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## Note

### How the Presumption Against Extraterritoriality Has Created a Gap in Environmental Protection at the 49th Parallel

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National boundaries constitute negative externalities and are environmental hazards because they allow companies to export harmful pollutants through transboundary rivers.<sup>1</sup> Because a border limits the reach of the legal protections of the source country, the polluters do not have to bear the true social costs of their activities—only the costs generated entirely within their home territories.<sup>2</sup> As a consequence, polluters undertake a level of activity that is greater than socially desirable,<sup>3</sup>

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1. See Martin F. Medeiros, Comment, *Transboundary Water Rights: A Valuation for Efficient Allocation*, 1 TULSA J. COMP. & INT'L L. 157, 158 (1993) (using the example of fertilizer runoff into rivers and the cost of the downstream cleanup to illustrate the externalization of the environmental costs of using fertilizer); see also THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 31 (2004) ("An externality exists when an individual . . . imposes a benefit or cost on some other individual who either does not have to pay for the benefit, or is not compensated for the cost. The most common example of an external cost (or negative externality) is pollution.").

2. Cf. Ari Bessendorf, Note, *Games in the Hothouse: Theoretical Dimensions in Climate Change*, 28 SUFFOLK TRANSNAT'L L. REV. 325, 341–42 (2005) ("States 'externalize' costs by forcing foreign states to bear the costs of a domestic activity. . . . Since the polluter does not bear the cost of the environmental damage it causes, it will pollute more than is optimal . . .").

3. *Id.*

and any additional harm is borne by individuals and groups that are left without legal recourse.

Along the United States-Canadian boundary, this phenomenon has recently manifested in the Pacific Northwest and in North Dakota, where actors use this national boundary externality to subsidize or insure risky environmental behavior.<sup>4</sup> Even though a treaty regulating water pollution between the countries has been in place for almost a century,<sup>5</sup> the public international law system has unsatisfactorily controlled transboundary pollution.<sup>6</sup> A jurisdictional doctrine known as the presumption against extraterritoriality has also hindered efforts to use national environmental statutes to correct the problem.<sup>7</sup> The presumption holds that while national legislatures have the power to enact statutes with extraterritorial reach, they operate under the presumption that the legislature does not exercise that power without stating its intent to do so.<sup>8</sup> This Note examines the present intractability of the transboundary water pollution problem along the 49th parallel—the north latitude line that traces much of the United States-Canadian border<sup>9</sup>—and proposes that the United States and Canadian presumptions against extraterritoriality be altered to allow national courts to address the problem. While United States courts presently apply exceptions to the presumption to exercise jurisdiction over transboundary cases, this Note proposes that courts should develop a rule that allocates cases to the forum best suited to remedy the problem presented.

Part I outlines the facts of three recent cases dealing with the externalization of environmental harm across the United States-Canadian border and examines strategic state behavior

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4. See Wil Burns et al., *International Environmental Law*, 40 INT'L LAW. 197, 212–13 (2006).

5. See Boundary Waters Treaty, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448.

6. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 958–63 (1997) (discussing the failure of international treaties and arbitration to control transboundary pollution).

7. See, e.g., *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 676 (S.D.N.Y. 1991) (applying the presumption to the Resource Conservation and Recovery Act in an action to bar recovery of damages incurred by the export of toxic waste abroad).

8. E.g., *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Ass'n of Internet Providers (SOCAN)*, [2004] 2 S.C.R. 427, 454 (Can.).

9. See OXFORD ATLAS OF THE WORLD 132–33 (5th ed. 1997) [hereinafter OXFORD ATLAS].

in bilateral and multilateral contexts. It demonstrates that the bilateral relationship that the United States and Canada have in their boundary waters presents a challenge that public international law cannot resolve. Part II addresses the jurisdictional challenges faced by United States and Canadian courts ruling on transboundary pollution cases. Specifically, this Part addresses personal jurisdiction, the presumption against extraterritoriality, and the exceptions to that presumption. Part III proposes a different model for examining “interterritorial” environmental cases that United States and Canadian courts can use. This Note concludes by calling upon courts in both countries to collaborate and adopt the proposed framework.

## I. POLLUTION IN THE UNITED STATES-CANADIAN TRANSBOUNDARY WATERWAYS AND THE FAILURE OF INTERNATIONAL LEGAL INSTITUTIONS TO PREVENT IT

### A. THE CHALLENGE OF TRANSBOUNDARY POLLUTION

Canadian environmentalists are worried about United States Coast Guard live ammunition training in the Great Lakes—the lead in the bullets is toxic to fish, algae, and plankton.<sup>10</sup> Montana is concerned that coal mining in Canada will lead to the contamination of the Flathead River.<sup>11</sup> And, the trumpeter swans of Judson Lake—which straddles the border between British Columbia and Washington State—are fatally ingesting lead shot deposited on the muddy lake bottom, yet neither government has taken any action to clean up the site.<sup>12</sup> Water pollution along the 49th parallel is a problem.

Almost a century ago, the United States and Canada dedicated themselves to controlling that problem. The Boundary Waters Treaty,<sup>13</sup> signed in 1909, contained a promise that the “waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.”<sup>14</sup> The treaty has enjoyed some success. Its most famous achievement

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10. James Keller, *U.S. Arms Coast Guard on Great Lakes*, HAMILTON SPECTATOR (Ont., Can.), Sept. 29, 2006, at A01, available at 2006 WLNR 16864969.

11. George Ochenski, *Policy Hypocrisy: Is Schweitzer's Environmentalism Sinking in Tar?*, MISSOULA INDEP., Sept. 14, 2006, at 11, available at 2006 WLNR 19680958.

12. Judson Lake Trumpeter Swans, <http://www.judsonlaketrumpeterswans.ca> (last visited Nov. 3, 2007).

13. Boundary Waters Treaty, *supra* note 5.

14. *Id.* art. IV.

to date is the Trail Smelter Arbitration.<sup>15</sup> In that case, the International Joint Commission (IJC), which was created by the treaty, resolved a dispute arising from damage caused by emissions from a smelter in Trail, British Columbia.<sup>16</sup>

Unresolved environmental harms, however, continue to move in either direction across the border. Even the Trail smelter is once again the center of a controversy that may come before the United States Supreme Court.<sup>17</sup> Over the course of the twentieth century, the smelter dumped millions of tons of slag—the sludge that remains after metals are extracted from ore—into the Columbia River.<sup>18</sup> As a result, waste flowed into Washington State, building up behind the Grand Coulee Dam and creating one of the nation's most contaminated sites.<sup>19</sup> In the litigation arising out of this contamination, the Ninth Circuit deftly sidestepped the presumption against extraterritoriality.<sup>20</sup> The court found Teck Cominco, the present owner of the smelter, potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>21</sup> This statute imposes on polluters the costs accruing from researching how best to clean up contaminated sites.<sup>22</sup> While Teck Cominco has settled with the Environmental Protection Agency (EPA) for these preliminary costs,<sup>23</sup> it

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15. See Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Trail Smelter Arb. Trib. 1938 & 1941).

16. See Michael J. Robinson-Dorn, *The Trail Smelter: Is What's Past Prologue? EPA Blazes a New Trail for CERCLA*, 14 N.Y.U. ENVTL. L.J. 233, 243–53 (2006) (providing a detailed narrative of the Trail Smelter Arbitration and its attendant circumstances).

17. See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188); Karen Dorn Steele, *High Court Issues Order in Columbia Pollution Case: Solicitor General Brief Sought in Teck Cominco Appeal*, SPOKESMAN-REV. (Spokane, Wash.), June 5, 2007, at 1A, *available at* 2007 WLNR 11633843 (describing the present controversy and noting that the Supreme Court has asked the United States Solicitor General to submit an amicus brief on the case).

18. See *Pakootas*, 452 F.3d at 1069 (stating that the smelter discharged up to 145,000 tons of slag per year into the Columbia River between 1906 and 1995).

19. Robinson-Dorn, *supra* note 16, at 266–68.

20. See *Pakootas*, 452 F.3d at 1075 (holding that the “release” of toxins from decaying slag into American waters, not the dumping of the slag into the Canadian section of the Columbia River, created the CERCLA violation).

21. *Id.* at 1082; *see also* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000).

22. *Pakootas*, 452 F.3d at 1072.

23. *Id.* at 1071–72 n.10.

still maintains that it is not liable for the costs ultimately involved in cleaning up the damage.<sup>24</sup> This continued recalcitrance leaves open the possibility of future litigation.

In addition to the continued controversy over the Trail smelter, Manitoba has been arguing with North Dakota about the Continental Divide, which passes through the state and separates the Hudson Bay drainage basin from the Missouri River basin.<sup>25</sup> North Dakota wishes to build an artificial connection, the Northwest Area Water Supply Project (NAWS), between the two basins.<sup>26</sup> NAWS would allow the state to provide fresh water to water-poor regions in the northwestern portion of the state.<sup>27</sup> Manitoba, which shares some of the Hudson Bay basin, has expressed concern that such a project could lead to cross-contamination of the basins with invasive species, prompting an ecological meltdown on the same level as the zebra mussel infestation in the Great Lakes.<sup>28</sup> In 2005, a United States federal district court found Manitoba's argument compelling, and a district judge used the National Environmental Policy Act (NEPA)<sup>29</sup> to order a more searching environmental assessment of the project.<sup>30</sup> As in the Trail Smelter Case, the district court found that the application of the United States statute was not extraterritorial.<sup>31</sup>

Later that same year, however, Manitoba and a number of environmental groups lost a different face-off with a North Dakota water project. This time, the state sought to connect Devils Lake to the Sheyenne River.<sup>32</sup> The lake has no natural outlet, causing its water level to fluctuate dramatically and leading to floods which damage property along its shores.<sup>33</sup> North Dakota sought to build an artificial outlet in order to

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24. *Lloyd's Underwriters v. Cominco Ltd.*, [2006] 12 W.W.R. 486, 498 (B.C.S.C.) (Can.), *aff'd*, [2007] 7 W.W.R. 281 (B.C. Ct. App.).

25. *See* *Manitoba v. Norton*, 398 F. Supp. 2d 41, 45 & n.1 (D.D.C. 2005).

26. *Id.* at 46.

27. *Id.*

28. *See id.* at 45 & n.4.

29. 42 U.S.C. §§ 4321-4347 (2000).

30. *Norton*, 398 F. Supp. 2d at 65.

31. *Manitoba v. Norton*, No. 02-cv-02057(RMC), at 4-5 (D.D.C. Nov. 14, 2003) (order denying motions for judgment on the pleadings) (allowing the case to proceed because it believed that "appropriate restraints within the United States" might be sufficient to grant standing and declining to find that "NEPA has true extraterritorial application").

32. *See* *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 697 N.W.2d 319, 323-24 (N.D. 2005).

33. *Id.* at 323.

control this flooding.<sup>34</sup> However, the lake's isolation may have also led to the development of a unique ecosystem, and there were concerns that such an outlet, like NAWS, would create the risk of cross-contamination of invasive species.<sup>35</sup> Manitoba lost this court battle in the North Dakota Supreme Court.<sup>36</sup> Moreover, as no federal funds were being used in the project, NEPA was inapplicable.<sup>37</sup>

Thus, although the Boundary Waters Treaty and its adjudicatory body are in place, a series of lawsuits involving these problems continue to find their way into domestic courts. However, this litigation is not altogether unexpected. It is instead the consequence of an interaction of geography and the strategic behavior of nation-states.

#### B. THE FAILURE OF INTERNATIONAL INSTITUTIONS TO RESOLVE THE PROBLEM

Public international law governs the way in which nations structure their behavior in relation to each other on the international stage.<sup>38</sup> Private international law, on the other hand, governs the choice of municipal law to be applied in disputes between private parties.<sup>39</sup> Recognized sources of public international law include treaties,<sup>40</sup> custom,<sup>41</sup> and international rule-making institutions.<sup>42</sup> When a nation becomes involved in an international dispute, the disagreement may arise in either a bilateral or a multilateral context. Bilateral disputes involve breaches of treaties between nations or of customary international law.<sup>43</sup> Multilateral disputes, conversely, involve a breach

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34. *Id.*

35. Blake Nicholson, *Groups Complain About DL Outlet to NAFTA Commission: Opponents Say Outlet Breaks International Law*, GRAND FORKS HERALD, Mar. 28, 2006, available at 2006 WLNR 5124873.

36. *People to Save the Shyenne River*, 697 N.W.2d at 333.

37. See *Env'tl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 594 (S.D. Ind. 1991) (stating that NEPA jurisdiction over a project only exists where there is federal funding).

38. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2 (3d ed. 1999).

39. See *id.*; see also *id.* at 4 (defining municipal law as "the internal laws of national legal systems").

40. *Id.* at 5.

41. *Id.* at 5-6.

42. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 694-96 (5th ed. 1998) (listing the ways in which international organizations can serve as sources of public international law).

43. See Eric A. Posner & John C. Yoo, *Judicial Independence in Interna-*

of the state's obligations to the constituency of an international institution of which it is a member.<sup>44</sup> The context in which the dispute arises affects the nation's response. In turn, the nation's response impacts private litigants' ability to influence the resolution of the problem.

### 1. State Participation in International Dispute Resolution

Independent, sovereign nations operate upon an international stage which is disordered and anarchic—there is no world government.<sup>45</sup> Given the risk that a nation may lose any adjudicative proceeding to which it is a party, and the fact that it may choose not to participate in such proceedings, a nation will not subject itself to international dispute resolution unless it has an incentive to do so.<sup>46</sup>

In bilateral dispute resolution, there is a prospective incentive for participation. A country “will comply with [an adverse decision] if the cost of compliance is less than the future benefits of continued use of adjudication.”<sup>47</sup> In the bilateral context, the future benefits of arbitration are a function of the country's expectation that over time, it can generally expect to win as much as it loses.<sup>48</sup> In the multilateral context, however, compliance reinforces the supranational structure which the member state helped erect.<sup>49</sup> This support benefits the member state

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*tional Tribunals*, 93 CAL. L. REV. 1, 14–19 (2005) (outlining a theory as to why states submit their disputes to arbitration). *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 940 (2005) (limiting the usefulness of Posner's arguments to bilateral relationships).

44. *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463–64 (2003) (claiming, using the example of the World Trade Organization, that “compulsory dispute settlement provides a framework for ensuring that [member states] will follow through on their cooperative agreements rather than defecting”).

45. *See id.* at 431 (“No international sovereign imposes order on the system [of international law].”).

46. Posner & Yoo, *supra* note 43, at 21.

47. *Id.* at 20.

48. *See id.* at 20–21 (explaining that a “state that expects to lose . . . would refuse to consent” to arbitration unless the state can expect that, over time, decisions will fall within an acceptable “win set”). A country's decision to submit a particular dispute to arbitration will be based on the expected value of the arbitration—the value determined by looking at the cost and benefits of potential outcomes discounted by the probability of each outcome. *Id.* The historical data which makes up the “win set” helps a country to determine the probability of any given outcome. *Id.*

49. *See* Helfer & Slaughter, *supra* note 43, at 935 (“By increasing the probability of both material sanctions and reputational harm, international

because the state can expect that its interests will be protected in arbitrations to which it is not a party.<sup>50</sup> Thus, even if the nation loses a multilateral dispute, that defeat may still serve its long-term interests.<sup>51</sup>

The different balance of interests presented by bilateral and multilateral disputes explains why private parties are excluded from international forums that resolve bilateral disputes,<sup>52</sup> but may be permitted to sue in multilateral forums.<sup>53</sup> If states were to open up access to private parties, the number of disputes in which a state could expect to be involved would increase dramatically.<sup>54</sup> By comparison, any given private litigant with access to such forums likely would be a party to only a small number of lawsuits<sup>55</sup>—often only one or two. In bilateral dispute forums, this surge in litigation would impose tremendous costs on states while failing to provide a concurrent

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tribunals raise the cost of violations, thereby increasing compliance and enhancing the value of the agreement for all parties.”).

50. See *id.* at 938–39 (hinting that supranational tribunals “minimiz[e] . . . negative externalities [exported by a party in breach of international law to] all member states”).

51. The same thing can be said of bilateral investment treaties. Although the signatory state can often be sued by private litigants through such treaties, cooperation by the country increases its reputation among foreign investors and helps to attract additional investment. See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 173–73 (2007).

52. See, e.g., International Court of Justice, Frequently Asked Questions, <http://www.icj-cij.org/information/index.php> (follow “Frequently Asked Questions” hyperlink) (last visited Nov. 3, 2007) [hereinafter International Court FAQ] (noting that the International Court of Justice is a forum to which states may submit their disputes, but that it has no jurisdiction to deal with applications from individuals or private entities).

53. See Henry W. McGee, Jr. & Timothy W. Woolsey, *Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano’s The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000), 20 UCLA J. ENVT. L. & POLY 109, 116 (2001/2002) (book review) (“International bodies that do grant standing to non-state parties now outnumber those with limited state-to-state jurisdiction.”). For example, trading blocs like the WTO, NAFTA, and the EU grant access to private litigants. *Id.* However, such access is generally limited to economic and trade disputes. *Id.*

54. See *United States v. Mendoza*, 464 U.S. 154, 159–60 (1984) (outlining the sheer volume of litigation in which the United States federal government is involved due to its “geographic breadth” and the “nature of the issues” it litigates); see also Martinez, *supra* note 44, at 439 (noting that granting private parties access to international forums “tends to increase the number of cases brought”).

55. See *Mendoza*, 464 U.S. at 159–60.



benefit,<sup>56</sup> because the state would only face off against each individual litigant a few times. Furthermore, as the state will most likely play the role of a defendant,<sup>57</sup> the expected value of such litigation would always be negative for the state party.<sup>58</sup> In the multilateral context, however, each state would still reap the benefits of an international legal framework.<sup>59</sup>

In fact, the increase in litigation would enhance compliance by other member states by increasing the costs of noncompliance.<sup>60</sup> Thus, the current structure of public international law maximizes benefits for nations by encouraging litigation which is potentially beneficial to states, while discouraging litigation that only imposes costs. Unfortunately, this maximization presents a problem for those seeking to address transboundary pollution along the United States-Canadian border.

## 2. Transboundary Water Disputes Between the United States and Canada Inhibit the Participation of Private Parties

The alluvial geography of North America<sup>61</sup> creates an essentially bilateral interaction between the United States and Canada over their transboundary waters.<sup>62</sup> The United States

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56. See *id.* at 160 (using this as one justification for prohibiting the use of offensive nonmutual collateral estoppel against the federal government).

57. See Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 245–46, 265 (2007) (noting that arbitration clauses in bilateral investment treaties allow private investors to enforce treaty obligations against state parties and, as a result, the “state is a defendant” in such arbitrations).

58. The cost in the case of a victory for the state party would be the cost of litigating, which would be compounded with the cost of providing a remedy in the event of an adverse decision.

59. See Helfer & Slaughter, *supra* note 43, at 938–39 (explaining how independent international tribunals can “help states resolve cooperation problems arising from treaties that regulate public goods or the global commons” and thus minimize negative externalities).

60. See Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 13 (“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted [to] . . . the Member States.”).

61. See Noah Hall, *Bilateral Breakdown: U.S.-Canada Pollution Disputes*, NAT. RESOURCES & ENV'T, Summer 2006, at 18, 18 (“The [United States and Canada] share a five thousand-mile border that includes approximately 150 rivers and lakes containing over 90 percent of North America’s fresh surface water, and over 20 percent of the total fresh surface water in the world.”).

62. See *id.* at 19 (“Beginning nearly a century ago, the two countries established the foundation for their bilateral relationship on environmental matters with the Boundary Waters Treaty of 1909[,] . . . [which] provides legal ob-

is the only country with which Canada shares an international boundary.<sup>63</sup> There is no interaction between the river systems that cross the United States-Canada border and those that cross the United States border with Mexico.<sup>64</sup> It is therefore unsurprising that the two countries have sought to resolve their boundary water problems in a manner typical of the bilateral international framework—by creating a dispute forum that bars private party access.<sup>65</sup> As a result, disputes that reach final arbitration are often resolved in a manner that serves the political needs of the countries, rather than in a form that redresses the injuries suffered by those harmed by pollution. For example, in the Trail Smelter Arbitration, political compromises eventually limited recovery to a mere \$428,000 of the \$2 million in damage claims originally submitted.<sup>66</sup> A brief examination of the international adjudicative bodies that could potentially exercise jurisdiction over United States-Canadian cases shows that a private environmental litigant will be unable to find relief at the international level.

*a. Bilateral Dispute Resolution Forums—The International Court of Justice and the International Joint Commission*

The International Court of Justice (International Court) is a forum for resolving disputes of a predominantly bilateral character.<sup>67</sup> While it has the jurisdiction to resolve any treaty dis-

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ligations and a dispute resolution mechanism between the United States and Canada for the two countries' shared boundary waters.”).

63. See OXFORD ATLAS, *supra* note 9, at 132–33.

64. See *Manitoba v. Norton*, 398 F. Supp. 2d 41, 45 (D.D.C. 2005) (“The Continental Divide separates water flows in the United States so that streams flow to opposite sides of the continent.”). Compare OXFORD ATLAS, *supra* note 9, at 132–33 (showing that no river crosses both the United States-Canada border and the United States-Mexico border), with *id.* at 11 (showing that the Danube River touches the boundaries of ten countries—Germany, Austria, Slovakia, Hungary, Croatia, Serbia, Bulgaria, Romania, Moldova, and the Ukraine).

65. See, e.g., *Robinson-Dorn*, *supra* note 16, at 248–50 (explaining that the Trail Smelter Arbitration, which involved toxic smoke emissions from the smelter in Trail, British Columbia, only came before the International Joint Commission when the United States government nationalized the issue). Even more generally, “[m]ost international environmental institutions lack forums with jurisdiction to resolve international environmental disputes between nations, more less [sic] provide a forum for private actors.” *McGee & Woolsey*, *supra* note 53, at 116.

66. See *Robinson-Dorn*, *supra* note 16, at 250–52 (combining pre-1932 emission damages (\$350,000) with those from 1932–1937 (\$78,000)).

67. While the procedural rules of the International Court permit intervention by other states, in practice, the court rarely allows such third-party inter-

putes brought before it,<sup>68</sup> many of the broader multilateral treaties have their own dispute resolution bodies.<sup>69</sup> The International Court also has jurisdiction to hear cases dealing with customary international law.<sup>70</sup> Unfortunately, since the disputes brought before it are bilateral, states have nothing to gain by opening standing to private parties.<sup>71</sup> Thus, the International Court can only hear disputes between states and is not available to private litigants in transboundary pollution cases.<sup>72</sup>

The IJC, on the other hand, is a body that owes its entire existence to a bilateral agreement: the Boundary Waters Treaty between the United States and Canada.<sup>73</sup> This treaty governs the use of the waters shared by both countries.<sup>74</sup> While the IJC serves a mainly advisory function,<sup>75</sup> it can hear cases under certain circumstances.<sup>76</sup> However, the IJC can only issue findings of fact, not binding decisions, in pollution cases.<sup>77</sup> Fur-

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vention. U.N. Conference on Trade & Dev. [UNCTAD], *Dispute Settlement* § 1.2, at 19, U.N. Doc. UNCTAD/EDM/Misc.232/Add.19 (2003), available at [http://www.unctad.org/en/docs/edmmisc232add19\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add19_en.pdf) (discussing dispute settlement under the International Court of Justice).

68. See International Court of Justice, Basis of the Court's Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php> (follow "Contentious Jurisdiction" hyperlink; then follow "Basis of the Court's Jurisdiction" hyperlink) (last visited Nov. 3, 2007) [hereinafter International Court Jurisdiction] ("Article 36, paragraph 1, of the Statute [of the International Court of Justice] provides that the jurisdiction of the Court comprises all cases which the parties refer to it.").

69. See Helfer & Slaughter, *supra* note 43, at 926 tbl.2(a) (listing a number of such courts).

70. See International Court Jurisdiction, *supra* note 68 (citing the Statute of the International Court of Justice for the proposition that the court has jurisdiction concerning "any question of international law").

71. Private parties would not be repeat actors of the type that incentivize states to submit to outside arbitration in the bilateral context. See Posner & Yoo, *supra* note 43, at 20–21 (theorizing that states submit to bilateral arbitration as part of a long-term strategy, rather than to solve discrete incidents).

72. See International Court FAQ, *supra* note 52.

73. See Boundary Waters Treaty, *supra* note 5, art. VII.

74. See *id.* preliminary art. (defining "boundary waters").

75. See International Joint Commission, Who We Are, [http://www.ijc.org/en/background/ijc\\_cmi\\_nature.htm](http://www.ijc.org/en/background/ijc_cmi_nature.htm) (last visited Nov. 3, 2007) (stating that the Commission can investigate and monitor pollution problems and recommend actions).

76. See Boundary Waters Treaty, *supra* note 5, art. VIII (granting the power to make binding decisions regarding "all cases involving the use or obstruction or diversion of the [boundary] waters").

77. See *id.* art. IX (limiting the IJC's power in all other cases within its jurisdiction).

thermore, even in this limited capacity, the IJC can only conduct proceedings if either the United States or Canada initiates them—private litigants do not have standing.<sup>78</sup> Thus, private parties cannot rely on the IJC to provide them with adequate relief.

*b. Multilateral Dispute Resolution Forums—The World Trade Organization and the North American Free Trade Agreement*

Both the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA)<sup>79</sup> are multilateral arrangements with their own judicial bodies.<sup>80</sup> While private parties have standing to sue in these courts,<sup>81</sup> complaints are limited to the jurisdictional competence of the bodies.<sup>82</sup> This competence extends only to the particular harms the member states sought to eliminate through the treaty (i.e., the economic costs associated with barriers to trade).<sup>83</sup> Granting private parties access to these judicial bodies helps the organizations minimize the ability of any single member to externalize costs to other members.<sup>84</sup> Noncompliant member states free ride on the benefits created by cooperative member states.<sup>85</sup> At the same

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78. *See id.* (stating that controversies between the “High Contracting Parties” shall be “referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred”). Note, however, that the Trail Smelter Arbitration was decided under a special agreement that granted the IJC, in that specific case, the power to assign damages. *See* Robinson-Dorn, *supra* note 16, at 248–50.

79. U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

80. *See* McGee & Woolsey, *supra* note 53, at 113 (contrasting Romano’s focus on the International Court’s role in international environmental disputes with his neglect of “other, sometimes compulsory, adjudication contained in such multilateral agreements as . . . the World Trade Organization (“WTO”) . . . and regional entities such as the European Union (“EU”) and the North American Free Trade Agreement (“NAFTA”)”).

81. *See id.* at 116.

82. *See id.* at 119–24 (describing the access of private parties to the WTO and NAFTA courts).

83. *See* NAFTA, *supra* note 79, art. 102; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations arts. II(1) & III, Apr. 15, 1994, 33 I.L.M. 1125, 1144–45 (1994) (WTO Agreement).

84. *See* Helfer & Slaughter, *supra* note 43, at 938–39 (citing the role of supranational courts as “minimizing the parties’ negative externalities [inflicted] upon all member states”).

85. *See* MICELI, *supra* note 1, at 32 (discussing the “free-rider problem” as a potential source of market failure).

time, their noncompliance creates a negative externality for all other member states.<sup>86</sup> By tying themselves to binding dispute resolution systems, states seek to resolve both of these problems. However, the narrow economic focus of these agreements means private parties seeking to have environmental wrongs corrected are often excluded from these forums.<sup>87</sup>

Although there is an environmental side agreement to NAFTA<sup>88</sup> with its own adjudicative body,<sup>89</sup> the remedy available to such plaintiffs is merely a “spotlight remedy” that does not provide concrete relief<sup>90</sup>—the environmental court only has the power to publish findings.<sup>91</sup>

The difference in the remedies available in the North American trade and environmental courts is a consequence of the relationship of each field of law to the continent’s geography. Trade has a longer geographic reach than discreet environmental harms.<sup>92</sup> For example, while Mexican trade barriers could impose costs upon the Canadian market,<sup>93</sup> the presence of the United States between the two countries creates a vast buffer zone that environmental harm emanating from either is un-

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86. See *id.* at 31 (stating that the most common example of a negative externality is pollution).

87. See McGee & Woolsey, *supra* note 53, at 119, 121 (stating that the access of private parties to the WTO and NAFTA courts is limited, particularly with regard to environmental disputes).

88. See North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480.

89. See McGee & Woolsey, *supra* note 53, at 121 (explaining that the North American Agreement on Environmental Cooperation “provides a forum for private parties to bring complaints before a trilateral Commission for Environmental Cooperation”).

90. See Nicholson, *supra* note 35.

91. See *id.* (“A commission investigation produces a report that does not make any recommendations and might not even be made public.”); see also *DEVILS LAKE: Commission Receives Revised Outlet Complaint; Environmental Groups Request Investigation*, GRAND FORKS HERALD, July 17, 2006, available at 2006 WLNR 12260709 [hereinafter *DEVILS LAKE*] (observing that while “the ‘citizen submission’ process does not include the possibility of sanctions,” it does allow groups to “draw attention to an issue”).

92. See Lincoln L. Davies, Note, *If You Give the Court a Commerce Clause: An Environmental Justice Critique of the Supreme Court Interstate Waste Jurisprudence*, 11 FORDHAM ENVTL. L.J. 207, 272–73 (1999) (explaining the geographically limited environmental harm of landfills and chastising the Court’s interpretation of the Dormant Commerce Clause for commercializing waste and thereby broadening the geographic reach of garbage).

93. See, e.g., Hot Rolled Steel Sheet from Canada, Case No. MEX-96-1904-03, Final Decision at 1 (NAFTA Binational Panel June 16, 1997), reprinted in RALPH H. FOLSOM ET AL., HANDBOOK OF NAFTA DISPUTE SETTLEMENT (1998) (deciding a Mexican-Canadian dispute over tariffs for hot rolled steel).

likely to penetrate.<sup>94</sup> Thus, while the trade relationship created by NAFTA is multilateral, the environmental relationship amongst the bloc's members can be seen as two bilateral relationships: the United States-Mexico relationship and the United States-Canada relationship. The limited remedy available under the NAFTA side agreement therefore arises as a function of state self-interest.<sup>95</sup> And, while in some cases the decisions of the side agreement's court have prompted action by the governments of member states,<sup>96</sup> publicity is a poor substitute for injunctive relief or damages. Indeed, it is the very inadequacy of relief on the international stage that has prompted private parties, and political subdivisions such as Manitoba, to seek it elsewhere.<sup>97</sup>

### C. CANADIAN AND AMERICAN NATIONAL COURTS' OPPORTUNITY TO ADDRESS THE POLLUTION CROSSING THE 49TH PARALLEL

Legal commentators have both applauded<sup>98</sup> and decried<sup>99</sup> the growth of transnational lawsuits. However, Professor Jenny S. Martinez's recent scholarship argues that such suits play a

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94. See OXFORD ATLAS, *supra* note 9, at 132–33 (showing that even at their closest point, the Canadian and Mexican borders to the United States are separated by more than one thousand miles).

95. The member states would not expect challenges to arise from repeat private litigants, and as a result, would expect no long-term benefit from submitting to compulsory binding arbitration. See Posner & Yoo, *supra* note 43, at 20–21 (theorizing that states submit to bilateral arbitration as part of a long-term strategy, rather than to solve discrete incidents).

96. See McGee & Woolsey, *supra* note 53, at 122–23 (“While public exposure is the only sanction available to private parties under Article 14 [of the North American Agreement on Environmental Cooperation], it has resulted in member-states abandoning environmentally harmful decisions.”).

97. For example, the plaintiffs from *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 697 N.W.2d 319 (N.D. 2005), only filed a complaint with NAFTA after losing in the North Dakota Supreme Court. See *DEVILS LAKE*, *supra* note 91 (stating that the plaintiffs originally filed a NAFTA complaint in March of 2006).

98. See Robinson-Dorn, *supra* note 16, at 235 (“Teck Cominco can’t send highly toxic sludge across the border and then insist that border protects them from liability. They created one big mess here in the U.S., and they should clean it up . . .”).

99. See Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 47 (2006) (“An exorbitant jurisdictional assertion . . . ‘can readily arouse foreign resentment,’ ‘provoke diplomatic protests,’ ‘trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields.’” (quoting Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 28–29 (1987))).

vital role in the international judicial regime.<sup>100</sup> This nascent judicial system is the result of the knitting together of independent national, supranational, and international courts.<sup>101</sup> By engaging in interjurisdictional dialogue in case law, courts have established procedural rules that serve two important functions: appropriately allocating cases among courts that may have equal jurisdictional claims<sup>102</sup> and ensuring that the rulings given in such cases are respected in other jurisdictions.<sup>103</sup>

#### 1. The Use of Procedural Doctrines to Allocate Cases to the Appropriate Court

Federal or pseudo-federal structures present many interesting examples of legal doctrines that allocate jurisdiction among national and local court systems. One American allocative doctrine, *Pullman* abstention, requires federal courts to refrain from deciding constitutional cases where a state court resolving a complicated matter of state law would also avoid the question.<sup>104</sup> Another example can be found in the rule of *Foto-Frost v. Hauptzollamt Lübeck-Ost*, where the European Court of Justice (ECJ) claimed the power to strike down European Union (EU) legislation, while denying that power to national European courts.<sup>105</sup> One court's decision to allocate decision-making power to another, however, is insufficient without the cooperation of that other court.

#### 2. The Use of Judicial Dialogue to Convince Other Courts to Respect the Allocation of Cases

When a court attempts to allocate a case, it is immediately faced with the challenge of convincing its sister court to respect the allocation.<sup>106</sup> This requires judicial dialogue. The European experience serves as a useful illustration. In response to concerns articulated by a German court that the EU did not protect the fundamental human rights enshrined in the German

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100. See Martinez, *supra* note 44, at 432.

101. See *id.* at 436–44 (describing this process thus far).

102. *Id.* at 449–52.

103. *Id.* at 452–53.

104. See *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

105. Case 314/85, 1987 E.C.R. 4199, 4231.

106. See Martinez, *supra* note 44, at 479–80 (describing how courts of separate jurisdictions exercise discretion in choosing to recognize or reject the judgments of foreign courts).

Constitution, the ECJ recognized such rights at the European level.<sup>107</sup> Similarly, Germany's refusal to recognize the judgments of countries that would not recognize its own decisions prompted a change in the French practice of reviewing all foreign judgments.<sup>108</sup> Canadian provinces, which until only recently were not obligated to recognize each other's judgments, applied a reciprocity principle similar to that of the German courts.<sup>109</sup>

American and Canadian courts can learn to effectively allocate and address transboundary pollution cases. In order to do so, however, they must first revise the jurisdictional presumption against extraterritoriality.

## II. POTENTIAL JURISDICTIONAL BARRIERS TO UNITED STATES OR CANADIAN NATIONAL COURT ACTION IN CASES INVOLVING TRANSBOUNDARY WATER POLLUTION

The courts of the United States and Canada have the power to develop private international law doctrines that fairly allocate environmental cases.<sup>110</sup> In order to accomplish this task, however, courts will have to address two jurisdictional doctrines. The first is the doctrine of personal jurisdiction, which determines when it is appropriate for a court to exercise jurisdiction over a transboundary defendant.<sup>111</sup> Both countries use a contacts-based approach. While United States courts examine the relationship of the defendant to the forum,<sup>112</sup> Canadian courts hold the forum's relationship to the case being litigated as determinative.<sup>113</sup>

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107. Case 26/69, *Stauder v. Ulm*, 1969 E.C.R. 419, 419-30.

108. *Martinez*, *supra* note 44, at 453.

109. *See Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1091-94 (Can.).

110. National court litigation is not preempted by the Boundary Waters Treaty, so national courts are entitled to decide such cases. *See* Boundary Waters Treaty, *supra* note 5, art. IX (denying the IJC the power to issue binding decisions); *Manitoba v. Norton*, 398 F. Supp. 2d 41, 51 n.10 (D.D.C. 2005) (rejecting the argument that the Boundary Waters Treaty preempts a national court claim).

111. *See Parrish*, *supra* note 99, at 3-5.

112. To acquire personal jurisdiction over absent persons, a court in the United States must first be satisfied that there are sufficient "minimum contacts" between the individual and the state and that the exercise of jurisdiction will not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

113. *See Morguard*, [1990] 3 S.C.R. at 1087-91.



The other jurisdictional doctrine presents greater difficulty. The presumption against extraterritoriality puts at issue the power of a court to apply national environmental statutes to transboundary defendants.<sup>114</sup> Unfortunately, the presumption is imperfectly calibrated and allows defendants such as Teck Cominco and North Dakota to externalize costs or risks across the border unless a court rationalizes a territorial application of the statute. The contorted reasoning of such cases is sometimes met with skepticism on the other side of the border.<sup>115</sup> As the courts of one country rely on the courts of the other to implement extraterritorial judgments, such skepticism presents an obstacle to effectively addressing cross-border legal issues. If a foreign court is suspicious of the reasoning in a decision, it may find reasons not to respect and enforce that decision.

#### A. PERSONAL JURISDICTION OVER ALIEN DEFENDANTS

Historically, the power of a court to exercise in personam jurisdiction over a nonresident was limited by the presence or absence of the defendant within the forum's territory.<sup>116</sup> However, the growing interconnection of nations—and their states or provinces—prompted the adoption of rules in both the United States and Canada that focus on those connections. In the United States, this transition began during the middle of the twentieth century and the case law on the subject had largely stabilized by the end of the century.<sup>117</sup> In Canada, however, the transition to a connection-oriented law of personal jurisdiction only began in the last twenty years,<sup>118</sup> and the full impact of the shift remains to be seen. The exercise of personal jurisdiction over transboundary polluters is permissible under the doctrines of both countries.

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114. See *Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Ass'n of Internet Providers (SOCAN)*, [2004] 2 S.C.R. 427, 454 (Can.).

115. See *Lloyd's Underwriters v. Cominco Ltd.*, [2006] 12 W.W.R. 486, 497 (B.C.S.C.) (Can.) (reserving judgment on the reasoning of the Ninth Circuit in *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006)), *aff'd*, [2007] 7 W.W.R. 281 (B.C. Ct. App.).

116. Parrish, *supra* note 99, at 8–9.

117. See *id.* at 12–18 (describing this transition).

118. *Morguard*, [1990] 3 S.C.R. 1077, Canada's *International Shoe*, was only decided in 1990, and this Note will observe how it has impacted Canadian law regarding the recognition of foreign judgments, personal jurisdiction, and extraterritoriality.

### 1. Personal Jurisdiction in the United States

To acquire limited jurisdiction over absent persons, a court in the United States must first satisfy itself that there are sufficient “minimum contacts” between the individual and the state and that “traditional notions of fair play and substantial justice” will not be offended by the exercise of that jurisdiction.<sup>119</sup> This test is applied without reference to the sovereignty interests of another forum, either within or outside the United States. Rather, the test is guided only by the due process rights of the defendant.<sup>120</sup> Furthermore, the defendant does not need to have been present in the forum state. If the defendant “purposefully directed” his conduct towards the forum to the extent that he could reasonably expect to be sued there, then his presence or absence is irrelevant.<sup>121</sup>

### 2. Personal Jurisdiction in Canada

Canada’s adoption of a more expansive concept of personal jurisdiction is more recent and less settled than that of the United States. Like much of Canadian jurisdictional doctrine, it derives from the notion of comity, which encourages courts to recognize the decisions of foreign jurisdictions whenever possible.<sup>122</sup>

In Canada, unlike in the United States, there is no Full Faith and Credit Clause that requires the courts of one prov-

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119. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). While the extent of a federal court’s jurisdiction over an absent defendant is governed by the rules imposed by the state in which it sits, FED. R. CIV. P. 4(k)(1)(A), many states have long-arm statutes which permit their courts to extend their reach as far as is constitutionally permitted. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2003) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”). For the purposes of this general discussion of American personal jurisdiction, it is assumed that such a statute would be applicable.

120. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (holding that personal jurisdiction is not “a matter of sovereignty, but [is] a matter of individual liberty,” and finding the exercise of personal jurisdiction over a foreign defendant proper).

121. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)) (internal quotation marks omitted).

122. *Morguard*, [1990] 3 S.C.R. at 1096 (“Comity’ . . . is the recognition which one nation allows within its territory to the . . . acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws . . .” (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895))).

ince to recognize the judgments of another.<sup>123</sup> However, binding precedent from the British Privy Council, using the principle of comity, mandated that courts recognize foreign judgments in cases initiated while the defendant was in the territory of the foreign sovereign.<sup>124</sup> The rule was imported directly into Canadian law and governed the way provinces—seen as separate nations under private international law—treated each other’s judgments.<sup>125</sup> As the rule did not provide for the recognition of in personam judgments against absent foreign defendants, its application in a federal system proved problematic.<sup>126</sup> All that was required to escape the enforcement of a contract signed in one province was to move to another.<sup>127</sup> It was such a case that prompted the Canadian Supreme Court to alter Canada’s jurisdiction rules in *Morguard Investments Ltd. v. De Savoye*.<sup>128</sup>

*Morguard* established a more expansive view of personal jurisdiction. It held that comity requires courts to recognize judgments issued by foreign courts that had personal jurisdiction over the defendant.<sup>129</sup> To this end, *Morguard* held that personal jurisdiction could be exercised where there is a “real and substantial connection” between the forum and the suit.<sup>130</sup> This approach, the *Morguard* court believed, would adequately balance the plaintiff’s interest in suing in the forum of his choice with the hardship suffered by a defendant sued outside his home province.<sup>131</sup>

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123. *Id.* at 1100; *see also* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”). *But see* *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, 322–23 (Can.) (inferring a full faith and credit requirement from the structure of the Canadian Constitution although there is no explicit clause).

124. *See Morguard*, [1990] 3 S.C.R. at 1087–88, 1091–92.

125. *Id.* at 1091–92.

126. *See id.* at 1087 (framing the issue to be decided along these terms).

127. *See id.* at 1091–92.

128. *See id.*

129. *See id.* at 1103–04 (finding no difficulty in recognizing judgments where a foreign court has acted within the “ground[s] traditionally accepted . . . as permitting the recognition . . . of foreign judgments,” but going on to struggle with the extent to which “a court of a province [may] properly exercise jurisdiction over a defendant in another province”); *id.* at 1107 (“[I]f this Court thinks it inherently reasonable for a court to exercise jurisdiction . . . it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court’s judgment.”).

130. *Id.* at 1109.

131. *Id.*

Subsequent case law continues to apply the *Morguard* test and expand its reach.<sup>132</sup> In 1993, *Hunt v. T&N plc* constitutionalized the holding, explaining that Canada's federal structure permitted provinces to extend their jurisdictional reach into sister provinces.<sup>133</sup> Earlier that same year, *Amchem Products, Inc. v. British Columbia (Workers' Compensation Board)* internationalized the holding.<sup>134</sup> That case incorporated the "real and substantial connection" test into Canadian forum non conveniens law.<sup>135</sup> Under the rule announced, a court must dismiss a suit under the doctrine of forum non conveniens if there is a "more appropriate jurisdiction" to try the case.<sup>136</sup> As articulated by the court, the "real and substantial connection" test should be used to determine whether there is a more appropriate forum.<sup>137</sup> The presence of the defendant and the location where service is rendered are no longer relevant considerations under Canadian law.<sup>138</sup> Although it has evolved along a different path, Canada's personal jurisdiction law is now capable of reaching as far as that of its longer-established American neighbor.

### 3. Acquiring Personal Jurisdiction over a Transboundary Polluter

A transboundary polluter like Teck Cominco, which discharges vast amounts of waste into a river throughout most of

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132. *Desjean v. Intermix Media, Inc.*, [2006] 57 C.P.R.4th 314, 322–23 (Fed. Ct.) (Can.) (listing Canadian Supreme Court and Ontario cases that have applied this test).

133. [1993] 4 S.C.R. 289, 322–23 (Can.).

134. [1993] 1 S.C.R. 897, 920–21 (Can.).

135. *See id.* at 916–17, 919–21. In the United States, forum non conveniens is applied where an alternative forum exists and where "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,'" or when the "court's own administrative and legal problems" militate against the exercise of jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). This doctrine does not present a problem for United States-Canadian transboundary environmental litigation because the forums are close to each other, and the laws to be applied are similar. *See Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at \*4 (E.D. Wash. Nov. 8, 2004) (disposing of objections to the exercise of personal jurisdiction on these grounds), *aff'd*, 452 F.3d 1066 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188).

136. *Amchem*, [1993] 1 S.C.R. at 920–21.

137. *See id.*

138. *Id.*

a century,<sup>139</sup> should not be surprised when the river carries the waste downstream into another forum. Knowledge that the river will run its course is enough to satisfy the purposeful direction test of American personal jurisdiction law.<sup>140</sup> Canadian law would also quickly dispose of a challenge to personal jurisdiction as there is a “real and substantial connection” between the cause of action and the forum seeking to exercise jurisdiction.<sup>141</sup>

However, the ability to exercise personal jurisdiction over a defendant is meaningless if a court is not also able to exercise subject matter jurisdiction. The presumption against extraterritoriality may strip a court of such jurisdiction and is thus another obstacle to courts hearing transboundary pollution cases.

#### B. THE PRESUMPTION AGAINST EXTRATERRITORIALITY AND SUBJECT MATTER JURISDICTION

Both the United States and Canadian federal legislatures claim the power to legislate beyond the territorial limits of their respective countries.<sup>142</sup> However, both legislatures are presumed not to exercise this power unless they state their intent to do so.<sup>143</sup> This is known as the presumption against extraterritoriality. An examination of extraterritoriality case law, however, reveals exceptions that provide a basis for the general application of environmental statutes to transboundary polluters.

##### 1. The Presumption Against Extraterritoriality in the United States

The American presumption against extraterritoriality is an old rule, but has been recently revived by the Supreme

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139. *Pakootas*, 2004 WL 2578982, at \*3.

140. *Id.*; see also *Pakootas*, 452 F.3d at 1072 (noting that Teck Cominco did not challenge the personal jurisdiction ruling of the trial court on appeal).

141. See *United States v. Ivey*, [1996] 30 O.R.3d 370, 374–75 (Ont. Ct. App.) (Can.) (recognizing, for these reasons, an American court’s judgment against an absent Canadian defendant).

142. See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 284–85 (1949)); Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 3 (Eng.) (granting that power to the Canadian Parliament).

143. See *Foley Bros.*, 336 U.S. at 284–85; *Soc’y of Composers, Authors & Music Publishers of Can. v. Canadian Ass’n of Internet Providers (SOCAN)*, [2004] 2 S.C.R. 427, 454 (Can.).

Court.<sup>144</sup> Federal circuit courts struggling with the presumption have developed two exceptions to defeat the presumption in cases with American ties.<sup>145</sup> One exception provides that the presumption does not apply where the conduct giving rise to a case occurred within the United States.<sup>146</sup> The other applies where the adverse effects of such conduct are felt within the United States.<sup>147</sup> These exceptions are controversial, and there is disagreement as to whether one, both, or neither is valid.

*a. Development of the Rule*

The presumption against extraterritoriality first gained ground in the United States with *American Banana Co. v. United Fruit Co.*, a suit in which an American fruit company attempted to recover damages under the Sherman Antitrust Act for the monopolistic conduct in Columbia of a rival American company.<sup>148</sup> In dismissing the suit, Justice Oliver Wendell Holmes, Jr. articulated what would become the foundation for later jurisprudence on the presumption against extraterritoriality.<sup>149</sup> His argument was based on strict considerations of territorial sovereignty and on the respect that nations, as sovereign equals, owed each other.<sup>150</sup> He believed that “[f]or another jurisdiction . . . to treat [a party] according to its own notions rather than those of the place where he did the acts . . . would be an interference with the authority of another sovereign.”<sup>151</sup> While Justice Holmes admitted that Congress did have the competence to legislate beyond the borders of the United States,<sup>152</sup> he believed that courts should approach statutes cautiously and, “in case of doubt,” should construct statutes “as intended to be confined in [their] operation and effect to the terri-

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144. See William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–86 (1998).

145. See *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

146. *Id.*

147. *Id.*

148. 213 U.S. 347, 353–55 (1909).

149. See Dodge, *supra* note 144, at 85–86 (describing the early history of the presumption against extraterritoriality).

150. For example, see *American Banana*, 213 U.S. at 358, where Justice Holmes uses the same principles to develop the “act of state doctrine,” which requires American courts to refrain from passing judgment on the legality of the acts of foreign sovereigns.

151. *Id.* at 356.

152. See *id.* (citing, as an example, federal criminal statutes governing correspondence with foreign governments).

torial limits over which the lawmaker has general and legitimate power.”<sup>153</sup>

While it seemed for a time that the presumption against extraterritoriality had fallen into disfavor,<sup>154</sup> the Supreme Court reaffirmed the doctrine in *EEOC v. Arabian American Oil Co. (Aramco)*.<sup>155</sup> In *Aramco*, the Court again conceded that Congress can legislate extraterritorially, but held that judicial actors should operate under the assumption that legislation is passed to address domestic concerns.<sup>156</sup> The Court justified the presumption by observing that it “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>157</sup>

Under the modern doctrine, United States courts faced with an example case must go through a two-stage inquiry.<sup>158</sup> First, the court must examine the facts of the case to determine whether they require the extraterritorial application of a statute.<sup>159</sup> If it does, then the court is required to perform analysis under the presumption.<sup>160</sup> The presumption is not restricted to statutes regulating conduct, to those creating a right of action, or to any other similar category of statutes.<sup>161</sup> Second, if the court concludes that the presumption is applicable, it must determine whether Congress intended the statute to apply extraterritorially.<sup>162</sup> This does not amount, however, to a “clear statement rule.”<sup>163</sup> Courts can find intent by examining legislative history or through the use of other interpretive means.<sup>164</sup> The rule, however, remains a barrier to the extraterritorial application of a statute, because a failure to overcome the pre-

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153. *Id.* at 357.

154. Dodge, *supra* note 144, at 87.

155. 499 U.S. 244, 248 (1991).

156. *Id.*

157. *Id.*

158. *See, e.g., In re Maxwell Commc'n Corp.*, 186 B.R. 807, 815 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

159. *See, e.g., id.* at 815–16 (“First, a court must determine if the presumption applies at all: after identifying the conduct proscribed or regulated by the particular legislation in question, a court must consider if that conduct occurred outside of the borders of the U.S.”).

160. *See id.*

161. *See* *Urlic v. Am. Int'l Group*, No. 96 Civ. 1177(LBS), 1997 WL 223076, at \*4 (S.D.N.Y. May 1, 1997) (rejecting the argument that the presumption only applies to statutes regulating conduct).

162. *E.g., In re Maxwell Commc'n Corp.*, 186 B.R. at 816.

163. *See* *Kollias v. D&G Marine Maint.*, 29 F.3d 67, 73 (2d Cir. 1994).

164. *Id.*

sumption results in dismissal for lack of subject matter jurisdiction.<sup>165</sup>

*b. Exceptions to the Presumption*

The application of the presumption against extraterritoriality may be reasonable where a court is faced with a request to apply domestic law to cases where both the conduct and the effects of that conduct occur beyond the territorial jurisdiction of the United States.<sup>166</sup> Some courts, however, have dismissed the argument that cases with a substantial connection to the United States implicate the presumption.<sup>167</sup> Slowly, this reaction has led to the piecemeal adoption of two exceptions to the presumption: the “conduct” and the “effects” exceptions.<sup>168</sup> They first arose in the area of antitrust<sup>169</sup> and securities cases<sup>170</sup> before appearing in bankruptcy<sup>171</sup> and, finally, environmental cases.<sup>172</sup>

The conduct exception applies when the “conduct regulated by the government occurs within the United States.”<sup>173</sup> The effects exception, on the other hand, applies where the “failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States.”<sup>174</sup>

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165. See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 247, 259 (1991) (affirming a finding by the trial court that it lacked subject matter jurisdiction because the presumption against extraterritoriality had not been overcome).

166. See *Urlic*, 1997 WL 223076, at \*3 (applying the presumption against extraterritoriality to bar an insurance claim under 28 U.S.C. § 1364 for an automobile accident that occurred abroad).

167. The Ninth Circuit has taken this approach:

Certainly the doctrine of territorial sovereignty is not such an artificial limit on the vindication of legitimate sovereign interests that the injured state confronts the wrong side of a one-way glass, powerless to counteract harmful effects originating outside its boundaries which easily pierce its “sovereign” walls, while its own regulatory efforts are reflected back in its face.

*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984).

168. See *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997).

169. See *Dodge*, *supra* note 144, at 87.

170. See *Robinson*, 117 F.3d at 905.

171. See *In re Maxwell Commc'n Corp.*, 186 B.R. 807, 816–17 (S.D.N.Y. 1995), *aff'd*, 93 F.3d 1036 (2d Cir. 1996).

172. See, e.g., *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993).

173. *Id.*

174. *Id.*



Federal circuits are split as to the proper application of these two exceptions. Some jurisdictions recognize the conduct exception, while declining to apply the effects exception.<sup>175</sup> Other jurisdictions advocate for the opposite position,<sup>176</sup> while some jurisdictions apply both exceptions.<sup>177</sup> Some jurisdictions even limit the application of an exception to particular statutes or types of statutes.<sup>178</sup> If one of the exceptions is applicable, however, it precludes further analysis under the presumption against extraterritoriality, and the court does not proceed to statutory analysis.<sup>179</sup> This abbreviated analysis thus permits courts deciding transboundary cases to apply statutes that would not survive legislative intent analysis under the presumption.<sup>180</sup>

Each exception is derived from an inference as to congressional motives. The proponents of a conduct exception draw upon a classical understanding of sovereignty and power.<sup>181</sup> Such arguments first appeared in *American Banana*.<sup>182</sup> In that

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175. See *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1096–97 (9th Cir. 1994); see also *In re Maxwell Commc'n Corp.*, 186 B.R. at 821 (finding it “unclear if the domestic ‘effects’ of foreign conduct, in the absence of Congressional direction that a statute be applied to such conduct, is sufficient to render the presumption inapplicable”).

176. See *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (arguing that Congress does not normally legislate with the foreign effects of domestic conduct in mind); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 673 (S.D.N.Y. 1991) (refusing to apply the conduct test, but proceeding directly to an investigation of the legislative history); see also Dodge, *supra* note 144, at 124 (advocating for the general adoption of this position).

177. The D.C. Circuit adopted this position in *Massey*, 986 F.2d at 531, and the Fifth Circuit has also applied it in *Robinson v. TCI/US West Cable Communications Inc.*, 117 F.3d 900, 905 (5th Cir. 1997).

178. Compare *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1075–76 (9th Cir. 2006) (carefully classifying the environmental conduct as local and thus avoiding precedent which refuses to recognize the effects exception), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188), with *In re Simon*, 153 F.3d 991, 995 (9th Cir. 1998) (quoting *Massey*, 986 F.2d at 531, in order to apply the effects doctrine to a bankruptcy case).

179. See, e.g., *In re Maxwell Commc'n Corp.*, 186 B.R. at 816 (placing the conduct exception in the first stage of analysis under the presumption).

180. See *In re French*, 320 B.R. 78, 85 (D. Md. 2004), *aff'd*, 440 F.3d 145 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 72 (2006) (exempting from scrutiny, as an alternative holding, the Bankruptcy Code); *Goodman v. Lee*, No. 85-2966, 1994 WL 710738, at \*3–4 (E.D. La. Dec. 20, 1994) (deciding that the Copyright Act would apply regardless of the presumption).

181. See *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1096–97 (9th Cir. 1994) (noting the principle of territoriality in an international order populated with independent sovereignties).

182. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357–58 (1909).

case, Justice Holmes stated that congressional legislation regulating conduct was primarily “addressed to persons living within the power of the courts.”<sup>183</sup> This idea has been adopted by courts that recognize the conduct exception and, as a result, decline invitations to apply the presumption against extraterritoriality to bar cases involving conduct occurring within the United States.<sup>184</sup>

Proponents of the effects exception, on the other hand, argue that Congress is not much concerned with regulating the conduct of those within the United States, but with protecting Americans.<sup>185</sup> Under this theory, Congress intends domestic legislation to address not only domestic conduct, but also the adverse domestic effects of foreign conduct.<sup>186</sup>

In either case, the exceptions to the presumption apply only when the conduct or effect is significant enough to make the suit truly “domestic.”<sup>187</sup> Circuits disagree, however, as to the stringency of the threshold requirements necessary to prove that the application of an exception is appropriate.<sup>188</sup> This dispute as to what makes a statutory application “extraterritorial” has led one scholar to propose that extraterritoriality be examined along a “continuum of context.”<sup>189</sup>

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183. *Id.* at 356–57.

184. *See, e.g., Goodman*, 1994 WL 710738, at \*4 (“These acts . . . took place in the United States. Therefore, even if defendants’ acts constituted an infringement, plaintiff’s claims would be actionable under the copyright law, and plaintiff would be entitled to recover the foreign royalties derived from defendants’ fraudulent concealment.”).

185. *See, e.g., Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (arguing that territorial sovereignty allowed for the “vindication of legitimate sovereign interests,” such as domestic harm, even when the conduct infringing on those interests occurs abroad).

186. *See id.* (“[L]egislation to protect domestic economic interests can legitimately reach conduct occurring outside the legislating territory intended to damage the protected interests within the territory.”).

187. *Robinson v. TCI/US W. Cable Commc’ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997).

188. *See id.* at 905–06 (describing the different tests for the conduct exception); *see also Laker Airways*, 731 F.2d at 923 (describing the effects exception as being applicable “[a]s long as the territorial effects are not so inconsequential as to exceed the bounds of reasonableness imposed by international law”).

189. Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 87, 130 (2006).

c. *The Continuum of Context*

In *Environmental Defense Fund, Inc. v. Massey*, the court justified the application of NEPA to an American project in Antarctica based on the fact that Antarctica is a global commons over which no national government exercises sovereignty.<sup>190</sup> Some courts have since picked up on this sovereignty-based factor in their own decisions.<sup>191</sup> Professor Randall S. Abate recently proposed analyzing the extraterritorial application of United States environmental statutes within a “continuum of context” based on *Massey’s* rule.<sup>192</sup> Professor Abate argued that the degree of sovereignty that the United States exercises over the territory in which the case arises should determine how appropriate it is for a court to apply a national environmental statute to that case.<sup>193</sup> He believes that this sovereignty interest is strongest when the event occurs within American territory, weakens as it moves into a global commons, and finally disappears entirely within the sovereign territory of another country.<sup>194</sup> Applying his theory, Professor Abate argued that *Pakootas v. Teck Cominco Metals, Ltd.*<sup>195</sup> was improperly decided because the Trail smelter was located in a foreign sovereign territory.<sup>196</sup>

2. The Presumption Against Extraterritoriality in Canada

While Canadian provinces are constitutionally prohibited from legislating extraterritorially,<sup>197</sup> the federal parliament has the authority to do so.<sup>198</sup> Canada’s presumption against extraterritoriality is closely related to the line of cases that developed the nation’s modern personal jurisdiction doctrine. The

190. See 986 F.2d 528, 533–34 (D.C. Cir. 1993).

191. See *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000); *Basel Action Network v. Mar. Admin.*, 370 F. Supp. 2d 57, 71–72 (D.D.C. 2005); *NEPA Coal. of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993).

192. See Abate, *supra* note 189, at 130.

193. *Id.* at 103–04.

194. *Id.*

195. No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004), *aff’d*, 452 F.3d 1066 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188).

196. Abate, *supra* note 189, at 130–34.

197. See *Unifund Assurance Co. v. Ins. Corp. of B.C.*, [2003] 2 S.C.R. 63, 88 (Can.) (interpreting the Constitution Act, 1867, 30 & 31 Vict. Ch. 3, § 92 (U.K.), *as reprinted in* R.S.C., No. 5 (Appendix 1985)).

198. Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 3 (Eng.) (“It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.”).

doctrine made its first appearance in *Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers (SOCAN)*, where the Canadian Supreme Court held that Parliament “is presumed not to intend to [give a statute extraterritorial effect] in the absence of clear words or necessary implication to the contrary.”<sup>199</sup> However, *SOCAN* did not actually examine the text of the copyright statute or its legislative history before deciding that it could be given extraterritorial effect.<sup>200</sup> The court instead cited *Morguard* and its progeny for the proposition that a “real and substantial connection to Canada is sufficient to support the [extraterritorial] application of [the statute] . . . in a way that will accord with international comity and be consistent with the objectives of order and fairness.”<sup>201</sup> The court then proceeded to find that the requirements of the test had been met.<sup>202</sup>

While it may be argued that this demonstrates that the court’s articulation of a presumption against extraterritoriality was merely an empty threat, it is also possible to interpret *SOCAN* as the application of an exception to the presumption similar to those found in the United States. The court referred to a case holding that transboundary criminal fraud occurs simultaneously “here and there” rather than being limited to one or neither jurisdiction.<sup>203</sup> The application of this principle in *SOCAN* suggests that Canada may recognize a doctrine similar to the American conduct and effects exceptions to the presumption against extraterritoriality and that its courts will go through a similar two-stage process in applying the presumption.<sup>204</sup> However, jumping to such conclusions would be premature, as it assumes an established Canadian doctrine.

The fact that the court in *SOCAN* does not cite any authority for the existence of a presumption<sup>205</sup> implies that the *SOCAN* decision created the Canadian presumption against extraterritoriality. This inference is strengthened by the way in which the court justifies the presumption through principles

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199. See [2004] 2 S.C.R. 427, 454 (Can.).

200. See *id.* at 454–56.

201. *Id.* at 456.

202. See *id.*

203. *Id.* at 455 (quoting *Libman v. The Queen*, [1985] 2 S.C.R. 178, 208 (Can.)) (internal quotation marks omitted).

204. See *In re Maxwell Commc’n Corp.*, 186 B.R. 807, 815–16 (S.D.N.Y. 1995) (outlining the two-step process used by American courts when a case raises extraterritoriality concerns), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

205. See *SOCAN*, [2004] 2 S.C.R. at 454.

only developed in recent cases<sup>206</sup> and by the fact that pre-*Morguard* Canadian courts operated under more restrictive personal jurisdiction rules.<sup>207</sup> Further, neither of the two cases that cite to *SOCAN*'s presumption acknowledge any other source for the language.<sup>208</sup> The court's creation of the presumption against extraterritoriality in *SOCAN* may indicate that it is preparing to set limits to the vague "real and substantial connection" test established in *Morguard*.<sup>209</sup>

### III. USING NATIONAL COURTS TO CONTROL TRANSBOUNDARY WATER POLLUTION

The international dispute mechanisms currently in place are unable to address the movement of environmental harm across the United States-Canadian border. Further, the bilateral environmental relationship of the two countries makes an adequate public international law solution to this problem unlikely. Therefore, American and Canadian courts must collaboratively craft a set of procedural rules which allocate transboundary water cases to the appropriate forum.

These procedural mechanisms will increase the environmental health of both countries by allowing private parties to bring lawsuits against transboundary polluters. The threat of potentially costly penalties will cause polluters to consider less damaging options.<sup>210</sup> Furthermore, as in a multilateral international setting, private parties who sue transboundary polluters will represent the broader population harmed by the externalization of environmental costs.<sup>211</sup>

The continuum of context theory proposed by Professor Abate is a good place to begin crafting the necessary procedural

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206. *See id.*

207. *See Morguard Invs. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 1091–93 (Can.).

208. *See Sutcliffe v. R.*, [2006] 2 C.T.C. 2267, 2290–91 (Can. Tax Ct. 2005); *In re Smith*, [2005] 12 C.B.R.5th 39, 50 (N.W.T.) (Can.). Indeed, the *Sutcliffe* court appeared unsure of what to do with *SOCAN*'s language, seeming to imply that the language is merely a different way of phrasing "real and substantial connection." *See Sutcliffe*, [2006] 2 C.T.C. at 2291.

209. This would reverse the court's earlier reluctance to do so. *See Hunt v. T&N plc*, [1993] 4 S.C.R. 289, 325–26 (Can.) (declining to adopt a broad or narrow interpretation of the "real and substantial connection" test).

210. *See Maria E. Chang, Citizen Suits: Toward a Workable Solution to Help Created Wetlands Succeed*, 6 U. FLA. J. L. & PUB. POL'Y 77, 85 (1993) (describing the primary purpose of citizen suits as "deterrence").

211. *Id.* at 86 (noting that citizens who bring citizen suits are "vindicated public rights" through their actions).

regime. While Professor Abate's argument that the propriety of bypassing the presumption can be seen along a continuum is convincing, the continuum he proposes is inadequate for transboundary cases. Professor Abate's continuum focuses on the sovereignty over specific categories of territories and assumes that an event will be limited in both "conduct" and "effect" to one of the three categories on his continuum.<sup>212</sup> Because transboundary events like *Pakootas* encompass territories that fall on opposite ends of Abate's continuum,<sup>213</sup> a more appropriate formulation would use the physical geographical context of the event as an axis on the continuum to measure the propriety of bypassing the presumption. Furthermore, the temporal context of the case should also form an axis on the continuum of context because some transboundary cases, such as *Manitoba v. Norton*, involve the potential of future harm,<sup>214</sup> while others, such as *Pakootas*, involve harm that has already taken place.<sup>215</sup> In addition to recalibrating the presumption against extraterritoriality, judges within the United States should be aware that their opinions will have a foreign audience. They should understand that Canadian judges will read American opinions closely,<sup>216</sup> and they should also pay attention to the signals conveyed to them via foreign opinions.

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212. See Abate, *supra* note 189, at 104.

213. Part of the *Pakootas* case, the effects, falls within the territory of the United States, which forms one end of the Abate continuum. See *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069–70 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188); Abate, *supra* note 189, at 104. However, the conduct which gave rise to *Pakootas* occurred in Canada which, as a "sovereign foreign territor[y]," falls on the other end of the Abate continuum. See *Pakootas*, 452 F.3d at 1069; Abate, *supra* note 189, at 104.

214. See *Manitoba v. Norton*, 398 F. Supp. 2d 41, 44 (D.D.C. 2005) (stating that construction on the water transfer project at issue had just begun).

215. See *Pakootas*, 453 F.3d at 1068 (indicating that the hazardous waste had already been dumped).

216. See, e.g., *Amchem Prods. Inc. v. British Columbia (Workers' Comp. Bd.)*, [1993] 1 S.C.R. 897, 927 (Can.) (reading *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937–38 (D.C. Cir. 1984), very closely for clues as to how American courts would react to a Canadian jurisdictional assertion).

A. THE CONTINUUM OF CONTEXT IS NOT A QUESTION OF SOVEREIGNTY

1. The Territorial Context of Events—Territorial, Interterritorial, and Extraterritorial

Supporters of the exclusive application of a conduct exception to the presumption against extraterritoriality argue that Congress legislates according to the expectation that its statutes will regulate conduct that occurs within its territory.<sup>217</sup> On the other hand, those who argue for an exclusive effects exception to the presumption believe that the primary purpose of legislation is to protect those who are present within the legislating territory.<sup>218</sup> Both positions, however, suffer from a logical fallacy. They each assume that these interpretations of congressional intent are mutually exclusive. Congress, however, legislates with both intentions. The vast majority of legislation regulates domestic conduct to prevent harmful domestic effects. In other words, legislation should be examined under the “assumption that Congress . . . is primarily concerned with domestic conditions,”<sup>219</sup> which is broader than a narrow conduct- or effects-based test.

The problem, then, becomes one of appropriately defining “domestic conditions.” An appropriate definition should incorporate both the conduct and effect tests. The transboundary events that give rise to statutory causes of action are intimately tied to domestic conditions. Domestic conduct that gives rise to an interterritorial event is the result of domestic conditions that encourage such conduct, and the goal of domestic legislation is to discourage that conduct.<sup>220</sup> At the same time, the effects of such events have a negative impact on domestic conditions that the legislature desires to prevent.<sup>221</sup> Thus, the target of legislative action includes both conduct and effects—it is the

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217. See *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1095–97 (9th Cir. 1994).

218. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir. 1975) (asking whether “Congress would have wished the precious resources of United States courts” to be devoted to predominantly foreign problems).

219. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (emphasis added).

220. See *Subafilms*, 24 F.3d at 1091–92 (framing the question of liability—and the application of the conduct exception—on whether the conduct which Congress targeted with a copyright statute was the authorization of infringing acts or the infringing acts themselves).

221. See *Laker Airways*, 731 F.2d at 923 (arguing that sovereign states legislate in order to protect themselves and that an “entire transaction is not . . . immunized” by the fact that the causes of domestic harm occurred abroad).

interterritorial *event* in its entirety, even if one component of that event is located across a border.<sup>222</sup> This concept is particularly applicable to environmental cases more so than to the bankruptcy and antitrust cases, two areas of law that have applied the conduct and effects exceptions.

Unlike financial cases, where electronic transfers between legal-fiction entities can instantaneously travel anywhere in the world, environmental events are grounded in physical geography. In a sense, they have their own territorial boundaries. One can take a map and pencil, for example, and determine the geographical extent of the *Pakootas* case. It begins at Trail, British Columbia, extends downstream through the Upper Columbia River and Lake Roosevelt, and finally terminates at the Grand Coulee Dam.<sup>223</sup> This exercise reveals that the *Pakootas* event is extraterritorial to neither the United States nor Canada. It is instead “interterritorial” to both countries, much like the river it affected.

Indeed, courts struggling with the presumption against extraterritoriality have approached this “interterritorial” understanding of events, but have yet to express it. For example, in applying the presumption against extraterritoriality, courts must first examine whether the conduct or effects exceptions are applicable.<sup>224</sup> Alternatively, this threshold inquiry could ask whether the presumption is applicable at all. If an event is not extraterritorial, then the presumption should not be applied.<sup>225</sup> Because an interterritorial event occupies space within the borders of a state, the application of that state’s laws to it is not extraterritorial and the presumption is not implicated. Thus, the second step in extraterritoriality analysis need not be reached, and the text of an ambiguous environmental statute need not be subjected to scrutiny for extraterritorial intent.<sup>226</sup>

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222. See *Soc’y of Composers, Authors & Music Publishers of Can. v. Canadian Ass’n of Internet Providers (SOCAN)*, [2004] 2 S.C.R. 427, 455 (Can.) (arguing that the events that lead to transboundary litigation occur in both jurisdictions—i.e., they arise both “here and there” (quoting *Libman v. The Queen*, [1985] 2 S.C.R. 178, 208 (Can.)) (internal quotation marks omitted)).

223. Robinson-Dorn, *supra* note 16, at 263–65 (laying out the geography of the Upper Columbia River).

224. See, e.g., *In re Maxwell Commc’n Corp.*, 186 B.R. 807, 816 (S.D.N.Y. 1995) (asserting that a case involving conduct within the United States does not involve the extraterritorial application of American law), *aff’d*, 93 F.3d 1036 (2d Cir. 1996).

225. *Id.* at 815–16.

226. This does not, however, mean that a statute explicitly limiting itself to territorial application should be applied to an interterritorial event. Instead,



The challenge, rather, is to determine whether to allocate the case to a United States or a Canadian court.

Determining the territorial context of an event alone, however, does not solve the problem of allocation. Because an interterritorial case has a geographical breadth that extends into more than one nation, more than one nation has a claim to jurisdiction over it. The temporal context of the event will determine the appropriate allocation of the dispute.

## 2. The Temporal Context of Events—Sovereign Power over Cause and Effect

Events do not only have physical boundaries; they also have temporal boundaries. They have a beginning, a middle, and an end. Lawsuits may be initiated at any of these three points. The physical boundaries of an event shift over time as the event unfolds. This is significant for the purposes of allocating jurisdiction over such suits. Once again, *Pakootas* is a good illustration of this concept. When the Trail smelter began to dump slag into the Upper Columbia River, the *Pakootas* event existed only at the dump site.<sup>227</sup> As the event continued to develop, it encompassed the dump site, the flow of the slag into Lake Roosevelt, and the buildup of waste behind the Grand Coulee Dam.<sup>228</sup> Finally, once the smelter ceased dumping, the event reached its end state, where remaining slag was washed into Lake Roosevelt.<sup>229</sup>

This scenario demonstrates that as the temporal context of the event changed, so did the territorial context. Initially, the event was territorial to Canada and extraterritorial to the United States. It then became interterritorial to both countries and ultimately extraterritorial to Canada and territorial to the United States. Thus, in the initial stage of the event, the application of an American statute such as NEPA would have been

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the assumption is merely inverted, and interterritorial events are targeted by statutes absent evidence of contrary intent. For example, North Dakota's water quality statute limits itself to protecting the "waters of the state." N.D. ADMIN. CODE 33-16-02.1-02 (2001) (emphasis added). The North Dakota legislature has explicitly manifested its intent to target only local adverse effects. The clear statement of intent eliminates the need for any presumption as to how the legislature wanted a statute to apply, either interterritorially or extraterritorially.

227. See Robinson-Dorn, *supra* note 16, at 263–65 (laying out the geography of the Upper Columbia River).

228. *Id.*

229. *Id.*

extraterritorial and would have triggered the presumption.<sup>230</sup> On the other hand, the application of a Canadian equivalent of CERCLA during the end stage would also have been extraterritorial and triggered the presumption.<sup>231</sup> This is because—to use the language of American extraterritoriality doctrine—Canada had sovereign power over the conduct while the United States had sovereign power over the effects. Solving the problem of allocation, however, requires one further step because there is still a period of time during which the event remains interterritorial.

The relative power of two nations over an interterritorial event shifts along a continuum defined by the timeline of that event. Before the Trail smelter began to dump slag, Canada had exclusive control over the event, as no case or controversy had yet arisen in the United States. A Canadian court could have prevented the event by issuing an injunction under a NEPA-like statute, thus barring the smelter from pursuing its contemplated course of action. As time passed, however, and the smelter began dumping, both countries had the power to provide partial relief to the event. Canada could have acted to prevent further harm, while the United States could have ordered and supervised the cleanup of the environmental harm

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230. NEPA provides a property rule, which means that beneficiaries of the rule have the right to block further action by those whose activities are targeted by the rule. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) (defining property rules); Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 913–15 (2002) (describing NEPA). Thus, the application of a NEPA equivalent would require an American court to issue an injunction against a Canadian actor in Canada for conduct having no immediate effects within the United States, making such an application of the statute wholly extraterritorial.

231. CERCLA provides a liability rule, which means that the targeted activity cannot be blocked *ex ante*, but those individuals who violate the rule must make amends to individuals harmed by the violation of the rule. See Ronald G. Aronovsky, *Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395, 404–05 (2006) (stating that CERCLA provides for retroactive liability); Calabresi & Melamed, *supra* note 230, at 1105–06 (defining liability rules). What makes the extraterritorial application of a CERCLA-like statute problematic is that, rather than providing a damages remedy, the polluter is required to coordinate with domestic agencies in cleaning up the environmental damage it caused. See Aronovsky, *supra*, at 404–06 (stating that the EPA may either issue an administrative order directing the owner of a contaminated site to clean it, or clean up the site independently and later sue for the costs incurred). Under this model, a statutorily designated Canadian agency would be required to operate outside of its jurisdiction.

that had already occurred. Finally, once dumping had ended, and all the slag had flowed into the United States, only American courts had the power to address the event.<sup>232</sup> The timeline of the *Pakootas* event thus demonstrates that the “territoriality” of an environmental event can be allocated based on the form of relief available at the time of the lawsuit.

The operations of American environmental statutes and their Canadian cousins enable this allocation to work. Preventative environmental statutes, which could provide the basis for injunctive relief, typically require studies, hearings, and supervision.<sup>233</sup> At the same time, remedial environmental statutes, while embracing a polluter pays principle,<sup>234</sup> typically do not provide for damages. Instead, the polluter contributes directly to efforts to clean up the polluted sites.<sup>235</sup> In both cases government action and supervision are involved. Thus imposing such relief across a national boundary would not only be an affront to national sovereignty, but would also be impractical because there would be no agency infrastructure in place to implement the court’s instructions.

The proposed allocation of jurisdiction resembles traditional *in rem* jurisdiction, which allocates exclusive jurisdiction to the forum to first acquire jurisdiction over a res.<sup>236</sup> By adopting a relief-based allocation of jurisdiction over interterritorial en-

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232. In some cases, pollution may also remain in the source country. See, e.g., Judson Lake Trumpeter Swans, *supra* note 12 (describing a polluted lake that straddles the border). However, this lingering pollution is not a source of transboundary litigation and is beyond the scope of this Note because it would be addressed in litigation by local plaintiffs against a local defendant in a local court.

233. See Oliver A. Houck, *O Canada!: The Story of Rafferty, Oldman, and the Great Whale*, 29 B.C. INT’L & COMP. L. REV. 175, 241 (2006) (“In both [the American and Canadian] systems . . . the enforcement of environmental assessment requirements . . . depends on judicial review. . . . [M]ore than one reviewing court has ended up with years of supervision over national grazing policies, surface mining, and the preservation of the Pacific Salmon.”).

234. See PHILLIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 279–80 (2d ed. 2003) (defining the polluter pays principle as “the requirement that the costs of pollution should be borne by the person responsible for causing the pollution” and discussing the adoption of the principle by national governments).

235. See Eric Thomas Larson, Note, *Why Environmental Liability Regimes in the United States, the European Community, and Japan Have Grown Synonymous with the Polluter Pays Principle*, 38 VAND. J. TRANSNAT’L L. 541, 553–54 (2005) (describing four different tactics used by the EPA to force polluters to pay for the cleanup of Superfund sites).

236. Cf. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) (describing the operation of *in rem* jurisdiction).

vironmental litigation, United States and Canadian courts would avoid the same type of direct conflict that in rem jurisdiction was designed to avoid<sup>237</sup> while still maintaining the power to regulate the conduct of, and remedy the harms suffered by, their own residents. Indeed, applying this framework to *Norton* and *Pakootas* reveals that two American statutes already in place can serve a vital role in ensuring that the border does not protect transboundary polluters.

#### B. APPLYING THE MODIFIED CONTINUUM OF CONTEXT THEORY TO CLOSE THE GAP IN ENVIRONMENTAL PROTECTION

Because the two exceptions to the presumption against extraterritoriality are judicially crafted doctrines,<sup>238</sup> they can be adapted by the same judiciary that created them to reflect new insights into how the rules work in practice and how they can be improved. To that end, the analytical tools developed in the preceding subsection will now be applied to three recent transboundary environmental cases to demonstrate how the modified continuum of context might function in practice.

##### 1. *Norton*—The Interterritorial Application of NEPA

The plaintiff in *Norton* challenged NAWS under a NEPA provision that requires that an environmental impact statement (EIS) be issued before any major federal project with the potential to “significantly affect[] the quality of the human environment” may proceed.<sup>239</sup> This “‘action-forcing’ procedure[] ensure[s] that broad policy concerns regarding environmental quality are infused into the actions of the federal government.”<sup>240</sup> While private parties do not have standing to sue un-

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237. Cf. Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chat-tels*, 45 HARV. INT’L L.J. 239, 262 (2004) (noting that in rem jurisdiction “aims to maintain comity between domestic courts and to prevent a second action from threatening the first court’s basis for jurisdiction”); Martinez, *supra* note 44, at 448 (“[S]ystem-protective judicial process rules may be inherent in functional judicial systems: Not only are such rules necessary to make systems work, it is in the self-interest of courts to apply such rules because by increasing the functionality of the judicial system, they also increase the power and authority of courts. . . . [R]eciprocal cooperation between two formally unrelated courts can increase the power of both.”).

238. Dodge, *supra* note 144, at 101.

239. *Manitoba v. Norton*, 398 F. Supp. 2d 41, 52–53 (D.D.C. 2005). See generally National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000).

240. *Norton*, 398 F. Supp. 2d at 52.

der the statute itself, they may invoke the Administrative Procedure Act (APA) to challenge the adequacy of the environmental inquiry.<sup>241</sup> If the suit is successful, the trial court has the option to remand the case back to the federal agency and may also issue injunctive relief barring further progress on the project until an EIS is completed.<sup>242</sup>

Thus, NEPA and the APA are ideally suited to interterritorial litigation where an American court has the power to grant injunctive relief. Applying NEPA to potential environmental harm moving from the United States into Canada is proper under the revised continuum of context theory. This was not the holding, however, of the *Norton* court. In an unpublished order entered on November 14, 2003, the court intimated that the plaintiff's standing to sue under NEPA derived from the potential for harmful effects *within* the United States, even before contaminated waters reached the border with Canada.<sup>243</sup> Indeed, in its highly technical and detailed 2005 holding, the *Norton* court only made one comment that explained the province's concern with NAWS.<sup>244</sup> Although in *Norton*—ordering a more searching environmental analysis based on potential territorial harm<sup>245</sup>—this reasoning had no adverse effects, potential extraterritorial harm will go unexamined in cases where domestic harm would be insufficient to warrant further scrutiny.<sup>246</sup>

This is wrong. Because neither Manitoba nor Canada have any authority to prevent such projects from going forward, the American government should at least consider the harm which it risks exporting. If it fails to do so, it is externalizing envi-

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241. *Ranchers Cattleman Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1102 (9th Cir. 2005). See generally Administrative Procedure Act, 5 U.S.C. § 702 (2000).

242. *Norton*, 398 F. Supp. 2d at 65–67.

243. See *Manitoba v. Norton*, No. 02-cv-02057(RMC), at 4 (D.D.C. Nov. 14, 2003) (order denying motions for judgments on the pleadings) (making the presence of harmful effects within the United States a precondition for standing when those effects would “inevitably flow into the Province”); see also *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1421 (9th Cir. 1995) (explaining that standing is a separate and distinct issue from extraterritoriality).

244. *Norton*, 398 F. Supp. 2d at 47 (“Water from the project would drain into the Souris River, which flows into Manitoba.”).

245. *Id.* at 65.

246. *E.g.*, Opening Brief of Appellant Citizens United for Resources and the Environment at 23, *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, No. 06-16345 (9th Cir. Oct. 5, 2006), 2006 WL 3380587 (noting that the district court had ruled that NEPA could not be invoked against the extraterritorial effects of a United States project).

ronmental costs to its neighbors.<sup>247</sup> Under the revised continuum of context, a Canadian court would not have jurisdiction over the interterritorial event—which at the time *Norton* was filed, was territorial to the United States. An American court, however, would have jurisdiction over the conduct and could exercise jurisdiction over the case.

2. *People to Save the Sheyenne River, Inc.*—The Limitations of NEPA as a Tool to Prevent Transboundary Harm

Even if NEPA were consistently applied extraterritorially, it would not prevent every instance of transboundary harm. First, NEPA does not prohibit environmentally unsound policies from being executed.<sup>248</sup> It merely prevents *uninformed* environmentally unsound policies from going forward.<sup>249</sup> Once the government has prepared its EIS, it may proceed however it wishes.<sup>250</sup>

Second, NEPA only applies to “major Federal actions,”<sup>251</sup> and as a result does not affect privately or state funded projects.<sup>252</sup> For example, the absence of any NEPA-like statutory requirement<sup>253</sup> allowed the North Dakota court to completely ignore the potential transboundary effects of the Devils Lake outlet even though it made repeated reference to Manitoba as the plaintiff.<sup>254</sup> As a result, Manitoba was once again forced to argue by reference to the local environment, rather than the potential catastrophic harm that it might face in its own territory.<sup>255</sup>

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247. See Medeiros, *supra* note 1, at 167 (“To internalize these externalities, it is essential to determine their true costs and then . . . address these costs.”).

248. *Norton*, 398 F. Supp. 2d at 53.

249. *Id.*

250. *Id.*

251. National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (2000).

252. See *Envtl. Rights Coal., Inc. v. Austin*, 780 F. Supp. 584, 594 (S.D. Ind. 1991) (stating that NEPA jurisdiction over a project only exists where there is federal funding).

253. Compare N.D. ADMIN. CODE 33-16-02.1-02 (2001) (expressly limiting the application of the state water quality standards to “the waters of the state”), with 42 U.S.C. § 4331 (2000) (speaking in very broad terms such as “fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations”).

254. *People to Save the Sheyenne River, Inc. v. N.D. Dep’t of Health*, 697 N.W.2d 319, 329–32 (N.D. 2005) (beginning with the phrase “Manitoba argues”).

255. See *id.* at 329 (“Manitoba argues [that] . . . the discharge of Devils Lake water . . . would contribute to . . . chronic violations of North Dakota’s

There is nothing wrong with this result under the modified continuum of context theory. The state of North Dakota is entitled to regulate conduct as it sees fit. However, any harm that might arise in Manitoba as a consequence of an interterritorial event overlapping these two jurisdictions would fall within the jurisdiction of a Manitoba court. That court would be within its rights to provide remedial relief.

### 3. *Pakootas*—Addressing Boundary Waters Pollution Through the Remedial Application of CERCLA

Sovereign immunity concerns aside,<sup>256</sup> in cases like *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, where prospective relief is unavailable to prevent transboundary harm,<sup>257</sup> CERCLA and CERCLA-like statutes can be used to provide relief for the damage suffered.<sup>258</sup> Additionally, the prospect of such relief would force polluters to internalize the costs of bad behavior and deter them from initiating or continuing such behavior.<sup>259</sup>

For example, after the Trail Smelter Arbitration in the early twentieth century, the mining installation that would later become involved in *Pakootas* developed and installed technology that would prevent or reduce similar emissions in the future.<sup>260</sup> However, when concerns about the slag being dis-

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numeric phosphorous water quality standard . . .”).

256. See *Monaco v. Mississippi*, 292 U.S. 314, 331–32 (1934) (expounding on state sovereign immunity from a suit by foreign sovereigns in a number of cases, including that of “pollution of streams,” and also finding the federal government immune from vicarious liability because of the constitutional prohibition on states entering into compacts with foreign states). While this would prevent Manitoba from suing North Dakota absent a waiver of immunity, it would not bar suits against nonsovereign private party polluters.

257. See *People to Save the Sheyenne River, Inc. v. N.D. Dep’t of Health*, 697 N.W.2d 319, 333 (N.D. 2005) (using a deferential standard of review to find that the North Dakota Department of Health was “not arbitrary, capricious, or unreasonable” in its issuance of a permit to construct a water project).

258. 42 U.S.C. § 9607(a) (2000) (holding polluters liable); see, e.g., Canadian Environmental Protection Act, 1999 S.C., ch. 33, pmbl. (Can.) (announcing a “polluter pays” principle); *id.* at ch. 33, § 40 (allowing private citizens to sue for damages); Contaminated Sites Remediation Act, 1996 S.M., ch. 40, § 1 (Man.).

259. See Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 275–80 (1993) (outlining the mechanisms by which increasing the cost of a negative externality can force its internalization and deter behavior costly to society as a whole).

260. Robinson-Dorn, *supra* note 16, at 259–61.

charged from the smelter were summarily dismissed,<sup>261</sup> the smelter took no action to prevent the slag from inflicting harm, continuing to dump for another six decades.<sup>262</sup> Had the smelter believed that an American court could hold it liable,<sup>263</sup> it might have corrected its actions long ago.<sup>264</sup> Thus, a court's assertion of jurisdiction over the remedial aspects of an interterritorial event would ameliorate the harm that results when courts on the other side of the border fail to grant early injunctive relief.

Of course, while the trial court in *Pakootas* understood this principle,<sup>265</sup> the Ninth Circuit disagreed and instead localized the event by holding that "the leaching of hazardous substances from the slag" already present in the Lake Roosevelt site was the event that triggered CERCLA liability.<sup>266</sup> This reasoning was not unlike that found in *Norton*, as it circumvented the presumption against extraterritoriality by making an interterritorial event entirely territorial.<sup>267</sup> Decisions supported by such reasoning create challenges for those who seek to enforce the judgment.

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261. *Id.* at 261–62.

262. *See Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1069 (9th Cir. 2006) (stating that Teck Cominco only ceased discharging slag in 1995), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188).

263. *See Lloyd's Underwriters v. Cominco Ltd.*, [2006] 12 W.W.R. 486, 498 (B.C.S.C.) (Can.) (noting that Teck Cominco continues to maintain that it should not be held liable for cleanup costs, even though it has agreed to pay for an initial study of the Lake Roosevelt site), *aff'd*, [2007] 7 W.W.R. 281 (B.C. Ct. App.).

264. As a rational actor, the mining company would cease dumping if the expected liability would exceed the benefits of dumping slag. Leslie S. Gara, *Medical Surveillance Damages: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 303 (1988). Even if the expected liability proved insufficient to bring dumping to a complete halt, it would still likely reduce the level of activity to a more economically efficient level. *Id.*

265. *See Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at \*12 (E.D. Wash. Nov. 8, 2004) (finding the imposition of CERCLA in part justified because "Canada's environmental laws are intended to protect Canadian territory" and that the "laws do nothing to remedy the damage that has already occurred in U.S. territory"), *aff'd*, 452 F.3d 1066 (9th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3483 (U.S. Feb. 27, 2007) (No. 06-1188).

266. *Pakootas*, 452 F.3d at 1075; *see also id.* at 1077–78 ("A party that 'arranged for disposal' of a hazardous substance . . . does not become liable under CERCLA until there is an actual or threatened release . . . ." (quoting 42 U.S.C. § 9607(a)(3))).

267. *See Manitoba v. Norton*, No. 02-cv-02057(RMC), at 4 (D.D.C. Nov. 14, 2003) (order denying motions for judgment on the pleadings) (granting Manitoba standing under NEPA to challenge NAWS based on domestic effects).



C. USE OPINIONS AS A MEANS OF FOSTERING TRANSBOUNDARY JUDICIAL COOPERATION AND DIALOGUE

One Canadian court has expressed skepticism about the Ninth Circuit's reasoning in *Pakootas*.<sup>268</sup> This is unfortunate given that two Ontario courts have already recognized CERCLA judgments entered against Canadian defendants.<sup>269</sup> In these opinions, the Canadian courts laid out what they want from a foreign court in order to enforce its judgments. Simply put, "foreign judgments are to be recognized and enforced in Canada where the Canadian court is satisfied that there is a 'real and substantial connection' between the *jurisdiction* of the foreign court giving judgment and the *action* on which that judgment is based."<sup>270</sup> In other words, Canadian courts will recognize judgments of American courts where the modified continuum of context would allocate that case to an American court.<sup>271</sup>

Unfortunately, some American courts appear as reluctant to listen to such communications<sup>272</sup> as foreign courts are eager to discern how American courts will react to their judgments.<sup>273</sup>

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268. In a collateral case relating to insurance coverage for claims against Teck Cominco in the *Pakootas* suit, a Canadian court recited the following: "[A]fter oral submissions concerning [Teck Cominco's] applications in [*Pakootas*] had been completed . . . and my own judgment reserved, reasons for judgment dismissing [Teck Cominco's] appeal . . . were delivered by the . . . Ninth Circuit . . ." *Lloyd's Underwriters*, [2006] 12 W.W.R. at 497 (emphasis added). It is unlikely that the court would have so explicitly reserved judgment on the Ninth Circuit's reasoning if it had agreed with the *Pakootas* opinion.

269. See *United States v. Ivey*, [1996] 30 O.R.3d 370, 374–75 (Ont. Ct. App.) (Can.); *United States v. Shield Dev. Co.*, [2004] 74 O.R.3d 583, 594–95 (Ont. Super. Ct. J.) (Can.) (relying on *Ivey*), *aff'd*, [2005] 74 O.R.3d 595 (Ont. Ct. App.).

270. *Shield Dev. Co.*, [2004] 74 O.R.3d at 586 (emphasis added).

271. See *Ivey*, [1996] 30 O.R.3d at 374 (finding that the application of CERCLA was not extraterritorial because it did not seek to regulate conduct in Canada—it merely sought compensation for costs within the United States).

272. See, e.g., *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670, 672 (S.D.N.Y. 1991) (observing that a British court had granted the defendant's motion to dismiss because "all the actions claimed to be taken by FMC took place in the United States and U.S. law would apply," and then going on to grant the defendant's motion to dismiss because the adverse effects would be felt only in the United Kingdom).

273. See, e.g., *Amchem Prods. Inc. v. British Columbia (Workers' Comp. Bd.)*, [1993] 1 S.C.R. 897, 913 (Can.) ("Any doubts that a foreign court will not regard [an antisuit injunction] as a breach of comity are dispelled by reading the reaction of [Judge] Wilkey . . . in *Laker Airways Ltd. v. Sabena* . . ." (citing *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937–38 (D.C. Cir. 1984))).

This is a mistake because in “our international system of politically independent, socio-economically interdependent nation states,” where nations “must often rely on other countries to help [them] achieve [their] regulatory expectations,” national courts must “act at all times to increase the international legal ties that advance the rule of law within and among nations.”<sup>274</sup>

For example, *United States v. Ivey*, one of the two Ontario cases recognizing CERCLA judgments, was careful to point out that while the absent defendant resided in Canada, the targeted conduct and effects both occurred in the United States.<sup>275</sup> This reservation may indicate some anxiety in Canadian courts over the propriety of suits like *Pakootas*, and American courts should pay attention.

The solution is to directly address these concerns in the judicial opinions that decide interterritorial cases. If Canadian courts require a “real and substantial connection” in order to recognize a foreign judgment, an American court should explain why it believes such a connection exists. By engaging foreign courts in this way, one court system can invite another to collaborate in developing a common framework for allocating cases.<sup>276</sup>

#### CONCLUSION

The waterways of the North American continent have allowed private and public actors in the United States and Canada to externalize the costs of environmental harm across their mutual borders. Public international law has been unable to control this problem, but national courts acting as members of the nascent international judicial system have the potential to do so. In order to accomplish this task, these courts must develop procedural mechanisms to appropriately allocate jurisdiction over transboundary cases to each other. While some procedural doctrines, such as personal jurisdiction, have developed to the point where they are no longer problematic, others, such as the presumption against extraterritoriality and its exceptions, must change. By considering conduct and its effects separately, the present exceptions to the presumption fail to see that both are linked to the same event, which is interterritorial. Such interterritorial events exist in a continuum of context which is

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274. *Laker Airways*, 731 F.2d at 937.

275. *Ivey*, [1996] 30 O.R.3d at 374; see also *Shield Dev. Co.*, [2004] 74 O.R.3d at 586 (involving a copper smelter in Beaver County, Utah).

276. *Martinez*, *supra* note 44, at 507.

composed of territorial and temporal aspects. By examining the position of a transboundary environmental event on the continuum of context and by communicating with each other through their rulings, Canadian and American courts can allocate such cases to the appropriate forum. If they can do this, then they will no longer allow a gap in environmental protection along the 49th parallel.