

# On the Borderline: *Pakootas*, NAFTA, and the Problem of Transboundary Pollution

Natalie Collins\*

*The plaintiffs in Pakootas v. Teck Cominco faced a particularly challenging legal problem: not only was a large corporation polluting their local environment, but the corporation was located in Canada, while the plaintiffs lived in the United States. Although a variety of environmental agreements have been struck between the United States and its border neighbors over the last two hundred years, the plaintiffs chose not to invoke any of these (relatively toothless) compacts. Instead, they took their case to the courts. In 2018, the Ninth Circuit held that United States courts had properly exercised personal jurisdiction over the Canadian defendant—a success for the plaintiffs, and one that future plaintiffs in transboundary pollution cases may be able to use to their advantage. However, personal jurisdiction is far from the only hurdle facing plaintiffs in transboundary pollution lawsuits. This Note argues that the United States should address transboundary pollution through an enforceable multilateral agreement rather than leaving such cases to domestic courts; identifies the North American Free Trade Agreement as a particularly promising forum for such an agreement; and briefly sketches what such a solution could look like.*

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## INTRODUCTION

Pollution is not only an environmental problem but also a political problem. Nowhere is this clearer than at national borders.

In some situations, borders enable strategic avoidance of environmental laws by allowing corporations and governments to externalize their pollution by dumping it into territories where they are no longer legally responsible for it. As industrialized countries began to regulate toxic waste disposal more stringently in the 1970s and 1980s, for example, polluters often used developing countries as unregulated dumping grounds for their hazardous waste.<sup>1</sup>

Even when corporations or governments do not deliberately use borders to evade environmental laws, borders can produce legal and administrative barriers to enforcing those laws. Directly applying domestic environmental laws to foreign defendants poses practical hazards (in obtaining jurisdiction, overcoming the presumption against extraterritoriality, and ensuring that judgments will be enforced) and philosophical hazards (inasmuch as applying domestic laws to foreigners who did not write or vote for these laws contradicts the principles of sovereignty and self-determination).<sup>2</sup> Theoretically, it should be unnecessary to use domestic laws to redress transboundary pollution: According to a fundamental principle of international law,<sup>3</sup> countries have a right to be free from

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1. Robert V. Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579, 621 (2011).

2. See generally Jaye Ellis, *Extraterritorial Exercise of Jurisdiction for Environmental Protection Addressing Fairness Concerns*, 25 LEIDEN J. INT'L L. 397 (2012) (discussing the ramifications of extending U.S. environmental regulation across the Canada-United States border).

3. The *Trail Smelter* arbitration produced the following principle, regarded as a rule of customary international law:

No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

environmental harms inflicted by other countries.<sup>4</sup> Yet it is not easy for a government to actually enforce this right. As scholar Maria Banda writes, “[p]icking a fight with a foreign government is costly, and localized injuries to human health and the environment will often be dwarfed by the perceived need for bilateral cooperation on other issues, such as trade, defense, or border control.”<sup>5</sup>

This Note analyzes the United States’ ongoing problem with border pollution through the lens of two seemingly unrelated events from September 2018. First, on September 14, the Ninth Circuit handed down its most recent opinion in *Pakootas v. Teck Cominco*, a long-running case about hazardous waste pollution.<sup>6</sup> Sixteen days later, on September 30, the United States, Canada, and Mexico announced that they had arrived at a new trade agreement that, if ratified, would replace the North American Free Trade Agreement (NAFTA).<sup>7</sup> Together, *Pakootas* and the new trade deal show that the United States is addressing transboundary pollution slowly and incompletely through domestic litigation, while failing to address it more effectively through multilateral trade deals.

The *Pakootas* case has been bouncing up and down the court system since July 2004, when the plaintiffs first filed suit against Canadian company Teck Cominco Metals, Ltd. (now known as Teck Resources Ltd.).<sup>8</sup> The suit concerned Teck’s practice of dumping hazardous substances from its British Columbia smelter into the Columbia River,<sup>9</sup> which flows south into Washington State—where, the plaintiffs alleged, the substances came to rest contaminating the area’s surface water, groundwater, sediments, and biological resources.<sup>10</sup> The 2018 Ninth Circuit opinion, issued on interlocutory appeal, found that the Federal Court for the Eastern District of Washington had correctly asserted personal jurisdiction over Teck.<sup>11</sup> Personal jurisdiction, a necessary prerequisite for suit, is likely to prove difficult for plaintiffs to establish in transboundary pollution cases because of the lack of strong connection between the polluter and the affected parties.

Later in September 2018, the United States, Canada, and Mexico announced that they had arrived at a new trade agreement: the United States-Mexico-Canada Agreement, or “USMCA.”<sup>12</sup> If ratified, the agreement will replace NAFTA,

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AARON SCHWABACH, INTERNATIONAL ENVIRONMENTAL DISPUTES 15 (1st ed. 2006).

4. Maria L. Banda, *Regime Congruence Rethinking the Scope of State Responsibility for Transboundary Environmental Harm*, 103 MINN. L. REV. 1879, 1881 (2019).

5. *Id.*

6. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 571 (9th Cir. 2018).

7. *From NAFTA to USMCA Free Trade in North America Today & Tomorrow*, LIVINGSTON INT’L, <https://www.livingstonintl.com/nafta/> (last visited May 19, 2020).

8. *Teck Scraps Cominco Brand*, THE STAR (Oct. 1, 2008), [https://www.thestar.com/business/2008/10/01/teck\\_scraps\\_cominco\\_brand.html](https://www.thestar.com/business/2008/10/01/teck_scraps_cominco_brand.html).

9. Complaint for Injunctive and Declaratory Relief and for Civil Penalties at ¶ 4.1, *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-0256-AAM, 2004 WL 1720950 (E.D. Wash. July 21, 2004).

10. *Id.*

11. *Pakootas*, 905 F.3d at 576–78.

12. LIVINGSTON INT’L, *supra* note 7.

which has integrated the countries' economies for twenty-five years.<sup>13</sup> Although NAFTA is not primarily an environmental agreement, the parties to the original treaty had included an "environmental side agreement" to the treaty in order to "promote environmental cooperation, increase citizen participation in environmental protection, and ensure that each party effectively enforces its environmental laws."<sup>14</sup> The USMCA makes only small changes to the environmental protections of the original agreement.<sup>15</sup>

This Note argues that both NAFTA and the USMCA represent missed opportunities to address transboundary pollution between the United States and its border neighbors. *Pakootas* is not being decided using principles of international law or on the basis of an international agreement like NAFTA. Rather, its fate hinges on U.S. courts' interpretation of U.S. statutes and jurisdictional caselaw. This Note argues that this approach to transboundary pollution, which uses domestic litigation to resolve fundamentally international conflicts, is deeply flawed. Instead, it argues in favor of an enforceable, proactive agreement between the three countries, pointing to NAFTA and the USMCA negotiations as particularly appropriate fora for such an agreement.

Part I of this Note provides the factual and legal background for this argument. It describes some of the many forms that pollution has taken at the U.S.-Mexico and U.S.-Canada borders and outlines the three countries' attempts to resolve transboundary pollution by agreement. Part II then dives into the facts of *Pakootas* itself. It analyzes the case from a personal jurisdiction perspective, examining the elements of *Pakootas* that made it unusually easy for U.S. courts to assert jurisdiction. Finally, Part III outlines the ways that domestic litigation fails to adequately address transboundary pollution. It concludes by arguing that first NAFTA and now the USMCA represent critical missed opportunities to resolve this ongoing problem and briefly sketches the forms that such a resolution could take.

## I. BACKGROUND

### A. *The United States and Transboundary Pollution: A Brief Background*

This Part establishes the context for a discussion of transboundary pollution in the United States. Subpart 1 outlines recent examples of transboundary pollution along the United States' two borders, while Subpart 2 gives a brief history of the United States' diplomatic efforts to reduce transboundary pollution.

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13. James McBride & Mohamed Aly Sergie, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN REL. (Oct. 1, 2018), [http://www.cronicasinfin.com/noticias/NAFTA\\_s\\_Economic\\_Impact.pdf](http://www.cronicasinfin.com/noticias/NAFTA_s_Economic_Impact.pdf).

14. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1190 (2d ed., 2002).

15. Scott Vaughan, *USMCA Versus NAFTA on the Environment*, INT'L INST. SUSTAINABLE DEV., <https://www.iisd.org/library/usmca-nafta-environment> (last visited May 19, 2020).

I. *Recent Environmental Harms along U.S. Borders*

a. *British Columbian Mining Threatens U.S. Rivers*

Multiple actors have recently sought to protect the U.S. environment from the effects of Canadian mining activities. In June 2019, a group of U.S. senators from four states—Alaska, Montana, Washington, and Idaho—wrote a letter to British Columbia Premier John Horgan, highlighting “efforts of the United States (U.S.) and continued plans of Congress to protect American interests in the face of potential environmental and economic impacts resulting from large-scale hardrock and coal mines in British Columbia, Canada (B.C.)”<sup>16</sup> The senators explained that the states they represent “have tremendous natural resources that need to be protected against impacts from B.C. hard rock and coal mining activities near the headwaters of shared rivers” and stressed that they “remain[ed] concerned about the lack of oversight of Canadian mining projects near multiple transboundary rivers that originate in B.C. and flow into our four U.S. states.”<sup>17</sup> The letter also noted that the International Joint Commission (IJC)—a binational organization that resolves border disputes between the United States and Canada<sup>18</sup>—had not addressed the issue.<sup>19</sup>

Other U.S. actors have also voiced concern about environmental harms caused by Canadian mines. In 2018, U.S. commissioners at the IJC told the State Department that their Canadian counterparts “refused to acknowledge that mountaintop-removal coal mining pollution was killing and deforming fish in the Elk and Kootenai rivers.”<sup>20</sup> Later that same year, a group of fifteen Alaskan Native tribes filed a petition with the Inter-American Commission on Human Rights about the effects of British Columbia hardrock mining on fish populations.<sup>21</sup> So far, Canada has failed to meaningfully respond to these calls.

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16. Letter from Senator Lisa Murkowski and others, U.S. Senate, to Hon. John Horgan, Premier, British Columbia (June 13, 2019), [https://www.eenews.net/assets/2019/06/14/document\\_gw\\_03.pdf](https://www.eenews.net/assets/2019/06/14/document_gw_03.pdf); see also Dylan Brown, *Senators Urge British Columbia to Address Pollution*, E&E NEWS (June 14, 2019), <https://www.eenews.net/greenwire/2019/06/14/stories/1060581947>.

17. Letter from Senator Lisa Murkowski and others, *supra* note 16.

18. *Role of the IJC*, INT’L JOINT COMM’N, <https://www.ijc.org/en/who/role> (last visited May 19, 2020).

19. Letter from Senator Lisa Murkowski and others, *supra* note 16.

20. Brown, *supra* note 16.

21. Petition of Southeast Alaska Indigenous Transboundary Commission on Behalf of its Constituent Tribal Governments and their Tribal Members Seeking Relief from Violations of the Rights of the Members of the Southeast Alaska Indigenous Transboundary Commission Resulting from Hardrock Mining in British Columbia, Canada, Inter-Am. Comm’n H.R. (Dec. 5, 2018).

b. Tijuana Sewage Contaminates California Beaches

Wastewater, sewage, and garbage from Tijuana—often containing high levels of pesticides, heavy metals, and bacteria<sup>22</sup>—regularly stream across the border into Southern California.<sup>23</sup> The pollution creates a public health risk, damages habitats for threatened species, and causes beach closures.<sup>24</sup> The problem has plagued the area since the 1930s.<sup>25</sup>

In the 1990s, the United States and Mexico signed an agreement in which Mexico promised to ensure “that there are no discharges of treated or untreated domestic or industrial wastewater into the waters of the Tijuana River that cross the international boundary.”<sup>26</sup> But Mexico, faced with rapid development in Tijuana—much of which is not connected to the existing sewer system<sup>27</sup>—has been unable to keep the agreement.<sup>28</sup>

In 2018, the State of California and the San Diego Regional Water Quality Control Board responded to the sewage crisis by filing suit against the U.S. International Boundary and Water Commission (IBWC),<sup>29</sup> the U.S. agency charged with administering U.S.-Mexico treaties “regarding boundary demarcation, national ownership of waters, sanitation, water quality, and flood control in the border region.”<sup>30</sup> The suit is scheduled to go to trial in April 2020.<sup>31</sup> The San Diego Surfrider Foundation, the cities of Imperial Beach and Chula Vista, and the Port of San Diego have filed a similar suit against the IBWC.<sup>32</sup> Unlike the plaintiffs in these cases, not everyone agrees that the IBWC is responsible for dealing with the sewage. In response to the San Diego Regional Water Quality Control Board, the U.S. Department of Justice wrote that the IBWC is not “the agency that, under U.S. Law is responsible for managing transboundary trash, sewage, and sediment discharges from Mexico,” and that

22. Brie Stimson, *Calif. AG Intends to Sue Over Tijuana River Sewage Problem*, NBC SAN DIEGO (May 15, 2018), <https://www.nbcsandiego.com/news/local/calif-ag-intends-to-sue-over-tijuana-river-sewage-problem/49109/>.

23. Jeremy P. Jacobs, *Trump’s Border Wall Won’t Stop Sewage*, E&E NEWS (Mar. 30, 2018), <https://www.eenews.net/stories/1060077793/>.

24. *Id.*

25. Michael Smolens, *Tijuana Sewage Spills Generations of Frustration*, SAN DIEGO UNION-TRIBUNE (Feb. 18, 2018), <https://www.sandiegouniontribune.com/news/columnists/michael-smolens/sd-me-smolens-sewage-20180214-story.html>.

26. Jacobs, *supra* note 23.

27. Smolens, *supra* note 25.

28. Jacobs, *supra* note 23.

29. Complaint at 2, California *ex rel.* Reg’l Water Quality Control Bd. v. Int’l Boundary & Water Comm’n, No. 3:18-cv-02050-JM-JMA (S.D. Cal. Sept. 4, 2018); Stimson, *supra* note 22.

30. INT’L BOUNDARY & WATER COMM’N: U.S. & MEXICO, U.S. SEC., <https://www.ibwc.gov/home.html> (last visited May 19, 2020).

31. City News Service, *Group of Senators, Congress Members Call for End to Tijuana River Pollution*, KPBS (Apr. 30, 2019), <https://www.kpbs.org/news/2019/apr/30/group-of-senators-congress-members-call-for-end/>.

32. Surfrider Found. v. Int’l Boundary & Water Comm’n, No. 18CV1621 JM (JMA), 2018 WL 6504154, at \*1 (S.D. Cal. Dec. 11, 2018); Complaint at 1, City of Imperial Beach v. Int’l Boundary & Water Comm’n, 337 F. Supp. 3d 916 (S.D. Cal. 2018) (No. 18CV0457 JM JMA).

the agency cannot commit to projects for which it has not received congressional funds.<sup>33</sup> In addition to the suits, other solutions continue to be pursued. In September 2019, California Governor Gavin Newsom signed a bill that will direct \$15 million to addressing water quality issues in the Tijuana River Valley.<sup>34</sup>

c. New River Pollution Affects California Communities

Similarly, the New River, which runs from the Mexican city of Mexicali through California's Imperial Valley, is severely polluted.<sup>35</sup> Water and sediment samples show that the river contains polychlorinated biphenyls, polycyclic aromatic hydrocarbons, byproducts of DDT, and high levels of heavy metals.<sup>36</sup> While the river is encased underground in Mexicali, protecting citizens from its toxic contents, the U.S. portion of the river is exposed to the air.<sup>37</sup>

In Mexicali, the river picks up pollution in the form of sewage and factory waste.<sup>38</sup> The U.S. and Mexican governments have spent over \$91 million on upgrading Mexicali's sewage system, but the city has developed too rapidly for the sewers to keep up.<sup>39</sup> In particular, the city has been transformed by *maquiladoras*,<sup>40</sup> foreign-owned factories that receive tax incentives for using Mexican production and labor.<sup>41</sup> In addition to the overwhelmed sewage system, the factories themselves discharge waste directly into the river, including pollutants like arsenic, cadmium, cyanide, chromium, and mercury.<sup>42</sup>

In 1980, Mexico and the United States adopted an agreement to establish water quality standards for the river, but the agreement has never been enforced.<sup>43</sup> In 1994, the U.S. Environmental Protection Agency (EPA) issued subpoenas to the U.S. parent companies of Mexicali *maquiladoras* to determine

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33. Jacobs, *supra* note 23.

34. Gov. Newsom Signs Tijuana River Valley Legislation, FOX 5 (Sept. 30, 2019), <https://fox5sandiego.com/2019/09/30/gov-newsom-signs-tijuana-river-valley-legislation/>.

35. Brittny Mejia, *Three-eyed Fish and Two-headed Turtles? The Stench of This River Spanning U.S.-Mexico Border is Legendary*, L.A. TIMES (May 2, 2018), <https://www.latimes.com/local/california/la-me-ln-new-river-20180502-story.html>.

36. Ian James, *This River is Too Toxic to Touch, and People Live Right Next to it*, DESERT SUN (Dec. 10, 2018), <https://www.desertsun.com/in-depth/news/environment/border-pollution/poisoned-cities/2018/12/05/toxic-new-river-long-neglect-mexico-border-calexico-mexicali/1381599002/>.

37. Ian James, *A Crisis of Sewage? California Lawmakers Seek Funding for the Polluted New River*, DESERT SUN (Jan. 18, 2019), <https://www.desertsun.com/story/news/environment/2019/01/18/california-funding-polluted-new-river-border-mexicali-calexico/2537244002/>.

38. James, *supra* note 36.

39. *Id.*

40. Ian James, *This Mexican City was Transformed by Factories. Its People Pay a Heavy Price*, DESERT SUN (Dec. 10, 2018), <https://www.desertsun.com/in-depth/news/environment/border-pollution/poisoned-cities/2018/12/05/mexicali-industrial-city-factories-maquiladoras-border-pollution/1295896002/>.

41. ACRECENT FIN. CORP., *Maquiladoras in Mexico Benefits and Challenges*, <https://www.acrecent.com/maquiladoras-in-mexico-benefits-and-challenges/> (last visited May 19, 2020).

42. James, *supra* note 36.

43. *Id.*



what pollutants they released into the river.<sup>44</sup> Some of the companies argued that EPA lacked jurisdiction to issue the subpoenas at all, highlighting the uncertain legal landscape at the border.<sup>45</sup> Ultimately, the data EPA obtained from the U.S. parent companies was insufficient to assess the problem of pollutants in the river.<sup>46</sup> Since then, the United States has focused on supporting Mexico's water and sewer infrastructure.<sup>47</sup> More recently, however, both countries have decreased their funding toward sewer projects at the border,<sup>48</sup> likely to the detriment of the New River.

d. U.S. Air Pollution Plagues Canadian Cities

Over half of the air pollution in the Canadian province of Ontario originates in the United States; in some places in Ontario, the proportion is over 90 percent.<sup>49</sup> In February 2006, Canadian Minister of the Environment Lauren Broten filed comments with EPA, "detailing the Ontario government's concerns with the U.S. government agency's plans to allow higher emissions from coal-burning power plants."<sup>50</sup> In November of that year, thirteen Canadian municipalities filed a petition with EPA to call for reduced emissions from 150 U.S. power plants.<sup>51</sup>

Acid rain impacting Canadian waterways and forests has also been traced to air pollution from the United States.<sup>52</sup> In 1981, EPA Administrator Costle issued a letter pursuant to section 115 of the Clean Air Act, concluding that acid rain from U.S. sources endangered Canadian health and welfare.<sup>53</sup> However, Administrator Costle's successors in the next administration did not believe the letter required them to take further action, and the D.C. Circuit ruled that the letter was procedurally defective.<sup>54</sup> When Canada filed a formal petition requesting a rulemaking proceeding to implement the findings in Costle's letter, EPA rejected the petition, and the D.C. Circuit upheld the agency's decision.<sup>55</sup>

In 1991, the United States and Canada reached an agreement on acid rain that committed both countries to cap sulfur and nitrogen oxide emissions.<sup>56</sup>

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. ONTARIO MINISTRY OF THE ENVIRONMENT, CONSERVATION AND PARKS, ONTARIO CHALLENGES U.S. TO PROTECT AIR QUALITY (Feb. 17, 2006).

50. *Id.*

51. *Canadian Cities Petition U.S. to Curb Air Pollution*, CBC NEWS (Nov. 1, 2006), <https://www.cbc.ca/news/canada/canadian-cities-petition-u-s-to-curb-air-pollution-1.589035>.

52. Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 49 DUKE L.J. 931, 959–60 (1997).

53. *Id.*

54. *Id.*

55. *Id.* (citing *The Queen ex rel. Ontario v. U.S. EPA*, 912 F.2d 1525, 1533–34 (D.C. Cir. 1990)).

56. Merrill, *supra* note 52, at 964–65 n.172; *see also* Noah D. Hall, *Transboundary Pollution Harmonizing International and Domestic Law*, 40 U. MICH. J.L. REFORM 681, 715 (2007).

However, the agreement only required that the United States carry out the same emission reductions mandated by the 1990 Clean Air Act amendments.<sup>57</sup> The agreement failed to represent any substantive gains for Canada beyond the United States' existing domestic commitments. In 2000, the parties strengthened the agreement by signing Annex 3, which included new limitations on nitrogen oxide and volatile organic compound emissions.<sup>58</sup> Since then, however, progress has stalled,<sup>59</sup> and Ontario continues to suffer from air pollution that originated in the United States.<sup>60</sup>

## 2. *A Brief History of U.S. Border Pollution Agreements*

The examples in the last Subpart are far from the first or only instances of transboundary pollution between the United States and its border neighbors. In response, the United States, Canada, and Mexico have addressed transboundary pollution in a variety of treaties, agreements, and commitments. This Subpart outlines five major agreements that have attempted to tackle transboundary pollution: the International Boundary and Water Commission, the Boundary Waters Treaty, the *Trail Smelter* Arbitration, the La Paz Agreement, and the North American Free Trade Agreement.

### a. International Boundary and Water Commission

The IBWC, created by the United States and Mexico at the Convention of 1889,<sup>61</sup> seeks to:

apply the rights and obligations which the Governments of the United States and Mexico assume under the numerous boundary and water treaties and related agreements, and to do so in a way that benefits the social and economic welfare of the peoples on the two sides of the boundary and improves relations between the two countries.<sup>62</sup>

Unfortunately, the IBWC has been unable to resolve pollution affecting the two countries. Seen by border stakeholders as a “dinosaur,”<sup>63</sup> the agreement “has

57. Merrill, *supra* note 52, at 964–65 n.172.

58. Austen L. Parrish & Shi-Ling Hsu, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1, 26 (2007).

59. *Id.* at 28.

60. Jane Sims, *Smog Alert Could be Linked to U.S. Coal-Fired Generators*, LONDON FREE PRESS (May 29, 2018), <https://lfp.com/news/local-news/smog-alert-could-be-linked-to-u-s-coal-fired-generators>.

61. Richard Kyle Paisley et al., *Transboundary Water Management: An Institutional Comparison Among Canada, the United States, and Mexico*, 9 OCEAN & COASTAL L.J. 177, 187 (2003).

62. INT'L BOUNDARY & WATER COMM'N: U.S. & MEX., U.S. SEC., *The International Boundary and Water Commission – Its Mission, Organization and Procedures for Solution of Boundary and Water Problems*, [https://www.ibwc.gov/About\\_Us/About\\_Us.html](https://www.ibwc.gov/About_Us/About_Us.html) (last visited May 19, 2020).

63. Stephen P. Mumme, *The US-Mexico International Boundary and Water Commission in the Sustainable Development Era*, 9 IBRU BOUNDARY & SEC. BULLETIN 117, 117 (2001).

been roundly criticized”<sup>64</sup> and suffers from “glaring omissions” including “groundwater allocation, mechanisms for sharing water from lesser streams and rivers, consideration of ecologically-based water needs, and lack of an ecosystem-based orientation.”<sup>65</sup> Commentators argue that the IBWC has not played an effective role in pollution control, particularly concerning Mexican sewage in the United States,<sup>66</sup> and that it “lacks the sufficient structure or authority to deal with pollution problems.”<sup>67</sup> Thus far, the IBWC has been insufficient to resolve major pollution problems on the U.S.-Mexico border.

b. Boundary Waters Treaty of 1909

The Boundary Waters Treaty of 1909, which prohibits some types of waterborne pollution between the United States and Canada,<sup>68</sup> also created the IJC, “a six-member investigative and adjudicative body with the United States and Canada equally represented by political appointees.”<sup>69</sup> Both parties must agree to submit a dispute to the IJC for a binding arbitral decision.<sup>70</sup> On the U.S. side, the Senate must consent with a two-thirds majority.<sup>71</sup> Possibly as a consequence of this high bar, binding adjudication has never been invoked in the history of the treaty.<sup>72</sup>

Unlike adjudication, an aspect of the IJC that the parties *do* invoke is its investigative and reporting power.<sup>73</sup> Acting alone or together, the United States and Canada can submit issues to the IJC for nonbinding investigative reports and studies.<sup>74</sup> Recent years have seen studies on water quality in Lakes Champlain and Memphremagog; the impacts of flooding in the Richelieu River; and binational governance of the Lake of the Woods.<sup>75</sup> Such studies and reports “have proven valuable in diplomatically resolving dozens of transboundary pollution disputes” and have helped the parties craft new environmental policies.<sup>76</sup>

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64. Stephen P. Mumme, *The International Boundary and Water Commission Under Fire: Policy Prospective for the 21st Century*, 14 J. ENV'T & DEV. 507, 510 (Dec. 2005).

65. Paisley et al., *supra* note 61, at 192.

66. Margaret M. Sullivan, *Transboundary Pollution from Mexico: Is Judicial Relief Provided by International Principles of Tort Law?*, 10 HOUS. J. INT'L L. 105, 108 (1987).

67. *Id.* at 108 n.21.

68. Hall, *supra* note 56, at 694–95.

69. *Id.* at 706.

70. *Id.*

71. *Id.*

72. *Id.*; see also *The International Joint Commission (IJC)*, N.D. ST. WATER COMMISSION (Nov. 2016), [http://www.swc.nd.gov/info\\_edu/reports\\_and\\_publications/oxbow\\_articles/2016\\_November.pdf](http://www.swc.nd.gov/info_edu/reports_and_publications/oxbow_articles/2016_November.pdf).

73. Hall, *supra* note 56, at 707.

74. *Id.* at 706.

75. INT'L JOINT COMM'N, *Dockets–Applications & References*, [https://ijc.org/en/library/dockets?title=&combine=&field\\_date\\_value=2020-02-06%2017%3A29%3A09%20America/Toronto&field\\_region\\_target\\_id=All&page=0](https://ijc.org/en/library/dockets?title=&combine=&field_date_value=2020-02-06%2017%3A29%3A09%20America/Toronto&field_region_target_id=All&page=0) (last visited May 19, 2020).

76. Hall, *supra* note 56, at 707.

The IJC has a positive reputation for its objective scientific work; however, its enforcement role is limited.<sup>77</sup> For example, in March 2006, environmental nongovernmental organizations (NGOs) and citizens from the United States and Canada made a submission to the North American Commission for Environmental Cooperation (NACEC or CEC).<sup>78</sup> The submission argued that North Dakota's planned construction of an outlet to drain water from Devils Lake would negatively influence Canadian waters and violate the Boundary Waters Treaty and that the United States and Canada had an obligation to resolve the dispute through the IJC.<sup>79</sup> The Secretariat of the CEC dismissed the petition on the basis that the Boundary Waters Treaty is not enforceable law in the United States.<sup>80</sup> As Professor Noah D. Hall writes, "[t]he Secretariat's determination demonstrates the inherent weakness in the Boundary Waters Treaty. While the Boundary Waters Treaty contains strong standards for transboundary water pollution, it does not provide either a role for citizen enforcement or a mandatory duty to resolve transboundary issues through the International Joint Commission."<sup>81</sup> Without such a duty, the United States and Canada are free to ignore even instances of pollution that fall squarely within the terms of the Boundary Waters Treaty.

c. *Trail Smelter* Arbitration and "Soft Law"

The *Trail Smelter* Arbitration, which would seem to directly protect states from the effects of transboundary pollution, nonetheless has yet to be implemented in a binding context. "By far the most influential decision on transboundary pollution in international law,"<sup>82</sup> the *Trail Smelter* case involved the exact same British Columbia smelter as *Pakootas*.<sup>83</sup> In *Trail Smelter*, the harm that Teck (then called Cominco) caused to property in Washington State was from air pollution—specifically sulfur dioxide fumes<sup>84</sup>—rather than from hazardous waste that was at issue in *Pakootas*.<sup>85</sup> At the time, Washington lacked a long-arm statute that would have granted it jurisdiction over the smelter, and British Columbia courts similarly were limited jurisdictionally.<sup>86</sup> Rather than leaving the issue to individual landowners in Washington State, the United States

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77. *Id.*

78. *Id.* at 721; *see also infra* Subpart III.B.

79. Hall, *supra* note 56, at 721.

80. *Id.* at 722.

81. *Id.* at 723.

82. Merrill, *supra* note 52, at 947.

83. Austen L. Parrish, *Trail Smelter Déjà Vu Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363, 365 (2005).

84. *Id.* at 420.

85. Hall, *supra* note 56, at 733.

86. *Id.* at 708.

intervened under the theory of espousal, “in which the nation state takes on an international claim on behalf of its private citizens.”<sup>87</sup>

In 1928, Canada and the United States agreed to refer the matter to the IJC “for a factual study of the liabilities and damages.”<sup>88</sup> The tribunal’s decision, rendered in 1941, contained the following famous paragraph:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or to the properties or persons therein, when the cause is of serious consequence and the injury is established by clear and convincing evidence.<sup>89</sup>

The *Trail Smelter* Arbitration represents the only time an international court or tribunal has specifically addressed transboundary pollution.<sup>90</sup> In 1972, its most famous holding was incorporated into Principle 21 of the United Nations Conference on the Human Environment Stockholm Declaration, which provides that states have “the sovereign right to exploit their own resources . . . and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.”<sup>91</sup> Principle 21 of the Stockholm Declaration was reaffirmed by other forms of “soft law,”<sup>92</sup> notably Principle 2 of the United Nations Conference on Environment and Development Rio Declaration of 1992 and section 601 of the Restatement (Third) of the Foreign Relations Law of the United States.<sup>93</sup> All of these examples “carr[y] forward the *Trail Smelter* tribunal’s basic strategy” by articulating an implicit regime of strict liability for transboundary pollution.<sup>94</sup>

The *Trail Smelter* Arbitration is a promising approach to resolving transboundary pollution in North America. But, as embodied in the Stockholm Declaration and other forms of soft law, it lacks teeth: By definition, soft law is not binding. In 1991, the plaintiffs in a U.S. lawsuit attempted to use soft law in a legally enforceable way. They claimed the defendants had violated the Alien Tort Statute,<sup>95</sup> which only applies to conduct “constituting a treaty violation or a violation of the law of nations.”<sup>96</sup> Specifically, they claimed the defendants had violated the Stockholm Declaration and Restatement (Third) of Foreign

87. *Id.* at 709.

88. *Id.*

89. *Trail Smelter Case*, 3 R.I.A.A. 1905, 1965 (U.S.-Can. 1935).

90. Parrish, *supra* note 83, at 365.

91. Hall, *supra* note 56, at 699 (quoting the United Nations Conference on the Human Environment, *Stockholm Declaration of the United Nations*, 11 I.L.M. 1416, 1420 (June 16, 1972)).

92. Scholar Thomas Merrill describes “soft” international law as “official and semi-official international charters, declarations, and statements of principle dealing with transboundary pollution,” which, while not directly binding, are “nevertheless regarded as important indicia of the requirements of customary international law.” Merrill, *supra* note 52, at 951.

93. Hall, *supra* note 56, at 699.

94. Merrill, *supra* note 52, at 952.

95. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 669–70 (S.D.N.Y. 1991) (citing 28 U.S.C. § 1350)

96. *Id.* at 671.

Relations law.<sup>97</sup> However, the Southern District of New York found that neither the Stockholm Principles nor the Restatement “constitute[d] a statement of universally recognized principles of international law.”<sup>98</sup> The court thus rejected the plaintiffs’ attempt to use soft law to reach a legally binding conclusion. Neither the *Trail Smelter* Arbitration itself nor its incarnation in various instances of soft law can currently be invoked as a binding rule of law.

d. La Paz Agreement of 1983

Frustrated with the IBWC’s slow process and limited success in the pollution arena, in 1983 U.S. EPA and its Mexican counterpart signed the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (the La Paz Agreement) to “create a framework for stronger cooperation between the United States and Mexico on border environmental issues.”<sup>99</sup> The La Paz Agreement contains provisions to protect the countries’ environments from hazardous exports<sup>100</sup> and encourages data sharing and environmental assessment of projects affecting the border region.<sup>101</sup> To implement the agreement, Mexico and the United States have created a series of programs: the Integrated Border Environmental Plan in 1992; the Border XXI in 1996; the Border 2012 program in 2003; and the Border 2020 program in 2012.<sup>102</sup> These programs are designed to allow government entities to collaborate on specific problems and regions.<sup>103</sup>

The La Paz Agreement, and the programs it implements, have had successes in addressing pollution issues at the border. For example, Border 2020 has convened symposia on children’s environmental health and vector-borne diseases,<sup>104</sup> and held a workshop to improve binational intelligence sharing on environmental issues.<sup>105</sup> Earlier border programs also implemented important projects. Under Border XXI, for example, a task force identified and made funds available for the cleanup of abandoned waste sites, including the infamous Alco Pacific site.<sup>106</sup>

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97. *Id.*

98. *Id.*

99. Eileen Zorc, *The Border 2012 U.S.-Mexico Environmental Program Will a Bottom-Up Approach Work?*, 16 GEO. INT’L ENVTL. L. REV. 533, 536 (2004).

100. La Paz Agreement arts. 5–10, U.S.-Mex., Aug. 14, 1983, T.I.A.S. No. 10827, [hereinafter La Paz Agreement].

101. Stephen P. Mumme et. al., *Strengthening Binational Management of the Tijuana River*, 17 U. DENV. WATER L. REV. 329, 344 (2014).

102. EPA, PROTECTING THE ENVIRONMENT AND PUBLIC HEALTH IN THE U.S.-MEXICO BORDER REGION (2017).

103. Zorc, *supra* note 99, at 536.

104. EPA, *supra* note 102.

105. *Id.*

106. Zorc, *supra* note 99, at 540; *see also* NAT’L ENVTL. JUST. ADVISORY COUNCIL, BORDER ENVIRONMENTAL JUSTICE REPORT 22 (2003).

However, the reach of the La Paz Agreement is limited. The agreement does not commit the United States and Mexican “governments to any specific solution or investment in environmental protection . . . .”<sup>107</sup> The scope of the agreement is relatively circumscribed, with its terms only requiring the parties to obligate themselves to solve pollution problems “to the fullest extent practical.”<sup>108</sup> Under the terms of the agreement, no funds are committed by either country, and each party is expected to bear the entire cost of its own agreement.<sup>109</sup> Further, the agreement’s provisions are subordinate to existing state and national laws,<sup>110</sup> which—combined with the lack of committed funds—makes the agreement vulnerable to political uncertainties and governmental intransigence.<sup>111</sup> Finally, the agreement lacks enforcement provisions.<sup>112</sup> As a result of these limitations, much of the work under the agreement “involves either local-level task forces working with very limited funds to better apply existing standards or state and federal governments participating in training and education efforts to strengthen local regulatory capacity along the border.”<sup>113</sup>

e. North American Free Trade Agreement

NAFTA may not have been designed to address environmental issues, but political pressure soon made clear that it was unable to avoid them. Environmental groups in Canada, Mexico, and the United States all “mobilized popular opposition to NAFTA on the ground that liberalizing trade without adequate safeguards would harm the environment.”<sup>114</sup> The groups had two main concerns in particular: that a North American trade agreement would degrade the U.S.-Mexico border environment and that it would cause environmentally harmful foreign investment in Mexico.<sup>115</sup>

The governments that were the targets of these protests heeded some, though not all, of the protestors’ calls.<sup>116</sup> Two of the resulting environmental provisions in NAFTA are particularly salient. First, to address the call for U.S.-Mexico border cleanup, the United States and Mexico created the North American Development Bank (NADB).<sup>117</sup> NADB provides financing and

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107. Stephen P. Mumme & Kimberly Collins, *The La Paz Agreement 30 Years On*, 23 J. ENV’T & DEV. 303, 304 (2014). Note that the agreement does provide a mechanism for committing the governments to a specific solution or investment should the governments decide to do so.

108. La Paz Agreement, *supra* note 100.

109. Sullivan, *supra* note 66, at 109.

110. *Id.*

111. Mumme & Collins, *supra* note 107, at 319.

112. Sullivan, *supra* note 66, at 109.

113. Mumme & Collins, *supra* note 107, at 319.

114. John H. Knox & David L. Markell, *The Innovative North Commission for Environmental Cooperation*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 1 (David L. Markell & John H. Knox eds., 2003).

115. *Id.* at 3.

116. *Id.* at 8.

117. *Id.*

assistance for “projects and actions that help preserve, protect and enhance the environment of the border region.”<sup>118</sup> Second, to address concerns about enforcement of domestic environmental laws, the three governments produced a supplemental agreement to NAFTA called the North American Agreement on Environmental Cooperation (NAAEC).<sup>119</sup>

Among other provisions, the NAAEC creates the CEC, which is composed of a council of the three countries’ environmental ministers, a secretariat, and an independent advisory committee.<sup>120</sup> Citizens and NGOs can make submissions to the CEC when one of the member countries fails to enforce its own environmental laws.<sup>121</sup> The secretariat then decides whether a given submission merits a response from the country in question.<sup>122</sup> The secretariat may also respond to the submission by developing a factual record, which may be made public.<sup>123</sup> Factual records, whether produced in response to a submission or at the secretariat’s initiative, are not legally enforceable; rather, their function is to provide documented, credible information.<sup>124</sup> While a procedure exists to penalize member states that persistently fail to enforce their environmental laws, this process—like the arbitral process under the IJC—has never been used.<sup>125</sup>

Like the other agreements in this Subpart, the NAAEC fails to provide a truly enforceable means of transboundary pollution control. Critics point to the NAAEC’s “lack of credibility and effectiveness due to lack of sanctions or remedies.”<sup>126</sup> Scholars at the Center for American Progress have called the agreement “utterly ineffectual as [an] enforcement mechanism,” pointing to the fact that it has never “resulted in meaningful sanctions.”<sup>127</sup> Like other agreements that have aimed to control pollution at the United States’ borders, NAAEC’s lack of meaningful enforcement provisions has limited its efficacy. The parties’ unwillingness to cede control to a multiparty agreement means that pollution continues to plague the United States’ northern and southern borders.

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118. *Vision, Mission & Core Values*, N. AM. DEV. BANK, <https://www.nadb.org/about/vision-core-values> (last visited May 19, 2020).

119. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

120. *Id.* art. 8.2.

121. *Id.* art. 14.1.

122. *Id.* art. 14.2.

123. *Id.*

124. Hall, *supra* note 56, at 720.

125. Hugh Benevides, *Guest Blog Does the USMCA Offer Hope for a Revitalized Commission for Environmental Cooperation?*, CANADIAN ENVTL. L. ASS’N (Oct. 19, 2019), <https://cela.ca/guest-blog-does-the-usmca-offer-hope-for-a-revitalized-commission-for-environmental-cooperation/>.

126. Anne-Catherine Boucher, *The Fate of the North American Commission for Environmental Cooperation in the Context of the NAFTA Renegotiations*, AM. BAR ASS’N (May 1, 2018), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2017-2018/may-june-2018/the-fate-of-the-north-american-commission/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2017-2018/may-june-2018/the-fate-of-the-north-american-commission/).

127. Marc Jarsulic et al., *Trump’s Trade Deal and the Road not Taken*, CTR. FOR AM. PROGRESS (Feb. 1, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/02/01/465744/trumps-trade-deal-road-not-taken/>.



B. *Attacking Transboundary Pollution with Domestic Litigation: Pakootas v. Teck Cominco Metals, Ltd.*

The *Pakootas* case shows the difficulty and expense of legal responses to transboundary pollution in the absence of multinational agreements.

The background to *Pakootas* begins as early as 1896, when Teck's smelter in Trail, British Columbia first began operation.<sup>128</sup> The smelter discharged a solid waste product known as "slag" into the Columbia River.<sup>129</sup> Between 1930 and 1995, about four hundred tons of slag were washed into Columbia River from the Teck smelter every day.<sup>130</sup> The waste flowed downstream into the United States where it came to rest on the riverbed, broke down, and released hazardous substances in Washington State.<sup>131</sup>

In 1999, the Confederated Tribes of the Colville Reservation petitioned EPA to investigate the contamination of the Upper Columbia River site.<sup>132</sup> In December 2003, after a preliminary assessment, EPA issued a unilateral administrative order against Teck directing the company to perform a remedial investigation and feasibility study (Order).<sup>133</sup> The Order was issued under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA.<sup>134</sup> When Teck failed to follow the Order, EPA chose not to enforce it.<sup>135</sup>

In 2004, Joseph Pakootas and Donald Michel, two government officials from the Colville Tribes, attempted to enforce the Order by filing a CERCLA citizen suit against Teck in the Eastern District of Washington.<sup>136</sup> The plaintiffs were joined by the State of Washington as plaintiff-intervenor and, later, by the Colville Tribes as a co-plaintiff.<sup>137</sup> (The individual plaintiffs' claims were later dismissed, leaving the tribes as the primary plaintiff.)<sup>138</sup>

On an interlocutory appeal in 2006, the Ninth Circuit decided that the case did not involve an extraterritorial application of law.<sup>139</sup> On remand, the litigation was split into three phases to determine (1) whether Teck was a potentially responsible party and therefore liable under CERCLA; (2) Teck's liability for response costs; and (3) Teck's liability for natural resource damages.<sup>140</sup> In Phase

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128. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-LRS, 2012 WL 6546088, at \*2 (E.D. Wash. Dec. 14, 2012).

129. *Id.*

130. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 572 (9th Cir. 2018).

131. *Id.* at 572–73.

132. *Id.* at 573.

133. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1070 (9th Cir. 2006).

134. *Id.*

135. *Id.*

136. *Id.* at 1068. Under 42 U.S.C. § 9659, individual citizens may bring civil actions against parties alleged to be in violation of CERCLA. 42 U.S.C. § 9659 (2018).

137. *Pakootas*, 452 F.3d at 1068.

138. *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 573 n.5 (9th Cir. 2018).

139. *Pakootas*, 452 F.3d at 1079.

140. *Pakootas*, 905 F.3d at 573. Under CERCLA, potentially responsible parties are liable for four types of costs: removal or remedial "response costs" undertaken by a state, federal, or tribal government;

One of the trial, the district court held that Teck was jointly and severally liable to the tribes and the state.<sup>141</sup> In Phase Two, the district court issued a partial final judgment that found Teck liable for millions of dollars' worth of response costs.<sup>142</sup> Teck then appealed the Phase One and Phase Two judgments.<sup>143</sup> The Ninth Circuit ruled on this appeal in its September 2018 opinion—at the time of writing, the most recent opinion in the ongoing case.

In addition to tying up other loose ends, the 2018 decision affirmed the district court's exercise of personal jurisdiction over the Canadian company Teck for the pollution in Washington. The Ninth Circuit evaluated specific personal jurisdiction according to a three-prong test.<sup>144</sup> In applying the first prong, the district court had used the so-called "effects test" articulated by the U.S. Supreme Court in *Calder v. Jones*.<sup>145</sup> The *Calder* test arose when a California resident brought suit in California state court, arguing that a tabloid article about her was libelous.<sup>146</sup> The defendants argued that the California court lacked personal jurisdiction over them because they had written and edited the allegedly libelous article in Florida.<sup>147</sup> The *Calder* Court held that "[j]urisdiction over [defendants] is . . . proper in California based on the 'effects' of their Florida conduct in California."<sup>148</sup> The Court explained that the defendants had committed an intentional act; that they had expressly aimed the act at California; and that they knew the harm caused would be felt by the plaintiff in California.<sup>149</sup>

On appeal to the Ninth Circuit, Teck had argued that the district court should not have determined personal jurisdiction using the *Calder* "effects test," or, in the alternative, that the *Calder* test was not satisfied because the Trail smelter's discharges were not aimed at Washington.<sup>150</sup> In its 2018 decision, however, the court held that the *Calder* test was appropriate and that Teck's behavior met all three *Calder* requirements: Teck had (1) committed an intentional act (2) expressly aimed at the forum state and (3) causing harm that the defendant knew was likely to be suffered in the forum state.<sup>151</sup> After affirming the district court's use of *Calder*, the court found that the quintessential requirement of personal

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necessary response costs undertaken by any other person; damages for injury to, destruction of, or loss of natural resources; and the costs of any health assessment or health effects study. 42 U.S.C. § 9607(a)(4) (2018).

141. *Pakootas*, 905 F.3d at 574.

142. *Id.*

143. *Id.*

144. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).

145. *Pakootas*, 905 F.3d at 576–77 (citing *Calder v. Jones*, 465 U.S. 783 (1984)).

146. *Calder v. Jones*, 465 U.S. 783, 784–85 (1984).

147. *Id.*

148. *Id.* at 789.

149. *Id.* at 789–90.

150. *Pakootas*, 905 F.3d at 576–77.

151. *Id.* at 577–78.

jurisdiction was also satisfied: There would be no fair play and substantial justice if Teck managed to avoid suit in Washington.<sup>152</sup>

The case is currently headed back to the Eastern District of Washington for Phase Three. After fourteen years of litigation, *Pakootas* has still not been totally resolved—an example of the difficulty of using domestic litigation to resolve transboundary pollution issues.

## II. TRANSBOUNDARY POLLUTION THROUGH THE LENS OF PERSONAL JURISDICTION

One of the most important elements of the 2018 Ninth Circuit decision was the court's affirmation that the Eastern District of Washington had personal jurisdiction over the case. Without personal jurisdiction, the case could not have continued in U.S. courts, and the smelter pollution would have continued unabated. But because Teck is a Canadian company located in Canada, personal jurisdiction was far from guaranteed. Subpart A of this Part locates this holding within the larger landscape of personal jurisdiction jurisprudence, while Subpart B considers the holding's implications for future transboundary pollution cases.

### A. Personal Jurisdiction in Context

Personal jurisdiction is a species of territorial jurisdiction which concerns a court's power to engage in binding adjudication over a person or thing.<sup>153</sup> Personal jurisdiction jurisprudence has evolved to reflect two types of jurisdiction: general jurisdiction, which involves a defendant's overall connections to a forum, and specific jurisdiction, which “exists when the contacts with the forum are related to the dispute sought to be adjudicated.”<sup>154</sup> The jurisdictional analysis in *Pakootas* focused on whether the court had specific personal jurisdiction over Teck.<sup>155</sup>

#### 1. Personal Jurisdiction Rulings in *Pakootas*

The Ninth Circuit assesses personal jurisdiction using a three-part test: first, the defendant must purposefully direct himself toward or purposefully avail himself of the forum; second, the claim must arise out of or relate to the defendant's activities in the forum; and third, jurisdiction must comport with fair play and substantial justice.<sup>156</sup> Under the first part, the court considers (in a tort case) whether the defendant “purposefully direct[ed]” his activities at the forum,

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152. *Id.* at 578.

153. GEOFFREY C. HAZARD, JR., ET AL., PLEADING AND PROCEDURE: CASES AND MATERIALS 47 (11TH ED. 2015).

154. *Id.* at 72.

155. *Pakootas*, 905 F.3d at 577; *see also* *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at \*2 (E.D. Wash. Nov. 8, 2004).

156. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205-06 (9th Cir. 2006).

or (in a contract case) whether the defendant “purposefully avail[ed]” himself of the forum.<sup>157</sup> The Eastern District of Washington analyzed *Pakootas* as a tort case, under which the issue was whether Teck had “purposefully directed” its activities at Washington state.<sup>158</sup> To conduct this analysis, it used the *Calder* test,<sup>159</sup> under which “personal jurisdiction can be predicated on (1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—in the forum state.”<sup>160</sup>

In *Pakootas*, the Eastern District of Washington applied the three-part *Calder* test and found that “[t]he facts alleged in the individual plaintiffs’ complaint and the State of Washington’s complaint-in-intervention satisfy this three-part test.”<sup>161</sup> The alleged “intentional act” was “disposing of hazardous substances into the Columbia River”; this act was “expressly aimed at the State of Washington in which the Upper Columbia River and Franklin D. Roosevelt lake are located”; and “[t]his disposal causes harm which defendant knows is likely to be suffered downstream.”<sup>162</sup>

Having determined that Teck’s conduct satisfied the *Calder* test, the court still had to decide whether personal jurisdiction would “comport with ‘fair play and substantial justice.’”<sup>163</sup> It concluded that it would.<sup>164</sup> The court explained its reasoning: The burden on Teck was not great; Trail, British Columbia, is only ten miles from the Eastern District of Washington; exercising personal jurisdiction over Teck would not create conflict with Canadian sovereignty; and the state of Washington had a significant interest in adjudicating the dispute.<sup>165</sup>

Between the district court’s 2004 jurisdictional holding and the Ninth Circuit’s 2018 evaluation of that holding, the Supreme Court decided multiple landmark personal jurisdiction cases. In 2011, after twenty-five years without a personal jurisdiction case, the Supreme Court decided *Goodyear Dunlop Tires Operations, S.A. v. Brown* and *J. McIntyre Machinery, Ltd. v. Nicastro*.<sup>166</sup> *Goodyear* addressed general jurisdiction while *J. McIntyre* concerned personal jurisdiction, but both acted to limit the scope of personal jurisdiction, particularly over foreign defendants.<sup>167</sup>

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157. *Id.* at 1206.

158. *Pakootas*, 2004 WL 2578982, at \*2.

159. *Id.* at \*3. After describing the test, the court cites *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482 (9th Cir. 1994), but the test is widely known as the *Calder* test.

160. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir. 1993).

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

162. *Id.*

163. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–76 (1985)).

164. *Pakootas*, 2004 WL 2578982, at \*4.

165. *Id.*

166. Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 780 (2017).

167. See *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 929 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011).

In 2014, the Supreme Court issued two more personal jurisdiction decisions: *Daimler AG v. Bauman* and *Walden v. Fiore*.<sup>168</sup> In *Daimler*, the Court rejected the plaintiffs' argument that California district courts had general jurisdiction over German corporation Daimler AG.<sup>169</sup> *Walden*—the case most relevant to *Pakootas*—concerned professional gamblers traveling from Puerto Rico to Las Vegas who were stopped by Drug Enforcement Administration officers during their layover in Atlanta.<sup>170</sup> The agents, one of whom was named Walden, seized the gamblers' cash on suspicion that it was related to drug transactions.<sup>171</sup> Walden then filed an affidavit with the U.S. Attorney's Office supporting the seizure.<sup>172</sup> The gamblers filed suit in Nevada against Walden and others, arguing that the defendants had "violated their Fourth Amendment rights by, *inter alia*, improperly seizing their funds and filing a false and misleading affidavit that led to the continued withholding of those funds."<sup>173</sup>

The case reached the U.S. Supreme Court, which found that the Nevada court had lacked personal jurisdiction to hear the case. *Walden* held that "mere harm to a forum resident [is] not sufficient to justify jurisdiction in a forum with which the defendant had no contacts."<sup>174</sup> *Walden* distinguished *Calder v. Jones*, where "the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."<sup>175</sup> Taken alone, it is hard to accept that a defendant who libels an out-of-state plaintiff connects himself to the entire state where that plaintiff lives—but that defendants who commit other torts against out-of-state plaintiffs do not establish such a connection to the plaintiff's home state. The *Walden* Court's explanation of *Calder* seems to stretch our understanding of libel in order to make *Calder* fit within its rule that a defendant must establish contacts not only with the injured plaintiff, but also with the forum itself.

Together, *Goodyear*, *J. McIntyre*, *Daimler*, and *Walden* suggest that the Roberts Court's approach to personal jurisdiction is characterized by "a reluctance to draw foreign disputes into United States courts and an overall commitment to formalistic notions of sovereignty dependent upon territorial boundaries."<sup>176</sup> In all four cases, the Court agreed with the defendants that personal jurisdiction was improper. It also selected three cases with foreign defendants—out of "any number of personal jurisdiction cases" to which it could have granted certiorari—and found that personal jurisdiction was lacking over

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168. Stephanie S. Monplaisir, *Obtaining Personal Jurisdiction: A Deceptively Complex Stage of Litigation*, 79 ALA. LAW. 174, 178 (2018).

169. *Daimler AG v. Bauman*, 571 U.S. 117, 121–22 (2014).

170. Lee Goldman, *From Calder to Walden and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 370 (2015).

171. *Id.* at 371.

172. *Id.*

173. *Id.* at 371–72.

174. *Id.* at 373.

175. *Id.* at 375.

176. Robertson & Rhodes, *supra* note 166, at 786.

all of them.<sup>177</sup> The *J. McIntyre* decision seems especially restrictive: The Court failed to find jurisdiction even though the defendant did a substantial amount of business in the United States and the plaintiff likely could not file suit in any other state.<sup>178</sup>

*Walden* in particular raises questions about the continued relevance of *Calder v. Jones*. While the *Walden* Court distinguished *Calder*, at least one commentator has suggested that *Walden* is a “stealth overruling” of *Calder*: “if a new case were to arise today with the exact same fact pattern as *Calder*, it is unlikely that the Court would sustain jurisdiction.”<sup>179</sup> Even if *Walden* does not overrule *Calder*, commentators have read the case as cabining its effects.<sup>180</sup> Courts as well as commentators have been forced to consider the implications of *Walden* on *Calder*; a Fifth Circuit case cited to *Walden* in explaining that the *Calder* test did not yield personal jurisdiction over the defendant: “[t]he Supreme Court recently clarified . . . that mere injury to a forum resident is not a sufficient connection to the forum.”<sup>181</sup>

In its 2018 *Pakootas* opinion, however, the Ninth Circuit straightforwardly affirmed the district court’s use of the *Calder* test without invoking *Walden*. Teck had argued in its briefing that, first, the district court should not have applied *Calder*: “[T]hat test is for intentional torts, and Plaintiffs’ CERCLA section 107 claim is not an intentional tort claim.”<sup>182</sup> Second, Teck argued that the tribes had failed to satisfy the *Calder* test because, in discharging waste, Teck had not “expressly aimed” its conduct at the forum state.<sup>183</sup>

177. *Id.*

178. HAZARD, JR., ET AL., *supra* note 153, at 113.

179. Cassandra Burke Robertson & Charles W. “Rocky” Rhodes, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 253 (2014); *see also* Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2) A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 426 (2017) (stating “[a]lthough the Court tried mightily, the *Walden* decision is hard to square with *Calder* and *Keeton*”).

180. *See* John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607, 622 (2015) (describing *Walden* as “rein[ing] in expansive uses of *Calder* by the lower courts, or at least by the Ninth Circuit.”); *see also* Orrin K. Ames III, *Personal Jurisdiction Has the Roberts Court Provided Businesses and Their Counsel with Sufficient Predictability about Personal Jurisdiction to Make Properly Informed Compliance and Risk Assessments?*, 20 ATLANTIC L.J. 191, 212 (2018) (stating that under *Walden*, “effects of an intentional tort that will be considered sufficient to create the linkage of a defendant to a forum state must be to the forum state or its citizens and not just to a plaintiff”); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. LEGAL ANALYSIS 245, 275 (2014) (writing that “the Supreme Court in *Walden v. Fiore* recently rejected the broad interpretation of *Calder*”).

181. *Sangha v. Navig8 Shipmanagement Private Ltd.*, 882 F.3d 96, 103 (5th Cir. 2018); *see also* *Power Investments, LLC v. SL EC, LLC*, 927 F.3d 914, 918 (6th Cir. 2019) (finding that personal jurisdiction was proper in part because “[t]his case looks more like *Calder* than *Walden*”); *Ariel Investments, LLC v. Ariel Capital Advisors LLC*, 881 F.3d 520, 523 (7th Cir. 2018) (describing *Calder* in light of *Walden* and finding that “[t]he defendants in *Calder* thus had the sort of state-specific connection with California that [the defendant] lacks with Illinois”).

182. Appellant’s Reply Brief at 5, *Pakootas v. Teck Cominco Metals Ltd.*, 905 F.3d 565 (9th Cir. 2018) (No. 16-35742), 2017 WL 3476182, at \*5.

183. *Id.* at 7.

The Ninth Circuit rejected both arguments and found that personal jurisdiction was proper. First, “[t]he *Calder* test plainly applies here. Claims for recovery of response costs and natural resource damages are ‘more akin to a tort claim than a contract claim.’”<sup>184</sup> Second, the court found that Teck’s activities were expressly aimed at Washington. “The district court found ample evidence that Teck’s leadership knew the Columbia River carried waste away from the smelter, and that much of this waste travelled downstream into Washington, yet Teck continued to discharge hundreds of tons of waste into the river every day.”<sup>185</sup> Further, it did not matter that the waste was dumped into the river rather than directly into the state of Washington, since Teck was using the river as a built-in waste transport system; “[r]ivers are nature’s conveyor belts.”<sup>186</sup> Finally, turning to the question of fair play and substantial justice, the court found that not only did extending jurisdiction comport with fair play and substantial justice, but “[t]o the contrary, there would be no fair play and substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste.”<sup>187</sup>

## 2. Pakootas *Personal Jurisdiction before the Supreme Court*

In its petition for certiorari to the Supreme Court of the United States, Teck used *Walden* to challenge the Ninth Circuit’s application of *Calder*.<sup>188</sup> It argued, first, that the Ninth Circuit’s reading of *Calder* was incompatible with *Walden*,<sup>189</sup> and that the Ninth Circuit had erred in applying a “tort-specific jurisdictional test . . . without mentioning *Walden*’s rejection of the ‘effects test’ or its cabining of *Calder*’s ‘expressly aimed’ language.”<sup>190</sup> It added that while Teck had *known* its waste would wind up in Washington state, it had not “evidenced a conscious desire” that it do so, creating a situation more similar to *Calder* than to *Walden*.<sup>191</sup> Second, Teck argued that the Ninth Circuit was splitting from the Second, Fifth, and Seventh Circuits, which had all found that *Walden* overruled the *Calder* test, and from the Third and Eleventh Circuits, which had held that *Calder* only applies to intentional torts (and therefore not to strict-liability statutes like CERCLA).<sup>192</sup>

The Supreme Court denied Teck’s petition for certiorari.<sup>193</sup> In doing so, the Court implicitly accepted the Ninth Circuit’s use of *Calder*. Whatever implications *Walden* has for *Calder*, they do not yet include foreclosing

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184. Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565, 577 (9th Cir. 2018).

185. *Id.* at 578.

186. *Id.*

187. *Id.*

188. Petition for a Writ of Certiorari at 20, Teck Metals Ltd. v. The Confederated Tribes of the Colville Reservation, No. 18-1160, 2019 WL 1080892 at \*20 (2019).

189. *Id.* at \*23.

190. *Id.* at \*24–\*25.

191. *Id.* at \*26.

192. *Id.* at \*27–\*28.

193. Teck Metals Ltd. v. Confederated Tribes of the Colville Reservation, 139 S. Ct. 2693 (2019).

jurisdiction in situations where the defendant's waste is carried downstream into the forum state. Dumping hazardous waste can be assumed to establish a connection with the forum state that goes beyond its effects on the plaintiff. And if *Walden* does overturn the effects test, or if the federal circuits are split on the fate or effects of *Calder*, the Ninth Circuit was not so glaringly wrong in its stance on these issues that the Supreme Court felt obligated to correct them.

Thus, *Pakootas* managed to clear the personal jurisdiction obstacle that stands between transboundary pollution cases and the courts. However, as the next Subpart describes, this victory will likely be difficult for other transboundary pollution cases to replicate.

### B. Implications of *Pakootas* Jurisdiction for Transboundary Pollution

This Subpart explores the ways that future transboundary pollution plaintiffs can use the *Pakootas* jurisdictional holding to advance their cases. Ultimately, *Pakootas* presents an almost perfect set of facts for jurisdictional purposes—facts that are unlikely to be replicated in future cases. Therefore, it is likely *Pakootas*'s favorable jurisdictional ruling cannot be extended to the vast majority of transboundary pollution cases, which require an international agreement, not merely domestic litigation.

As a starting point, given the larger context of the case, the court's assertion of jurisdiction over Teck is not particularly surprising. As Professor Austen L. Parrish explains, U.S. courts have a history of asserting jurisdiction over Canadian companies,<sup>194</sup> most often over companies like Teck that are located close to the border and to the relevant U.S. court.<sup>195</sup> U.S. courts have also been willing to find jurisdiction based on environmentally harmful conduct originating outside the United States.<sup>196</sup> Further, Canadian law would likely support jurisdiction in this case, which makes the exercise of U.S. jurisdiction more reasonable.<sup>197</sup>

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194. See Parrish, *supra* note 83, at 390–91 (citing *Aristech Chem. Int'l v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628–629 (6th Cir. 1983); *Mitchie v. Great Lakes Steel Division, Nat. Steel Corp.*, 495 F.2d 213 (6th Cir. 1974), *cert. denied*, 419 U.S. 997 (1974); *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1258–60 (9th Cir. 1989); *United States v. Islip*, 18 F. Supp. 2d 1047 (Ct. Int'l Trade 1998); *EFCO Corp. v. Alumna Sys. USA*, 983 F. Supp. 816, 823 (S.D. Iowa 1997)).

195. See *id.* (citing *Aristech Chem.*, 138 F.3d at 628–29; *Glinka v. Abraham & Rose Co.*, 199 B.R. 484, 497 (D. Vt. 1996); *Ensign-Bickford Co. v. ICI Explosives USA Inc.*, 817 F. Supp. 1018, 1031 (D. Conn. 1993)).

196. See *id.* at 391–92 (citing *The Salton Sea Cases*, 172 F. 792, 794, 814–16 (9th Cir. 1909); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493 (1971)). In *Wyandotte Chems. Corp.*, the Supreme Court held that even though it had original jurisdiction over the case, it declined to exercise that jurisdiction, having “found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage.” *Wyandotte*, 401 U.S. at 504.

197. See Parrish, *supra* note 83, at 392 (citing *Moran v. Pyle Nat'l (Can.) Ltd.*, [1974] D.L.R. 239, 250–51; *Jenner v. Sun Oil Co.*, [1952] O.R. 240 (Can. Ont.)). The 2005 case *British Columbia v. Imperial Tobacco* further supports this assumption: in that case, the Canadian Supreme Court applied British Columbia law to American defendants whose only presence in Canada came in the form of tobacco sales. Parrish & Hsu, *supra* note 58, at 23.



The *Pakootas* jurisdictional holding is thus unlikely to be a major influence in future cases. Its limited downstream (as it were) implications take three primary forms. First, it illuminates the application of *Calder* in a post-*Walden* world. Second, it bucks recent jurisdictional trends by establishing personal jurisdiction over a foreign defendant, providing hope to plaintiffs seeking to sue non-U.S. defendants. Third, as this Subpart will explore, it furnishes precedent for plaintiffs seeking to establish that dumping waste—or even other forms of pollution—are sufficient to establish personal jurisdiction. Although it is a long shot, this third use may even help climate change plaintiffs, to whom personal jurisdiction can pose a formidable obstacle.

Indeed, at least one climate change plaintiff is already seeking to use *Pakootas* to establish personal jurisdiction. In July 2018, two months before the Ninth Circuit’s 2018 *Pakootas* decision, the Northern District of California dismissed the cities of Oakland and San Francisco’s climate change suits for (among other reasons) lack of personal jurisdiction.<sup>198</sup> The suits are public nuisance actions against BP, Chevron, ExxonMobil, and other oil companies.<sup>199</sup> In assessing personal jurisdiction, the court applied the Ninth Circuit’s three-part test.<sup>200</sup> But unlike *Pakootas*, the court never needed to invoke *Calder* because the defendants failed to dispute the “purposeful direction” prong.<sup>201</sup> Instead, the court’s analysis focused on the second prong, under which the claim must “arise out of or relate to” the defendant’s activities in the forum. Because “global warming would have continued in the absence of all California-related activities of defendants,”<sup>202</sup> the court dismissed the plaintiffs’ claims.<sup>203</sup>

The cities, which have appealed the dismissal to the Ninth Circuit,<sup>204</sup> make use of *Pakootas* in their opening brief. They begin their personal jurisdiction argument by claiming that the court’s test is too strict: “Only when *none* of the injuries alleged by plaintiffs could possibly have resulted from the defendants’ purposeful contacts should personal jurisdiction be denied under the second prong.”<sup>205</sup> They then argue that the district court erred by limiting its inquiry under the second prong to the defendants’ California activities.<sup>206</sup> “A claim arises from or relates to a defendant’s forum-directed activities if that conduct ‘connects [defendants] to the forum in a meaningful way.’ . . . There is no

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198. *City of Oakland v. BP P.L.C.*, No. C-17-06011 WHA, No. C 17-06012 WHA, 2018 WL 3609055, at \*1 (N.D. Cal. July 27, 2018), *appeal filed*, No. 18-16663 (9th Cir. Sept. 4, 2018).

199. Plaintiff-Appellants’ Consolidated Opening Brief, *City of Oakland v. BP P.L.C.*, No. 18-6663 (9th Cir. Mar. 13, 2019), 2019 WL 1300397, at \*1.

200. *City of Oakland*, 2018 WL 3609055, at \*5.

201. *Id.*

202. *Id.*

203. *Id.* at \*8.

204. Anne C. Mulkern, *Calif. Cities Seek to Revive Suits Against Big Oil*, CLIMATEWIRE (Mar. 14, 2019), <https://www.eenews.net/climatewire/stories/1060127275/search?keyword=climate+change+personal+jurisdiction>.

205. Plaintiff-Appellants’ Consolidated Opening Brief, *supra* note 199, at \*53.

206. *Id.* at \*54.

requirement that the conduct physically occur in the forum.”<sup>207</sup> As an example, the appellants point to *Pakootas*:

In *Pakootas v. Teck Cominco Metals* . . . for example, this Court affirmed the exercise of personal jurisdiction . . . . Rejecting the smelter’s argument that its waste-disposal activities were ‘expressly aimed’ only at Canada and not at Washington, the Court concluded that the smelter should have been anticipated being sued in Washington because it ‘knew the Columbia River carried waste away from the smelter, and that much of this waste travelled downstream into Washington, yet [it] continued to discharge hundreds of tons of waste into the river every day.’ . . . The smelter’s immediate aim may have been the Columbia River, but the inevitable down-river impacts on Washington were neither ‘random,’ ‘fortuitous,’ nor ‘attenuated.’ . . .

So too here. Defendants’ conduct may have occurred in many places (as well as California), but Defendants *knew* their intentional acts, domestic and foreign, would inevitably harm California coastal communities including Oakland and San Francisco. That is what the People’s Complaints allege . . . and that is all the People need to satisfy the second prong.<sup>208</sup>

It remains to be seen whether this argument will persuade the Ninth Circuit. Either way, *Pakootas* represents only a small part of the cities’ appeal.

Similarly, *Pakootas* has potential to help plaintiffs in other transboundary pollution cases establish personal jurisdiction when a defendant dumps, emits, or contaminates across a border. First, environmental plaintiffs should cite *Pakootas* to argue that polluting activities represent “purposeful direction” under *Calder*. In particular, *Pakootas* establishes that practices like dumping, which are not necessarily understood as deliberate or purposeful, nonetheless represent the defendant “expressly aiming” waste toward the forum state.<sup>209</sup> Second, now that *Walden* is settled Supreme Court precedent, plaintiffs should use *Pakootas* to show that transboundary pollution “connects [the defendant] to the forum in a meaningful way” under *Walden*.<sup>210</sup> Third, creative plaintiffs, like the cities of Oakland and San Francisco, can apply *Pakootas* to other parts of the personal-jurisdiction analysis, like the “arise out of or relate to” prong. Fourth, to show that jurisdiction is necessary to serve the interests of “fair play and substantial justice,” environmental plaintiffs should cite the Ninth Circuit’s finding that “there would be no fair play and substantial justice if Teck could avoid suit in the place where it deliberately sent its toxic waste.”<sup>211</sup> Finally, in a jurisprudential landscape increasingly unwilling to establish personal jurisdiction over foreign defendants, *Pakootas* represents precedent that national borders need not prove a barrier to redressing environmental harms.

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207. *Id.*

208. *Id.* at \*54–55 (emphasis in original).

209. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 577–78 (9th Cir. 2018).

210. *Walden v. Fiore*, 571 U.S. 277, 290 (2014).

211. *Pakootas*, 905 F.3d at 578.

Yet even with *Pakootas*'s help, establishing personal jurisdiction in such cases is far from guaranteed. *Pakootas* presents a jurisdictional fact pattern that is too ideal to be helpful in more ambiguous cases of transboundary pollution. To review, the Ninth Circuit jurisdictional test requires (1) purposeful availment or purposeful direction. In tort cases, this prong may be analyzed using the *Calder* test, which requires (a) an intentional act, (b) expressly aimed at the forum, (c) causing harm that the defendant knows is likely to be felt in the forum state. Once this prong is satisfied, the test requires (2) a claim arising out of or relating to the defendant's activities in the forum, and (3) comportment with fair play and substantial justice.

Regarding the first prong, while Teck's dumping in *Pakootas* clearly constituted an "intentional act," much pollution is closer to what the *Calder* court dismissed as "mere untargeted negligence."<sup>212</sup> Such pollution cannot be analyzed under *Calder* at all, as *Calder* applies only to intentional torts.<sup>213</sup> Establishing purposeful direction is likely to be extremely difficult for transboundary pollution plaintiffs who lack the benefit of *Calder*: Negligence is, by definition, not purposeful. And as *J. McIntyre* shows, without a specific showing of purposeful direction or availment, courts will decline to find personal jurisdiction even when there is no other apparent forum where the injured plaintiff could sue.<sup>214</sup>

The *Pakootas* plaintiffs were also in an unusually good position to satisfy the second and third *Calder* prongs. Teck knew that its dumping caused harms directly—and only—to Washington state.<sup>215</sup> In many cases, however, there may not be such clear evidence that the polluter knows it is polluting the forum state. There may be no way to prove that an individual factory in the midwestern United States, for example, knows that the fumes it emits are carried all the way to Canada. If the pollution is dispersed more widely and ambiguously than in *Pakootas*, the polluter genuinely may not know where it ends up. Such knowledge is necessary to satisfy the third *Calder* prong (the polluter knew that the harm was likely to be felt in the forum state), and may also aid plaintiffs in proving the second prong (the polluter expressly aimed the pollution at the forum).

*Pakootas* also made short work of the second prong of the jurisdictional test, which requires the claim to "arise out of or relate to" the defendant's activities in the forum. It was clear from the facts of the case that the harms arose exclusively from Teck's contacts with Washington state. As the Oakland and San

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212. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

213. See *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007); see also § 24:4. Colorado Long-arm statute—Commission of tortious act, 1B Colo. Prac., Methods of Practice § 24:4 (7th ed.).

214. HAZARD, JR., ET AL., *supra* note 153, at 113.

215. "[B]y the early 1990s, Teck's management acknowledged that the company was 'in effect dumping waste into another country,' using the Upper Columbia River as a 'free' and 'convenient disposal facility.'" *Pakootas*, 905 F.3d at 578.

San Francisco cases show, however, “arising out of or relating to” may be a much bigger obstacle in climate change cases, where the culpable action—emission of greenhouse gases—takes place worldwide. Assuming that the Northern District of California applied the correct test in those cases, it is of course true that global climate change does not arise out of oil companies’ actions in California alone. But by this test, there *is* no forum in which climate change suits could find a home. (That outcome likely would not bother Judge Alsup, who presided over the Oakland and San Francisco cases and who found, in addition to the jurisdictional ruling, that climate change is a political question not suited for the courts.)<sup>216</sup>

While “arising out of or relating to” is likely easier to satisfy in transboundary pollution cases that do not concern climate change, it could potentially pose an obstacle when the forum state suffers from environmental harm unrelated to its contact with the polluter. The California city of Calexico, for example, is affected by transboundary pollution from the Mexican city of Mexicali,<sup>217</sup> but much of its pollution also comes from dust,<sup>218</sup> field burning, and the Salton Sea.<sup>219</sup> In such a case, a defendant factory located in Mexico could argue that pollution in Calexico does not meaningfully arise out of the factory’s connections with the forum.

Finally, *Pakootas* was also an easy case for fair play and substantial justice. Not only did Teck deliberately send its toxic waste to Washington state, it had been doing so for “nearly a century.”<sup>220</sup> In a case where the defendant is a less notorious polluter than Teck, where the polluting activity is less obvious than dumping waste directly into a river that carries the waste directly downstream, and where the defendant has had fewer than a hundred years to realize the consequences of its actions, a court might be less inclined to find that personal jurisdiction is required by fair play and substantial justice.

Thus, while *Pakootas* is good news for the Colville Tribes, it likely means relatively little to plaintiffs in other transboundary pollution cases. The very fact that Teck contested personal jurisdiction all the way to the Supreme Court in a case as clear-cut as *Pakootas* suggests the difficulty of obtaining personal jurisdiction in more ambiguous cases. Climate change, in some ways the ultimate form of transboundary pollution, is perhaps the clearest example of *Calder*’s limitations.

One response to this burden on transboundary pollution plaintiffs could be the development of a new personal jurisdiction regime to govern instances of transboundary pollution. But a more comprehensive response, which takes

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216. Mulkern, *supra* note 204.

217. James, *supra* note 40.

218. *Id.*

219. Mindy Cooper, *Imperial County Residents Help Tackle Air Monitoring*, ENVTL. MONITOR (Nov. 20, 2017), <https://www.fondriest.com/news/imperial-county-residents-help-tackle-air-monitoring.htm>.

220. *Pakootas*, 905 F.3d at 572.

seriously Judge Alsup’s suggestion that climate change is best handled out of court, is to eliminate the need for personal jurisdiction through a multilateral agreement with our border neighbors. This Note argues that the best solution to transboundary pollution is not domestic litigation based on the *Pakootas* model but rather a diplomatic agreement with Canada and Mexico. It further identifies NAFTA and its possible replacement, the USMCA, as an opportunity—perhaps missed—to effectively craft such an agreement.

### III. NAFTA AS A VEHICLE FOR RESPONDING TO TRANSBOUNDARY POLLUTION

#### A. *Obstacles to Using Domestic Litigation to Resolve Transboundary Pollution*

##### 1. *Conceptual Obstacles to Using Domestic Litigation to Resolve Transboundary Pollution*

In “Trail Smelter Déjà Vu,” Parrish uses *Pakootas* to describe the disadvantages of using domestic litigation to resolve transboundary pollution. He notes that the *Pakootas* plaintiffs were likely to obtain favorable personal jurisdiction and extraterritoriality rulings—which they have since obtained—and to successfully enforce their judgment in a Canadian court.<sup>221</sup> Nonetheless, Parrish writes, attempting to address transboundary pollution issues in domestic courts poses larger problems. While these problems may not actually block plaintiffs from filing suit against transboundary polluters, they present reasons that domestic litigation may prove undesirable in the long run.

Parrish describes “conceptual” risks of attempting to resolve transboundary pollution in domestic courts. First, such an approach threatens to undermine other countries’ sovereignty.<sup>222</sup> Applying CERCLA to Teck “would set a precedent that Canadian companies, without Canadian consent, are required to follow U.S. environmental policy,” thus undermining Canada’s own environmental policy.<sup>223</sup> Second, U.S. courts may be biased—or may be perceived as biased—against foreign litigants.<sup>224</sup> The possibility of bias is especially pronounced in the environmental context, where the plaintiff is often either the U.S. government or a citizen group acting on the government’s behalf.<sup>225</sup> Third, bringing the suit may be fundamentally unfair to a defendant who did not know they would be subjected to U.S. laws.<sup>226</sup> Fourth, potential reciprocity means that if the United States pursues remedies against other countries’ polluters, plaintiffs from those

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221. Parrish, *supra* note 83, at 387–99.

222. *Id.* at 403–06.

223. *Id.* at 406.

224. *Id.* at 407–09.

225. *Cf. id.* at 409 (noting “[t]his bias is particularly acute in a CERCLA citizen’s suit when the suit is brought to recover monies for the United States government.”).

226. *Id.* at 408.

countries may pursue remedies against polluters in the United States.<sup>227</sup> This is a problem because it disincentivizes the U.S. government from pursuing legal remedies to transboundary pollution affecting U.S. citizens. Fifth, applying domestic litigation to foreign defendants may upset the United States' separation of powers.<sup>228</sup> Transboundary pollution is not only an environmental problem, but also a problem of foreign relations, which is traditionally handled by the executive branch and not the courts.<sup>229</sup>

Beyond Parrish's article, there are at least two reasons that domestic litigation is a less effective forum than an international agreement for resolving transboundary pollution. First, litigation is a fundamentally retroactive tool: Its goal is to resolve pollution that already exists, not prevent pollution before it occurs. Under ordinary circumstances, litigation may also operate proactively as a deterrent, but this is less likely in the transboundary context. While U.S. corporations plan their activities to avoid violating U.S. environmental laws, foreign corporations are less likely to conduct themselves with an eye to these laws. Foreign defendants who do not know that they will be held to answer for violations of U.S. laws—or who think that they would have a strong jurisdictional defense if a case were brought against them—are unlikely to amend their behavior in order to comply with these laws, limiting the laws' effectiveness.

Second, even if the United States began haling foreign polluters into court, this strategy would only address transboundary pollution *entering the United States*; it would not prevent the United States from polluting into Canada or Mexico. While Mexico and Canada might reciprocally bring litigation against U.S. transboundary polluters, procedural barriers could unevenly affect such litigation. A multilateral agreement, on the other hand, could address transboundary pollution in all directions simultaneously.

## 2. *Practical Obstacles to Using Domestic Litigation to Resolve Transboundary Pollution*

The *Pakootas* plaintiffs have obtained favorable personal jurisdiction and extraterritoriality rulings, and are likely to have their judgment approved by a Canadian court. But these obstacles are likely to prove much more challenging to other plaintiffs without the benefit of *Pakootas*'s fact pattern.

### a. Personal Jurisdiction

First, as discussed in Subpart II.B, personal jurisdiction will likely be more difficult for plaintiffs to obtain in transboundary pollution cases where the polluting activity is not obviously intentional; where the pollution is not clearly

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227. *Id.* at 409–10.

228. *Id.* at 425.

229. *Id.*

aimed at the forum state; where the defendant does not know the harm is likely to be felt in the forum state; or, as in the climate change cases, where the harm does not obviously and exclusively “arise out of” the defendant’s activities in the forum state.

Further, personal jurisdiction is not only difficult to establish in transboundary pollution cases, but it also may produce a fundamentally erratic regime. Determining personal jurisdiction on a case-by-case basis is far from consistent or predictable. This is true not only because personal jurisdiction necessarily must be determined with reference to a case’s specific facts, but also because—as noted by Jordan Diamond, the Executive Director at Berkeley Law’s Center for Law, Energy, and the Environment—personal jurisdiction depends on individual states’ long-arm statutes.<sup>230</sup> Therefore, “a Canadian company disposing of hazardous substances may face varying consequences depending upon whether its waste migrates into a northeastern or northwestern state in the United States.”<sup>231</sup> This makes litigation even more unpredictable than it already is, and creates the odd effect that the United States’ foreign policy depends on the state in which a particular conflict happens to arise.<sup>232</sup> This is problematic for plaintiffs, some of whom will be exposed to higher levels of pollution purely because of the state in which they live, and all of whom will face difficulties in knowing whether the time and expense of litigation are justified in a given case.

b. Extraterritoriality

Second, the presumption against extraterritoriality, which was one of the major issues in *Pakootas*,<sup>233</sup> will also pose an obstacle to plaintiffs in other cases. The *Pakootas* district court found that the case involved an extraterritorial application of CERCLA, writing that to find otherwise “would require reliance on a legal fiction that the ‘releases’ of hazardous substances into the Upper Columbia River Site and Lake Roosevelt are wholly separable from the discharge of those substances into the Columbia River at the Trail smelter.”<sup>234</sup> Nonetheless, the court found that because Congress had intended for CERCLA to be used to remedy “domestic conditions” in the United States, it was appropriate to apply CERCLA extraterritorially so long as it was being used to address U.S. environmental harms.<sup>235</sup>

The Ninth Circuit, on the other hand, fully relied on the district court’s “legal fiction.” Because CERCLA is concerned only with imposing liability for

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230. Jordan Diamond, *How CERCLA’s Ambiguities Muddled the Question of Extraterritoriality in Pakootas v. Teck Cominco Metals, Ltd.*, 34 *ECOLOGY L.Q.* 1013, 1040 (2007).

231. *Id.*

232. *Id.*

233. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073–79 (9th Cir. 2006).

234. *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at \*5 (E.D. Wash. Nov. 8, 2004).

235. *Id.* at \*9.

cleanup and actually does not regulate polluting activities themselves, and because the cleanup site in *Pakootas* was entirely located within the United States, the court held that “applying CERCLA here to the release of hazardous substances at the Site is a domestic, rather than an extraterritorial application of CERCLA, even though the original site of the hazardous substances is located in a foreign country.”<sup>236</sup>

Thus, the extraterritoriality issue in *Pakootas* was resolved favorably to the plaintiffs, but only as a result of *Pakootas*’s unusually favorable facts. The cleanup site was located entirely within the United States,<sup>237</sup> and CERCLA is solely focused on cleanup and does not extend to how waste is handled by producers.<sup>238</sup> If the site had been located partially in Canada, the plaintiffs would arguably be seeking to apply CERCLA to Canadian territory—extraterritorially.

The narrowness of the Ninth Circuit’s holding means that it may not apply to claims brought under environmental statutes other than CERCLA. For instance, U.S. plaintiffs would have little luck suing a Canadian defendant under the Resource Conservation and Recovery Act, (RCRA), which regulates “the generation, transportation, treatment, storage and disposal of hazardous waste.”<sup>239</sup> In *Pakootas*, the Ninth Circuit compared CERCLA and RCRA, concluding that because CERCLA, unlike RCRA, did not directly regulate Teck’s Canadian activities, *Pakootas* was not an extraterritorial application of law.<sup>240</sup> In the hazardous waste context, plaintiffs are unlikely to suffer from the unavailability of RCRA, since CERCLA appears to be available—at least in the Ninth Circuit—to remedy any resulting hazardous waste damage. But extraterritoriality cannot always be evaded by applying “cleanup” statutes; for instance, there is no CERCLA equivalent for air pollution.<sup>241</sup> Even though it was resolved in *Pakootas*, the presumption against extraterritoriality could prove to be a major problem in future transboundary pollution litigation.

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236. *Pakootas*, 452 F.3d at 1079.

237. *Id.* at 1074.

238. *Id.* at 1079.

239. *Resource Conservation and Recovery Act (RCRA) Overview*, EPA, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview#how%20does%20rcra%20work> (last visited May 19, 2020).

240. *Pakootas*, 452 F.3d at 1078–79.

241. Section 115 of the U.S. Clean Air Act provides that EPA must notify the governor of a state where emissions originate when those emissions “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country.” 42 U.S.C. § 7415 (2018). That state must then alter its air pollution plan under the Clean Air Act “to prevent or eliminate the endangerment.” *Id.* Thus, the Clean Air Act may seem to already incorporate transboundary concerns, making a CERCLA equivalent for air pollution unnecessary. However, as described in Part II above, Ontario was unable to trigger section 115 to force the U.S. to address its role in Canadian acid rain, suggesting that section 115 is less effective than it appears. Indeed, Thomas Merrill writes that no state has ever obtained relief from transboundary pollution under the Clean Air Act. *See Merrill, supra* note 52, at 933.



## c. Enforcement

Third, plaintiffs in transboundary pollution cases could also encounter difficulty in having their judgments enforced. The United States is not a party to any international treaty for the recognition of foreign court judgments,<sup>242</sup> making enforcement inherently unpredictable. The lack of a treaty also means that enforcement of U.S. judgments in foreign countries is complex even where it is possible: An individual “possessing a U.S. judgment must bring an entirely new action [in the foreign court] in order to obtain recognition and enforcement.”<sup>243</sup>

U.S. plaintiffs, like those in *Pakootas*, are unlikely to encounter problems in having their judgments obtained in Canadian courts. “A significant number of U.S. judgments have now been enforced in Canada” since the 1990s.<sup>244</sup> However, enforcement of U.S. decisions may be more difficult to obtain in Mexico, where local courts will not enforce a U.S. judgment if the U.S. court in question would not have had jurisdiction under Mexican jurisdictional laws.<sup>245</sup> The judgment also must not be contrary to Mexican public policy, must not result from an *in rem* action, and must not be the same as an action pending in the Mexican courts—even if the U.S. litigation was filed first.<sup>246</sup> “This, of course, leaves open the possibility that a litigant faced with a loss in the United States . . . can file a case in Mexico, perhaps years after the U.S. case was filed, and thereby block enforcement as a matter of law.”<sup>247</sup> Mexico’s process for enforcing foreign judgments is so “rigorous”<sup>248</sup> that one frustrated practitioner has described U.S. judgments as practically “worthless” in Mexico.<sup>249</sup>

Finally, while the United States often enforces foreign countries’ judgments, enforcement is not guaranteed. The United States has a generally “pro-recognition” attitude toward foreign judgments; “it has been said that in the United States, foreign judgments are enforced more regularly than in perhaps any other country.”<sup>250</sup> But exceptions do exist. In three cases from 2009, 2008, and 2006, U.S. courts refused to recognize orders from Mexican courts that they found had been based on fraud.<sup>251</sup> Thus, Mexican and Canadian plaintiffs, like U.S. plaintiffs, cannot be certain any judgments they obtain will be honored.

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242. Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT’L L. 150, 150–51 (2013).

243. *Id.* at 163.

244. Parrish, *supra* note 83, at 399–401.

245. Zeynalova, *supra* note 242, at 165–66.

246. Matthew H. Adler, *Enforcement in a New Age: Judgments in the United States and Mexico*, 5 U.S.-MEX. L.J. 149, 152 (1997).

247. *Id.*

248. Romelio Hernandez, *Avoiding Pitfalls: Enforcement of U.S. Judgments in Mexico*, HMH LEGAL 1, <http://www.hmhlegal.com/Pdfs/EnforcementofUSJudgmentsinMexico.pdf> (last visited May 19, 2020).

249. Zeynalova, *supra* note 242, at 174.

250. *Id.* at 155.

251. Timothy G. Nelson, *U.S. Courts Decline Recognition to Three Judgments from Mexico*, 28 GPSOLO 36, 36 (2011).

As a means of remedying transboundary pollution, domestic litigation is not only questionable in the light of the United States' other political and philosophical commitments, but also beset by serious pragmatic challenges. As *Pakootas* shows, these challenges are not always insurmountable. Yet they are deeply rooted in fundamental features of the United States' legal system like jurisdiction, the presumption against extraterritoriality, and the process of enforcement, and together they represent a serious barrier to fair, uniform, and effective resolution of transboundary pollution.

### B. *The Missed Opportunity of NAFTA*

If domestic litigation is the wrong tool to solve transboundary pollution, what is the right tool? This Subpart argues that NAFTA represents a missed opportunity to address transboundary pollution with a thorough, enforceable multilateral agreement. It develops this argument with reference to one of the only articles to directly address NAFTA in the context of transboundary pollution: "The CEC and Transboundary Pollution," in which Professor John H. Knox argues that the CEC is ill-positioned to address transboundary pollution.<sup>252</sup> This Subpart reviews Knox's article, concludes that NAFTA—if not necessarily the CEC—is the appropriate forum to address transboundary pollution, and reviews NAFTA's advantages in this role.

#### 1. *Knox's Argument Against Addressing Transboundary Pollution With the CEC*

Knox begins his argument by describing the CEC's failure to implement two mandates directly related to transboundary pollution control: first, developing recommendations for a transboundary environmental impact assessment, and second, encouraging establishment of reciprocal access to domestic courts.

Concerning the first obligation, Article 10(7) of the NAAEC requires the CEC to "consider and develop recommendations" regarding a transboundary environmental impact assessment (EIA) procedure.<sup>253</sup> Knox writes that although the NAFTA parties began working toward a trilateral transboundary EIA in 1995, the negotiations reached an impasse when the parties were unable to agree about the scope of the agreement.<sup>254</sup>

Concerning the second obligation, the NAAEC requires the CEC to encourage equal access to domestic environmental remedies.<sup>255</sup> Equal access "would allow a resident of a country who is or may be harmed by transboundary

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252. John H. Knox, *The CEC and Transboundary Pollution*, in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 80 (David L. Markell & John H. Knox, eds., 2003).

253. *Id.* at 84.

254. *Id.* at 85–86.

255. *Id.* at 86.

pollution to seek relief through legal proceedings in the country in which the pollution originates.”<sup>256</sup> By guaranteeing the right of entry to member countries’ courts, equal access would resolve many of the practical obstacles to domestic litigation. Despite the NAAEC’s mandate, however, Knox writes that the CEC has taken no action towards implementing these provisions except a 1999 secretariat report describing each country’s serious obstacles to equal access.<sup>257</sup>

In analyzing why the CEC has failed to implement either mandate, Knox points to one “obvious problem”: “the CEC is a trilateral organization, and these issues are essentially bilateral.”<sup>258</sup> He argues that seeking a trilateral EIA has prevented the parties from attaining bilateral EIAs: “[i]f Canada and the United States were not enmeshed in the stalled trilateral negotiation, they could reach a bilateral agreement tomorrow,” but such an agreement is blocked by the CEC deadlock.<sup>259</sup> Similarly, the CEC’s “lack of interest in reciprocal access may be due in part to the fact that the obstacles to access are quite different along the two borders.”<sup>260</sup>

These observations suggest that arriving at a trilateral agreement about transboundary pollution would be incredibly difficult. Knox explains that it also is not necessary: “[M]ost cases of transboundary pollution do not directly concern all three North American countries.”<sup>261</sup> Even if similar problems exist at both borders, they do not necessarily need to be addressed by the same solution. Rather, the parties “should continue to use bilateral institutions such as the IJC, the La Paz mechanisms, the IBWC, and the NADB to address these issues and refrain from using the CEC to supervise them.”<sup>262</sup> Knox acknowledges gaps in the coverage of the bilateral institutions, but concludes that the solution is to “add the necessary functions at the bilateral level.”<sup>263</sup> Concerning the CEC, Knox writes that the institution’s proper role in addressing transboundary pollution is facilitating information exchange and addressing pollution that is truly trilateral.<sup>264</sup>

## 2. *The Failure of Bilateral Agreements to Address Transboundary Pollution*

Knox’s argument hinges on the failure of the CEC to effectively implement its mandates, but the bilateral agreements that he points to as a solution have arguably failed at the same tasks for much longer. Despite a history dating back

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256. *Id.*

257. *Id.* at 88.

258. *Id.* at 89.

259. *Id.*

260. *Id.*

261. *Id.* at 90.

262. *Id.* at 91.

263. *Id.*

264. *Id.* at 92.

to at least 1889,<sup>265</sup> the United States' bilateral border agreements continue to lack an effective mechanism to deal with transboundary pollution.

As the issues described in Part I suggest, existing bilateral agreements have failed to curb pollution at the Mexico-U.S. border. In 1993, J. Michael McCloskey, then Chairman of the Sierra Club, testified before the Senate Environment and Public Works Committee. He explained that existing institutions and bilateral agreements meant to address environmental issues at the U.S.-Mexico border “lack adequate provisions for public participation or transparency to be effective,” specifically criticizing the IBWC as “enormously frustrating” and the International Border Environmental Plan as “disappointing.”<sup>266</sup> The situation has not improved;<sup>267</sup> in 2018, for example, twenty-five years after McCloskey's testimony, the state of California filed suit against the IBWC for its failure to adequately address transboundary pollution from Tijuana.<sup>268</sup>

The United States' bilateral agreements with Canada have been more successful but have still failed to address major instances of transboundary pollution. The IJC, for example, has been described as “highly respected,” and is “often emulated as a model for the international community.”<sup>269</sup> James Davidson, a Canadian attorney, writes that the IJC has played an important role in establishing the United States' and Canada's transboundary and environmental responsibilities regarding the Great Lakes.<sup>270</sup> The IJC has been less successful in preventing Great Lakes transboundary pollution itself, however, an outcome Davidson attributes to the IJC's lack of enforcement powers and power of initiative.<sup>271</sup> Nor was the IJC able to resolve Canadian acid rain<sup>272</sup> or the environmental impacts of hardrock mining.<sup>273</sup> And, of course, no

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265. The International Boundary and Water Commission, *supra* note 62 (explaining that the IBWC was “[e]stablished in 1889”).

266. *The North American Free Trade Agreement and its Environmental Side Agreements Hearing Before the S. Comm. on Env't & Pub. Works*, 103 Cong. 88, 95–96 (Oct. 19, 1993) (statement of J. Michael McCloskey).

267. See, e.g., Sandra Dibble, *Tijuana Sewage Spills Have Been an Environmental Problem for Decades so What's the Solution?*, SAN DIEGO UNION-TRIBUNE (Mar. 25, 2018), <https://www.sandiegouniontribune.com/news/border-baja-california/sd-me-border-sewage-20180305-story.html> (describing the continuing effects of pollution, despite efforts to clean up the Tijuana area).

268. See *supra* Subpart I.A.1.b.

269. Parrish, *supra* note 83, at 417–18 (quoting Gregory S. Wetstone & Armin Rosencranz, *Transboundary Air Pollution: The Search for an International Response*, 8 HARV. ENVTL. L. REV. 89, 92 (1982); Colleen P. Gaffry, *Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT'L ENVTL. L. REV. 399, 424–25 (1998)).

270. James Davidson, *Resolution of Transboundary Pollution Disputes: The Great Lakes Experience*, 3 ASIA PAC. J. ENVTL. L. 233, 238 (1998).

271. *Id.*

272. Merrill, *supra* note 52, at 959–60.

273. See Chloe Williams, *From Canadian Coal Mines, Toxic Pollution That Knows No Borders*, YALE ENV'T 360 (Apr. 1, 2019), <https://e360.yale.edu/features/from-canadian-coal-mines-toxic-pollution-that-knows-no-borders>; see also *U.S. IJC Commissioners Call Out Canadian Commissioners for Repressing Data on B.C. Mine Pollution of Transboundary U.S. Rivers*, SALMON BEYOND BORDERS (July

bilateral agreement was invoked in *Pakootas*. The amicus curiae brief for Her Majesty the Queen in Right of the Province of British Columbia, supporting Teck's request for certiorari, complained about the Ninth Circuit's failure to invoke bilateral mechanisms: Neither the 2018 decision nor the 2006 decision "even mentions the Boundary Waters Treaty, the IJC, the Trail Smelter proceedings, or any of the mechanisms the United States and Canada have utilized over the last 100 years to resolve trans-boundary environmental disputes."<sup>274</sup> The brief argued that the Ninth Circuit should have refused to apply private litigation to a fundamentally diplomatic issue. But as the Sierra Club explained in its 2005 amicus brief to the Ninth Circuit, "[n]either government has taken any steps to seek either an advisory opinion or binding decision by the IJC in this matter."<sup>275</sup>

Knox acknowledges these gaps in existing bilateral agreements, and even acknowledges that "[d]espite a series of bilateral agreements and institutions . . . transboundary pollution continues. Indeed, every section of both borders seems to have its own notorious problem."<sup>276</sup> He argues that the solution is strengthening the bilateral agreements themselves.<sup>277</sup> But it is not clear why the political will that is absent in the CEC would be present in the bilateral agreements. Knox suggests that, were Canada and the United States not deadlocked in the CEC, they could come to an agreement on a transboundary EIA procedure "tomorrow."<sup>278</sup> But over twenty years have passed since the NAFTA parties produced a draft agreement on transboundary EIA.<sup>279</sup> Since then, the project was briefly taken up by the Security and Prosperity Partnership, a short-lived policy framework between the United States, Mexico, and Canada.<sup>280</sup> It is difficult to believe that the United States and Canada are still restrained from entering into a transboundary EIA agreement by the possibility that CEC discussions could revive.

Knox is correct that the CEC has also failed to effectively address transboundary pollution. But NAFTA—whether through the CEC or another

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11, 2018), <https://www.salmonbeyondborders.org/press-releases/us-ijc-commissioners-call-out-canadian-commissioners-for-repressing-data-on-bc-mine-pollution-of-transboundary-us-rivers>.

274. Brief for Her Majesty the Queen in Right of the Province of British Columbia, as Amicus Curiae Supporting Petitioner's Request for Certiorari at 10, *Teck Metals, Ltd. v. The Confederated Tribes of the Colville Reservation*, No. 18-1160, 2019 WL 1514060 (Apr. 5, 2019).

275. Brief for the Sierra Club and Sierra Club of Canada, as Amicus Curiae Supporting Appellees and Intervenor-Appellee for an Affirmation of the Order of the District Court at 11, *Pakootas and State of Wash. v. Teck Cominco Metals, Ltd.*, No. 05-35153, 2005 WL 3517742 (July 28, 2005).

276. Knox, *supra* note 252, at 80.

277. *Id.* at 91.

278. *Id.* at 89.

279. *Id.* at 85.

280. Geoffrey Garver & Aranka Podhora, *Transboundary Environmental Impact Assessment as Part of the North American Agreement on Environmental Cooperation*, 26 *IMPACT ASSESSMENT & PROJECT APPRAISAL* 253, 257 (2008). The Security and Prosperity Partnership has been inactive since 2009. Murray Dobbin, *The SPP is Dead. Let's Keep it That Way*, *RABBLE.CA* (Sept. 24, 2009), <http://rabble.ca/news/2009/09/spp-dead-lets-keep-it-way>.

mechanism—nonetheless represents a more promising opportunity to solve this problem than bilateral agreements.<sup>281</sup> First, NAFTA contains built-in advantages that make it a particularly appropriate forum for a transboundary pollution agreement. Second, because of NAFTA's broad impacts on member countries, it has a responsibility to address the environmental dimensions of those impacts. Third, addressing all transboundary pollution in a single agreement obviates the need for line-drawing between "bilateral" and "multilateral" problems.

### 3. *NAFTA's Advantages in Addressing Transboundary Pollution*

#### a. Practical Advantages to Addressing Transboundary Pollution in NAFTA

Turning to the first point, while Knox is correct that "international agreement becomes more difficult as more countries are added to the mix,"<sup>282</sup> NAFTA presents two related advantages to combat this difficulty. The first advantage is that the parties are already present and negotiating, limiting transaction costs. The cooperative framework already exists so fewer resources are required to bring everyone to the negotiating table. As the initial NAFTA environmental protestors recognized, an agreement on some topics is an excellent opportunity to seek agreement on other topics.

The second advantage takes the form of the NAFTA negotiations (or renegotiations) themselves. As Professor Thomas Merrill notes, one of the reasons that transboundary pollution is so poorly regulated is that the source state mostly or only benefits from the polluting activity, while the affected state mostly or only suffers.<sup>283</sup> This means that "the source state has no incentive to participate in a regime of centralized regulation unless it receives compensation of some sort from the affected state," but "[d]evising such a scheme is awkward and expensive."<sup>284</sup> Incorporating environmental negotiations into NAFTA negotiations mitigates this difficulty: The "compensation" from the affected state to the source state can take the form of the advantages the parties seek to gain in their trade negotiations.

Indeed, NAFTA negotiations could produce incentives at two distinct parts of the process. First, parties could negotiate for the transboundary pollution regime itself, conditioning their acceptance of other parts of NAFTA on the establishment of an agreement about transboundary environmental harms. As the above discussion of bilateral agreements shows, international legal agreements often lack enforceability. In the absence of a supranational law or governing body, countries' desire to enter into a trade agreement, and their preferences

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281. "NAFTA" here refers to NAFTA and any subsequent renegotiations, including the USMCA.

282. Knox, *supra* note 252, at 89.

283. Merrill, *supra* note 52, at 935.

284. *Id.*

regarding the details of that trade agreement represent one of the few opportunities to secure their consent to an enforceable regime.

Second, trade sanctions and loss of NAFTA benefits could provide a means of enforcing the transboundary pollution agreement. In fact, the existing agreement theoretically takes advantage of this opportunity: The NAAEC includes a “Party-to-Party dispute resolution process that can lead to monetary sanctions or to loss of NAFTA benefits.”<sup>285</sup> But, as McCloskey predicted in his testimony before the Senate Committee on Environment and Public Works, “the dispute process set up is so long and complicated, even egregious violations would be hard to penalize.”<sup>286</sup> Indeed, the process of imposing penalties against an offending party has never been used.<sup>287</sup> A better environmental agreement would learn from these mistakes and more effectively make use of NAFTA sanctions and benefits to incentivize environmental compliance, as discussed in Subpart III.D below.

Using NAFTA to address transboundary pollution requires political will. In negotiating for a transboundary pollution mechanism, the parties risk losing other parts of the agreement that they may strongly wish to see implemented; in providing that violations of the pollution agreement are punishable through trade sanctions or loss of NAFTA benefits, the parties risk their own economic interests. Ultimately, any transboundary pollution agreement requires political will, especially if it is to be meaningfully enforceable. Given the serious harms caused by transboundary pollution, as well as NAFTA’s environmental impacts and concomitant responsibility for environmental protection, it seems clear that each party should approach NAFTA negotiations with a serious commitment to addressing transboundary pollution. Further analysis of each country’s goals, strategies, and outcomes in the NAFTA negotiation process is beyond the scope of this Note.

b. The Truly Multilateral Nature of Pollution Requires a Multilateral Agreement

Just because transboundary pollution occurs on a single border between two countries does not mean, as Knox suggests, that its solution should be confined to an agreement between those countries alone. Knox himself acknowledges that “the line between transboundary harm that is primarily bilateral and harm that is primarily trilateral will often be difficult to draw.”<sup>288</sup> On a purely practical level, a trilateral solution would obviate the need for this line drawing. It would also ensure that no environmental issues fall through the cracks as they would if, for instance, NAFTA dismisses an issue as fundamentally bilateral, but existing

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285. Boucher, *supra* note 126; see also NAAEC, *supra* note 119, art. 22–36.

286. *The North American Free Trade Agreement and its Environmental Side Agreements Hearing Before the S. Comm. on Env’t & Pub. Works*, 103 Cong. 88 (Oct. 19, 1993).

287. Benevides, *supra* note 125.

288. Knox, *supra* note 252, at 92.

bilateral agreements fail to adequately address that issue. Of course, the agreement should be structured so that the easy resolution of two countries' bilateral issue is not blocked by the more difficult resolution of a trilateral issue. But a trilateral solution offers advantages as well as obstacles, including the opportunity to share strategies and information among the three countries.

More conceptually, a trilateral solution would acknowledge that "[e]nvironmental systems are not restrained by national boundaries."<sup>289</sup> Tijuana sewage spills may affect the United States and Mexico most directly, but the world's oceans are interconnected. "When a species become extinct, it is lost to the world, not just to the country or countries in which it once lived."<sup>290</sup> The ultimate form of global environmental harm, of course, is climate change. A transboundary pollution agreement between Canada, Mexico, and the United States would not necessarily address climate change; given that the USMCA fails to mention the topic,<sup>291</sup> the parties seem unwilling to confront it at this time. But a trilateral agreement would nonetheless be the first step toward such a confrontation. Any solution to global climate change must involve multilateral action. Such a solution has proved elusive so far, due in no small part to the United States' own recalcitrance.<sup>292</sup> But given the eventual necessity of such an agreement, multilateral agreements that responsibly address environmental issues represent key progress and are only to be encouraged.

### c. Moral Responsibility to Address Transboundary Pollution in NAFTA

Regardless of the other merits of addressing transboundary pollution in NAFTA, the agreement's enormous power to impact the environment imbues its drafters with the responsibility to limit NAFTA's detrimental environmental effects.

The actual effects of NAFTA on the environment are controversial.<sup>293</sup> Some sources suggest that environmentalists' fears have come true,<sup>294</sup> while others fail to find negative environmental consequences of NAFTA.<sup>295</sup> Accurate assessments of the environmental impact of NAFTA are presumably

289. SCHWABACH, *supra* note 3, at 2.

290. *Id.*

291. Jeffrey J. Schott, *Five Flaws in the USMCA and How to Fix Them*, PIERSON INST. FOR INT'L ECON. (Aug. 6, 2019), <https://www.piie.com/blogs/trade-and-investment-policy-watch/five-flaws-usmca-and-how-fix-them>.

292. See, e.g., Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html> (describing the Trump administration's decision to withdraw from the Paris agreement on climate change).

293. Stephen P. Mumme, *NAFTA and Environment: The North American Free Trade Agreement's Impact on the Trilateral Environment Remains Controversial*, FOREIGN POL'Y FOCUS (Oct. 1, 1999), [https://fpif.org/nafta\\_and\\_environment/](https://fpif.org/nafta_and_environment/).

294. *NAFTA at 25: Promises vs. Reality*, REPLACE NAFTA (Jan. 1, 2019), <http://infographic.replacenafta.org/nafta-at-25-promises-vs-reality/>.

295. Sara Fitzgerald, *The Effects of NAFTA on Exports, Jobs, and the Environment: Myth v. Reality*, HERITAGE FOUND. (Aug. 1, 2001), <https://www.heritage.org/trade/report/the-effects-nafta-exports-jobs-and-the-environment-myth-vs-reality>.



complicated by two facts: First, it is impossible to know how environmental conditions in the three countries would have developed in the *absence* of NAFTA; second, NAFTA was implemented at the same time as its concomitant environmental protections, making it difficult to trace effects to causes.<sup>296</sup>

Nonetheless, it seems inarguable that NAFTA has the *potential* to impact the environment. Linda J. Allen of the American Public University System identifies four possible negative impacts of trade agreements on the environment: legal effects, scale effects, sectoral effects, and product effects.<sup>297</sup> Legal effects include inequitable enforcement of environmental laws across countries, creating pollution havens; the possibility that countries will roll back their own environmental laws to attract industry, creating a “race to the bottom”; the possibility that trade regime rules will conflict with, and perhaps triumph over, domestic environmental regulations or multilateral environmental agreements; and lack of transparency or public participation in trade negotiations.<sup>298</sup> More straightforwardly, scale effects are caused by higher levels of pollution and faster depletion of natural resources as production and consumption levels increase due to the trade agreement.<sup>299</sup> Sectoral effects are caused by changes in patterns of production and consumption, while product effects are caused by the trade flows of particularly environmentally harmful products.<sup>300</sup> NAFTA has the potential to cause all of these effects.<sup>301</sup>

Given the scope of NAFTA’s influence on the member countries, it would be absurd to suppose that the agreement is somehow fundamentally environment neutral. Not all effects are obvious: NAFTA’s investor protections have been described as “instrumental” in encouraging the United States and transnational oil companies to invest in Mexican oil.<sup>302</sup> Indeed, when U.S. President Donald Trump first threatened to withdraw from NAFTA, there were concerns that major oil companies would no longer bid for stakes in Mexican oilfields.<sup>303</sup> Given the dramatic environmental consequences of oil drilling, the effects of NAFTA on the Mexican oil industry are necessarily linked to environmental outcomes, even

296. See David Floyd, *NAFTA’s Winners and Losers*, INVESTOPEDIA (Nov. 27, 2018), <https://www.investopedia.com/articles/economics/08/north-american-free-trade-agreement.asp> (stating “[a]n honest assessment of NAFTA is difficult because it is impossible to hold every other variable constant and look at the deal’s effects in a vacuum”).

297. Linda J. Allen, *The Environment and NAFTA Policy Debate Redux: Separating Rhetoric from Reality*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 965, 974 (2018).

298. *Id.* at 976–83.

299. *Id.* at 972.

300. *Id.*

301. Allen herself finds that “[w]hile it is very difficult to make broad generalizations about the impact of NAFTA on the environment . . . there has been no relative increase in pollution because of NAFTA’s provisions, nor has Mexico become a pollution haven.” *Id.* at 989.

302. Irina Slav, *Under Threat? U.S. Oil Interests in Jeopardy if Key NAFTA Provision is Removed*, USA TODAY (Mar. 26, 2018), <https://www.usatoday.com/story/money/energy/2018/03/26/under-threat-u-s-oil-interests-jeopardy-if-key-nafta-provision-removed/457860002/>.

303. David Alire Garcia, *Threats to NAFTA Cast Doubt Over Mexico’s Oil Tenders, Investment*, REUTERS (Nov. 2, 2017), <https://www.reuters.com/article/us-trade-nafta-oil/threats-to-nafta-cast-doubt-over-mexicos-oil-tenders-investment-idUSKBN1D214W>.

if it is impossible to know how the industry would have developed without NAFTA.

Not all of NAFTA's environmental effects are linked to transboundary pollution per se. But any change that affects a country's entire environmental landscape will also affect its borders. Not only that, but any change in the trade relationship between two countries will necessarily affect their border as well, as altered or increased trading patterns necessarily transform the transition zones across which goods are moved. Given NAFTA's unavoidable impacts on the border and the environment, it has a responsibility to meaningfully address the effects of transboundary pollution.

### C. *The USMCA and Transboundary Pollution*

The USMCA, which will replace NAFTA if implemented, represents the most recent opportunity for Canada, Mexico, and the United States to address their common and intersecting environmental issues. The agreement was first announced on September 30, 2018<sup>304</sup> and was signed by the three countries' leaders on November 30, 2018.<sup>305</sup> Both Mexico and the United States have ratified the agreement, and Canada is expected to do so shortly.<sup>306</sup>

This Subpart briefly explores the provisions of the agreement that may be relevant to transboundary pollution. Ultimately, while the true effect of the agreement cannot be known unless and until it is implemented, the language contained in the agreements does not seem to represent the necessary improvement over the NAAEC.

#### 1. *Organization of the USMCA*

In order to understand the differences between the USMCA and NAFTA, it is necessary to understand the differences in how the agreements are organized. Unlike NAFTA, the USMCA has incorporated an environmental agreement into a chapter of the agreement itself (Chapter 24).<sup>307</sup> At the same time, the parties have also negotiated a separate Environmental Cooperation Agreement (ECA), which will take effect if and when the USMCA does.<sup>308</sup> "The interplay" between

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304. LIVINGSTON INT'L, *supra* note 7.

305. Doug Palmer & Megan Cassella, *NAFTA 2.0 is Signed—but it's Far From Finished*, POLITICO (Nov. 30, 2018), <https://www.politico.com/story/2018/11/30/usmca-signed-g20-999748>.

306. William Mauldin & Alex Leary, *USMCA The Deal's Been Signed, but the Debate Continues*, WALL ST. J. (Jan. 29, 2020), <https://www.wsj.com/articles/usmca-the-good-the-bad-and-the-unknown-11580319768>.

307. United States-Mexico-Canada Agreement, ch. 24, Nov. 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [hereinafter "USMCA"].

308. EPA, 2018 AGREEMENT ON ENVIRONMENTAL COOPERATION AMONG THE GOVERNMENTS OF THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (2018), [https://www.epa.gov/sites/production/files/2018-11/documents/us-mxca\\_eca\\_-\\_final\\_english.2.pdf](https://www.epa.gov/sites/production/files/2018-11/documents/us-mxca_eca_-_final_english.2.pdf) [hereinafter "ECA"].

Chapter 24 and the ECA “formalizes how the three countries will cooperate on environmental protection and conservation.”<sup>309</sup>

The ECA preserves the CEC in its current form.<sup>310</sup> Unlike the NAAEC, however, the ECA also lists twenty-seven topics that the CEC may wish to explore, some of which are relevant to transboundary pollution:

The Work Program may include short-, medium- and long-term cooperative activities in areas such as . . . (g) strengthening cooperation on environmental impact assessments of proposed transboundary projects . . . (j) addressing transboundary environmental issues and promoting clean air, clean water, and clean soil . . . (l) the sound management of chemicals and waste, including transboundary movements of hazardous waste . . .<sup>311</sup>

While this is promising, it of course does not actually commit the CEC to any specific activities. Indeed, these items could be seen as elaborations on similar language in the NAAEC, which provided that “The Council may consider, and develop recommendations regarding . . . (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants.”<sup>312</sup>

In addition to the CEC, Chapter 24 establishes an Environment Committee to meet every two years.<sup>313</sup> The purpose of the Environment Committee is to “oversee the implementation of this Chapter,”<sup>314</sup> which includes commitments to protect the ozone layer,<sup>315</sup> to prevent ship pollution,<sup>316</sup> and to reduce marine litter.<sup>317</sup> None of Chapter 24’s provisions, however, directly address transboundary pollution.

## 2. *Enforcement of Environmental Laws under the USMCA*

While the USMCA includes a version of the NAAEC’s environmental enforcement mechanism, the changes in the USMCA’s version are likely not enough to revitalize the historically weak provision.

Articles 22 through 36 of the NAAEC provide an enforcement procedure for member countries that fail to enforce their environmental laws<sup>318</sup>—a

309. Aaron Cosbey, *Weighing up the Environmental Cooperation Agreement under the Canada-United States-Mexico Agreement*, INT’L INST. FOR SUSTAINABLE DEV. 1 (Feb. 2019), <https://www.iisd.org/sites/default/files/publications/environmental-cooperation-agreement-policy-brief.pdf>.

310. ECA, *supra* note 308, art. 2.

311. *Id.* art. 10(2)(g), (j), (l).

312. NAAEC, *supra* note 119, art. 10(2)(g). Substantially similar language also appears at Article 4(j) of the ECA. ECA, *supra* note 308, art. 4(j).

313. USMCA, *supra* note 307, art. 24.26.

314. *Id.*

315. *Id.* art. 24.9.

316. *Id.* art. 24.10.

317. *Id.* art. 24.12. The strictness of these provisions varies. Article 24.10 states that parties shall be in compliance with the provision if they “maintain the measure or measures . . . implementing its obligations under MARPOL Convention,” and describes what is necessary to establish a violation of the provision. On the other hand, Article 24.12 only commits the parties to “take measures to prevent and reduce marine litter.”

318. NAAEC, *supra* note 119, arts. 22–36.

provision that could conceivably resolve many instances of transboundary pollution but which has never been used.<sup>319</sup> Chapter 24 of the USMCA contains a similar procedure, with some alterations. Article 24.4 of the new agreement states that “No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.”<sup>320</sup> “In a manner affecting trade or investment between the parties” is defined to mean action that involves:

(i) a person or industry that produces a good or supplies a service traded between the Parties or has an investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.<sup>321</sup>

By requiring that the good or service be “traded between the Parties” or “compet[e] in the Territory of a Party with a good or service of another Party,” Article 24.4 seems to exclude certain intrastate activities. This makes it narrower than the parallel provision under the NAAEC, which provides that “[w]ith the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action.”<sup>322</sup> It is not clear, however, how many activities the new definition actually excludes. If a person produces and sells paper entirely within a single country, but paper is regularly traded among the member countries, is that person considered “a person or industry that produces a good or supplies a service traded between the Parties”? How directly must goods or services compete in order to count as “compet[ing] in the territory of a Party with a good or a service of another Party”? The answers to these questions are unclear, leaving open the possibility that Chapter 24’s enforcement mechanism is substantially narrower than the NAAEC’s. This possibility, in turn, may not matter; as Hugh Benevides, former member of the CEC Secretariat, pointed out, the historical problem with the provision is not its scope but its use. Even if the definition is interpreted broadly, “it is difficult to imagine any one of the Parties suddenly inspired to exercise dispute resolution provisions that have been disregarded to date.”<sup>323</sup>

Chapter 24 also tweaks the dispute resolution process for conflicts that arise under Chapter 24 (including conflicts about environmental enforcement). Under the NAAEC, the parties are required to consult with one another before initiating dispute resolution procedures.<sup>324</sup> Under Chapter 24, parties are required to consult first with each other, then with the Environment Committee representatives, then with the relevant ministers of the parties before dispute

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319. Benevides, *supra* note 125.

320. USMCA, *supra* note 307, art. 24.4.

321. *Id.*

322. NAAEC, *supra* note 119, art. 5.1.

323. Benevides, *supra* note 125.

324. NAAEC, *supra* note 119, arts. 22–23.

resolution is an option.<sup>325</sup> Chapter 24 also refers parties to the USMCA's general dispute resolution procedures, while the NAAEC contained its own dispute resolution provisions.<sup>326</sup> Again, it remains to be seen whether these changes will incentivize parties to use the neglected procedure. The required layers of consultation could encourage parties to raise concerns about other parties' environmental enforcement in the hope of resolving the issue through consultation rather than a resource-intensive arbitral procedure. Alternatively, the consultation requirement could discourage parties from raising concerns by making the route to sanctions even longer and more unwieldy.

### 3. *Other Transboundary Pollution Strategies under the USMCA*

Chapter 24 of the USMCA and the ECA also fail to implement other transboundary pollution strategies, like a transboundary EIA procedure or reciprocal access to remedies for environmental issues. Regarding EIA procedures, Article 24.7 provides that "[e]ach Party shall maintain appropriate procedures for assessing the environmental impacts of proposed projects that are subject to an action by that Party's central level of government that may cause significant effects on the environment with a view to avoiding, minimizing, or mitigating adverse effects." The NAAEC's most similar provision states that "[e]ach party shall, with respect to its territory . . . (e) assess, as appropriate, environmental impacts."<sup>327</sup> Article 24.7 is more promising than its predecessor: it does not limit the party's activity to "its territory," it does not limit assessment to what is "appropriate," and it requires the parties to maintain "a view to avoiding, minimizing, or mitigating adverse effects." However, it also does not require the parties to harmonize their environmental assessments or hold them to a certain standard. Given that the United States, Mexico, and Canada each already have an EIA regime under domestic law,<sup>328</sup> Article 24.7 likely does no more than require the countries to maintain those regimes. The ECA also mentions that the CEC's cooperative projects could include "strengthening cooperation on environmental impact assessments of proposed transboundary projects,"<sup>329</sup> but this is no stronger than the CEC's lapsed mandate under the NAAEC to "consider and develop recommendations" with regard to a transboundary EIA procedure.<sup>330</sup>

Regarding equal access to legal remedies, Article 24.6 provides that "[e]ach party shall ensure that persons with a recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, or judicial proceedings for the enforcement of the Party's environmental laws."

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325. USMCA, *supra* note 307, arts. 24.29, 24.31, 24.32.

326. *Id.* art. 24.32; NAAEC, *supra* note 119, arts. 22–36.

327. NAAEC, *supra* note 119, art. 2.

328. Knox, *supra* note 252, at 84.

329. ECA, *supra* note 310, art. 10(2)(g).

330. NAAEC, *supra* note 119, art. 10(7)(a).

This language, however, is almost identical to language in NAAEC Article 6(2), suggesting that it does not establish a new right to legal remedies for environmental harms. Rather, “recognized interest under its law” likely continues to limit access to the courts to those who meet jurisdictional and other requirements.

#### 4. *USMCA as a Missed Opportunity*

Chapter 24 and the ECA contain some new language about transboundary pollution, but no meaningful new requirements. The true test of the provisions, of course, will be their operation in practice. A sufficiently funded and motivated CEC could pursue the ambitious goals set out for it in the ECA even without a strict mandate to do so. Unlike the NAAEC, the ECA provides that the CEC’s annual budget “may be supplemented through funding or in-kind contributions from the Parties, and the Commission may receive funding or in-kind contributions from external sources in excess of the annual budget.”<sup>331</sup> If it receives such donations, the CEC—recently described as “seriously underfunded and understaffed”<sup>332</sup>—may have the resources it needs to pursue transboundary pollution reform. Otherwise, the USMCA represents another missed opportunity to address this ongoing problem.

#### *D. Necessary Elements of a Tripartite Solution to Transboundary Pollution*

Having argued that the United States, Canada, and Mexico should use NAFTA to respond to transboundary pollution, this Note now looks briefly at the possible content of such a response. This Subpart begins by examining substantive standards the parties could incorporate into NAFTA, then turns to procedural mechanisms to address transboundary pollution. Finally, it ends with a discussion of the parties’ economic and institutional capacity to enforce environmental regulations.

#### 1. *Substantive Pollution Standards*

Like NAFTA,<sup>333</sup> the USMCA contains an anti-rollback provision preventing the countries from dismantling their environmental regulations.<sup>334</sup> Also like the version in NAFTA, however, the version in the USMCA is unenforceable.<sup>335</sup> While adding teeth to the anti-rollback provision would be one way to strengthen the USMCA, a more complete solution to transboundary

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331. ECA, *supra* note 310, art. 12.

332. NEIL CARTER, *THE POLITICS OF THE ENVIRONMENT: IDEAS, ACTIVISM, POLICY* 290 (3d ed., 2018).

333. Boucher, *supra* note 126.

334. Vaughan, *supra* note 15.

335. *Id.*

pollution would involve new substantive antipollution measures. One solution might be for the NAFTA parties to explicitly adopt the strict liability regime articulated in the *Trail Smelter* Arbitration, under which no country may pollute in a way that causes substantial harm to another country.<sup>336</sup> Merrill argues, however, that this formulation has been unsuccessful,<sup>337</sup> pointing to structural features of strict liability that tend to produce bargaining breakdown.<sup>338</sup>

Another approach to substantive environmental standards would require the parties to implement specific limits on pollutants. Merrill writes that successful treaties dealing with transboundary pollution “do not . . . adopt any kind of centralized, universal adjudicatory mechanism based on strict liability . . . . Rather, they incorporate specific limitations on discharges of pollutants.”<sup>339</sup> While a strict liability approach would generate disputes about the amount of harm necessary to trigger penalties, a pollutant limit would not require evidence of harm at all. It would also operate more proactively than a strict liability regime, targeting pollutants at their source rather than at the point of harm. Finally, it would incorporate the lesson presented by the United States’ federal environmental statutes. Both the Clean Air Act and the Clean Water Act “embody the same understanding reflected in customary international law: source states should be held strictly liable for interstate pollution that causes significant harm in an affected state.”<sup>340</sup> However, no state has ever obtained relief for transboundary pollution under the Clean Air Act,<sup>341</sup> and very few have done so under the Clean Water Act.<sup>342</sup> This track record suggests that an international agreement should focus on the more successful element of U.S. environmental statutes: emission and discharge limits.

## 2. *Procedural Mechanisms to Address Transboundary Pollution*

### a. Equal Access to Domestic Remedies

With or without substantive standards, countries could resolve disputes like *Pakootas* by requiring that the NAFTA member countries provide equal access to their domestic legal and administrative remedies. Under such a regime, a resident of a NAFTA country who was harmed by transboundary pollution from another NAFTA country would be able to seek redress in the country where the

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336. See Merrill, *supra* note 52, at 952.

337. *Id.* at 958.

338. *Id.* at 995–96. Merrill explains that, first, there is a gap between official strict liability norms and strict liability in practice, making litigation of transboundary pollution issues unpredictable. *Id.* at 995. Second, strict liability incentivizes parties to take “hard” bargaining positions by preventing them from arguing that their actions were reasonable or the damage was unforeseeable. *Id.* at 996. Third, rather than promoting transparency, strict liability creates an incentive for affected states to exaggerate their injuries and for source states to deny any connection to the injury whatsoever. *Id.* at 996–97.

339. *Id.* at 961.

340. *Id.* at 954–55.

341. *Id.* at 933.

342. *Id.* at 960.

pollution originated. As discussed above, Articles 10(8) and 10(9) of the NAAEC call on the CEC to establish such access, but the Council has failed to do so.<sup>343</sup>

Equal access has many advantages over *Pakootas*-style litigation, in which the injured party seeks redress for transboundary pollution within his own country's legal system. Equal access would eliminate the pragmatic obstacles faced by *Pakootas* plaintiffs: Personal jurisdiction, extraterritoriality, and enforcement issues would no longer stand in the way of plaintiffs seeking redress. Because equal access does not hale defendants into foreign court systems, it does not threaten other countries' sovereignty or principles of self-governance. Further, equal access does not allow courts to determine the United States' foreign policy. Rather, the executive branch would make the international agreement establishing equal access, and courts would continue to fulfill their role of adjudicating disputes. Unlike *Pakootas*-style litigation, equal access would embrace the deterrent function of environmental laws: Because defendants would only be subject to their own domestic laws, they could reasonably anticipate suit under those laws. Bias could still pose a problem, although it is worth noting that only plaintiffs would face the prospect of litigating in a foreign forum. To prevent bias against plaintiffs, the parties could experiment with possible safeguards—such as agreeing to impanel juries of the plaintiff's fellow citizens—or could pursue one of the more complex jurisdictional options in Subpart D.3 below.

b. Possible Fora for Enforcing Substantive Standards

If the parties do choose to implement new substantive pollution standards, whether via a strict liability regime or pollutant limits, they would need to designate a body to enforce the new substantive standard. This Subpart presents two possible routes to enforcement. First, the parties could enforce the standards using the NAFTA dispute resolution mechanism. Second, they could enforce the standards using their own domestic courts.

i. Enforcing Substantive Standards with NAFTA Dispute Resolution

The first option to enforce pollution standards or agreements is through dispute resolution under NAFTA. When pollution originating in one country causes injury in another country, the injured country can initiate dispute resolution against the source country, which would potentially result in penalties against the source country. As things stand, this approach seems unlikely to be successful. Parties already have—and have ignored—the option of using dispute resolution under the NAAEC whenever another party fails to enforce its own environmental laws. This includes cases where enforcing those laws would prevent transboundary pollution; in *Pakootas*, for instance, the United States

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343. See Knox, *supra* note 252, at 88.



could have initiated dispute resolution regarding Canada's failure to enforce its hazardous waste regulations but did not.

Nonetheless, there are advantages to addressing transboundary pollution through NAFTA dispute resolution rather than through domestic courts. An updated dispute resolution mechanism could draw upon remedies not available to domestic courts: it could penalize countries that are the source of transboundary pollution with trade sanctions or loss of NAFTA benefits. For that reason, it seems worthwhile to pursue an improved version of the dispute resolution process. It remains to be seen whether the USMCA's alterations to the dispute resolution mechanism will render it friendly enough for the parties' use. Two possible alterations that the USMCA does not adopt, however, could also be useful here.

First, the parties could change Chapter 24 to allow citizen submissions to trigger the dispute resolution process. Under both the NAAEC and Chapter 24, individuals and NGOs in the NAFTA countries may file complaints when one of the member countries fails to enforce its environmental law.<sup>344</sup> While such complaints may lead to the publication of factual reports, they cannot lead to the imposition of penalties against a member country. Rather, when the NAAEC was drafted, "the hope was that the publicity resulting from the publication of a factual report would embarrass that party into taking corrective action . . . ."<sup>345</sup> By linking citizen submissions to the dispute resolution process, however, the parties could allow citizens to more directly vindicate their own environmental rights rather than relying on their federal government to pursue those rights on their behalf.

The task of deciding whether a given citizen submission triggers dispute resolution could be decided either before or after the preparation of a factual report, and could be delegated to the CEC Secretariat—the body that is currently responsible for considering citizen submissions<sup>346</sup>—or another designated entity. To ensure that the dispute resolution panel understands the gravity of the complaint, even if the NAFTA parties themselves are apathetic, either the citizen who submitted the complaint or an NGO committed to advocating on that citizen's behalf could be required to provide submissions to the dispute resolution panel.

In the event that the parties adopt emission and discharge limits, a second approach to enforcement would be to adopt a protocol for monitoring compliance. The parties could either create a new administrative body to conduct semiregular investigations or could charge the CEC with doing so; either way, they would have to commit to providing the investigatory body with sufficient funds to fulfill its mandate. Any violation of the standards would automatically

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344. David J. Blair, *The CEC's Citizen Submission Process Still a Model for Reconciling Trade and the Environment?*, 12 J. ENV'T & DEV. 295, 296 (2003); Cosby, *supra* note 309; *see also* USMCA, *supra* note 307, art. 24.27.

345. Blair, *supra* note 344, at 296.

346. USMCA, *supra* note 307, art. 24.27.

trigger penalties or dispute resolution. While the emission and discharge standards would have the most effect if they were implemented throughout the three countries, the parties could also agree to only require or only enforce the standards within border zones. A party that knew it would fail the investigation with regard to a certain pollutant could work with the CEC to develop an emission or discharge reduction program. Penalties or dispute resolution would not be triggered with regard to that pollutant until the program had run its course.

ii. Enforcing Substantive Standards in Domestic Courts

The parties could also pursue a second option of incorporating the new standards into their domestic laws and enforcing them in their domestic courts. Consider this solution in combination with equal access. A party injured by transboundary pollution would have automatic access to redress in whichever country originated the pollution. This would include access to a common set of environmental protections that would apply no matter which NAFTA country was responsible for the injury. This approach has the advantage of taking advantage of existing court mechanisms while protecting state sovereignty.<sup>347</sup> For this reason, and because it would eliminate the necessity of funding and staffing a supranational organization or arbitration process, this approach may be more politically appealing than using a NAFTA body to enforce the standards. However, this domestic-court solution would mean forfeiting the opportunity to use trade sanctions or NAFTA benefits to incentivize countries to enforce their new environmental laws.

c. *Additional Jurisdictional Solutions*

Equal access resolves many of the procedural problems posed by transboundary pollution, but it also requires plaintiffs to file their claims in a foreign court system. This is at best intimidating and at worst prohibitive, particularly for plaintiffs who do not speak the language. Equal access risks selecting for wealthy and legally sophisticated plaintiffs, leaving poorer and less sophisticated plaintiffs without recourse. This Subpart proposes two jurisdictional remedies to this problem.

The first proposal is for the NAFTA parties to agree that under certain circumstances involving transboundary pollution, plaintiffs from one NAFTA country may sue defendants from another NAFTA country in the plaintiff's domestic courts. This strategy would produce *Pakootas*-style suits, but because the countries would agree to the scheme beforehand, personal jurisdiction would not act as an obstacle. Such a scheme is least politically problematic if confined to certain causes of action, most obviously causes of action under the shared substantive standards described above.

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347. See Hall, *supra* note 56, at 745.

When the NAFTA parties adopted the new emission and discharge limits into their substantive laws, they could also adopt new causes of action and jurisdictional laws. These laws would make violators of the new emission and discharge limits subject to suit in both source state and affected state whenever both polluter and plaintiff were within a certain distance of a border. To avoid conflict between the NAFTA countries over the terms or outcomes of such suits, these causes of action could be limited in certain ways. Rather than relying on idiosyncratic common-law concepts, for example, suits against foreign plaintiffs could be limited to a single standardized statutory claim under each emission or discharge limit. Further, for the jurisdictional regime to be effective, each party would have to agree to enforce all relevant awards granted by the other parties' courts. To make these awards minimally controversial, and to avoid enforcement difficulties associated with injunctive relief, remedies could be limited to a single standardized financial award for each type of claim.

This Subpart's second jurisdictional recommendation is simply a particular limitation of the first, tailored to the U.S.-Mexico border in particular. Rather than a scheme where transboundary polluters are *always* subject to suit in multiple NAFTA countries, the parties could expand jurisdiction over such defendants only in certain circumstances. When a polluting facility is *located* in NAFTA Country A, but *owned* by a parent company or individual domiciled in NAFTA Country B, injured plaintiffs in Country B would have the option of filing environmental claims against that polluter in Country B's courts. This rule would subject at least some U.S.-owned *maquiladoras* to suit in the United States and would disincentivize companies from moving their operations in order to avoid environmental regulations or enforcement.

These approaches would avoid not only the practical but also many of the conceptual problems associated with applying domestic environmental laws to foreign defendants. Because the parties would agree to the regime beforehand, it would not contradict principles of sovereignty or self-governance, and defendants would be on notice of the environmental laws they would be expected to follow. Standardized remedies would prevent windfall verdicts, which might be perceived as biased in favor of local plaintiffs. Further, because the policies would be fundamentally reciprocal, any loss for a given party's defendants would be a gain for its plaintiffs. Under the first jurisdictional approach, for example, Canadian citizens would be protected by a core set of Canadian environmental laws regardless of whether they faced pollution from Canada, Mexico, or United States.

*d. Building Institutional Capacity*

Many transboundary pollution issues do not require lawsuits or new regulations but simply adequate government resources and infrastructure. Allen writes that "the *sine qua non*" for ensuring that trade agreements do not cause

environmental degradation “is strengthening institutional capacity of trading partners to protect the environment.”<sup>348</sup>

The importance of government resources is most obviously relevant to pollution from municipal facilities, such as sewage spills, but it also applies to enforcing regulations against private polluters. Pollution at the U.S.-Mexico border in particular has been blamed on “underfunded and understaffed” Mexican regulatory agencies that lack the power to fully implement Mexico’s environmental laws. Sara Grineski, a sociologist who has studied pollution at the border, explains that “I don’t think the regulations are so different, but the actual enforcement of the regulations is very different.”<sup>349</sup> Equal access could make some progress toward enforcement by incentivizing facilities to comply with regulations or face costly judgments. However, inasmuch as the lack of regulation is caused by lack of resources, the only true solution is that those resources be provided.

The NAFTA parties recognized the importance of investment at the U.S.-Mexico border when they established NADB.<sup>350</sup> NADB will continue regardless of the fate of the USMCA, although as Antonio Garza writes, “[t]he USMCA is an opportunity to re-think and expand” NADB.<sup>351</sup> In January 2019, Senator John Cornyn introduced Senate bill S. 267.<sup>352</sup> The bill would both increase funding to the bank and increase its scope to prepare for the possible impacts of the USMCA, including the environmental effects of the increase of imports and exports of across the Texas border.<sup>353</sup> Regardless of the overall merits of the bill, Senator Cornyn and his cosponsors are correct that trade agreements have an impact on the border environment, and that investment in environmental infrastructure is necessary to address that impact.

Just as the CEC’s mandate is meaningless if it lacks the funds to carry out that mandate, the most innovative border agreement cannot succeed if the member countries lack the resources to effectively enforce it. Transboundary pollution is the perfect example of why it is not only the United States’ moral responsibility, but also in its own best interest, to support its trading partners’ environmental infrastructure and regulatory capacity.

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348. Allen, *supra* note 297, at 1024.

349. James, *supra* note 40.

350. Knox & Markell, *supra* note 114, at 8. While the parties initially created both the Border Environment Cooperation Commission and NADB, they have since merged as NADB. *NADB and BECC merge*, N. AM. DEV. BANK (Nov. 7, 2017), <https://www.nadb.org/news/nadb-and-becc-merge>.

351. Antonio Garza, *USMCA Will Also Shape the Role of the North American Development Bank*, WASH. EXAMINER (Sept. 13, 2019), <https://www.washingtonexaminer.com/opinion/op-eds/usmca-will-also-shape-the-role-of-the-north-american-development-bank>.

352. North American Development Bank Improvement Act, S. 267, 116th Cong. (2019).

353. *Id.*

## CONCLUSION

By the time the USMCA was signed on September 30, 2018, it was too late to affect the outcome of *Pakootas*. And by the time this Note is published, it will be too late to change the text of the USMCA. Nonetheless, it is not necessarily too late for the NAFTA parties to effectively address transboundary pollution. Even if the USMCA is enacted exactly as written, better funding for the CEC or the NADB could make a dramatic difference in environmental conditions at the United States' borders.

Transboundary pollution can be seen as a microcosm of all pollution. First, it is the perfect externality—a harm the polluter or source country causes but does not have to absorb. Second, mitigating pollution requires individuals or countries to collaborate for their mutual self-interest, even when doing so is against their immediate personal self-interest. Within a given country, the existing governmental apparatus often—although not always—has the power to oversee and enforce the collaboration that is necessary to address pollution. Transboundary pollution presents a problem because there is no preexisting supranational organization with enforcement power over the member countries. Finally, the most acutely threatening form of both transboundary pollution and all pollution is climate change.

Climate change makes clear that environmental law on the scale of individual states' physical territory is no longer sufficient. In order to address both climate change and more conventional examples of transboundary pollution, parties need to band together, whether to form a supranational organization or to agree on the principles to apply in their home courts. *Pakootas*'s jurisdictional uncertainty and years of delays are exactly the kinds of obstacles we can no longer afford. The NAFTA parties effectively addressing transboundary pollution will not solve climate change, but conceptually—and eventually, perhaps, in reality—it is the first step.

