The Plight of American Citizens Injured by Transboundary River Pollution

Donald Carl Arbitlit

Follow this and additional works at: https://scholarship.law.berkeley.edu/elq

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38NV6J

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcer@law.berkeley.edu.
The Plight of American Citizens Injured by Transboundary River Pollution

Donald Carl Arbitblit*

I

INTRODUCTION

This Article considers the legal remedies available to American citizens injured by transboundary pollution. The analysis demonstrates that a direct action against Canadian polluters—private or governmental—will fail because Canadian courts lack jurisdiction to hear the case. Using state long-arm statutes to obtain jurisdiction over Canadian defendants will be futile because Canadian legal doctrines do not permit enforcement of judgments based on such jurisdiction.

The Boundary Waters Treaty between the United States and Canada appears to hold some promise of relief for American citizens injured by Canadian water pollution. An examination of the treaty, however, reveals that it has no enforceable mechanism to settle transboundary pollution disputes.

The only remaining possibility for recovery involves the Foreign Sovereign Immunities Act of 1976. That Act limits sovereign immunity and permits recovery in American courts against foreign states for certain tortious conduct. Such conduct must involve the violation of a duty derived from accepted principles of international law. It is the thesis of this Article that foreign nations have a duty to avoid transboundary pollution and to prevent private parties from causing transboundary pollution. An FSIA suit would give American citizens the means to enforce this duty against the Canadian Government. It would also avoid the jurisdictional problems inherent in direct or long-arm actions. Finally, it would provide an effective and predictable resolution of Canadian-American transboundary pollution disputes by protecting American interests without unduly burdening Canadian expectations.

International river pollution is a cause of increasing concern in the northwestern United States, largely due to current and proposed Cana-

Copyright ©1979 by Ecology Law Quarterly.

* B.S. 1974, Tufts University; J.D. 1979, University of California, Berkeley; member, Vermont Bar.

339
dian activities in developing the energy resources of the vast western provinces. The potential pollution that would result from three proposed projects—one in the United States, and two in Canada—has led to negotiations between the United States Department of State and the Canadian Department of External Affairs. One of the Canadian projects involves a massive governmental coal-fired power station recently completed in Saskatchewan, the other involves a proposed privately owned coal mining operation in British Columbia. Each project threatens to damage wilderness and plains regions in Montana. Hence, citizens in these areas have organized in an attempt to protect the environment from the adverse effects of the projects.

The ability of Americans to prevent transboundary river pollution or to obtain damages may soon be tested by the proposed coal mining operation in British Columbia near the Montana border. This project could cause serious damage to the Flathead River and Flathead Lake.

The North Fork of the Flathead River flows through a wilderness area. From its headwaters in British Columbia the river rushes past mountain cliffs and dense forests to its confluence with the Middle and South Forks of the Flathead. This region of the Flathead is sparsely populated; it includes one of the few grizzly bear habitats in the United States, and it supports a wide range of animal, fish, and plant life. Congress has recently designated sections of all three forks of the Flathead as wild and scenic rivers, entitling them to protection against development and degradation by domestic sources.

Cabin Creek is a tributary of the North Fork of the Flathead, with its source in Canada. Cabin Creek's clear and clean quality is now threatened by the proposed mining of a large seam of high-grade coal alongside the creek only eight miles north of the United States border. One proposal calls for the construction of a new town of 3000 to 5000 inhabitants in an uninhabited area near the mine site. The town would include a power plant, road system, sewage treatment facility, and pos-

1. The Garrison Diversion Unit is a proposed irrigation project that would use water from the Souris River in North Dakota. The project could lower the quality of the water as the river flows across the border into Canada since irrigation water would be returned to the river with a much higher concentration of mineral salts. The Canadian Government has formally protested the project; some American citizens have questioned its wisdom and necessity. See generally Note, An Analysis of the Scope of the Final Environmental Impact Statement on the Garrison Diversion Unit Project: Applying a Totality of Circumstances Test, 53 N. D. L. Rev. 427 (1977); Note, A Primer on Boundary Waters Treaty and the International Joint Commission, 51 N. D. L. Rev. 493 (1974); Note, Selected Environmental Law Aspects of the Garrison Diversion Project, 50 N. D. L. Rev. 329 (1974).

2. See text accompanying notes 78-81 and 184-89 infra.

3. See notes 5-15 infra and accompanying text.

4. See notes 9-10 infra and accompanying text.


sibly a railroad line. Pollutants in Cabin Creek would flow downstream, spoiling the Flathead. Thousands of Montana residents inhabiting the southern region of the Flathead drainage basin may thus lose the aesthetic and economic values of the river and the surrounding forests if the proposed project is completed.

A citizens group, the Flathead Coalition, has brought together groups and individuals with little in common except a concern for protection of the waters of the Flathead drainage. The Coalition has made it plain to the Canadian Government and private developers that it will take legal action to prevent harm to the environment and to recover damages if such harm should occur.

It is not clear what effect these actions have had on the other side of the border. The British Columbia Government returned the first proposal to the developer in 1976 for further studies of the potential effects of development on water quality and aquatic life, and as yet there has been no second proposal. The reason for the prolonged silence, however, may have more to do with economics than with environmental concern. Specifically, prospective Japanese buyers are not


8. Potentially harmful environmental effects include "accelerated erosion and siltation, pollution from fine coal particles in the air and water, and introduction of bentonite, a clay harmful to aquatic life, into the water." Chadwick, The Flathead, 152 NATIONAL GEOGRAPHIC 13, 18 (1977). Furthermore, the local economy depends upon the tourist industry, which in turn depends upon the purity of the environment. Flathead Coalition News, Nov. 1975, at 2.

9. A list of the groups participating in the Coalition indicates the range of interests represented: "the Kalispell Chamber of Commerce, the British Columbia Wildlife Federation, the Flathead Lakers, Flathead Valley Community College, American Association of UM Women, the Montana Wilderness Association, the Kalispell Lions Club, Kiwanis Club, the Area Wide Planning Organization, the Confederated Salish and Kootenai Tribes, the Vancouver Environmental Law Center, American Rivers Council, the League of Women Voters, the West Shore Chamber of Commerce, Flathead Wildlife, the Bitterroot Mission Group of the Sierra Club, the Wilderness Society, the National Parks and Conservation Association, and the Associated Students of the University of Montana." Flathead Coalition News, Nov. 1975, at 2.

10. As a result of such efforts the Montana State Legislature passed a bill amending existing air and water pollution control laws to permit Montana agencies to seek injunctive relief and civil penalties against Canadian defendants. See MONT. REV. CODES ANN. §§ 69-3906(4), -3921.1, -4802(10), -4820.1(3) (Supp. 1977). It is questionable whether this statute will be of any use to plaintiffs seeking relief against foreign polluters, because a Montana judgment could only be enforced through another suit in a Canadian court. Canada's rules concerning enforcement of foreign judgments would present a major obstacle to the success of plaintiffs' suits. See notes 34-47 infra and accompanying text.


certain that the developers can deliver Cabin Creek coal at the predicted cost.13 Nevertheless, the developers have done sufficient sampling to be certain that the seam contains a large quantity of high-grade coal,14 and they will almost certainly seek to mine this area when market conditions are more favorable.15

II
PRIVATE LAW REMEDIES FOR TRANSBOUNDARY POLLUTION

Montana residents have two possible private law actions against Canadian polluters: (1) a direct action for injunctive relief or money damages in a Canadian court, and (2) a long-arm suit in Montana court, followed by a suit for enforcement in Canadian court. The direct action in Canadian court is virtually certain to fail,16 and the Montana long-arm action will be difficult to enforce.17 Thus, Montana residents are unlikely to obtain any relief through a private lawsuit.

A. Direct Action in Canadian Court

A suit by American plaintiffs in Canadian court for damages to American property would fail because Canadian courts adhere to the rule that they have no power to hear cases involving injury to foreign land. The leading British case on this point, British South Africa Co. v. Companhia de Mocambique,18 involved an alleged trespass on land in a foreign country. Defendant's assertion that the plaintiff did not own the land would have required the court to determine the title to foreign land. The British House of Lords held that the court had no jurisdiction to decide the question since the case must be tried in the forum where the land is located. In Albert v. Fraser Cos.,19 the New Brunswick Supreme Court relied on Mocambique in holding that it had no jurisdiction to adjudicate a claim for damages to either real or personal property in Quebec allegedly caused by defendants' actions in New Brunswick. The rule, which appears to be applied uniformly in Canadian courts, would preclude Canadian jurisdiction over a suit by an American plaintiff for transboundary pollution injuries to American land due to wrongful or negligent acts of a Canadian corporation.20

14. Stage 1 Report, supra note 7, at iii.
16. See notes 18-23 infra and accompanying text.
17. See notes 24-47 infra and accompanying text.
20. Canadian citizens are not subject to the same disability in American courts, which assume jurisdiction for suits involving transboundary pollution injuries to foreign land. For example, when a group of Canadian citizens sued in United States District Court for injuries
The justification for refusing jurisdiction in these cases may have been the difficulty of ascertaining ownership of foreign lands. If so, this jurisdictional rule no longer serves a useful purpose since modern recording statutes make it easy for courts to determine legal ownership, and the parties themselves frequently do not contest the title.\textsuperscript{21} Moreover, the Canadian rule is contrary to the nonbinding recommendation of the Organization for Economic Cooperation and Development (OECD). The OECD recommends that member countries remove the obstacles that prevent foreigners injured by transboundary pollution from having access to the members' administrative and judicial systems.\textsuperscript{22} The OECD believes removal of such obstacles would "facilitate the prevention and the solution of many transfrontier pollution problems, without prejudice to other means available . . . ."\textsuperscript{23} Because the recommendation is nonbinding, however, a United States plaintiff is not assured of a remedy for pollution occurring in Canada unless Canadian courts change their rule.

\textbf{B. Suit Against a Canadian Corporation in a Montana Court}

Two procedural issues that are likely to arise in a suit in an American court against a foreign defendant are the power of the domestic court to assume jurisdiction over the defendant, and the willingness of a foreign court to enforce the original judgment.\textsuperscript{24} A Montana court would undoubtedly assume personal jurisdiction over the foreign corporation to their property caused by air pollution from American factories, the court assumed that it had jurisdiction to decide the matter without mentioning the issue of proof of ownership of the injured land. Michie v. Great Lakes Steel Div., 495 F.2d 213 (6th Cir. 1974).

\textsuperscript{21} See, e.g., H. Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth 186-98 (1938).

\textsuperscript{22} Organisation for Economic Co-operation and Development, Recommendation, Equal Right of Access in Relation to Transfrontier Pollution, (adopted May 11, 1976), reprinted in Organisation for Economic Co-operation and Development, OECD and the Environment (No. 38.172) 58 (1976). The OECD has the power to enact binding "Decisions" as well as nonbinding "Recommendations." Decisions are "binding on all Members and implemented by them in accordance with appropriate national procedure." \textit{Id.} at 8. An example of a binding decision is the OECD's statement on "Protection of the Environment by Control of Polychlorinated Biphenyls." \textit{Id.} at 17. A breach of a binding decision would give rise to an action against the nonconforming nation in the International Court of Justice. Breach of a nonbinding "recommendation" does not give rise to such an action.


\textsuperscript{24} It is assumed here that the defendant corporation does not own any assets in Montana that could be attached to satisfy a Montana judgment. If such assets were available, plaintiffs would not be faced with the problems inherent in attempting to persuade a Canadian court to enforce a judgment obtained in a Montana court. See notes 34-47 infra and accompanying text.
porate defendant, but enforcement of a Montana judgment in Canada is far from certain.

1. Jurisdiction over the Foreign Corporate Defendant

Two tests must be met for a domestic court to take jurisdiction over a nonresident defendant: the standard established by statutes of the particular forum, and the due process standard of the United States Constitution. Under Montana statutory law a court may assume jurisdiction over a person whose acts result "in accrual within [Montana] of a tort action ...." Decisional law has interpreted this statute to mean that a tort may accrue where the injury occurs. Therefore, the acts of a Canadian polluter though they occur outside of Montana, would subject the defendant to the court's jurisdiction because their effects are felt in Montana.

The due process requirement for assumption of jurisdiction emphasizes fairness to both the plaintiff and the defendant. Although a court will try to provide the plaintiff with a forum, it will probably not assume jurisdiction over a defendant that has had no contact with the state or that has derived no benefit from the state. In the common case of widespread distribution of products that cause injury in distant states or countries, courts have considered the foreseeability of the product causing injury in the forum as an additional factor in establishing the fairness of exercising jurisdiction.

25. Some states' long-arm statutes allow jurisdiction to the maximum extent consistent with due process. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973): "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."


Any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee or through an agent, of any of the following acts: (b) the commission of any act which results in accrual within this state of a tort action ....

Id. Corporations are included within the definition of "person." Id. Rule 4(A).


28. In International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), the Court held that due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The International Shoe standard was recently upheld and extended to "all assertions of state court jurisdiction" in Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The crucial criterion in determining whether jurisdiction may be granted over a nonresident defendant is the "relationship among the defendant, the forum and the litigation." Id. at 204.

29. See, e.g., Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D. Mont. 1972). In that case the court assumed jurisdiction over a Swedish manufacturer of ammunition that allegedly injured the plaintiff in Montana after he had purchased the ammunition in Idaho. The court held that due process was not denied when a manufacturer who sells goods intending that they be generally distributed is forced to defend a tort action in the forum where its products cause injury.
The court held that the presence of a British defendant's product in Hawaii together with the defendant's knowledge that its product was destined for Hawaii was sufficient contact with Hawaii to establish jurisdiction consistent with due process. Thus, a court would hold that a polluter whose waste products foreseeably cause injury in a foreign state is not denied due process if it is required to defend itself in the forum where the damage occurred.

The United States Supreme Court considered the permissible reach of long-arm jurisdiction over foreign polluters in *Ohio v. Wyandotte Chemicals Corp.* In an action brought by Ohio against a Michigan corporation and a Canadian corporation, the Supreme Court refused to exercise original jurisdiction on the grounds that Ohio courts were competent to assert jurisdiction over the defendants under the authority of the state's long-arm statute. In response to *Wyandotte*, Ohio initiated an action in state court on theories of nuisance, negligence, and trespass. The Ohio Court of Appeals upheld a permanent injunction against mercury dumping by either defendant.

*Wyandotte* thus provides precedent for a state court to assume jurisdiction over a foreign defendant alleged to have caused transboundary pollution injuries. A Montana court would be likely to accept an argument that *Wyandotte* and *Scanlan* support that court's assumption of jurisdiction over a polluting Canadian coal mining corporation.

2. Enforcement of Foreign Judgments in Canada

Assuming that the defendant corporation has no assets in Montana that could be attached and executed in satisfaction of a judgment against the corporation, the judgment must be enforced in a Canadian court. Enforceability of foreign judgments in Canada is determined by the principle of reciprocity: a Canadian court will enforce a foreign judgment only if the courts of its own country would enforce a judgment of a similar nature rendered in the foreign jurisdiction.

---

30. 417 F.2d 231 (9th Cir. 1969).
32. The Supreme Court did not expressly authorize the assertion of jurisdiction over the defendants by the Ohio courts since the only issue was whether the Court should exercise its original jurisdiction. Nevertheless, the competence of the state court to hear the case was implicit in the Supreme Court's opinion. The Court stated that "[w]hile this Court, and doubtless Canadian courts, if called upon to assess the validity of any decree rendered against either Dow Canada or Wyandotte, would be alert to ascertain whether the judgment rested upon an even-handed application of justice, it is unlikely that we would totally deny Ohio's competence to act if the allegations made here are proved true." 401 U.S. at 500. One federal court recently relied on *Wyandotte* to uphold jurisdiction over the City of Milwaukee for pollution originating in Wisconsin but allegedly causing harm in Illinois. *Illinois v. City of Milwaukee*, 599 F.2d 151, 156 (7th Cir. 1979), *cert. denied*, 47 U.S.L.W. 3586 (U.S. Mar. 6, 1979) (No. 78-974).
34. If the foreign defendant appeared in Montana court, the prior judgment would support a contempt judgment based on disobedience of the prior judgment. It is doubtful,
judgment if the original forum obtained personal jurisdiction over the defendant in a manner that accords with a form of personal jurisdiction exercised by the Canadian courts. The question becomes whether a Canadian court would exercise original jurisdiction over a nonresident American corporation alleged to have caused pollution injuries to Canadian property. The issue is not whether an American court would enforce a Canadian judgment, but whether the basis of jurisdiction exercised in the American court would also be a sufficient basis for a Canadian court to assume jurisdiction in a parallel situation.

A Canadian court has power to assume jurisdiction over a nonresident defendant only for a "tort committed within the jurisdiction." A broad reading of this phrase would include the place of the injury as well as the place of the tortious act. The Canadian courts read the statute more narrowly, however, and generally hold that a tort is committed only at the place of the defendant's conduct, not at the place of the harm.

One author has argued that under Canadian case law the rule does not apply to intentional torts and that a pollution injury would be intentional. The place of the harm, in addition to the place of the act, would then be the place where an intentional tort was "committed," within the meaning of the Canadian jurisdictional rule. Under this interpretation a Canadian court would recognize Montana's form of jurisdiction and enforce the Montana judgment.

The leading case cited for this proposition is Jenner v. Sun Oil Co., in which a Canadian court took jurisdiction over an American corporation, radio station, and radio announcer, in a suit for injuries caused by defamatory words spoken during a radio broadcast originating in the United States. The court explained that:

It is to be presumed that those who broadcast over a radio network in
the English language intend that the messages they broadcast will be heard by large numbers of those who receive radio messages in the English language. . . . A radio broadcast is not a unilateral operation. It is the transmission of a message.41

In *Original Blouse Co. v. Bruck Mills Ltd.*, a British Columbia court took jurisdiction over a Quebec defendant alleged to have made fraudulent misrepresentations in telephone conversations and letters. The basis of its jurisdiction was that the defendant "was putting in motion a chain of events which he knew would result in the representations reaching the plaintiff in Vancouver . . . . The representation cannot be said to have been made until received. . . ."43

In both *Jenner* and *Original Blouse* the torts were intentional. Each case refers to the "communicative" nature of the tort, however, implying that the tort is not completed until the message is received in the jurisdiction where the suit is brought. In short, it is not clear whether the exception upon which jurisdiction is based is that the tort is "intentional" or that it is "communicative."44 If the rationale for the exception is the actor's knowledge of the likelihood of resulting harm, the Canadian court would be likely to enforce the American judgment assuming the plaintiffs could show that the defendants knew their pollution would cause injury in Montana.45 But, if the rationale depends upon the tort involving communication, enforcement would probably be denied because pollution does not involve communication.

At this point no firm predictions can be made as to the way a Canadian court would treat a pollution injury.46 It seems unlikely, however, that the Canadian courts are ready to reverse this basic rule of tort law jurisdiction. Plaintiffs might have more success arguing for an exception limited to transboundary pollution cases. The exception would allow the Canadian courts to align their rule of jurisdiction with the

41. Id. at 535.
43. Id. at 182.
44. One Canadian authority has stated that the exception is based on the fact that "the place of wrong is the place where the actual publication or communication occurs." J. CASTEL, CONFLICT OF LAWS 947 (2d ed. 1968). Nevertheless, the cases do not make a clear choice between the rationale of "communication" and that of "intention."
45. The British Columbia Government has required the mining corporation to file reports documenting its studies of the likely effects of the proposed development. See note 7 supra. These reports contain references to effects on water quality and wildlife, and they indicate that the corporation would have knowledge that its activities could cause harm.
46. Plaintiffs should argue against the Canadian jurisdictional rule on policy grounds, emphasizing the cultural and technological changes of the past few decades that have resulted in greatly increased contacts between people separated only by political barriers. These contacts, due to commerce, travel, pollution, or radio broadcasts, lead inevitably to injuries and thus to lawsuits. Fairness to all parties demands that the courts not be overly protective of defendants' interest in not having to defend suits in distant jurisdictions at the expense of plaintiffs' interest in compensation for injury.
policy of their national government as expressed in the recommendations of the OECD concerning equal access to judicial procedures for victims of transboundary pollution. The Canadian courts might be receptive to this approach if the defendant knew of the likely resulting harm, a factor of some importance in the communication cases, and if the defendant would suffer no great hardship in defending a suit in an American court. Both elements would be present in the Cabin Creek coal mine development.

III

GOVERNMENTAL REMEDIES FOR TRANSBOUNDARY POLLUTION: THE BOUNDARY WATERS TREATY

In 1909, Great Britain and the United States ratified a treaty intended to “prevent disputes regarding the use of boundary waters . . . and to make provision for the adjustment and settlement” of all questions between the United States and Canada “involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier . . . .” Because the general success of this treaty in resolving certain types of boundary water disputes has been described elsewhere, this section focuses on the inadequacies and uncertainties of the treaty as a means of preventing and resolving transboundary pollution problems.

The treaty provides only a vague prohibition against pollution and leaves its major terms undefined. Although more detailed definitions could be obtained by reference to sources external to the treaty, there is reason to believe that those interpreting the treaty prefer the present ambiguity despite the resulting lower standard of environmental protection. More importantly, the treaty provides no mechanism for binding adjudication of pollution disputes.

The only specific reference to pollution in the Boundary Waters Treaty provides that “boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.” Since the treaty provides no definition of

47. See text accompanying notes 22-23 supra.
49. Id. preamble.
50. See generally L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES (1958); Bilder, Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Co-operation, 70 MICH. L. REV. 469 (1972) [hereinafter cited as Great Lakes Pollution].
51. See text accompanying notes 158-66 and 170-76 infra.
52. See text accompanying notes 53-64 infra.
53. Boundary Waters Treaty, supra note 48, art. IV.
“pollution” or “injury,” the United States Department of State and the Canadian Department of External Affairs must provide them. Political pressures, however, rather than expertise in water pollution or concern for individuals’ rights, often influence these departments. As a result, the definitions agreed upon tend to avoid conflict between the two countries, rather than to solve the problems of transboundary pollution. For example, a recent State Department memorandum stated:

Our discussions with the Canadians concerning the Garrison Diversion Unit have apparently established their agreement that “injury” refers to an unreasonable interference with a neighboring State’s enjoyment of its own resources, involving material damage, and does not encompass all impacts which might occur. Article IV does not provide that there can be no degradation per se of transboundary waters.\footnote{54}{Memorandum from K. Scott Gudgeon, U.S. Department of State, to Wingate Lloyd, EPA Office of International Activities (Mar. 5, 1975) at 2 [hereinafter cited as State Dep’t Memo].}

Although the memorandum refers to several principles, documents, and judicial decisions as the basis for the definition of “injury,”\footnote{55}{Id. at 1-8. This use of sources outside the treaty is consistent with the generally held view that “[c]larification of ambiguity above all necessitates reference to general principles and to the larger international law context—universal and regional—within which the agreement was negotiated.” Hayton, The Formation of the Customary Rules of International Drainage Basin Law, in The Law of International Drainage Basins 834, 835 (A. Garretson, R. Hayton & C. Olmstead eds. 1967).} the memorandum accords little weight to sources that support a more stringent standard of state responsibility for pollution injury. Two of these sources are discussed in a later section of this Article;\footnote{56}{See text accompanying notes 158-66, 170-76 infra.} for the moment, it is sufficient to point out that the definition of “injury” may have been unduly influenced by political concerns.\footnote{57}{The reference to the Garrison Diversion Unit in the passage quoted from the State Department Memorandum, see text accompanying note 54 supra, emphasizes the problem of political influences. The Garrison Diversion Unit is a planned American irrigation project that has caused much concern in Canada over the amount and quality of water that will flow across the border after the project is constructed. See generally Note, Selected Environmental Law Aspects of the Garrison Diversion Project, 50 N.D.L. REV. 329 (1974); Note, A Primer on the Boundary Waters Treaty and the International Joint Commission, 51 N.D.L. REV. 493 (1974). While this problem is negotiated, the two countries must also deal with potential pollution from Canadian projects such as the Poplar River power plant. See text accompanying notes 78-81 and 184-89 infra. There have been allegations that a “trade-off” is contemplated, that the United States would not press for strict environmental controls for the power plant if the Canadians would be similarly accommodating concerning the American irrigation project. See, e.g., Hoklin, Cabin Creek Realities, Montana Public Affairs, Rep. No. 22, June 1977, at 6; Flathead Coalition News, May 1977, at 7. Whether or not such tradeoffs are being made, there is an inherent danger in creating legal definitions when both parties have substantial interests at stake, and neither is an objective, disinterested decisionmaker. Particularly where the planned development is a governmental project, as are the Garrison Diversion Unit and the Poplar River plant, the governments’ own negotiators may feel an institutional interest in reaching agreement on
mission (IJC)\textsuperscript{58} with the authority to adjudicate water use disputes.\textsuperscript{59} The IJC, consisting of three members from each nation,\textsuperscript{60} has developed a reputation for objectivity and expertise in the resolution of boundary waters problems.\textsuperscript{61} The IJC could exercise a judicial function and decide particular boundary waters pollution disputes, or it could exercise a legislative function and create rules and standards for polluters. At the present time, however, both functions are served inadequately because the IJC cannot take any action until the two nations refer a problem to it,\textsuperscript{62} and even then it can only “examine into and report upon the facts and circumstances” of pollution cases.\textsuperscript{63} Furthermore, although the Treaty authorizes the IJC to issue “such conclusions and recommendations as may be appropriate,” it expressly provides that these reports “shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law . . . .”\textsuperscript{64}

\textbf{A. The Problem of Delay}

Because the IJC must await a referral before it can act, it usually has no opportunity to use its expertise in the planning stages of a development. As a result, serious environmental problems may be unresolved for extended periods of time. The IJC itself has recognized the importance of taking early action to prevent problems from developing. In a draft agreement issued at the request of the United States and Canada in 1920, the IJC stated:

The Commission is firmly of the view that the best method to avoid the evils which the Treaty is designed to correct is to take proper steps to \textit{prevent} dangerous pollution crossing the boundary line rather than to wait until it is manifest that such pollution has actually physically

\textsuperscript{58} Boundary Waters Treaty, \textit{supra} note 48, art. VII.
\textsuperscript{59} See, e.g., text accompanying notes 82-83 \textit{infra}.
\textsuperscript{60} The Boundary Waters Treaty establishes the number of members, \textit{supra} note 48, art. IV.
\textsuperscript{61} \textit{See generally} L. BLOOMFIELD \& G. FITZGERALD, \textit{BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES} 60-64 (1958); \textit{Great Lakes Pollution, supra} note 50, at 518-20.
\textsuperscript{62} See text accompanying notes 75-76 \textit{infra}.
\textsuperscript{63} Boundary Waters Treaty, \textit{supra} note 48, art. IX.
\textsuperscript{64} Id.
crossed, to the injury of health or property on the other side.\textsuperscript{65}

The draft agreement was prepared after the IJC investigated the dumping of untreated municipal sewage in boundary waters.\textsuperscript{66} The IJC's investigation resulted in a report that described "a situation along the frontier which [was] generally chaotic, everywhere perilous, and in some cases disgraceful."\textsuperscript{67} The urgency of the situation appeared reduced, however, by "the advent of chlorination of municipal water supplies and . . . the general belief that there was an inexhaustible supply of clean, fresh water to dilute all wastes."\textsuperscript{68} Once the immediate situation eased, the two nations felt no need to grant preventive powers to the IJC, and never ratified the draft agreement.

The apparent rationale for denying the IJC the power to prevent pollution is that such power would discourage development and industrialization. This rationale is inadequate because the marginal benefits to industry cannot justify reasonably avoidable damage to or loss of finite natural resources. The pollution damage to the Great Lakes demonstrates the seriousness of the problems. The two nations did not refer that situation to the IJC until 1964.\textsuperscript{69} The IJC report, issued after its six-year study, confirmed what all parties knew: the waters were "seriously polluted on both sides of the boundary to the detriment of both countries and to an extent which is causing injury to health and property. . . ."\textsuperscript{70} The IJC recommended remedial measures, such as adoption of general and specific water quality objectives, immediate reduction of phosphorus content in detergents, and implementation of a program of municipal and industrial waste treatment facilities.\textsuperscript{71} These remedial actions became the basis for the Great Lakes Water Quality Agreement of 1972 (GLWQA).\textsuperscript{72} The GLWQA has been commended as a model for future regulation of international pollution and cooperation between nations.\textsuperscript{73} These problems might never have arisen at all, however, if the nations had cooperated in granting to the IJC the power to prevent injurious pollution.\textsuperscript{74} Delay is unnecessarily aggravated because problems are not re-

\textsuperscript{66.} Id.
\textsuperscript{67.} Id. at 70.
\textsuperscript{68.} I.J.C., Report on Pollution of Lake Erie, Lake Ontario, & the International Section of the St. Lawrence River 3 (1970), quoted in Barros & Johnston, supra note 65, at 111.
\textsuperscript{69.} I.J.C., Report on Pollution of Lake Erie, Lake Ontario, & the International Section of the St. Lawrence River 5 (1970).
\textsuperscript{70.} Barros & Johnston, supra note 65, at 136.
\textsuperscript{71.} Id. at 149-55.
\textsuperscript{72.} Apr. 15, 1972, United States-Canada, 23 U.S.T. 301, T.I.A.S. No. 7312.
\textsuperscript{73.} See, e.g., Barros & Johnston, supra note 65, at 71; Great Lakes Pollution, supra note 50, at 517.
\textsuperscript{74.} See text accompanying notes 62-63 supra.
ferred to the IJC until both nations agree that a problem exists, and decide upon the specific questions to be addressed by the IJC. The treaty does not require this practice since it allows a reference to be made by either the United States or the Canadian Government. The justification for the mutual consent practice is diplomatic deference, but the cost of such diplomacy can be unnecessary environmental harm. While the two nations negotiate on whether a project presents an environmental problem, developers may continue with their projects. They realize that the government will be less likely to halt construction after they have incurred great costs and provided a large number of jobs.

A current example is the Saskatchewan provincial government’s development of a coal-fired power plant and its cooling reservoir along the Canadian portion of the Poplar River, despite on-going negotiations between Canada and the United States concerning the pollution and water loss injuries to United States residents that could result. The increased evaporation caused by the reservoir will increase the concentration of dissolved minerals in the water, thereby impairing use of the water for agriculture in the United States. During the negotiations the power plant and dam have been completed, test operations are to begin by January 1980, and the plant is scheduled to operate at full capacity by April 1980. Meanwhile, the two governments agreed on the terms of a referral to the IJC, which is due to issue its report and recommendations by February 1980—just before the power plant is scheduled to reach full capacity. At this point it may be politically impossible for the Americans to prevent the project from operating. Furthermore, the standards governing plant operations will be set before the IJC recommendations are formulated. American citizens could have benefited from an earlier reference to the IJC.

75. Great Lakes Pollution, supra note 50, at 485-88.
76. Boundary Waters Treaty, supra note 48, art. IX.
78. See generally, R. Schleyer, The Transboundary Effect, Safeguarding the Poplar River in Montana, Environmental Quality Council Staff Report to the Montana State Legislature 1-3 (1976) [hereinafter cited as Schleyer]. See notes 184-86 infra and accompanying text.
79. Telephone conversation with Mike Machler, Meteorologist, Montana Air Quality Bureau (Nov. 19, 1979).
81. Telephone conversation with Craig Ferguson, Assistant Secretary of the Canadian Section of the IJC (Nov. 19, 1979). The International Poplar River Water Quality Board, an investigative board of the IJC, issued its six volume report to the IJC in July 1979. The IJC will now issue its report to the two governments. Id.
B. A Proposed Solution: Expanding the Role of the IJC

Because of IJC’s experience in solving disputes in Canadian-American water use, the IJC should be given the binding authority to prevent or minimize problems before they occur. The IJC could exercise this authority in case-by-case adjudication or by the creation of rules and standards.

Under the provisions of the Boundary Waters Treaty, the IJC has the authority to approve or disapprove all cases involving “uses or obstructions or diversions . . . affecting the natural level or flow of boundary waters,”82 and “remedial or protective works or any dams or other obstructions in waters flowing from boundary waters . . . the effect of which is to raise the natural level of waters on the other side of the boundary. . . .”83 The IJC does not have the authority, however, to approve or disapprove a case on the ground that it may involve transboundary pollution. Pollution problems may have been excluded from the IJC’s binding authority because of the prevailing attitude in 1909, when the treaty was signed, that pollution was not a significant problem. With the increasing development of the northwest frontier, however, there will soon be no boundary waters that have not been affected by pollution. As with projects affecting the flow of boundary waters, the Treaty should be amended to require the United States and Canada to submit to the IJC development plans for projects involving transboundary pollution for binding adjudication of the manner in which the plans may be carried out.

The IJC’s experience in the preparation of the Great Lakes Water Quality Agreement84 has shown that it can prepare evenhanded rules and standards necessary for a successful international agreement. The GLWQA model is best suited to bodies of water subject to consistent discharge of a significant level of pollution from a large number of sources. The certain and extensive nature of the pollution would justify the time and expense of studying and monitoring pollution levels. This type of agreement would be less useful in unpopulated, unspoiled areas where the pollution problems involve special circumstances related to the particular development, the geography, and the body of water. In these cases, general agreements would provide a minimum standard, while adjudication of the particular case would provide a remedy tailored to the special needs of the parties and the region involved.

An ideal system of transboundary pollution control, then, would combine the power to set general standards, typified by the GLWQA, with the power to approve or reject a particular project, or to condition

82. Boundary Waters Treaty, supra note 48, art. III.
83. Id. art. IV.
84. See text accompanying notes 72-73 supra.
its approval upon compliance with special requirements. This system would not prevent degradation of the environment in all instances; the conflicting social goals of industrial and energy development must be balanced with environmental protection. Nevertheless, a grant of authority to the IJC to rule upon the acceptability of polluting developments before they take place would give the decisionmaking power to the most objective, most expert, and least political body available.

IV

THE FOREIGN SOVEREIGN IMMUNITIES ACT AND TRANSBOUNDARY POLLUTION

Neither the Boundary Waters Treaty nor a law suit is likely to provide relief for an American citizen injured by a Canadian polluter. The Treaty has only vague prohibitions against pollution, and the IJC makes only after-the-fact recommendations. A private law suit involves uncertainty because of Canada's jurisdictional rules limiting enforcement. A third alternative, however, may permit Americans to recover damages. The alternative involves a "hybrid" cause of action that combines the domestic procedural law of the Foreign Sovereign Immunities Act of 1976 (FSIA)\textsuperscript{85} with the international substantive law of tort requiring a nation to prevent extraterritorial pollution injuries.

A. Establishing Jurisdiction and Enforcing Judgments under the FSIA

The Foreign Sovereign Immunities Act of 1976 was enacted to prevent the inconsistent application of sovereign immunity in American courts in suits by American citizens against foreign nations. The major goal of FSIA was to codify the so called "restrictive principle" of sovereign immunity under which "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)."\textsuperscript{86} Despite the informal adoption of this principle by the Department of State in 1952,\textsuperscript{87} prior to the 1976 legislation foreign states would exert diplomatic pressure on the Department, urging it to intervene in such suits. The Department of State would then argue that the foreign state was immune to a private citizen's claims, even though the acts upon which the suit was based were private or commercial. Absent clearly expressed legal rules, many courts simply dismissed the plaintiffs' claims on the ground of sovereign immunity, regardless of

\textsuperscript{87} \textit{See} Letter from Jack B. Tate to Phillip B. Perlman, Changed Policy Concerning the Granting of Sovereign Immunities to Foreign Governments (May 19, 1952), \textit{reprinted in} 26 DEP'T STATE BULL. 984 (1952) ("Tate Letter").
the restrictive principle. 88

The Act corrected this problem by (1) defining the circumstances under which a foreign nation is subject to the jurisdiction of American courts, 89 and (2) granting to the judiciary the sole authority to determine whether these circumstances exist. 90

Specifically, the Act provides that a foreign state is subject to jurisdiction in an American court 91 for actions based on the commercial activities of foreign states 92 and for certain noncommercial torts. 93

The specific reference to commercial activities was included because "foreign state enterprises are everyday participants in commercial activities." 94 The Act states that commercial activity "means either a regular course of commercial conduct or a particular commercial transaction or act." 95 Although the legislative history deems it unwise to give a precise definition of the term, it notes that a "foreign government's sale of a service or product . . . would be . . . included within the definition." 96 A little earlier the report notes that a commercial activity would include "a mineral extraction company." 97 Thus the government-owned power plant on the Poplar River appears to be a commercial activity by the foreign state. The privately owned coal mine on the Flathead River, however, is not a commercial activity that would subject Canada to the jurisdiction of American courts, since the commercial activity is not carried on by the foreign state.

Section 1605(a)(2) provides that a foreign state is not immune from jurisdiction when the "action is based . . . upon an act outside the territory of the United States in connection with a commercial activity

97. Id. at 16, U.S. CODE CONG. & AD. NEWS at 6614-15.
of the foreign state elsewhere and that act causes a direct effect in the United States . . ."98 The legislative history expressly states that this clause is to make "the exercise of jurisdiction by the United States consistent with the principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)."99 Section 18 of the Restatement, in turn, refers not merely to commercial activity, but includes "conduct and its effect [that] are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems."100 As an example of a transboundary effect in which a foreign state was liable for damages, the Reporters' Notes101 cited the Trail Smelter case.102 That case established Canada's liability under international law for fumes produced in Canada that polluted air in the United States.103 This is an example of a direct effect in the United States of a tort, committed elsewhere that would give American courts jurisdiction over a foreign state. Thus, a Canadian government-operated power plant polluting American waters would subject Canada to American jurisdiction.

Assuming Canada, in the course of operating the power plant, breached a tort duty to American citizens,104 there remains the problem of enforcing the judgment. Section 1610(a) provides that

[t]he property in the United States of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment in aid of execution . . . if . . . (2) the property is or was used for the commercial activity upon which the claim is based . . . .105

Thus, property may be attached only if it is used in the commercial activity giving rise to the claim itself. In the case of the power plant, plaintiffs may attach building materials or technical machinery destined to be used at the plant. Furthermore, "the commercial activity upon which the claim is based" could be read broadly to include property connected with other governmental power plants or even other governmental power generating facilities. This interpretation would fulfill a principal congressional intention behind the Act: to provide a

100. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).
101. Id. Reporters' Note 3.
103. This is the Restatement view of the Trail Smelter case. There is some uncertainty as to whether the Trail Smelter case established such a broad duty under international law. See, e.g., Bleicher, An Overview of International Environmental Regulation, 2 ECOLOGY L.Q. 1, 22 (1972).
104. For a discussion of Canada's duty under international law to prevent transboundary pollution, see notes 116-90 infra and accompanying text.
remedy for Americans injured by foreign governmental activities. The more property subject to attachment, the more likely the judgment will be satisfied.

Alternatively, one could attach property under section 1610(b), which provides:

any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution . . . if . . . (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) . . . regardless of whether the property is or was used for the activity upon which the claim is based.106

In other words, if the plaintiffs in the Poplar River case successfully sued a Canadian governmental agency that also engaged in commercial activity in the United States, any property belonging to that agency, commercial or noncommercial, could be attached.107 Plaintiff may not attach the property of another agency, however.108

This may prove to be the more successful route to satisfy the judgment. A large agency responsible for the power plant, for example, the Canadian equivalent of the Department of the Interior, may be engaged in a broad range of commercial and noncommercial activities in the United States. The property involved in any of these activities is subject to attachment.

Turning to the privately owned coal mine on the Flathead River, obtaining jurisdiction and satisfying a judgment against the Canadian Government, or one of its agencies should prove no more difficult than in the case of the government-owned coal-fired power plant, assuming plaintiff can demonstrate that Canada has a tort duty to prevent transboundary pollution.109 As noted earlier, the privately owned coal mine cannot be considered a "commercial activity of the foreign state." Consequently, jurisdiction must be based on section 1605(a)(5) for noncommercial torts.

That section provides that a foreign state is not immune from jurisdiction whenever

money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of the foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. . . .110

106. Id. § 1610(b) (emphasis added).
108. Id.
109. See notes 116-90 infra and accompanying text.
110. 28 U.S.C. § 1605(a)(5) (1976). The statute makes clear that jurisdiction can be
The statutory language alone indicates that the jurisdictional requirement is satisfied if the injury occurs in the United States. The legislative history, on the other hand, indicates that "[t]he tortious act or omission must occur within the jurisdiction of the United States. . . ."111 Despite the restrictive language in the legislative history, an American court should assume jurisdiction over the Canadian Government.

First, as noted above, the statutory language makes no restriction on the location of the tortious act or omission. Rather, the statute seems to follow the rule, common in many jurisdictions, that jurisdiction attaches where the damage occurs.112 Without such a rule, transboundary torts could never be remedied. As stated in section 27 of the Restatement of Conflict of Laws, Second jurisdiction may be based on "causing an effect in the state by an act done elsewhere."113

Second, even when a statute provides that the state has jurisdiction over the defendant only for the "commission of a tortious act within" the state, a court may interpret the statute broadly. Thus, in Gray v. American Radiator & Standard Sanitary Corp.,114 the Illinois Supreme Court found jurisdiction over an Ohio corporation under a similarly worded statute. The Ohio corporation had not actually sold or manufactured anything in Illinois. Rather, one of its products, through normal distribution channels, found its way to Illinois where it allegedly exploded and injured the plaintiff. The Illinois Supreme Court held that the occurrence of the injury in Illinois was sufficient to satisfy the requirement that the tortious act occur within the state, although actual negligence must have occurred at the Ohio manufacturing plant.

Similarly, a court should interpret the language of section 1605(a)(5) and the legislative history to find jurisdiction where the damage occurs—in the case of the Cabin Creek mine, in Montana. Absent such an interpretation, plaintiffs injured by transboundary pollution, which Canada had a duty to prevent, would be left without a remedy. Leaving American plaintiffs without a remedy would defeat a principal motivation for the Act: giving "citizens . . . access to the courts in order to resolve ordinary legal disputes."115

Third, if international legal principles establish Canada's duty to

---

prevent transboundary pollution, the tortious omission would occur not at the mine site, but at the Montana border. That is, Canada would breach its duty not by permitting the production of pollution, but by allowing it to cross the international border. This may be sufficient to be a "tortious act or omission . . . within the jurisdiction of the United States."

If, however, a court finds that section 1605(a)(5) does not subject Canada to the jurisdiction of American courts for failure to prevent transboundary pollution from a privately owned coal mine, American plaintiffs will be without a remedy. It is entirely possible, perhaps even likely, that Congress simply had not considered this narrow class of tort claims. If so, Congress should amend the FSIA to include a specific provision for noncommercial tortious activities occurring within a foreign state and causing injury in the United States.

Assuming that jurisdiction is established, the judgment could be satisfied following the analysis used for the government owned power plant. The plaintiffs probably would sue a large Canadian agency or department with responsibilities to oversee pollution regulation. A large enough agency would probably conduct sufficient business in the United States to permit satisfaction of a judgment by attaching its property under section 1610(b)(2).

Assuming that jurisdiction and attachment procedures are established, plaintiffs in both the Poplar River and Flathead River cases must establish that Canada, or one of its agencies, has breached a duty toward Montana citizens. Although plaintiffs must prove the usual elements of tort, they can establish defendant's duty of care only by relying upon principles of international law. The following section proposes that a nation has the duty to prevent extraterritorial pollution injuries caused by activities within its jurisdiction and control.

B. The Duty to Prevent Extraterritorial Pollution Injuries: Sources of International Law

The generally accepted sources of modern international law are set out in article 38 of the Statute of the International Court of Justice. These sources include international conventions, international customs, and general principles of law. Judicial decisions and scholarly publications are a subsidiary means for determining the rules of law.116

116. Statute of the International Court of Justice, art. 38, reprinted in International Court of Justice, Acts and Documents Concerning the Organization of the Court, No. 4, Charter of the United Nations, Statute and Rules of Court and Other Documents, (No. 59,774 (1978). It is not always possible to distinguish practice, principles, and judicial decisions as the statute purports to do. The statute has particularly low regard for the weight of judicial decisions, treating them as merely "subsidiary" means of determining the rules of international law. Id. art. 38, § 1(d). However, the court itself "uses legal precedents for
This statute has been called the "highest authority," and any court called upon to administer international law should rely upon it.\textsuperscript{117} It is well established that American courts are competent to enforce international law, "not only by virtue of this country's status and membership in the community of nations, but also because international law is part of the law of the United States."\textsuperscript{118} Thus, a state or federal court hearing an FSIA suit against Canada would be competent to apply international law by considering the sources of law listed in article 38.

These sources of international law impose a duty on nations to prevent extraterritorial pollution injuries. Custom, practice, and judicial decisions have established a principle of limited rather than absolute sovereignty, requiring that both sides to a transboundary pollution dispute have an equitable share of available resources.\textsuperscript{119}

International conventions are not sources of law establishing a tort duty. A breach of a convention such as the Boundary Waters Treaty, which specifically prohibits polluting boundary waters,\textsuperscript{120} is not "tortious conduct," since a treaty is generally considered to be a private statute or contract regulating the parties' behavior. A treaty violation, therefore, would not be remediable under the FSIA, since that act allows jurisdiction only in suits based on a foreign state's commercial activity and tortious conduct.\textsuperscript{121} Therefore, plaintiffs suing under FSIA would have to demonstrate a duty to prevent extraterritorial pollution injury based on non-treaty sources of international law.

1. International Customs as Sources of International Law

Custom provides an important source of international law and may establish a duty to prevent pollution. Evidence of custom is found in the practices of nations in their relations with one another.\textsuperscript{122} It can be found in acts and declarations of state representatives, diplomatic guidance as to the law," J. CASTEL, INTERNATIONAL LAW 24 (3d ed. 1976) [hereinafter cited as CASTEL], and "[q]uite apart from the attitude of [the courts] towards their own prior decisions, the judgments and advisory opinions delivered by them are considered by international lawyers . . . as being . . . what the most authoritative international judicial body holds to be the international law on a given point, having regard to a given set of circumstances." J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 44 (5th ed. 1963). Thus, the sources of international law are not as neatly divided as article 38 suggests, but instead are intimately intertwined.

\textsuperscript{119} See text accompanying notes 147-56 infra.
\textsuperscript{120} Boundary Waters Treaty, supra note 48, art. IV.
\textsuperscript{121} See text accompanying notes 91-115 supra.
\textsuperscript{122} Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor. J. BRIERLY, THE LAW OF NATIONS 59 (6th ed. 1963).
correspondence, and opinions of law officers. A consistent manner of resolving like problems in international treaties also may be indicative of legal customs.

Relying solely upon general customs to supply principles of international law to resolve pollution disputes may not be appropriate as nations have recognized pollution problems only recently. There are too few instances of international action on pollution to form a large body of customary international law. Additionally, while some general principles derived from custom have been uniformly rejected, there are important general principles that are widely accepted and that might have a bearing on an FSIA suit.

The particular practices of the disputants may prevail over more widely accepted principles. For example, the United States and Canada have clearly established the responsibility of each country to prevent extraterritorial pollution injuries. Thus, plaintiffs would seek to establish a duty based on a framework of general custom, with the specific custom of the United States and Canada lending content to that framework.

The seminal case in customary international law involving pollution is Trail Smelter. The case involved air pollution injury to American citizens and property in Washington caused by a smelting operation at Trail, British Columbia. Because private attempts to resolve the dispute failed, diplomatic negotiations were begun. In 1927, the United States suggested that the problem be referred to the International Joint Commission under article IX of the Boundary Wa-

123. Id. at 60-61.
125. See Lester, Pollution, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 89, 109 (A. Garretson, R. Hayton & C. Olmstead eds. 1967) [hereinafter cited as Lester].
126. One rejected principle is the so-called Harmon Doctrine, announced in 1895 as the United States Attorney General's response to Mexican protest against diversion of the Rio Grande. Harmon stated that "the rules, principles, and precedents of international law impose no liability or obligation on the United States." 21 Op. Att'y Gen. 274, 283 (1895). Although this doctrine has been cited in the course of diplomatic negotiations, a review of its history shows that apart from "sporadic self-serving assertions in the heat of controversy, the doctrine has not been widely relied upon" in actual practice. Lester, supra note 125, at 96. The rejection of the Harmon Doctrine points out the difficulty of attempting to determine legal standards based on positions taken by governmental officials protecting their country's interests.
127. For example, in a case involving special practices of certain Latin American nations with respect to the granting of asylum, the International Court of Justice stated: "The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question." Asylum Cases, [1950] I.C.J. 276 (emphasis added).
129. 3 R. Int'l Arb. Awards at 1918.
ters Treaty, providing for investigation and nonbinding recommendations.\textsuperscript{130} Canada agreed, and the IJC undertook a three-year study resulting in a report recommending that Canada pay $350,000 damages to the United States and that the company install certain pollution control devices.\textsuperscript{131} In 1933, the United States complained of continuing damages, and negotiations were renewed.\textsuperscript{132} As a result, the Canadian Government agreed to have a tribunal determine its responsibility without having the matter submitted to an international court. Even though the case never came before an international court, the American claim and the Canadian response created certain expectations for future conduct.\textsuperscript{133} Such expectations, based on past practice, are the essence of customary international law.

\textit{Trail Smelter} also represents an example of international law that would be binding upon the United States and Canada even if not accepted as a principle of more widespread applicability.\textsuperscript{134} The Canadian-American tribunal eventually held that

under the principles of international law as well as 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 \ldots 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. \ldots [T]he Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter.\textsuperscript{135}

The \textit{Trail Smelter} holding represents the most frequently cited basis in customary international law for a state’s obligation to prevent extraterritorial injury.\textsuperscript{136}

The principles taken from the decision do not support an absolute prohibition against extraterritorial pollution injury. The holding itself requires that the case be of “serious consequence” before a state becomes responsible for injuries. Furthermore, the tribunal interpreted its instructions to attain a “just solution” to mean that the smelter’s operation would be allowed to continue, “but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the

\textsuperscript{130} See text accompanying notes 58-64 supra.
\textsuperscript{131} 3 R. Int’l Arb. Awards at 1918. The company proceeded after 1930 to install pollution control devices that significantly decreased sulfuric emissions. \textit{Id.} at 1919. By 1935 Canada had paid the judgment. \textit{Id.} at 1932.
\textsuperscript{132} \textit{Id.} at 1919.
\textsuperscript{134} Even if its precedential weight were questioned as to other nations, the Department of State has said that the \textit{Trail Smelter} decision’s “importance to bilateral relations is not challenged.” State Dep’t Memo, supra note 54, at 6.
\textsuperscript{135} 3 R. Int’l Arb. Awards at 1965.
United States . . ., and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.137 Nonetheless, the case provides a basis for a Canadian duty to avoid, with reasonable efforts, causing or permitting pollution injury to property or persons in the United States.

The requirements of “serious consequence” and a “just solution” announced in Trail Smelter are in accord with the generally accepted principle of international law, sic utere tuo ut alienum non laedas, which is frequently translated as “one must so use his own rights as not to infringe upon the rights of another.”138 The principle does not completely proscribe injury to a neighbor’s property, but requires a balancing of interests. One commentator stated that a state violates the sic utere tuo principle when it “avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage.”139 Thus, the principle alone is of little value in clarifying a state’s responsibility since it does not give any basis for determining the circumstances under which a state’s own advantage provides a “legitimate” justification for causing injury to another state. The main importance of the sic utere tuo principle is that it acknowledges the limited nature of a state’s sovereign right to develop its resources140 and rejects notions of absolute sovereignty.141

In addition, the principles of “neighborliness” and “equality of right” can be derived from state practices and judicial decisions. Although both of these principles lend support to the proposition that a state has a duty to prevent extraterritorial pollution, they are too broad to decide specific cases.

Stemming from the interdependence of bordering states, the principle of neighborliness imposes a duty upon each state to control sources of extraterritorial damage.142 In Lake Lanoux143 Spain complained that a French hydroelectric project would interfere with its rights under a bilateral treaty assuring Spain the unaltered flow of the Carol River. The tribunal deciding the case stated that France must show “a real concern to reconcile the interests of the other riparian with

137. 3 R. Int’l Arb. Awards at 1939.
138. E.g., MONT. REV. CODES ANN. § 49-106 (1947).
141. The theory of absolute sovereignty, with its genesis in the Harmon Doctrine, has been rejected. Id. at 20-23. See also note 126 supra.
142. Lester, supra note 125, at 97.
its own,”144 and that both states must be prepared to settle differences through mutual concessions and reciprocal good will.145 The tribunal found no treaty violation, however, because the treaty required only that Spain receive the full flow of the river, and France had taken steps to restore the Carol to its full level of flow before the river reached the border.146 Thus, the case provides no specific application of the principle of neighborliness.

The principle of equality of right limits state sovereignty when two states share the same resource.147 This principle finds support in the consistent practice of states in resolving similar problems in treaties.148 A United Nations study found that “when a waterway crosses two or more territories in succession, each of the states concerned possesses rights of sovereignty and ownership over the section flowing through its territory. The same applies to frontier waterways. Each state possesses equal rights on either side of the boundary line.”149

Implied in the principle of equality of right is responsibility to avoid violating the limited sovereignty of other states by using more than a “fair” share of the resource. This was recently made explicit in the Stockholm Declaration on the Human Environment:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.150

Although not binding international law, United Nations declarations influence the statements and actions of nations, which in turn shape the law.151 Both Canada and the United States have expressly recognized the notions of right and correlative responsibility as a reflection of existing customary international law.152

148. See text accompanying note 124 supra.
151. See CASTEL, supra note 116, at 27.
The Stockholm Declaration has advanced the development of international environmental law by endorsing the notion of limited sovereignty. It supports the idea of an international law tort duty to prevent extraterritorial pollution injuries. The equality of right theory, however, does not give guidance in determining the particular circumstances that give rise to responsibility for pollution injuries. As with the Trail Smelter requirements of "serious consequences," a "just solution" and the sic utere tuo and neighborliness principles, equality of right requires a balancing of the conflicting interests. These principles do not suggest a scheme to resolve the conflict.

IJC activities may present useful guidelines for establishing customs in international pollution problems because the IJC has developed considerable expertise in transboundary pollution problems. Through the IJC, both Canada and the United States have acknowledged their responsibilities to abate pollution in boundary waters, and they have agreed to specific water quality objectives and monitoring by joint control boards.

A particularly important IJC investigation resulted in the Report on the Pollution of Rainy River and Lake of the Woods. The case concerned two pulp and paper plants that polluted an international river and lake used for domestic, industrial, and recreational purposes. Contrary to a recent Department of State memorandum, the IJC did not ignore "background legalisms" in its recommendations. Rather, it relied upon the main legalism—the Treaty obligation not to pollute to the injury of health or property across the border—as the basis for its technical evaluation and water quality objectives. In addition, the specific water quality objectives were set to protect certain uses, example of the specific actions to which the two nations have agreed is the creation of sewage facilities in consideration of both present and future demands. See I.J.C., Report of the International Joint Commission on the Pollution of Boundary Waters 72 (1951), quoted in Lester, supra note 125, at 105.

Measure to Control Pollution Authorized in Great Lakes Area, 25 DEP'T STATE BULL. 947 (1951). An example of the specific actions to which the two nations have agreed is the creation of sewage facilities in consideration of both present and future demands. See I.J.C., Report of the International Joint Commission on the Pollution of Boundary Waters 72 (1951), quoted in Lester, supra note 125, at 105.

153. See text accompanying note 119 supra.
154. See text accompanying notes 135-37 supra.
155. See text accompanying notes 138-41 supra.
156. See text accompanying notes 142-46 supra.
157. See Lester, supra note 125, at 105.
158. This experience is a result of the IJC's consideration of problems referred under article IX of the Boundary Waters Treaty. See text accompanying notes 130-31 supra.
159. Measures to Control Pollution Authorized in Great Lakes Area, 25 DEP'T STATE BULL. 947 (1951). An example of the specific actions to which the two nations have agreed is the creation of sewage facilities in consideration of both present and future demands. See I.J.C., Report of the International Joint Commission on the Pollution of Boundary Waters 72 (1951), quoted in Lester, supra note 125, at 105.
161. State Dep't Memo, supra note 54, at 3.
162. Boundary Waters Treaty, supra note 48, art. IV.
164. BARROS & JOHNSTON, supra note 65, at 105.
actly the kind of legal adjudication that must be made under the general principles of international law requiring balancing of conflicting interests. More importantly, the stated general objective was far more protective of environmental interests than any of the vague principles espoused in the Department of State memorandum. The report recommended:

In general all wastes . . . should be in such a condition when discharged into the river that they do not create conditions which will adversely affect the use of these waters as a source of domestic or industrial water supply, or for navigation, fish and wildlife, bathing, recreation, agriculture and other riparian activities.

Both countries frequently adopt IJC recommendations. Arguably, the acceptance of these reports creates a binding obligation upon the parties to conduct themselves in accordance with IJC standards. Acquiescence in the recommendations produces the same expectations about future conduct as if the recommendations were binding.

Even if the IJC reports are not binding, they are entitled to greater precedential weight than granted by the Department of State. The IJC practice supplements the state's duty, imposed by general international law, to use only its reasonable share, with a duty to control its wastes for the protection of uses listed in the Rainy River Report, including wildlife, recreation, and agriculture. An industrial use that failed to protect the uses listed in the report may be unreasonable under IJC practice, and therefore violative of the general duty of reasonable use.

2. The Helsinki Rules as a Source of International Law

In addition to custom, a second important source of international law establishing a duty for nations to prevent transboundary pollution is the Helsinki Rules. Created by the International Law Association and based on a comprehensive survey of state practice, the Rules have been adopted as international law by several nations.

The chief contribution of the Rules to the development of the law

---

165. See text accompanying notes 138-56 supra.
167. GREAT LAKES POLLUTION, supra note 50, at 487.
168. See note 133 supra and accompanying text.
169. See text accompanying notes 160 and 166 supra.
172. See, e.g., INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-FOURTH CONFERENCE 922 (1970) (Argentina adopted the Rules). The Rules have been noted with approval in the United States. State Dep't Memo, supra note 54, at 3 n.3.
is their application of vague principles to specific facts. They define the principle to be applied in terms of the circumstances that must be considered. Article IV declares that “each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the water of an international drainage basin.” Article X (1) states the specific rule concerning pollution: “Consistent with the principle of equitable utilization a State (a) must prevent any new form of water pollution or any increase in the degree of existing water pollution which would cause substantial injury in the territory of a co-basin State.”

The “substantial injury” requirement is easier for plaintiffs to meet under the Helsinki Rules definition than under that found in the Department of State memorandum. The Rules define “substantial injury” as one that “materially interferes with or prevents a reasonable use of the water.” The Department of State memorandum, on the other hand, states that “injury” refers to an unreasonable interference with a neighboring State’s enjoyment of its own resources, involving material damage. The Helsinki Rules give plaintiffs a greater advantage by placing more emphasis on the reasonableness of the existing use, rather than the unreasonableness of the interference.

The effectiveness of using the Rules can be shown by applying them to the potential suits by American citizens against the Canadian Government for its failure to prevent damage to American interests caused by the private coal-mining operation along the Cabin Creek, and the government-owned and operated power plant on the Poplar River in Saskatchewan. Article V(2) of the Rules, listing eleven nonexclusive factors to be considered by a tribunal, provides a frame-

173. Helsinki Rules, supra note 170, art. IV. The succeeding articles amplify this basic principle. Article V(1) states: “What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.” Article V(2) then lists eleven nonexclusive factors to be considered in that determination. See notes 179-80 infra.

174. Id. art. X(1)(a). Additionally, art. IX defines water pollution as “any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin . . .”

175. Id. art. X, com. (c).

176. State Dep’t Memo, supra note 54, at 2.

177. See text accompanying notes 5-15 supra.

178. See text accompanying notes 78-81 supra.

179. Relevant factors that are to be considered include: (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin state; (b) the hydrology of the basin, including in particular the contribution of water by each basin state; (c) the climate affecting the basin; (d) the past uses of the waters of the basin, including existing uses; (e) the economic and social needs of each basin state; (f) the population dependent on the waters of the basin in each basin state; (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin state; (h) the availability of other resources; (i) the avoidance of unnecessary waste in the use of waters of the basin; (j) the practicability of compensating one or more of the co-basin states as a means of adjusting
work for this analysis. Although the analysis in this paper is limited to a few factors, a conclusion normally would be based on all of them.\footnote{180}

Traditionally, equity favors existing uses over new ones. Article VIII of the Helsinki Rules applies this principle by requiring a new competing use to justify interfering with an existing use.\footnote{181} In the case of the coal mining operation, for example, Montana residents use the waters of the Flathead Drainage for domestic purposes and fisheries. A significant recreation and tourism industry depends upon the purity of the environment for its success in attracting visitors.\footnote{182} Canada, on the other hand, has almost no citizens living in its portion of the Flathead Drainage and makes no use of the water.\footnote{183} As a result, the Canadian Government would have difficulty overcoming the presumption in favor of Montana's existing beneficial uses.

In the Poplar River drainage Americans' water use is primarily for agriculture.\footnote{184} The Canadian power plant in Saskatchewan threatens that use of the river. The large surface area of a new reservoir and the heating of the water will increase evaporation and concentrate dissolved minerals in the water.\footnote{185} This is particularly significant since the existing high concentration of dissolved minerals makes the water only marginally useful for irrigation. An investigative board appointed by the International Joint Commission concluded that "further deterioration of water quality could seriously impair existing or future [agricultural] uses in the basin."\footnote{186} As with the Flathead River case the conflicts among uses; and (k) the degree to which the needs of a basin state may be satisfied without causing substantial injury to a co-basin state. Helsinki Rules, supra note 170, art. V(2).

\footnote{180} Id. art. V(3). Some factors not considered in this limited analysis include the proportion of drainage area in each state (in both cases the rivers drain more acreage in the United States), and the contribution of water by each basin state (in both cases the major contribution comes from the American side). These factors favor an American plaintiff since it would be unreasonable to allow a Canadian use to impair American use of the rivers when most of the water and affected land are in the United States.

\footnote{181} See note 179 supra. Additionally, article VII(1) states: "An existing reasonable use may continue in operation unless the factors justifying its existence are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use." Id.

\footnote{182} Hoklin, Cabin Creek Realities, Montana Public Affairs, Rep. No. 22, June 1977, at 1-2.

\footnote{183} The nearest town to the proposed minesite is Elko, B.C., 86 kilometers away; the population is 250. Stage I Report, supra note 7, at IX-1.

\footnote{184} SCHLEYER, supra note 78, at 8. A survey of water uses in 1975 found that 67 percent of the total water was used for irrigation, 23 percent for domestic consumption, and 10 percent was lost through evaporation. Id.

\footnote{185} Evaporation from the reservoir amounts to 2500 acre-feet per year. The 300-megawatt power plant will cause an additional 1800 acre-feet per year to evaporate due to increased water temperature. Three more 300-megawatt units are planned for this site; their eventual completion will create a demand of approximately 10,000 acre-feet per year, which is only slightly less than the entire flow of the East Fork of the Poplar River. Id. at 16-17.

\footnote{186} International Souris-Red Rivers Engineering Board, Joint Studies for Flow Appor-
Canadian Government would have difficulty in overcoming the presumption in favor of existing agricultural uses.

The Helsinki Rules require nations to avoid unnecessary waste, as in the storage of more water than the state needs, and to prevent emission of inadequately treated effluents that make the water useless. In combination with the article X prohibition against new forms of pollution causing material injury to reasonable uses, this factor presents a strong argument for requiring developers to use stringent pollution control standards. In the Poplar River basin, for example, the developer could reduce waste by reducing the evaporation from the power plant's reservoir and cooling system. A failure to consider such measures would be a factor in deciding whether the Canadian use is "unnecessarily wasteful."

Whether the nation's needs can be met without injuring a neighboring state may be the most significant factor in determining whether a particular project violates the Rules' principle of equitable utilization. A failure to consider alternative plans involving less injury would mean that the development was "unreasonable." In the Flathead Drainage case, for example, Canada could impose tighter pollution controls, relocate the mine site, or allow only a smaller development. In the Poplar River case, Canada could purchase electric power from existing sources, build its plant in another location, and/or bring water to the site from other locations. Significantly, the Canadians have admitted the need for other sources of cooling water, and the search for alternatives is currently under way. At the least, a "reasonable" development could only proceed after a complete study of the alternatives.

In summary, several of the factors set out in article V(2) of the Helsinki Rules support American plaintiffs in their attempt to show that the Canadian Government has a duty to prevent extraterritorial pollution injuries. It is entirely possible, however, that many cases would not be as clear cut as the Poplar and Flathead examples. Particularly where the drainage area is already subject to heavy use on both sides of the border—in the Great Lakes region for example—the principle of equitable utilization could do little more than to divide evenly
the assimilative capacity of the waters and to prevent development of new sources that would increase the level of injurious pollution. In these areas, a system of water quality objectives and a plan for improved pollution control may be far more effective in protecting environmental values. Nonetheless, the Rules' emphasis on existing uses and the state's obligation to investigate alternatives protect unspoiled waters presently used for beneficial purposes.

The Helsinki Rules are important to American plaintiffs' FSIA cause of action because the rules clarify and make specific the general principles of international law creating a tort duty to prevent extraterritorial pollution injury. The Rules make it possible to apply these general principles by focusing attention on the relevant circumstances that must be considered in deciding whether a particular use is equitable. This focus would lead to consistent decisions more frequently than the vague formulations of *sic utere tuo*, neighborliness, or equality of right. 

**CONCLUSION**

Canadian rules of jurisdiction are not compatible with the OECD recommendation that nations grant equal rights of access to the courts for victims of transboundary pollution. These jurisdictional rules prevent Americans from suing a polluter directly in Canadian courts and would prevent Canadian enforcement of a judgment obtained in the United States.

Despite the successfully negotiated agreements and the history of IJC resolution of boundary waters disputes, major problems still exist in obtaining relief from Canadian transboundary pollution. The IJC is too easily circumvented, and its participation is usually delayed until after injuries have occurred. Nonetheless the experience and objectivity of the Commission should be applied to pollution disputes before injury occurs. An ideal regime of transboundary pollution control would include both IJC adjudication of particular disputes, where flexibility would be crucial, and systems of control standards, water quality objectives, and monitoring boards such as those created by the GLWQA, for areas subject to regular polluting uses.

The lack of an existing reliable remedy in either private or treaty law necessitates bringing a suit against the Canadian Government under FSIA for relief from transboundary pollution injuries. The suit would be based on a tort duty imposed by international law. That duty, although not explicitly set forth in treaties, can be derived from customary international law principles, and from the Helsinki Rules. It would provide a reliable source of relief for United States citizens injured by transboundary pollution.