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PRACTICAL APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW: DOES IT WORK ATOLL?

Martin D. Gelfand*

I. INTRODUCTION

Between September 5, 1995 and January 24, 1996, France undertook a new round of nuclear testing in the South Pacific at the Mururoa Atoll, a ring-shaped coral island surrounding a lagoon in French Polynesia. France started testing nuclear weapons in the Pacific in 1966, and prior to this latest round, tested 175 nuclear weapons through 1991. The forty-one tests conducted between 1966 and 1974 were atmospheric, and the 134 tests conducted between 1975 and 1991 were underground. The latest tests have also been underground.

France's decision to resume nuclear testing in the Pacific fueled the flames of worldwide opposition. France contends that it is entitled to

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3 See id.


5 See, e.g., id. (reporting condemnation of the tests from New Zealand, Australia, and Japan); France Conducts Second Nuclear Test in South Pacific, DEUTSCHE PRESSE-AGENTUR, Oct. 2, 1995, available in LEXIS, World Library, Allworld File (reporting U.S. opposition to the testing as indicated by White House spokesman Michael McCurry announcing that the United States "regretted" the French tests and "urge[d] all of the nuclear powers, including France, to refrain from further nuclear tests"); Philip Shenon,
test the weapons underground at Mururoa because the atoll is on French sovereign territory. National leaders in the South Pacific, however, are concerned about potential environmental damage to their countries. France counters that the testing is safe. Others are not so sure.

Since the 1970s, there has been a proliferation of international law instruments that attempt to address issues such as the French nuclear testing controversy of 1995-96. Using the nuclear testing controversy as a case study, this Note explores the state of international environmental law. Specifically, it tracks the international community's progress in restating transboundary environmental law. It suggests ways to resolve international environmental law's real-world inadequacies.

Commonwealth Opposes Major on A-Tests, N.Y. TIMES, Nov. 11, 1995, at 7 (reporting statement issued by the fifty-two nation British Commonwealth at its summit in Auckland, New Zealand, on Nov. 10, 1995. Although British Prime Minister John Major was the sole dissenter to the statement, Prince Philip, husband of Queen Elizabeth II, made the royal family's opposition to the testing known: "There is suspicion that [the testing is] doing damage. If you're concerned with conservation, you want to make sure it isn't."); Jane Holligan, Non-Aligned Movement Shifts 'South,' UPI, Oct. 19, 1995, available in LEXIS, World Library, Allwld File (reporting that the 113-nation Non-Aligned Movement "strongly deplores nuclear testing" in the Pacific); Big Turnout in French Anti-Nuclear Protest, REUTER EUR. COMMUNITY REP., Oct. 15, 1995, available in LEXIS, World Library, Allwld File (reporting on the Oct. 14, 1995 demonstration that drew 10,000 French demonstrators outside France's main submarine base to protest the testing); Daniel Plesch & Simon Whitby, France's Bomb, Our Problem, N.Y. TIMES, Sept. 30, 1995, at 19 (stating that "[t]o date, 150 countries have criticized the underground weapons tests at the Mururoa Atoll in French Polynesia that resumed this month after three years and that are to continue into 1996.").


See, e.g., Shenon, supra note 4 (stating that the promise that France will sign a comprehensive test ban treaty "has done little to placate the people who live in the South Pacific nations closest to the test site, and who say earlier nuclear tests there wreaked havoc with wildlife and human health").


See, e.g., E.U.: Nuclear Tests - Team of Experts Did Not Have Access to Important Surveillance Systems, Reuter Textline, Oct. 18, 1995, available in LEXIS, World Library, Allwld File. The team leader of a European Union verification mission to the Mururoa Atoll reported that his experts did not have access to environmental monitoring systems and "because of this, it is impossible to give an unreserved view on the efficiency and adequacy of the overall surveillance system in place." Id.; see also discussion infra notes 84-92 and accompanying text.

See Part III.B infra.
Part II tracks the development of international law models that speak to the question of how to determine whether one sovereign state is entitled to injunctive relief when another sovereign state is engaging in environmentally hazardous activity. Part II.A discusses the precedent set in the *Trail Smelter Case*, a controversy between the United States and Canada in the 1920s and 1930s that culminated in a landmark 1941 arbitral decision requiring proof of a "cause in fact" before an affected party could attain relief from an environmentally damaging project. Part II.B discusses the legacy of a landmark 1970 U.S. statute, the National Environmental Policy Act (NEPA). NEPA requires proponents of a project with a potentially significant environmental effect to conduct environmental impact assessments and make those assessments available to the public. As discussed below, the legacies of these two models are quite different: the 1940s model provides that damages must be proved while the 1970s model places the burden on the party engaging in the activity to show that damages will not likely occur, or is the better alternative. Part II.C discusses general trends in international law relating to this topic, including the proliferation of NEPA-style international agreements.

Part III discusses additional historical and political issues at stake in the South Pacific. Part IV analyzes the recent controversy in the South Pacific in light of the 1940s and 1970s models discussed, focusing on the body of international environmental law that utilizes the 1970s model. Part IV.A explores how applying the various international environmental treaties, where possible, should have enjoined France from testing its weapons, at least until the required environmental impact assessments were completed under current international law. Part IV.B explains why that did not happen. Part IV.C provides alternatives that may be applicable to another similar situation, should it arise. These alternatives include using equity principles, customary international law to hold parties to their obligations, and rethinking the dispute resolution provisions of international environmental treaties. The rethinking process should include an examination of recent multilateral trade agreements as an appropriate model for revising dispute resolution language in international environmental agreements.

Part V concludes by acknowledging the positive impact the 1970s model treaties have had on international environmental law and encourag-
ing affected states to be forceful and creative in exercising these treaties to enforce their requirements on proponent states. Looked at in this light, affected states in the future may find greater success in exercising their rights under the many international environmental agreements now in force or approved for ratification.\textsuperscript{16} However, 1970s model treaties are limited by ineffectual dispute resolution provisions that need to be reworked to include effective enforcement.

II. THE INTERNATIONAL ENVIRONMENTAL LAW MODELS

A. The 1940s Model: The Trail Smelter Case

One of the first and most important cases in modern international environmental law is the \textit{Trail Smelter Arbitration}.'\textsuperscript{17} A lead and zinc smelter in the town of Trail, British Columbia, just north of the Canadian-U.S. border, emitted sulfur dioxide that caused damage to farms and timber across the border in the United States.\textsuperscript{18} In its final decision in 1941, the tribunal for the \textit{Trail Smelter Case}, composed of one judge each from the United States and Canada, as well as a chief judge from Belgium,\textsuperscript{19} decided that:

\begin{itemize}
  \item \textit{Trail Smelter}, 3 R.I.A.A. at 1917-19. Although the case dealt with law and equity, this Note only considers the equity questions. Article 3 of the Convention for Settlement of Difficulties from Operation of Smelter at Trail, B.C., 49 Stat. 245 (1935), T.S. No. 893 (ratified Aug. 3, 1935), set out the questions as follows:
    \begin{enumerate}
        \item Whether damages caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?
        \item In the event that the answer to the first part of the preceding Question, being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent?
        \item In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained at the Trail Smelter?
        \item What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?
    \end{enumerate}

\textit{Id.} at 1908. For purposes of this Note, only Question 2 will be considered.

\item \textit{Trail Smelter}, 3 R.I.A.A. at 1908 (stating that "[t]he Tribunal shall consist of a chairman and two national members. The chairman shall be a jurist of repute who is

Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. 20

The Trail Smelter Case introduces the old Roman law concept of *sic utere ut alienum non laedas* – one should use one's own property in such a manner as not to injure that of another21 – to modern international environmental law.22 Quoting Professor Eagleton, the tribunal stated, "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction."23 The International Court of Justice (I.C.J.) adopted this principle in the Corfu Channel Case in which British naval personnel were killed and warships damaged by mines that, although not traced directly to the Albanian government, were known to that government.24 The I.C.J. thus found Albania liable for damages under the *sic utere* principle.25 The *sic utere* principle has also been included in the Restatement of Foreign Relations Law of the United States § 601(1)(b):

A state is obligated to take such measure as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control . . . are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.26

The 1940s model, as articulated in the Trail Smelter case, while focusing on the *sic utere* principle, modifies that principle with the requirement of showing causation.27 One problem with the 1940s

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20 Id. at 1965.
23 Trail Smelter, 3 R.I.A.A. at 1963 (citing C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 80 (1928)).
25 Id. at 23.
26 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1986) [hereinafter *RESTATEMENT*].
27 See supra notes 19-20 and accompanying text.
model's causation requirement is that it, in effect, allows one state to pollute another state up to a threshold at which damage is found.28 This problem inevitably leads to a second problem: determining, in a reliable manner, what that threshold is.29 Finding causation in general, let alone in environmental damage claims, is fraught with misunderstanding.30 Environmental damages present a special kind of causation problem because of the time lag between act and injury and uncertainties associated with proof.31 Proof is difficult in environmental injury cases because plaintiffs are often able to show only a "causal link" rather than "but-for cause."32 Causation in cases involving delayed pathological injuries such as nuclear accidents, nuclear testing, and other catastrophic environmental incidents, are practically impossible unless the effects of the accident are immediate.33 In U.S. environmental law, tort-type damage claims have "proved to be a crude mechanism at best for controlling the onslaught of modern-day pollution."34 Thus, the ability of the 1940s model to resolve situations such as that in the South Pacific is limited, where damage has to be proved, but the risks remain significant.35

28 See Rubin, supra note 17, at 281.
30 See generally Richard W. Wright, Causation in Tort Law, 73 CAL. L. REV. 1735, 1737 (1985). "In all of tort law, there is no concept which has been as pervasive and yet elusive as the causation requirement, which relieves a defendant of liability if his tortious conduct was not a cause of the plaintiff's injury." Id. (citations omitted); David A. Bagley, The United States and International Nuclear Civil Liability, 18 BROOK. J. INT'L L. 497, 575, 576 (1992) (stating that "[t]here is no facet of the law of tort that is more elemental, and more often taken for granted in legal analysis, than the requirement of causation in fact.").
32 See id. at 583 n.30 and accompanying text.
33 See Bagley, supra note 30, at 576. "The principal culprits are those of indeterminate and indeterminable causes. That is, similar injuries can be caused (albeit less severely) by non-nuclear causes and from radiation from other than nuclear sources, such as medical treatment and even the sun." See id. at 576 n.341.
35 See discussion infra notes 84-92 and accompanying text.
B. The 1970s Model: National Environmental Policy Act (NEPA)

One way to avoid some of the problems of assessing damage after it happens is to take a proactive approach: assess potential damage of a project in an attempt to prevent the damage from happening.36 The 1970s model places emphasis on findings in a publicly executed environmental impact assessment before a project actually takes place. The pioneering piece of legislation requiring an assessment is the U.S. National Environmental Policy Act of 1970 (NEPA).37 On January 1, 1970, U.S. President Richard Nixon signed NEPA into U.S. domestic law.38 NEPA's declaration of policy states that "it is the continuing policy of the Federal Government . . . to use all practical means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations . . ."39 Despite such lofty goals, NEPA's methodology for achieving them is modest. NEPA requires all federal agencies to include a detailed statement of the environmental

38 See PERCIVAL, supra note 34, at 1023.
impact of any proposed action. NEPA further requires agencies to make the detailed statement available to the public.

Unlike other U.S. environmental legislation of the 1970s, NEPA merely requires federal agencies to consider the likely environmental effects of their projects. The "detailed statement" described in paragraph (C) that assesses the "environmental impact" of a project in subparagraph (i), outlined above, has come to be known in U.S. law as the Environmental Impact Statement and elsewhere generally as the Environmental Impact Assessment (EIA). The requirement of public participation in the EIA process, however, is emphatic, and failure to comply with this requirement could potentially derail a project.

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40 42 U.S.C. § 4332(2) (1990). Specifically, § 4332(2)(C) requires that:

[A]ll agencies of the Federal Government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environment effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with [appropriate Federal agencies]. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review process[.]


43 PERCIVAL, supra note 34, at 1024.


45 See PERCIVAL, supra note 34, at 109.

NEPA revolutionized environmental policy making not by imposing any substantive environmental controls, but rather by mandating changes in the decision-making process
One commentator, William Tilleman, considered NEPA’s emphasis on public participation, outlined six reasons for such emphasis, including: (1) improving the quality of development decisions through consultation; (2) empowering the public to participate in conflict resolution; (3) restructuring the way proponents select activities; (4) saving long-term costs by predicting and avoiding environmental damage; (5) advancing communication and understanding; and (6) providing an agreed-upon procedural framework. Tilleman uses, by way of illustration, the hypothetical scenario of a proposed pulp mill. Although the question at law may be simply whether to approve the project, a broad sample of public input will help establish priorities that include a broader perspective of the immediate short-term goal in question and other possible alternatives. For example, issues raised might include whether the government allows the cutting of timber for feedstock to the mill or whether to preserve the timber, promote recycling, and enhance the resource base for future generations. Tilleman notes, however, that greater public participation means greater delay, greater costs to run the system, and greater risks.
Generally, the EIA has become widespread in international agreements, U.N. resolutions, and in the writings of legal scholars.50 One major multi-lateral treaty that includes the requirement to conduct an EIA is the Law of the Sea.51 Article 204 of the Law of the Sea requires that states, through competent international organizations, “observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.”52 Article 205 requires that states “publish reports of the results obtained” in their EIAs, or provide the reports to the competent international organizations for them to make available to all states.53 The Law of the Sea was approved on April 30, 1982, by 130 votes in favor, four opposed, and seventeen abstentions.54 The Convention was ratified by the requisite sixty signatories55 when the government of Guyana deposited its ratification on November 16, 1993.56

The Law of the Sea’s approval by the United Nations, even before its ratification, was an indication that the NEPA principles have made their way into customary international law.57 In a case between Tunisia

50 Klein-Chesivoir, supra note 36, at 525.
52 Id. art. 204.
53 See id. art. 205.
55 See LAW OF THE SEA, supra note 51, art. 308(1) (indicating that sixty “instrument[s] of ratification or accession” were needed for ratification and that the “Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession.”).
57 Statute of the International Court of Justice, 59 Stat. 1055 (1945), T.S. No. 993, at 25. Article 38 of the Statute of the International Court of Justice provides that decisions in accordance with international law shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59 [providing that decisions of the Court have no binding force except between the parties and in respect of that particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
and Libya, for instance, the International Court of Justice recognized language in the Law of the Sea after its approval but before its ratification as text that has codified preexisting principles of international law.58 The I.C.J. explained that it “could not ignore any provision of the draft convention if it came to the conclusion that the content of such provision is binding on all members of the international community because it embodies or crystallizes a preexisting or emergent rule of customary law.”59

Article 38 of the Vienna Convention on the Law of Treaties indicates that third party states may be bound by international agreements if such agreements are recognized as customary international law.60 Section 102(3) of the Restatement (Third) of Foreign Relations states: “International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are in fact widely accepted.”61 It is more likely that such agreements create customary international law when the agreement is “multilateral[,] is designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states.”62 Such is the case with the Law of the Sea: other than the dispute settlement provisions, most of the environmental protection provisions of the Law of the Sea now reflect customary international law.63

C. Application of the 1970s Model: Slouching Toward Mururoa

Although sixty-three states have ratified the Law of the Sea as of February 3, 1994, France has not.64 Neither New Zealand, Australia, Japan, nor the United States have ratified the agreement, though all but the United States have signed it.65 Two other treaties that incorporate the EIA requirement of the 1970s model do, however, include France among its signatories: the Noumea66 and Espoo Conventions.57

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58 See Sohn, supra note 54, at 278.
59 Id. (citing the Case Concerning the Continental Shelf (Tunis. v. Libyan Arab Jamahiriya) 1982 I.C.J. 18, 38. The question of how practices and agreements get crystallized into international law is further developed in section IV.B.1.
61 Restatement, supra note 26, § 102(3).
62 Id. § 102, cmt i.
63 Id. at pt. V Introductory Note, pt. VI Introductory Note.
64 See Status of the Law of the Sea, supra note 56.
65 See id.
66 Convention for the Protection of the Natural Resources and Environment of the
1. Noumea

The Convention for the Protection of the Natural Resources and Environment of the South Pacific Region was done at Noumea, New Caledonia on November 25, 1986, and is known as the “Noumea Convention.” Article 2 of the Noumea Convention states that the Convention applies to the South Pacific Region “Convention Area” in or near the Pacific Ocean within 200 nautical miles of the various signatory states. Article 12 states: “The Parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices.” Article 16 provides for EIAs to be done in accordance with the public access provisions in NEPA. Article 31 provides for the Convention’s entry into force.


Noumea Convention, supra note 66, art. 1(1).

Id. art. 2.

Id. art. 2. The signatories are: Cook Islands, France, Marshall Islands, New Zealand, Palau, the United States, Federated States of Micronesia, Nauru, the United Kingdom, and Western Samoa. Recent Actions Regarding Treaties to which the United States is a Party, 26 I.L.M. 1736, 1736 (Nov. 1987).

Noumea Convention, supra note 66, art. 12.

Id. art. 16. The text of Article 16 reads in full:

Environmental Impact Assessment

1. The Parties agree to develop and maintain, with the assistance of competent global, regional and sub-regional organisations as requested, technical guidelines and legislation giving adequate emphasis to environmental and social factors to facilitate balanced development of their natural resources and planning of their major projects which might affect the marine resources in such a way as to prevent or minimize harmful impacts on the Convention Area.

2. Each Party shall, within its capabilities, assess the potential effects of such projects on the marine environment, so that appropriate measures can be taken to prevent any substantial pollution of, or significant and harmful changes within, the Convention Area.

3. With respect to the assessment referred to in paragraph 2, each party shall, where appropriate, invite:

(a) public comment according to its national procedure,

(b) other Parties that may be affected to consult with it and submit comments.

The results of these assessments shall be communicated to the [South Pacific Commission], which shall make them available to interested parties.

Id. (emphasis added); Cf. 42 U.S.C. § 4332(2)(C) (1990) (both instruments mandate to their respective constituencies, inter alia, the publication of analyses of the potential environmental impacts of proponents’ projects, along with ways to minimize or reduce such effects. Both instruments require the proponents to make the EIAs available to the
into force upon "the thirtieth day following the date of deposit of at least ten instruments of ratification, acceptance, approval or accession." The Noumea Convention entered into force on August 22, 1990.

2. Espoo

The "Convention on Environmental Impact Assessment in a Transboundary Context" was done at Espoo, Finland on February 25, 1991, and is known as the "Espoo Convention." The Espoo Convention is a multilateral agreement that codifies the NEPA EIA principles. Specifically, Article 2 of the Espoo Convention requires an environmental impact assessment for each of several enumerated activities in Appendix I. Nuclear testing is not one of the seventeen enumerated activities.

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List of Activities

1. Crude oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.
2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).
3. Installations solely designed for the production or enrichment of nuclear fuels, for the reprocessing of irradiated fuels or for the storage, disposal and processing of radioactive waste.
4. Major installations for the initial smelting of cast-iron and steel for the production of non-ferrous metals.
5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20,000 tonnes finished product; for friction material, with an annual production of more than 50 tonnes finished product; and for other asbestos utilization of more than 200 tonnes per year.
6. Integrated chemical installations.
7. Construction of motorways, express roads and lines for long-distance railway traffic and of airports with a basic runway length of 2,100 metres or more.
8. Oil and gas pipelines.
Other activities may be treated as such enumerated activities if such activity is "likely to cause a significant adverse transboundary impact and thus should be treated as if it [were] listed." As of June 11, 1991, twenty-nine states had signed the Espoo Convention. However, Espoo is not yet in force, as sixteen states have yet to ratify the agreement as required by Article 18. France is a signatory to the Espoo Convention, though it has not yet ratified the agreement.

D. The Trail Smelter Test Applied to Mururoa

The international law theory that arose from the Trail Smelter case offered injunctive relief from a proponent state only if (1) the consequence of the proponent state's action is serious, and (2) the affected state can establish by clear and convincing evidence that it was injured. Part one of the 1940s model test is easily met by evidence brought forward by New Zealand before the I.C.J. on September 11, 1995. New Zealand Attorney General Paul East testified before the I.C.J. that the noted French volcanologist, Professor Pierre Vincent, who has studied the Mururoa Atoll, believes that "[a]ll of the factors now known to be conducive to destabilisation of volcanoes . . . are present at Mururoa."
These factors, including major weathering and fracturing of materials, as well as steep sides, leave Mururoa vulnerable to potential immediate adverse effects of even one additional underground nuclear explosion. According to Professor Vincent, "[t]he immediate consequence of such a destabilisation would be a sudden spill-out of part of the radioactive "stockpile" into the sea and the formation of a tidal wave – or, more accurately speaking, a tsunami – which would threaten the lives of those living not only in Mururoa but in neighbouring archipelagoes."

Attorney General East also submitted the findings of Dr. Colin Summerhayes, the Director of the Institute of Oceanographic Sciences in the United Kingdom, who stated that, "[v]olcanic islands like Mururoa are inherently unstable and may fail, given an appropriate trigger like an earthquake or a very large explosion. Failure is likely to cause a giant submarine landslide that may demolish parts of the island and could create a tidal wave that may itself damage coastal installations on the other islands nearby." Dr. Summerhayes also stated that the creation of such a tidal wave was "a general threat to coasts as far away as New Zealand and Australia." However, the second test of the 1940s model cannot be met without the showing of actual injury to the affected state. Thus, part two of the 1940s model test will not be met unless the catastrophes foreseen by Professor Vincent and Dr. Summerhayes actually occur and are shown with "clear and convincing evidence."

III. A LOOK AT THE HISTORICAL AND POLITICAL CONTEXT FROM AN ENVIRONMENTAL PROTECTION PERSPECTIVE

A. Nuclear Test Cases Revisited

In discussing the transition from the 1940s model to the 1970s model, it is appropriate to mention the Nuclear Test Cases in which New Zealand and Australia sought to enjoin France from testing nuclear weapons in the atmosphere at Mururoa. In 1974, the I.C.J. “ducked the issue” by dropping the case against France when France announced that it was going to stop atmospheric testing. However, France did not stop

87 Id.
88 Id.
89 Id.
90 Id.
92 See id.
95 See id. (explaining that New Zealand and Australia complained that states have
testing, but merely switched to underground testing.\textsuperscript{96} France continued to test underground through 1991 and resumed its testing in 1995.\textsuperscript{97}

New Zealand reopened its 1974 case against France upon France's 1995 decision to resume testing. Since France terminated its recognition of the I.C.J.'s compulsory jurisdiction in 1974, New Zealand could not merely file a new cause of action.\textsuperscript{98} Instead, New Zealand's case was based on paragraph 63 of the I.C.J.'s 1974 decision, which provides that "if the basis of this Judgment were to be affected, the applicant could request an examination of the situation in accordance with the provisions of this Statute."\textsuperscript{99} New Zealand argued that the basis of the I.C.J.'s judgment is affected because new information had emerged that showed the environmental hazards of the underground tests are more dangerous and immediate than was previously known.\textsuperscript{100}

On September 22, 1995, the I.C.J. again ducked the issue by ruling narrowly that the basis of its 1974 decision was not affected, holding that the 1974 decision "dealt exclusively with atmospheric nuclear tests."\textsuperscript{101} France announced in 1974 that it would stop conducting atmospheric tests. Since New Zealand's "objective [had] in effect been accomplished," with respect to stopping the atmospheric testing, the I.C.J. ruled that "the object of the claim [has] clearly disappeared [and therefore] there is nothing on which to give judgment."\textsuperscript{102} In order for the basis to change, a right to be free from the hazardous increased radiation due to fallout from the atmospheric testing that France was conducting at Mururoa Atoll). France conducted its last atmospheric test in 1974 and switched to underground testing starting in 1975. \textit{See id.} When France publicized its decision to cease atmospheric testing, the I.C.J. dropped the case. \textit{See id.} "Press statements do not often have legal effect at international law, but this one did." \textit{Id.}

\textsuperscript{96} \textit{See New Zealand Brief, supra} note 2 (indicating that after 1975 all tests were conducted underground).

\textsuperscript{97} \textit{See id.; see also discussion supra} notes 1-9 and accompanying text.

\textsuperscript{98} \textit{1973-74 I.C.J. Y.B.} 49.


\textsuperscript{100} 1995 I.C.J. at 367-68.

\textsuperscript{101} \textit{Id.} at 306. The court noted that in the 1974 case, "the Court reached the conclusion that Judgment dealt exclusively with atmospheric nuclear tests [and that] consequently, it is not possible for the Court now to take into consideration questions relating to underground nuclear tests . . . ." \textit{Id.} at 306. "[T]he Court cannot, therefore, take account of the arguments derived by New Zealand, on the one hand from the conditions in which France has conducted underground nuclear tests since 1974, and on the other hand from the development of international law in recent decades -- and particularly the conclusion, on 25 November 1986, of the Noumea Convention . . . ." \textit{Id.}

\textsuperscript{102} \textit{Id.} at 305.
the court ruled, France would have to once again test atmospheric weapons.\textsuperscript{103}

B. A Proliferation of Paper Instruments

In its brief to the I.C.J., New Zealand cited the Noumea Convention and France's obligations thereunder.\textsuperscript{104} Specifically, New Zealand cited Article 16, which delineates the Convention's signatories' obligation to perform an EIA.\textsuperscript{105} New Zealand also cited Article 12, requiring signatories to "take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices."\textsuperscript{106} New Zealand argued that "this reference to nuclear testing does not exclude such activity from the clear duty expressed in Article 16 to carry out an [EIA]."\textsuperscript{107} New Zealand also cited several other international agreements to show that conducting EIAs is required by customary international law "in relation to any activity which is likely to cause significant damage to the environment, particularly where such effects are likely to be transboundary in nature."\textsuperscript{108} These agreements, all requiring EIAs where applicable, include the United Nations Environmental Programme Draft Principles of Conduct;\textsuperscript{109} the United Nations Law of the Sea;\textsuperscript{110} the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources;\textsuperscript{111} the 1985 European Community Envi-

\textsuperscript{103} Id. at 305-06.
\textsuperscript{104} See New Zealand Brief, supra note 2, at 36-44.
\textsuperscript{105} See Noumea Convention, supra note 66 (citing art. 16 in full); see also New Zealand Brief, supra note 2, at 37 (also citing art. 16 in full).
\textsuperscript{106} Noumea Convention, supra note 66, art. 12.
\textsuperscript{107} New Zealand Brief, supra note 2, at 38, \S 76.
\textsuperscript{108} Id. at 44, \S 89.

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.

Id. at 1098 (citations omitted).

\textsuperscript{110} See LAW OF THE SEA, supra note 49, at 73.
\textsuperscript{111} See ASEAN Agreement on the Conservation of Nature and Natural Resources, Kuala Lumpur July 19, 1985, reprinted in 2 SELECTED MULTILATERAL TREATIES IN THE FIELD OF THE ENVIRONMENT 343 (Iwona Rummel-Bulska & Seth Osafo eds. 1991). Article 14(1) provides that parties conducting activities "which may significantly affect the natural environment conduct an assessment of their consequences . . . ." Id. at 347. Article 20(3) requires parties "to make environmental impact assessment before engaging in any activity that may create risk of significantly affecting the environment
Environmental Assessment Directive;\textsuperscript{112} the 1989 World Bank Operational Directive;\textsuperscript{113} the 1991 Protocol on Environmental Protection to the Antarctic Treaty;\textsuperscript{114} the 1992 Convention on Biological Diversity;\textsuperscript{115} and the 1991 Espoo Convention.\textsuperscript{116}

In 1992, there were approximately 885 different environmentally oriented legal instruments,\textsuperscript{117} compared with less than three dozen such instruments in 1972.\textsuperscript{118} One commentator, in assessing the instruments that have been proliferating over the last twenty years, noted: "Although these treaties are indisputably impressive in intellectual achievement and praiseworthy in effort, it can readily be seen that the treaties will only be effective if applicable everywhere or nearly everywhere, on a largely unconditional basis."\textsuperscript{119} Another commentator, critiquing the EIA requirements, notes:

A duty to inform mandates nothing; it provides no guidance about whether and how pollution source states should alter their behavior in light of new information. Adherence to duties of prior assessment and disclosure will scarcely reduce transboundary pollution. Thus, the shift to procedural obligations renders compliance with international law inconsequential for actually protecting the environment.\textsuperscript{120}

Professor McDougal recognized that traditional approaches to international law have "ranged from the view, at one extreme, that international law is not law at all but mere rules of international morality [to] the other extreme, that international law dictates the concept of national law."\textsuperscript{121} Professor McDougal sought a more central position: a "world public order which maintains an appropriate creative balance between the

\textsuperscript{116} Espoo Convention, supra note 67.
\textsuperscript{119} Bagley, supra note 30, at 537 n.174.
\textsuperscript{120} Developments, supra note 22, at 1513.
inclusive, shared competence of the entire community of states and the exclusive, non-shared competence of particular states . . . ." Each state, Professor McDougal argues, has "a double interest in such inclusive competence." Analogizing the McDougal principle to the situation in the South Pacific and other potential situations, we begin to see the problem that New Zealand and other states face with respect to international environmental law. The inclusive, shared competence is reflected in a group of states that share a common marine system. This group acknowledges that by signing regional and global treaties that recognize, as articulated in the Noumea Convention, "the special hydrological, geological and ecological characteristics of the region which requires special care and responsible management." The exclusive, non-shared competence reflects the sovereignty of each individual state and the basic responsibility of each of them to protect its territory and population.

On the one hand, if international law is to mean anything, it is in the application, not in the "indisputably impressive ... intellectual achievement and praiseworthy ... effort" of its publicists. On the other hand, this impressive body of work represents the efforts of scholars, politicians, and activists who drafted, negotiated, and lobbied for their states' signatures and ratification. As such, it can serve as an important set of tools that, taken together, can be skillfully and effectively implemented. The following section discusses how two such instruments, the

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122 Id. at 26.
123 Id.
124 Noumea Convention, supra note 66, at pmbl.
125 See Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905, 1919 (1941). It is worth noting that the claims made by the United States against Canada in the Trail Smelter Case were primarily those of private U.S. citizens complaining of damage and injury caused by a private Canadian corporate "citizen." Id. Yet the United States did not sue Canada on behalf of those citizens, at least not outright. Rather, the United States took action to protect its sovereign rights. The arbitral tribunal recognized this relationship:

The controversy is between two Governments involving damage occurring in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada), for which damage the latter has assumed by the Convention an international responsibility. In this controversy, the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned" . . . and of "interested parties" . . . and although the damage suffered by individuals may, in part, "afford a convenient scale for the calculation of the reparation due to the State."

See id. at 1912-13 (citing Judgment No. 13, Permanent Court of Int’l Justice, Series A, No. 17, at 27-28).

126 Bagley, supra note 30, at 537 n.174.
Noumea and Espoo Conventions, may be merged to result in a powerful, but limited, effect.

IV. CAN SOUTH PACIFIC STATES PROTECT THEMSELVES FROM RADIOACTIVE CONTAMINATION?

A. Merging a “Do” Treaty with a “How-To” Treaty

Did New Zealand or other South Pacific states have forums other than the I.C.J. to voice their dispute with France over the resumption of nuclear tests at the Mururoa Atoll? Though the I.C.J. refused to address the issue, the 1970s model, as codified in the various treaties outlined above, is theoretically equipped to address situations such as those faced by New Zealand and its neighbors.\footnote{127} Although it would be far outside the scope of this Note to look at the hundreds of instruments\footnote{128} that incorporate the 1970s model into their codification of international law, two of these instruments, the Noumea and Espoo Conventions, are instructive in an analysis of how the 1970s model might be applied to the situation at hand.\footnote{129}

Any discussion of implementation and enforcement of a treaty must begin with the principle from Roman law of pacta sunt servanda (agreements of the parties must be observed).\footnote{130} This principle “embodies a widespread recognition that commitments publicly, formally and (more or less) voluntarily made by a nation should be honored.”\footnote{Pacta sunt servanda was codified into the United Nations Conference on the Law of Treaties at Vienna on May 22, 1969, and was entered into force in 1981.} Article 26 of the Vienna Convention states: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”\footnote{132}

The Noumea Convention was not specifically geared toward EIAs, but rather to protect the environment of the South Pacific, particularly,

\footnote{127}{See discussion infra notes 210-16 and accompanying text.}
\footnote{128}{See discussion supra notes 109-16 and accompanying text.}
\footnote{129}{See generally Noumea Convention, supra note 67; Espoo Convention, supra note 67.}
\footnote{130}{See 1973-74 I.C.J. Y.B. 49.}
\footnote{131}{Id.}
\footnote{132}{Vienna Convention, supra note 61, art. 26.}
\footnote{133}{Id.}
that of the defined Convention Area.\textsuperscript{134} The requirement for EIAs\textsuperscript{135} was just a part of the overall objective of the Noumea Convention. Other than the requirement for conducting EIAs, as described above in Article 16, the Noumea Convention gives little guidance as to how EIAs are to be conducted.\textsuperscript{136} While New Zealand accurately described in its brief to the I.C.J. what France's responsibilities were, the Noumea Convention itself does not specify, for instance, what should be included in an EIA, or what procedures are prescribed for executing compliance with Article 16's requirements.\textsuperscript{137}

The Noumea Convention may be described as a "Do" treaty, mandating that the parties do protect the environment of the Convention Area.\textsuperscript{138} Among the items that the Noumea Convention requires France to do, as described above, is to prevent pollution from nuclear testing as delineated in Article 12: "The Parties shall take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices."\textsuperscript{139} The Mururoa Atoll is part of French Polynesia which is described in Article 2 as part of the Convention Area.\textsuperscript{140} As discussed in Part II.B, EIAs provide a means of preventing some of the problems associated with proof of causation after

\textsuperscript{134} See generally, Noumea Convention, supra note 66, at pmbl (providing goals such as preserving traditions and cultures in the South Pacific, recognizing the "hydrological, geological and ecological characteristics of the region," seeking harmonious resource protection and development, etc.).

\textsuperscript{135} See Noumea Convention, supra note 66, art. 16.

\textsuperscript{136} See id.

\textsuperscript{137} Id. (providing the full text of a fairly bare-boned call to signatories of the Noumea Convention to conduct EIAs but providing very little guidance as to what is supposed to be in an EIA and what procedural methodology is to be followed for ensuring the public notification requirements are met).

\textsuperscript{138} See Noumea Convention, supra note 66, art. 6 (requiring parties to prevent pollution from vessels); id. art. 7 (requiring parties to prevent pollution from land-based sources); id. art. 8 (requiring parties to prevent pollution from sea-bed activities); id. art. 9 (requiring parties to prevent pollution from atmospheric discharges); id. art. 10 (requiring parties to prevent pollution from waste disposal activities); id. art. 11 (requiring parties to prevent pollution from toxic and hazardous waste storage); id. art. 12 (requiring parties to prevent pollution from nuclear testing); id. art. 13 (requiring parties to prevent pollution from mining and dredging operations); id. art. 14 (requiring parties to protect endangered species of flora and fauna); id. art. 15 (requiring parties to prevent pollution during emergency response operations). Id.

\textsuperscript{139} Id. art. 12.

\textsuperscript{140} See generally id. (including French Polynesia in the list of states to be included in describing the "convention area").
an environmental injury has occurred.\textsuperscript{141} By taking a proactive approach, EIAs assess potential damage of a project to prevent the damage from happening.\textsuperscript{142} Therefore, to comply with Article 12 of the Noumea Convention, France is required to submit an EIA as prescribed by Article 16.

The Noumea Convention anticipates its own procedural, or "How-To" gaps.\textsuperscript{143} Article 4 of the General Provisions, encourages further international law-making by providing that the "[p]arties shall endeavor to conclude bilateral or multilateral agreements . . . for the protection, development and management of the marine and coastal environment of the Convention Area" consistent with the Noumea Convention.\textsuperscript{144} Article 5 encourages parties to formulate and adopt "other Protocols prescribing agreed measures, procedures and standards to prevent, reduce and control pollution form all sources . . . ."\textsuperscript{145} It also requires the parties to "establish and adopt recommended practices, procedures and measures to prevent, reduce and control pollution" in cooperation with competent international organizations.\textsuperscript{146} It follows, therefore, that the drafters foresaw that the Noumea Convention instrument alone would not be sufficient to carry out its stated goals and that further agreements, protocols, and procedures would be required.

What is needed, therefore, is a "How-To" instrument that provides further guidance on how to comply with, among other things, the EIA requirement of Article 16 of the Noumea Convention. As international environmental instruments go, the Espoo Convention fits the bill. The Espoo Convention was developed with the specific purpose of creating a system "to give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment, at all appropriate administrative levels, as a necessary tool to improve the quality of information presented to decision makers . . . .\textsuperscript{147}

The Espoo Convention begins, as does the Noumea Convention, with a goal-oriented declaration: "The Parties shall . . . take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."\textsuperscript{148} The

\textsuperscript{141} See discussion supra notes 36-63 and accompanying text.
\textsuperscript{142} See discussion supra notes 36-63; see also Klein-Chesivoir, supra note 36, at 517.
\textsuperscript{143} See discussion infra notes 144-46 and accompanying text.
\textsuperscript{144} Noumea Convention, supra note 66, art. 4(1).
\textsuperscript{145} Id. art. 5(3).
\textsuperscript{146} Id. art. 5(4).
\textsuperscript{147} Espoo Convention, supra note 67, at pmbl. (emphasis added).
\textsuperscript{148} Id. art. 2(1).
Espoo Convention continues by articulating the requirement for an EIA,\textsuperscript{149} referring the reader to Appendix II which lists the EIA’s content requirements.\textsuperscript{150} Article 3 covers notification provisions, requiring that the proponent state notify all potentially affected states and engage in “effective consultations” with such states.\textsuperscript{151} It also requires that the notification include any information on the proposed activity’s possible transboundary effect, the nature of its possible decision on the matter, and a reasonable time to respond to the notification.\textsuperscript{152} Article 3 also sets up action requirements for the affected parties and other concerned parties.\textsuperscript{153} In sum, where the Noumea Convention dedicated three short paragraphs to EIA requirements, the Espoo Convention is dedicated to both the substantive provisions of an environmental protection instrument and the procedural requirements of the EIA. The Espoo Convention, therefore, provides the procedural, or “How-To” fillers for the Noumea Convention’s gaps.\textsuperscript{154}

B. Roadblocks on the Highway to Espoo

That the Espoo Convention is not yet in force is not in itself a problem, as signatories to international agreements are “obliged to refrain from acts that would defeat the object and purpose of the agreement.”\textsuperscript{155} Thus, even though Espoo is not yet in force, its terms oblige its signatories, France included.

The bigger problem for New Zealand and other South Pacific states is that they are not signatories to the Espoo Convention.\textsuperscript{156} As noted above, there are hundreds of international environmental instruments in

\textsuperscript{149} Id. art. 2(2).

\textsuperscript{150} Id. app. XII. Content requirements include: (a) description and purposes of the proposed activity; (b) description of reasonable alternatives; (c) description of environment likely to be affected; (d) description of the potential environmental impact; (e) description of mitigation measures to minimize impacts; (f) relevance and reliability of data used; (g) uncertainties; (h) measurement and monitoring requirements; and (i) non-technical summary with visual presentation as appropriate. Id. Compare note 72, supra (text of the Noumea EIA requirement) with note 41, supra (text of NEPA EIA requirement).

\textsuperscript{151} Espoo Convention, supra note 67, art. 3(1).

\textsuperscript{152} Id. art. 3.

\textsuperscript{153} Id.

\textsuperscript{154} See discussion supra notes 147-55 and accompanying text.

\textsuperscript{155} RESTATEMENT, supra note 26, § 312(3); see also Vienna Convention, supra note 60, art. 1.

\textsuperscript{156} See supra note 80.
effect today. Generally, it behooves a state to know what these instruments are, what is contained in them, and whether it is to its tactical and strategic advantage in a given or anticipated situation to sign such an instrument. If, for example, New Zealand was a signatory to both the Noumea and Espoo Conventions, as is France, then New Zealand could more easily make the case that France is accountable for both the substantive requirements of Noumea and the procedural requirements of Espoo. Generally, international agreements are “binding upon the parties to it . . .”

On the other hand, in circumstances where successive international agreements are made, the Restatement of Foreign Relations articulates the following formula:

Section 323. Successive International Agreements . . .

(2) When all the parties to the earlier agreement are also parties to the later agreement, the earlier agreement applies only to the extent that its provisions are compatible with those of the later agreement.

(3) When the parties to the later agreement do not include all the parties to the earlier one,

(a) as between states parties to both agreements the rule in Subsection (2) applies;

(b) as between a state party to both agreements and a state party to only one of the agreements, the agreement to which both states are parties governs their mutual rights and obligations.

Thus, it could be argued that only the Noumea Convention governs the mutual rights and obligations of both France and New Zealand and that the Espoo Convention does not apply.

Notwithstanding the fact that the I.C.J. refused to consider whether France violated Article 16 of the Noumea Convention, France argued before the court that it complied with Article 16, but was under no obligation to comply with the Espoo Convention. Marc Perrin de Brichambaut, Director of Legal Affairs at the French Ministry of Foreign

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157 See discussion supra notes 104-26 and accompanying text.
158 See generally discussion supra notes 130-33 and accompanying text (explaining the Roman pacta sunt servanda concept). Pacta sunt servanda “lies at the core of the law of international agreements and is perhaps the most important principle of international law.” RESTATEMENT, supra note 26, § 321, cmt. a.
159 Id. § 323.
160 See note 101 and accompanying text.
161 See Nuclear Tests (N.Z. v. Fr.) (English translation of Verbatim Record of Sept. 12, 1995 at 10:00 a.m.) at 64-74 [hereinafter Verbatim Record] (on file with author).
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Affairs, testifying before the court, correctly noted, "Despite its name, 'impact assessment,' this type of measure leaves each State, including under the [Noumea] treaty arrangements, with a considerable discretion as to how it ensure, before undertaking potentially dangerous activities, that the effect of such activities on the environment will not be detrimental." Mr. de Brichambaut argued that "France has from the outset publicized its testing by circulating details directly to the United Nations," noting, however, that "France, like other nuclear powers, has to classify some information, but this does not make the test safety data any less credible. Mr. de Brichambaut criticized New Zealand "citing pell-mell provisions of conventions not yet in force, such as the Espoo Convention . . . to produce a massive effect and convince the Court of the existence of a particularly dense and binding corpus juris necessarily implying recourse to a concept" of a structurally rigid codification of EIA procedure. In conclusion, Mr. de Brichambaut argued:

Even though we have willingly demonstrated the precautions taken by France, which, as the Court has seen, are supported by widely circulated scientific data, it still remains that international law recognizes no ecological exception in the matter of evidence. Environmental law, like other fields of law, obeys the well-known principles of actori incombit probatio [proof rests on the plaintiff], and therefore New Zealand must base its allegations on something other than the worst-case scenarios encouraged by the undeniable talent of its counsel. Specifically, in connection with damage that can be equated with transboundary damage, so often found where the environment is concerned, the International Court of Justice in its Judgment in the Corfu Channel case rejected the plea of self-evidence and we do not believe that international law on this point has changed.

The French Legal Affairs Director thus summarized his argument by raising the fundamental issue in the broader context of environmental law: does international environmental law embrace the 1940s model or the 1970s model? His position is that the 1940s model, requiring the plaintiff to show damages, is controlling. New Zealand, on the other

163 Id. at 68.
164 Id. at 73.
165 Id.
166 Id. at 67; see also New Zealand Brief, supra note 2, at 44-49 (discussed supra notes 108-16 and accompanying text, summing up New Zealand's argument about customary environmental law that Mr. de Brichambaut is refuting).
167 Verbatim Record, supra note 162, at 73-74.
168 See discussion supra notes 17-63 and accompanying text.
hand, follows the 1970s model, asking the court to show deference to the preventative EIA concept that has been appearing in the more recent international environmental instruments. As noted, the I.C.J. did not address this issue, but instead focused narrowly on the procedural question of whether it was authorized to review any French nuclear testing other than the atmospheric testing that was at issue in the 1974 decision.\textsuperscript{169} The remainder of this Note focuses on how, if at all, a state in a situation similar to that of New Zealand can attempt to enforce France's, or any other state's, obligation under 1970s model international environmental agreements.

C. The Road Ahead: Creative Next Steps for International Environmental Treaties

1. Equity Principles

Interestingly, New Zealand and other South Pacific states probably are not eligible to sign the Espoo Convention. Article 16 of the Espoo Convention provides that the agreement "shall be open for signature . . . by States members of the Economic Commission for Europe [E.C.E.] as well as States having consultative status with the pursuant to paragraph 8 of the Economic and Social Council resolution 36 (IV) of 28 March 1947 . . . ."\textsuperscript{170} Paragraph 8 of that resolution provides for admission "in a consultative capacity, European nations not Members of the United Nations."\textsuperscript{171} Although New Zealand participates in some E.C.E. sessions in activities of concern, such as telecommunications, "on the basis of the wording and referencing in Article 16 of the Espoo Convention, this level of participation does not appear to be sufficient enough to constitute consultative status," according to Warren Fraser, an attorney for the New Zealand Ministry of Foreign Affairs and Trade, who participated in the second round of nuclear test cases between New Zealand and France.\textsuperscript{172}

The Noumea Convention, to which both France and New Zealand are parties, includes a vague EIA requirement that is open to the discretionary interpretation of any party so interested.\textsuperscript{173} The Espoo Convention, however, which could potentially rein in a given party's discretion with some

\textsuperscript{169} See discussion \textit{supra} notes 93-103 and accompanying text.
\textsuperscript{170} Espoo Convention, \textit{supra} note 67, art. 16.
\textsuperscript{172} Memorandum from Warren Fraser, Legal Division, New Zealand Ministry of Foreign Affairs and Trade, Wellington, N.Z. to Martin Gelfand 1 (Jan. 29, 1996) (on file with author).
\textsuperscript{173} See discussion \textit{supra} notes 163-71 and accompanying text.
of the firm procedural requirements anticipated in the Noumea Convention,\(^{174}\) is out of bounds to New Zealand.\(^{175}\)

Restatement section 322(2) binds a party to an international agreement with respect to its entire territory.\(^{176}\) Since France's testing was being conducted on its sovereign territory\(^{177}\) and France is a signatory to both the Noumea and Espoo Conventions, it follows that France is bound by both the requirement to complete an EIA under Article 12 of Noumea\(^{178}\) and by the more stringent EIA procedural requirement under Espoo.\(^{179}\) However, the Espoo Convention confers "affected party" and "concerned party" status only on parties to the agreement.\(^{180}\) Since only European states and the United States are able to attain such status, party states in the South Pacific are effectively precluded from taking action against France under the terms of the Espoo Convention.

One possibility is to try applying equitable principles to the case in point. One such principle is that of \textit{ex aequo et bono}, according to equity and fairness. This principle is articulated in the Statute of the International Court of Justice as the power of the Court to decide a case under such terms if the parties agree thereto.\(^{181}\) The problem becomes obvious where, as in the case between France and New Zealand, one of the parties, France, is not a party to the I.C.J. statute\(^{182}\) and the other party, New Zealand, is not a party to the agreement in dispute.\(^{183}\) France need

\(^{174}\) See discussion supra notes 143-52 and accompanying text.

\(^{175}\) See discussion supra notes 172-74 and accompanying text.

\(^{176}\) RESTATEMENT, supra note 26, § 322(2).

\(^{177}\) Friedman, supra note 6.

\(^{178}\) Noumea Convention, supra note 66, art. 12.

\(^{179}\) See discussion supra notes 143-56 and accompanying text.

\(^{180}\) See Espoo Convention, supra note 67, at 804:

4. The Party of Origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause significant adverse transboundary impact.

5. Concerned Parties shall, at the initiative of any such Party, enter into discussions on whether one or more proposed activities not listed in Appendix I is or are likely to cause a significant adverse transboundary impact and thus should be treated as if it or they were so listed. Where those Parties so agree, the activity or activities shall be thus treated . . . .

\(^{181}\) Statute of the I.C.J., supra note 57, at 25.

\(^{182}\) 1973-74 I.C.J. Y.B. 49.

\(^{183}\) See discussion supra notes 143-56.
not agree to the jurisdiction of the I.C.J., while New Zealand is barred from participation in *ex aequo et bono* by virtue of its non-party status.

Professor Michael Reisman described equity as "the complex of inclusively prescribed goals, which are rarely formulated in peremptory and conventional legal terms, yet which condition all authoritative decision. The most craftsmanlike legal decision that controverts these goals, though faultless and regular by the criteria of a narrowly conceived discipline, is nevertheless 'splendidly null.'"\(^{184}\) Without reliance on an equity principle such as the one Professor Reisman articulates, New Zealand is effectively precluded from pressing its complaint against France.

The problem for New Zealand is that of fundamental unfairness. France is permitted to act in a manner in its colonial territory that would be precluded in its motherland by the terms of the Espoo Convention. In Europe, any other signatory to Espoo could enjoin France from testing nuclear weapons. But in its territory in the South Pacific where there are no parties to Espoo, France is free to do as it pleases with impunity under the terms of the Espoo Convention.

In a 1988 seminar on equity in international law moderated by Professor Sohn, the issue was raised that "[i]nterpreting the law to reflect justice opens the inquiry to such a broad range of choice that it invites the [International Court of Justice] to exercise power arbitrarily. Justice is such an elusive notion . . . ."\(^{185}\) Professor Louis Sohn responded:

I might agree with you, but the Court does not. In the Tunisia-Libya Case\(^{186}\) the Court started by saying: "equity as a legal concept is a direct emanation of the idea of justice. The Court whose task it is by definition to administer justice, is bound to apply it." Of course, the word justice is part of the name of the Court – International Court of Justice . . . . The parties that established the Court felt it should be a court of justice, not a court of ossified law.\(^{187}\)

"Ossified law" might be a good way of describing the 1940s model that the I.C.J. upheld in the second nuclear test case between New Zealand and France.\(^{188}\) By refusing to consider France's alleged breach of the

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\(^{184}\) W. MICHAEL REISMAN, NULLITY AND REVISION 560 (1971).

\(^{185}\) Seminar, *Equity in International Law*, 82 AM SOC'Y INT'L PROC 277, 283.

\(^{186}\) See discussion supra notes 57-59 and accompanying text (citation added by author).

\(^{187}\) Seminar, *supra* note 185, at 283 (quoting Professor Louis Sohn).

\(^{188}\) See, e.g., *supra* note 170 (French legal affairs director defending *actori incombis probatio* principle that, like the *Trail Smelter* and *Corfu Channel* cases, required a polluter to discharge beyond some threshold that could only be found out through
Noumea and Espoo Conventions, the I.C.J. seemed to take a different tack than the one it took in the 1982 Tunisia-Libya Case.  

2. Espoo as Customary International Law to Which France is Bound

Even without signatory status, New Zealand can show that the procedural requirements of the Espoo Convention have become customary international law by virtue of their widespread acceptance under the Espoo Convention itself. It was noted above that concepts codified in the Law of the Sea crystallized into customary international law despite their not being put into force through a formal ratification process. The Restatement of the Law (Third) of Foreign Relations recognizes three ways for a rule of international law to be accepted by the international community of states: through international agreement, by derivation from general principles common in the world’s legal systems, and through "customary law." The Restatement further notes, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." The drafters explain that "[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary [international] law." By way of example, the drafters cite the North Sea Continental Shelf Cases. There, the I.C.J. observes that Article 6 of the Vienna Convention states that "[e]very State possesses the capacity to conclude treaties." Drawing from that principle, the court inquiries as to whether a treaty, so concluded, created customary international law:

In so far as the contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating [the treaty term] as a norm-creating provision which has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as

litigation, rather than the more proactive 1970s-style environmental protection instruments that have tended to replace the actori incombite probatio policies of the past); see discussion supra notes 36-63 and accompanying text.

189 See discussion supra notes 184-85.
190 See discussion supra notes 50-63 and accompanying text.
191 See discussion supra notes 57-59 and accompanying text.
192 RESTATEMENT, supra note 26, § 102(1)(a)-(c).
193 Id. § 102(2).
194 Id. § 102, cmt. i.
196 Vienna Convention, supra note 60, § 6.
to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time, this result is not lightly to be regarded as having been attained.\textsuperscript{197}

Sir Ian Sinclair distills this rendering into a three-part test: (1) Is the treaty term "of a fundamentally norm-creating character such as could be regarded as the basis of a general rule of law?"; (2) was there widespread participation in the development of the term?; and (3) is there evidence of extensive state practice?\textsuperscript{198} Sinclair draws the conclusion that international agreements can, with qualifications, generate international environmental law binding on non-parties.\textsuperscript{199}

The Espoo Convention has been signed by twenty-nine party states or international organizations, reflecting a multilateral character of the instrument.\textsuperscript{200} Moreover, larger-scale treaties such as the Law of the Sea with 130 votes in favor and more than sixty ratifications have adopted EIA requirements.\textsuperscript{201} The popularity of the EIA provisions serves as evidence of the "norm-creating character" of the instruments.\textsuperscript{202} Extensive state practice of EIA provisions is reflected in the fact that major industrial nations, including the former Soviet Union, Germany, France, Japan, the United Kingdom, and the United States all have domestic laws requiring EIAs in their domestically enacted bodies of law.\textsuperscript{203} Thus, using the Sinclair test\textsuperscript{204} and the Restatement Section 102 standard,\textsuperscript{205} a 1970s model EIA instrument such as the Espoo Convention is the type of international agreement that can become customary international law, capable of creating both obligations and rights for non-parties.\textsuperscript{206}

3. Dispute Procedures

\textsuperscript{197} \textit{North Sea Continental Shelf} (F.R.G. v. Den. and Nor.), 1969 I.C.J. 41 (Feb. 20).
\textsuperscript{199} Sinclair, supra note 198, at 23.
\textsuperscript{200} See Espoo Convention, supra note 80 (referring to list of signatories).
\textsuperscript{201} Sohn, supra note 54, at 271 n.2.
\textsuperscript{202} See Sinclair, supra note 198, at 22.
\textsuperscript{203} See Klein-Chesivoir, supra note 36, at 525.
\textsuperscript{204} See Sinclair, supra note 198.
\textsuperscript{205} See \textit{Restatement}, supra note 26, § 102, cmt. i.
\textsuperscript{206} \textit{Cf. id.} § 324(1) ("An international agreement does not create either obligations or rights for a third state without its consent.").
Both the Noumea and Espoo Conventions set out procedural requirements for dispute resolution. Paragraph 1 of Article 26 of the Noumea Convention provides that if two parties in dispute cannot settle the dispute between themselves, "they should seek the good offices of, or jointly request mediation by, a third Party."207 Once the parties determine that they cannot settle the dispute through negotiation and mediation, they may, if both parties agree, submit to arbitration under conditions set up in the Annex on Arbitration.208 The problem is that arbitration is not mandatory.209 Paragraph 2 of Article 26, however, does provide that if the parties are not able to settle the dispute under the provisions of Paragraph 1, they are not absolved "from the responsibility of continuing to seek to resolve [the dispute] by means referred to in paragraph 1."210 Thus, while the Noumea Convention does not mandate arbitration, parties to the treaty maintain an obligation to continue to mediate the dispute. The Espoo Convention is similar to the Noumea Convention, except that there is no explicit requirement for the parties to continue mediating.211 Nevertheless, neither is there explicit permission for the parties to break off mediation.212 Moreover, the pacta sunt servanda principle, codified into international law through the Vienna Convention, requires states' commitments to be honored.213

Other 1970s model international environmental agreements suffer from the same problem: non-mandatory dispute resolution provisions. The Antarctic Treaty,214 for instance, requires that activities in Antarctica "be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the environment."215 Article 8 provides guidelines for doing so.216 Article 18 of the Antarctic Treaty calls for parties to a dispute, "at

207 See Noumea Convention, supra note 66, art. 26(1).
208 See id. Paragraph 2 refers to the set of eleven articles on arbitration set out in the Annex on Arbitration. See id. art. 26(2).
209 See id. art. 26(1). "If the Parties concerned cannot settle their dispute through the means mentioned in paragraph 1, the dispute shall, upon common agreement, except as may be otherwise provided in any Protocol to this Convention, be submitted to arbitration under conditions laid down in the Annex on Arbitration to this Convention." Id. Nothing in the Annex on Arbitration requires either party to submit to arbitration. Id.
210 See id.
211 See Espoo Convention, supra note 67, art. 15(1).
212 Id.
213 See discussion supra notes 130-33 and accompanying text.
214 Antarctic Treaty, supra note 114.
215 Id. art. 3(2)(c).
216 Id. art. 8.
the request of any one of them, [to] consult among themselves as soon as possible with a view to having the dispute resolved by negotiation, inquiry, conciliation, arbitration, judicial settlement or other peaceful means to which the parties to the dispute agree.\textsuperscript{217} While Articles 13, 19, and 20 offer guidelines for parties to go about the dispute resolution procedures, there is nothing in the language of the treaty that requires parties to do so.\textsuperscript{218} Similarly, the Convention on Biodiversity requires each party to conduct "environmental impact assessment[s] of its proposed projects that are likely to have significant adverse effects on biological diversity . . . ."\textsuperscript{219} Such a provision, applied to the current nuclear test case, would allow New Zealand to try France in absentia before a tribunal, but has no provision for enforcing compliance with any decision that such a tribunal might make.\textsuperscript{220} Likewise, nothing in the dispute resolution provisions of the Law of the Sea requires a state to actually enter into dispute resolution procedures.\textsuperscript{221}

Recent multilateral trade resolutions provide a better dispute resolution model from the perspective of enforcement. The General Agreement on Tariffs and Trade (GATT), for instance, provides punitive measures, including monetary fines and suspension of benefits under the treaty, against a state that fails to comply with its obligations.\textsuperscript{222} GATT, however, does not require environmental impact assessments for projects likely to have a detrimental environmental effect. Like GATT, the North American Free Trade Agreement (NAFTA) provides punitive measures for failure to comply with its provisions.\textsuperscript{223} Unlike GATT, NAFTA recog-

\textsuperscript{217} \textit{Id.} art. 18.

\textsuperscript{218} \textit{Id.} arts. 13, 19, 20.

\textsuperscript{219} Convention on Biodiversity, \textit{supra} note 115.

\textsuperscript{220} See \textit{id.} art. 27.

\textsuperscript{221} \textit{LAW OF THE SEA, supra} note 51, at 97-104.


nizes the relevance of the environmental impact assessment: although the agreement itself does not establish the requirement, it calls for the Commission for Environmental Cooperation to "consider and develop recommendations with respect to . . . assessing the environmental impact of proposed projects . . . likely to cause significant adverse transboundary effects . . . ."224

Combining the 1970s model international environmental treaties with trade agreements, where possible, could be one way of working out the impasse that some states might find themselves in, should they be party to both types of agreements with appropriate and applicable provisions for enforcement of dispute resolution procedures. A more likely scenario is for treaty drafters and negotiators to work better enforcement provisions into the dispute resolution sections of the international environmental treaties. While vague enforcement provisions have been the model of choice in the past with respect to international environmental treaties,225 the multilateral trade agreements may have paved the way for greater openness to the possibility of greater enforcement power for international environmental treaties.

Requiring an EIA does not necessarily stop a project. However, that is not the purpose of an EIA. Rather, an EIA is designed to disclose full information to the public and help decision-makers, with participation by the informed public, to make more environmentally protective, and politically stable decisions.226 Still, the sheer number of instruments in force give flexibility to affected states that seek injunctive relief from proponent states.227 Gaps in one instrument may be filled by applicable details in another. But international environmental treaties need to be enforceable. Trade sanctions such as those included in GATT and NAFTA can be drafted into international environmental treaties to provide affected and potentially affected states the ability to enforce the treaties.

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224 Id. art. 10(7).
225 See, e.g., Developments, supra note 22, at 1551 (explaining that international environmental agreements, like other international agreements, purposely limit the scope of treaties to reserve power for their own state and to increase the probability of ratification).
226 See discussion supra notes 46-49 and accompanying text.
227 See discussion supra notes 103-20 and accompanying text.
V. CONCLUSION: PRACTICAL APPLICATION OF ENVIRONMENTAL TREATY PROLIFERATION

The 1970s model can be seen as a procedural tool for affected states to assert their will against a proponent state. The proliferation of environmental instruments seems to evidence a growing and deep-seated concern of the world’s populace.

A major problem with many international environmental treaties on the books today is that they lack the teeth necessary for a relatively small state, or coalition of small states, to enforce their provisions on larger, more economically or militarily powerful states. This problem is illustrated by the recent dispute between the militarily powerful France and relatively smaller states of New Zealand and Australia. Thomas Friedman of the New York Times, perceptively described the South Pacific conflict:

> What the French, who have no environmental movement, have totally missed is the development elsewhere in the world of a concept of environmental sovereignty. Environmental sovereignty says my home, my space, isn’t just limited to my borders on a map. It includes the air I breathe, the water off my shore and the whole food chain upon which I rely. Environmental sovereignty is not confined either by borders or conventional time. That is, the French say there is no danger of the Mururoa Atoll fracturing and leaking massive radiation that has been trapped in volcanic rock beneath it from 139 French underground tests since 1975. Well, maybe there is no leakage today, but what about in 50 years? 200 years?

The will that a potentially affected state attempts to assert through application of the 1970s model, therefore, can be seen as an attempt to assert its sovereignty: namely, its ability to control events on its territory in a strategic and immediate sense. The model, and its intended application, are articulated in such instruments as the Noumea and Espoo Conventions. However, France, too, in testing its weapons on its territory in the South Pacific, is exercising sovereignty.

Under the current scheme of international environmental agreements, the smaller states can show that the more powerful states are required, politically and morally, to come to the table under the auspices of an arbitral panel of their choosing. But in actuality, the more powerful states can choose to ignore their political and moral obligations because the enforcement provisions are not effective. These provisions merely ask that

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proponent states to participate in good faith and do not impose economic sanctions for failure to participate.

As the 1990s fade into the twenty-first century, the 1970s model has become the political and moral paradigm for international environmental protection. The fact that instruments such as the Noumea and Espoo Conventions, along with hundreds of other similar agreements, are actually being negotiated and ultimately adopted by sovereign points to the positive direction of environmental protection in an international context. France's status as signatory to the Noumea and Espoo Conventions indicates the willingness of the French polity, if not the current political leadership, to adapt to current and future global environmental needs. And New Zealand's willingness to exercise its will to apply these instruments, even if unsuccessful this time, shows that the 1970s model of international environmental law has made its way beyond the theoretical stages. However, these agreements are using an ineffective boiler-plate textual model in their dispute resolution sections. To ensure the 1970s model is truly adopted under international law, treaty drafters and negotiators need to adopt the dispute resolution language of recent multilateral trade agreements such as GATT and NAFTA. This would put the necessary enforcement mechanisms into otherwise useful and effective treaties.