁶⁸ *Agreement Between the United States and Mexico Establishing the Border Environmental Cooperation Commission and the North American Development Bank* (1993), 16 November 1993, T.I.A.S. 12516, 32 I.L.M.1545, (entered into force 1 January 1994).

transboundary EAs.⁶⁹ The BECC EA program is related to the certification of projects that are financed through the North American Development Bank. Consequently, it is only those proposed activities that are seeking NADB funding that are subject to the EA requirements. Under the BECC process, an applicant must submit an EA as required under domestic laws, or if no EA is required under domestic laws then an EA in accordance with BECC criteria must be submitted.⁷⁰ Where the proposal is likely to have “significant transboundary environmental effects”, additional information must be provided including a discussion of possible effects in each country, a discussion of project alternatives and a justification of the preferred alternative. The project criteria expressly require public participation, and where there are potential transboundary impacts participation must include members of the public in both countries.⁷¹ Bi-lateral cooperation and involvement is also assured because of the involvement of the BECC itself, which consists of high ranking officials from both the U.S and Mexico, including representatives from the state departments and federal environmental agencies, as well Border State representative.

There is also some indication of direct negotiation between Border States regarding transboundary notification. For example, documents from the Border Governors Conference indicates that the ten Border States (the sub-state governments on both sides of the U.S. – Mexico border) have been working on transboundary notification procedures for projects with potential environmental impact within the 100 kilometre border area, but are awaiting completion of an agreement between the federal governments.⁷²

4. Tri-lateral Approaches

⁶⁹ The La Paz Agreement, *supra* n.67, Article 6.

⁷⁰ Border Environmental Cooperation Commission, *Project Certification Criteria*, online: BECC, <http://www.cocef.org/Certification_criteria.pdf>

⁷¹ The form of participation required is determined through the development of a Comprehensive Community Participation Plan, which includes involvement of a local steering committee and public meetings. Described in *ibid*.

⁷² See Border Governors Conference, “Accomplishments - Executive Summary from June 2001 - June 2002 Presented at the XX United State – Mexico” online: Texas Secretary of State <<http://www.sos.state.tx.us/border/jdxxaccomplishments.shtml>>.

a) The NACEC Draft TEIA Agreement

The institutional vehicle for developing common environmental policies between the three North American states is the *North American Agreement on Environmental Cooperation (NAAEC)*,⁷³ one of the so-called “side agreements” to the *North American Free Trade Agreement*. The *NAAEC* itself arose out of concerns that increased economic integration from free trade would negatively impact environmental protection. The centerpiece of the *NAAEC* was the creation of a tri-lateral Commission, the Commission for Environmental Cooperation (CEC), to serve as both a forum for discussion of environmental matters, and to implement the requirements of the *NAAEC*. The CEC is comprised of a Secretariat; a Council, made up of the environmental ministers from each Party; and a Joint Public Advisory Committee, comprised of appointed members of the public from each Party. The Council has no independent legislative power, but it has the authority to make recommendations to the national governments of the Parties. Among the areas specifically identified by the *NAAEC* for the development of further policies was transboundary EA. Article 10(7) of the *NAAEC* provides:

Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this Article within three years on obligations, consider and develop recommendations with respect to:

- (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
- (b) notification, provision of relevant information and consultation between Parties with respect to such projects; and
- (c) mitigation of the potential adverse effects of such projects.

In support of this initiative, the CEC Secretariat engaged a group of experts to prepare a series of background reports on issues related to transboundary environmental

⁷³ (1993) 32 ILM 1480, in force 14 September 1993.

impact assessment (EIA).⁷⁴ The experts group identified a number of key issues that would be relevant to the conclusion of an agreement of transboundary EIA, as well as a range of policy options for addressing each of the issues. The central issues identified were notification, exchange of information and assessment, mitigation and consultation and dispute resolution.⁷⁵ In 1997, based on the recommendations of the experts group, the Council decided to complete a binding agreement on transboundary EIA between the parties. To this end, the Council made public a “*Draft North American Agreement on Transboundary Environmental Impact Assessment*” (the “*Draft TEIA Agreement*”) prepared by the experts group.⁷⁶ The *Draft TEIA Agreement* has not yet been completed and remains in skeletal form, but the general direction of the agreement is evident from the draft. Like the *Espoo Convention*, the focus is solely on transboundary environmental impacts, and as such, does not address impacts to the global commons nor does it address domestic impacts that may have broader international implications, such as impacts to biological diversity or impacts affecting global climate change (often referred to as issues of “common concern”). The preamble to the *Draft TEIA Agreement* references the harm principle, as well as the duties of prior notification and consultation in good faith, suggesting that the agreement is informed by these broader principles of international law. However, while the *Draft TEIA Agreement* acknowledges these principles, it does not impose a positive obligation on states to prevent or mitigate transboundary harm, preferring instead to focus on procedural obligations. This purely procedural approach is, of course, in keeping with the procedurally oriented nature of the domestic EA systems for each of the Parties.

The general approach of the *Draft TEIA Agreement* is to ensure that each Party treats transboundary impacts in a way that is no less favourable than it would treat impacts of a purely internal nature; an approach that has been described as being

⁷⁴ These papers are contained in Commission for Environmental Cooperation, North American Environmental Law and Policy, v.4 (Cowansville, Quebec, Editions Yvon Blais, 2000).

⁷⁵ CEC Secretariat, “Issues under Article 10(7) of the North American Agreement on Environmental Cooperation” in *ibid* at 17.

⁷⁶ Online: CEC < http://www.cec.org/pubs_info_resources/law_treat_agree/pbl.cfm?varlan=english >.

underlain by a broad principle of non-discrimination.⁷⁷ Because the *Draft TEIA Agreement* does not expressly provide for basic minimum standards for the application of transboundary EIA, the agreement fails to address the need for reciprocity between the Parties. One commentator describes the difficulty as arising because the federal EIA legislation of Canada and the United States applies to a narrower range of activities than that of Mexico. As noted in the discussion of the domestic approaches to transboundary EIA, the concern is that many projects that would be subject to EIAs under Mexican law would not be subject to EIAs under the laws of the United States, given the strong constitutional role for states in environmental protection, including EIA processes. In the border area between the United States and Mexico, many of the projects on the American side of the border would not be subject to an EIA given the absence of a comprehensive EIA scheme in the U.S. Border States. During the initial negotiations on the *Draft TEIA Agreement*, the Mexican government made reciprocity of application a fundamental issue, which has not yet been resolved.⁷⁸

The reliance on domestic approaches is also evident in the notification and consultation provisions of the *Draft TEIA Agreement*. For example, the notification requirement provides that the potentially affected state shall be notified no later than the public of the state of origin,⁷⁹ and the public participation rights afforded to the public of the potentially affected state are to be equal to those granted to the public of the state of origin.⁸⁰ Again this could be problematic from a reciprocity standpoint since under the Mexican EA process notification does not occur until after the EA has been completed, whereas under the *NEPA* process there are requirements for consultations during the scoping phase and further requirements for the circulation of a draft EIS for discussion purposes in advance of its finalization.⁸¹ There are, however, some aspects to the agreement that address some of the uncertainty associated with domestic approaches. For example, in order to identify with greater precision those projects that would be subject to

⁷⁷ John Knox, “The Myth and Reality of Transboundary Environmental Impact Assessment” (2002) 96 A.J.I.L. 291.

⁷⁸ Discussed in *ibid* at 307.

⁷⁹ *TEIA Draft Agreement*, *supra* note 76, Art. 3.1.

⁸⁰ *Ibid*, Art. 12.1(b).

⁸¹ See discussion above.

notification requirements, the agreement provides that projects that fall into enumerated categories and that are located within 100 kilometres of either border. The 100 kilometre area mirrors the definition of the “border area” between the United States and Mexico established under the *La Paz Agreement* and matches the notification requirements under the *U.S. – Canada Air Quality Agreement*. The list of specified projects is undeveloped, but would be contained in an appendix to the agreement. The *Draft TEIA Agreement* would also require notice for projects outside the 100 kilometre area where the project is found to have the potential to cause significant transboundary impacts. The *Draft TEIA* also provides a list of factors that should be considered by government authorities in making determinations regarding significance.⁸² A further improvement under the *Draft TEIA Agreement* is the proposal that each party would designate points of contact within their respective federal authorities for the purposes of notification.⁸³ Each party can also designate points of contact within sub-state authorities. Many other key aspects of the agreement are yet to be negotiated, including requirements for post project monitoring and dispute settlement.

b) Security and Prosperity Partnership

The negotiations relating to the *Draft EIA Agreement* have remained in abeyance since 1998, notwithstanding that the Joint Policy Advisory Committee has on numerous occasions called for a “re-energizing” of the negotiations.⁸⁴ As noted in the introduction, it now appears that the parties have abandoned this process in favour of a parallel process under the Security and Prosperity Partnership of North America initiated in June 2005, at a leaders summit between Canada, the United States and Mexico.⁸⁵ The parties have committed to negotiate a TEIA Agreement by June 2007 or thereabouts, and that terms of reference for the discussions were to be drafted by Oct. 2005, although to date no details

⁸² The list draws on similar factors contained in regulation issued under *NEPA*.

⁸³ *Supra* n.76, Art. 4.1.

⁸⁴ Stephen Siciliano, “Nafta United Urges North America to Step up Transborder EIA Negotiations” *International Environmental Daily*, December 17, 2002, online: WL, BNA-IED.

⁸⁵ *Security and Prosperity Partnership of North America Report to Leaders*, June 2005, online: Foreign Affairs Canada < <http://www.fac-aec.gc.ca/spp/SPP-report.PDF> >. The Security and Prosperity Partnership is an initiative of the leaders of Canada, the United States and Mexico. It is not an international organization, nor is it supported in anyway by an institutional structure, such as a treaty body.

of this initiative have been disclosed.⁸⁶ It is unclear whether this process is a continuation of the CEC TEIA process under NAFTA that was commenced in the late 1990's, and the extent to which this process may differ substantively from the draft TEIA that was created through that process. To date no indication has been given as to which agencies may be involved in the development of a TEIA agreement under this process.

5. Future Prospects for Transboundary EIA in North America

Given the uncertain status of tri-lateral approaches to transboundary EIA, it is certainly open to question whether a tri-lateral approach to transboundary EIA in North America is a sensible strategy. The bi-lateral strategies that have met with some success have arisen in response to particular environmental concerns, and not out of a more general demand for continental environmental governance strategies. To a significant degree the environmental concerns facing the three North American countries are bi-lateral in nature, and it has been suggested that seeking tri-lateral solutions, such as the *Draft TEIA*, where there are issues regarding reciprocity may unnecessarily hinder the development of achievable bi-lateral agreements.⁸⁷ In this regard, John Knox suggests that the CEC is not well-suited to resolving North American transboundary pollution issues.⁸⁸

While I tend to agree with Knox's concerns regarding the role of the CEC and the prospects for effective tri-lateral cooperation concerning transboundary pollution generally, there may be some merit in continuing to work towards a continental approach to transboundary EIA, since all three countries share a common set of problems relating to transboundary EIA. Paramount among these issues is the clear need for transboundary coordination between federal and sub-state governments. The absence of minimum transboundary EIA obligations that are recognized by sub-state units is at the heart of

⁸⁶ Despite this commitment, the communication from an August 2006 leaders summit indicates that both of these time frames have been delayed, online: Foreign Affairs Canada <http://geo.international.gc.ca/can-am/main/right_nav/prosperity-en.asp>.

⁸⁷ Knox, *supra* n.38 at 89.

⁸⁸ *Ibid* at 91. It should be noted, however, that Knox remains of the view that the CEC has an important role as a source of environmental information on regulatory approaches in each country and in coordinating efforts respecting long range air pollution and continental air quality issues.

inter-state disputes regarding EIA obligations, such the Canadian concerns regarding the Garrison and Devil's Lake water diversion proposals. The central limitation to coordination of this nature is the reticence by all three countries to make significant adjustments to their domestic EIA programs. To some degree Canada has overcome some of these problems through federal – provincial harmonization agreements that recognize the federal government's international commitments. In U.S. jurisdictions, this kind of coordination may be more difficult due to the absence of comprehensive EIA legislation in key border jurisdictions. Although, it should be noted that institutions such as the BECC, the Border Governors Conference, the U.S. – Canada Air Quality Committee and environmental cooperation agreements between states and provinces have increased sub-state environmental coordination efforts along both borders. Many of these co-ordination efforts are occurring at an agency to agency level and are oriented towards establishing clear points of contact for transboundary issues and to providing improved processes for the exchange of environmental information. The bi-lateral approaches that have been successful have tended to focus on improving the coordination of existing EIA processes, as opposed to creating additional obligations and institutions. In cases where separate institutions have been created, such as the IJC, IWBC and the International Porcupine Caribou Board, they have shown mixed success.

Given the need to coordinate activities among a large number of governments, existing institutions and agencies, the conclusion of a uniform and comprehensive North American approach to transboundary EIA is a demanding task. Unlike the EU where the requirements for transboundary EIA could be imposed in a hierarchical manner through the European Community EIA Directive,⁸⁹ no such centralized authority exists in North America. In light of these complexities, the most fruitful short term strategy may be the negotiation of a framework agreement setting out the goals and broad principles for transboundary EIA upon which both levels of government in each country can agree upon. A framework approach could also identify key points of contact for purposes of notice and consultation and encourage the trend of increased inter-agency cooperation.

⁸⁹ EC, *Council Directive* 85/337, [1985] O.J. L 175/ 40, amended by EC, *Council Directive* 97/11, [1997] O.J. L. 73/5, and by EC, *Council Directive* 03/35.

Such an approach could provide for more detailed implementation measures to be negotiated through sub-state and agency agreements.⁹⁰ Finally, a framework approach may provide for a uniformity and reciprocity with respect to transboundary EIA at the level of principles, while recognizing at the level of implementation the need for more context specific and agency driven solutions. Such an agreement need not be formally binding, and given the reciprocity concerns, it may be advantageous for the parties to consider a soft law approach.

Framework and soft law approaches to the negotiation of international environmental governance arrangements have met with success across a wide variety of issue areas and are a common feature of North American environmental cooperation.⁹¹ In relation to transboundary EIA requirements, it is noteworthy that the *Espoo Convention* was preceded by the non-binding *UNEP EIA Goals and Principles*.⁹² Indeed, the *Espoo Convention* was originally conceived of as a framework requiring further bi-lateral agreements for implementation, but during the negotiation phase this approach was abandoned in favour of a treaty imposing direct obligations on the parties.⁹³ A second framework approach that has met with success is the coordination of trans-provincial environmental impacts and federal-provincial EIA responsibilities through an agreement negotiated between the respective federal and provincial Ministers of the Environment.⁹⁴ This agreement contemplated further bi-lateral agreements between both the federal government and individual provinces and agreements between

⁹⁰ This appears to be the approach anticipated by the Border Governors Conference who noted in 2005 that U.S. and Mexican states have worked on transboundary notification procedures but were awaiting a federal agreement in order to implement the program. See *supra* n.72 at 15.

⁹¹ For example, both the *U.S. – Canada Air Quality Agreement* and the *Porcupine Caribou Agreement*, discussed above contained language qualifying the formally binding nature of those agreements. There is a vast literature on the relative merits of hard law versus soft law approaches to international cooperation. For a good general discussion, see Kenneth Abbott and Duncan Snidal, “Hard and Soft Law in International Government” (2000) 54 *Int. Org.* 451.

⁹² UNEP Res. GC14/25, 14th Sess., (1987), endorsed by GA Res. 42/184, UN GAOR, 42d Sess., UN Doc A/Res/42/184 (1987)

⁹³ Discussed in Robert Connolly, “The UN Convention on EIA in a Transboundary Context: A Historical Perspective” (1999) 19 *Envtl Impact Assessment Rev.* 37.

⁹⁴ CCME Sub-Agreement on Environmental Assessment, *supra* n.22.

different provinces.⁹⁵ The case of a North America-wide agreement is complicated by the different levels of government and competing agency interests involved. However, some measure of comfort may be taken from the existing level of environmental coordination that exists bi-laterally on federal, sub-state and agency levels. In this regard, many of the basic principles of TEIA have been accepted, such as the need for early public notification and consultation, and the need for reciprocal access to environmental information. There is also broad agreement on more specific measures such as the use of the 100 kilometre zone in defining projects caught by TEIA obligations. A TEIA agreement should seek to capitalize on these arrangements as exemplars and to broaden their current scope; an approach that again would benefit from the flexibility afforded through a framework approach.

⁹⁵ See, for example, Agreement Between Quebec and New Brunswick Concerning Transboundary Environmental Impacts, entered into November, 2001, online: Government of New Brunswick < <http://www.gnb.ca/0009/0001-e.pdf> >.