environmental law?

D. Role of Non-State Actors

1. Public Participation and the Aarhus Co

Increasingly, it is not enough that States part
governance of international environmental regim
public participation is needed to confer legitimacy
is especially true when dealing with issues of comp

In 1998, the UNECE Convention on Access t
Participation in Decision-making and Acce
Environmental Matters was adopted in Aarhus, D
Convention links environmental protection and h
links government accountability and environm

focusing on interactions between the public and government authorities through formal administrative procedures. The Convention is forging a new process for public participation in the negotiation and implementation of international agreements, including in extending public access to its compliance mechanism. The following excerpt is from the decision establishing the compliance mechanism.

DECISION I/7 OF THE MEETING OF THE PARTIES, AARHUS CONVENTION, REVIEW OF COMPLIANCE, ANNEX (2002)

VI. COMMUNICATIONS FROM THE PUBLIC

18. On the expiry of twelve months from either the date of adoption of this decision or from the date of the entry into force of the Convention with respect to a Party, whichever is the later, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention, unless that Party has notified the Depositary in writing by the end of the applicable period that it is unable to accept, for a period of not more than four years, the consideration of such communications by the Committee. The Depositary shall without delay notify all Parties of any such notification received. During the four-year period mentioned above, the Party may revoke its notification thereby accepting that, from that date, communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention. * * *

20. The Committee shall consider any such communication unless it determines that the communication is:

(a) Anonymous;

(b) An abuse of the right to make such communications;

(c) Manifestly unreasonable;

(d) Incompatible with the provisions of this decision or with the Convention.

21. The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress. * * *

XII. CONSIDERATION BY THE MEETING OF THE PARTIES

37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, decide upon one or more of the following measures:

(a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;

(b) Make recommendations to the Party concerned;

(c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of

compliance with the Convention and to report on the implementation of this strategy;

(d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

(e) Issue declarations of non-compliance;

(f) Issue cautions;

(g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

(h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate. * * *

II. PRINCIPLES SHAPING INTERNATIONAL ENVIRONMENTAL LAW AND POLICY

A. STATE SOVEREIGNTY

Sovereign States are the primary subjects of international law, and as we saw in Chapter 6 on lawmaking, State sovereignty is important to international environmental law—indeed all international law—because of the fundamental tension between a State's interest in protecting its independence (i.e. its sovereignty) and the recognition that certain problems, in this case regional and global environmental problems, require international cooperation. Most international environmental treaties by their very nature constrain a State's sovereignty.

State sovereignty in the legal sense signifies independence—that is, the right to exercise, within a portion of the globe and to the exclusion of other States, the functions of a State such as the exercise of jurisdiction and enforcement of laws over persons therein. Sovereignty reflects the broad sweep of responsibilities, rights, authorities and powers that international law confers when it confers "Statehood."

Among the rights that attach to statehood is that of sovereign equality—that all States are treated equally as legal persons in international law. According to the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, Annex, U.N.G.A. Resolution 2625 (XXV) (Oct. 24, 1970) [hereinafter *1970 UN Declaration on International Law*]:

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> In particular, sovereign equality includes the following elements:
>
> 1. States are juridically equal;
>
> 2. Each State enjoys the rights inherent in full sovereignty;
>
> 3. Each State has the duty to respect the personality of other States;
>
> 4. The territorial integrity and political independence of the State are inviolable;
>
> 5. Each State has the right freely to choose and develop its political, social, economic and cultural systems.

The *1970 UN Declaration on International Law* provides evidence of a consensus within the United Nations on the meaning of certain principles in the UN Charter, and is thus widely considered to reflect customary international law.

Critical in the environmental context is the extent of territorial sovereignty.

> In spatial terms the law knows four types of regime: territorial sovereignty, territory not subject to the sovereignty of any state or states and which possesses a status of its own (trust territories, for

example), the *res nullius*, and the *res communis*. Territorial sovereignty extends principally over land territory and the territorial sea, its seabed and subsoil. The concept of territory includes islands, islets, rocks, and (in certain circumstances) reefs. . . . A *res nullius* consists of an area legally susceptible to acquisition by states but not as yet placed under territorial sovereignty. The *res communis*, consisting of the high seas (which for present purposes include exclusive economic zones) and also outer space, is not capable of being placed under state sovereignty. In accordance with customary international law and the dictates of convenience, the airspace above and subsoil beneath state territory, the *res nullius*, and the *res communis* are included in each category.

JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 203 (8th ed. 2012). Thus territorial sovereignty extends to the geographic borders of the country and to the underlying subsoil as well as the airspace overhead. States have sovereignty over inland waters, including groundwater, wholly within their boundaries and have substantial sovereign rights with respect to shared watercourses. Sovereignty over resources also extends outward through the Exclusive Economic Zone (EEZ) determined under the *Law of the Sea Convention* to be 200 nautical miles from the coast.

National sovereignty over the development of natural resources located within the State has been reaffirmed in many multilateral agreements, international declarations and resolutions. For example, the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, while obliging contracting States to co-operate in the protection of certain components of cultural and natural heritage, emphasizes full respect for the sovereignty of States in which territory the cultural and natural heritage is situated. *UNESCO World Heritage Convention*, Article 6. Similarly, the 1992 *Biodiversity Convention* affirms that States have sovereign rights over their biological resources and the authority to regulate access to genetic resources. *Biodiversity Convention*, Article 15; *see also Stockholm Declaration*, Principle 21; *Rio Declaration*, Principle 2.

Another manifestation of State sovereignty was the principle that all States enjoyed permanent sovereignty over the natural resources occurring within their territory. The principle emerged in the 1960s and 1970s in response to the concerns of former colonial States that most of the economic benefits received from the exploitation of natural resources in developing states were accruing to foreign corporations. Through the principle of permanent sovereignty over natural resources, the developing States reaffirmed their right to control the terms and conditions of how their resources would be exploited. They sought to ensure that the economic benefits from foreign investment in their countries would accrue to their long-term development. The flavor of developing country calls for permanent sovereignty over natural resources can be seen in the following General Assembly Resolution:

G.A. Res. 2158 (XXI), U.N. GAOR, Twenty-first Session (1966) (Sovereignty)

The General Assembly, * * *

1. *Reaffirms* the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development, in conformity with the spirit and principles of the Charter of the United Nations and as recognized in General Assembly resolution 1803 (XVII); * * *

3. *States* that such an effort should help in achieving the maximum possible development of the natural resources of the developing countries and in strengthening their ability to undertake this development themselves, so that they might effectively exercise their choice in deciding the manner in which the exploitation and marketing of their natural resources should be carried out;

4. *Confirms* that the exploitation of natural resources in each country shall always be conducted in accordance with its national laws and regulations;

5. *Recognizes* the right of all countries, and in particular of the developing countries, to secure and increase their share in the administration of enterprises which are fully or partly operated by foreign capital and to have a greater share in the advantages and profits derived therefrom on an equitable basis, with due regard to the development needs and objectives of the peoples concerned and to mutually acceptable contractual practices, and calls upon the countries from which such capital originates to refrain from any action which would hinder the exercise of that right;

6. *Considers* that, when natural resources of the developing countries are exploited by foreign investors, the latter should undertake proper and accelerated training of national personnel at all levels and in all fields connected with such exploitation;

7. *Calls upon* the developed countries to make available to the developing countries, at their request, assistance, including capital goods and know-how, for the exploitation and marketing of their natural resources in order to accelerate their economic development, and to refrain from placing on the world market non-commercial reserves of primary commodities which may have an adverse effect on the foreign exchange earnings of the developing countries.

State sovereignty, including its manifestations as territorial sovereignty and permanent sovereignty over natural resources, is not absolute. It is in fact challenged all the time in international law. For example, most of the international law of human rights is intended to place certain minimum conditions on a State's behavior toward individuals. In the environmental context, State sovereignty is subject to the general duty, not to harm the interests, including environmental interests, of other States (discussed below in Section II.G. of this chapter). More broadly, the emergence of the concept of a common concern of humankind (discussed below in Section II.D.) may present a challenge to State sovereignty. As our knowledge of the ecological

interrelatedness of the planet broadens, more activities or resources may qualify as "common concerns" of international society, which in turn provides conceptual justification for increasing international cooperation. For example, some observers argue that a State's sovereign right to pursue its own development path may now be conditioned to reflect the common goal of sustainable development. *See Rio Declaration*, Principle 3 (defining the right to development to include intergenerational equity).

QUESTIONS AND DISCUSSION

1. Despite the increasing recognition of the need for international cooperation in resolving transnational and global environmental issues, the principle of sovereignty over environment and development issues has been reaffirmed in many international agreements, declarations and resolutions. In this regard, recall the developing countries' opposition to making environmental issues a focus of international cooperation, prior to the Stockholm Conference. Among other things, the State sovereignty principle should remind us of the paramount importance of national level actions for protecting the environment and achieving sustainable development, as well as the critical need to build environmental capacity within all countries.

2. Determining the extent and scope of a State's sovereignty is not quite as straightforward as one might expect. For example, sovereign air space is generally considered to reach to the altitude achievable by ordinary manned flight. The actual height of this altitude changes, however, as technology allows manned aircraft to achieve higher and higher altitudes. *See* U.N. Doc. A/AC.105/C.2/7 (1970); C. STONE, THE GNAT IS OLDER THAN MAN 35 (1993). This is not just an academic exercise, because the rights to air space are quite valuable. For example, the value of equatorial orbits led the equatorial nations to claim that their sovereignty included the space orbits over their territories. Their claim has never been recognized by other nations.

3. State sovereignty is not only constrained by relationships with other states as defined in international law, but it may also be shaped by the empowerment of individuals (human rights) or communities (community rights). Indigenous peoples' assertions of sovereignty, for example, may be in conflict with state sovereignty. *See, e.g.*, the discussion of free, prior informed consent *infra* in Section II.O and the rights of indigenous peoples in Chapter 18.

4. Recall the discussion in Chapter 6 of Hart's "minimum content" of natural law that societies need for human survival. Which universal principles could you argue limit a State's sovereignty over its environment?

5. The 1966 Resolution on Sovereignty excerpted above was one of a series of General Assembly Resolutions extending through the 1960s and 1970s that developing countries promoted in an effort to create a New International Economic Order (NIEO). For reasons that should be obvious, the NIEO resolutions were typically opposed by the United States and other industrialized countries. As was discussed in Chapter 5, UN General Assembly resolutions are not binding law, and are viewed primarily as non-binding recommendations. The developing country concerns expressed in the NIEO resolutions nonetheless reverberate today in current discussions regarding environmental and social aspects of international investment law

and conflicts between investors and host-states, particularly developing countries (as discussed further in Chapter 17).

B. RIGHT TO DEVELOPMENT

At different times, the concept of a right to development has reflected several different approaches: first, the interest of developing countries to control and enhance their own development; second, the right of all peoples to enjoy the right of self-determination; and third an individual's right to enjoy a minimum quality of life. Because of these different conceptions of the right to development, its application can be confusing. The right to development, like the related concept of permanent sovereignty over natural resources, is a manifestation of the developing countries' aspirations for achieving greater economic independence and forming a more equitable international economic order. Protecting the right of all countries and peoples to choose their own development path, even if that means over-exploiting natural resources, is often a primary part of developing country agendas in international environmental negotiations. In addition, the right to a minimum level of development is tied closely to calls for economic justice and the need to alleviate poverty.

The UN General Assembly endorsed the right to development in its 1986 Declaration on the Right to Development, UNGA Res. 41/128, Annex (Dec. 4, 1986). Most countries endorsed the Declaration, with the exception of the United States. As you read the following excerpt, consider which of the different conceptions of a right to development seems to prevail in the Declaration.

Declaration on the Right to Development

A/RES/41/128, Annex (December 1986)

The General Assembly, . . .

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. * * *

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development. * * *

Article 6

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights. * * *

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

The following excerpt from Ian Brownlie helps clarify the history of the right to development as well as some of the politics surrounding adoption of the 1986 Declaration.

IAN BROWNLIE, THE HUMAN RIGHT TO DEVELOPMENT

1–2, 22–23 (1989)

2. The political and moral imperatives behind the value now described as the "right to development" are twofold. The first is that the individual State should be able to control its own economy and thus to develop in its own way. The second is the idea that economic development as such is inadequate and the performance of an economic system should be related to qualitative criteria based upon human rights standards: excellence is not to be calculated exclusively in accordance with economic criteria. * * *

53. The original motivation behind the concept of the right to development was the need to enhance the implementation of existing human rights standards and to stress the interdependence of civil and political rights, on the one hand, and the economic and social rights on the other hand. The ethical quantities behind the thinking included the fundamental nature of development, the international duty of solidarity for development, moral interdependence, economic interdependence, the maintenance of peace, and the moral duty to make reparation to developing countries for the period of colonial exploitation (see the Report of the Secretary-General, Doc. E/CN.4/1334, 2 January 1979, pp. 20–28). * * *

55. The right to development, as presented in the Declaration of 1986 and elsewhere, reflects the idea of entitlement and the corresponding duties, particularly of States. This is of major significance. However, it fails, almost completely, to give structure and content to the concept of economic justice. The *modus operandi* offered is fairly obscure but, in so far as it can be discerned, it consists partly of the insistence on the implementation of existing human rights standards, and partly of the duty of States to cooperate with each other in order to create conditions favourable to the realisation of the right to development.

56. Nothing is said about specific strategies for achieving levels of economic justice. No reference is made to the duty to provide development assistance as such. * * * No doubt the relative absence of specificity was the political price to be paid for attracting a very low score of contrary votes and abstentions.

57. The focus on human rights (as a sort of flag of convenience) has had the result that the *inter-State* connotations of economic equity have been weakened. Indeed, the focus on human rights may very well have increased the excuses for not giving economic aid, or for suspending existing programmes, as a form of non-forcible counter-measure on the basis that the potential recipient is not applying one or more human rights standards.

58. The extent to which the economic aspect of development and development assistance has been played down in the Resolution of 1986 is evidenced by the relative absence of "*developing* States" from the cast of subjects and, or, beneficiaries of the right to development. The principal exception is to be found in Article 4(2) [of the 1986 UN Resolution

excerpted above] . . . (and there is a reference also in Article 7). However, generally speaking, the emphasis is not on a polarity between developed and developing States, as it was in the resolutions of 1974 concerning the New International Economic Order and the Charter of Economic Rights and Duties of States.

In recent years, the United Nations has continued its efforts to promote the right to development, but more emphasis is now placed on implementation—through the alleviation of poverty and addressing inequitable development more generally—than on any potentially binding legal dimensions of the right. In this regard, consider the following UN General Assembly Resolution adopted in 2010, which reflects the United Nations' current approach to the right to development.

The Right to Development

UNGA Res. No. 64/172, March 24, 2010

The General Assembly, * * *

Recalling further that the Declaration on the Right to Development, adopted by the General Assembly in its resolution 41/128 of 4 December 1986, confirmed that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations, and that the individual is the central subject and beneficiary of development, * * *

Reaffirming the objective of making the right to development a reality for everyone, as set out in the U.N. Millennium Declaration . . . ; * * *

15. Stresses that the primary responsibility for the promotion and protection of all human rights lies with the State, and reaffirms that States have the primary responsibility for their own economic and social development and that the role of national policies and development strategies cannot be overemphasized; * * *

18. Stresses the need to strive for greater acceptance, operationalization and realization of the right to development at the international and national levels, and calls upon States to institute the measures required for the implementation of the right to development as an integral part of fundamental human rights; * * *

21. Recognizes that, despite continuous efforts on the part of the international community, the gap between developed and developing countries remains unacceptably wide, that most of the developing countries continue to face difficulties in participating in the globalization process and that many risk being marginalized and effectively excluded from its benefits;

22. Expresses its deep concern, in this regard, at the negative impact on the realization of the right to development owing to the further aggravation of the economic and social situation, in particular of developing countries, as a result of the ongoing international energy, food and financial crises as well as global climate change; * * *

24. *Urges* developed countries that have not yet done so to make concrete efforts towards meeting the targets of 0.7 per cent of their gross national product for official development assistance to developing countries and 0.15 to 0.2 per cent of their gross national product to least developed countries, and encourages developing countries to build on the progress achieved in ensuring that official development assistance is used effectively to help to meet development goals and targets; * * *

28. *Also recognizes* that good governance and the rule of law at the national level assist all States in the promotion and protection of human rights, including the right to development, and agrees on the value of the ongoing efforts being made by States to identify and strengthen good governance practices, including transparent, responsible, accountable and participatory government, that are responsive and appropriate to their needs and aspirations, including in the context of agreed partnership approaches to development, capacity-building and technical assistance;

29. *Further recognizes* the important role and the rights of women and the application of a gender perspective as a cross-cutting issue in the process of realizing the right to development, and notes in particular the positive relationship between women's education and their equal participation in the civil, cultural, economic, political and social activities of the community and the promotion of the right to development; * * *

30. *Stresses its commitment* to indigenous peoples in the process of the realization of the right to development, and reaffirms the commitment to promote their rights . . . ; * * *

QUESTIONS AND DISCUSSION

1. According to the Office of the UN High Commission on Human Rights, the right to development includes the following elements:

- full sovereignty over natural resources
- self-determination
- popular participation in development
- equality of opportunity
- the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights

Are there other elements that you think are necessary to achieve the right to development? Can you see how the right addresses both an individual's and a peoples' right?

2. Developing countries also brought their assertion of the right to development to the 1992 UNCED and succeeded to a great extent in ensuring that the *Rio Declaration* gave the right to development equal or perhaps even greater recognition than any obligations to protect the environment. Principle 3 of the *Rio Declaration*, for example, reads: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." This is immediately followed by Principle 4, which reads: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be

considered in isolation from it." Consider the following analysis from Professor Ileana Porras regarding these two principles:

> Many developed country delegates opposed the recognition of a right to development implied in Principle 3. There were two main lines of argument:
>
> (1) no such right existed (i.e. no such right had yet been recognized by the international community);
>
> (2) even if there were such a right, it was a limited right, constrained by natural limits (i.e. the limit of natural resources and that of the ecosystem to restore itself) and constrained by the principle of equity which required sustainable development.
>
> Finally, developed countries argued that Principles 3 and 4 should be combined. In insisting on their separation, developing country negotiators intended to ensure that the right to development would not be transformed into a right to "sustainable development."
>
> The meaning of these two principles is likely to be debated for years. On the one hand, Principle 4 provides that "environmental protection *shall* constitute an integral part of the development process" (emphasis added). On the other hand, this mandatory requirement is qualified by the preceding phrase "[i]n order to achieve sustainable development." Ambiguity remains as to whether the phrase "[i]n order to achieve sustainable development" is intended to be read as requiring States to pursue "sustainable development" or whether it simply sets up the definition of "sustainable development" in the mode of an aspiration. The juxtaposition of the two principles, however, suggests that not all development need be "sustainable" as the right to development set out in Principle 3 is unconditional, except to the extent that the purpose of the right to development is described as "to equitably meet the developmental and environmental needs of present and future generations." In considering the relationship between development and environment, the Rio Declaration thus appears to give pre-eminence to development. Environment and development are equal partners in "sustainable development" but the right to development comes before sustainable development.

Ileana Porras, *The Rio Declaration: a New Basis for International Cooperation,* in PHILIPPE SANDS, GREENING INTERNATIONAL LAW 25 (1994). Do you agree with Professor Porras' interpretation of the *Rio Declaration?* Does, for example, the conditioning of the right to development on meeting "environmental needs" in Principle 3 signal a more significant departure from the existing view of the right to development than recognized in the above passage? Do any other parts of the *Rio Declaration* shed light on the relationship or hierarchy between development and sustainable development? Has the right to development been transformed to a right to sustainable development?

3. The U.S. government persistently objects to the right to development in any formal sense. In signing Principle 3 of the *Rio Declaration*, for example, the United States attached the following interpretative statement:

> The United States understands and accepts the thrust of Principle 3 to be that economic development goals and objectives must be pursued in such a way that the development and environmental needs of present

and future generations are taken into account. The United States cannot agree to, and would disassociate itself from, any interpretation of Principle 3 that accepts a "right to development," or otherwise goes beyond that understanding. The United States does not, by joining in consensus on the Rio Declaration, change its long-standing opposition to the so-called "right to development." Development is not a right. On the contrary, development is a goal we all hold, which depends for its realization in large part on the promotion and protection of human rights set out in the Universal Declaration of Human Rights.

A/Conf.151/26/Rev.1 (vol. II). Do you agree with the U.S. position? Since Rio, the U.S. position has been refined somewhat and the United States now appears to support an individual's right to develop to his or her full potential. The United States still resists the right of development as a right of States to demand a certain level of development or, for example, to demand foreign assistance or technology transfers. How do you think the U.S. position will affect international environmental law?

4. The right to development (as well as the related principle of permanent sovereignty over natural resources, described above) are rooted in two different concerns of the United Nations: (a) the economic development of underdeveloped countries and (b) human rights and self-determination of peoples. These two concerns have sometimes led to uncertainty as to whether the principles apply to States or to peoples. Consider, for example, Article 22.1 of the African Charter on Human and Peoples' Rights, which states that "All *peoples* shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." (Emphasis added.) Similarly, Article 25 of the UN Covenant on Economic, Social and Cultural Rights as well as Article 47 of the UN Covenant on Civil and Political Rights emphasize the right of all peoples to benefit from their natural resources: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." What practical significance does it make whether the right to sovereignty over natural resources is a human right, a right of peoples or a right of States?

C. COMMON HERITAGE OF HUMANKIND

State sovereignty and the principles and rights that derive from it have historically been applied to the natural resources within a State. Yet, over half of the world's surface area lies outside the national borders of any one State. Those areas beyond the limits of national jurisdiction—the high seas, the sea-bed, Antarctica, outer space, and possibly the outer atmosphere, including the ozone layer—are frequently referred to as the "global commons." Resources in the global commons are outside the territorial reach of States, and the concept of sovereignty does not readily apply. For many global commons resources, most notably the high seas fisheries, the general rule has been the right of capture—i.e. whoever captures a fish or other resource has the right to it. Concerned that this right of capture penalizes developing and land-locked states, participants in the Law of the Sea Convention and other negotiations perceived a need for a new conceptual framework to

harm, discussed above in Section H. [illegible] not to cause environmental [illegible] Principle 21 of Pays Principle should be extended to inter-State disputes?

K. GOOD NEIGHBORLINESS AND THE DUTY TO COOPERATE

The obligation for States to cooperate generally with their neighbors in addressing international issues is a binding principle of international law. This is not a new principle, but rather an enduring component of international law for the past 200 years:

> Natural resource management has been a subject of international law-making for well over two hundred years—starting with bilateral and regional regulatory agreements and dispute settlement arrangements over the shared utilization of water, wildlife and fisheries in transboundary area, and over the allocation and exploitation of "fugitive" marine resources outside national jurisdiction. What emerged during that period—especially under the label of "vicinage" or "good neighbourship law" (*bon voisinage*, *Nachbarschaftsrecht*)—were typical territorial regimes of reciprocity, either between contiguous states or for the users of geographical areas customarily designated as "global commons".

Peter H. Sand, *The Evolution of International Environmental Law* in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (2006).

Good neighborliness and the duty to cooperate are reflected in part in Article 1.3 of the UN Charter, which includes among the purposes of

the United Nations "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character. . . ." The *1970 UN Declaration of Principles on International Law* elaborated the general obligation to cooperate in the following way:

> States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.
>
> To this end:
>
> a. States shall co-operate with other States in the maintenance of international peace and security;
>
> b. States shall co-operate in the promotion of universal respect for and observance of human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance;
>
> c. States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention;
>
> d. States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter.
>
> States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth through-out the world, especially that of the developing countries.

Declaration of Principles on International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N.G.A. Res. 2625 (Oct. 24, 1970), *reprinted in* 9 I.L.M. 1292 (1972). No mention of environment is made in the UN Charter nor in the *1970 Declaration of Principles on International Law*. As discussed in Chapter 4 on the history of international environmental law, environmental issues did not emerge on the international agenda until the 1972 Stockholm Conference. Stockholm legitimized international cooperation in the field of the environment; after Stockholm the UN Charter's reference to the duty to cooperate in the "economic, social and cultural fields as well as in the field of science and technology" implicitly included cooperation regarding the global environment.

Principle 24 of the *Stockholm Declaration* stated the obligation in the following way:

> International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means

Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities (2001):

Article 7: Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Article 8: Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Article 9: Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

As noted in the ILC Draft rules, environmental impact assessment, notification, and consultation are all connected as a set of procedural requirements governing interstate relations where there exists the risk of transboundary impacts.

QUESTIONS AND DISCUSSION

1. Under what circumstances might a State be obligated to provide prior notification to another State, but not be required to enter into good faith consultations?

2. *Problem Exercise.* Although the concept of prior notification and consultation seems relatively straightforward, implementing it can be difficult. Obstacles might include language differences between countries, differences between the legal, social or economic cultures of the countries, and a lack of institutional relations for exchanging information and

is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

Similarly, according to the final principle of the *Rio Declaration* (Principle 27), "States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development." Other principles in the *Rio Declaration* require or at least urge international cooperation to address a number of issues related to sustainable development, including *inter alia* poverty alleviation, capacity-building, the conservation, protection and restoration of the Earth's ecosystem, the relocation and transfer of pollution, and the maintenance of an open international economic system. More recently, the International Law Commission has found that states "shall cooperate in good faith . . . in preventing significant transboundary harm or at any event in reducing the risk thereof." ILC Draft Articles on the Prevention of Transboundary Harm for Hazardous Activities, Art. 4 (2001).

Much of international environmental law relates to fulfilling this general obligation to cooperate in investigating, identifying, and avoiding environmental harms. Over time the duty to cooperate in the environmental context has led to the development of more specific duties relating, for example, to the need to notify and consult with potentially affected States, described below.

L. DUTIES TO PROVIDE PRIOR NOTIFICATION AND TO CONSULT IN GOOD FAITH

The principle of prior notification obliges States planning an activity to transmit to potentially affected States all necessary information sufficiently in advance so that the latter can prevent damage to its territory. In the environmental context, the *Rio Declaration*, for example, requires States to "provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect."

This requirement of prior notification is often closely connected to the obligation to consult in good faith. The principle of consultation requires States to allow potentially affected States an opportunity to review and discuss a planned activity that may have potentially damaging effects. The acting State is not necessarily obliged to conform to the interests of affected States, but should take them into account. The principle has been reiterated in various other declarations and conventions, frequently including a requirement that the consultation be "in good faith and over a reasonable period of time." Although conceptually at least the duty to notify could exist in situations where no duty to consult exists, in practice the two requirements are typically linked together as suggested by the following provisions from the ILC's

conducting consultations. Design a notification and consultation regime for proposed projects affecting the U.S.-Mexico Border. Consider, for example, how the notification will be provided, to whom, and what it will contain. Consider, too, what forms of consultation will be required.

3. Consultation is often institutionalized through standing international bodies (for example, the U.S.-Canada International Joint Commission, the Nordic Council, or the European Council) and through new institutions created in the framework of a specific environmental convention. *See* Chapter 5 (discussing the authority of Conferences of the Parties and treaty secretariats). What advantages for notification and consultation do permanent institutions provide?

4. For more on the principles of prior notification and good faith consultation, *see, e.g.*, *OECD Council Recommendation on Principles Concerning Transfrontier Pollution*, *reprinted in* 14 I.L.M. 242 (1975); *London Guidelines for the Exchange of Information on Chemicals in International Trade*, UNEP G.C.Dec. 15/30, Art. 11 (May 25, 1989); *Montreal Rules of International Law Applicable to Transfrontier Pollution*, Art. 8 (International Law Association, 1982); UNEP, *Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared By Two or More States*, Principles 6, 7 (1978); *Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden, done* Feb. 19, 1974, 1092 U.N.S.T. 279 (1974), *reprinted in* 13 I.L.M. 591 (1974); *see also* Lac Lanoux Arbitration (Fr. v. Spain), 24 I.L.R. 101 (1957), discussed *infra* in Chapter 13.

M. THE PRINCIPLE OF PRIOR INFORMED CONSENT

The principle of prior informed consent (PIC) has two manifestations: (1) a requirement that when one State plans to operate in another State that it must seek that State's prior informed consent and (2) a requirement emanating from indigenous rights that communities, particularly indigenous communities, have the right to give (or withhold) their free, prior informed consent to activities that affect them.

Prior Informed Consent when Operating in Another State. Note that the obligation of notification and consultation does not typically require States to receive the consent of the affected State. Thus in a typical situation involving transboundary environmental harms, a country (State A) planning to build in its own territory a factory causing pollution or some other harm would be under an obligation to assess the environmental risks, notify an affected State (State B) and enter into good faith negotiations with State B, but there would be no requirement to gain State B's consent.

If State A actually sought to act in the territory of State B, however, simple notification and consultation are typically not sufficient. Thus, for example, a party to the Basel Convention that seeks to dispose of hazardous wastes in another State must inform the importing State of the nature of the wastes and receive the written consent of the importing State. For other activities requiring prior

informed consent, see *Basel Convention*, Art. 6 (4) (transporting hazardous wastes through a State); *International Atomic Energy Agency Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, Art. 2 (lending emergency assistance after a nuclear accident); *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (exporting domestically banned chemical substances); *Convention on Biological Diversity*, Art. 15(5) (prospecting for genetic resources); and *Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species*, Principle 10 (intentionally introducing alien species into another country).

Prior Informed Consent from Communities, particularly Indigenous Communities. For indigenous peoples, their claims of sovereignty over their traditional lands and self-determination includes the right to provide (or withhold) consent to activities that are proposed in their traditional lands. Their approach to prior informed consent thus emanates from sovereignty just as does that of the States. According to Article 32 of the UN Declaration on the Rights of Indigenous Peoples:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *see also, e.g.*, ILO Convention No. 169, Art. 6(2) (requiring consultations to have the "objective of achieving agreement or consent") Saramaka People v. Suriname, Judgment of the Inter-American Court of Human Rights, April 2007; *Marie and Carrie Dann Case (United States)*, Inter-Am. C.H.R., Report No. 75/02, Case No. 11.140, OEA/Ser.L/VII.116, Doc. 46 (Dec. 27, 2002); *The Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)*, Case No. 11.577, OEA/Ser. L/V/II.102, Doc.6 rev. (2000); *see generally* Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, SUST. DEV. L & POL'Y, Summer 2004, at 43. The rights of indigenous peoples are discussed further in Chapter 18.

QUESTIONS AND DISCUSSION

1. What practical difference is there between a general duty to cooperate and more specific obligations to consult in good faith or to receive prior informed consent? Is one just a subset of the other?

2. The World Bank Group has wrestled with the issue of FPIC with respect to indigenous peoples for more than a decade. The 2001 Extractive Industries Review sponsored by the World Bank concluded that "indigenous peoples and other affected parties do have the right to

participate in decisionmaking and to give their free, prior and informed consent throughout each phase of a project cycle. FPIC should be seen as the principle determinant of whether there is a 'social license to operate' and hence is a major tool for deciding whether to support an operation." The EIR thus recommended that the World Bank require project sponsors to obtain the free, prior informed consent of affected communities as a condition of Bank support for extractive industry projects. *See* STRIKING A BETTER BALANCE: THE WORLD BANK AND EXTRACTIVE INDUSTRIES, FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW (Dec. 2003).

Pressured from both sides, the Bank came up with compromise language that projects would require "free, prior informed consultation leading to broad community support." In light of the UN Declaration on the Rights of Indigenous Peoples and other developments, the Bank's compromise has been less defensible and the International Finance Corporation, the private sector arm of the World Bank, in 2012 amended its Performance Standards to include free, prior, and informed consent for indigenous peoples in certain circumstances including where projects may result in the relocation of indigenous peoples from traditional lands, significant impacts on critical cultural heritage, or the use of indigenous peoples' knowledge, innovations or practices. IFC Environmental and Social Performance Standards, Standard 7, paras. 13–17 (2012).

N. DUTY TO ASSESS ENVIRONMENTAL IMPACTS

Environmental impact assessment (EIA) is the process for assessing the impact of proposed activities, policies or programs to integrate environmental issues into development planning. The EIA process should ensure that *before* granting approval (1) the appropriate government authorities have fully identified and considered the environmental effects of proposed activities under their jurisdiction and control and (2) affected citizens have an opportunity to understand the proposed project or policy and to express their views to decisionmakers.

The ICJ has appeared to recognize that states are under an obligation to conduct an EIA, at least where there are potential impacts on a shared resource. In its 2010 decision in the Uruguay-Argentina Pulp Mills case, the ICJ found that the bilateral treaty in question in that case had:

> to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river of the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, para. 204. *See also In the Matter of the Indus Waters Kishenganga Arbitration (Ind. v. Pak)*, Partial Award, INT'L CT OF ARB. para. 450 (18 Feb. 2013). The Court further found, however, that the content of the obligation to conduct an EIA, at least with respect to the requirements to assess alternatives and to consult with affected communities, was solely a matter of domestic law.

The ICJ thus joined many commentators in recognizing that there is an international law duty to conduct an EIA in the transboundary context. *See* ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Article 7 (2001) ("Any decision in respect of the authorization of an activity . . . [should] be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment); UNEP, Principles on Shared Natural Resources, Principle 4 (1978) ("States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource"); the 1991 UNECE Convention on EIA in a Transboundary Context (specifying a State's obligations related to transboundary environmental impact assessment for the forty-five parties that have ratified it).

In addition to the obligation to conduct an EIA in the transboundary context, many international instruments, international institutions, and most countries now require some form of EIA even where there is no transboundary impact. As a result, the source and content of the obligation to assess environmental impacts may be different, depending on whether the impacts relate to transboundary impacts as noted above or to global environmental issues, the activities of international institutions, or solely national environmental impacts.

Global Environmental Issues. EIA is increasingly used as a specific mechanism to further the goals of global environmental treaties. For example, Article 14 of the Biodiversity Convention states that the signatories shall as far as possible and appropriate:

> Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

Part of the purpose in these global treaties is to ensure that specific environmental impacts are included and given full consideration in the normal course of implementing domestic EIA laws. By emphasizing the role of EIA, global treaties also heighten the profile of the specific environmental issue (say biodiversity conservation) at the national level, thus ensuring that national governments integrate these issues into their development planning. *See, e.g., Climate Convention*, Art. 4(1)(f); *Law of the Sea Convention*, Art. 206; *World Charter for Nature*, Principle 11(c); *Wellington Convention on the Regulation of Antarctic Mineral Resources Activities*, Arts. 37(7)(d)–(e), 39(2)(c), 54(3)(b), *reprinted in* 27 I.L.M. 868 (1988).

EIAs at International Institutions. EIAs have also become common requirements for many international institutions, particularly those that support development projects that could affect the environment. All of the multilateral development banks, for example, have environmental assessment policies that apply to their project activities. The World Bank's Operational Directive on Environmental Assessment, O.D. 4.01, explains the purpose of Environmental Assessment (EA) for the Bank's international lending activities:

> The purpose of EA is to improve decision making and to ensure that the project options under consideration are environmentally sound and sustainable. All environmental consequences should be recognized early in the project cycle and taken into account in project selection, siting, planning, and design. EAs identify ways of improving projects environmentally, by preventing, minimizing, mitigating, or compensating for adverse impacts. These steps help avoid costly remedial measures after the fact. By calling attention to environmental issues early, EAs (a) allow project designers, implementing agencies, and borrower and Bank staff to address environmental issues in a timely and cost-effective fashion; (b) reduce the need for project conditionality because appropriate steps can be taken in advance or incorporated into project design, or alternatives to the proposed project can be considered; and (c) help avoid costs and delays in implementation due to unanticipated environmental problems. EAs also provide a formal mechanism for interagency coordination on environmental issues and for addressing the concerns of affected groups and local nongovernmental organizations. In addition, the EA process plays an important role in building environmental management capability in the country.

World Bank, OD 4.01, para. 2 (Oct. 1991). The U.S. export credit and insurance agencies, namely the Overseas Private Investment Corporation and the Export-Import Bank, have also all adopted some form of EIA procedures. *See* Export-Import Bank Environmental Procedures and Guidelines, http://www.exim.gov/; OPIC Environmental Handbook (Feb. 2004), http://www.opic.gov/; *see also* the OECD Common Approaches on the Environment and Officially Supported Export Credits, Doc. No. TAD/ECG2012(5), http://www.olis.oecd.org/; and the Equator Principles III (2013), www.equator-principles.com (providing environmental standards for commercial banks).

International Obligation to Implement EIA at National Level. Less clear than the obligation to assess environmental impacts in the transboundary context is whether States are obligated to assess the impacts of planned activities that are expected to have impacts solely *within* their borders. Principle 17 of the *Rio Declaration* states: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." Thus, the *Rio Declaration* suggests that EIA is required for public projects presenting significant environmental impacts regardless of where they are expected to occur. *See also UNEP Governing Council Decision: Goals and Principles of Environmental Impact Assessment*, UNEP/GC.14/17, Annex III, June 17, 1987

(reprinted in the *Treaty Supplement*); *EEC Council Directive: Assessment of the Effects of Certain Public and Private Projects on the Environment*, Dir. No. 85/337, June 27, 1985; WCED Legal Experts Group, Article 5.

A strong argument could be made that the duty to assess environmental impacts has become a part of customary law. Considerable state practice certainly exists, with well over 150 countries having a domestic environmental impact assessment law. Many judicial decisions in many countries have also enforced the obligation to conduct environmental impact assessment under these laws. *See, e.g.*, Northern Jamaica Conservation Assoc. v. National Resources Conservation Authority, Jam. Sup. Ct., Claim No. HCV 3022 of 2005 (2006); Rodgers Muema Nzioka, et al. v. Tiomin Kenya Ltd., High Court of Kenya at Mombasa, Case No. 97 of 2001; Mundy vs. Central Environmental Authority, et al., Sup.Ct. of Sri Lanka (SC Appeal 58/2003) (20 Jan. 2004). Less evident is the extent to which the state practice on environmental impact assessment is due to a belief that the State is required under international law (i.e. the requirement of opinio juris). Some observers argue alternatively that EIA is a general principle of international law. Whether considered custom or a general international principle, EIA is central to the global practice of environmental law. *See, e.g.*, Tseming Yang & Robert Percival, *The Emergence of Global Environmental Law*, 36 ECO. L. Q. 615 (2009).

QUESTIONS AND DISCUSSION

1. In the Argentina-Uruguay Pulp Mills case, the Court found that the obligation to conduct an environmental impact assessment was a "general obligation in international law." The Court did not otherwise provide support for its position. What source of international law do you think the Court was relying on? In the case, both Argentina and Uruguay agreed that there was an obligation to assess impacts, but they disagreed on whether international law provided any guidance as to the content of the obligation. In this respect, the Court agreed with Uruguay finding that Uruguay's domestic law provided the applicable standards for the environmental assessment. If you were handling the next case before the ICJ, how would you argue that the obligation to conduct an EIA should include minimum requirements, such as a review of alternatives or consultation with affected people? What research and analysis would you need to provide the Court?

2. A number of critical issues in the national implementation of EIAs can be seen in the formulation of Principle 17 of the *Rio Declaration*. First EIAs only need be done for *significant adverse impacts*. Some country laws use "substantial" impacts as the threshold for triggering the EIA requirement. The Principle also only applies to decisions of a "competent national authority," which limits the application of the EIA to government decisions at the national level. An alternative approach might have encouraged countries to apply EIAs to subnational and local decisions, as well.

3. Article 10.7 of the North American Agreement on Environmental Cooperation, instructs the parties (Canada, Mexico and the U.S.) to negotiate an agreement on assessing the transboundary environmental impacts of proposed projects. In response, the U.S. Council on Environmental Quality (CEQ) issued a *Guidance on NEPA Analyses for Transboundary Impacts*.

> Neither the National Environmental Policy Act (NEPA), 42 U.S.C. secs. 4331–4344 nor the . . . CEQ regulations implementing NEPA define agencies' obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, which are caused by the action, are later in time or farther removed in distance, but are still reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem, as well as cumulative effects. Case law interpreting NEPA has reinforced the need to analyze impacts regardless of geographic boundaries within the United States, and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States that could have environmental effects within the United States.
>
> In sum, based on legal and policy considerations, CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States.

Council on Envtl. Quality, *Guidance on NEPA Analyses for Transboundary Impacts*, at 2–4 (July 1, 1997). What are the practical difficulties in implementing this guidance? How could acceptance of the UNECE Transboundary EIA Treaty or similar agreement help to facilitate implementation? Is this guidance useful as State practice for demonstrating that the obligation to study transboundary environmental impacts is part of customary law?

4. One of the primary reasons for conducting environmental assessments is to inform the public of proposed projects and to engage them in a meaningful dialogue about the potential benefits and environmental and social costs of a proposed activity. Public participation is included in many EIA regimes. *See, e.g.*, Int'l Bank for Reconstruction and Development, Operational Policy 4.01, at paras. 15–16 (January 1999). Environmental assessment is thus closely linked to the principle of public participation, discussed next.

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0. PUBLIC PARTICIPATION AND ACCESS TO INFORMATION

The rights of public access to information and participation in achieving environmental protection and sustainable development are becoming increasingly recognized among governments at both the domestic and international levels. Along with the exponential growth in non-governmental organizations interested in sustainable development issues, the trend toward recognizing the right of the public, particularly locally affected communities, to participate in the environment and development decisions that affect their lives is transforming the way international policy is made.

Principle 10 of the Rio Declaration sets forth the general parameters of the principles of public participation, access to information and access to justice in environmental decisionmaking: